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When the Friendly Skies Are Not So Friendly: The Proper Venue for Prosecuting In-Flight Crime

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INTRODUCTION

A criminal defendant is guaranteed a right to a trial in the district where the crime was committed.[1] But what happens when a crime is committed 30,000 feet above the district? Courts have agreed that the airspace above a district is considered a part of the judicial district that lies below,[2] but does it make sense to allow a prosecutor to bring charges only in the district that happens to be below the airplane at the exact second the crime occurred? This is the precise question that has created a circuit split regarding the proper venue to prosecute crimes for in-flight offenses.[3]

The United States has ninety-four federal judicial districts[4] and 5,300,000 square miles of domestic airspace.[5] This airspace provides ample opportunity for in-flight crime to occur in any of the ninety-four districts depending on an airplane's flight path.

Over the last three years, in-flight crimes have frequented many headlines. In 2018, a man groped a woman sitting next to him and urinated on the seat in front of him on a flight from Denver to Charleston,[6] an intoxicated man fought with and spat blood at a

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1 U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

2 *E.g.*, United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973).

3 *See* United States v. Breitweiser, 357 F.3d 1249 (11th Cir. 2004); United States v. Lozoya, 920 F.3d 1231 (9th Cir. 2019), *reh'g granted*.

4 "The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals." *Court Role and Structure*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/2GLG-SW7P] (last visited Mar. 28, 2020).

5 *Air Traffic by the Numbers*, FEDERAL AVIATION ADMINISTRATION, https://www.faa.gov/air_traffic/by_the_numbers/ [https://perma.cc/PSW8-LPJ5] (Mar. 19, 2020 2:20 PM).

6 The man was arrested in Charleston, South Carolina. Michael Bartiromo, *Frontier Airlines Passenger Arrested After Peeing on Seat in Front of Him During Flight*, FOX NEWS, https://www.foxnews.com/travel/frontier-airlines-passenger-arrested-after-peeing-on-seat-in-front-of-him-during-flight [https://perma.cc/NG5G-3FZF] (May 22, 2018).

passenger during a flight to Miami,[7] an eighty-two-year-old man struck a flight attendant who was standing in an aisle,[8] a man punched a flight attendant twice in the face before hitting another passenger with a wine bottle,[9] a man repeatedly doing pull-ups on the overhead luggage racks grew verbally abusive after a flight attendant requested he stop,[10] and a man grabbed a woman's leg and touched her feet on a flight.[11] In 2019, a woman threw a laptop at her boyfriend's head during a flight for looking at other women,[12] an intoxicated man attempted to punch a flight attendant,[13] and a man demanded to use the first-class lavatories before attempting to enter the cockpit.[14] In 2020, already, a man has

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7 After a man was refused beer by the flight attendant, he got into a fight with a passenger on American Airlines Flight 1293 and was later arrested in Miami where the plane landed. Avi Selk, *An American Airlines Passenger Was Refused Beer—So He Screamed, Fought and Spit Blood, FBI Says*, WASHINGTON POST (May 26, 2018, 1:29 PM), https://www.washingtonpost.com/news/dr-gridlock/wp/2018/05/26/an-american-airlines-passenger-was-refused-beer-so-he-screamed-fought-and-spit-blood-fbi-says/ [https://perma.cc/HX6Q-GWUK].

8 Brittany Bernstein, *Man Arrested on Flight to RSW Accused of Harassing Flight Attendant, Using Racial Slur*, NEWS-PRESS, https://www.news-press.com/story/news/crime/2018/06/08/north-fort-myers-man-arrested-flight-rsw/685634002/ [https://perma.cc/8ZTE-S6NY] (June 8, 2018, 5:36 PM).

9 Christine Clarridge, *Man Who Ignited Midair Brawl on Seattle-to-Beijing Flight Sentenced to 2 Years in Prison*, SEATTLE TIMES, https://www.seattletimes.com/seattle-news/crime/man-who-ignited-midair-brawl-on-seattle-to-beijing-flight-sentenced-to-2-years-in-prison/ (May 16, 2018, 6:42 AM).

10 Shehab Khan, *American Airlines Flight Diverted After Passenger Refuses to Stop Doing Pull-Ups on Overhead Compartment*, INDEPENDENT (Oct. 3, 2018, 11:37 AM), https://www.independent.co.uk/news/world/americas/american-airlines-flight-diverted-passenger-pull-ups-overhead-compartment-phoenix-boston-a8566161.html [https://perma.cc/GGY2-WN9U].

11 Bob D'Angelo, *Southwest Airlines Diverts Flight After Passenger's 'Footsie' Game*, BOSTON 25 NEWS, https://www.boston25news.com/news/national/southwest-airlines-diverts-flight-after-passengers-footsie-game/856458020/ [https://perma.cc/69UL-RTRV] (Oct. 20, 2018, 9:59 AM).

12 Lee Brown, *Plane Passenger Throws Laptop at Boyfriend for 'Looking at Other Women,'* NEW YORK POST, https://nypost.com/2019/07/23/plane-passenger-throws-laptop-at-boyfriend-for-looking-at-other-women/ [https://perma.cc/7HWZ-KF5Q] (July 23, 2019, 1:50 PM).

13 Cydney Henderson, *Hawaiian Airlines Passenger Arrested for Trying to Hit Flight Attendant; Plane Turns Around*, USA TODAY (Feb. 28, 2019, 7:59 PM), https://www.usatoday.com/story/travel/news/2019/02/28/intoxicated-hawaiian-airlines-traveler-tried-hit-flight-attendant/3021797002/ [https://perma.cc/LYD4-YZGK].

14 Daniella Genovese, *Alaska Airlines Flight Diverted After 'Unruly' Passenger Threatens Crew*, FOXBUSINESS (Sept. 27, 2019), https://www.foxbusiness.com/industrials/alaska-airlines-flight-diverted-after-alleged-passenger-threat [https://perma.cc/Q24T-QPP4].

attacked a flight attendant,[15] and a passenger has repeatedly punched the seat of the woman who had reclined the seat in front of him during an American Airlines flight.[16] These are just a few of the many in-flight altercations that gave rise to criminal charges in the past few years.

Each of these incidents falls under the proscribed acts that are deemed federally criminal if committed within the special aircraft jurisdiction.[17] Although jurisdiction can easily be established through this statute, venue becomes much more difficult to establish because of a lack of clear statutory language.

Venue decisions significantly influence a criminal trial by determining the district in which a case may be brought and from where jurors are selected.[18] The right to proper venue, dating back to before the American Revolution, is embedded with protections that influence how venue-specific legislation is interpreted.[19] The right to a proper venue stands to protect the rights of the defendant, the government, and the community where the crime was committed.[20] Some of the rights protected by venue statutes include the defendant's right not to be forced to sit trial in an unfamiliar environment and the government's right to access evidence for prosecution.[21] Typically, the proper venue is the location where the crime was committed.[22] However, Congress can provide otherwise through specific venue statutes or provisions within statutes as long as that venue provision does not violate any of the protections guaranteed by the right to a proper venue.[23]

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[15] Michael Hollan, *United Express Passenger Attempts to Storm Cockpit, Attacks Flight Attendant, Injures 6 Officers, Police Say*, FOX NEWS (Jan. 12, 2020), https://www.foxnews.com/travel/united-passenger-storm-cockpit-newark [https://perma.cc/WWB5-XJWA].

[16] Christopher Elliot, *Is It Wrong to Recline Your Airline Seat? Debate Rages Again After American Airlines Incident*, USA TODAY, https://www.usatoday.com/story/travel/airline-news/2020/02/14/american-airlines-seat-fight-goes-viral-wrong-recline/4759519002/ [https://perma.cc/P88L-7FVB] (Feb. 14, 2020, 11:53 AM).

[17] The special aircraft jurisdiction covers proscribed offenses committed on an in-flight civil aircraft after the external doors are closed. 49 U.S.C. § 46506 (providing that certain acts punishable in the special maritime and territorial jurisdiction of the United States are also made criminal if committed in the special aircraft jurisdiction).

[18] *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

[19] Scott A. Liljegren, *Criminal Procedure: Failure to Instruct the Jury on Venue, When Requested, Constitutes Reversible Error, Notwithstanding Venue Subsumed by a Guilty Verdict*, 37 WASHBURN L.J. 439, 443 (1998).

[20] *See* discussion *infra* Section II.A.

[21] *See id.*

[22] U.S. CONST. art. III, § 2, cl. 3; FED. R. CRIM. P. 18.

[23] 2 CHARLES ALAN WRIGHT, AUTHOR R. MILLER & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 301 (4th ed. 2020) [hereinafter FEDERAL PRACTICE, § 301]; *see* FED. R. CRIM. P. 18.

Congress has done exactly this with 18 U.S.C. § 3237(a).[24] The first paragraph provides that charges against continuing offenses committed in multiple districts can be brought in any district where the crime was committed.[25] The second paragraph provides that a crime

> involving the use of mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and . . . may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.[26]

Prosecutors have commonly used this second paragraph as the justification for bringing charges against a defendant in the district where the flight lands even when the crime itself did not occur within the landing district.[27] A recent Ninth Circuit decision, however, found this argument unpersuasive. The court held that an in-flight crime does not automatically involve transportation in interstate commerce just because the crime was committed on an airplane, and thus limited the proper venue to the district that was below the airplane at the exact moment the crime occurred.[28] This was the first time a court has ever prevented prosecutors from bringing charges in the landing district,[29] and the result of this decision created a circuit split with potentially disastrous consequences. The Ninth Circuit decided it would rehear the decision en banc, likely because the court realized the consequences that may result.[30]

Even though the Ninth Circuit seems like it may change its mind, the decision it made in *United States v. Lozoya* opened the door to a problem that requires legislative action. A better and more sound

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24 *See* 18 U.S.C. § 3237(a).

25 *Id.*

26 *Id.*

27 *See* United States v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004); United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012).

28 United States v. Lozoya, 920 F.3d 1231, 1240 (9th Cir. 2019), *reh'g granted*.

29 *Id.* at 1244 (J. Owens dissenting).

30 *Lozoya*, 944 F.3d 1229–30; *Status of Pending En Banc Cases*, UNITED STATES COURTS FOR THE NINTH CIRCUIT (July 1, 2020), https://www.ca9.uscourts.gov/enbanc/ [https://perma.cc/E9LR-PE6Z] (stating that the rehearing was calendared for March 10, 2020, but not argued or submitted). This rehearing has been canceled because "[t]he U.S. Court of Appeals for the Ninth Circuit has canceled en banc hearings . . . amid coronavirus concerns." Madison Alder, *Ninth Circuit Cancels En Banc Hearings in Response to COVID-19*, BLOOMBERG LAW (Mar. 6, 2020, 7:24 PM), https://news.bloomberglaw.com/us-law-week/ninth-circuit-cancels-en-banc-hearings-in-response-to-covid-19 [https://perma.cc/EF4Q-DKKP].

interpretation of § 3237(a) exists and is used by some courts, but the possibility that other courts could still interpret the second paragraph in a way that prevents prosecutors from bringing charges in the landing district is extremely concerning and needs to be remedied. Congress has previously remedied confusing language in venue statutes by passing legislation and has the opportunity to do so again with § 3237(a).[31]

This Comment argues that Congress should enact legislation to ensure that the landing district is a proper venue for in-flight crimes. This Comment accomplishes this argument through five Parts. Part I discusses the rising crime rates of specific in-flight crimes and how the special aircraft jurisdiction ensures these crimes remain under federal jurisdiction. Part II begins an analysis of the venue provisions by looking at the historical context that led to the development of these provisions and the interests these venue provisions are meant to protect. Part III explains the rules that govern venue in federal criminal courts and provides background on 18 U.S.C. § 3237(a), the statute that led to the circuit split and is the focus of this Comment. Part IV looks at the three circuit decisions that have interpreted the relevant paragraph of 18 U.S.C. § 3237(a). Part V examines the two interpretations resulting from these three decisions and suggests that, while the broader *Breitweiser* interpretation is a better interpretation that produces a more workable rule, Congress still needs to enact legislation to prevent courts from interpreting the second paragraph of § 3237(a) too narrowly and leaving open the possibility of in-flight crime going unpunished.

I
IN-FLIGHT CRIMES ARE FEDERAL CRIMES

Part I explores a current in-flight crime increase that is frequenting airlines and introduces the statute governing the special aircraft jurisdiction, which makes certain acts committed on airplanes criminal under federal law. Although proper venue for in-flight crime is the primary focus of this Comment, this Comment will first provide background on the special aircraft jurisdiction, which gives the federal government jurisdiction over certain proscribed offenses committed on in-flight airplanes. This background is necessary to better understand the proscribed offenses that will dictate the determination of venue and the need for a uniform rule across all circuits.

[31] 2 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 303 (4th ed. 2020) [hereinafter FEDERAL PRACTICE, § 303].

Airplanes that are 30,000 feet in the air are not free from dangerous criminal activity, and this in-flight criminal activity is on the rise.[32] In-flight crime is not a recent phenomenon, however. In 1961, Congress established the special aircraft jurisdiction in response to numerous unruly passenger incidents that states could not prosecute because of jurisdictional problems.[33] When crimes were committed in states that were not the same as the states the planes landed in, the landing state could not establish jurisdiction over the defendants with a reasonable degree of accuracy.[34] Because the landing states could not establish jurisdiction, the states where the crimes were committed were left to perform the difficult task of gathering evidence, which was often made even more difficult with witnesses now being in other states.[35] Recognizing these issues and the "potential for catastrophe . . . if criminal acts were allowed to go unpunished," Congress enacted the special aircraft jurisdiction statute to provide that certain crimes committed on an in-flight aircraft would be considered federal crimes.[36]

In recent years, the FBI has seen a significant increase in in-flight sexual assaults.[37] Many in-flight sexual assaults still remain unreported.[38] But, according to the FBI in 2018, reports of in-flight sexual assault have risen dramatically since 2014.[39] This increase in

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32 *Lozoya*, 920 F.3d at 1243.

33 "Congress put the bill on the fast track as a result of an intoxicated passenger who physically assaulted an airline captain." Jeffrey A. Klang, *Federal Air Marshals: The Last Line of Defence*, 27 ANNALS AIR & SPACE L. 363, 368 (2002). The defendant couldn't be prosecuted in the landing state because of jurisdictional problems. *Id.*

34 "Determining the exact location where the crime had been committed . . . was a daunting task." *Id.*

35 *Id.*

36 *Id.*

37 *Lozoya*, 920 F.3d at 1243.

38 *Id.* A majority of sexual assaults are not reported to police as it is: "Only 230 out of every 1,000 sexual assaults are reported to police. That means about 3 out of 4 go unreported." *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/M5G2-SDSE] (last visited Mar. 28, 2020). In fact, according to 2018 NCVS data, rape and sexual assault remain the most underreported crimes. *New Data – Sexual Assault Rates Doubled*, NSVRC (Oct. 10, 2019), https://www.nsvrc.org/blogs/new-data-sexual-assault-rates-doubled [https://perma.cc/C9FF-SFH6]. Reasons behind the underreporting of sexual assaults are the barriers victims will encounter in the criminal justice system. *Id.* These barriers include long timelines, financial costs, and lack of privacy. *Id.* Another is the fear of not being believed or being blamed for their own assaults. *Id.*

39 FBI, *Sexual Assault Aboard Aircraft: Raising Awareness About a Serious Federal Crime*, FBI (Apr. 26, 2018), https://www.fbi.gov/news/stories/raising-awareness-about

reports could be an effect of the Me Too Movement. The Me Too Movement inspired many survivors of sexual harassment or sexual assault to share their stories through social media or the press,[40] and researchers have studied the effects of the Me Too Movement within the United States as a whole and discovered that the movement led to an increase of sexual assault reports.[41] But there is also a chance that in-flight sexual assaults are just increasing in general. Without recorded data exploring this, there is no way to tell.[42]

FBI investigators have pointed out that offenders may take advantage of the fact that some victims may not report a sexual assault because of feeling embarrassed, trying not to cause a scene, or trying to convince themselves the assault was accidental.[43] FBI agents have also stated that the flights where sexual assaults happen are most often long-haul flights.[44] Because long-haul flights are more likely to cross over several judicial districts, under the Ninth Circuit's narrow view of venue, prosecutors would be forced to demonstrate that the events occurred over a specific judicial district before the merits of the case could be tried.[45] Therefore, it would be more difficult for a prosecutor

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-sexual-assault-aboard-aircraft-042618 [https://perma.cc/FUD4-7LBS] (comparing thirty-eight reports of in-flight sexual assault in 2014 to sixty-three reports of in-flight sexual assault in 2018).

40 The Me Too Movement, originally founded in 2006, began to rise in 2017 when the *New York Times* published an article detailing the allegations of sexual harassment and assault committed by Harvey Weinstein, a former film producer and now convicted sex offender. Anna North, *Study: More People Reported Sex Crimes Around the World in the Wake of Me Too*, VOX (Dec. 11, 2019, 9:50 AM), https://www.vox.com/2019/12/11/21003592/me-too-movement-sexual-assault-crimes-reporting [https://perma.cc/TM7D-C6HD].

41 Researchers have studied the effects of the Me Too Movement within the United States as a whole and discovered that the movement led to an increase in sexual assault reports. *Id.*; Ro'ee Levy & Martin Mattson, *The Effects of Social Movements: Evidence from #MeToo* (Mar. 15, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3496903 [https://perma.cc/C5KT-CPB6]. Researchers found that the Movement increased reporting sex crimes by about seven percent in the U.S. *Id.* The study found that there was a seven percent increase in reporting when looking at nationwide crime statistics from the FBI. *Id.* Since the FBI collects statistics on rape only, the researchers looked at city-level data that included a wider variety of sex crimes and found a thirteen percent increase in reporting as a result of Me Too. *Id.*

42 "Definitive figures about sexual assaults on flights are elusive because no clearinghouse for data exists." Christopher Mele, *Sexual Assault on Flights: Experts Recommend Ways to Stay Safe and Combat It*, N.Y. TIMES (Mar. 23, 2019), https://www.nytimes.com/2019/03/23/travel/airline-flights-sexual-assault.html [https://perma.cc/BAD2-44VX].

43 FBI, *supra* note 39.

44 *Id.*

45 *See* United States v. Lozoya, 920 F.3d 1231, 1243 (9th Cir. 2019), *reh'g granted*.

to bring charges with a narrow rule limiting proper venue. Imagine a rule that requires a young victim of an in-flight sexual assault to recount minute by minute the traumatizing experience they endured solely to get the charges into a court. This is not something a victim of a crime wants to do, especially a victim who has experienced a traumatic assault of any kind.[46] Since sexual offenders have taken advantage of the many reasons that some victims may not report a sexual assault, it is quite possible sexual offenders could also use to their advantage a rule that makes establishing the proper venue nearly impossible. With in-flight sexual assault reports on the rise, the last thing that should be done is to make it more difficult for those experiencing sexual assault to achieve any form of justice.

Sexual assault offenses are included in the acts proscribed by Congress[47] and deemed criminal if completed on an airplane while it is in flight.[48] The other proscribed acts include assault, robbery, maiming, embezzlement and theft, receiving stolen property, murder, manslaughter, and attempted murder or manslaughter.[49]

If a defendant commits any of these proscribed acts within the special aircraft jurisdiction of the United States, the defendant can be charged with a federal crime under 49 U.S.C. § 46506(1).[50] A

46 "A threshold challenge in the investigation of sexual violence is that, due to the particularly sensitive nature of these experiences, victims may have greater difficulty speaking about their ordeal than victims of less intimate and/or stigmatized crimes." Kim Thuy Seelinger et al., *The Investigation and Prosecution of Sexual Violence* 19 (Human Rights Ctr., Working Paper, 2011). "[B]ecause of the effects of trauma on brain chemistry, many victims forget all or parts of the assault. . . . Traumatic memories are actually developed, stored and retrieved differently than non-traumatic memories." LYNN H. SCHAFRAN ET AL., NATIONAL JUDICIAL EDUCATION PROGRAM, JUDGES TELL: WHAT I WISH I HAD KNOWN BEFORE I PRESIDED IN AN ADULT VICTIM SEXUAL ASSAULT CASE 9 (2011), https://mcasa.org/assets/files/Judges-Tell.pdf [https://perma.cc/4C6J-R3E6].

47 Sexual abuse offenses are federal crimes if committed in the special aircraft jurisdiction. 49 U.S.C. § 46506(1); 18 U.S.C. §§ 2241–44.

48 49 U.S.C. § 46506 (providing that certain acts punishable in the special maritime and territorial jurisdiction of the United States are made criminal if committed in the special aircraft jurisdiction).

49 "An individual on an aircraft in the special aircraft jurisdiction of the United States who commits an act that—if committed in the special maritime and territorial jurisdiction of the United States . . . would violate section 113, 114, 661, 662, 1111, 1112, 1113, or 2111 or chapter 109A of title 18, shall be fined under title 18, imprisoned under that section or chapter, or both." 49 U.S.C. § 46506(1); 18 U.S.C. §§ 113 (proscribing assault), 114 (proscribing maiming), 661 (proscribing embezzlement and theft), 662 (proscribing receiving stolen property), 1111 (proscribing murder), 1112 (proscribing manslaughter), 1113 (proscribing attempted murder or manslaughter), 2111 (proscribing robbery).

50 49 U.S.C. § 46506(1).

defendant commits an act within the special aircraft jurisdiction when the act is committed on in-flight civil aircrafts of the United States.[51] An aircraft is considered in-flight once all external doors are closed after passengers finish boarding and remains in-flight until one external door opens to allow passengers to exit the airplane.[52]

Although jurisdiction can easily be established through this statute, venue becomes much more difficult to establish because of the complex interplay between constitutional protections, public policy, and federal statutes. The same reasoning behind enacting the special aircraft jurisdiction, however, can also apply to enacting specific statutory language that promotes a consistent venue rule across all circuits.

II
THE RIGHT TO A PROPER VENUE

Part II dives first into the historical context that led to the development of the constitutional venue provisions. Further, Part II explains how this history provides the necessary knowledge to understand the public policy considerations and interests of the defendant, government, and community that the venue provisions were enacted to protect. These protections play a large role in court interpretations of any federal statute governing venue.

A. Historical Context Behind the Venue Provisions

Venue is "not a mere technicality,"[53] and an issue regarding venue in criminal cases is more than a procedural bump in the road to prosecution.[54] Venue influences a case throughout all stages of a criminal trial. First, venue determines the districts where a case may be brought.[55] Second, the venue will be the district where the jurors who decide the outcome of the case are selected.[56] Third, court decisions on

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[51] 49 U.S.C. § 46501(2)(A). The jurisdiction also includes aircraft of the United States armed forces, non-U.S. aircraft in the United States, and non-U.S. aircraft outside the United States that are scheduled to land in the United States or last departed from the United States as long as they next land in the United States. *Id.* § 46501(2)(B)–(D).

[52] 49 U.S.C. § 46501(1)(A).

[53] United States v. Miller, 111 F.3d 747, 749 (10th Cir. 1997).

[54] United States v. Johnson, 323 U.S. 273, 276 (1944).

[55] *See* United States v. Rodriguez-Moreno, 526 U.S. 275, 278 (1999).

[56] "[T]he accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. CONST. amend. VI.

venue play a large role in the convenience and expense associated with the entirety of the trial.[57] Fourth, a case filed in an improper venue will be subject to dismissal since a district court does not have the power to transfer a case to the proper venue.[58] This can occur before the case is ever heard on its merits.[59] If a district court disagrees with a defendant's motion for dismissal, and the defendant is convicted and appeals, an appellate court must reverse the conviction if the court finds no evidence of proper venue.[60]

As the Supreme Court noted, because of the huge impact venue has on an entire criminal trial, venue questions "raise deep issues of public policy in the light of which legislation must be construed."[61] These deep issues of public policy require courts to balance competing interests against each other.[62]

These competing interests date back to before the American Revolution, and the Framers of the Constitution recognized the importance of these interests and worked hard to ensure the venue provisions adequately protected them.[63] Some of these interests originated with the common-law right to a jury by the vicinage.[64] Vicinage means "the place [or vicinity] from which the jury must be summoned."[65] This common-law right to trial by the vicinage existed long before the Constitution protected these same rights through its

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57 "[V]enue changes . . . are extremely costly and highly inefficient." Jordan Gross, *If Skilling Can't Get a Change of Venue, Who Can? Salvaging Common Law Implied Bias Principles from the Wreckage of the Constitutional Pretrial Publicity Standard*, 85 TEMP. L. REV. 575, 607 (2013). "[G]ranting a change of venue entails a significant personal and institutional costs and inconveniences for trial courts." *Id.* at 607–08. In a case where a federal defendant was granted change of venue, the judge who granted the change transferred the case to his home venue. United States v. McVeigh, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996). By doing this, the judge eliminated any inconvenience he would have had if the judge had to preside over a trial in a district where his chambers were not located. Gross, *supra*, at 607.

58 United States v. Hilger, 867 F.2d 566, 568 (9th Cir. 1989); 8A BARBARA J. VAN ARSDALE ET AL., 8A FEDERAL PROCEDURE, LAWYERS EDITION § 22:71 (2020).

59 A pretrial motion alleging improper venue must be made if "the motion can be determined without a trial on the merits." FED. R. CRIM. P. 12(b)(3)(A)(i).

60 VAN ARSDALE ET AL., *supra* note 58.

61 United States v. Johnson, 323 U.S. 273, 276 (1944).

62 *Id.*

63 "[T]he right to proper venue has been highly protected since the inception of this nation." Liljegren, *supra* note 19, at 444.

64 William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 60 (1944).

65 *Id.*

venue provisions.[66] England intruded on this fundamental right leading up to the American Revolution, and this led to the addition of the venue provisions in the Constitution.[67]

The British Parliament tried to impose criminal penalties on colonists to gain more control over the colonies.[68] At the time, the colonists controlled how the grand jurors were selected, and the British could not find any witnesses from the colonies willing to testify against colonists who were accused of crimes.[69] To combat this, in 1769, the British Parliament ordered anyone accused of treason in the colonies to be tried in England.[70] In response to the stripping of such a fundamental right, colonies passed resolutions proclaiming that anyone accused of committing treason in a colony would have a trial held in their respective colony.[71] Colonists hoped to avoid the unfairness and hardship that would occur if they had to stand trial in England.[72] Parliament ignored these resolutions and in 1774 passed The Intolerable Acts,[73] which essentially provided that British officers should be tried in "friendly England" when charged with crimes committed in the colonies.[74] Here, the colonists felt that the "concept that the community which had suffered injury should be allowed to judge those charged with the injury" was intruded upon.[75]

The actions by British Parliament were not forgotten by colonists[76] and influenced how the Framers developed the venue provisions that

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66 *See id.*

67 Liljegren, *supra* note 19, at 444.

68 *Id.* at 443.

69 Paul Mogin, *"Fundamental Since Our Country's Founding":* United States v. Auernheimer *and the Sixth Amendment Right to be Tried in the District in Which the Alleged Crime Was Committed*, 6 U. DENV. CRIM. L. REV. 37, 40 (2016) (describing how the British failed to impose criminal sanctions against rioters because American colonists were in control of the Town of Boston and no witnesses would testify against the rioters).

70 Liljegren, *supra* note 19, at 443. The British Parliament accomplished this by using a 1543 statute that provided that those accused of treason outside Britain should be tried within Britain. Mogin, *supra* note 69, at 40–41.

71 Liljegren, *supra* note 19, at 443 n.25. The legislature of Virginia "passed a resolution proclaiming that any trial for treason or misprision of treason committed in Virginia should be held in Virginia. . . . [T]he lower house of the Massachusetts General Court similarly approved a resolution denouncing the prospective removal to England of colonists" accused of crimes committed in Massachusetts. Mogin, *supra* note 69, at 41.

72 Blume, *supra* note 64, at 66.

73 Liljegren, *supra* note 19, at 443.

74 United States v. Means, 409 F. Supp. 115, 117 (D.N.D. 1976).

75 *Id.*; Liljegren, *supra* note 19, at 444 n.26.

76 "The Declaration of Independence stands as proof that America rejected the King's revocation of venue rights in the new lands." Liljegren, *supra* note 19, at 444.

are relied on today.[77] The Framers included a provision in Article III requiring all criminal trials be held in the state where the crime was committed.[78] But this provision was deemed inadequate by many who thought it might still allow for the government to forum shop or to take those accused far from their homes because larger states have the potential to cover many miles.[79] To address this, James Madison introduced an amendment to the Constitution in the House of Representatives.[80] The amendment was passed by the House, but the Senate had issues with the proposed version.[81] A conference committee was appointed, formed a compromise, and produced what would be the Sixth Amendment that exists today.[82]

B. The Interests Protected by the Right to Proper Venue

As seen from this history leading up to its inclusion, the Sixth Amendment was designed to meet the needs of both the defendant and the federal government, creating a compromise between these two interests.[83] These two competing interests have been recognized by the U.S. Supreme Court and continue to play a role in the development of venue rules and statutes, as well as courts' interpretations of these

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[77] *Id.*

[78] "[T]he trial of all crimes shall be held in the state where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed." U.S. CONST. art. III, § 2, cl. 3.

[79] Mogin, *supra* note 69, at 42. Those opposing argued that the federal government could use the provision to take the defendant far from his home and find a jury in order to obtain the result they intended. *See* 3 JOHNATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 504, 569 (1788) (statement of Chairman Grayson), http://oll-resources.s3.amazonaws.com/titles/1907/1314.03_Bk.pdf [https://perma.cc/5YZB-UMXJ]. ("[The jury] possess an absolute, uncontrollable power over the venue. The conclusion, then, is, that they [c]an hang any one they please, by having a jury to suit their purpose.").

[80] Mogin, *supra* note 69, at 42 ("[T]rial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, for the right of challenge, and other accustomed requisites.") (citing 1 ANNALS OF CONG. 435 (1789) (Joseph Gales ed., 1834)).

[81] Williams v. Florida, 399 U.S. 78, 94–95 (1970).

[82] *Id.* at 95–96.

[83] Vineet R. Shahani, *Change the Motion, Not the Venue: A Critical Look at the Change of Venue Motion*, 42 AM. CRIM. L. REV. 93, 96 (2005); Scott Kafker, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 746 (1985) ("While the sixth amendment right to venue was intended to protect a defendant against inconvenience and prejudice, this was not its only purpose; the framers also intended to protect the *government's* interest in trying a person accused of crime in an impartial environment." (emphasis in original)).

laws.[84] Additionally, the interests of the community have played a role in shaping the interpretations of these provisions, but to a lesser extent than these first two sets of interests.

1. Defendant's Interests

Venue protects the defendant from the burdens that come with sitting for a trial in an unfamiliar environment.[85] When the government pulls the defendant far away from his home to sit trial in an unfamiliar environment, the defendant faces inconvenience, unfairness, and hardship.[86] As the Supreme Court noted, a defendant will encounter unfair hardships when forced to take "a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city."[87] Some of these hardships include "traveling great distances, separation from family and friends, the potential difficulty in securing character witnesses, limitation on the choice of counsel, [and] a deleterious effect on one's livelihood."[88] A defendant should not be sent "into a strange locality to defend himself against the powerful prosecutorial resources of the Government."[89] A trial in the district where the crime occurred prevents the inconvenience, unfairness, and hardship because it ensures in most cases that the defendant will defend in a convenient place for him and his witnesses.[90] The Supreme Court stated that federal statutes regulating venue should be interpreted in a way that respects this consideration of safeguarding against unfairness and hardship.[91] This

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84 *See* United States v. Johnson, 323 U.S. 273, 278 (1944) ("While it may facilitate the Government's prosecution in a case like this to have its witnesses near the place of trial, there must be balanced against the inconvenience of transporting the Government's witnesses to trial at the place of the sender the serious hardship of defending prosecutions in places remote from home.").

85 United States v. Cores, 356 U.S. 405, 407 (1958).

86 *Id.*

87 Hyde v. Shine, 199 U.S. 62, 78 (1905).

88 Robert L. Ullmann, *One Hundred Years After Hyde: Time to Expand Venue Safeguards in Federal Criminal Conspiracy Cases?*, 52 SANTA CLARA L. REV. 1003, 1008 (2012).

89 Dupoint v. U.S., 388 F.2d 39, 44 (5th Cir. 1967).

90 Perry O. Barber, Jr., *Venue in Federal Criminal Cases: A Plea for Return to Principle*, 42 TEX. L. REV. 39, 40 (1963).

91 The Supreme Court has directed "that criminal statutes must be construed, and venue determinations made, in light of the safeguards that the Constitution imposes." United States v. Salinas, 373 F.3d 161, 165 (1st Cir. 2004).

safety net promotes "both fairness and public confidence in the criminal justice system."[92]

Venue provisions also limit the government's ability to forum shop by narrowing the federal government's choice of trial to the district where the crime was committed. Forum shopping can occur when the government has the opportunity to choose to prosecute a defendant in multiple districts.[93] When the government has a choice of many courts and selects a court that will look most favorably upon its claims, it has forum shopped.[94] Defendants want to limit the possibility of forum shopping because they do not want to be subjected to a trial by a jury that was carefully selected by the government to support its interest.[95] A defendant does not want to leave the verdict to a jury made of strangers who might lack sympathy or who have animosities or prejudices against him.[96] The venue provisions prevent this from happening.[97] If a court fails to consider venue rights seriously, the government could abuse its power when selecting the most favorable court.[98] This concern was recognized by the Supreme Court, which stated that courts should not construe venue provisions in a way that would provide the government the choice of its favorable tribunal.[99]

2. Government's Interests

The venue provisions offer immense protections for the defendant, but this right to venue is not an absolute right.[100] A defendant that travels to a remote location "cannot invoke the Constitution's venue protections to preclude trial there."[101] The venue provisions were also

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92 *Id.* at 164.

93 *Forum Shopping*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/forum_shopping [https://perma.cc/4KPA-CCZP] (last visited Mar. 26, 2020).

94 *Id.*

95 Barber, Jr., *supra* note 90, at 42–43.

96 Ullmann, *supra* note 88, at 1008.

97 *Id.*

98 *See* United States v. Johnson, 323 U.S. 273, 275 (1944); United States v. Miller, 111 F.3d 747, 749 (10th Cir. 1997).

99 "We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it." Travis v. United States, 364 U.S. 631, 634 (1961) (quoting *Johnson*, 323 U.S. at 275).

100 "The history and purpose of the sixth amendment therefore suggest that the right to venue is not an absolute right of the defendant." Kafker, *supra* note 83, at 746.

101 Ullmann, *supra* note 88, at 1009.

intended to protect the government's interest in trying a defendant.[102] The government is interested in trying a defendant in an impartial environment,[103] not being constrained to one specific area for a trial,[104] and ensuring the prosecution has adequate access to evidence.[105]

3. Community's Interests

Because the venue determines the community from where a jury will be pulled, venue also helps serve the goal of producing a jury that operates as the conscience of the community it is serving.[106] The modern-day focus of selecting jurors is to choose jurors that will "reflect the opinions of the community and can act as impartial and fair arbiters of the case."[107] The community's interest in ensuring that a defendant charged with violating the community's laws will sit trial within that community "is not a matter to be cast aside lightly."[108] The Second Circuit has pointed out that the "places that suffer the effects of a crime are entitled to consideration for venue purposes."[109]

III
FEDERAL CRIMINAL VENUE

A. How Courts Determine Venue

The Constitution,[110] Federal Rules of Criminal Procedure (FRCP),[111] and federal statutes[112] govern proper venue for prosecution of federal criminal offenses. These are all further complicated by the policy considerations discussed in Part II.

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102 "By equating districts with states, Congress had attempted to ensure that the government's interest in trying a defendant would not be sacrificed to the defendant's right to venue." Kafker, *supra* note 83, at 746.

103 The Sixth Amendment right to venue was "also intended to protect the *government's* interest in trying a person accused of crime in an impartial environment." *Id.*

104 *Johnson*, 323 U.S. at 278.

105 Mogin, *supra* note 69, at 57.

106 *Id.* at 57–58.

107 Shahani, *supra* note 83, at 95 (noting that the role has changed from selecting a jury of the defendant's peers).

108 United States v. Means, 409 F. Supp. 115, 117 (D.N.D. 1976).

109 United States v. Reed, 773 F.2d 477, 482 (2d Cir. 1985).

110 U.S. CONST. art. III, § 2, cl. 3.

111 FED. R. CRIM. P. 18.

112 *See id.* (setting out various statutes that regulate venue and are not affected by Rule 18).

The U.S. Constitution, through Article III and the Sixth Amendment, guarantees a criminal defendant's right to a proper venue.[113] Article III provides that "the trial of all crimes shall be held in the state where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed."[114] The Sixth Amendment then limits proper venue to the district in which the crime was committed by guaranteeing the defendant a right to a jury from the vicinage.[115] The Supreme Court has held that these two provisions predetermine and fix venue to the state and district where the crime was committed.[116]

The FRCP solidifies this constitutional guarantee with Rule 18,[117] setting out that "the government must prosecute an offense in a district where the offense was committed," unless there is a statute that provides otherwise.[118] Thus, a federal statute that is within the framework of Article III and the Sixth Amendment can regulate venue without violating Rule 18.[119]

A venue provision is usually added by Congress to criminal statutes, providing a fixed venue for the prosecution of that specific federal criminal offense.[120] A court must then begin what is referred to as a *Rodriguez-Moreno* inquiry to determine the appropriate venue to bring the charges based on how the statute defines the elements of the crime.[121]

The Supreme Court decided in both *United States v. Cabrales* and *United States v. Rodriguez-Moreno* that a determination of where a crime was committed is based on the elements of the criminal offense charged.[122] In *Cabrales*, the Supreme Court held that the *locus*

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113 U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

114 U.S. CONST. art. III, § 2, cl. 3.

115 U.S. CONST. amend. VI. Modern commentators have noted that any distinction between the Constitutional venue and vicinage provisions has disappeared. Ullmann, *supra* note 88, at 1007.

116 Johnston v. United States, 351 U.S. 215, 220 (1956).

117 FEDERAL PRACTICE, § 301, *supra* note 23 ("[Rule 18 is] merely a reaffirmation of the constitutional…principles that had long prevailed").

118 FED. R. CRIM. P. 18.

119 The Notes of Advisory Committee on Rules explains that the many federal statutes enacted to regulate venue, "particularly in respect to continuing offenses," are not affected by Rule 18. *Id.* cmt. 2.

120 United States v. Reed, 773 F.2d 477, 480 (2d Cir. 1985).

121 United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999).

122 Mogin, *supra* note 69, at 50–51; *see* United States v. Cabrales, 524 U.S. 1, 6–7 (1998); *see Rodriguez-Moreno*, 526 U.S. at 279.

delicti[123] of the offense must be determined by identifying the nature of the crime and then determining the location where the criminal acts were committed.[124] This was restated by the Supreme Court in *Rodriguez-Moreno*.[125] In *Rodriguez-Moreno*, the Supreme Court held that the nature of the crime is determined by looking at the statute's language that specifies the conduct that constitutes the offense.[126] In other words, courts look to the elements of the crime.[127] These elements are then used to determine whether the offense is a point-in-time offense or a continuing offense.[128] If the offense is a continuing offense, 18 U.S.C. § 3237 regulates the venue.[129]

B. Venue for Continuing Offenses and Offenses Involving Interstate Commerce

Under 18 U.S.C. § 3237(a), the federal government regulates the venue for continuing criminal offenses in the first paragraph.[130] The first paragraph provides that the proper venue for continuing offenses[131] lies in any district in which the offense "was begun, continued, or completed."[132]

The next paragraph under § 3237(a) is what has caused a circuit split. The statute sets out that any offense involving transportation in interstate commerce is considered a continuing offense for the purposes of § 3237(a), and proper venue will lie in any district wherein the

123 *Locus delicti* is defined as "[t]he place where an offense was committed." BLACK'S LAW DICTIONARY (11th ed. 2019).

124 *Cabrales*, 524 U.S. at 6–7.

125 *Rodriguez-Moreno*, 526 U.S. at 279.

126 *Id.* at 279–80.

127 *Id.* at 280.

128 The Court determined that Congress prohibited both the use of the firearm and the commission of acts that constitute a kidnapping through the enactment of the statutory offense the defendant was charged with. *Id.* at 281.

129 Comment 2 sets out some of the statutes that can regulate venue, and § 3237 is listed. *Id.* at 282.

130 *See* 18 U.S.C. § 3237(a).

131 A continuing criminal offense is a "continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." U.S. v. Midstate Horticultural Co., 306 U.S. 161, 166 (1939) (quoting Armour Packing Co. v. United States, 153 F. 1, 5–6 (8th Cir. 1907), *aff'd*, 209 U.S. 56 (1908)).

132 "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed." 18 U.S.C. § 3237(a).

interstate commerce moves.[133] Thus, an offense involving transportation in interstate commerce can be prosecuted in any district the interstate commerce passed through regardless of whether the actual offense began, continued, or was completed in that district.[134]

The second paragraph to § 3237(a) was added to remove "all doubt as to the venue of continuing offenses and make . . . special venue provisions" unnecessary.[135] It was intended to be a catchall provision and greatly widen the scope of venue.[136] This reflects the general view of most prosecutors that having a wide choice of venue is good.[137] What Congress might not have considered, though, is that this view is not a universal one.[138] For instance, some courts have limited the wide choice of venue the second paragraph offers,[139] and the second paragraph of § 3237(a) may be interpreted broadly or narrowly.

Prosecutors rely on this second paragraph when arguing for proper venue in the district where an airplane lands, regardless of whether the defendant committed the proscribed acts within the landing district itself.[140] Congress needs to enact legislation to prevent these interpretations from varying across circuits.

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133 Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

18 U.S.C. § 3237(a).

134 *See id.*

135 FEDERAL PRACTICE, § 303, *supra* note 31. The second paragraph to § 3237(a) was added in response to a Supreme Court decision dealing with the Federal Denture Act. *Id.* The Federal Denture Act prohibited using the mail or interstate commerce to send a denture that had its cast taken by someone not licensed to practice dentistry in the state the denture was sent. *See* United States v. Johnson, 323 U.S. 273, 273–74. The Supreme Court held that venue could not be at the place of delivery of the dentures and only at the place where the dentures were deposited in the mail. *Id.* The Reviser of the Criminal Code believed this was because the Federal Denture Act did not have a specific venue provision in it. FEDERAL PRACTICE, § 303, s*upra* note 31. Thus, the Reviser added the second paragraph to § 3237 to remove "all doubt as to the venue of continuing offenses and make unnecessary special venue provisions." *Id.*

136 FEDERAL PRACTICE, § 303, s*upra* note 31.

137 *Id.*

138 *Id.*

139 *Id.*

140 *See* United States v. Breitweiser, 357 F.3d 1249, 1252–53 (11th Cir. 2004); United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012).

IV
A CIRCUIT SPLIT

Part IV examines the opinions of the three circuits that have decided this issue. The Eleventh Circuit was the first to decide following the enactment of the statute, followed by the Tenth Circuit, which relied heavily on the Eleventh. Then, on April 11, 2019, the Ninth Circuit created a circuit split in *United States v. Lozoya* after finding the prior circuits' analyses unpersuasive.[141]

Not only is this decision the first to prevent federal prosecutors from prosecuting in-flight offenders in the district where the airplane lands[142] but it presents an absurd and unworkable rule. The Ninth Circuit's interpretation informs us just how necessary it is to have Congress enact legislation that clearly ends interpretations preventing prosecution in the landing district.

The Ninth Circuit, likely recognizing the absurdity of its own decision and the necessity to rule differently, has granted a rehearing of the case en banc and ordered that courts do not cite the 2019 decision as precedent.[143] Originally scheduled for March 10, 2020,[144] the rehearing has been canceled and postponed in response to coronavirus concerns.[145]

Regardless of what results when the rehearing is argued and submitted, the 2019 decision still shows just how necessary it is to have Congress produce a clear, consistent, and workable rule to instruct all circuits. Otherwise, the lack of legislation leaves open the possibility for other circuits to produce similar interpretations that create absurd results and prevent just prosecution.

A. The Eleventh Circuit: U.S. v. Breitweiser

Russel Breitweiser, a previously convicted sex offender, boarded a flight to Atlanta, Georgia, and followed two teenage girls to their

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141 *Compare* United States v. Lozoya, 944 F.3d 1229 (9th Cir. 2019), *reh'g granted*, *with Breitweiser*, 357 F.3d 1249, *and Cope*, 676 F.3d 1219.

142 *See Lozoya*, 920 F.3d at 1231.

143 *Id.* at 1229–30. "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FED. R. APP. P. 35.

144 *Status of Pending En Banc Cases*, *supra* note 30 (stating that the rehearing was calendared for March 10, 2020, but not argued or submitted).

145 "The U.S. Court of Appeals for the Ninth Circuit has canceled en banc hearings . . . amid coronavirus concerns." Alder, *supra* note 30.

row.[146] He asked to sit in the empty seat beside them.[147] After takeoff, he began inappropriately touching the fourteen-year-old on her thigh, hands, face, and hair.[148] When Breitweiser left to use the restroom, the fourteen-year-old told another passenger that Breitweiser was making her uncomfortable.[149] This passenger informed a flight attendant, and Breitweiser was ultimately charged with abusive sexual contact with a minor and simple assault of a minor.[150]

At trial, a jury convicted Breitweiser on both counts.[151] Breitweiser appealed, arguing that the Northern District of Georgia was not the proper venue[152] because the government failed to show the crimes he was charged with were committed in that district or its airspace.[153]

The Eleventh Circuit explained that Congress established 18 U.S.C. § 3237 as a way to find venue when the crime involves the use of transportation.[154] Venue is proper in any district "from, through, or into which" the interstate commerce, or in this case the airplane, moves.[155]

Under the second paragraph of § 3237(a), the court explained, the offenses at issue in this case will be deemed continuing offenses if they involve the use of transportation in interstate commerce.[156] Thus, all the government needed to show was that Breitweiser committed his crimes on an airplane that eventually landed in the Northern District of Georgia.[157]

The Eleventh Circuit included public policy concerns to support its analysis of this issue.[158] Explaining that § 3237 is a catchall provision created to prevent crimes committed in transit from escaping punishment because of a lack of venue,[159] the court said the statute was designed to "eliminate the need to insert venue provisions in every

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146 This occurred on January 11, 2001. *Breitweiser*, 357 F.3d at 1251–52.

147 *Id.* at 1252.

148 *Id.*

149 *Id.*

150 *Id.*

151 Breitweiser was convicted of "abusive sexual contact with a minor as a repeat sex offender in violation of 18 U.S.C. §§ 2244(a)(3) and 2247 and simple assault of a minor in violation of 18 U.S.C. § 113(a)(5)." *Id.* at 1251.

152 *Id.*

153 *Id.* at 1253.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.* at 1253–54.

159 *Id.*

statute where venue might be difficult to prove."[160] The court noted it would be nearly impossible for the government to prove exactly which federal district was beneath the plane when the crime was committed.[161]

B. The Tenth Circuit: U.S. v. Cope

Aaron Jason Cope was the copilot and first officer on a commercial flight from Austin, Texas, to Denver, Colorado.[162] The captain smelled alcohol on Cope during the flight and reported this to a human resources officer upon landing.[163] The captain escorted Cope to the breath-alcohol technician, who administered two breathalyzer tests.[164] The first registered .094, and the second, conducted 21 minutes later, registered .084.[165]

After waiving his right to a jury trial, Cope was convicted in the district court in the District of Colorado for operating a common carrier while under the influence of alcohol in violation of 18 U.S.C. § 342.[166] Cope appealed to the Tenth Circuit, arguing that venue was improper in the District of Colorado because there was no evidence that he was under the influence of alcohol in Colorado.[167]

Relying on the Eleventh Circuit's ruling in *Breitweiser*, the Tenth Circuit explained that the government just needed to show that the crime at issue took place on a form of transportation in interstate commerce.[168] The issue of whether Cope was under the influence of alcohol in Colorado was therefore immaterial because all that mattered was that Cope was under the influence of alcohol while operating a common carrier in interstate commerce.[169] Thus, venue was proper in the District of Colorado, as well as all the districts Cope traveled through during that flight.[170]

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160 *Id.* at 1254.

161 *Id.* at 1253.

162 This occurred on December 8, 2009. United States v. Cope, 676 F.3d 1219, 1221 (10th Cir. 2012).

163 *Id.*

164 *Id.* at 1222.

165 *Id.*

166 *Id.*; *see also* 18 U.S.C. § 342.

167 *Cope*, 676 F.3d at 1221.

168 *Id.* at 1225.

169 *Id.*

170 *Id.*

C. The Ninth Circuit: U.S. v. Lozoya

The Ninth Circuit is the most recent circuit to rule on this issue.[171] The court, however, took a very different approach compared to the two preceding examples, rejecting both interpretations offered by both the Tenth and Eleventh Circuits.[172] Not only did the Ninth Circuit take a different approach but the majority opinion is the first to prevent federal prosecutors from prosecuting federal offenders in the district where the airplane lands.[173]

The facts of the case center on an interaction between Monique A. Lozoya and Oded Wolff on a flight from Minneapolis to Los Angeles on July 19, 2015.[174] Lozoya settled into her seat to take a nap, but she was interrupted by Wolff, who sat directly behind her, repeatedly jostling her seat.[175] While Wolff maintained that he simply tapped the TV screen on the back of Lozoya's seat trying to turn it off, the interaction escalated to Lozoya ultimately hitting Wolff across the face with her hand.[176]

Lozoya was convicted of assault by the Central District of California, so she appealed her conviction to the Ninth Circuit, arguing that the Central District court was an improper venue.[177] She argued that venue was improper because, although the plane landed in the Central District, the assault occurred before the flight entered the Central District's airspace.[178] Specifically, Lozoya argued that the jurisdictional element of 49 U.S.C. § 46506, which requires an assault occur on an in-flight airplane for the assault to be a federal crime within the special aircraft jurisdiction, does not suddenly turn an assault into an assault that involves the transportation in interstate commerce.[179]

The Ninth Circuit agreed with Lozoya and held that an assault does not implicate interstate commerce just because it occurred on an in-

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[171] *See* United States v. Lozoya, 920 F.3d 1231 (9th Cir. 2019), *reh'g granted*.

[172] *See id.* at 1240.

[173] *Id.* at 1244. *Compare Lozoya*, 920 F.3d at 1243, *with* United States v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004), *and* United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012).

[174] *See Lozoya*, 920 F.3d at 1233.

[175] *Id.*

[176] *Id.* at 1233–34.

[177] *Id.* at 1233, 1239.

[178] She produced undisputed trial evidence that established the assault occurred before the flight entered the airspace above the Central District. *Id.* at 1239.

[179] *Id.* at 1240.

flight airplane.[180] Thus, because the assault occurred before the flight was in the Central District's airspace, the court decided that "there is no doubt that the assault did not occur within the Central District of California."[181]

This reasoning is the exact opposite of what the Eleventh Circuit did in *Breitweiser* and the Tenth Circuit did in *Cope*. As mentioned previously, in both *Breitweiser* and *Cope*, the courts agreed with the government that the assault was a continuing offense for purposes of § 3237(a) because the offense involved transportation in interstate commerce.[182]

The Ninth Circuit recognized this and critiqued both the Tenth Circuit and Eleventh Circuit interpretations.[183] First, the Ninth Circuit pointed out that the Eleventh Circuit did not analyze the conduct elements of the assault charged in *Breitweiser* as required by *Rodriguez-Moreno*.[184] According to the Ninth Circuit, the Eleventh Circuit came to its decision by relying on a pre-*Rodriguez-Moreno* case that described § 3237 as the catchall after emphasizing the difficulties the government would encounter when trying to prove proper venue in a district below the plane.[185] Second, the Ninth Circuit pointed out that the Tenth Circuit also did not consider *Rodriguez-Moreno* nor the conduct of the offense the defendant in *Cope* was charged with, and the Tenth Circuit simply followed the *Breitweiser* reasoning.[186]

The majority acknowledged a "creeping absurdity" with its holding in the opinion, pointing out the difficulty prosecutors will have when trying to pinpoint the exact moment an assault occurred at 20,000 feet.[187] The court even posed a hypothetical scenario presenting just how infeasible this holding could be.[188] But even this complicated

180 *Id.*

181 *Id.* at 1239.

182 *Compare id.*, *with* United States v. Breitweiser, 357 F.3d 1249 (11th Cir. 2004), *and* United States v. Cope, 676 F.3d 1219 (10th Cir. 2012).

183 *See Lozoya*, 920 F.3d at 1240 (referring to the other courts' reasoning as "not persuasive").

184 *Id.*

185 *Id.*

186 *Id.* at 1240–41.

187 *Id.* at 1242.

188 Imagine an inflight robbery or homicide—or some other nightmare at 20,000 feet—that were to occur over the northeastern United States, home to three circuits, fifteen districts, and a half dozen major airports, all in close proximity. How feasible would it be for the government to prove venue in such cluttered airspace?

Id.

hypothetical possibility was not enough to "overcome the combined force of the Constitution, *Rodriguez-Moreno*, and . . . case law."[189]

As for the public policy concerns, the court addressed the unfairness argument.[190] The court noted that setting the venue in the district below the airspace where the assault occurred would not create any unfairness to defendants because someone accused of an in-flight crime is unlikely to care where the proper venue will be.[191]

Judge Owens, in his dissent, admitted that § 3237(a) could be clearer but agreed with the reasoning of the Tenth and Eleventh Circuits.[192] Judge Owens pointed out that the Supreme Court advised courts to avoid absurd results when interpreting statutes.[193] He suggested that the majority's opinion led to an absurd result.[194] Common sense, according to Judge Owens, dictated following the Tenth and Eleventh Circuit analyses to avoid requiring a precise pinpoint of a crime that would make prosecution impossible.[195]

The majority and dissent shared a similar sentiment: a hope that Congress will establish a venue rule, consistent with constitutional requirements, that will remedy the issue faced here.[196] Judge Owens then urged the Supreme Court to hold, or Congress to enact, a rule that ensures venue lies in the district where the airplane lands.[197]

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189 *Id.*

190 *Id.*

191 *Id.*

192 *Id.* at 1244.

193 *Id.*

194 *Id.*; *see also* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); United States v. Turkette, 452 U.S. 576, 580 (1981) ("[A]bsurd results are to be avoided and internal inconsistencies in the statute must be dealt with.").

195 Judge Owens identifies several circumstances that would lead to an impossible prosecution of violent in-flight crimes:

> A flight from San Francisco to Houston potentially crosses eight judicial districts. A flight from San Francisco to Miami crosses far more. Asking a traumatized victim, especially a child, to pinpoint the precise minute where a sexual assault occurred is something [he] cannot imagine the Framers intended, or the more recent Congress wished when it enacted [the] venue and flight laws.

Lozoya, 920 F.3d at 1244–45.

196 "Congress can—consistent with constitutional requirements, of course—enact a new statute to remedy any irrationality that might follow from our conclusion. Indeed, we share the dissent's hope . . . that Congress will address this issue by establishing a just, sensible, and clearly articulated rule for this and similar airborne offenses." *Id.* at 1243.

197 "I respectfully dissent, and urge the Supreme Court (or Congress) to restore quickly the just and sensible venue rule that, until now, applied to domestic air travel." *Id.* at 1245.

V
A SOLUTION

These three court decisions produce two different interpretations of § 3237(a). The *Breitweiser* and *Cope* cases interpret the second paragraph of § 3237(a) to mean that a charged offense will be a continuing offense when the offense involves transportation in interstate commerce.[198] Thus, under the *Breitweiser* rule, venue is proper in any district the interstate commerce travels even if the offense itself was committed for only a brief second in the airspace above one district.

On the other hand, the *Lozoya* case interprets the second paragraph of § 3237(a) to mean that a charged offense must *implicate* interstate commerce for the charged offense to be considered a continuing offense.[199] The Ninth Circuit did not establish what exactly would implicate interstate commerce, but it made it clear that simply committing any offense on an airplane is not sufficient.[200] If the charged offense does not implicate interstate commerce, then Rule 18 and *Rodriguez-Moreno* establish that the proper venue is the district below the airspace at the exact moment when the offense occurred.[201]

Of the two interpretations, the better interpretation and more workable rule is the *Breitweiser* rule. This rule is further supported by the policy considerations behind venue, whereas the *Lozoya* rule is not. There is no guarantee, however, that courts will produce a *Breitweiser* rule when faced with interpreting § 3237(a).

Part V argues that allowing courts to interpret § 3237(a) has led to unworkable rules and absurd results which could make it extremely difficult to successfully prosecute crimes. Instead of relying on courts to adopt the *Breitweiser* rule, Congress should accomplish the same result through legislative action and ensure that proper venue for in-flight assaults should include the district in which the flight lands.

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198 United States v. Breitweiser, 357 F.3d 1249, 1252–53 (11th Cir. 2004); United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012). This will be referred to as the *Breitweiser* rule for the remainder of this Comment.

199 *Lozoya*, 920 F.3d at 1240.

200 *See id.*

201 *Id.*

A. Proper Venue for In-Flight Crimes Should Include the Landing District

1. The Lozoya *Rule Is an Incorrect Interpretation of § 3237(a)*

The *Lozoya* rule is not a correct interpretation of § 3237(a) because the Ninth Circuit misapplied the *Rodriguez-Moreno* inquiry and interpreted the phrase "involves interstate commerce" far too narrowly. On petition for a rehearing en banc, the government argued that the *Lozoya* rule is a misapplication of the *Rodriguez-Moreno* inquiry to § 3237(a).[202] The government is correct.

The second paragraph of § 3237(a) makes an offense involving transportation in interstate or foreign commerce a continuing offense in itself.[203] This second paragraph does not require that courts ask whether the offense itself continued through multiple districts.[204] The first paragraph of § 3237(a) requires this, which is why courts must use the *Rodriguez-Moreno* inquiry for offenses falling under paragraph one.[205] Instead, the *second* paragraph explains that if the offense involved interstate commerce then the offense will be deemed a continuous offense, and venue is proper through all districts the interstate commerce moved.[206] The Ninth Circuit used the *Rodriguez-Moreno* inquiry on an offense that falls under the second paragraph of § 3237(a) and should have been considered a continuing offense per se.[207] This was a misapplication of the *Rodriguez-Moreno* inquiry.

2. A Narrow Interpretation of "Involving Interstate Commerce" Is Not Further Supported by the Public Policy Considerations Embedded Within the Venue Provisions, Unlike the Broader Breitweiser *Rule*

The phrase "involving interstate commerce" has been construed broadly in some courts but narrowly in others.[208] While the narrow

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202 Government's Petition for Panel Rehearing and/or Rehearing En Banc, United States v. Lozoya, 920 F.3d 1231 (9th Cir. 2019), *reh'g granted* (No. 17-50336), http://cdn.ca9.uscourts.gov/datastore/uploads/enbanc/17-50336pfr.pdf [https://perma.cc/6TAX-T55M].

203 18 U.S.C. § 3237(a).

204 *See id.*

205 *See id.*; United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999).

206 18 U.S.C. § 3237(a).

207 *See Lozoya*, 920 F.3d at 1240.

208 "Even in the few cases in which courts have applied § 3237(a) to offenses that do not include transportation in interstate commerce as an element, they have always required a

definition usually requires the transportation of interstate commerce be included as an element of the offense, the broader definition does not.[209] The *Breitweiser* rule interprets the phrase broadly, but it still requires a tight connection between the interstate commerce and the proscribed act.[210] This broader definition is further supported by the public policy, which will be explored in this section.

Trial in the district where the crime occurred is supposed to prevent the unfairness and hardship to the defendant that may result if the defendant were forced to travel and sit for trial in an unfamiliar environment.[211] The Ninth Circuit in *Lozoya* explained that setting the venue in the district below the airspace where the assault occurred, compared with setting it in the landing district, will not create any additional unfairness to defendants because someone accused of an in-flight crime is unlikely to care where the proper venue will be.[212] In its opinion, the Ninth Circuit cites to another case that used this reasoning to support its decision to set the venue in the landing district.[213] In that case, however, the court noted that the defendant could still transfer his case under Rule 21(b) to another venue beneath the flight path if he found extensive unfairness and hardship resulted from the court's decision.[214] When the Ninth Circuit set the venue only in a district below where the crime occurred, the defendant's ability to transfer the venue was severely limited as well. Thus, the Ninth Circuit's reasoning that limiting the venue to the district below where the crime occurred presents no additional unfairness and hardship than it would if the venue were set in the landing district fails.

Further, when the proper venue for an in-flight crime is limited only to the district below the airspace the airplane is traveling through, a defendant is likely to encounter more unfairness and hardship compared to if the proper venue also included the landing district. There is a much higher chance that a defendant is familiar with the landing district than a random district that just so happens to be beneath the flight path. If, by chance, the defendant is more familiar with the

tight connection between the offense and the interstate transportation." United States v. Morgan, 393 F.3d 192, 200 (D.C. Cir. 2004).

209 *See id.*; *Lozoya*, 920 F.3d at 1240.

210 *See* United States v. Breitweiser, 357 F.3d 1249, 1253–54 (11th Cir. 2004).

211 Barber, Jr., *supra* note 90, at 40.

212 *Lozoya*, 902 F.3d at 1242.

213 *Id.*

214 United States v. Hall, 691 F.2d 48, 50–51 (1st Cir. 1982). A defendant may make a motion to transfer the proceeding to another district in which the crime occurred when it is in the interest of justice to do so. FED. R. CRIM. P. 21(b) cmt. 2.

district below where the crime was committed, the defendant can still advocate for transfer of venue because any venue beneath the flight path would be deemed proper under the *Breitweiser* rule.

The venue provisions also aim to protect the defendant from the possibility of the government forum shopping and selecting a venue to support its interest. The *Lozoya* decision protects the defendant's interest by limiting the forums in which the government can bring a case; however, courts have also noted that the defendant cannot use these constitutional protections to preclude a trial in a place he willingly traveled to in order to commit a crime. In situations with in-flight crime, a defendant willingly placing himself on an airplane knowing that the plane will be traveling through multiple districts and eventually landing should not be able to avoid prosecution in any of these locations just because the defendant decides it is easier to commit his crime on an airplane.

The venue provisions are also in place to ensure the government's interests are protected.[215] The government wants to ensure the prosecution has adequate access to evidence.[216] Usually, the district where the crime was committed is the best place to access the evidence. But when a crime is committed on an airplane, the airplane contains most, if not all, of the evidence as it continues on its flight plan. Witnesses will land with the plane when it arrives at its destination. Although some witnesses may not be staying in the landing district and there may be expenses with bringing them back, it is far more likely that this will be an easier avenue to access evidence than it would be in a random district that just happens to be beneath the airplane's flight path.

The government would also face extreme difficulty if it were required to prove the exact location in the airspace when a crime was committed. There are plenty of hypothetical situations that show just how difficult identifying proper venue under the *Lozoya* rule could be. The dissent in *Lozoya* identified one of these hypothetical situations when describing a flight traveling from San Francisco to Houston.[217] A nonstop flight from San Francisco to Houston has the potential to cross eight judicial districts.[218] This flight has an average flight time of

215 *See* discussion *supra* Part II.B.2.

216 *See id.*

217 *Lozoya*, 920 F.3d at 1244.

218 *Id.*; *see Geographical Boundaries of U.S. Courts of Appeals and U.S. District Courts*, FEDERAL JUDICIAL CENTER (1999), https://www.fjc.gov/sites/default/files/2012

three hours and thirty minutes.[219] A victim would need to pinpoint the precise minute the crime occurred in order to identify the proper judicial district, out of the eight, for prosecution to be successful. If the victim is unable to do this, or the prosecutor is unable to prove this by a preponderance of the evidence, a court following the Ninth Circuit interpretation would dismiss the case. This would waste courts' resources, allow the offender to escape appropriate judicial punishment, and cause unnecessary burden on traumatized victims, who would have to recount minute-by-minute details of their experiences in order for prosecutors to attempt to narrow down the judicial district.

The selection of venue also determines the community in which a jury will be pulled. This jury is supposed to act as the conscience of the community it is serving. "[P]laces that suffer the effects of a crime are entitled to consideration for venue purposes."[220] The effects of a crime occurring on an airplane are felt much more strongly in the landing district than in a district 30,000 feet below where a crime happened. A person that would otherwise have been convicted may be able to avoid all consequences because of a prosecutor's failure to pinpoint the exact moment a crime occurred. This person may exit the airplane, remain unpunished, and continue to commit similar crimes within the community.

But what happens when a flight is diverted because of a crime and lands in a district that was not the original landing district? If that is the case, the defendant still has the opportunity to argue for transfer of venue to any district that was beneath the flight path, including the district where the plane departed.[221] By ensuring that any of these districts are deemed a proper venue, not just the landing district nor the district that is flown over at the exact moment of a crime, the defendant's, government's, and community's interests are protected.

/IJR00007.pdf [https://perma.cc/7L85-AXQF]; *U.S. and International Route Maps*, UNITED AIRLINES, https://www.united.com/web/en-US/content/travel/route-maps.aspx (last visited June 14, 2020).

219 *SFO to IAH (San Francisco to Houston) Flights*, FLIGHTS.COM, https://www.flights.com/flights/san-francisco-sfo-to-houston-iah/ [https://perma.cc/V6ZU-4XRA] (last visited June 14, 2020).

220 United States v. Reed, 773 F.2d 477, 482 (2d Cir. 1985).

221 FED. R. CRIM. P. 21(b) cmt. 2.

B. Congress Should Enact Legislation to Prevent Possible Court Interpretations of § 3237(a) That Prohibit Prosecution in the Landing District

With the increase of in-flight crime, as noted in Part I and by the Ninth Circuit itself, the importance of maintaining a legal structure that supports the just prosecution of in-flight offenders is paramount.

We are currently forced, however, to rely on the courts to determine whether they will adopt a broader, workable *Breitweiser* approach or a more narrow, disastrous *Lozoya* approach. Courts are left to decide whether or not a defendant's crime involves transportation in interstate commerce when the crime, although lacking interstate commerce involvement as an element, is committed *on* a mode of interstate transportation during interstate travel. This issue comes down to the language of the substantive statute prohibiting the crime the defendant is accused of and the language of the second paragraph of § 3237(a) requiring that the crime must *involve* interstate commerce to be a continuing crime. Basically, is committing a specific crime *on* a device of interstate commerce sufficient to involve interstate commerce even if involvement of interstate commerce is not an element of that crime? As evidenced by the Ninth Circuit ruling, some courts may not think so.

Regardless of the decision the Ninth Circuit will make following the en banc rehearing of *Lozoya*, there remains the possibility that other courts may interpret the second paragraph of § 3237(a) similarly to the Ninth Circuit, leaving the opportunity for defendants to escape consequences through this procedural, statutory flaw. The results of this could be disastrous, especially as the in-flight sexual assault crime rate continues to rise.

Congress needs to amend the language of the substantive statutes to ensure that charged offenses committed on in-flight airplanes can be prosecuted in the landing districts. Because an amendment to the language creates the same result as a court following the *Breitweiser* rule, the addition will also be supported by the public policy of the Constitution and the Sixth Amendment.

Congress has previously amended substantive statutory language in response to restrictions imposed by courts on the wide choice of venue that § 3237(a) provides for prosecutors.[222] Specifically, Congress changed a substantive statute's language to include the word "use" over

[222] FEDERAL PRACTICE, § 303, *supra* note 31.

the word "deposit" in order for a crime prohibiting depositing obscene matter in the mail to fall under the second paragraph of § 3237(a).[223] A defendant was charged under 18 U.S.C. § 1461, which, at the time, made it a crime to knowingly deposit for mail anything declared by that section to be nonmailable.[224] The government appealed the trial court's decision that venue was improper.[225] The issue was whether the charged offense of knowingly depositing for mail "anything declared by § 1461 to be nonmailable [was] completed when the deposit [was] made, or whether it [was] a continuing offense."[226] Specifically, does the charged offense involve the *use of mails* as required by the second paragraph of § 3237(a), or does the charged offense require only the deposit of mail? The Tenth Circuit decided that the language of the substantive statute, § 1461, suggested that the offense was complete when a deposit was made in the mail, and this was a clear distinction from the requirement that the offense must show use of the mail to qualify as a continuing offense under the second paragraph of § 3237(a).[227] The use of the mail continues from the point of deposit to the point of delivery.[228]

Congress responded to this decision by changing the language of the substantive statute so that the statute made it a crime when the defendant knowingly *uses* the mail for what was declared by that section to be nonmailable.[229] Thus, § 3237(a) now governs the determination of venue in cases that are brought under the substantive statute of § 1461.[230]

Like Congress did with § 1461, Congress should clear up the confusion that revolves around determining venue for in-flight crimes. Congress could accomplish this by adding language to the substantive statutes. An issue, however, may arise preventing Congress from solving the problem in this way. The substantive statutes make the proscribed acts crimes within the territorial jurisdiction of the United States,[231] and these proscribed acts only become federal crimes when

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223 *Id.*

224 United States v. Ross, 205 F.2d 619, 620 (10th Cir. 1953).

225 *Id.*

226 *Id.*

227 *Id.* at 620–21.

228 *Id.* at 621.

229 FEDERAL PRACTICE, § 303, *supra* note 31.

230 *Id.*

231 *See* 18 U.S.C. § 113 ("Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished . . . .").

committed on an airplane through a different jurisdictional statute.[232] It may not be plausible for Congress to add language to the substantive statutes when those statutes are not specific to airplane incidents. To remedy this issue, Congress should consider amending the language of § 3237(a) to set out that any crime falling under the special aircraft jurisdiction is considered a crime involving interstate commerce. This would likely be easier to accomplish than including specific venue provisions within each individual statute and will ensure a united front across all circuits when dealing with in-flight crime.

CONCLUSION

When left to be interpreted by the courts, 18 U.S.C. § 3237(a) either produces a broad or much too narrow rule regarding the proper venue for in-flight crimes. The broader rule, as seen in *Breitweiser*, is supported by the statutory language and the policy considerations that are embedded in the venue provisions. The possibility of having circuits with conflicting interpretations and rules is far too concerning to allow for courts to continue to make this decision, however.

Proper venue, a constitutional guarantee and fundamental right, for in-flight crimes should include the landing district. Most importantly, the proper venue should not be limited to the district below the airspace that the airplane was in when the crime was committed. Statutory language that amends the current language in place and instructs all courts to apply the same rule, regardless of the circuit, is desperately needed. Flights frequently cross multiple districts and circuits. Without a national rule, in-flight crime may go entirely unpunished because of a procedural inconsistency across the circuits.

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232 49 U.S.C. § 46506(1).