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Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle

In federal criminal prosecutions, venue lies only in "a district in which the offense was committed." 1 This rule derives from the constitutional guarantees of a trial "in the state where the said crimes shall have been committed," 2 and of a jury "of the State and district wherein the crime shall have been committed." 3 When it was framed in the late eighteenth century, this "district-of-the-crime" test generally pointed to just one permissible place for trial — the district in which the accused was physically present at the time the crime was committed. 4 Advances in communications and transportation and the expansion of federal criminal law have made it increasingly difficult to determine where, for the purpose of laying venue, a crime is "committed." 5 The elements of a modern crime may be widely scattered over time and space, and may not coincide with the physical presence of the person bearing criminal responsibility. 6

Because of these developments, venue is frequently litigated in

1. FED. R. CRIM. P. 18 provides in its entirety:
Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

Under the continuing offense statute, an offense which is "begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a) (1976).

2. U.S. CONST. art. III, § 2, cl. 3.

3. U.S. CONST. amend. VI. The sixth amendment does not provide for venue literally, but defines the "vicinage" from which jurors will be drawn. See Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue, 43 Mich. L. Rev. 59, 60 (1944). In practice, the sixth amendment has consistently been interpreted as guaranteeing trial in the district where the crime was committed. See, e.g., Johnston v. United States, 351 U.S. 215, 220 (1956); Hyde v. United States, 225 U.S. 347, 364 (1912); In re Palliser, 136 U.S. 257, 265 (1890); 2 C. Wright, Federal Practice and Procedure § 301, at 190 (2d ed. 1982).


5. See 8A Moore's Federal Practice ¶ 18.02(2), at 18-14 (2d ed. 1983) ("The framers could not have contemplated a society with the mobility and complexity of ours, and the almost infinite variety of acts which have become criminally sanctioned."); Abrams, Conspiracy and Multi-Venue In Federal Criminal Prosecutions: The Crime Committed Formula, 9 UCLA L. Rev. 751, 752 (1962) ("crimes with multidistrict contacts have become more common because of a variety of factors, "including improvements in long-distance communication and transportation facilities . . . and the nature of crimes now covered by federal criminal laws"); Kershen, supra note 4, at 38 ("The assumption under which the constitutional draftsman had operated with respect to the locality of the crime had been invalidated by technological changes.").

6. See Abrams, supra note 5, at 817; Kershen, supra note 4, at 38. The "elements" of a crime are those facts that the prosecution must prove to obtain a conviction, including a prescribed act, a culpable mental state, a particular result, certain attendant circumstances, and
federal criminal cases. Although the Supreme Court has said that questions of criminal venue "raise deep issues of public policy," no consistent view of that policy has been voiced. Instead, courts gener-

any independent facts needed to establish the jurisdiction of the court. See generally W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §§ 2, 16 (1972).

Some early federal crimes by definition required the culprit to be physically present at the scene of events that were relatively circumscribed in time and space. See, e.g., Act of April 30, 1790 ch. 9 § 11, 1 Stat. 112, 114 (1848) (concealing a pirate); Act of March 3, 1825 ch. 64 § 23, 4 Stat. 102, 109 (1846) (now codified in modified form at 18 U.S.C. § 1706 (1976)) (injuring a bag used to carry mail).

The Supreme Court rejected a physical presence test at an early date. See In re Palliser, 136 U.S. 257, 265 (1890). More recent commentary has suggested that the locus of a crime should be construed "to be — if at all possible — where a defendant was physically present and acting at the time of the offense." Comment, supra note 4, at 423. Such a physical test would be of little use, however, in determining venue for a crime like price discrimination in the transportation of goods in interstate commerce. See 49 U.S.C. § 11903 (Supp. III 1979) (setting venue in any "district in which any part of the violation is committed or through which the transportation is conducted"); note 13 infra. 7.

7. In a recent 18-month period, the courts of one circuit alone decided venue issues in cases involving prosecutions for receiving payments from an employer in violation of the Taft-Hartley Act, United States v. Billups, 692 F.2d 320, 331-33 (4th Cir. 1982) (venue lies where proscribed act occurs or wherever commerce is affected); use of the mails to facilitate the importation of drugs, United States v. Lowry, 675 F.2d 593, 596 (4th Cir. 1982) (venue proper in any district through which the drugs move); obstruction of justice, United States v. Kibler, 667 F.2d 452, 454-55 (4th Cir.), cert. denied, 456 U.S. 961 (1982) (venue lies in district of obstructed judicial proceeding even where all acts of obstruction occur elsewhere); presentation of false claims to an agency of the U.S. government, United States v. Blecker, 657 F.2d 629, 632-33 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1982) (venue may lie where claim is prepared, where it is delivered to the agency, or where it is given to an intermediary for delivery to the agency); willfully attempting to evade income taxes, United States v. Goodyear, 649 F.2d 226, 228 (4th Cir. 1981) (prosecution stemming from failure to file 1971 tax return may be brought in district where, years later, defendant made false statements regarding income to IRS agents); and willfully causing a destructive substance to be placed on an aircraft, United States v. Bradley, 540 F. Supp. 690, 695 (D. Md. 1982) (where defendant put bomb into suitcase of unsuspecting party, venue lies where innocent party brought bomb on board the plane, not in district in which the defendant acted).


9. In United States v. Cores, 356 U.S. 405 (1958), the Court stated that the venue provisions are safeguards against the unfairness and hardship of prosecution in a place remote from the defendant's home. 356 U.S. at 410; see also United States v. Johnson, 333 U.S. 273, 275 (1944). But in Johnston v. United States, 351 U.S. 215 (1956), the majority found that "this requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused." 351 U.S. at 220-21. This view, of course, merely restates the test without explaining the policy behind it. See also In re Palliser, 136 U.S. 257, 265 (1890) (stating test without reference to policy).

Justice Harlan advanced a more explicit rationale for the constitutional venue limitations in his dissent in Travis v. United States, 364 U.S. 631 (1961), where he noted that the "basic policy of the Sixth Amendment" would be best served by holding trial where the "witnesses and relevant circumstances surrounding the contested issues" could be found. 364 U.S. at 640; see also Kershen, Vicinage, 29 OKLA. L. REV. 803, 810 (1976) ("[T]he defendant ought to be able more easily to investigate the alleged crime, to obtain interviews with the witnesses to the alleged crime, to present the evidence found . . . and to insure the presence of witnesses at trial if it is held near the place of the commission of the alleged crime . . . ."). But see 8A MOORE'S FEDERAL PRACTICE, supra note 5, ¶ 18.02, at 18-14 ("It is doubtful whether the concern which led to the inclusion of two provisions regarding venue could have been to facilitate the prosecution of crime, by fixing trial in a place convenient for the government's witnesses."). See generally 2 C. WRIGHT, supra note 3, § 301, at 191-94.
ally resort to formalistic statutory analysis, considering constitutional policy only in those rare instances when they cannot glean any indication of congressional intent as to venue. This formalistic approach has yielded inconsistent results. In some cases it has restricted venue so severely that defendants who were tried in their home districts, which had substantial contacts with the alleged offenses, succeeded in reversing their convictions for improper venue; in other cases, statutory analysis has resulted in broad

10. "The [venue test used by most courts] . . . is basically a formalistic approach which focuses on the elements constituting the offense, the acts done, how they relate to the offense and where they had impact." Abrams, supra note 5, at 817; see also Comment, supra note 4, at 402 ("The courts have generally glossed over the serious constitutional venue problems . . . concentrating upon the explicit language of applicable constitutional provisions without due regard to the underlying spirit.").

The underlying assumption of the formalistic approach is that Congress, as the sole promulgator of federal crimes, has plenary power to define where those crimes are "committed," subject only to the requirement that the offense in question have some minimal contacts with the district in which venue is laid. See 2 C. WRIGHT, supra note 3, § 302, at 201 ("Congress lacks power to provide for trial in a district other than that in which the offense was committed, but this is not a significant limitation on congressional power. By altering the verb in a statute it may alter the nature of the offense, and thus the proper venue, or it may proscribe some additional offense related to the principal offense."); Abrams, supra note 5, at 816 ("It appears that Congress, by its definition of the elements of offenses, by its formulation of the general venue provision, and by enactment of specific venue provisions attached to particular offenses exercises an almost plenary power over venue."). Congress may explicitly provide for venue in any district "through which a process of wrongdoing moves." United States v. Johnson, 323 U.S. 273, 276 (1944). Thus Congress can provide that venue for accepting price discriminations in respect of the transportation of goods in interstate commerce may lie in any district through which the goods are transported, see Armour Packing Co. v. United States, 209 U.S. 56, 74 (1908), and that venue for using the mails to ship dentures prepared by an unlicensed dentist may lie in any district through which the dentures are shipped, Johnson, 323 U.S. at 274.


11. See United States v. Johnson, 323 U.S. 273, 276 (1944) ("If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."); United States v. Cores, 356 U.S. 405, 407 (1958).

12. In United States v. Lombardo, 241 U.S. 73 (1916), a prosecution for failing to file a required statement regarding an alien harbored for prostitution was brought in the defendant's home district in the State of Washington. The Court found it necessary to consider the etymology of the word "file": "The word 'file' is derived from the Latin word *filium,* and relates to the ancient practice of placing papers on a thread or wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received." 241 U.S. at 76 (quoting the lower court opinion in Lombardo, 228 F. 980, 983 (W.D. Wash. 1915)). Applying the rule that a culpable omission is "committed" where the duty should have been performed, see 2 C. WRIGHT, supra note 8, § 302, at 198, the Court held that venue lay only in the District of Columbia and not where the required statement should have been prepared and mailed.

The Lombardo decision can be compared with Travis v. United States, 364 U.S. 631 (1961),
venue possibilities that virtually negate the constitutional venue limitations. 13

Courts have struggled to determine venue for cases involving obstruction of justice 14 with similarly inconsistent results. 15 The circuits

where the charge was making a false statement in a matter before a federal agency. The statement, which falsely indicated that the defendant was not a member of the Communist party, had been filed with the National Labor Relations Board in Washington, D.C. Trial was held in Denver, where the defendant resided and from which the statement was mailed. The statement was supplied pursuant to a now-repealed section of the Taft-Hartley Act, but that section did not require such a filing, except as a "condition precedent to a union's use of the Board's procedures." 364 U.S. at 635. "If it had, the whole process of filing, including the use of the mails, might logically be construed to constitute the offense." 364 U.S. at 635. Absent such a requirement, the Court, citing Lombardo, held that venue could be laid only in the District of Columbia: "The locus of the offense has been carefully specified; and only the single act of having a false statement at a specified place is penalized." 364 U.S. at 637 (emphasis in original).

In both Lombardo and Travis the government tried to invoke the continuing offense statute. Lombardo, 241 U.S. at 77; Travis, 364 U.S. at 633-34; see note 1 supra. In each case the government failed, and the formalistic approach worked to reverse the conviction of a defendant whose "chief complaint was conviction, not conviction in a forum favorable to the government." Barber, Venue in Federal Criminal Cases: A Plea for Return to Principle, 42 TEXAS L. REV. 39, 47 (1963).

13. See, e.g., Armour Packing Co. v. United States, 209 U.S. 56 (1908). The defendant company was charged with receiving price discriminations in respect of the transportation of goods in interstate commerce, in violation of the Elkins Act, ch. 708, 32 Stat. 847 (1903) (now codified in substantially modified form at 49 U.S.C. § 11903 (Supp. III 1979)). The shipment in question was carried by rail from Kansas to New York; venue was laid in the Western District of Missouri, which was along the route. The Court commented approvingly: "[T]ransportation being of the essence of the offense, when it takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey, it is equally and at all times committed." 209 U.S. at 74. The Court could have made an equally plausible argument, however, that the "essence" of the offense was the acceptance of the advantageous price, and that transportation was merely the element that conferred jurisdiction on the federal courts.


Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Until recently, § 1503 covered interference with witnesses, as well as jurors and court officers. See S. Rep. No. 532, 97th Cong., 2d Sess. 14 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2515, 2520. Most of the obstruction of justice cases discussed in this Note, see note 15 infra, involved interference with witnesses and arose under this earlier version of § 1503. Today such cases would be brought under 18 U.S.C.A. § 1512 (West Supp. 1983), which provides, in relevant part:

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence the testimony of any person in an official proceeding;
(2) cause or induce any person to—
have divided over where to lay venue in prosecutions for obstruction of justice when the defendant allegedly acted in one judicial district to obstruct a proceeding that was pending in another. This Note argues that formalistic analysis, which has led courts to set venue in the district of the affected trial, should be rejected in favor of a more policy-oriented approach. Part I demonstrates that a formalistic

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
(D) be absent from an official proceeding to which such person has been summoned by legal process; or
(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or deters any person from—
(1) attending or testifying in an official proceeding;
(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
(3) arresting or seeking the arrest of another person in connection with a Federal offense; or
(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding; or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

(d) For the purposes of this section—
(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

Although this statute effects significant changes in the law, see generally S. Rep. No. 5323, 97th Cong., 2d Sess. (1982), it does not purport to settle the venue problem that has arisen under the older obstruction statute and is likely to arise under this one.

A number of other statutes can be brought under the "obstruction of justice" rubric. See 18 U.S.C. § 1501 (1976) (assault on process server); § 1502 (resistance to extradition agent); § 1504 (influencing juror by writing); 18 U.S.C.A. § 1505 (West Supp. 1983) (obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. § 1506 (1976) (theft or alteration of record or process, false bail); § 1507 (picketing or parading); § 1508 (recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting); § 1509 (obstruction of court orders); 18 U.S.C.A. § 1510 (West Supp. 1983) (obstruction of criminal investigations). However, §§ 1503 and 1512 are the basic statutes protecting the federal judicial system from interference.


16. See notes 18-20 infra and accompanying text.
statutory analysis that closely inspects either legislative history or the language of the statute ultimately fails to reveal congressional guidance. Accordingly, Part II examines the concerns underlying constitutional venue limitations. The Note explores the history of the district-of-the-crime test and concludes that the test was intended as a flexible rule to improve factfinding in criminal cases. Thus, the overriding consideration in venue problems should be the accessibility of witnesses and tangible evidence for investigation and use at trial. Applying this principle to obstruction of justice cases, this Note concludes that because witnesses and evidence will ordinarily be most available where the obstructive acts were committed, venue should lie in the district where the defendant allegedly acted.

I. STATUTORY ANALYSIS: AN ILLUSORY SEARCH FOR GUIDANCE

Although obstruction of justice is a very old federal crime, it poses a venue problem that is not yet resolved. When a person acts in one judicial district to obstruct a judicial proceeding pending in another, where is the crime committed for venue purposes? Three circuits have held that the district in which the defendant allegedly acted is the exclusive venue in such circumstances, but four others have found venue properly laid in the district of the target proceeding. Although the latter courts have reserved the question of whether venue might also lie where the defendant allegedly acted, at least one district court has held that the district of the target proceeding is the only permissible place for trial.

In examining venue questions, courts and commentators have developed a few basic rules. Congress may provide that venue for the crimes it creates will lie in any district having some minimal contacts with the offense. When Congress does not explicitly provide


20. See Kibler, 667 F.2d at 455 n.2; Barham, 666 F.2d at 524 n.2; Tedesco, 635 F.2d at 906 n.5; O'Donnell, 510 F.2d at 1193.


22. See Abrams, supra note 5, at 816 ("Congress could not . . . consistently with the Con-
for venue, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the . . . acts constituting it."23

In an obstruction of justice case, both the district where the defendant acts and the district of the target proceeding meet the minimal contacts test.24 Congress could provide for venue in either, or both, under current venue doctrine.25 Congress has not, however, made any explicit provision for venue in obstruction of justice cases.26 Thus, under the formalistic venue approach, courts have brought the tools of statutory construction to bear on the problem, searching for some intimation of congressional intent. This Part considers contemporary arguments based on the legislative history and language of the obstruction of justice statute and finds them unconvincing, concluding that in all probability Congress simply never considered the venue question.

A. Legislative History: Obstruction of Justice as a "Constructive" Contempt of Court

Historically, obstruction of justice and contempt of court27 are

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24. The location of the acts constituting a crime is, of course, a permissible venue. *See* note 23 supra and accompanying text. The place where criminal acts take effect has also been found to have sufficient contacts to support venue. *See*, e.g., Lamar v. United States, 240 U.S. 60, 66 (1916) (prosecution for impersonating a member of Congress over the telephone may be brought where the call was received because "the personation took effect there"); United States v. Billups, 692 F.2d 320, 331-33 (4th Cir. 1982) (prosecution under Taft-Hartley Act for accepting an illegal payment from an employer may be brought where commerce is affected by the illegal act); cf. United States v. Swann, 441 F.2d 1053, 1056 (D.C. Cir. 1971) (Tamm, J., concurring) (venue does not lie in district of target proceeding when a mere attempt to obstruct administration of justice is alleged, but question of venue left open if actual obstruction is alleged).

25. "In some instances Congress has chosen to limit an otherwise permissible choice of venue." 2 C. WRIGHT, supra note 3, § 302, at 201; see note 10 supra.

26. *See* note 14 supra. Nor is this situation governed by the general continuing offense statute, 18 U.S.C. § 3237(a) (1976). To be a continuing offense, a crime must involve either two or more distinct acts or a continuously moving act. *See* United States v. Lombardo, 241 U.S. 73, 77 (1916), *quoted in* Travis v. United States, 364 U.S. 631, 636 (1961); Abrams, supra note 5, at 777-78, 789-92. Obstruction of justice is not begun where the act of obstruction is committed and completed where the target proceeding is pending; rather, it is "begun, carried out and completed" in one place, and therefore is not covered under the continuing offense statute. United States v. Swann, 441 F.2d 1053, 1055 (D.C. Cir. 1971).

27. 18 U.S.C. § 401 (1976) provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
closely related crimes. Until the early nineteenth century, conduct now cognizable under the obstruction of justice statute was punishable as contempt of court. The limits of the contempt power were first defined by statute in the same 1831 congressional act that made obstruction of justice a separate criminal offense. Even today, all conduct encompassed under the obstruction of justice statute may still be punished as contempt of court when it occurs in or near the presence of the court.

Some courts have used this historical and logical link to justify laying venue for obstruction of justice in the district of the target proceeding. They argue that Congress viewed obstruction of justice as a "constructive" contempt of court — "in reality a codification of the court's power to punish contempts committed outside its presence, albeit by criminal prosecution following indictment." These courts conclude that because the offended tribunal has the exclusive power to punish actual contempts of its authority, it is also the proper venue for "constructive" contempt prosecutions.

This argument pushes the "constructive" contempt metaphor too far. This Section examines the legislative history and concludes

(2) Misbehavior of any of its officers in their official transactions;
(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

28. Although the question has yet to arise, insofar as §1512 covers conduct obstructing judicial proceedings, the obstruction/contempt analogy is applicable to this section as well as § 1503. However, it is not necessary under § 1512 that an official proceeding "be pending or about to be instituted." 18 U.S.C.A. § 1512(a)(1) (West Supp. 1983). Since only courts, and not mere investigators, have contempt powers, the analogies break down in prosecutions for obstructive acts committed before the institution of judicial proceedings.

29. See Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) (Corrupt overtures to court and its officers punishable as contempt); NEW YORK COMMISSIONERS ON REVISION OF THE STATUTES, REPORT OF THE COMMISSIONERS 12, 72 (1828); Nelles & King, Contempt by Publication in the United States, 28 COLUM. L. REV. 525, 531 (1928).


31. See Nye v. United States, 313 U.S. 33, 49 (1941) ("an act of misbehavior though covered by [the obstruction of justice] provisions may also be a contempt if committed in the 'presence' of the Court").


33. See Bessette v. W.B. Conkey Co., 194 U.S. 324, 336-37 (1904) ("[Orders imposing punishment] are triable only by the court against whose authority the contempts are charged. No jury passes upon the facts; no other court inquires into the charge."); Sullivan v. United States, 4 F.2d 100, 101 (8th Cir. 1925); Dunham v. United States, 239 F. 376, 378-79 (5th Cir. 1923); Merchants' Stock & Grain Co. v. Board of Trade of City of Chicago, 201 F. 20, 27 (8th Cir. 1912).

34. This argument logically demands exclusive venue for obstruction of justice in the district of the target proceeding. See United States v. Elliott, 446 F. Supp. 209, 210 (W.D. Va. 1978) (denying motion to transfer to district where defendant acted) ("To hold otherwise would deprive this court of its traditional power to deal with contempts of its authority."). Other courts, however, have not stated whether the district of the target proceeding is the only proper venue. See note 20 supra.

35. Although there may be some analytical value in calling an obstruction of justice a
that Congress intentionally distinguished obstruction of justice from contempt, with its summary proceedings. Unlike contempt, obstructive conduct committed outside the presence of the court does not give rise to the urgency that justifies suspension of procedural safeguards. Furthermore, this Section will argue, nothing in history or principle requires that the venue safeguard be treated differently from other procedural rights that are denied to those charged with contempt, but secured to obstruction of justice defendants. 36

Legislative history shows Congress' desire to place limits on the contempt power. Although the contempt power of the federal courts was first established by the Judiciary Act of 1789, the Act did not define contempt. The movement for a statutory limitation of the contempt power arose out of the controversy surrounding Judge James H. Peck. In 1830, Peck was impeached by the House of Representatives and tried by the Senate for abusing the contempt power. 38 The extensive arguments in the Peck trial repeatedly emphasized that the contempt power should be limited to that necessary for the preservation of judicial functions. 39

36. In addition to indictment by grand jury, the obstruction defendant is entitled to trial by jury. Nye v. United States, 313 U.S. 33, 49 (1941); cf. Bloom v. Illinois, 391 U.S. 194 (1968) (only petty contempts may be tried without honoring demand for trial by jury). Where contempt occurs in the actual presence of the court, it may be punished without notice and hearing. FED. R. CRIM. P. 42(a). A contempt conviction for conduct that is also criminal carries no double jeopardy protection. See In re Debs, 158 U.S. 564, 594 (1895); 3 C. WRIGHT, supra note 3, § 706.

37. Ch. 20, § 17, 1 Stat. 73, 83 (1789). Moreover, such power is arguably inherent in the courts and exists independently of any statute. See Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227-28 (1821).

38. Peck, a District Court judge in Missouri, held Luke Edward Lawless in contempt for publishing a letter critical of one of the judge's opinions, claiming that the letter tended to "bring odium on the court, and to impair the confidence of the public in the purity of its decisions." A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 2 (Boston 1833 & reprint 1972). "The proceeding was a travesty on justice, as the case was conspicuous for the bias, rudeness and anger shown by the judge." C. THOMAS, PROBLEMS OF CONTEMPT OF COURT 26 (1934). In 1830, the House of Representatives voted to impeach Peck. After a six-week trial, which included nine days of argument on the law of contempt, the Senate acquitted Peck by a 21-21 vote. The result has variously been explained "by sympathy for the age and infirmities of the judge, by party and intraparty considerations, and by the hostility between President Jackson and House Manager Buchanan." C. THOMAS, supra at 27 (footnotes omitted). On the day after the acquittal, February 1, 1831, the House passed a resolution directing the Committee on the Judiciary "to inquire into the expediency of defining by statute all offences which may be punished as contempts of the courts of the United States." 7 CONG. DEB. 560-61 (1831).

39. See, e.g., A. STANSBURY, supra note 38, at 87 (argument of Rep. M'Duffle): Necessity . . . must also be the plea of the federal judges, by which only they can justify the exercise of the power of punishing for contempts . . . . It must be a case of actual
essentially an emergency power, necessary only "to punish all direct outrages upon the court; to prevent the Judge from being driven from the bench, and the jury from being driven from their box." 40

Of paramount concern to Congress was the violation of procedural safeguards, 41 including the venue protections, 42 that use of the contempt power entails.

A few weeks after the Peck trial ended, Congress, without further recorded debate, passed a law clarifying the law of contempt. 43 The new Act limited summary punishments to misbehavior in the presence of the court "or so near thereto" 44 as to obstruct the administration of justice, misbehavior of officers of the court, and disobedience of court orders. Section 2 of the Act provided for prosecution by indictment of persons who "corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any Court of the United States." 45 This distinction suggests that Congress had determined that the obstuctive conduct defined in section 2 did not create an emergency sufficient to justify use of summary contempt power. Far from codifying the power of the court to punish all contempts of its authority wherever they occur, the Act substantially restricted contempt powers that the courts had previously exercised. 46


41. A. Stansbury, supra note 38, at 445-46 (argument of Rep. Buchanan) (noting that Peck's contempt proceedings against Lawless denied him trial by jury, an impartial judge, indictment by a grand jury, and protection against self-incrimination and double jeopardy).
42. See A. Stansbury, supra note 38, at 89 (argument of Rep. M'Duffie) (Contempt permits punishment "in utter disregard of all the constitutional guarantees, which secure to every citizen the right 'to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed.'") (quoting U.S. Const. amend. VI).
46. See In re Michael, 326 U.S. 224, 227 (1945). The presence of § 2 in the 1831 Act does not reflect a congressional purpose to give courts the power to punish all contempts of their authority, regardless of where they take place. Prior to 1831 the acts proscribed by § 2 were punishable by summary contempt procedures. See note 29 supra and accompanying text.
Section 2 afforded the procedural safeguards of indictment and trial by jury to defendants charged with obstructing justice. Venue was not specifically mentioned, and one could argue that Congress intended to treat venue for obstruction of justice like venue for contempt, making the offended tribunal the proper place for subsequent prosecution.\textsuperscript{47} The Peck debates, however, show a specific concern for venue limitations along with the other procedural safeguards.\textsuperscript{48} There is no reason to assume that Congress intended obstruction of justice to be subject to all normal procedural safeguards except venue limitations. Moreover, in the Peck trial, Congress identified necessity as the only basis for abridging such procedural protection.\textsuperscript{49} There is no necessity that the required indictment and prosecution be brought in the district of the target proceeding; the offended court’s integrity could be vindicated by charges brought by any U.S. Attorney in any district court.\textsuperscript{50}

Contempt of court and obstruction of justice punish many of the same forms of conduct, and many substantive concepts relating to one can be applied to the other.\textsuperscript{51} But, as the history set forth here was added by the Senate as an eleventh-hour amendment to insure that such misbehavior would not go unpunished. Nelles & King, Contempt by Publication, 28 COLUM. L. REV. 525, 530-31 & n.24 (1928). “It was clearly undesirable that such misdeeds be left altogether immune from punishment in the Federal Courts. There was no necessity, or even strong expediency, that they be dealt with summarily.” \textit{Id.} at 531. Section 2 was, it seems, a stopgap measure. Its presence in the Act cannot be construed as evidence of any overall congressional design regarding contempts. Indeed, when systematic codification of the federal statutes was undertaken, § I of the 1831 Act was incorporated into the Judicial Code, ch. 231, § 268, 36 Stat. 1087, 1163 (1911), while § 2, as amended, was moved to the Criminal Code, ch. 321, § 135, 35 Stat. 1088, 1113 (1909). Congress evidently intended that contempts committed outside the presence of the court should be prosecuted only under the safeguards of criminal procedure.

Nevertheless, in United States v. O'Donnell, 510 F.2d 1190 (6th Cir.), cert. denied, 421 U.S. 1001 (1975), the Court of Appeals concluded that obstruction of justice should be treated as a constructive contempt for venue purposes. In reaching this decision, the court relied on Nye v. United States, 313 U.S. 33 (1941). In Nye, according to the Sixth Circuit, the Supreme Court “strongly implied, if it did not hold, that such contempts are punishable by the court whose authority is challenged regardless of where the contemptuous acts may have occurred.” 510 F.2d at 1195. This reading ignores the Supreme Court's explicit holding. The Court reversed the contempt convictions of two men charged with inducing “through the use of liquor and persuasion,” a feeble-minded plaintiff to drop a civil suit. 313 U.S. at 39. Noting that the alleged acts occurred over 100 miles from the court where the civil action was pending, the Court ruled they were not “so near thereto as to obstruct the administration of justice” and could not be punished as contempt. 313 U.S. at 48-52. The Court went on to say: “If petitioners can be punished for their misconduct, it must be under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions.” 313 U.S. at 53 (emphasis added).

\textsuperscript{47} See note 32 supra.

\textsuperscript{48} See note 42 supra and accompanying text.

\textsuperscript{49} See notes 39-40 supra and accompanying text.

\textsuperscript{50} See United States v. Johnson, 323 U.S. 273, 278 (1944) (“Prosecutions of federal crimes are under the general supervision of the Attorney General of the United States; United States Attorneys do not exercise autonomous authority.”).

shows, a perceived need for different procedural rules motivated Congress to distinguish between the two offenses. The substantive parallels between obstruction of justice and contempt of court do not provide a basis for blurring this congressionally imposed procedural distinction.52

B. **Statutory Language: The “Focus” of Section 1503**

The language of the modern obstruction of justice statute, section 1503 of title 18, has been the basis for two distinct, but related, arguments in favor of laying venue in the district of the target proceeding. Both arguments contend that the focus of section 1503 is not the act of obstruction, but rather its intended effect on the administration of justice. Thus, the crime is “committed” where the offender intends that justice be obstructed, the district of the target proceeding.54

The first argument, advanced by the Sixth Circuit in *United States v. O’Donnell*,55 proceeds from the supposition that section 1503 is very general as to the type of acts it condemns, although it is quite specific as to the nature of the intended effect upon the administration of justice.56 This observation suggests that the “focus” of the statute is not on the acts done, but instead “is upon the intended effect of any corrupt conduct of whatever description upon the administration of justice by the courts;”57 thus, the crime is committed where its effect is to occur, the district in which the target proceedings are pending.

It follows from this reasoning that obstruction of justice can be distinguished, for example, from the crime of bribing public officials,58 where venue lies in the district where the bribe is passed, not

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> It seems to me that the purpose of § 2 of the Act of March 2, 1831 . . . was to remove the courts’ power to punish for constructive contempts and to require that such proceedings be conducted by the normal process of indictment, trial and conviction, including normal rules with respect to venue. Thus I cannot conclude that the offended court should be the preferred forum for prosecution of acts occurring elsewhere.

53. *See* note 14 *supra*.

54. The Supreme Court set the stage for this argument in *Travis v. United States*, 364 U.S. 631 (1961), where it held that venue for filing a false “non-communist” affidavit with the NLRB lies only in Washington, D.C. Because the statute did not require that a statement be filed, the Court could not construe the making and mailing of a false statement as part of the offense. 364 U.S. at 635. “[O]nly the single act of having a false statement at a specified place is penalized.” 364 U.S. at 637. The Court apparently decided that the “focus” of the statute in question was the effect of “having” a false statement before the NLRB, not the act of making such a statement.


56. 510 F.2d at 1194; *see also* United States v. Barham, 666 F.2d 521, 523-24 (11th Cir.), *cert. denied*, 456 U.S. 947 (1982).

57. *O’Donnell*, 510 F.2d at 1194.

58. 18 U.S.C. § 201(b) (1976) provides:
where the inducement is intended to have an effect on the official's public duties.\textsuperscript{59} Under the bribery statute, it is argued, the "essence" of the offense is "the actual giving or transfer of money or other thing of value," not the effect that the bribe may have.\textsuperscript{60} The apparent distinction is that although the bribery statute condemns a carefully defined act with little regard to its intended effect, the obstruction statute defines an illegal purpose and proscribes any means of carrying it out.

But this distinction between bribery and obstruction of justice is not convincing for three reasons. First, the obstruction statute specifically prohibits the use of "threats or force or... any threatening letter or communication" to interfere with pending judicial proceedings and therefore is not as general as to the type of acts it condemns as the \textit{O'Donnell} argument claims.\textsuperscript{61} Second, the bribery statute, like section 1503, also "focuses" on the intended effect of the defendant's acts.\textsuperscript{62} Third, some conduct punishable by the bribery statute may also constitute an obstruction of justice.\textsuperscript{63} Adherence to \textit{O'Donnell}'s reasoning would cause venue in such cases to turn upon

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\textsuperscript{60} \textit{O'Donnell}, 510 F.2d at 1194.

\textsuperscript{61} 18 U.S.C. § 1503 (1976); \textit{see note 14 supra.} The general term "corruptly" has added little else. \textit{See United States v. DeAlesandro}, 361 F.2d 694 (2d Cir. 1966) (includes bribery); United States v. Polakoff, 121 F.2d 333 (2d Cir. 1941) (includes fraudulent inducements); United States v. Cohen, 202 F. Supp. 587 (D. Conn. 1962) (includes perjury).

In addition, 18 U.S.C.A. § 1512 (West Supp. 1983), a well-drafted modern statute that supplements § 1503, \textit{see note 14 supra}, is helpful in interpreting the archaic language of § 1503. \textit{See United States v. Stewart}, 311 U.S. 60, 64 (1940) (acts of Congress that deal with the same subject matter are in pari materia, and the "later act can therefore be regarded as a legislative interpretation of the earlier act... in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting.") (citations omitted). In § 1512, Congress specified "intimidation, physical force, threats, misleading conduct, and harassment" as proscribed acts. The availability of this specific interpretative aid renders the type of acts condemned far less general than the \textit{O'Donnell} court suggests.

\textsuperscript{62} 18 U.S.C. § 201(b) (1976), \textit{see note 58 supra}, specifies three specific intents that may constitute the crime: intent to influence any official act, intent to influence a public official to participate in any fraud upon the United States, or intent to induce a public official to violate his lawful duties. Each of these intent elements "focuses" on the anticipated effect of the bribe.

\textsuperscript{63} "The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title." 18 U.S.C. § 201(k) (1976).
the crime charged, and would complicate the venue problem when
the government charges both bribery and obstruction of justice.

If, in fact, section 1503 does emphasize the effect of the obstruc-
tive conduct instead of the act itself, it does not necessarily follow
that venue must lie in the district of the intended effect. In the stat­
ute defining murder, for example, Congress plainly focused on the
intended effect of the fatal act over the means used to carry out the
offense.64 Congress nevertheless determined that venue should lie
"where the injury was inflicted, or the poison administered or other
means employed which caused the death, without regard to the place
where the death occurs."65 It is not clear whether section 1503 does
focus on intended effect over acts. Even if it does, Congress’ han­
dling of the statute defining murder suggests that the venue implica­
tions of that focus are uncertain.

The second argument based on the language of section 1503 was
advanced by the First Circuit in United States v. Tedesco,66 and uses
the venerable technique of examining the "key verbs" of a criminal
statute to determine its locus delecti.67 The final clause of section
1503 applies to anyone who corruptly or by threats of force "influ­
ences, obstructs, or impedes, or endeavors to influence, obstruct, or
impede, the due administration of justice."68 The court in Tedesco
relied on these words in concluding that "Congress was concerned
not with the place where the threats or offers of money or other ben­
efits were made, but with the effect such threats or bribes might have
on a witness testifying in a particular proceeding."69

The obstruction of justice statute as a whole, however, is so am-

64. "Murder is the the unlawful killing of a human being with malice aforethought." 18

65. 18 U.S.C. § 3236 (1976). The O'Connell court attempted to distinguish both murder
and bribery from obstruction of justice on the basis that they do not involve an intent to cause
a certain result at a specified location. 510 F.2d at 1194. ("The intent to influence the conduct
of a public official in no way depends upon where the public official may be at the time. . .
As far as murder is concerned, it is of no significance where the intended result is actually
accomplished . . . .). Under § 1503, the court said, "the affect of corrupt conduct is always
intended to occur only at one place; viz., the place or district in which the court sits or the
proceeding is pending." 510 F.2d at 1194 (emphasis in original). This distinction is not per­
suasive. Though a specific intent to obstruct a judicial proceeding is an element of the § 1503
offense, see United States v. Ryan, 455 F.2d 728, 734 (9th Cir. 1971), there is no requirement
that the defendant know where that target proceeding is pending. Surely a change in the venue
of the target proceeding will not exculpate a defendant who intended to obstruct justice at the
original location.


67. 635 F.2d at 905; see also United States v. Kibler, 667 F.2d 452, 454 (4th Cir.), cert.
District Court, 12 VA. L. REV. 287, 289 (1926).

68. See note 14 supra.

69. 635 F.2d at 905; see United States v. Kibler, 667 F.2d at 454;
We agree with Tedesco that analysis of the verbs defining the offense establishes that the
situs of the crime is the place of the judicial proceeding that the accused sought to thwart.
The threats, force, threatening letters, or communication mentioned in the statute are
biguous that it is highly unlikely that Congress was attempting to specify proper venue when it chose the words “influence, obstruct, or impede.” Other clauses, applying to anyone who “endeavors to influence, intimidate, or impede any grand or petit juror” or who “injures any such grand or petit juror in his person or property,” define the offense in terms of the offender’s act and its immediate effect, not its effect on the target proceeding. Since some obstructive conduct can be described under any of these clauses, an analysis of the “key verbs” gives no helpful indication of congressional intent.

Thus, despite the reasoning in O'Donnell and Tedesco, section 1503 offers no indication of congressional intent as to venue. Because Congress frequently appends explicit venue provisions to criminal statutes, the lack of such a provision in section 1503 suggests that Congress has simply never considered the venue problem. Moreover, the nuances of section 1503 have been lost to age and archaic draftsmanship. Thus, the formalistic approach has failed to produce a convincing rationale for laying venue in either possible district.

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nouns which merely provide a description of the means employed by the accused to achieve an illegal end.

70. See note 14 supra.

The version of § 1512 reported by the Senate Judiciary Committee contained a clause very similar to the final clause of § 1503. See S. 2420, 97th Cong., 2d Sess. § 201(a) (1982) (“Whoever . . . with intent corruptly, or by threats of force, or by any threatening letter or communication, influences, obstructs, impedes . . . enforcement and prosecution of federal law . . . .”). Significantly, this language was omitted from the final version. As a result, § 1512 contains only verbs which define the offense in terms of the prohibited act and its immediate impact on the witness, not on the administration of justice as such.


72. Tedesco and Kibler failed to heed the warning given long ago by Professor Dobie, a proponent of the “key verb” technique:

When, as is so often the case, the statute enumerates several such verbs, only scrupulous, even meticulous, nicety in exact quotation can prevent these statutes, as well as the decisions under them, from proving a snare and a delusion to the unwary.

Dobie, supra note 67, at 289.

73. When the Federal Rules of Criminal Procedure were adopted, the Advisory Committee listed more than 30 special statutory venue provisions. FED. R. CRIM. P. 18 advisory committee note, reprinted in 3A C. WRIGHT, supra note 3, at 502-03 app.. Many of these provisions are still in effect. See, e.g., 15 U.S.C. § 78aa (regulation of securities exchanges); 18 U.S.C. § 659 (larceny of interstate or foreign shipments); 18 U.S.C. § 2421 (white slave traffic); 28 U.S.C. § 3235 (capital cases); 28 U.S.C. § 3238 (offenses on the high seas).

74. [T]he difficulties of so-called interpretation arise when the Legislature had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.

J. GRAY, THE NATURE AND SOURCES OF THE LAW 165 (1909). Though the question has yet to arise, it appears that § 1512 will require judges to make similar interpolations.
II. CONSTITUTIONAL VENUE POLICY

Since the obstruction of justice statute does not indicate either implicitly or explicitly where venue should lie, the choice of venue should be governed by policy considerations derived from the venue limits set forth in the Constitution. The Supreme Court has noted the importance of respecting, wherever possible, "the underlying spirit of the constitutional concern for trial in the vicinage." 75 Unfortunately, the Court has not voiced a consistent understanding of that policy. 76 This Part first examines the historical evidence, concluding that the Framers limited venue to the district of the crime in order to promote thorough factfinding and that constitutional venue limitations should be applied flexibly toward that end. The Note then demonstrates that these policy goals are relevant in contemporary obstruction of justice cases, and concludes that the constitutional approach mandates setting venue in the district where the acts were committed.

A. Historical Background of Constitutional Venue Policy 77

The constitutional venue provisions did not depart significantly from the common law, which laid venue for criminal prosecutions in the county where the crime was committed. 78 Although this rule originated when jurors decided cases on the basis of their personal

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76. See note 9 supra and accompanying text.
77. The actual events that precipitated the inclusion of venue limitations in the Constitution are detailed elsewhere. See Blume, supra note 3, at 59-67; Kershen, supra note 9, at 805-08; Comment, supra note 4, at 404-14. The impetus seems to have come from Parliament's 1769 revival of a statute of Henry VIII providing for trial in England of treasons committed "out of this realm of England." An Act for the Trial of Treasons Committed Out of the King's Dominions, 1543, 35 Hen. 8, ch.2. The Declaration of Independence decried the King for "transporting us beyond Seas to be tried for pretended offenses." The Declaration of Independence para. 21 (U.S. 1776), reprinted in 1 DOCUMENTS OF AMERICAN HISTORY 101 (H. Commager 5th ed. 1949).
78. See 1 J. BISHOP, NEW CRIMINAL PROCEDURE § 49 (2d ed. 1913); Blume, supra note 3, at 60-61. This approach continues to be the general rule in state criminal prosecutions. See Y. Kamisar, W. LaFave & J. Israel, MODERN CRIMINAL PROCEDURE 1068 (5th ed. 1980).

Like the present venue test, the common law rule was subjected to excessively literal application by the courts. The doctrine emerged that a crime could be prosecuted only in a venue in which all the facts necessary to establish the offense occurred. See 1 T. Starkie, A TREATISE ON CRIMINAL PLEADING 1 (2d ed. 1822). The impracticality of this rule, which meant that some crimes were not subject to prosecution anywhere, id. at 2, was gradually ameliorated by special venue provisions in various criminal statutes. See ARCHBOLD'S SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES 17-25 (4th Am. ed. 1840) [hereinafter cited as ARCHBOLD]. In homicide cases in which the mortal injury and death occurred in different counties, a special statute laid venue where death occurred. An Act for Trial of Murder and Felonies Committed in Several Counties, 1548, 2 & 3 Edw. 6, ch. 24, § 2. A continuing offense statute provided that crimes begun in one county and completed in another could "be dealt with, inquired of, tried, determined and punished in any of the said Counties." An Act for Improving the Administration of Criminal Justice in England, 1826, 7 Geo. 4, ch. 64, § 12. Stephen said of these statutes: "The only general interest attaching to these excep-
knowledge of the participants and events, the reasons that account for the rule's continued vitality emerged in the late eighteenth century. At that point, the authorities began to defend local venue as a means of providing fairer trials and more accurate results:

A man charged with a crime, is, by the laws of England, usually tried in the county in which he is said to have committed the offence, that the circumstances of his crime may be more clearly examined, and that the knowledge which the jurors thereby receive of his general character, and of the credibility of the witnesses, might assist them in pronouncing, with a greater degree of certainty, upon his innocence or guilt.

Proponents of the common law rule were particularly conscious of the hardships the accused might face in marshalling his witnesses at a remote forum. Better factfinding justified the selection of venue; trial near the scene of the crime made it easier to investigate the facts and present evidence at trial.

An emphasis on factfinding was also the hallmark of the early state constitutional venue provisions. At the time of the Constitutional Convention of 1787, four of the thirteen state constitutions contained venue provisions. Three of these were expressly intended to protect the right to trial of the facts where they "happened." The New Hampshire Constitution, for example, provided:

In criminal prosecutions, the trial of facts in the vicinity where they happen, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offence ought to be tried in any other county than that in which it is committed.

The Massachusetts and Maryland provisions express the same venue policy that facts should be tried where the relevant evidence
would be readily accessible, that is, where the facts "happened." 87

The federal constitutional venue provisions were promulgated in this legal-historical context. Though these provisions were undoubtedly seen as having a number of virtues, 88 the preeminent concern, and the one most relevant today, 89 was facilitating factfinding by

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86. "[T]he trial of facts where they arise, is one of the greatest securities of the lives, liberties and estate of the people." MD. CONST. of 1776, Declaration of Rights, art. XVIII.

87. One commentator has suggested that these provisions were actually intended to insure that the facts would be determined by local jurors having knowledge relevant to the crime. See Kershen, supra note 9, at 836 n.121. However, this rationale was not followed in one of the few early cases construing these provisions. In Commonwealth v. Parker, 19 Mass. (2 Pick.) 549 (1824), the court held that it was permissible under the Massachusetts constitution to bring a murder prosecution in the county in which the victim died, rather than where the lethal blow was inflicted, because the death and the circumstances of it, the connexion between that and the supposed cause, the manner in which the party has languished, the supervenience of some disease disconnected from the antecedent injury, the dying declarations of the deceased, and many other circumstances, may be important facts in the trial, and it may happen, and often does, that the mere giving the stroke was the least difficult fact to be settled.

19 Mass. at 558. The Parker court found that the testimony of the doctor who examined the victim and of those who heard his dying words were crucial to the case. The opinion emphasized the location of evidence, not the jurors' familiarity with the circumstances and dramatis personae of the crime, despite the defense argument to the contrary. 19 Mass. at 551.

88. The adoption of the Sixth Amendment's district-of-the-crime test was prompted by the conviction that Article III did not provide a sufficiently narrow definition of the vicinage from which jurors were to be drawn. See F. Heller, supra note 79, at 25-27; Kershen, supra note 9, at 816-28.

Although the Supreme Court has said that there is no constitutional right to trial in the defendant's home district, see, e.g., Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 245 (1964); In re Palliser, 136 U.S. 257, 265 (1890), it has indicated that "the underlying spirit of the constitutional concern for trial in the vicinage" demands that the district of the crime be construed to be, if possible, the defendant's home district. United States v. Johnson, 323 U.S. 273, 276 (1944); see also 2 C. Wright, supra note 3, § 301, at 193-94. This view places a premium on formalistic statutory construction despite its purported attention to the "underlying spirit" of the venue provisions. Venue limitations apparently were viewed as a means of protecting defendants from the rigors and discomforts of trial far from their homes and families. See 16 PARLIAMENTARY HISTORY OF ENGLAND 490 (1813); Blume, supra note 3, at 64-66; Kersh, supra note 9, at 808-09. In the late 18th century, the defendant's place of residence and the place of the crime would ordinarily lie within the same venue. See 8A MOORE'S FEDERAL PRACTICE, supra note 5, § 18.02, at 18-14; 2 C. Wright, supra note 3, § 301, at 191; Kersh, supra note 4, at 37. Yet the Constitution explicitly chose the situs of the crime as the place for trial when the two did not coincide. This choice suggests that the primary concern was the accessibility of evidence, the only advantage that the place of commission holds over the accused's place of residence. See United States v. Aronoff, 463 F. Supp. 454, 457 (S.D.N.Y. 1978) ("[T]he historical principles underlying venue policy are fairness and justice generally; the defendant's home district is relevant only as far as considerations of fairness and justice demand."); 2 C. Wright, supra note 3, § 301, at 191; Kersh, supra note 9, at 810-11.

89. See notes 105-11 infra and accompanying text. At the present time, when complete ignorance of the circumstances surrounding a case is the goal of the jury selection process, trial by jury "of the vicinage" is a vestigial concept. See F. Heller, supra note 79, at 95.

Moreover, the desire to spare the accused the rigors of trial far from home is no longer a compelling justification. First, improvements in transportation and communications have alleviated the rigors of travel and the isolation of remote courts typical of the 18th century. Second, the district-of-the-crime test will not even serve this policy goal in many cases, since people today are far more likely to commit crimes outside their district of residence than they once were.
holding trial near where the relevant evidence could be found.90

Though the constitutional district-of-the-crime test is phrased as a positive command, the Framers must have been aware that problems would arise if it were applied too literally,91 even if they could not have imagined the extent to which those problems would grow.92 Historically, the venue limitations imposed by the common law and state constitutions were not literal and absolute. By the late eighteenth century, Parliament had begun to pass laws providing for broader venue possibilities than a literal approach to the county-of-the-crime test would permit,93 treating the common law approach as a general rule of thumb that would usually, but not always, point to the "proper" venue.94 The state provisions are also notable for their flexibility. They cited the common law test in laudatory95 or admonitory96 terms, offering merely "a caution to all future legislators to regard this principle."97 This history suggests that, in venue questions, the constitutional test should not be employed rigidly, but rather in the manner necessary to facilitate factfinding.

B. Application of Constitutional Venue Policy to Obstruction of Justice

The history of constitutional venue limitations suggests that venue should be laid where evidence is most accessible. In obstruction of justice cases, courts must choose between the district where the obstructive acts took place and the district in which the target proceedings were being conducted. This Section argues that the constitutional policy of enhancing factfinding can best be served by laying venue where the acts took place.

90. See Travis v. United States, 364 U.S. 631, 640 (1961) (Harlan, J., dissenting) ("basic policy" best served by trial where the "witnesses and relevant circumstances surrounding the contested issues" will be found); United States v. Nadolny, 601 F.2d 940, 943 (7th Cir. 1979) ("Venue traditionally has been based on notions of fair, fast and efficient administration of trials. When venue is laid in the proper district . . . witnesses are more readily available, and the operative facts and situs of the incident are closer at hand.").

91. See note 78 supra; Kershen, supra note 4, at 37 n.307.

92. See, e.g., cases cited in note 7 supra.

93. For example, venue for extortion, resisting or assaulting excise officers, and inciting soldiers or sailors to mutiny could be laid in any county. ARCHBOLD, supra note 78, at 18-19.

94. Cf. J. Stephen, supra note 78, at 278: [A]ll courts otherwise competent to try an offense should be competent to try it irrespectively of the place where it was committed, the place of trial being determined by the convenience of the court, the witnesses, and the person accused. Of course, as a general rule, the county where the offense was committed would be the most convenient place for the purpose.

95. The Massachusetts and Maryland provisions do not incorporate the common law test as such, but rather only praise in general terms trial "where" or "in the vicinity where" the facts occurred. See notes 85-86 supra and accompanying text.

96. The New Hampshire provision states that "no crime or offense ought to be tried" other than where it was committed. See note 84 supra and accompanying text.

Venue should lie exclusively in the district in which the defendant acted, where the "witnesses and relevant circumstances surrounding the contested issues" will probably be found. The indictments in obstruction of justice cases allege simple acts — a beating, a shooting, an offer of a bribe or other inducement — that took place at specified times and places; most available evidence will relate to these acts. The only fact that occurs in the district of the target proceeding is the fact of the affected proceeding, which is unlikely to be a contested issue, and in any event can be proven by documentary evidence easily transmitted to the site of the obstruction trial.

One could argue that improvements in transportation and communication would insure the availability of evidence and witnesses even if venue were laid in the district of the target proceedings, and that the need for careful application of the historical concern underlying the constitutional safeguards has therefore been eliminated. In reality, however, geography is still a concern in investigating and trying obstruction of justice cases. First, although compulsory process in federal criminal cases reaches the entire United States, an indigent defendant can secure a subpoena for an absent witness only by showing that the witness is "necessary to an adequate defense," a revelation that may expose defense strategy. Second, attorneys

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99. See United States v. Nadolny, 601 F.2d 940 (7th Cir. 1979) (FBI informant beaten by fellow Teamsters at place of work).
103. The pendency of a target proceeding in the federal courts is a fact that the government must prove beyond a reasonable doubt. See Cotton v. United States, 409 F.2d 1049, 1054 (10th Cir. 1969), cert. denied, 396 U.S. 1016 (1970).
104. A similar argument was rejected with elaboration in United States v. Passodelis, 615 F.2d 975, 977 (3d Cir. 1980) ("Though our nation has changed in ways which it is difficult to imagine that the Framers of the Constitution could have foreseen, the rights of criminal defendants which they sought to protect in the venue provisions of the Constitution are neither outdated nor outmoded.").
107. "The practical result [of Fed. R. Crim. P. 17(b)] is that the indigent defendant gives considerable discovery to the government before trial . . . ." 2 L. Orfield, Criminal Procedure Under the Federal Rules § 17.64 (1966). The rule does permit ex parte applica-
commonly interview potential witnesses and gather evidence throughout a trial, and unexpected events may require calling a witness on short notice — things that cannot be done easily if the witnesses and evidence are located far from the district of the target proceeding.\(^{108}\) Third, although some physical evidence can be easily and cheaply transferred to the place of trial, the scene of the obstructive acts cannot be. A view, cumbersome even when venue is laid near the scene of the acts, can be entirely impracticable if trial is held near the target proceedings.\(^{109}\) Even if a view by the jury is not contemplated, the defense attorney may be deprived of a personal visit to the scene, which often provides invaluable information for impeaching witnesses.\(^{110}\) Fixing venue in a district other than the one in which the contested acts occurred greatly hampers these ordinary practices.\(^{111}\)

In some cases, application of the constitutional policy will be more difficult. An obstruction of justice could involve a series of acts in or communications among a number of different districts. In these cases the choice should be among districts in which acts constituting the offense took place.\(^{112}\) Clearly, the district of the target proceeding should not be chosen. Even though it satisfies the minimal standards of contact with the crime and is not expressly prohibited by any statutory provision, laying venue in that district ignores


\(^{109}\) See United States v. Nadolny, 601 F.2d 940, 943 n.2 (7th Cir. 1979) ("Carrying the Government’s argument to its extreme, one could visualize a § 1510 criminal trial in West Virginia (situs of an investigation) when the beating of an informant in that investigation took place in Anchorage, Alaska.").

\(^{110}\) See A. Amsterdam, supra note 108, \(\S\) 111.

\(^{111}\) Even if geographical hurdles can be overcome, the waste of defense, prosecution, and judicial resources is difficult to justify in a prosecutorial system with 94 "branch offices." See Office of the Federal Register, The United States Government Manual 1982/83, at 325-26 (1982).

Moreover, the continued importance of laying venue where trial is convenient is recognized in the 1966 amendment to Rule 21(b) providing for transfer to any district "for the convenience of parties and witnesses, and in the interest of justice," without regard for the district of the crime. See Fed. R. Crim. P. 21 advisory committee note; cf. Barber, supra note 12, at 50-51 (arguing for rule equivalent to that of 1966 amendment prior to its adoption). The advisory committee approved the criteria for transfer enumerated in Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240 (1964), which included "location of possible witnesses," "location of events likely to be in issue," "location of documents and records likely to be involved," and "expense to the parties." 376 U.S. at 244. Platt was decided under the original version of Rule 21(b), which permitted transfer only among districts in which some part of the crime was "committed."

\(^{112}\) In such cases, the continuing offense statute, see note 1 supra, would be applicable.
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the principal concern underlying constitutional venue limitations — that trial should be held near where the relevant evidence can be found.

The analysis that this Note applies to obstruction of justice cases may be applied to other crimes for which venue has not been specifically determined by statute. Modern crimes and modern means of committing crimes have complicated the operation of the district-of-the-crime test. Literal use of the venue test, by painstakingly examining the words that define a crime to determine where it is “committed,” has led to unpredictable results and considerable expenditure of judicial energy. Where statutory construction fails to yield guidance, courts should recognize the constitutional policy to be served, and should therefore lay venue based on a pragmatic evaluation of where the factfinding process can be conducted most effectively.

CONCLUSION

Obstruction of justice cases should be tried where the defendant allegedly acted, not where the target proceedings were held. Formalistic statutory construction cannot resolve the venue problem; both the legislative history and the language of the statute are inconclusive. Deference to constitutional venue limitations, however, dictates that venue should be laid where witnesses and evidence are most available; because factfinding in obstruction of justice cases will generally be more effective in the district where the obstructive acts took place, venue is properly laid in that district.

113. By the time the district-of-the-crime test was framed, it was already apparent that attempts to apply it literally would lead to difficulty. See notes 78, 93-94 supra and accompanying text. Today this approach leads to inconsistent results bearing no relation to any conception of constitutional policy. See, e.g., cases cited in notes 7, 12 & 13 supra.

With common law and early statutory crimes it made sense to speak of “trial of facts in the vicinity where they happen” because the disputed facts would ordinarily concern whether the defendant did some proscribed act, with the requisite intent and without justification. The facts of intent, see, e.g., United States v. Haldeman, 559 F.2d 31, 115-16 (D.C. Cir. 1976) (en banc), cert. denied, 431 U.S. 933 (1977); see generally W. LaFave & A. Scott, supra note 6, §§ 28, at 202-03, and justifications, see generally id. at §§ 47-57, could normally be inferred from the circumstances surrounding the act. The contested facts, then, form a nice little bundle with a definite locus. The crucial facts in a modern criminal trial may be a company’s share of a product market, see, e.g., United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377 (1956), the going tariff on goods shipped between two points on a given date, see, e.g., Armour Packing Co. v. United States, 209 U.S. 56 (1908), or the conformity of dentures to federal law, see, e.g., United States v. Johnson, 323 U.S. 273 (1944). It is pointless to think in terms of where these facts “happen.” It does, however, make sense to think in terms of “where” the proof, or at least substantial proof, of these facts is located.

114. See, e.g., cases cited in notes 7, 12 & 13 supra.

115. “In a criminal case, the question of venue is not merely a legal technicality but a significant matter of public policy.” United States v. Black Cloud, 590 F.2d 270, 273 (8th Cir. 1979).