Extra Venues for Extraterritorial Crimes? 18 USC § 3238 and Cross-Border Criminal Activity

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INTRODUCTION

Consider two situations involving violations of federal criminal law. In each of these circumstances, where should the trials of the offenders be held?

In the first situation, a man travels from his home in Chicago to Bangkok, Thailand, by means of a taxi ride to Chicago O'Hare International Airport and a plane ride directly to Bangkok. While in Thailand, the man engages in sex with a fifteen-year-old Thai girl. US law enforcement officials become aware of the illicit activity before the man returns to the United States. The man's return flight from Bangkok includes a short layover at Los Angeles International Airport. While on this layover, the man is arrested for violating the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003[1] (PROTECT Act), which prohibits "engag[ing] in any illicit sexual conduct with another person" in a foreign place or "travel[ing] in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person."[2]

In the second situation, several individuals are involved in a scheme to smuggle cocaine from Colombia into the United States. Participant A physically transports the cocaine on a boat that travels from Costa Rica to Miami. Participant B, who is located in Atlanta, directs the overall distribution of the cocaine throughout the United States. After a sting operation conducted by the FBI reveals the identities and interrelated activities of these individuals, they are each arrested under various charges,

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1 Pub L No 108-21, 117 Stat 650, codified in various sections of Title 18 and the US Sentencing Guidelines.

2 PROTECT Act § 105, 117 Stat at 654, codified at 18 USC § 2423(b)–(c).

including conspiracy to import and distribute cocaine.[3] Participant B is arrested in Atlanta, but Participant A's situation is a bit more complicated. After a storm throws his boat off course, he is arrested in the Gulf of Mexico—technically part of the high seas[4]—after being spotted by a Coast Guard vessel. Immediately after the arrest, the Coast Guard brings Participant A to Mobile, Alabama.

Both of the situations involve criminal activity with both domestic and extraterritorial elements. In other words, parts of the criminal conduct occurred within the territorial jurisdiction of the United States, and other parts took place outside of such jurisdiction, either in the jurisdiction of a foreign country or on the high seas. A federal statute, 18 USC § 3238, defines venue for extraterritorial crimes. Although § 3238 unquestionably covers crimes committed entirely extraterritorially, does it also encompass crimes that involve conduct spanning both US and extraterritorial locales such as the ones described above?[5]

In the past few decades, courts have come to different conclusions regarding the applicability of § 3238 to these types of criminal offenses. The majority of courts has held that the statute applies to this criminal conduct. However, some courts have held that while § 3238 applies to conduct begun abroad and carried into the United States (as the statute refers to offenses "begun or committed" outside the United States), it does not apply to conduct undertaken in the reverse direction—that is, begun in the United States and continued extraterritorially. Finally, one court of appeals has held that § 3238 cannot apply whenever *any* criminal conduct is performed within the United States.

The resolution of this disagreement among courts is a pressing issue for a number of reasons. First, the application of § 3238 to conduct partially taking place within the United States will often result in a change of trial venue, and transfer rules do not always ensure that the trial will end up in an

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3 See 21 USC §§ 846, 963.

4 Though the precise meaning of the term "high seas" is somewhat contested, the Supreme Court has described it as "international waters not subject to the dominion of any single nation." *United States v Louisiana*, 394 US 11, 22–23 (1969).

5 It is helpful at this point to expressly set out the terminology and shorthand used in this Comment. Section 3238 refers to actions taking place "upon the high seas, or elsewhere out of the jurisdiction of any particular State or district." This Comment's use of the phrases "extraterritorial," "foreign," and "abroad" is meant to be interchangeable with this statutory phrase. Similarly, the phrases "in the United States" and "domestic" refer to locations within the jurisdiction of a US state or district.

appropriate location. As § 3238 generally provides that trials shall take place wherever an offender is first brought or arrested, the application of this statute can take venue away from a district in which some criminal activity occurred. Moreover, although this is a procedural issue, venue can have a deep effect on substantive rights. Finally, this particular venue issue is especially relevant now because of two recent trends. First, given the expanding nature of global communications, travel, and business, criminal conduct is increasingly transnational. Second, Congress has been increasingly inclined to criminalize activity that takes place at least partially extraterritorially in a variety of contexts, including sexual crimes, kidnapping, and corruption- and drug-related offenses.[6] Therefore, the scope of § 3238 is relevant to a growing number of criminal trials.

This Comment proceeds in three parts. Part I is an overview of criminal law venue provisions in both the Constitution and various federal statutes. Part II delves into the case law and reviews how courts have interpreted § 3238 when dealing with criminal activity spanning US and extraterritorial locales. Part III proposes a new framework for analyzing § 3238 based on the plain language of the statute, its legislative history and purpose, and the essential purposes and values of venue rules.

I. Constitutional and Statutory Background

This Part provides background information necessary to understand courts' disagreement about the proper application of § 3238. The first Section outlines the constitutional foundations of venue for criminal trials. The following Section then explains the statutory scheme of venue for extraterritorial crimes, including § 3238.

A. The Constitutional Framework of Venue for Criminal Trials

Two constitutional provisions mention the location of criminal trials.[7] Article III states that criminal trials should take place in the state in which the crime at issue is committed.[8] However, if crimes are "not committed within any State, the

[6] See, for example, USA PATRIOT Improvement and Reauthorization Act of 2005 § 122, Pub L No 109-177, 120 Stat 192, 225 (2006), codified at 21 USC § 960a; PROTECT Act § 105, 117 Stat at 654, codified at 18 USC § 2423(c); International Parental Kidnapping Crime Act of 1993, Pub L No 103-173, 107 Stat 1998, codified at 18 USC § 1204.

[7] See US Const Art III, § 2, cl 3; US Const Amend VI.

[8] US Const Art III, § 2, cl 3.

Trial shall be at such Place or Places as the Congress may by Law have directed."[9] The Sixth Amendment, which guarantees various procedural rights for criminal trials, commands that criminal defendants have a "right to a speedy and public trial, by an impartial jury *of the State and district wherein the crime shall have been committed*."[10]

The Federal Rules of Criminal Procedure (FRCrP) follow the outline of the Constitution. FRCrP 18 states that "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."[11] Thus, both the Constitution and the FRCrP mandate that venue for criminal proceedings related to a particular crime should be set within the state and district in which that crime is committed. Nevertheless, as both Article III and FRCrP 18 explain, Congress has the authority to set statutory rules for venue when a criminal offense does not occur within a US state or district.

B. The Statutory Framework of Venue for Extraterritorial Crimes

Pursuant to the constitutional rules governing criminal venue under Article III, Congress has passed a number of statutes providing venue for crimes that do not occur within a single US state or district. Of most importance to this Comment is 18 USC § 3238, which specifies the appropriate venue for extraterritorial crimes.[12] Title 18 USC § 3237(a), which outlines venue for continuing offenses (that is, crimes that span multiple districts), is also relevant, as courts sometimes identify it as an alternative basis for venue when crimes span both US and extraterritorial locales.[13] In fact, much of the discussion of § 3238 in the case law involves an examination of which statute—§ 3238 or § 3237(a)—should take precedence in situations where both seem to apply.

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9 Id.

10 US Const Amend VI (emphasis added).

11 FRCrP 18.

12 18 USC § 3238.

13 18 USC § 3237(a). For an example of a court utilizing § 3237(a) instead of § 3238, see *United States v Gilboe*, 684 F2d 235, 239 (2d Cir 1982).

1. Venue for extraterritorial crimes: 18 USC § 3238.

As noted above, 18 USC § 3238 provides venue for extraterritorial crimes. A version of 18 USC § 3238 has been in effect since 1790.[14] The statute's legislative history will be discussed in more detail in Part III. For now, it suffices to say that although the wording has changed somewhat over the centuries, the basic framework of the statute has remained the same. This Comment focuses on the 1948 addition of the phrase "begun or" before the term "committed."[15]

Section 3238, which is titled "Offenses not committed in any district," provides in full:

> The trial of all offenses *begun or committed* upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, *is arrested or is first brought*; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.[16]

Put simply, § 3238 provides venue for crimes that are "begun or committed" on the high seas or any other location outside of the jurisdiction of any specific US state or district. The authority for this provision flows directly from Article III's specification that Congress can set the location of the trials of crimes that are "not committed within any State."[17]

The statute applies a two-step, disjunctive test to determine venue.[18] First, venue is set in the district in which the offender is arrested or first brought. "[F]irst brought" refers to the US location to which a defendant is taken when he or she is "returned to the United States already in custody."[19] Second, if the offender has not yet been arrested or brought to the United States,

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[14] See Act of Apr 30, 1790 § 8, ch 9, 1 Stat 112, 113–14, codified as amended at 18 USC § 3238.

[15] See Act of June 25, 1948 § 3238, ch 211, 62 Stat 683, 826, codified as amended at 18 USC § 3238.

[16] 18 USC § 3238 (emphasis added).

[17] US Const Art III, § 2, cl 3.

[18] See, for example, *United States v Layton*, 855 F2d 1388, 1410–11 (9th Cir 1988); *United States v Hsin-Yung*, 97 F Supp 2d 24, 28 (DDC 2000).

[19] *United States v Catino*, 735 F2d 718, 724 (2d Cir 1984).

prosecutors may file an indictment in the district in which the offender last resided or, if the offender has no known last residence, in the District of Columbia. These provisions apply both to a principal offender and to any joint offenders.

2. Venue for continuing offenses: 18 USC § 3237(a).

Title 18 USC § 3237(a) provides venue for continuing offenses—offenses that span multiple districts. The statute states:

> 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*.
>
> 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.[20]

Section 3237(a) applies to two types of offenses: (1) those "begun" in one particular district and "completed" in a different district, and (2) those "committed" in multiple districts. For these continuing offenses, venue is proper in any district in which the "offense was begun, continued, or completed."[21] In addition, § 3237(a) specifies that three other types of offenses are continuing offenses covered by the statute: those involving (1) the mails, (2) "transportation in interstate or foreign commerce," and (3) importation into the United States of either a person or object.[22] Although courts have been somewhat inconsistent in the classification of offenses as "continuing," it is clear that some criminal activity—such as an isolated murder or robbery by a single individual—would not qualify.[23]

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20 18 USC § 3237(a) (emphasis added).

21 18 USC § 3237(a).

22 18 USC § 3237(a).

23 See Jeffrey R. Boles, *Easing the Tension between Statutes of Limitations and the Continuing Offense Doctrine*, 7 Nw J L & Soc Pol 219, 221 (2012).

II. THE COURTS' APPLICATION OF § 3238

Courts have disagreed as to when § 3238 applies in the context of criminal conduct that spans both domestic and extraterritorial locales. Although § 3238 plainly applies to conduct occurring entirely outside of the jurisdiction of a US state or district, it is less clear whether it applies to cross-border action. Recall that § 3238 states that it applies to "offenses begun or committed" extraterritorially. Furthermore, note that § 3237(a) also purports to prescribe venue for offenses that occur in multiple US districts. As will be discussed below, this has posed a second point of disagreement. Courts are divided as to whether venue for crimes spanning both US districts and extraterritorial locations can be set by § 3238 even though venue would theoretically be proper in a different district under § 3237(a).

Part II.A discusses the majority interpretation of § 3238: the statute applies to conduct that spans locations within the United States and abroad. Part II.B examines the two decisions holding that § 3238 categorically does *not* apply to such cross-border offenses. Finally, Part II.C analyzes the few decisions that have held that § 3238 *sometimes* does not apply to criminal offenses committed partly abroad and partly domestically—particularly those begun in the United States and continued abroad.

A. Majority View: If the Offense Includes Both Extraterritorial and Domestic Conduct, § 3238 Applies

This Section examines the majority interpretation that § 3238 applies to all cross-border criminal activity. These cases are broken up into two categories. Part II.A.1 discusses opinions that do not reach a temporal inquiry—that is, cases that do not discuss whether the criminal activity began extraterritorially or in the United States. Conversely, Part II.A.2 considers cases that do reach such an inquiry—in other words, opinions that expressly consider where the criminal conduct began and still hold that § 3238 applies to such conduct.

1. Cases that do not reach a temporal inquiry.

The Fourth and Fifth Circuits have each held that § 3238 applies to conduct that spans both extraterritorial and domestic locales. However, neither of these courts expressly contemplated the temporal aspect of the offenses; that is, although the criminal conduct in question may have either begun abroad or in the

United States, these courts did not address the sequence of the crime as a factor in applying § 3238.

In a pair of cases in the late 1970s, the Fifth Circuit addressed the applicability of § 3238 to marijuana-related conspiracy charges. In *United States v Erwin*,[24] the defendants were apprehended on the high seas while traveling in a boat—which originated in Alabama—containing marijuana.[25] The defendants were first brought to the Eastern District of Louisiana, where venue was laid.[26] They argued that venue was only appropriate in a district where an overt act in furtherance of the conspiracy occurred, and thus that the trial should be held in Alabama.[27] The court rejected this claim, stating: "That venue may also be appropriate in another district will not divest venue properly established under § 3238."[28] Nevertheless, the court did not reach the question of whether the offense began in the United States or extraterritorially; this fact did not seem to matter to the court's application of § 3238.

Similarly, the Fifth Circuit in *United States v Williams*[29] held that § 3238 could apply to set venue in the Southern District of Alabama, where the defendant was first brought from the high seas, in spite of the fact that an overt act in furtherance of the conspiracy took place in New York.[30] In a manner comparable to *Erwin*, the court held that an otherwise-proper application of § 3237(a) cannot divest venue from a district that is an appropriate venue under § 3238.[31] The court similarly did not discuss the temporal nature of the conspiracy. And, just as in *Erwin*, it is unclear where the criminal conduct began.

In *United States v Levy Auto Parts of Canada*,[32] the Fourth Circuit addressed a conspiracy to violate the Arms Export Control Act in which twenty-four of the twenty-six overt acts took place abroad.[33] The defendants argued that they should be tried in the Western District of Michigan, where the only two domestic overt acts occurred, but the government claimed that venue

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24 602 F2d 1183 (5th Cir 1979).

25 Id at 1184.

26 Id at 1185.

27 Id.

28 *Erwin*, 602 F2d at 1185.

29 589 F2d 210 (5th Cir 1979).

30 Id at 212–13.

31 Id.

32 787 F2d 946 (4th Cir 1986).

33 Id at 948.

was proper in the Eastern District of Virginia, where one coconspirator was arrested.[34] The court expressly followed *Williams* and *Erwin* in holding that the fact that venue may be appropriate in another district under § 3237(a) does not make venue based on § 3238 automatically inappropriate.[35] The court felt certain of its decision in this particular case because the Michigan overt acts "had a quality of surplusage" in that they were unnecessary to make out the offense and were only tangentially related to the conspiracy.[36] Hence, the conspiracy was "essentially foreign."[37] The *Levy Auto Parts* court did not expressly contemplate the temporal nature of the conspiracy as part of its decision regarding the application of § 3238. Although the court essentially realized the conspiracy likely began abroad, given that twenty-four out of the twenty-six overt acts took place outside of the United States, it did not consider this fact important in its discussion of whether § 3238 should apply.

Finally, a Ninth Circuit concurring opinion also implicates these issues. In *United States v Jensen*,[38] the court contemplated the proper venue for an offense of operating a vessel in a grossly negligent manner, where the defendants' criminal actions took place on both the high seas and in US territorial waters.[39] The majority did not reach the issue of the proper application of § 3238 because venue would have been in the same district whether the statute applied or not.[40] However, in a concurring opinion, Judge Betty Fletcher opined that § 3238 applies to this situation, stating that "the alleged offense was still 'begun or committed' upon the high seas during the period charged" regardless of the fact that the defendants also operated the vessels within US territorial waters.[41] The concurring opinion did not delve into the issue of where the offense was temporally begun. As will be discussed further below,[42] this interpretation is inconsistent with a later decision of the Ninth Circuit, which held

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34 Id at 947, 949.
35 Id at 951.
36 *Levy Auto Parts of Canada*, 787 F2d at 951–52.
37 Id at 952.
38 93 F3d 667 (9th Cir 1996).
39 Id at 670.
40 Id.
41 Id at 671 (B. Fletcher concurring).
42 See text accompanying notes 77–84.

that conduct begun in the United States and continued abroad is not subject to § 3238's venue requirements.[43]

2. Cases that do reach a temporal inquiry.

The Third Circuit and the District Court for the District of Columbia have both applied § 3238 to criminal conduct spanning both domestic and extraterritorial locales. Unlike the cases discussed above, these courts expressly reached the sequence of the conduct; they specifically considered where the criminal activity began and still held that § 3238 applied to the offense.

In *United States v Pendleton*,[44] the Third Circuit applied § 3238 to a violation of the PROTECT Act, which prohibits any US person traveling in foreign commerce from engaging in illicit sex.[45] The defendant had flown from New York City to Germany, where he had sexually molested a minor, but he was arrested in the District of Delaware.[46] The court first rejected the defendant's contention that § 3237(a) *must* apply in this context because his offense involved foreign commerce; the court held that the venue provision in that statute is not mandatory because it states only that offenses "*may* be inquired of and prosecuted."[47] Instead, the court followed the test set out by the Supreme Court in *United States v Rodriguez-Moreno*,[48] under which courts identify the *locus delicti* through an examination of the nature of the crime.[49] For the PROTECT Act violation at issue in *Pendleton*, the court found that the essential "conduct constituting the offense" was the illicit sexual act, which took place in Germany.[50] Thus, as the essential conduct occurred abroad, § 3238 applies.[51]

The court then recognized the split in authority as to whether § 3238 only applies to conduct taking place entirely outside of the United States.[52] It noted that, although § 3238's title seems to include only "offenses not committed in any district," the text of the statute leads to a different conclusion, and

43 See *United States v Pace*, 314 F3d 344, 351 (9th Cir 2002).

44 658 F3d 299 (3d Cir 2011), cert denied, 132 S Ct 2771 (2012).

45 *Pendleton*, 658 F3d at 304–05.

46 Id.

47 Id at 303, quoting 18 USC § 3237(a).

48 526 US 275 (1999).

49 *Pendleton*, 658 F3d at 303–04.

50 Id at 303–05.

51 Id at 304–05.

52 Id.

the title of a statute "cannot limit the plain meaning of statutory text where that text is clear."[53] Because the text states that § 3238 applies to crimes begun *or* committed extraterritorially, the court rejected an interpretation of "committed" extraterritorially to mean "wholly committed" extraterritorially:

> Pendleton would have us read the term "committed" to mean "wholly committed." But this cannot be correct, because crimes that are "wholly committed" outside the United States are, by definition, "begun" abroad. For the term "committed" to have independent meaning, it must refer to *crimes that begin inside the United States* but that are in their essence committed abroad.[54]

Here, the offense began in New York because it was there that the defendant "initiated foreign travel."[55] However, the offense was committed when the illicit sexual act occurred in Germany.[56] Since the "criminal conduct was 'essentially foreign,'" as the Fourth Circuit said in *Levy Auto Parts*, § 3238 applies.[57]

The District Court for the District of Columbia has also addressed this issue. In *United States v Torres-Garcia*,[58] the court held that § 3238 applied to set venue for a defendant whose involvement in a conspiracy to import drugs and launder money was entirely extraterritorial.[59] Several overt acts in furtherance of the conspiracy—though none performed by the defendant—took place in the United States.[60] The defendant argued that § 3238 was inapplicable if any criminal activity took place within the United States; therefore, even though he entered the conspiracy abroad, the United States–based overt acts would nullify the use of § 3238.[61] In a similar vein to *Pendleton*, the court noted that the text—though not the title—of the statute did not

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53 *Pendleton*, 658 F3d at 304–05, quoting *M.A. v State-Operated School District of Newark*, 344 F3d 335, 348 (3d Cir 2003).

54 *Pendleton*, 658 F3d at 305 (emphasis added).

55 Id.

56 Id.

57 Id, quoting *Levy Auto Parts of Canada*, 787 F2d at 950. The Western District of Texas came to a similar conclusion in regard to a defendant who traveled from Arizona to Mexico, where he engaged in illicit sexual conduct with minors. See *United States v Armstrong*, 2007 WL 3171775, *4 (WD Tex).

58 2007 WL 1207204 (DDC).

59 Id at *1, 7–8.

60 Id at *6.

61 Id.

support this reading, because "begun" would be rendered meaningless.[62] It also stated that the offense of a money laundering conspiracy is "committed" where an agreement to form the conspiracy is entered into; here, the defendant entered into the agreement abroad, and thus the offense was "committed" abroad under § 3238.[63] The court conceded that the United States–based overt acts here were "more substantial" than those in *Levy Auto Parts*, but maintained that "precedent makes it clear that venue is proper."[64]

B. Minority View: If the Offense Includes Both Extraterritorial and Domestic Conduct, § 3238 Does Not Apply

In contrast to the cases mentioned above, the Second Circuit in *United States v Gilboe*[65] concluded that § 3238 does not apply to criminal offenses that span both domestic and foreign locations but rather only applies when conduct takes place entirely extraterritorially.[66] Although the defendant was located outside of the United States, his fraudulent scheme involved a ship owner located in New York City with whom the defendant corresponded through telex and phone and the transfer of money through banks located in New York City.[67] The court held that § 3238 did not apply, as it "applies only to offenses not committed in any district, as [§ 3238's] title indicates."[68] Rather, § 3237(a), which provides venue for continuing offenses such as those involving foreign commerce, was applicable and served to set venue in the Southern District of New York due to the New York–based aspects of the crime.[69] It is important to note that *Gilboe*'s statements on this issue have been labeled dicta and its reasoning deemed unpersuasive by district courts within its own circuit.[70] However, the Second Circuit itself has not further considered the topic.

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62 *Torres-Garcia*, 2007 WL 1207204 at *7.

63 Id.

64 Id. The DC District Court reached a similar conclusion in *United States v Cobar*, 2006 WL 3289267 (DDC), in which the defendant's involvement in a conspiracy to import drugs was entirely extraterritorial although other aspects of the conspiracy involved US locations. See id at *5.

65 684 F2d 235 (2d Cir 1982).

66 See id at 239.

67 Id at 236–37.

68 Id at 239 (quotation marks omitted).

69 *Gilboe*, 684 F2d at 239.

70 See, for example, *United States v Miller*, 2012 WL 1435310, *8 (D Vt); *United States v Bin Laden*, 146 F Supp 2d 373, 381 n 17 (SDNY 2001).

The Eastern District of North Carolina has also refused to apply § 3238 to activity that took place partly abroad and partly in the United States. In *United States v Briceno*,[71] the court held that the statute was not applicable to a conspiracy to import drugs into the United States.[72] The defendant made most of the arrangements for the importation while in Mexico and Brazil, but also made telephone calls to an undercover Drug Enforcement Agency agent located in North Carolina and met with that agent in Miami, where he was arrested.[73] The court stated that "[t]o give the court jurisdiction under [§ 3238], the offense must be committed out of the jurisdiction of any district or state," but here both "overt acts and substantive offenses were committed in the Eastern District of North Carolina."[74] Since conspiracy is a continuing offense, § 3237(a) served to provide venue in this case.[75] The court distinguished the case from the binding Fourth Circuit precedent of *Levy Auto Parts* by claiming that the actions taken in the United States in that case were "surplusage" and "unnecessary, insubstantial and insignificant," whereas Briceno's United States–based acts "ma[d]e up eighteen substantive counts in the indictment of using a telephone in furtherance of a felony."[76]

C. The Middle View: If the Offense Includes Both Extraterritorial and Domestic Conduct, § 3238 Sometimes Does Not Apply

The Ninth Circuit and the District of Connecticut have each held that § 3238 is not applicable in one particular context of conduct spanning foreign and domestic locales: when criminal conduct begins within the United States and is continued abroad. In *United States v Pace*,[77] the Ninth Circuit determined that § 3238 did not apply to set venue for the trial of a wire-fraud offense in which the Ohio-based defendant sent faxes and instructed his secretary to provide his personal rather than business bank information to a Mexican company.[78] The defendant

71 1987 WL 36867 (ED NC).
72 Id at *4.
73 Id at *1–2, 4.
74 Id at *4.
75 *Briceno*, 1987 WL 36867 at *3–4.
76 Id at *3.
77 314 F3d 344 (9th Cir 2002).
78 Id at 351.

also received wire transfers from Mexico while in Ohio.[79] The court concluded—using the *Rodriguez-Moreno* test described above[80]—that a wire-fraud offense begins with "conduct that causes a wrongful transmittal" and therefore here includes the sending of faxes and secretarial instructions.[81] Hence, the offense was not "begun" abroad.[82] Additionally, the offenses were partly "committed" in the United States due to the receipt of the wire transfers in Ohio.[83] Crucially, the court held, "[i]t is true that the offenses were also committed in Mexico, but § 3238 does not apply unless the offense was committed entirely on the high seas or outside the United States (unless, of course, the offense was 'begun' there)."[84]

The District Court for Connecticut has also held that § 3238 does not govern criminal conduct beginning in the United States and continuing abroad. *United States v Perlitz*[85] involved facts largely identical to those of *Pendleton*: the defendant travelled from New York City to Haiti and, while in Haiti, engaged in sex acts with minors.[86] In contrast to *Pendleton*, the court found that traveling in foreign commerce was an "essential conduct element" of the PROTECT Act offense.[87] As the travel took place partly in New York, "§ 3238, which by its terms governs only crimes 'committed . . . elsewhere out of the jurisdiction of any particular State or district,' is inapplicable."[88] Note that although the *Perlitz* court held that § 3238 does not apply to conduct beginning in the United States and continuing abroad, it did not expressly reach whether the statute similarly is inapplicable to conduct beginning abroad and continuing in the United States. Thus, it is unclear whether it sides with its Second Circuit precedent of *Gilboe* or with the more limited denial of applicability found in *Pace*.

At least two other district courts within the Second Circuit have addressed the applicability of § 3238 to conduct spanning both foreign and domestic locales. In *United States v Bin Laden*,[89]

79 Id.

80 See text accompanying notes 48–49.

81 *Pace*, 314 F3d at 349, 351 (quotation marks omitted).

82 Id at 351.

83 Id.

84 Id.

85 728 F Supp 2d 46 (D Conn 2010).

86 Id at 49.

87 Id at 56–57.

88 Id at 57.

89 146 F Supp 2d 373 (SDNY 2001).

the District Court for the Southern District of New York held that § 3238 was appropriate in the context of an "international conspiracy offense . . . *beg[u]n* outside the United States, irrespective of the fact that a few of the alleged overt acts of the conspiracy were *later* committed inside the United States."[90] The court rejected the precedent of *Gilboe*, claiming that it was "[u]nconsidered dictum" and represented a "myopic reading" of the statute.[91] Implicit in the court's rejection of *Gilboe* is a refusal to allow domestic activity to block the application of § 3238. However, it is not certain whether the *Bin Laden* court would side with *Pendleton* in allowing the use of § 3238 in *all* situations in which conduct spans both domestic and extraterritorial locations. While it is clear from the opinion that § 3238 can be applied when an offense is begun abroad and continued into the United States, the court did not reach conduct flowing in the opposite direction; consequently, it is not entirely obvious where *Bin Laden* falls in this categorization.

Similarly, the District Court for Vermont, when faced with an international parental kidnapping offense, stated that "[i]f the essential conduct elements were begun or committed outside of any district then venue would be proper" under § 3238.[92] While the court expressly rejected *Gilboe* in stating this, it is—in a similar vein to *Bin Laden*—unclear whether the court would hold that there are limits to the application of § 3238 based on the temporal sequence of actions, or whether it would side with *Pendleton* in holding that *all* conduct committed both extraterritorially and domestically is covered by the statute.[93]

III. When Should § 3238 Apply?

As discussed above, courts have not applied § 3238 uniformly to criminal conduct that occurs both domestically and extraterritorially. Whereas some have held that § 3238 cannot apply if any conduct takes place within the United States, others have concluded that a domestic action does not defeat the application of § 3238. Still others have held that § 3238 *sometimes* does not apply to such cross-jurisdictional conduct, particularly if that conduct begins in the United States and then continues abroad.

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90 Id at 381 (emphasis added).

91 Id at 381 n 17.

92 *Miller*, 2012 WL 1435310 at *9.

93 See id.

In resolving this disagreement, this Comment argues that § 3238 applies to (1) criminal activity committed entirely extraterritorially and (2) criminal activity begun extraterritorially and continued into the United States. However, in contrast to the majority of the case law, this Comment maintains that § 3238 does *not* apply to (3) criminal activity begun in the United States and continued extraterritorially. Table 1 below sets out the applicable statute and resulting venue for each type of criminal activity under this Comment's proposed approach.

TABLE 1. APPLICATION OF 18 USC § 3238

Location of Criminal Activity	**Applicable Statute**	**Location of Venue**
Entirely extraterritorial	18 USC § 3238	US district where defendant is arrested or first brought.
Extraterritorial → United States	18 USC § 3238	US district where defendant is arrested. Likely to be district in which defendant has conducted some criminal activity.
United States → Extraterritorial	18 USC § 3237(a)	US district(s) where defendant has conducted criminal activity.

This solution is based on a reading of the statutory language and legislative history as ambiguous regarding certain types of conduct, and an examination of the central purposes of venue rules. This approach has four steps, each of which aligns with general canons of statutory construction. First, this Comment analyzes the plain language of the statute and finds that some situations—crimes committed entirely abroad and those begun abroad and continued into the United States—are clearly within the ambit of the statute. While other courts have also found that the plain language includes a third type of criminal activity—that begun in the United States and continued abroad—this Comment argues that the statute is ambiguous regarding this activity. Specifically, this Comment posits that there are two plausible, yet irreconcilable, readings of this statutory language.

Second, this Comment evaluates the scant legislative history and concludes that this history does not clarify the ambiguity regarding § 3238's scope. Third, this Comment undertakes an examination of the overall purpose of § 3238—to provide a venue where there otherwise would not be one—which suggests that the statute should not apply to this particular category of criminal conduct. Finally, this Comment identifies and discusses the purposes of venue rules and related legal concepts in order to bolster the conclusion that § 3238 does not apply to conduct begun in the United States and continued abroad. More specifically, this Comment argues that the chief purpose of venue is to provide fairness and convenience to defendants, and claims that the application of § 3238 to criminal conduct begun in the United States and continued abroad works to defeat this objective.[94]

A. The Plain Language of § 3238

When analyzing the meaning of a statute, courts must first look to its text and determine whether that language has a "plain and unambiguous meaning."[95] In the case of § 3238, the plain language might support the application of § 3238 to three types of criminal conduct: (1) crimes committed completely extraterritorially, (2) crimes begun extraterritorially and contin-

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[94] Note that this Comment does not address which actions constitute any particular criminal offense. The determination of when § 3238 applies (to conduct committed entirely abroad, conduct begun in the United States and continued abroad, or conduct begun abroad and continued in the United States) is a prior consideration to this analysis and is the focus here. Many of the courts do engage in this kind of analysis, usually looking to the *locus delicti* test set forth in *Rodriguez-Moreno* to determine which actions constitute an offense. See, for example, *Pendleton*, 658 F3d at 303 (stating that it "was not error" for the lower court to "rel[y] on *Rodriguez-Moreno*'s two-pronged approach to determine venue"); *Pace*, 314 F3d at 349 (citing *Rodriguez-Moreno* and detailing how in order to determine whether venue is proper, the court must look to the nature and location of the criminal acts). This determination obviously affects the application of § 3238. For example, if a court determines that the conduct that constitutes an offense took place entirely abroad, then § 3238 clearly applies. Conversely, if the same offense is construed to include activity that took place both in the United States and abroad, the statute may not apply. Differences in the interpretation of constitutive actions of a criminal offense may even partly reconcile the dissimilar outcomes of *Perlitz* and *Pendleton*, as the former interpreted the *locus delicti* of the PROTECT Act offense to include the traveling aspect and the latter did not. Nevertheless, although some courts have conflated these two types of examinations, the *locus delicti* determination is analytically separate from the prior issue of what kinds of conduct are covered by § 3238 and is thus not at issue in this Comment.

[95] *Barnhart v Sigmon Coal Co*, 534 US 438, 450 (2002), quoting *Robinson v Shell Oil Co*, 519 US 337, 340 (1997).

ued into the United States, and (3) crimes begun in the United States and continued extraterritorially.

1. Crimes committed completely extraterritorially.

Recall that § 3238 sets venue for offenses that are "committed" extraterritorially.[96] This language unambiguously includes criminal conduct committed entirely abroad without any United States–based activities. Consistent with this plain language, all courts that have considered the issue have applied § 3238 to such conduct.[97] Given the consensus on this point, no further analysis of legislative history or purpose is required.

2. Crimes begun extraterritorially and continued into the United States.

The applicability of § 3238 to crimes begun abroad and continued into the United States is also supported by the plain language of the statute. Section 3238 explicitly includes "all offenses *begun* . . . upon the high seas, or elsewhere out of the jurisdiction of any particular State or district."[98] It is true that many of the cases discussed in Part II do not actually reach the question of the temporal sequence of criminal conduct and thus do not expressly advocate this interpretation of the statute.[99] Nevertheless, their broader holdings—that § 3238 applies to conduct involving both extraterritorial and domestic elements—are consistent with this statutory construction. Even *Pace*, which concludes that § 3238 does not apply to some conduct spanning both types of jurisdictions, recognizes that the statute explicitly does apply to conduct begun abroad and continued into the United States.[100] In particular, the court noted that "§ 3238 does not apply unless the offense was committed entirely on the high seas or outside the United States (*unless, of course, the offense was 'begun' there*)."[101]

The Second Circuit is the only court of appeals to reach a result inconsistent with this interpretation. In *Gilboe*, the court determined that the application of § 3238 is defeated by the

96 18 USC § 3238.

97 See, for example, *United States v Holmes*, 670 F3d 586, 588, 593–97 (4th Cir 2012); *United States v Erdos*, 474 F2d 157, 158, 160–61 (4th Cir 1973).

98 18 USC § 3238 (emphasis added).

99 See Part II.A.1.

100 See *Pace*, 314 F3d at 351.

101 Id (emphasis added).

occurrence of any part of the criminal offense within the United States.[102] Although the Second Circuit has not revisited this issue since *Gilboe*, several district courts within the Second Circuit have called *Gilboe* into question, labeling its reasoning on this matter dicta and opining that its decision was "myopic."[103] Moreover, *Gilboe*'s only reference to § 3238 is to the title of the statute: "Offenses not committed in any district."[104] However, as the *Pendleton* court astutely pointed out, "it is a well-settled rule of statutory interpretation that titles and section headings cannot limit the plain meaning of statutory text where that text is clear."[105] Although these opinions do not overrule the *Gilboe* decision, they do detract somewhat from its relevance, particularly in light of the weight of authority arrayed against it by other courts of appeals.

There is a significant counterargument to this interpretation of § 3238 based on § 3237(a), the venue statute for continuing offenses.[106] If a criminal offense involves conduct in both the United States and a foreign location, it may be possible to construe that offense as a continuing offense. This argument is even more forceful when criminal conduct spans multiple US districts in addition to an extraterritorial location. For example, a conspiracy might begin in Brazil but continue into both Arizona and Montana, with overt acts occurring in each jurisdiction. In these situations, should § 3238, which governs venue for extraterritorial crimes, or § 3237(a), which sets venue for continuing offenses, take precedence?

Several courts have addressed the relationship between these two statutes and held that § 3237(a) does not divest courts of jurisdiction under § 3238.[107] In other words, § 3238 can still apply even if § 3237(a) would also have been appropriate. *Erwin* and *Levy Auto Parts* did not discuss their rationale for this determination. Nevertheless, *Pendleton* explained its decision by reference to § 3237(a)'s lack of a "mandatory venue provision,"

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102 *Gilboe*, 684 F2d at 239.

103 See text accompanying notes 89–93.

104 *Gilboe*, 684 F2d at 239, quoting 18 USC § 3238.

105 *Pendleton*, 658 F3d at 305 (quotation marks omitted), quoting *M.A. v State-Operated School District of Newark*, 344 F3d 335, 348 (3d Cir 2003). See also *Brotherhood of Railroad Trainmen v Baltimore & Ohio Railroad Co*, 331 US 519, 528–29 (1947).

106 Recall that § 3237(a) states in part that "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."

107 See, for example, *Pendleton*, 658 F3d at 303; *Williams*, 589 F2d at 213.

given that the statute says such offenses "may," not "must," be prosecuted in a particular district.[108]

There is additional support, though not recognized by the courts, for this position in the language of § 3237(a). The statute states that it applies "except as otherwise expressly provided by enactment of Congress."[109] Section 3238 is an "enactment of Congress" that "expressly provide[s]" venue for crimes begun outside of the United States and continued within it. Therefore, the existence of § 3237(a) does not defeat the plain language of § 3238 mandating venue for such offenses.

In sum, the plain language of § 3238 supports an interpretation of the statute as applying to crimes begun extraterritorially and continued into the United States. Thus, to the extent that *Gilboe* holds the contrary, it is incorrect.

3. Crimes begun in the United States and continued extraterritorially.

Crimes begun within the United States and continued extraterritorially are not explicitly covered by § 3238. The statute simply mentions crimes "begun" extraterritorially or those "committed" there. As discussed above, many early cases did not reach the question of the temporal sequence of criminal conduct when holding that § 3238 could apply to offenses including conduct occurring both domestically and extraterritorially.[110] However, *Pendleton* expressly reached this issue and held that § 3238 should apply to criminal activity begun in the United States but then continued extraterritorially.[111] *Pendleton* based its decision partly on the statute's "plain language" surrounding the term "committed."[112] The court reasoned that if "committed" meant "wholly committed," it would subsume the word "begun," because all crimes that are "wholly committed" extraterritorially are also "begun" extraterritorially.[113] Hence, "committed" encompasses "crimes that begin inside the United States but that are in their essence committed abroad."[114]

[108] *Pendleton*, 658 F3d at 303, citing 18 USC § 3237(a).
[109] 18 USC § 3237(a).
[110] See Part II.A.1.
[111] *Pendleton*, 658 F3d at 303–05.
[112] Id at 305.
[113] Id.
[114] Id (emphasis omitted).

While at first glance this interpretation of the "plain language" seems logical, further inquiry reveals shades of doubt. It is not entirely clear that an interpretation of "committed" as "wholly committed" would render "begun" completely meaningless. If "committed" refers to crimes wholly committed extraterritorially and "begun" refers to those begun extraterritorially and continued in the United States, then each term retains meaning. The statute would then cover crimes committed entirely abroad—such as a murder on the high seas—and crimes begun abroad and continued into the United States—such as a fraudulent wire transfer initiated in Germany and received in Maryland. In addition, the simple fact that for several decades courts—including courts of appeals—have disagreed as to the applicability of § 3238 to crimes spanning foreign and domestic locales confirms the ambiguity of this language.

Moreover, the sequence of amendments to § 3238 also provides evidence that the term "committed" in the statute should be read as "wholly committed," further calling into question *Pendleton*'s reading of the statute's "plain language." Prior to 1948, the predecessor to § 3238 reached only "offenses committed upon the high seas."[115] The 1948 amendment added the words "begun or" before "committed" so as to read "offenses *begun or* committed upon the high seas."[116] All other language remained the same, and, as discussed below, the purpose of this amendment is unclear from the legislative history.[117] If "committed" means partially committed—as *Pendleton*'s reading of the statute would suggest—then why did Congress add the words "begun or" in 1948? Since the term "partially committed" already encompasses offenses that are "begun" extraterritorially and continued into the United States, it is not clear why Congress would have added this redundant phrase.[118] Accordingly,

115 Act of Mar 3, 1911 § 41, ch 4, 36 Stat 1087, 1100, codified as amended at 18 USC § 3238.

116 Act of June 25, 1948 § 3238, ch 211, 62 Stat at 826 (emphasis added).

117 See text accompanying notes 121–35.

118 Note that *Pendleton*'s analysis is subject to one additional interpretation. It is possible that the *Pendleton* court read "committed" in § 3238 as not including crimes begun with some insignificant action performed extraterritorially and continued with all substantive elements committed in the United States. Thus, the addition of "begun" is not superfluous because it was meant to include these particular situations—that is, crimes that were "begun," but not "committed," abroad. However, this interpretation of *Pendleton* is inconsistent with the court's emphasis on applying § 3238 only to crimes that are "essentially foreign" and "in their essence committed abroad." *Pendleton*, 658 F3d at 305. Moreover, even if this reading of *Pendleton* is plausible, this concession still

the 1948 amendment further highlights the ambiguity of § 3238's language and perhaps even implies that "committed" should be read as "wholly committed," an interpretation that leads to the conclusion that § 3238 does not apply to conduct begun in the United States and continued extraterritorially.

B. The Legislative History of § 3238

Because the language of § 3238 is not entirely plain on its face regarding the category of crimes begun in the United States and continued extraterritorially, this Section examines the legislative history of the statute in order to further ascertain whether this type of activity is covered. As will be seen, the legislative history—in a similar vein to the statute's language—is ambiguous regarding this kind of criminal conduct.

A version of § 3238 has been a part of federal statutory law since 1790.[119] After outlawing several offenses committed on the high seas and other locations outside of US territorial jurisdiction, this provision stated—in a manner very similar to the current version—that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."[120]

In 1948, Congress made what is, for the purposes of this Comment, the most significant alteration of the statute. As noted in the previous Section, this amendment added the words "begun or" before "committed upon the high seas."[121] The intent of this alteration is not clear. The only legislative record regarding the amendment states that the "[w]ords 'begun or' were inserted to clarify [the] scope of this section and section 3237 of this title."[122] As the *Levy Auto Parts* court noted, this statement is "cryptic" and not particularly helpful.[123] It may suggest some

substantiates this Comment's overall claim in this Section—that *Pendleton*'s interpretation is not the *only* plausible reading of the statute and that there is thus a good deal of ambiguity in § 3238's language.

119 See Act of Apr 30, 1790 § 8, ch 9, 1 Stat at 113–14.

120 Act of Apr 30, 1790 § 8, ch 9, 1 Stat at 114.

121 Act of June 25, 1948 § 3238, ch 211, 62 Stat at 826. Note that § 3238 has since been amended once more. This amendment provided that venue was proper in any district into which any *joint* offender is brought or arrested and allows for the filing of indictments when an offender has not been arrested or brought into any district. See Act of May 23, 1963, Pub L No 88-27, 77 Stat 48, codified at 18 USC § 3238.

122 *Revision of Title 18, United States Code*, HR Rep No 304, 80th Cong, 1st Sess A161 (1947).

123 *Levy Auto Parts of Canada*, 787 F2d at 950.

intent to "harmonize" § 3238 and § 3237 by making § 3238 a continuing offense statute.[124] However, the legislature's decision to retain the title of "Offenses not committed in any district" cuts against this interpretation.[125]

In sum, the scant legislative history of § 3238 does little to illuminate its application to criminal conduct begun in the United States and continued extraterritorially. Part III.C thus conducts an examination of the purpose of § 3238 in order to determine if that purpose can shed light on the question of whether the statute applies to set venue for this type of crime.

C. The Purpose of § 3238

Congress's purpose in enacting § 3238 is unclear from the legislative history. Nevertheless, the general constitutional and statutory framework for venue in federal criminal trials implies that the underlying purpose of the statute is to provide a venue where there otherwise would not be one. Recall that the Constitution mandates that venue for criminal trials be set in the US state and district in which the crime is committed.[126] For criminal activity that takes place entirely abroad, the Constitution's directions for setting venue are incomplete, as there is no US district in which the crime was committed. Under this reading, § 3238 is simply an effort to fill in this constitutional gap by providing a specific venue in these situations. Section 3237(a) can also be interpreted through this lens. The Constitution is unclear regarding venue for offenses that span multiple US districts; hence, § 3237(a) fills the gap by providing that venue may be set in any of the districts in which criminal activity took place.

Under this interpretation of § 3238 as a gap filler, the statute should not apply when an alternative US venue exists, particularly when the statutory language is unclear as to § 3238's applicability. Thus, venue for a criminal offense begun in the United States and continued abroad should arguably not be set pursuant to § 3238 because it is not necessary to utilize this gap-filling statute in order for a venue to be determined. Instead, the constitutional venue rule—which prescribes venue in the district in which the crime was committed—is sufficient.

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[124] Id.

[125] Id.

[126] US Const Art III, § 2, cl 3; US Const Amend VI.

To conclude, the purpose of § 3238 as a gap-filling measure implies that the statute should not be applied to criminal activity begun in the United States and continued extraterritorially, especially because it is not evident that these types of crimes fall within the plain meaning of the statute. Part III.D will look to the more general purposes of venue and other analogous areas of the law in order to ascertain whether these background legal principles support this conclusion regarding the criminal activity encompassed by § 3238.

D. The Purposes of Venue and Similar Legal Concepts

This Section will analyze the purposes of venue and other analogous legal concepts in order to ascertain whether those objectives align with the application of § 3238 to criminal conduct beginning in the United States and continuing abroad. This Section first explains the various purposes of venue rules in US criminal law before looking to other analogous concepts, including forum non conveniens, as well as civil and criminal transfer. After setting out these objectives, this Section then concludes that fairness and convenience to the defendant is the primary purpose of these rules, and that the application of § 3238 to conduct beginning in the United States and continuing abroad is inconsistent with that purpose.

1. Purposes of venue in federal criminal law.

The purposes of venue rules in federal criminal law can be grouped into four basic categories: fairness and convenience to defendants, convenience to victims and witnesses, efficiency, and prevention of the strategic manufacturing of venue.

First, both the Constitution and the FRCrP are concerned with fairness and convenience to defendants. Recall that Article III of the Constitution requires that criminal trials be held in the state in which the crime is committed.[127] The Constitution repeats this assurance in the Sixth Amendment by guaranteeing that trials will take place in the judicial district in which crimes occur.[128] In fact, the Founders were particularly concerned with

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[127] US Const Art III, § 2, cl 3. See also text accompanying notes 7–9.

[128] US Const Amend VI. Note that this Comment is not proposing that the application of § 3238 to crimes committed partially extraterritorially would be unconstitutional. Instead, this Section merely intends to deduce the broader purposes behind these constitutional provisions—and other similar areas of the law—in order to ascertain which interpretation of § 3238 is more aligned with those general objectives.

venue for criminal trials, as evidenced by both this double assurance in the Constitution and by the Declaration of Independence's listing of the transportation of colonist-defendants "beyond Seas to be tried" as a grievance against King George III.[129] As the Supreme Court has noted, constitutional venue rules locating trials in the place in which a crime is committed are "a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."[130] Those rules "serve[ ] to shield a federal defendant from [such] hardship."[131] The FRCrP follow this constitutional mandate in prescribing that venue be set "in a district where the offense was committed" and by directing courts to take the "convenience of the defendant" into consideration when setting venue.[132]

Venue rules also evince a concern for the convenience of victims, witnesses, and other third parties.[133] In particular, FRCrP 18 notes that venue decisions within a district must have "due regard" for the convenience of the victims and witnesses of crimes.[134] This rule is similar to the concern for the defendant's convenience, and suggests a desire to not overburden individuals who have a duty to participate in a trial or an interest in observing one.

Yet another purpose of venue rules is to promote efficiency, generally through the conservation of prosecutorial or judicial resources and the prompt administration of justice. This concern is evident in both the FRCrP and in the history of § 3238. First, FRCrP 18 includes "the prompt administration of justice" as one concern that courts must give regard to when setting venue

129 See *United States v Cabrales*, 524 US 1, 6 (1998), quoting United States Declaration of Independence (1776). In 1769, the Virginia House of Burgesses passed a similar resolution that denounced the practice of transporting colonists to England to be tried there as a violation of their basic rights. See *Cabrales*, 524 US at 6 n 1.

130 *United States v Cores*, 356 US 405, 407 (1958).

131 *United States v Rommy*, 506 F3d 108, 119 (2d Cir 2007), quoting *Cores*, 356 US at 407.

132 FRCrP 18.

133 See, for example, *United States v Freitag*, 2012 WL 5392307, *2–3 (D Neb) (accepting the government's argument "that Omaha should remain the place of trial as being more convenient to the victim and to witnesses from West Virginia"); *United States v Lewis*, 504 F2d 92, 97–98 (6th Cir 1974) ("[T]he presence of venue at a particular place is controlled by numerous factors, e.g., . . . proximity of witnesses and counsel."). In the context of transfer of venue, the Supreme Court has noted that in order to promote "convenience and justice," witnesses and parties should be protected from "unnecessary inconvenience and expense." *Van Dusen v Barrack*, 376 US 612, 616 (1964) (quotation marks omitted), quoting *Continental Grain Co v Barge FBL–585*, 364 US 19, 27 (1960).

134 FRCrP 18.

within a district.[135] This provision allows trials to be set in locations that would allow them to move forward at a faster pace. Second, the 1963 amendment of § 3238, which provides that venue can be set wherever a *joint* offender is arrested or first brought,[136] was motivated by a concern over administrative efficiency. Legislative history shows that the purpose of this amendment was to allow all joint offenders of an extraterritorial crime to be tried together, regardless of where each offender was arrested or first brought, in order to reduce the burden on the Department of Justice and make its prosecutorial work more efficient and cost effective.[137]

Finally, a less firmly established purpose of venue rules is to prevent the government from strategically manufacturing venue in order to gain undue advantage in prosecuting crimes. The Supreme Court has noted 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."[138] Although the lower courts have not expressly accepted this "manufactured venue" charge,[139] at least one court has entertained the possibility of accepting such an argument in the future, stating that it will "not preclude the possibility of similar concerns if a case should arise in which key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue."[140]

2. Purposes of concepts similar to federal criminal venue rules.

This Comment will now examine forum non conveniens, criminal transfer, and civil transfer as analogies to criminal venue. As with the determination of venue in criminal trials, each concept relates to a determination of the proper location of a particular legal proceeding. Each concept involves a balancing test with several factors. Thus, an examination of these factors will assist in making more general conclusions as to which

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135 FRCrP 18.

136 See Act of May 23, 1963, 77 Stat at 48.

137 See *Criminal Offenses Not Committed in Any District*, HR Rep No 88-98, 88th Cong, 1st Sess 2 (1963); *Criminal Offenses Not Committed in Any District*, S Rep No 88-146, 88th Cong, 1st Sess 2 (1963).

138 *Travis v United States*, 364 US 631, 634 (1961), quoting *United States v Johnson*, 323 US 273, 276 (1944).

139 See *Rommy*, 506 F3d at 127 (collecting cases questioning or rejecting this theory).

140 *United States v Myers*, 692 F2d 823, 847 n 21 (2d Cir 1982).

background legal values and purposes are important when determining the location of trials.

First, forum non conveniens is a doctrine by which courts can decline civil jurisdiction over a matter merely because that matter would be better suited for a different jurisdiction.[141] The Supreme Court specified several factors relevant to this determination in *Gulf Oil Corp v Gilbert*.[142] The Court stated that courts should consider the private interests of litigants by favoring the plaintiff's choice of forum while accounting for the enforceability of judgments, the ability to compel witnesses to attend proceedings, the accessibility of evidence, and the desire to not allow the plaintiff to "vex, harass, or oppress the defendant by inflicting upon him [unnecessary] expense or trouble."[143] Various public interest considerations also inform this decision, including administrative difficulties stemming from court congestion, the burden of jury duty imposed on communities that are unrelated to the litigation in question, the interest of deciding localized disputes within that local setting, the appropriateness of a court deciding disputes based on the law of its own jurisdiction, and the desire to hold trials in the view of the people upon whose affairs a particular dispute touches.[144]

Several of these factors are relevant to the discussion of § 3238. For example, the concern for not allowing plaintiffs to vex defendants by inflicting "expense or trouble" is similar to the criminal law venue purpose of ensuring fairness and convenience to the defendant.[145] It may even support the purpose of discouraging the government—analogous here to the plaintiff—from manufacturing venue to gain undue advantages. Forum non conveniens analysis evinces a concern for ensuring that witnesses can participate easily and that interested third parties, including the communities affected by the dispute—or here, communities impacted by the crime—are able to view or at least be aware of the proceedings.[146] Accessibility of evidence is also pertinent in this discussion because evidence is more likely to be

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141 See *Gulf Oil Corp v Gilbert*, 330 US 501, 507 (1947).

142 330 US 501 (1947).

143 Id at 508 (quotation marks omitted), citing Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum L Rev 1, 2 (1929).

144 *Gulf Oil Corp*, 330 US at 508–09.

145 See notes 127–42 and accompanying text.

146 Although FRCrP 17 allows subpoenas to be served on witnesses anywhere in the United States, it also directs courts to consider the convenience of the witness when setting the location of depositions. See FRCrP 17(f)(2).

found in locations in which criminal activity took place. Additionally, the burdens associated with trials should not be placed on communities that have no relationship with the matter—or, by analogy, the criminal conduct—at issue. Finally, the purpose of avoiding administrative congestion is also relevant in federal criminal law.[147]

The transfer of trials implicates similar considerations. Transfer of civil actions is governed by 28 USC § 1404, and FRCrP 21 sets out the transfer of criminal trials. Both provisions state that courts can transfer proceedings to other judicial districts for the convenience of parties and witnesses; FRCrP 21 also adds the convenience of victims to this list.[148] Furthermore, both allow transfer "in the interest of justice."[149] Finally, as the Supreme Court has noted, § 1404 encompasses the objective of "prevent[ing] parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just."[150] That is, § 1404 aims to prevent parties' manufacturing of venue and attempts to move trials to less convenient and fair locations.

3. Relationship of purposes to the application of § 3238.

The four general purposes of criminal law venue rules—which are by and large reaffirmed by the purposes of forum non conveniens and transfer—suggest that § 3238 should not apply to criminal conduct begun in the United States and continued abroad. This Section will outline how these purposes serve to support this conclusion.

First, the concepts of fairness and convenience to the defendant are pervasive throughout criminal law venue rules—in both the Constitution and the FRCrP—as well as in forum non conveniens and transfer.[151] Courts view the general rule that criminal trials are located where crimes occur as an assurance of this fairness and convenience, and both civil and criminal transfer rules expressly contemplate the convenience of the defendant

147 See Tom C. Clark, *A Commentary on Congestion in the Federal Courts*, 8 St Mary's L J 407, 407–08 (1976).

148 28 USC § 1404(a); FRCrP 21(b).

149 28 USC § 1404(a); FRCrP 21(b).

150 *Barrack*, 376 US at 624.

151 See US Const Art III, § 2, cl 3; US Const Amend VI; 28 USC § 1404(a); FRCrP 18, 21(b); *Gulf Oil Corp*, 330 US at 507–09.

as a factor.[152] Moreover, inherent in forum non conveniens analysis is the desire to disallow plaintiffs—or by analogy prosecutors—to seriously burden defendants through their choice of forum.[153] In general, this purpose leads to a conclusion that venue for crimes with at least some United States–based conduct should be located in the district in which that conduct took place rather than the district in which the defendant was merely arrested or first brought by the government. Therefore, with conduct begun in the United States and continued abroad, fairness and convenience generally dictate locating venue in the district in which the conduct began, rather than wherever the defendant is first brought or—if he returns to the United States on his own *after* the crime is completed—arrested. This is in contrast to conduct begun abroad and continued in the United States, in which it is more likely—although it is not always the case—that the defendant will be arrested in a district in which some criminal activity took place, because he is by definition continuing his offense into the United States.

Second, fairness and convenience to third parties—including witnesses, victims, and members of the community affected by criminal activity—is a part of each of the concepts discussed above.[154] The FRCrP grant due regard for the convenience of witnesses and victims when deciding venue and in allowing transfer, and § 1404 similarly contemplates the convenience of witnesses.[155] Forum non conveniens analysis includes consideration of the availability of witnesses in a particular forum and the value of having trials in the view of people who are affected by a particular dispute.[156] Moreover, forum non conveniens also warns against levying burdens on communities that have no relation to the dispute; in other words, forum non conveniens implies that there is a value in ensuring that third parties such as jurors and local governments are not inconvenienced and forced to pay—both monetarily and otherwise—for proceedings unrelated to their communities.[157]

All of these interests suggest that § 3238 should not be applied to set venue in a district in which a defendant was simply

152 See 28 USC § 1404(a); FRCrP 21(b); *Cores*, 356 US at 407; *Rommy*, 506 F3d at 119.
153 See *Gulf Oil Corp*, 330 US at 508.
154 See 28 USC § 1404(a); FRCrP 18, 21(b); *Gulf Oil Corp*, 330 US at 508–09.
155 See 28 USC § 1404(a); FRCrP 18, 21(b).
156 See *Gulf Oil Corp*, 330 US at 508–09.
157 See id.

arrested or first brought rather than one in which the crime was begun. It is more likely that victims, witnesses, and other interested third parties—not to mention evidence—will be located in the latter district than in the former because part of the crime occurred there. In addition, locating a criminal trial in a district that has no relation to the crime aside from the fact that a defendant was arrested or first brought there may place an undue burden on that community. While this unfair burden may be inevitable when criminal conduct takes place entirely outside of the United States—because there is no other alternative US venue—it can and should be avoided when crimes are begun in the United States.

Third, criminal venue rules and the forum non conveniens principle of disallowing the plaintiff to place onerous burdens on the defendant through forum choice may suggest that thwarting the government's ability to manufacture venue is an important concern.[158] This issue is a much greater concern with criminal conduct beginning in the United States and continuing extraterritorially than with conduct flowing in the opposite direction. It is not possible for the government to manufacture venue by strategically bringing a defendant from a foreign country into a particular US district in the latter situation because the defendant has already entered the United States while completing his criminal activity. However, with conduct beginning in the United States and continuing abroad, the government does have the ability to strategically manufacture venue. Thus, this underlying purpose also counsels against applying § 3238 to criminal conduct begun in the United States and suggests that laying venue in the district where that conduct began is more appropriate. This interpretation of § 3238 would preclude the possibility of the government manufacturing venue by strategically arresting an individual in a particular US district or—more likely—apprehending an individual abroad and strategically bringing him into a desired venue within the United States so that he is "first brought" there under the statute.

Finally, the objective of efficiency is evident in criminal venue and the analogous concepts discussed above. FRCrP 18 invokes "the prompt administration of justice" as a concern, and the Sixth Amendment—though from the perspective of ensuring

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158 See *Travis*, 364 US at 634; *Gulf Oil Corp*, 330 US at 508.

individual rights—guarantees a speedy trial.[159] Moreover, forum non conveniens analysis contemplates the existence of administrative problems due to congestion.[160] Section 3238's legislative history also suggests that Congress was concerned about efficiency. The statute was amended in 1963 in order to conserve resources at the Department of Justice; the amendment permitted prosecutors to set venue by arresting or first bringing any joint offender in a particular district.[161]

In general, the purpose of efficiency should have no effect on the decision whether to apply § 3238 to criminal conduct begun in the United States and continued extraterritorially. There is no reason to think that the districts in which defendants are typically arrested or first brought are less congested or otherwise more efficient than those districts in which the conduct began. Nevertheless, there may be one situation in which efficiency may imply that § 3238 should be applied to conduct begun in the United States and continued abroad—cases of multiple defendants. Given that § 3238 now allows all joint offenders to be tried in the district in which one offender was arrested or first brought, there may be some situations in which the application of § 3238 to a criminal offense begun in the United States by one joint offender but continued extraterritorially by a different joint offender may lead to a more efficient use of government resources in prosecuting the crime. However, this concern for efficiency is undermined by the fact that in many cases prosecutors will be able to try joint offenders together, regardless of the use of § 3238, because of the broad venue options for conspiracies and aiding and abetting activity granted to prosecutors.[162]

Before arriving at the final conclusions of this Comment, it is necessary to address a counterargument to the very use of this analysis and the analysis conducted in the previous section regarding the purpose of § 3238 as a gap filler. This Comment

159 US Const Amend VI; FRCrP 18.

160 See *Gulf Oil Corp*, 330 US at 508.

161 See Act of May 23, 1963, 77 Stat at 48. See also notes 136–47 and accompanying text.

162 See, for example, *United States v Royer*, 549 F3d 886, 896 (2d Cir 2008) (holding that venue is proper wherever an overt act in furtherance of a conspiracy is committed, "includ[ing] not just acts by co-conspirators but also acts that the conspirators caused others to take that materially furthered the ends of the conspiracy"); *United States v Valdez-Santos*, 457 F3d 1044, 1046–47 (9th Cir 2006) (holding venue proper "in a district in which individuals other than the defendant possessed drugs, so long as the defendant aided and abetted that possession by his participation in the chain of possession in another district").

argues that many of the underlying rationales for § 3238 and for venue more generally counsel courts against applying § 3238 to conduct begun in the United States and continued abroad. However, some of these purposes may seem to apply just as much to conduct flowing in the other direction. In other words, these rationales might hint toward the inapplicability of § 3238 to both types of conduct—that begun abroad and continued into the United States, and that begun in the United States and continued abroad. But it is clear from the text that § 3238 must apply to conduct begun abroad and continued in the United States. Thus, the purposive argument seems to be in tension with the textually mandated outcome. There are two responses to this concern.

First, as explained in Part III.A, there is an inherent difference in the clarity of the statute in terms of different types of conduct. Whereas the statute's language is clear in regard to conduct beginning abroad and continuing into the United States,[163] it is much more ambiguous in regard to conduct begun in the United States and continued abroad. When a statute's language is plain on its face, courts should not conduct further inquiry into the legislative history and purposes of that statute.[164] Therefore, the clarity of § 3238 in terms of conduct begun extraterritorially means that courts should stop their inquiry at that point. Congress has spoken clearly on this subject; no further examination is warranted. However, the statute's text is unclear with regard to criminal activity begun in the United States. Thus, courts must look to other features of the statute, including legislative history and underlying purposes—both of § 3238 specifically and of venue rules more generally. As shown above, an examination of these aspects, while not entirely dispositive, implies that § 3238 should not be applied to this type of conduct.

Second, even if there were no difference in the clarity of the language, there is a reasonable basis for Congress to have desired to include criminal activity beginning extraterritorially and continuing in the United States while excluding activity originating in the United States. It is more likely that the application of § 3238 will cause venue to be laid in a district in which

[163] See Part III.A.2.

[164] See *Bruesewitz v Wyeth LLC*, 131 S Ct 1068, 1081 (2011); *Ex parte Collett*, 337 US 55, 61 (1949) ("[T]here is no need to refer to the legislative history where the statutory language is clear.").

the defendant is unfamiliar and which has no relation to the crime in the context of crimes begun in the United States rather than those begun abroad. With crimes begun abroad and carried into the United States, for at least some period of time the defendant will be located in the district in which some criminal activity took place, merely because he is continuing his crime there. Therefore, the application of § 3238, which sets venue in the district in which the defendant is first arrested, is likely to have the effect of laying venue in a district in which criminal activity was committed. With crimes begun in the United States and continued abroad, the crime ends abroad and the defendant later returns to the United States—either voluntarily or in the custody of US officials—after the crime has terminated. It is reasonable for Congress to have supposed that in this case, there is a greater chance of § 3238 setting venue in a district unrelated to the crime. Moreover, the problem of the government manufacturing venue—by bringing a defendant located outside of the United States and already in custody into any US district it chooses—is not applicable to crimes begun abroad and continued into the United States because the defendant is already located in the United States.[165] However, this problem is very much a possibility for cases flowing in the opposite direction.[166]

Thus, although the legislative history is unclear, there is a good reason why Congress may have chosen to distinguish crimes beginning extraterritorially and continued into the United States from those beginning in the United States and continued extraterritorially. This rationale further supports the conclusions reached above—that the purpose of § 3238 as a gap filler and the underlying rationales for venue and related legal concepts demonstrate that the statute should not be applied to criminal activity begun in the United States and continued abroad.

[165] See text accompanying note 158.

[166] A potential counterargument is that this interpretation would read out the "first brought" provision of § 3238, which directs that venue be set in the district in which defendants are "first brought" into the United States. In other words, this reading of the statute seems to render this provision meaningless, as it would not apply to defendants who begin their criminal conduct abroad and carry it into the United States on their own volition. Nevertheless, this provision is still necessary for criminal activity committed entirely abroad, where there is no connection between the crime and *any* US district. In these situations, defendants may be apprehended abroad, and venue will be set in the district into which they are "first brought."

To summarize this Section, the purposes of venue and similar legal concepts suggest that § 3238 should not be applied to criminal offenses begun in the United States and continued abroad. This conclusion is appropriate largely because the application of the statute in these situations will often lead to venue being set in a district in which the defendant was first brought or arrested but not where any criminal activity occurred. This determination receives support from a conclusion that chief among the purposes discussed above is the objective of fairness and convenience to the defendant, which in most cases dictates that the defendant should be tried in the location where at least part of the crime occurred. Among all the purposes analyzed, this was the only objective clearly of concern to the Founders—it was mentioned in the Declaration of Independence and twice in the Constitution. Furthermore, this concern permeates not only criminal venue rules but is also an important aspect of the balancing tests involved in forum non conveniens and civil and criminal transfer rules. Thus, based on the purposes of venue and similar concepts in the law, § 3238 should be interpreted as inapplicable to offenses begun in the United States and continued extraterritorially.[167]

[167] A comprehensive analysis of § 3238's application to conspiracies—a type of crime in which the temporal sequence of criminal activity is not always clear—is outside the scope of this Comment. However, a simple solution that aligns with the conclusions reached above would direct courts to determine where the conspiratorial agreement is formed, based on the physical location of the coconspirators at the time of the agreement, in order to determine where a conspiracy begins. See Richard Siegel, *Federal Criminal Conspiracy*, 43 Am Crim L Rev 495, 499–500 (2006) (analyzing the conspiratorial agreement as the first element of a conspiracy). See also Wayne R. LaFave, 2 *Substantive Criminal Law* § 12.2(a) at 265–66 (West 2d ed 2003). When coconspirators are located both within the United States and abroad at the time of the agreement, courts should favor an interpretation of these types of conspiracies as beginning in the United States—meaning that § 3238 will not apply and venue will be set in the US district in which at least one coconspirator was located. This venue—rather than a venue into which a foreign coconspirator is first brought or arrested under § 3238—is more convenient and fair to United States–based defendants and is at least *equally* convenient and fair to foreign-based defendants. Moreover, it is more likely that witnesses and evidence will be found in a district in which some coconspirators were located when they formed the conspiracy. This solution, though perhaps somewhat difficult to implement in cases in which the timing of the conspiratorial agreement is ambiguous, is still preferable to the ad hoc and somewhat vague decisions of the past few decades in which courts have attempted to determine whether conspiracies were "essentially foreign." See, for example, *Levy Auto Parts of Canada*, 787 F2d at 952; *Briceno*, 1987 WL 36867 at *3. This solution will lead to more uniformity in decisions involving the application of § 3238 to conspiracies, and its slight preference for the non-application of § 3238 aligns well with the more general purposes of venue in US criminal law.

CONCLUSION

The application of 18 USC § 3238 to criminal offenses that span both domestic and extraterritorial locales is an issue that has divided courts for decades. Courts have relied on various aspects of the statute—including its text and legislative history—to decide when the statute will apply to set venue. This Comment argues that the plain language of the statute clearly encompasses criminal activity taking place entirely extraterritorially and activity begun extraterritorially and continued into the United States. However, the statute is not nearly as clear in regard to conduct beginning in the United States and continuing abroad. Both the drafting history and purpose of § 3238 suggest that the statute does not apply in these situations. Furthermore, an examination of the purposes of both federal criminal law venue rules and other related legal concepts such as forum non conveniens and transfer reinforces the conclusion that § 3238 should not apply to criminal activity begun in the United States and continued extraterritorially. This is chiefly—though not entirely—because of the likely adverse effect of that application on fairness and convenience to criminal defendants. Thus, when venue would otherwise be proper in another US district because the criminal activity began there, § 3238 should not divest that venue simply because the activity continued extraterritorially. In other words, if venue is appropriate in a district without recourse to § 3238 because the criminal activity at issue began in that district, § 3238 should not apply.