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Ond Hundred Years After Hyde: Time to Expand Venue Safeguards in Federal Criminal Conspiracy Cases?

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ONE HUNDRED YEARS AFTER *HYDE*: TIME TO EXPAND VENUE SAFEGUARDS IN FEDERAL CRIMINAL CONSPIRACY CASES?

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TABLE OF CONTENTS

Introduction
I. The Constitution's Venue Protections
   A. Constitutional Provisions
   B. Policy Reasons for Constitutional Venue Protection
II. *Hyde v. United States*: Venue in Federal Criminal Conspiracy Cases
   A. The *Hyde* Opinion
   B. Criticism of *Hyde* by Justice Holmes and Justice Jackson
III. Expansion of What Can Constitute an Overt Act in Furtherance of a Conspiracy
IV. Constraints on Prosecution Control over Venue in Criminal Conspiracy Cases, and the Limits of Those Constraints
   A. Joint Trial of Conspiracy and Substantive Charges
   B. Federal Rule of Criminal Procedure 21(b)
   C. Justice Department Policy

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V. Enhancing Constitutional Venue Protections in Criminal Conspiracy Cases: A Proposed New Judicial Standard
Conclusion

INTRODUCTION

One century ago this year, the Supreme Court held in *Hyde v. United States* that venue in a federal conspiracy case lies in any district in which one or more overt acts occurred.[1] In a 5–4 decision over the impassioned dissent of Justice Holmes, who attacked the holding as diminishing an important constitutional right, the Court established an expansive interpretation of venue in conspiracy cases that has held to this day.[2] The majority opinion in *Hyde* recognized that "to extend the jurisdiction of conspiracy by overt acts may give to the government a power which may be abused . . . ."[3] Nonetheless, the Court held that a broad interpretation of venue was necessary to effectively prosecute multi-district conspiracies.[4] As the *Hyde* majority predicted, its ruling has helped enable government prosecutions of large numbers of defendants charged with far-flung organized crime and other conspiracies at mass trials the Framers could probably not have predicted.[5]

Justice Holmes' dissent was equally prescient. Noting that the Court's jurisdiction now spanned the entire continent, Holmes examined numerous potential

1. Hyde v. United States, 225 U.S. 347, 363 (1912).
2. *Id.* at 391, 363.
3. *Id.*
4. *See id.* ("We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment . . . . And this may result if the rule contended for be adopted. Let him meet with his fellows in secret, and he will try to do so; let the place be concealed, as it can be, and he and they may execute their crime in every state in the Union and defeat punishment in all.").
5. *See, e.g.*, Allen v. United States, 4 F.2d 688, 698 (7th Cir. 1924) (affirming Prohibition Act convictions of forty-two of sixty-three defendants); United States v. Trenton Potteries Co., 273 U.S. 392, 393 (1927) (affirming convictions of twenty individuals and twenty-three corporations for violating the Sherman Act, ch. 647, 26 Stat. 209 (codified as amended at 315 U.S.C. §§ 1–7)); United States v. Bruno, 105 F.2d 921, 924 (2d Cir. 1939) (affirming conviction of one defendant and reversing conviction of another in an eighty-eight-defendant narcotics prosecution); Poliafico v. United States, 237 F.2d 97, 116 (6th Cir. 1956) (affirming convictions of fourteen defendants in a twenty-defendant narcotics prosecution); United States v. Martino, 648 F.2d 367 *passim* (5th Cir. 1981) (affirming convictions of fifteen of twenty-three indicted RICO defendants).

ramifications of the Court's holding, at one point describing the majority's reasoning as "an amazing extension of even the broadest form of fiction."[6] Holmes observed that this fiction allowed for prosecution in a district in which the defendants had never come "within a thousand miles," and he posited that "it might be at the choice of the government to prosecute in any one of twenty states in none of which the conspirators had been."[7]

As Holmes predicted, *Hyde* has enabled the government to prosecute criminal conspiracy cases in districts that have only the most tenuous connection to the alleged conduct and no connection to the particular defendants on trial. One can only wonder how Justice Holmes would have reacted to the Eleventh Circuit's panel decision in *United States v. Shearer*, a drug conspiracy case.[8] In *Shearer*, venue was found to properly lie in the Middle District of Florida, even though its only connection to the crime was the inference that co-conspirators not on trial and not even testifying as witnesses must have passed through that district, because two drove and one flew from the Miami area to New Orleans.[9]

This Article argues that the *Hyde* standard for venue in federal criminal conspiracy cases provides insufficient safeguards for defendants who seek to assert their constitutional venue rights. The *Hyde* standard for venue, broad in light of the Supreme Court's decision, has become even broader in recent decades as courts have expanded the scope of what can constitute an "overt act" in furtherance of a conspiracy.[10] Federal courts should modify the common law of venue by granting defense motions to transfer cases from districts that have no significant connection to the alleged criminal conspiracy. This evolution of the common law would provide a needed counter-balance to the common law's expansion in recent decades of what can constitute an overt act in furtherance of a conspiracy. Absent such a countervailing change in the common law, venue—a safeguard that appears not once but twice in the Constitution—will remain essentially meaningless in

6. *Hyde*, 225 U.S. at 389 (Holmes, J., dissenting).
7. *Id.* at 386, 389.
8. United States v. Shearer, 794 F.2d 1545, 1550–51 (11th Cir. 1986).
9. *See infra* Part IV.
10. *See infra* Part III.

conspiracy cases.

Part II of this Article describes the Constitution's venue protections, and Part III discusses the *Hyde* opinion. Part IV, discusses the expansion in recent decades of what can constitute an "overt act" in furtherance of a conspiracy, which provides the basis for venue in most criminal conspiracy prosecutions. Part V of the Article outlines the constraints on prosecution control over venue in criminal conspiracy cases, and the limits of those constraints. Part VI, proposes a new judicial standard, beyond the mere commission of any overt act, for determining when motions to transfer venue should be granted. Part VII is the Article's brief conclusion.

I. THE CONSTITUTION'S VENUE PROTECTIONS

A. *Constitutional Provisions*

The U.S. Constitution addresses venue in two separate provisions. In Article III, titled "The Judicial Branch," Section 2, titled "Trial by Jury, Original Jurisdiction, Jury Trials," the relevant clause states that all criminal trials "shall be by Jury; and *such Trial shall be held in the State where the said Crimes shall have been committed*; but where not committed in any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[11] The Sixth Amendment, titled "Right to Speedy Trial, Confrontation of Witnesses," contains a very similar but not identical clause: "the accused shall enjoy the right to a speedy and public *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 . . . ."[12] As one leading scholar on venue in criminal cases aptly noted, the Article III clause is a venue provision (concerning the location of the trial), while the Sixth Amendment clause is a vicinage provision (concerning the location of the jury pool).[13]

11. U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

12. U.S. CONST. amend. VI (emphasis added).

13. "The Sixth Amendment preserves one of the oldest institutions of the common law—the jury of the vicinage. Venue in modern law means the place of trial. Vicinage means, not the place of trial, but the place from which the jury must be summoned." William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 U. MICH L. REV. 59, 60 (1944).

Although venue and vicinage are different legal concepts, modern commentators have noted that "[t]his technical distinction has been of no real importance."[14] Jurors are selected from the district in which the trial is held. "The distinction between the Constitutional venue and vicinage provisions has all but vanished."[15]

The historical background of the Constitution's venue provisions is well documented. In 1769, only six years before the start of the Revolutionary War, the British Parliament passed a law establishing a special commission to investigate, try, and adjudicate acts of alleged treason, under which the accused American colonists would be removed to Great Britain for prosecution.[16] The colonies reacted by passing resolutions opposing the British law, such as the Virginia Resolves, and the first Continental Congress in 1774 declared that the colonists had the right to a jury trial of the vicinage, or location of the offense.[17] Two years later, the Declaration of Independence denounced King George III "for transporting us beyond Seas to be tried for pretended offenses."[18] "By insisting on a right to a jury of a vicinage the colonists hoped to escape the hardship and danger of standing trial in some distant colony or in England."[19] As Justice Ginsburg observed in *United States v. Cabrales*, the framers remembered this affront to their rights by King George and wrote two separate provisions relating to the place of trial into the Constitution.[20]

B. Policy Reasons for Constitutional Venue Protection

The policy reasons for the Constitution's venue protections are closely linked to their historical background of preventing the sovereign from transporting the accused to a

14. 2 CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 301 (4th ed. 2009).

15. Andrew D. Leipold, *How The Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1133–34 (2005) (citing United States v. Passodelis, 615 F.2d 975, 977 n.3 (3d Cir. 1980) (the difference between Constitutional venue and vicinage provisions "has never been given any weight")).

16. Blume, *supra* note 13, at 63–64.

17. *Id.* at 64–66.

18. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

19. Blume, *supra* note 13, at 66.

20. United States v. Cabrales, 524 U.S. 1, 6 (1998) (venue for money laundering offense conducted entirely in Florida did not lie in Missouri, even if laundered funds were derived from unlawful Missouri drug sales).

distant location for trial. In *United States v. Cores*, the Supreme Court stated that the Constitution's "provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."[21] Unfairness and hardships that can result from being tried in a remote place can include traveling great distances,[22] separation from family and friends,[23] the potential difficulty in securing character witnesses,[24] limitation on the choice of counsel,[25] a deleterious effect on one's livelihood,[26] and being tried in an alien environment in a tribunal favorable to the prosecution.[27] As noted by Supreme Court Justice Joseph Story, the object of these venue provisions is to protect the accused "from being dragged to a trial in some distant state, away from his friends, witnesses, and neighborhood; and thus subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him."[28] Indeed, the Department of Justice itself recognizes that "prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results."[29]

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

22. *Id.* at 410; Johnston v. United States, 351 U.S. 215, 224 (1956) (Douglas, J., dissenting); Krulewitch v. United States, 336 U.S. 440, 452 (1949).

23. *Johnston*, 351 U.S. at 224; United States v. Radley, 558 F. Supp. 2d 865, 879 (N.D. Ill. 2008).

24. *Cores*, 356 U.S. at 410. The expense of transplanting character witnesses to a distant venue is often too great to warrant their use and, even if used, such witnesses are likely to have limited effectiveness before a foreign jury. *Radley*, 558 F. Supp. 2d at 878.

25. *See* United States v. Johnson, 323 U.S. 273, 275 (1944); *Radley*, 558 F. Supp. 2d at 882.

26. *Radley*, 558 F. Supp. 2d at 881.

27. *See id.* These concerns were also described forcefully in the Virginia Resolves: "Conveyed to a distant Land, where no Friend, no Relation will alleviate his Distresses or minister to his Necessities; and where no Witness can be found to testify his Innocence; shunned by the reputable and honest, consigned to the Society and Converse of the wretched and abandoned . . . ." Blume, *supra* note 13, at 64–65 (capitalizations left for emphasis).

28. United States v. Palma-Ruedas, 121 F.3d 841, 861–62 (3d Cir. 1997) (Alito, J., dissenting) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 925 (Carolina Academic Press reprint 1987)). Justice Story further noted: "Besides this; a trial in a distant state or territory might subject a party to the most oppressive expenses, or perhaps even to the inability of procuring proper witnesses to establish his innocence." *Id.*

29. DEPARTMENT OF JUSTICE: UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' MANUAL 9-27.001 (2002) [hereinafter U.S. ATTORNEYS' MANUAL],

On the other hand, a defendant who travels to a remote location to commit a crime cannot invoke the Constitution's venue protections to preclude trial there. As Judge Winter noted in *United States v. Reed*, discussed *infra*, "all appear to agree that the place where the acts constituting the crime occurred is a proper venue."[30] Justice Harlan argued that the basic policy of the Sixth Amendment would best be served by trying cases at the location of "witnesses and relevant circumstances surrounding the contested issues."[31]

As Judge Winter observed in *Reed*, although the concept of a right to trial in the vicinage was so highly regarded as to appear twice in the Constitution, the Supreme Court has yet to articulate a coherent definition of the underlying policies.[32] Consequently, courts have been required to balance the accused's interest in avoiding prosecution in remote places with the competing interests of the courts, prosecutors, and witnesses.

II. *HYDE V. UNITED STATES*: VENUE IN FEDERAL CRIMINAL CONSPIRACY CASES

A. *The* Hyde *Opinion*

The common law of venue in federal criminal conspiracy cases is based almost entirely on *Hyde*.[33] In that case, the government alleged that the defendants conspired to defraud the United States by fraudulently obtaining state lands in California and Oregon in order to exchange them with the federal government for more developable lands, which they planned to sell for a profit.[34] The defendants were California

available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.001.

30. United States v. Reed, 773 F.2d 477, 480–81 (2d Cir. 1985).

31. Travis v. United States, 364 U.S. 631, 640 (1961) (Harlan, J., dissenting).

32. *Reed*, 773 F.2d at 480.

33. Hyde v. United States, 225 U.S. 347 (1912). As Professor Norman Abrams wrote almost fifty years ago in what was then the seminal article on this topic: "Any discussion of the extent to which conspiracy venue differs from venue for other offenses must focus upon [the] rule which was first firmly established for the federal courts fifty years ago in *Hyde v. United States*, a landmark decision which merits careful study." Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. REV. 751, 754 (1962) (citations omitted).

34. *Hyde*, 225 U.S. at 351–52.

residents who had never previously set foot in the District of Columbia where they were tried.[35] Two defendants—Hyde, who was one of the alleged principals in the conspiracy, and Schneider, who worked for Hyde—were convicted of conspiring to defraud the United States under then Section 5440 of the Revised Statutes.[36]

The defendants appealed their convictions based on a lack of venue in the District of Columbia. The Supreme Court heard the case to determine whether under the Sixth Amendment venue in a criminal conspiracy prosecution lies only where the conspiracy was formed (i.e., the location of the unlawful agreement), or whether venue may lie at the location of any overt act.[37] On appeal, the government argued that the defendants "formed" the conspiracy in the District of Columbia because they committed overt acts in furtherance of the conspiracy there.[38]

Neither the venue provision of Article III, Section 2 nor the vicinage provision of the Sixth Amendment contemplates that a crime could be committed in more than one jurisdiction. Moreover, neither provision explicitly contemplates conspiracy as an offense.[39] Consequently, the Supreme Court could write essentially on an empty slate in deciding where venue in a conspiracy case should lie when the conspiracy was entered into in one district and overt acts took place in another.[40]

By a 5–4 margin, the Court held that venue could lie in either the district where the conspiracy was entered into or

35. *Id.* at 356–57. Seven years earlier in *Hyde v. Shine*, 199 U.S. 62, 76 (1905), the same defendants challenged, in a habeas corpus petition, their removal from California to the District of Columbia. The Court held in a 6-3 decision that the government's allegation in the indictment that the conspiracy was entered into in the District of Columbia was sufficient to establish probable cause. *Id.* The dissent argued that removal was improper because there was no probable cause; there was conclusive evidence that the defendants were not present in the District of Columbia at the time the alleged conspiracy was formed and thus they could not be guilty of the crime charged. *Id.* at 98.

36. *Hyde*, 225 U.S. at 355–56. The two other alleged conspirators were acquitted. *Id.*

37. *Id.* at 357.

38. *Id.* at 350.

39. Another intriguing facet of the venue and vicinage provisions of Article III, Section 2 and the Sixth Amendment is that both provisions assume a crime has been committed, as opposed to stating that venue lies where the crime or crimes are *alleged* to have been committed.

40. *Id.* at 360.

any district in which an overt act took place.[41] After a review of the contemporary jurisprudence on conspiracy, the Court reasoned that while the agreement was the "gist" of the conspiracy offense, "an overt act was necessary to complete it."[42] Thus, a conspiracy transcends the time and location of the agreement and extends to the times and locations of all the overt acts.[43] As the Court viewed it, conspiracy is a continuing offense that can be prosecuted in any district where it is begun, continued, or completed.[44]

In upholding the convictions, the Supreme Court cited several policy considerations.[45] The Court relied foremost on the need for the effective administration of the criminal justice system: "We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment because of the difficulty in convicting him—indeed, of even detecting him."[46] While noting the potential for oppression in the rule it established, the Court found the countervailing considerations more compelling: "It is not an oppression in the law to accept the place where an unlawful purpose is attempted to be executed as the place of punishment, and rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from

41. *Id.* at 357, 363.

42. *Id.* at 359.

43. The Court explained:

> We have held that a conspiracy is not necessarily the conception and purpose of the moment, but may be continuing. If so in time, it may be in place, carrying to the whole area of its operations the guilt of its conception and that which follows guilt, trial and punishment. As we have pointed out, the statute states what in addition to the agreement is necessary to complete the measure of the offense. The guilty purpose must be put into a guilty act.

Id. at 363.

44. *Id.* at 360.

45. *Id.* at 363–64.

46. *Id.* at 363. According to the Court, a rule requiring the government to prove the location where agreement took place would unnecessarily hinder law enforcement. Determining the geographic location of a meeting of the minds may often be a difficult and ambiguous proposition. *Id.* at 361–62. Furthermore, a criminal could potentially avoid prosecution for conspiracy by effectively concealing the location of the agreement. *Id.* at 363. The Court stated that its decision "cuts through such puzzles and makes the act of the conspirator, which necessarily has a definite place without the aid of presumption or fiction, the legal inception of guilt, inculpating all and subjecting all to punishment." *Id.* at 362.

theirs."[47] In the Court's view, the *Hyde* rule was entirely consistent with constitutional venue requirements—that the crime be prosecuted in the district where it was committed.[48]

B. Criticism of Hyde *by Justice Holmes and Justice Jackson*

The critique of expansive venue in criminal conspiracy cases begins with the dissenting opinion of Justice Holmes in *Hyde*.[49] Speaking for four of the nine justices, Holmes categorically rejected the majority's opinion. He argued that while an overt act by any co-conspirator in any jurisdiction might suffice to expand the liability of all co-conspirators, this concept did not compel the majority's holding that venue was proper wherever any co-conspirator had committed an overt act. As Holmes explained, "[I]t does not follow that an overt act draws the conspiracy to wherever such overt act may be done, and whether it does so or not is the question before us now."[50]

Justice Holmes then argued that as the boundaries of the United States expanded, the importance of the Constitution's venue protections correspondingly increased:

> With the country extending from ocean to ocean, this [venue] requirement is even more important now than it was a hundred years ago, and must be enforced in letter and spirit if we are to make impossible hardships amounting to grevious [sic] wrongs. In the case of conspiracy the danger is conspicuously brought out. Every overt act done in aid of it, of course, is attributed to the conspirators; and if that means that the conspiracy is present as such wherever any overt act is done, it might be at the choice of the government to prosecute in any one of twenty states in none of which the conspirators had

47. *Id.* at 363. The companion case to *Hyde*, *Brown v. Elliott*, in deciding a similar venue challenge to a conspiracy conviction, added: "The Constitution of the United States is not intended as a facility for crime. It is intended to prevent oppression, and its letter and its spirit are satisfied if where a criminal purpose is executed the criminal purpose be punished." Brown v. Elliot, 225 U.S. 392, 402 (1912).

48. *Hyde*, 225 U.S. at 363.

49. *Id.* at 384–91.

50. *Id.* at 385. In making that statement, Holmes assumed "so far as the statute of limitations is concerned, an overt act done anywhere with the express or implied consent of conspirators would show the conspiracy to be continuing between the parties so consenting, and leave them open to prosecution for three years from that date." *Id.*

> been. And as wherever two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed.[51]

In Holmes' view the majority's ruling was "an amazing extension of even the broadest form of fiction."[52]

Although Justice Holmes' dissent was forcefully argued, it had little or no effect. Nearly forty years after Holmes' dissent in *Hyde*, Justice Jackson wrote a concurring opinion that sharply criticized prosecutors for ignoring defendants' constitutional venue protections. Jackson's concurrence in *Krulewitch v. United States* described conspiracy as an "elastic, sprawling and pervasive offense . . . [that] constitutes a serious threat to fairness in our administration of justice."[53] Jackson did not limit his critique to venue, but the remarks on venue were among his most pointed.

> An accused, under the Sixth Amendment, has the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." The leverage of a conspiracy charge lifts this limitation from the prosecution and reduces its protection to a phantom, for the crime is considered so vagrant as to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its object. The Government may, and often does, compel one to defend at a great distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district.[54]

Jackson went on to describe an extreme example: "Circumstances may even enable the prosecution to fix the place of trial in Washington, D.C., where a defendant may lawfully be put to trial before a jury partly or even wholly

51. *Id.* at 386–87.

52. *Id.* at 389. Justice Holmes went on to posit what he saw as an extreme example of the potential for government abuse of expansive venue in criminal conspiracy cases where "an otherwise innocent overt act done in one state drew to itself a conspiracy in another state to defraud people in the latter, even though the first state would punish a conspiracy to commit a fraud beyond its own boundaries." *Id.*

53. Krulewitch v. United States, 336 U.S. 440, 445–46 (1949) (Jackson, J., concurring). Justice Jackson was particularly concerned with a prosecutor's tendency to indict for conspiracy in lieu of a substantive offense. *Id.*

54. *Id.* at 452–53.

made up of employees of the Government that accuses him."[55] Justice Jackson's concern about prosecutors fixing the place of trial in Washington, D.C., hardly is academic. As noted below, venue for the offense of gathering, transmitting, or losing defense information is always authorized in the District of Columbia regardless of where the relevant conduct occurred.[56]

In their attacks on expansive venue in criminal conspiracy cases, both Justice Holmes in *Hyde* and Justice Jackson in *Krulewitch* focused on the prosecution's power to force a defendant to stand trial in a "remote" location, in seeming disregard of a defendant's Sixth Amendment right to be tried by a jury of "the State and district where the crime shall have been committed." As the Justices noted, the consequences of this power include both personal hardship to the defendant[57] and the prosecution's ability to choose the venire.[58]

Writing in 1962—50 years after *Hyde*, eighteen years after the enactment of Federal Rule of Criminal Procedure ("Rule") 21(b),[59] and thirteen years after *Krulewitch*—Professor Abrams stated: "The tendency [in conspiracy cases] has been to dispose of objections to venue based on overt acts alone by citation of *Hyde*."[60] Indeed, after a thorough examination of the relevant precedent, Abrams concluded that the concerns of the four dissenters in *Hyde* had gone virtually unnoticed.[61] A more recent scholarly work noted the heightened potential for prosecutorial abuse in decisions about where to bring criminal conspiracy cases.[62]

55. *Id.*

56. *See infra* note 90.

57. *Hyde*, 225 U.S. at 386 (Holmes, J., dissenting).

58. *See Krulewitch*, 336 U.S. at 453 (Jackson, J., concurring).

59. FED. R. CRIM P. 21(b). *See infra* Part IV.B (gives courts the power under certain circumstances to transfer venue on motion of the defendant).

60. Abrams, *supra* note 33, at 759.

61. *Id.* at 759–60.

62. "The risks of a defendant [in a conspiracy prosecution] being tried in a remote location are greater than in most cases, since venue in a conspiracy prosecution can be laid in any district in which any conspirator performed any of the overt acts to accomplish its object." WRIGHT & HENNING, *supra* note 14, § 226 (citing Whitfield v. United States, 543 U.S. 209, 218 (2005)). These risks are compounded by the usual risk of prejudice from joining many defendants in one case. *Id.*

There does not appear to be any federal statute that places greater constraints on prosecutors' ability to select venue in any criminal conspiracy case than the test set forth in *Hyde*. As discussed in the next two sections of this Article, the expansion in recent decades of what can constitute an overt act in furtherance of a conspiracy, when combined with this lack of constraints, has given prosecutors enormous control over the selection of venue in criminal conspiracy cases.

III. EXPANSION OF WHAT CAN CONSTITUTE AN OVERT ACT IN FURTHERANCE OF A CONSPIRACY

Over the past several decades, a series of federal appeals court rulings has expanded the scope of what can constitute an overt act in furtherance of a conspiracy. These rulings often arose in the context of whether an element of the offense had been satisfied, or whether a statute of limitations defense was applicable. When they arose in the context of a venue challenge, they were frequently disposed with brief citation to Article III, the Sixth Amendment, and *Hyde*. One effect of the convergence of these rulings is that conspiracy prosecutions have been allowed to proceed in districts that have essentially no connection to the charged conduct.

It has been established, for example, that the overt act providing the basis for venue in a federal criminal case need not have been committed by the defendant[63] or any co-defendant at trial.[64] Venue is also proper in any district in which an overt act occurs, even if the commission of an overt act is not an element of the offense.[65] The conspirator who committed the overt act need not even be named in the indictment.[66] Nor does the defendant need to know "where . . . or if . . . the overt act was committed."[67] Indeed, it need not even be foreseeable that an overt act would be committed

63. *E.g.*, United States v. Saavedra, 223 F.3d 85, 94 (2d Cir. 2000); United States v. Angotti, 105 F.3d 539, 545 (9th Cir. 1997). *See also* WRIGHT & HENNING, *supra* note 14, § 303 (citing *Saavedra*, 223 F.3d at 94 and *Angotti*, 105 F.3d at 545).

64. *See* United States v. Molt, 772 F.2d 366, 367, 370 (7th Cir. 1985).

65. *See Whitfield*, 543 U.S. at 218 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 252 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 402–04 (1927)).

66. *Angotti*, 105 F.3d at 545.

67. *Id.*

in the district where the charges were brought.[68]

It has also become accepted law that lawful conduct or "trivial"[69] acts can constitute an overt act in furtherance of the conspiracy.[70] Thus, the fact that a co-conspirator drove through the district,[71] or placed a phone call to someone in the district[72] will suffice to establish venue there. Flying over a judicial district in the course of the conspiracy will suffice to establish venue there.[73] Indeed, the fact that an airplane flying over the district was occupied solely by government agents does not defeat venue, unless "there [is] an indication that its route had been significantly out of the ordinary . . . ."[74]

When more than one of the above circumstances appears, the venue for a federal conspiracy prosecution can have almost no connection to either the defendant or the alleged unlawful conduct. In *United States v. Shearer*, a drug conspiracy case, a cooperating witness testified that a co-conspirator told him that electronics for a boat to be used to smuggle marijuana had been driven to New Orleans from a location near Miami.[75] There was also testimony that another non-testifying co-conspirator had flown from Miami to New Orleans, and that the flight path would necessarily pass over the Middle District of Florida.[76] There was no evidence that Shearer was present at any time in the Middle District of Florida.[77] On that record, the Eleventh Circuit held that venue in that district was proper. The court noted that all prior cases finding venue based on flights passing over a district involved the pick-up or delivery of contraband.[78] Nonetheless, the court held that the government established venue, because it required only proof by a preponderance of the evidence that an overt act in furtherance on the

68. *Id.* (citing United States v. Tannenbaum, 934 F.2d 8, 12–13 (2d Cir. 1990)).

69. *See* Krulewitch v. United States, 336 U.S. 440, 452–53.

70. *See, e.g.*, Chavez v. United States, 275 F.2d 813, 817 (9th Cir. 1960) ("an overt act in itself may be a perfectly innocent act standing by itself").

71. United States v. Shearer, 794 F.2d 1545, 1550–51 (11th Cir. 1986).

72. United States v. Naranjo, 14 F.3d 145, 147 (2d Cir. 1994) (cases cited).

73. United States v. Williams, 536 F.2d 810, 812 (9th Cir. 1976).

74. United States v. Ramirez-Amaya, 812 F.2d 813, 816 (2d Cir. 1987).

75. *Shearer*, 794 F.2d at 1550.

76. *Id.*

77. *Id.* at 1546–50.

78. *See id.* at 1551.

conspiracy had been performed in the district where the case was prosecuted.[79]

All of the above-noted cases expanding the scope of what can constitute an overt act in furtherance of a conspiracy post-date the *Hyde* decision. Many of them were decided in contexts other than a challenge to venue, such as whether the charge was time-barred by a statute of limitation. This precedent enables prosecutors to bring criminal cases in jurisdictions that have only the most tenuous connection to the defendant or the charged criminal conduct.

IV. CONSTRAINTS ON PROSECUTION CONTROL OVER VENUE IN CRIMINAL CONSPIRACY CASES, AND THE LIMITS OF THOSE CONSTRAINTS

At least two legal checks exist on federal prosecutors who might seek to bring conspiracy cases in districts far from the site of a defendant's alleged conduct. First, to the extent that a defendant simultaneously faces conspiracy and substantive charges, venue must lie for both offenses.[80] Second, Federal Rule of Criminal Procedure 21(b) gives courts discretion to grant a defendant's change-of-venue motion "in the interest of justice." However, both of these legal checks have significant limitations. In theory, the Justice Department could impose additional limits on prosecutors who seek to bring charges in districts removed from defendants' conduct, but current policy imposes no such limits.

A. *Joint Trial of Conspiracy and Substantive Charges*

Venue must lie for both the conspiracy charge and the substantive offense when both are tried together.[81] However, this legal check has limited benefit to defendants, for at least three reasons. First, venue for many substantive offenses is itself expansive. For example, there are many federal criminal statutes that prohibit "use of the mails" in

79. *See id.*

80. *See* Leipold, *supra* note 15, at 1136 (citing United States v. Corona, 34 F.3d 876, 881 (9th Cir. 1994) (holding that proper venue for conspiracy and the underlying substantive crime is the location of the substantive crime); United States v. Walden, 464 F.2d 1015, 1020 (4th Cir. 1972) ("trial ought to be held at the place of commission of the substantive offense")).

81. *See Corona*, 34 F.3d at 881.

connection with various activities.[82] The phrase "use of the mails" has been interpreted to include any location where the item mailed was sent, received or traveled through during the mailing process.[83] Perhaps more relevant today, wire fraud offenses are similarly broad.[84] Racketeering offenses under 18 U.S.C. § 1959 are also subject to very broad venue, prosecution being proper anywhere the racketeering enterprise has significant operations.[85] And, not surprisingly, drug distribution offenses have been subject to very broad venue, including locations where the drug activity could have an effect.[86]

Second, prosecutors frequently bring conspiracy charges without adding a substantive offense. A review of the 2008 statistics from the Federal Justice Statistics Resource Center indicates that federal prosecutors brought 15,297 conspiracy charges against defendants in 2008 under 21 U.S.C. § 846, the drug manufacturing and distribution conspiracy statute, while the combined number of substantive charges brought under 21 U.S.C. § 841 was 9282.[87] These statistics suggest that at least 6015 drug defendants indicted in 2007, and probably a significantly higher number, were charged only with conspiracy.[88] It should be noted here that the two most

82. These include the distribution of obscene or crime-inciting materials (18 U.S.C. § 1717 (2011)), certain sexually oriented materials (18 U.S.C. § 1735 (2011)), and materials that incite a riot (18 U.S.C. § 2101 (2011)). United States v. Brennan, 183 F.3d 139, 147 (2d Cir. 1999).

83. *Brennan*, 183 F.3d at 147.

84. *See* 18 U.S.C. § 1343 (2011).

85. *See* United States v. Saavedra, 223 F.3d 85, 99 (2d Cir. 2000) (Cabranes, J., dissenting).

86. *See, e.g.*, United States v. Hull, 419 F.3d 762, 765–66 (8th Cir. 2005) (prosecuting defendant for distribution of marijuana in Minnesota even though he was arrested for attempting to sell drugs in California); United States v. Zidell, 323 F.3d 412, 422–23 (6th Cir. 2003) (subjecting Dallas residing defendant to Tennessee venue because the drugs sold were intended for Tennessee).

87. BUREAU OF JUSTICE STATISTICS, *Federal Criminal Case Processing Statistics*, http://fjsrc.urban.org/ (data downloaded March 19, 2009). In 2007, 14,770 defendants were charged under 21 U.S.C. § 846, whereas 10,220 defendants were charged under § 841, suggesting that, in 2007, at least 4550 defendants were charged only with conspiracy. *Id.* In 2006, 15,208 defendants were charged under 21 U.S.C. § 846, whereas 10,409 defendants were charged under § 841, suggesting that, in 2006, at least 4800 defendants were charged only with conspiracy. *Id.*

88. For each defendant who was charged with more than one substantive offense, the total number of defendants charged with one or more substantive

widely used criminal conspiracy statutes do not have separate venue provisions.[89] At least two federal conspiracy statutes do have separate venue provisions, and in both cases Congress has expanded venue beyond the Supreme Court's ruling in *Hyde*.[90] There does not appear to be any federal statute that places greater constraints on the prosecutor's ability to select venue in any criminal conspiracy case than the test set forth in *Hyde*.

Third, in multi-defendant cases, prosecutors can nonetheless bring some substantive charges by limiting them to defendants whose alleged substantive crimes occurred in the district of trial. For example, in *United States v. MacKenzie*, the government charged four executives and eight lower-level managers of a pharmaceutical company with violating the general conspiracy statute.[91] Although the company had its headquarters in Illinois and many defendants never worked in Massachusetts, the case was brought in the District of Massachusetts, the home office of the prosecutors who investigated the case. Prosecuting the case in Massachusetts led to the somewhat anomalous result that only two sales managers (who worked in Massachusetts) were charged with substantive offenses, while the four executives and six other sales managers faced no substantive charges.[92]

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offenses decreases further below 9282. *Id.*

89. *See* 18 U.S.C. § 371 (2011) (general conspiracy statue); 21 U.S.C. § 846 (2011) (drug manufacture and distribution conspiracy statute).

90. The federal money laundering statute contains a venue provision which provides that: "A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place." 18 U.S.C. § 1956(i)(2) (2011). Similarly, venue for espionage begun or committed outside the United States, including conspiracy offenses, may always be brought in the District of Columbia, as well as "in any other district authorized by law." 18 U.S.C. § 3239 (2011) (establishing venue for 18 U.S.C. §§ 793 and 794 offenses); 18 U.S.C. § 793(g) (2011) ("[g]athering, transmitting or losing defense information"); 18 U.S.C. 794(c) (2011) ("[g]athering or delivering defense information to aid foreign government").

91. Superseding Indictment at 3–5, 21–22, United States v. MacKenzie, No. 01-CR-10350-DPW (D. Mass. July 16, 2002). Author represented one of the sales manager defendants.

92. *See id.* at 21–22, 69–85. Ultimately, all twelve of these defendants were either acquitted or the charges against them were dismissed. Verdicts, United States v. MacKenzie, No. 01-CR-10350-DPW (D. Mass. July 14, 2004).

The above-described factors explain why existing venue provisions for substantive offenses place only limited constraints on the power of federal prosecutors to choose venue for criminal conspiracy cases. In theory, Rule 21(b), discussed in the next section, should provide significant constraints on the exercise of this power. In practice, judges have decreased their use of Rule 21(b) at the same time that prosecution control over venue has increased through the expanded definition of "overt act" discussed above in Part IV of this Article.

B. Federal Rule of Criminal Procedure 21(b)

Federal Rule of Criminal Procedure 21(b), approved by Congress in 1944, gives judges the power to transfer cases "for the convenience of the parties and witnesses and in the interest of justice," upon motion of the defendant.[93] When applied in conjunction with Federal Rule of Criminal Procedure 14, which allows for severance of defendants in multi-defendant cases, Rule 21(b) allows the court to transfer a particular defendant's case to a more appropriate venue.[94]

In the initial decades after Rule 21(b) was adopted, courts frequently granted transfers of criminal cases under the rule, even when the transfer resulted in a severance of defendants and therefore more than one trial.[95] Most of these

93. FED. R. CRIM. P. 21(b).

94. *Id.*; FED. R. CRIM. P. 14(a).

95. *See, e.g.*, United States v. White, 95 F. Supp. 544, 551 (D. Neb. 1951) (venue transferred from Nebraska to Oklahoma, because, *inter alia*, defendant was "quite certainly a man of modest means" and a Nebraska trial "would involve him in vastly greater expense than he would incur in a trial in Oklahoma"); United States v. Amador Casanas, 233 F. Supp. 1001, 1004 (D.D.C. 1964) (transferring wire fraud counts from D.C. to Puerto Rico, where defendants resided, and removing non-transferable counts from court's calendar until transferred counts were disposed of); United States v. Jessup, 38 F.R.D. 42, 50 (M.D. Tenn. 1965) (transferring charges against two defendants from Tennessee to Mississippi, where those defendants resided, even though result would be separate trial against third defendant); United States v. Aronoff, 463 F. Supp. 454, 460–61 (S.D.N.Y. 1978) (transferring conspiracy and other charges against two defendants from New York to Michigan, where these defendants resided, despite government argument that result would be an additional multi-week trial); United States v. Haley, 504 F. Supp. 1124, 1129 (E.D. Pa. 1981) (transferring RICO conspiracy and other charges against seven indigent defendants from Pennsylvania to Georgia, where they resided, based primarily on "economic hardship accruing to defendants by virtue of attending a lengthy trial far from home"); United States v. Daewoo Indus. Co., 591 F. Supp.

decisions relied heavily on the financial, emotional, and practical hardship to the defendants of facing trial far from their homes.[96] In recent decades, however, Rule 21(b) motions have almost always been denied.[97] One federal court has noted "a trend in recent years away from granting transfers to mitigate the financial, emotional, or practical burdens of trial in a distant locale . . . . [T]he Court's own research supports the observation that transfer under Rule 21(b), although not unheard of, has been rare in recent years."[98] Citing Professor Wright, the court identified one of the rare exceptions being a 1990 case from the Western District of Washington where one of the major considerations supporting transfer was a possible volcanic eruption in Alaska.[99]

In analyzing Rule 21(b) motions, courts typically cite *Platt v. Minnesota Mining & Mfg. Co.*, in which the Supreme Court noted but did not specifically endorse a ten-factor test[100] that had been applied by the district court.[101] This ten-

157, 165 (D. Ore. 1984) (transferring conspiracy and other charges from Oregon to California, finding that "[t]o try this case in unfamiliar jurisdiction with a very small Korean population, far away from family and friends who could provide financial and emotional support would exacerbate needlessly the fears and alienation that the defendants may feel").

96. *See* United States v. Quinn, 401 F. Supp. 2d 80, 85 (D.D.C. 2005); cases cited *infra* note 98.

97. *See* WRIGHT & HENNING, *supra* note 14, § 344. An analysis of the reasons for this decline is beyond the scope of this Article; greater ease and declining cost of travel have been cited as two factors. *See infra* note 98.

98. *Quinn*, 401 F. Supp. 2d at 85–86 (footnotes omitted). The court noted that "the trend in recent years was hardly surprising when one considers the massive expansion of technology and the relative decline in costs for long-distance travel over the past few decades." *Id.* at 86. Certainly for defendants, such as actor Wesley Snipes, who filed "requests to travel out of the country for lengthy periods of time" while his trial was pending, arguments as to the burden of being tried far from home "ring hollow." United States v. Snipes, No. 5:06-cr-22, 2007 U.S. Dist. LEXIS 65432 (M.D. Fla. Sept. 5, 2007).

99. *Id.* (citing WRIGHT & HENNING, *supra* note 14, § 344 n.29). For a few more recent examples of Rule 21(b) transfers, see Radley, 558 F. Supp. 2d 865, 870 (2008); United States v. Ferguson, 432 F. Supp. 2d 559, 564 (E.D. Va. 2006); United States v. Lima, No. 94-800, 1995 WL 348105, at *2 (N.D. Ill. Jun. 1, 1995).

100. The ten factors include:

> (1) [L]ocation of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of

factor test applied by the district court has been widely adopted.[102] However, as Judge Posner has noted, the "open-ended character of the standard in Rule 21(b) for a change of venue" gives the district courts essentially unbridled discretion.[103]

Courts impose a relatively high burden on defendants who seek Rule 21(b) changes of venue. In order to prevail in a Rule 21(b) motion, a "defendant carries the burden of showing substantial balance of inconvenience to warrant finding a transfer would be in the interests of justice."[104]

There are also significant pragmatic limitations on a defendant's willingness to bring a Rule 21(b) motion. In most instances a defendant who has been charged with a federal crime will want an attorney who practices frequently in the jurisdiction where the charge has been brought. Also, for any defendant who cannot afford counsel, appointed counsel will almost always practice primarily or exclusively in the district

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> each district or division involved; (10) any other special elements which might affect the transfer.

Platt v. Minn. Mining & Mfg. Co., 376 U.S. 240, 243–44 (1964).

101. Indeed, the issue decided by the Court in *Platt* was not the standard for transfers under Rule 21(b), but whether the Court of Appeals had authority to order a transfer or was limited to "determin[ing] the appropriate criteria" for transfer and "leav[ing] their application to the trial court on remand." *Id.* at 244–45. The Supreme Court held that the Court of Appeals did not have authority to order a transfer of venue. *Id.* at 245.

102. *See, e.g.*, United States v. Johnson, 510 F.3d 521, 528 (4th Cir. 2007); *In re* United States, 273 F.3d 380, 387–88 (3d Cir. 2001); United States v. Jordan, 223 F.3d 676, 685 (7th Cir. 2000); United States v. Maldonado-Rivera, 922 F.2d 934, 966 (2d Cir. 1990).

103. This is one of those areas in which the question for the court of appeals is whether,

> [T]he discretion granted to the district court has been exercised. If it has been, it will be almost impossible to show that it has been abused– let alone abused to such a degree as to meet the very high standard for review by means of the extraordinary writ of mandamus.

In re Balsimo, 68 F.3d 185, 187 (7th Cir. 1995) (citation omitted).

104. DEPARTMENT OF JUSTICE: UNITED STATES ATTORNEYS, CRIMINAL RESOURCE MANUAL § 533 (citing United States v. Benjamin, 623 F. Supp. 623 (D.D.C. 1985)), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00533.htm; United States v. Oster, 580 F. Supp. 599 (S.D. W. Va. 1984); United States v. Baltimore and O.R.R., 538 F. Supp. 200 (D.D.C. 1982); United States v. Jones, 43 F.R.D. 511 (D.D.C. 1967), *aff'd sub nom*. Jones v. Gasch, 404 F.2d 1231 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). However, for a recent example of a conspiracy case in which defendants' Rule 21(b) motion was granted, see United States v. Auffenberg, No. 07-30042-MJR (S.D. Ill. July 5, 2007) (Memorandum and Order).

where the case was brought. Once the defendant has developed a working relationship with his or her attorney, transferring the case to a distant location would typically present significant obstacles to counsel, though it might be closer to where the defendant, the defendant's family and most of the key witnesses reside. Had the case initially been brought in a jurisdiction with which the defendant had more contact, this difficult choice would not be necessary.

The decreasing reluctance of judges to grant Rule 21(b) motions, the virtually unbridled discretion inherent in the prevailing test for assessing such motions and the practical problems for a defendant in changing venue once the case has been brought all explain why Rule 21(b) has placed few constraints on the ability of prosecutors to select venue in criminal conspiracy cases.

C. Justice Department Policy

The U.S. Justice Department places various non-legally binding constraints on the exercise of prosecutorial power through the Principles of Federal Prosecution ("PFP"). These principles "provide to Federal prosecutors a statement of sound prosecutorial policies and practices for particularly important areas of their work."[105] To the extent that the PFP addresses selection of venue in criminal cases, in essence it places no weight on a defendant's constitutional venue protections.

Venue is addressed in the section of the PFP titled "Initiating and Declining Charges—Prosecution in Another Jurisdiction."[106] The PFP identifies three factors to be considered in selecting a jurisdiction when a criminal case may be prosecuted in more than one jurisdiction, as follows: (1) strength of the jurisdiction's interest in the case; (2) ability and willingness of prosecutors in the jurisdiction to prosecute effectively; and (3) the probable sentence upon conviction.[107] Protection of the accused's constitutional venue rights is not mentioned in this discussion.

Additional guidance for federal prosecutors can be found in the Justice Department's Criminal Resource Manual. The

105. U.S. ATTORNEYS' MANUAL, *supra* note 29.
106. *Id.* at 9-27.240.
107. *Id.*

Criminal Resource Manual notes that "[i]nitial choice of venue is up to the prosecution,"[108] and further states, "A defendant must demonstrate substantial inconvenience to nullify this prosecutive prerogative . . . ."[109] This guidance, like the Principles of Federal Prosecution, does not suggest to prosecutors that they consider the defendant's venue rights in deciding where to bring criminal charges. It is therefore not surprising that federal prosecutors frequently bring conspiracy cases in jurisdictions that have only the most tenuous connection to the defendants who are being charged.

V. ENHANCING CONSTITUTIONAL VENUE PROTECTIONS IN CRIMINAL CONSPIRACY CASES: A PROPOSED NEW JUDICIAL STANDARD

The common law of what constitutes an overt act in furtherance of a conspiracy has expanded to the point where almost any conduct in a judicial district, no matter how trivial or removed from the defendants on trial, can provide a basis for venue in that district. Moreover, the most commonly used legal standard for assessing motions to transfer venue under Rule 21(b) is an essentially standard-less ten factor test that gives short shrift to a defendant's constitutional rights.

A century after *Hyde*, the time has come to adopt a new legal standard that gives defendants' venue rights more standing. Courts should apply a presumption in favor of transferring cases under Federal Rule of Criminal Procedure 21(b) in conspiracy cases that lack some modicum of connection between the charged conduct and the district of prosecution, beyond the mere commission of any overt act by an alleged conspirator. Such a standard would be preferable to the current ten-factor test of *Platt*, which in essence provides little more than a completely malleable totality of the circumstances analysis.

Precedent that could support an alternate standard to the *Platt* test in criminal conspiracy cases has already been developed in several circuits in the context of venue for substantive offenses. Three circuits have applied a

108. DEPARTMENT OF JUSTICE: UNITED STATES ATTORNEYS, CRIMINAL RESOURCE MANUAL § 531 (citations omitted), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00531.htm.

109. *Id.*

"substantial contacts" test to determine where venue is proper for certain substantive offenses and two other circuits have noted this standard with at least some apparent approval.[110] The definition of what constitutes "substantial contacts" has certainly not been onerous for prosecutors. Indeed, the standard has at times been used to expand venue. The "substantial contacts" test therefore holds promise for creating a threshold for venue in conspiracy cases higher than the "any overt act" rule of *Hyde* without unduly burdening multi-district prosecutions.

The requirement that a substantive offense must have "substantial contacts" with a district for venue to lie there first appeared in 1985 with the Second Circuit's decision in *United States v. Reed*.[111] The prosecution in *Reed* involved deposition testimony taken in San Francisco pursuant to a civil action in the Southern District of New York.[112] The defendant was indicted in the Southern District of New York for perjury and obstruction of justice for making false statements and offering fabricated documents.[113] These counts were dismissed by the trial court for improper venue on the grounds that perjury could only be prosecuted where the oath was taken and that obstruction of justice could only be prosecuted where the acts constituting the obstruction occurred.[114]

On appeal, the Second Circuit reversed the trial court, finding that venue was indeed proper in the Southern District of New York. Before addressing the facts of the case, the Court engaged in a review of the constitutional policy of venue, noting: "The Constitution requires only that the venue chosen be determined from the nature of the crime charged as well as from the location of the act or acts constituting it, and that it not be contrary to an explicit policy underlying venue."[115] The Court also recognized that the Constitution and Federal Rule of Criminal Procedure 18, the basic venue provision in the federal criminal rules, "are often of precious little aid in explaining how the locus of a crime is to be

110. *See infra* notes 121–23.
111. United States v. Reed, 773 F.2d 477, 481 (2d Cir. 1985).
112. *Id.* at 478.
113. *Id.* at 479.
114. *Id.* at 477–78.
115. *Id.* at 480.

determined."[116] Responding to this lack of any "single defined policy or mechanical test to determine constitutional venue,"[117] the court in *Reed* adopted what it called a "substantial contacts" test to determine constitutional venue.[118] The substantial contacts test considers: (1) the site of the defendant's acts, (2) the elements and nature of the crime, (3) the place where the effect of the conduct occurs, and (4) the suitability of the district for accurate fact-finding.[119] The latter three factors "often give sites other than where the act occurred equal standing so far as venue is concerned."[120] The Second Circuit subsequently applied the *Reed* substantial contacts test in *United States v. Saavedra* to determine the outer bounds of venue for offenses that are subject to venue in multiple districts.[121]

Four Circuits have expressly adopted or cited with apparent approval the substantial contacts test set forth in *Reed* for determining where venue can lie for a substantive offense.[122] The Sixth Circuit appears to be the only appeals court to have referenced the substantial contacts test in a criminal conspiracy case, reversing a drug conspiracy conviction on venue grounds.[123] However, the reference to substantial contacts was *dicta* in that no agreement or overt act occurred in the Eastern District of Michigan, where the defendant was indicted. All of the relevant conduct and the

116. *Id.* at 479–80.
117. *Id.* at 481.
118. *Id.*
119. *Id.*
120. *Id.*
121. United States v. Saavedra, 223 F.3d 85, 89 (2d Cir. 2000).
122. *See* United States v. Goldberg, 830 F.2d 459, 466 (3d Cir. 1987) (affirming venue in a wire fraud case in a district where the defendant was incarcerated when the plaintiff executed the scheme from prison even though no wires were used in that district); United States v. Cofield, 11 F.3d 413, 417 (4th Cir. 1993) (affirming venue in Virginia for a witness retaliation conviction where the assault occurred in the District of Columbia but the case in which the victim previously testified was located in Virginia); United States v. Williams, 788 F.2d 1213, 1217 (6th Cir. 1986) (holding venue proper in a bail jumping case, both in the district where bail was granted and where the defendant failed to appear); United States v. Muhammad, 502 F.3d 646, 653–54 (7th Cir. 2007) (affirming venue in Wisconsin in attempted drug distribution case where the defendant purchased drugs in Arizona for resale in Wisconsin, but was arrested in Oklahoma while transporting the drugs).
123. United States v. Williams, 274 F.3d 1079, 1080 (6th Cir. 2001).

unlawful agreement occurred in Texas.[124] Indeed, the only connection between the offense and Michigan was the statement of an undercover agent to the defendant that he intended to sell the drugs there.[125]

From the defense perspective, applying the substantial contacts test to criminal conspiracy cases under Federal Rule of Criminal Procedure 21(b) could significantly enhance the venue rights of defendants facing conspiracy charges. From the government's perspective, however, requiring the prosecution to establish substantial contacts between the alleged conspiracy and the district of prosecution poses at least two potential obstacles to effective law enforcement.

The first potential concern for federal prosecutors arises from the fact that many large conspiracy cases begin with the discovery of relatively minor criminal conduct. For example, the arrest of a street-level drug dealer carrying a small quantity of cocaine may ultimately lead to a multidistrict or even international drug distribution conspiracy case. If the prosecutors and agents who handled the initial arrest and patiently assembled a complex case were precluded from prosecuting the case in their home district, based on a judicial finding that the district lacked "substantial contacts" with the overall conspiracy, the result could well be added government expense and a less effective prosecution effort.

The second potential obstacle for prosecutors arises from the vagueness of a substantial-contacts standard. Prosecutors may have trouble proving that a particular overt act occurred, but they have no difficulty understanding the concept. In contrast, a prosecutor could find it difficult to determine whether one or more overt acts constituted "substantial" contacts.

Judging from the lack of legal challenges or expressions of prosecutor opposition to the substantial contacts test in substantive cases, neither of these potential problems should present a real obstacle to the government if courts define substantial contacts in conspiracy cases the way they have defined the term in substantive cases. Moreover, even in the absence of a showing of substantial contacts by the prosecution, courts could allow the presumption in favor of

124. *Id.* at 1084.
125. *Id.*

transfer to be rebutted by other compelling circumstances.

A common-sense application of the substantial contacts test to criminal conspiracy cases would make little or no dent in the Justice Department's ability to effectively prosecute multi-district conspiracies. Indeed, a strong argument exists that federal prosecutions should already be giving at least some formal credence to defendants' venue rights, something that current Department policy does not consider.[126] Surely defendants should receive greater protection than the current overt act test provides, given how the common law definition of overt acts has developed.

CONCLUSION

The century-old holding in *Hyde*, that venue in criminal conspiracy cases lies in any district in which one or more overt acts occurred, has greatly facilitated the prosecution of complex and geographically diverse conspiracies. However, it has also subjected many defendants to prosecution in districts that have little or no connection to their alleged conduct, the conduct of their alleged co-conspirators, or their place of residence. Protection of the defendant's constitutional venue rights seems to have fallen between the cracks in some federal criminal cases. Indeed, one goal of this Article has been to remind not only prosecutors but also defense attorneys that venue rights are of constitutional magnitude and should not be regarded merely as some *pro forma* hurdle that the prosecution inevitability will surmount.

A century after *Hyde*, the time has come to establish a presumption in favor of transferring venue under Federal Rule of Criminal Procedure 21(b) in conspiracy cases where the government fails to establish some modicum of connection between the charged conduct and the district of prosecution, beyond the mere commission of one overt act by any

126. *See* DEPARTMENT OF JUSTICE: UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' MANUAL 9-27.240 (2002), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm. The relevant PFP section, titled *Initiating and Declining Charges—Prosecution in Another Jurisdiction*, should be amended to require that prosecutors to consider the defendant's constitutional venue rights in additional to the three currently noted factors. *See id.* This simple change would help ensure that prosecutors give some consideration to each defendant's venue rights in criminal conspiracy cases.

coconspirator. This evolution of the common law would enhance protection of defendants' constitutional venue rights without impeding the effective administration of justice.