NOTE

VENUE ABOVE THE CLOUDS: PROSECUTING IN-FLIGHT CRIMES BY CREATING A "HIGH SKIES" LAW

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INTRODUCTION

Occurring high in the skies above, crimes committed aboard aircraft capture our imagination. These crimes serve as ingredients for Hollywood spectacle, from hijackings,[1] to poison darts,[2] to smuggled crates full of venomous snakes.[3] But what

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1 *See, e.g.*, AIR FORCE ONE (Beacon Pictures 1997) (presenting an example of a Hollywood film centered around a plane hijacking).

2 *See* NON-STOP (Studio Canal 2014).

3 *See* SNAKES ON A PLANE (Mutual Film Company 2006).

happens after the action ends? Behind the scenes, prosecution of in-flight crimes remains in a state of flux. The debate about how to determine a proper venue exemplifies this shifting legal landscape. Recently, statutory and constitutional questions of venue have divided courts and sewn uncertainty as to where defendants charged with in-flight crimes can face justice. This Note calls upon Congress to revise a well-known statute in order to fix the escalating problem of in-flight venue and bring this aspect of criminal procedure into the twenty-first century.

The federal circuits disagree about where to lay criminal venue for in-flight crimes. In 2019, the Ninth Circuit decided *United States v. Lozoya*, which involved the prosecution of an assault—an unremarkable passenger scuffle—committed during a commercial flight.[4] The defendant was charged in the district where the aircraft landed.[5] However, the *Lozoya* court found that the proper venue for prosecuting an assault was the district over which the aircraft was flying during the assault itself.[6] Key to the Ninth Circuit's holding was its characterization of the assault as an instantaneous offense rather than a "continuing offense" that spanned multiple districts.[7] As a point-in-time offense, the court found that the typical statute used for in-flight venue, 18 U.S.C. § 3237(a), was inapplicable, and therefore venue was improper in the district where the aircraft landed (long after the assault was over).[8] Consequently, the Ninth Circuit split with the Tenth and Eleventh Circuits,[9] which have interpreted § 3237(a) to allow prosecution of in-flight crimes in any district through which the aircraft moves during the flight.[10] This circuit split suggests that the intersection of in-flight crime and venue could benefit from academic analysis. Indeed, in light of a documented rise of in-flight crime—including disturbing accounts of sexual assault relayed in the courts and popular media—it is imperative to

4 920 F.3d 1231, 1233–34 (9th Cir. 2019).

5 *Id.* at 1238.

6 *Id.* at 1241.

7 *Id.* at 1239.

8 *Id.* at 1239–40.

9 As of the publication of this Note, the Ninth Circuit has granted review en banc of the panel's decision. *See* United States v. Lozoya, 944 F.3d 1229, 1229–30 (9th Cir. 2019). However, even if the en banc Ninth Circuit joins its sister circuits in their interpretation of § 3237(a), the thorny issues raised by the *Lozoya* panel would remain. As this Note argues, the solution is to look *beyond* § 3237(a) in order to resolve these interpretive problems.

10 *See* United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012); United States v. Breitweiser, 357 F.3d 1249, 1253–54 (11th Cir.), *cert. denied*, 541 U.S. 1091 (2004); United States v. McCulley, 673 F.2d 346, 350 (11th Cir. 1982).

answer this question of where to prosecute these point-in-time offenses.[11]

This Note will argue that the *Lozoya* court properly rejected § 3237(a) in light of constitutional venue safeguards. Despite the fact that venue depends upon the nature of the particular elements of the underlying crime,[12] § 3237(a) depends on broad interpretations of statutory terms like "continuous" or "interstate commerce" to reach in-flight crimes that often have little, if anything, to do with these legal concepts.[13] The *Lozoya* court, then, was correct to point out that courts have used § 3237(a) to create a legal fiction.

Nevertheless, while the *Lozoya* decision may be legally sound, its holding creates unacceptable venue obstacles for both prosecutors and defendants of in-flight crimes in the age of jetliners.[14] Constitutional limits on criminal venue require a defendant to be tried where the crime occurred. Without a sensible statute to provide venue for in-flight crimes, point-in-time offenses committed during flight could only be laid within a single district. The problem is that district—whose only connection to the crime is existing thirty thousand feet below where the defendant acts—could be highly inconvenient for all of the parties involved, and worse, could be impossible to determine. With the rise of everyday air travel, a new legislative solution is required: one that looks beyond conventional venue borders that exist on the ground.

Consequently, this Note proposes looking to an entirely different statute. A small amendment to 18 U.S.C. § 3238—better known as the "high seas" statute—would create a common-sense solution to this unsettled area of criminal procedure. Just as § 3238 delineates the "high seas" as a physical zone for venue, so too could it add a clause recognizing a "high skies" zone of national navigable airspace.[15] A "high skies" zone would streamline venue problems by guaranteeing a workable venue for any crime—both point-in-time and continuous—committed during flight. While this solution calls into question assumptions of vertical state territoriality, this Note argues that legal decision makers have long rejected such assumptions in practice when it comes to governing the high skies.

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11 *See infra* Part I.

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

13 *See infra* subpart III.B.

14 *See infra* subpart III.C.

15 18 U.S.C. § 3238 (2018).

This Note will proceed in four parts. Part I will explore the growth of in-flight crimes and explain why prosecuting this unique subset of crimes will become more imperative in the future. Part II will provide background on the constitutional limitations on venue, the policies that those limitations serve, and the current federal statutes that could apply to in-flight crimes. Part III will proceed to analyze the circuit split regarding § 3237(a) and the legal and policy problems of the holdings on both sides. Finally, Part IV will propose that Congress resolve that circuit split by rewriting § 3238 to include a high skies clause that provides venue for all in-flight crimes, as well as defend that clause against fairness or federalism critiques.

I
THE RISE OF IN-FLIGHT CRIME

Unlike determining venue, determining federal jurisdiction of crimes committed in national airspace is simple. Congress has long declared that "[t]he United States Government has exclusive sovereignty of airspace of the United States."[16] Some federal statutes target certain infamous types of air crime, such as aircraft piracy[17] or interference with flight personnel.[18] However, even the most everyday crimes become federal offenses if they are committed in-flight. Committing any crime aboard an aircraft "from the moment all external doors are closed" before takeoff until an external door opens again is a strictly federal, not state, offense.[19] This means that federal prosecutors have the responsibility to address in-flight crimes such as theft or physical disputes between passengers.[20]

The importance of tackling in-flight crime is only growing. While the public focuses on infrequent catastrophic crimes committed aboard aircraft, such as terrorism, the general rise of air travel requires prosecuting more commonplace crimes as well. In 2018 alone, over one billion passengers flew in the United States, with an average of 2,789,971 passengers flying

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16 49 U.S.C. § 40103(a)(1) (2018). More specifically, exclusive federal sovereignty is limited to navigable airspace. *See id.* § 40102(a)(32) (defining "navigable airspace"); Stephen J. Migala, *UAS: Understanding the Airspace of States*, 82 J. AIR L. & COM. 3, 34 (2017) (generalizing that "navigable airspace extends down to 1,000 feet above cities and congested areas, and, mostly, extends down to 500 feet elsewhere, as above persons or property. Below those altitudes lies non-navigable airspace—and that remainder is left to the states" (footnote omitted)).

17 49 U.S.C. § 46502.

18 *Id.* § 46504.

19 *Id.* § 46501(1).

20 *See id.* § 46506.

every day.[21] The growth of any such regular activity can create an associated risk of crime. In fact, while data on in-flight crimes are largely unavailable, at least one crime—sexual assault—reflects this concerning trend.[22]

In-flight sexual assault is a new frontier for prosecutors. Reports of in-flight sexual assaults in the United States rose from thirty-eight in 2014 to sixty-three in 2017, an increase of 66% over just three years.[23] Indeed, the actual number of such sexual assaults is likely much higher because many cases go unreported.[24] Long-distance passenger flights create a particularly high-risk environment for sexual assault given the relative anonymity and physical proximity of assailants and victims.[25] Another factor is passengers' widespread use of alcohol and drugs during air travel, where assailants "use alcohol to exploit their victims' vulnerability and to lower their own inhibitions."[26] Notably, flight attendants themselves face a greater chance of being sexually assaulted, with one recent survey reporting that 18% of flight attendant respondents had experienced physical sexual harassment while at work within the previous year alone.[27]

Authorities have responded to concerns about in-flight sexual assault in a number of ways. The Federal Bureau of Investigation has highlighted its focus on prosecuting these crimes. It has urged passengers and crew members to remain vigilant and "flag assaults immediately so law enforcement offi-

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21 FED. AVIATION ADMIN., AIR TRAFFIC BY THE NUMBERS 6 (2019), https://www.faa.gov/air_traffic/by_the_numbers/media/Air_Traffic_by_the_Numbers_2019.pdf [https://perma.cc/6C5W-963K].

22 *See* Javier De Diego, Omar Jimenez, Rene Marsh & Juana Summers, *FBI: Sexual Assaults on Flights Increasing 'at an Alarming Rate'*, CNN (June 20, 2018, 9:19 PM), https://www.cnn.com/2018/06/20/politics/fbi-airplane-sexual-assault/index.html [https://perma.cc/YGW7-T9BM] ("[I]t is difficult to determine just how frequently assaults happen on commercial flights because no federal regulatory agency tracks that data nationwide.").

23 *Id.*

24 *See id.*

25 *See* Nora Caplan-Bricker, *Flight Risk*, SLATE (Aug. 31, 2016, 5:58 AM), https://slate.com/human-interest/2016/08/flight-risk.html [https://perma.cc/S3TD-ZNGN].

26 Karen Schwartz, *Recent Incidents Put a New Focus on Sexual Assault on Airplanes*, N.Y. TIMES (Oct. 20, 2016), https://www.nytimes.com/2016/10/20/travel/recent-incidents-put-a-new-focus-on-sexual-assault-on-airplanes.html?action=click&module=RelatedCoverage&pgtype=article&region=footer [https://perma.cc/YHT4-FYEN] (noting also that, "Alcohol or drugs were identified as a factor in 23 percent of the 10,854 disruptive incidents" recorded worldwide by one trade association in 2015).

27 *#MeToo in the Air*, ASS'N FLIGHT ATTENDANTS-CWA, https://www.afacwa.org/metoo#a1 [https://perma.cc/73VT-Y6MK] (last visited July 26, 2020).

cials can effectively investigate and prosecute the cases."[28] And in late 2018, Congress created a National In-Flight Sexual Misconduct Task Force managed by the United States Department of Transportation to improve training, reporting, and data collection protocols.[29] Victims have also taken matters into their own hands. For example, at least one group of passengers has filed a civil class action complaint against an airline for lax enforcement against sexual assaults on its flights.[30] In light of the #MeToo movement, harrowing accounts of sexual assault have become a publicized safety issue during flight,[31] and federal prosecutions are likely to escalate.[32]

Despite a new awareness of in-flight crimes, federal courts have created an additional hurdle to addressing this national issue: they disagree on where such defendants must be prosecuted.[33] There is evidence that the underreporting problem is

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28 Lynh Bui, *Sexual Assaults on Airplanes Are Increasing, FBI Warns Summer Travelers*, WASH. POST (June 20, 2018, 3:53 PM), https://www.washingtonpost.com/local/public-safety/sexual-assaults-on-airplanes-are-increasing-fbi-warns-summer-travelers/2018/06/20/64d54598-73fd-11e8-b4b7-308400242c2e_story.html [https://perma.cc/F2QM-R22L].

29 *See National In-Flight Sexual Misconduct Task Force*, U.S. DEP'T TRANSP. (Mar. 16, 2020), https://www.transportation.gov/airconsumer/ACPAC/in-flight-sexual-misconduct-task-force [https://perma.cc/4BT5-SR6Y]; *but cf.* Justin Bachman, *Sexual Misconduct on Airlines Gets Its #MeToo Moment—or Does It?*, BLOOMBERG (May 10, 2019, 3:00 AM), https://www.bloomberg.com/news/articles/2019-05-10/sexual-misconduct-on-airlines-gets-its-metoo-moment-or-does-it [https://perma.cc/NAD8-D46H] ("Consumer advocates and flight attendants . . . accuse [Transportation Secretary Elaine] Chao of putting the task force squarely in the pocket of airline management.").

30 *See* Class Action Complaint, Ramsay v. Frontier, Inc., No. 1:19-cv-03544 (D. Colo. Dec. 16, 2019).

31 *See, e.g.*, Bachman, *supra* note 29 ("Last year, the #MeToo movement's exposure of ghastly workplace behavior finally reached the airlines."); Michael E. Miller, *'This Was 30 Minutes of Hell for this Young Lady': Unaccompanied Minor Groped on Flight*, WASH. POST (June 20, 2016, 6:33 AM), https://www.washingtonpost.com/news/morning-mix/wp/2016/06/20/this-was-30-minutes-of-hell-for-this-young-lady-unaccompanied-minor-groped-on-flight/ [https://perma.cc/9DHG-WBP8] ("This is going to affect the rest of [the victim's] life.").

32 *See, e.g.*, Press Release, Dept' of Justice, Maine Man Charged with Sexual Assault of Woman on Delta Flight (Mar. 14, 2018), https://www.justice.gov/usao-ndga/pr/maine-man-charged-sexual-assault-woman-delta-flight [https://perma.cc/4UEB-EPKN] (flight from Charlottesville to Atlanta); Press Release, Dep't of Justice, Orchard Park Man Pleads Guilty to Assaulting a Woman During a United Airlines Flight (June 6, 2018), https://www.justice.gov/usao-wdny/pr/orchard-park-man-pleads-guilty-assaulting-woman-during-united-airlines-flight [https://perma.cc/24GZ-DFB9] (flight from Newark to Buffalo); Press Release, Dep't of Justice, Passenger Charged with Criminal Sexual Misconduct for Actions During an American Airlines Flight Diverted to Tulsa (Nov. 8, 2019), https://www.justice.gov/usao-ndok/pr/passenger-charged-criminal-sexual-misconduct-actions-during-american-airlines-flight [https://perma.cc/P2JC-HMXZ] (flight from North Carolina to Utah).

33 *See infra* subparts III.A and III.B.

exacerbated by the feeling that investigation and prosecution is "a jurisdictional maze," where victims file complaints when they return home but quickly learn that local police lack authority to act.[34] If victims know that their allegations could be dismissed for lack of a proper venue, they might hesitate to come forward. Moreover, because air travel implicates every federal district across the United States, judicial uniformity and stability in this area is critical. In other words, it is vital that courts receive clear guidance about where in-flight defendants can face trial. With these stakes in mind, the statutes that govern venue must be fixed as soon as possible.

II
THE CRIMINAL VENUE FRAMEWORK

While it is often undisputed and thus overlooked, criminal venue is "not a mere technicality."[35] Instead, overlapping constitutional and statutory requirements require the prosecution to prove that the selected venue properly reflects "where the said Crimes shall have been committed" by the defendant.[36] In federal court, the prosecution must prove venue by a preponderance of the evidence, rather than beyond a reasonable doubt.[37] Yet in the modern era of air travel, satisfying this venue requirement has proved increasingly challenging.

A. Constitutional Requirements

The United States Constitution discusses criminal venue twice.[38] Article III, Section 2 requires that the "[t]rial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[39] The Sixth Amendment similarly requires that "[i]n all criminal prosecutions, the ac-

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34 Christopher Mele, *Sexual Assault on Flights: Experts Recommend Ways to Stay Safe and Combat It*, N.Y. TIMES (Mar. 23, 2019), https://www.nytimes.com/2019/03/23/travel/airline-flights-sexual-assault.html [https://perma.cc/VS8X-2248].

35 United States v. Kelly, 535 F.3d 1229, 1233 (10th Cir. 2008) (quoting United States v. Miller, 111 F.3d 747, 749 (10th Cir. 1997)).

36 U.S. CONST. art. III, § 2, cl. 3.

37 *See, e.g.*, United States v. Lewis, 797 F.2d 358, 366 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987) (stating that venue must be proven by a preponderance of the evidence); United States v. Powell, 498 F.2d 890, 891 (9th Cir.), *cert. denied*, 419 U.S. 866 (1974) (same); United States v. Luton, 486 F.2d 1021, 1023 (5th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974) (same).

38 *See* U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

39 *Id.* art. III, § 2, cl. 3.

cused 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 . . . ."[40] While the Sixth Amendment refers to the area from which the jury must be drawn, the Supreme Court has interpreted this "vicinage" clause to encompass the same right as described in Article III, Section 2: the defendant's right to be tried in the state and district where the crime was committed.[41] Importantly, however, the Constitution states that if a crime is committed outside of any state or district, Congress is free to designate venue by law.[42]

B. The Purposes of Limited Venue

These constitutional limits on criminal venue fulfill several purposes recognized since the nation's founding. The American colonists wrote the venue and vicinage clauses following their "vigorous reaction" to the British practice of extracting rebellious colonists for trial in faraway England.[43] Today, many of those same due process concerns remain. As the Supreme Court has stated, "[q]uestions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed."[44] Limiting venue to the district where the crime was committed provides "fairness and convenience to defendants, convenience to victims and witnesses, efficiency, and prevention of the strategic manufacturing of venue."[45] In short, linking venue to the elements of the crime is designed to ensure that the trial participants and the evidence all share a genuine connection to the place where the trial is held. By drawing the jury from that same district where the crime occurred, the Sixth Amendment's vicinage provision also promotes local participation in criminal adjudication, as the jury

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40 *Id.* amend. VI.

41 *See* Johnston v. United States, 351 U.S. 215, 220 (1956). The Federal Rules of Criminal Procedure mirror these constitutional requirements. *See* FED. R. CRIM. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.").

42 U.S. CONST. art. III, § 2, cl. 3.

43 United States v. Busic, 549 F.2d 252, 257 (2d Cir. 1977); *see also* Todd Lloyd, *Stretching Venue Beyond Constitutional Recognition*, 90 J. CRIM. L. & CRIMINOLOGY 951, 953 (2000) (noting that the Declaration of Independence specifically criticized the English King George III "for transporting us beyond Seas to be tried for pretended offenses").

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

45 Megan O'Neill, *Extra Venues for Extraterritorial Crimes? 18 USC § 3238 and Cross-Border Criminal Activity*, 80 U. CHI. L. REV. 1425, 1448 (2013).

will "represent the community most affected by the crime and will therefore serve as the conscience of the community."[46] Hence, venue protects the interests of multiple stakeholders in a criminal trial, but most importantly, it safeguards the defendant's rights.

C. Two Statutory Routes: Sections 3237(a) and 3238

For crimes that occur on land, determining venue is usually straightforward. However, the "Constitution's directions for setting venue are incomplete" because crimes can occur across multiple districts or in no district at all.[47] To fill these venue gaps, Congress has enacted special venue statutes that reach certain types of crimes. The two statutes that best relate to in-flight crimes are 18 U.S.C. §§ 3237(a) and 3238.[48]

Section 3237(a) has two paragraphs. The first paragraph, enacted in 1867, deals with "[c]ontinuous [o]ffenses."[49] It reads: "[A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."[50] The second paragraph, added in 1948, creates an interstate commerce component.[51] It reads in pertinent part: "Any offense involving . . . transportation in interstate or foreign commerce . . . is a continuing offense and . . . may be inquired of and prosecuted in any district from, through, or into which such commerce . . . moves."[52] Accordingly, § 3237(a) vastly expands the appropriate venue options when an offense involves transportation in interstate commerce through many districts.[53]

A second statute, § 3238, also tackles the constitutional venue gap. This "venerable" statute was passed in 1790.[54] Section 3238 reads in full:

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46 Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1551 (1993).

47 O'Neill, *supra* note 45, at 1447.

48 *See id.*

49 2 CHARLES ALAN WRIGHT & PETER J. HENNIG, FEDERAL RULES OF CRIMINAL PROCEDURE § 303 (4th ed. 2008).

50 18 U.S.C. § 3237(a) (2018).

51 2 WRIGHT & HENNIG, *supra* note 49.

52 18 U.S.C. § 3237(a).

53 *See* Paul Mogin, *"Fundamental Since Our Country's Founding":* United States v. Auernheimer *and the Sixth Amendment Right to be Tried in the District in Which the Alleged Crime Was Committed*, 6 U. DENV. CRIM. L. REV. 37, 46 (2016).

54 2 WRIGHT & HENNIG, *supra* note 49, § 304, at 371 n.1.

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.[55]

Section 3238 thus provides ranked venue options for crimes committed outside of any state or district. As discussed below, federal circuit courts have considered the applicability of both §§ 3237(a) and 3238 to in-flight crimes and come to contrasting conclusions.[56]

Along with these two statutes, it is important to bear in mind that Federal Rule of Criminal Procedure 21 provides a flexible venue bulwark. Rule 21(b) allows a defendant to request a transfer from a proper venue to a different venue "for the convenience of the parties, any victim, and the witnesses, and in the interest of justice."[57] This minimal standard protects a defendant from the harshness of a trial in a venue that is constitutionally proper but is otherwise undesirable. Rule 21(b) is thus extremely useful in narrowing the wide potential of unattractive venues that an in-flight crime might create. But this remedial measure does not solve the more fundamental problem of determining what venues are proper for those crimes in the first place. Part III will illustrate how several federal circuit courts have wrestled with this issue and arrived at opposing conclusions.

III
THE CIRCUIT SPLIT

Few courts have addressed venue when it comes to in-flight crime. Until recently, the Tenth and Eleventh circuits provided prevailing doctrine in this area, holding that § 3237(a) permits venue in any district through which the aircraft travelled.[58] However, the Ninth Circuit has rejected this interpretation and found that no specific statute reached point-in-time

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55 18 U.S.C. § 3238.

56 *See infra* Part III.

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

58 *See* United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012); United States v. Breitweiser, 357 F.3d 1249, 1253–54 (11th Cir.), *cert. denied*, 541 U.S. 1091 (2004); United States v. McCulley, 673 F.2d 346, 350 (11th Cir. 1982).

crimes committed during flight.[59] The circuit debate has largely centered on how to interpret § 3237(a), with scant attention given to the potential usefulness of § 3238.

A. The Tenth and Eleventh Circuits: Section 3237(a) Creates Venue for Every In-Flight Crime

In 1982, the Eleventh Circuit became the first federal court of appeals to address venue for in-flight crimes.[60] In *United States v. McCulley*, the defendant used a "James Bond style" trunk to stow away into an aircraft's cargo hold in Los Angeles.[61] Midway through the flight, he emerged from the trunk and stole mail.[62] Upon landing in Atlanta, he was caught and charged with, among other crimes, damaging mail bags.[63] While the defendant broke into the bags somewhere outside of the Northern District of Georgia, the court interpreted the offense to be a "continuing" one under § 3237(a) because the aircraft was a form of transportation in interstate commerce.[64] The *McCulley* court interpreted § 3237(a) as a "catchall provision designed to prevent a crime which has been committed in transit from escaping punishment for lack of venue" and found that Congress had enacted it in order "to eliminate the need to insert venue provisions in every statute where venue might be difficult to prove."[65] Accordingly, the court found that venue was proper in the district where the airplane landed, even if the offense itself had already ended.[66]

The Eleventh Circuit reaffirmed this holding twenty-two years later in *United States v. Breitweiser*.[67] In *Breitweiser*, the defendant sat next to two young women, one of whom was a minor, on a flight from Houston to Atlanta.[68] At some point during the flight, the defendant inappropriately touched the minor.[69] After sensing something amiss, a flight attendant moved the young women up to the first class cabin for the remainder of the flight.[70] The defendant was subsequently convicted of abusive sexual contact with a minor as well as

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59 *See* United States v. Lozoya, 920 F.3d 1231, 1239–43 (9th Cir. 2019).
60 *See McCulley*, 673 F.2d at 350.
61 *Id.* at 348.
62 *Id.*
63 *Id.* at 349; *see also* 18 U.S.C. § 1706 (2018).
64 *McCulley*, 673 F.2d at 349–50.
65 *Id.* at 350.
66 *See id.* at 350.
67 357 F.3d 1249, 1253–54 (11th Cir.), *cert. denied*, 541 U.S. 1091 (2004).
68 *Id.* at 1251–52.
69 *Id.* at 1252.
70 *See id.*

simple assault in the Northern District of Georgia, where the aircraft landed.[71] On appeal, the Eleventh Circuit acknowledged the Supreme Court's command that the "*locus delicti* [of a crime] must be determined from the nature of the crime alleged and the location of the act or acts constituting it."[72] However, the court did not examine the instantaneous nature of the assault, but instead concluded that the assault was "continuous" under § 3237(a) because it was committed in-flight.[73] The Eleventh Circuit repeated its conclusion from *McCulley* that 3237(a) serves as a "catchall" provision for in-flight crimes.[74] It further noted the practical implications of a contrary ruling would make it "difficult if not impossible for the government to prove, even by a preponderance of the evidence, exactly which federal district was beneath the plane" when the defendant assaulted the minor.[75] Therefore, the court found venue to be proper in the Northern District of Georgia even though the crime had ended before the defendant had entered that district.[76]

The Tenth Circuit then adopted the Eleventh Circuit's interpretation of § 3237(a) in *United States v. Cope*.[77] In *Cope*, the defendant was a commercial airline pilot who consumed numerous drinks the night before flying from Austin to Denver.[78] He was indicted for operating a common carrier while under the influence of alcohol.[79] The defendant argued that there was no evidence that he was still intoxicated by the time the aircraft landed in the District of Colorado, so venue was improper there.[80] The Tenth Circuit rejected this argument.[81] Citing *Breitweiser*, the Tenth Circuit found venue would be proper "in any district" through which the defendant flew because the crime involved a form of transportation in interstate commerce under § 3237(a).[82] In so holding, the Tenth Circuit

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71 *Id.* at 1251–52.
72 *Id.* at 1253 (alteration in original) (quoting United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999)).
73 *See id* at 1253–54.
74 *Id.* (quoting United States v. McCulley, 673 F.2d 346, 350 (11th Cir. 1982)).
75 *Id.* at 1253.
76 *Id.* at 1253–54
77 676 F.3d 1219, 1225 (10th Cir. 2012).
78 *Id.* at 1221, 1228–29.
79 *See id.* at 1222; *see also* 18 U.S.C. § 342 (2018).
80 *Cope*, 676 F.3d at 1224.
81 *Id.* at 1224–25.
82 *Id.* at 1225.

found that venue was proper where the defendant landed the aircraft even if he was no longer intoxicated in that district.[83]

With the Tenth and Eleventh Circuits adopting identical interpretations of § 3237(a), there seemed to be consensus among the federal courts about venue for in-flight crimes. However, a mundane slap of a passenger—and new guidance from the Supreme Court on how to determine venue—upset this consensus when the Ninth Circuit heard argument in *United States v. Lozoya*.

B. The Ninth Circuit: Section 3237(a) Does Not Apply to Point-In-Time In-Flight Crimes

In *United States v. Lozoya*, the Ninth Circuit disagreed with the Tenth and Eleventh Circuits' broad reading of § 3237(a).[84] The defendant in *Lozoya* was an airline passenger who allegedly slapped another passenger during a flight somewhere over the Midwest.[85] He was charged with simple assault in the Central District of California, where the flight ended.[86] Following his conviction, the defendant challenged the propriety of venue, arguing that the assault had occurred before the aircraft ever entered the Central District of California.[87]

The Ninth Circuit reversed the conviction after finding that venue was improper.[88] In so holding, the Ninth Circuit ruled out the possibility that the alleged slap was either (1) a continuous offense, or (2) an offense that implicated interstate commerce.[89] Because neither of these prongs were met, the *Lozoya* court found that § 3237(a) did not apply.

In excluding the slap as a continuous offense, the Ninth Circuit relied on a relatively recent decision by the Supreme Court regarding venue: *United States v. Rodriguez-Moreno*.[90] In that case, the Supreme Court reaffirmed the locus delicti test, meaning that venue must be linked to the conduct elements of the offense and the actual location where the defendant committed those acts.[91] In *Lozoya*, this analysis was straightforward because the only element of the assault was the slap,

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83 *See id.*
84 920 F.3d 1231, 1240–41 (9th Cir. 2019).
85 *See id.* at 1233–34.
86 *Id.* at 1234.
87 *Id.* at 1234, 1238.
88 *Id.* at 1243.
89 *Id.* at 1239–40.
90 526 U.S. 275 (1999).
91 *Id.* at 279–82.

which "occurred in an instant" somewhere over the Midwest.[92] The Ninth Circuit thus drew a line between continuous and point-in-time offenses when it refused to apply § 3237(a).

In excluding the slap as affecting interstate commerce, the *Lozoya* court concluded that the only "conduct constituting the offense was the assault, which had nothing to do with interstate commerce," so § 3237(a) did not provide venue in the Central District of California where the flight landed.[93] The court found that the elements of the crime of assault would "not require any such transportation [in interstate commerce] for the commission of the offense," and that the setting aboard the aircraft was purely circumstantial.[94] In other words, the elements of the assault would not have changed whether the defendant slapped the passenger on an aircraft or elsewhere.

The *Lozoya* court thus acknowledged and rejected the reasoning of the Tenth and Eleventh Circuits. It criticized the *Breitweiser* and *Cope* decisions for failing to use the Supreme Court's locus delicti test when analyzing the conduct of the underlying offenses.[95] Likewise, the Ninth Circuit found that the *McCulley* case had declared that § 3237 serves as a "catch-all provision" despite a lack of supporting authority.[96] In contrast, the *Lozoya* court found the legislative history of § 3237(a) to be ambiguous at best, and unconvincing in light of the "clear" statutory text.[97] It recognized that the while "[c]ertain aspects of the legislative history suggest that § 3237 might have been intended as something of a catchall provision," at least one congressional report had "clarified that § 3237 was directed at continuing offenses, not to offenses generally."[98]

As a matter of first impression, the Ninth Circuit also considered whether § 3238 could apply to in-flight crimes even if § 3237(a) did not. However, the court quickly excluded § 3238 as a source for venue based on circuit precedent that the "navi-

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92 *Lozoya*, 920 F.3d at 1239.

93 *Id.* at 1240.

94 *Id.* (quoting United States v. Morgan, 393 F.3d 192, 200 (D.C. Cir. 2004)).

95 *Id.* at 1240–41.

96 *Id.* at 1240.

97 *Id.* at 1240 n.4. Indeed, the legislative history suggests that Congress did not intend for § 3237 to serve as a panacea for the in-flight crime problem. One House Report found that the language of § 3237 "would not, however, solve the difficulties involved in establishing jurisdiction which may exist in the case of an offense committed in only one jurisdiction." H.R. REP. No. 87–958 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 2563, 2578. The report went on to conclude that in such cases, the venue provisions in the constitution would still require "trial in the State or district in which the crime was committed." *Id.*

98 *Lozoya*, 920 F.3d at 1240 n.4.

gable airspace above [a] district *is a part of the district*."[99] Thus, the court found that the assault could not be said to have been committed entirely outside of any one district, as § 3238 required.[100] With neither § 3237(a) nor § 3238 applicable, the *Lozoya* court concluded that venue was proper in the district over which the aircraft was located during the slap.

The *Lozoya* court then addressed the practical implications of its decision. The majority opinion rejected the notion that it would be "impossible" to prove the moment during the flight when the crime occurred.[101] While conceding that "such an undertaking would require some effort," the court suggested that the government could prove this point in time based on the flight's length, average speed, information about the districts along the flight's path, and the approximate time when the crime was reported.[102] However, the court made no attempt to calculate the proper district itself, noting only that the assault did not occur in the Central District of California.[103]

Judge John Owens dissented in part from the *Lozoya* opinion. He sided with the Tenth and Eleventh Circuits in finding that § 3237(a) applied to in-flight crimes, and noted that the *Lozoya* holding was the first to "disturb[ ] the ability to prosecute federal offenders in the district where the airplane landed," including for crimes more serious than simple assault.[104] While conceding that the language in § 3237(a) "could be clearer," Judge Owens warned that the majority opinion risked creating "absurd results."[105] He provided a hypothetical example where a defendant sexually assaulted a passenger on a flight from San Francisco to Houston.[106] Under the majority's rule, Judge Owens claimed, it would be highly unlikely that the government could rely on a "traumatized victim" to remember exactly when that sexual assault occurred during a flight that passed over at least eight judicial districts.[107] The dissent opinion argued that courts should take a flexible, "common sense" approach to § 3237(a).[108] But Judge Owens did

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99 *Id.* at 1241 (alteration in original) (quoting United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973)). How the *Barnard* court arrived at this conclusion is unclear. *See* discussion *infra* text accompanying notes 149–151.

100 *Lozoya*, 920 F.3d at 1240–42.

101 *Id.* at 1241.

102 *Id.* at 1241–42.

103 *Id.* at 1243.

104 *Id.* at 1244 (Owens, J., concurring in part and dissenting in part).

105 *Id.*

106 *Id.*

107 *Id.* at 1244–45.

108 *Id.* at 1244.

agree with the *Lozoya* majority on one thing: Congress could dispel the confusion through new legislation.[109]

C. Problems with the Ninth Circuit's Interpretation

While this Note argues that the *Lozoya* court correctly determined that § 3237(a) could not apply because the assault did not occur in the Central District of California, its holding is problematic for three reasons. First, linking a crime to a "fly-over" district—considered by this Note to be any place that is distant from either terminus of the flightpath—makes little practical sense. It is unlikely that witnesses aboard an aircraft will have any relationship with a district thirty thousand feet below, and they might be unwilling or unable to travel to a faraway district months or years after the incident. Likewise, any evidence will likely be found on the aircraft itself and would have to be brought into the fly-over district, thus frustrating the efficiency goal of venue.

Second, prosecutors could struggle to prove the district where a point-in-time crime occurred because modern aircraft move so quickly over multiple districts. Indeed, the Department of Justice's *Criminal Resource Manual* questioned whether a non-continuous offense "merits prosecution at all" if a prosecutor lacks substantial evidence showing where the aircraft was positioned during that offense.[110] For example, the dissent in *Lozoya* cautioned that it could be impossible to "pinpoint" the exact district in a situation where a defendant committed a sexual assault on a child who struggles to remember the point during the flight when he or she was victimized.[111] Thus, even though venue need only be proved by a preponderance of the evidence,[112] criminals could escape justice under the Ninth Circuit's narrow interpretation of § 3237(a).

Third, mandating venue in a fly-over district is arguably unfair to defendants. In this regard, due process concerns in

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109 *See id.* at 1245 ("I . . . urge the Supreme Court (or Congress) to restore quickly the just and sensible venue rule that, until now, applied to domestic air travel."); *id.* at 1243 (majority opinion) ("Congress can—consistent with constitutional requirements, of course—enact a new statute to remedy any irrationality that might follow from our conclusion.").

110 U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 1406 (1999), https://www.justice.gov/jm/criminal-resource-manual-1406-aircraft-piracy-interference-and-other-title-49-aircraft-offenses.

111 *See Lozoya*, 920 F.3d at 1244–45 (Owens, J., concurring in part and dissenting in part).

112 *See id.* at 1242 (majority opinion).

the civil context provide a helpful analogy. Asserting personal jurisdiction over a civil defendant must conform with "traditional notions of fair play and substantial justice" under the Fourteenth Amendment's Due Process Clause.[113] A defendant's physical presence within a state is usually a surefire guarantee that due process will be satisfied, because the defendant voluntarily chooses to enter that forum.[114] However, serving a defendant with process during a flight—in order to achieve personal jurisdiction in the state below—has been suggested as an outer constitutional limit because the defendant does not voluntarily enter that state as any real destination.[115] Put another way, the defendant would never imagine being compelled into court in a fly-over state when he or she bought the plane ticket.

Mandating *criminal* venue in a district that a defendant never stepped foot in implicates parallel concerns about unwillingness to be subjected to the forum, as well as undue sur-

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113 Burnham v. Superior Court, 495 U.S. 604, 609 (1990) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

114 *See id.* at 624–25.

115 *Cf.* Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959). In *MacArthur*, the district court found that personal service on a civil defendant flying over the state of Arkansas did not violate due process, despite the fact that the defendant had never set foot in the forum. *Id.* The court reasoned that the defendant had subjected himself to Arkansas sovereignty through his travel, noting that "[i]t cannot seriously be contended that a person moving in interstate commerce is on that account exempt from service of process while in transit." *Id.* Further, the court found that Arkansas sovereignty extended into navigable airspace:

> It does not follow, however, from Congressional declarations of National sovereignty over the navigable airspace of this country . . . that the States have been denuded of all of their sovereignty and jurisdiction with respect to such airspace or that the same has been excluded from their boundaries or limits.

Id. at 446. However, the *MacArthur* court conceded that its holding might merely reflect the limitations of air travel in 1958:

> [A] time may come, and may not be far distant, when commercial aircraft will fly at altitudes so high that it would be unrealistic to consider them as being within the territorial limits of the United States or of any particular State while flying at such altitudes. But no such situation is here presented. We have an ordinary commercial aircraft, flying on an ordinary commercial flight in the ordinary navigable and navigated airspace of 1958.

Id. at 447. Scholars have sharply criticized *MacArthur* and its underlying rationale. *See* Jeffrey W. Stempel, *The Irrepressible Myth of* Burnham *and Its Increasing Indefensibility After* Goodyear *and* Daimler, 15 NEV. L.J. 1203, 1225 (2015) (arguing that *MacArthur* "is probably the most outlandish example of the exercise of tag service being used to establish personal jurisdiction notwithstanding the new jurisdictional paradigm of fairness and reasonable expectation"); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 289 (1956) (offering a hypothetical of a civil defendant who is served with process while flying over a venue "three thousand miles away from his home").

prise. On the other hand, a defendant who chooses to commit a crime might be said to have "waived" any claim of unfairness in a way that a civil defendant traveling on an aircraft for business or pleasure has not given that criminal punishment emphasizes the defendant's *mens rea*: the defendant's morally blameworthy choice to act during the flight.[116] Likewise, Federal Rule of Criminal Procedure 21(b) makes it fairly easy for a criminal defendant to request a transfer of venue to a more suitable location.[117] And one scholar has noted that this same "advent of relatively rapid air transportation" alleviates some of the hardships of being tried for a crime far from home.[118] Nevertheless, fairness concerns weigh against trying a defendant in a fly-over district.

Therefore, under the *Lozoya* court's reading of § 3237(a), a defendant who commits a point-in-time offense would either face venue in an undesirable fly-over district or escape justice entirely. Rather than stomach the "irrationality" of these two outcomes, however, Congress could go between the horns of the dilemma and create its own solution.[119] Perhaps the most promising option is the "high seas" statute, § 3238.

IV
RESOLVING THE CIRCUIT SPLIT: A PROPOSED REVISION TO § 3238

The circuit split regarding what venue law applies to in-flight crimes calls for a statutory solution. Indeed, both the majority and the dissent in *Lozoya* agreed that Congress should either write a new statute or revise an existing one to solve the in-flight venue gap.[120] Sections 3237(a) and 3238 present two possible candidates for revision. The statutes overlap significantly, and "much of the discussion of § 3238 in the case law involves an examination of which statute—§ 3238 or § 3237(a)—should take precedence in situations where both seem to apply."[121] However, while the Ninth, Tenth, and Eleventh Circuits have primarily considered the applicability of § 3237(a), expanding that statute to encompass in-flight crimes might have the perverse effect of creating more interpretive

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116 *See* Ann Hopkins, Comment, *Mens Rea and the Right to Trial by Jury*, 76 CALIF. L. REV. 391, 397 (1988).

117 *See* FED. R. CRIM. P. 21(b).

118 David Spears, *Venue in Federal Criminal Cases: A Strange Duck*, 43 CHAMPION 24, 25 (2019).

119 United States v. Lozoya, 920 F.3d 1231, 1243 (9th Cir. 2019).

120 *See supra* note 109.

121 O'Neill, *supra* note 45, at 1428.

problems.[122] Indeed, the debate over § 3237(a) has obscured the potential of § 3238 to better solve the in-flight venue problem—a potential that only the Ninth Circuit touched upon.[123] Even if § 3238 does not provide venue for every in-flight crime as currently written, Congress could easily retrofit it to do so. A short additional provision could clarify § 3238's reach, enabling it to cover in-flight crimes that it is already otherwise well-designed to address.

A. Some Difficulties in Revising § 3237(a)

While circuit courts have concentrated on the merits of § 3237(a), that statute supplies a clumsy solution to the in-flight venue gap. There are several problems. For one, re-categorizing instantaneous crimes—like the slap in *Lozoya*—as "continuous" is an unsatisfying legal fiction. The law recognizes a distinction between point-in-time and continuous crimes.[124] A point-in-time offense "occurs at a single, immediate period of time," meaning it can only happen in one place.[125] Accordingly, an assault on someone in New York City—in the Southern District of New York—cannot logically occur simultaneously in Los Angeles—in the Central District of California. And even if that assault occurs on a plane flying between those two cities, the elements of the crime have not changed. Under the Supreme Court's locus delicti test, a point-in-time offense with a single element is limited to a single district where that offense is committed.[126] If § 3237(a) "hinges on the point-in-time versus continuing offense controversy," then it is ill-equipped to reach both types of offenses simultaneously.[127]

Another problem is that courts must stretch the notion of an "offense involving . . . transportation in interstate . . . commerce" in order to reach many in-flight crimes.[128] Certainly, some in-flight crimes will "involve" aircraft as transportation in interstate commerce, such as when a crime disrupts the crew's

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122 *See infra* subpart IV.A.

123 *See supra* text accompanying notes 99–100.

124 *See* United States v. Salinas, 373 F.3d 161, 168 (1st Cir. 2004) (reasoning that to construe the crime of passport fraud as continuous "even after completion would, in our judgment, require a significant (and unwarranted) expansion of the law of venue").

125 Jeffrey R. Boles, *Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*, 7 NW. J.L. & SOC. POL'Y 219, 227–28 (2012).

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

127 Emily C. Byrd, *When Does the Clock Stop? An Analysis of Point-in-Time and Continuing Offenses for Venue Purposes*, 11 LOY. MAR. L.J. 175, 186 (2012).

128 18 U.S.C. § 3237(a) (2018).

ability to manage the flight.[129] However, it is unclear how other crimes—such as a sexual assault that goes unreported to anyone in the aircraft's cabin—could "involve" interstate commerce when that crime could not plausibly be said to have any effect on that interstate commerce.

Using § 3237(a) to reach all in-flight crimes also creates practical problems. The statute gives prosecutors wide leeway to pick and choose venue, thus frustrating the purposes of the constitutional venue limitations. Because venue is proper under § 3237(a) "in any district from, through, or into which such commerce . . . moves," a prosecutor could choose to try an in-flight crime in any district in the aircraft's flight path.[130] To be sure, this venue list includes some sensible options, including take-off or landing districts with which the parties presumably share some connection. However, nothing in § 3237(a) prevents a prosecutor from selecting a fly-over district along the flight-path—*even one that the aircraft was not flying over* when the crime occurred. After all, the prosecution would need to only prove by a preponderance of the evidence that the defendant was in-flight when the crime was committed, not that the crime occurred in any specific district. Section 3237(a) therefore enables prosecutors to "manufacture[ ]" venue to inconvenience the defendant, perhaps in order to seek a favorable plea bargain.[131] While it is true that a defendant could seek a transfer under Rule 21(b), a well-designed statute should not automatically burden defendants with an unattractive venue at the outset.[132] Prosecutors use § 3237(a) to reach continuous crimes in all sorts of settings on the ground today,[133] but the new frontier of in-flight crime calls for a more tailored statutory scheme.

B. Adding a "High Skies" Clause to § 3238

Assuming that the Ninth Circuit's interpretation of § 3237(a) is correct, and that § 3237(a) is ill-suited to Congres-

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129 *See* United States v. Hall, 691 F.2d 48, 50 (1st Cir. 1982) (Breyer, J.) (finding venue to be proper in the district where an aircraft made an unscheduled landing due to the defendant's disruptive behavior, even though the defendant was sitting quietly by the time the aircraft entered that district).

130 18 U.S.C. § 3237(a).

131 *See* O'Neill, *supra* note 45, at 1448–49; *see also* Byrd, *supra* note 127, at 185.

132 *See* Donna A. Balaguer, *Venue*, 30 AM. CRIM. L. REV. 1259, 1265 (1993) ("[C]ourts have considered the potential abuse of power under section 3237 as a factor encouraging the grant of a Rule 21(b) motion for transfer.").

133 *See, e.g.*, United States v. Rodriguez-Moreno, 526 U.S. 275, 282 (1999) (kidnapping where defendant took victim across multiple states).

sional clarification, a third solution to the in-flight venue problem becomes ideal: Section 3238. Of course, § 3238 already governs many types of in-flight crimes, including those that occur outside of the United States or over the high seas.[134] Congress long ago passed 18 U.S.C. § 7, which clarified that flying "over the high seas" is jurisdictionally equivalent to sailing as a vessel on the high seas.[135] But for crimes committed over the contiguous United States, prosecutors and courts seem to treat § 3238 as an afterthought. This should change.

Section 3238 does not share § 3237(a)'s pitfalls. Indeed, rewriting the § 3238 "high seas" statute to include a "high skies" clause—to encompass any crimes committed in navigable airspace—would provide a clear venue rule that works for both defendants and prosecutors of in-flight crimes. There are at least three reasons why § 3238 is the ideal candidate for in-flight venue: Congress could revise it easily, Congress has used it for this purpose in the past, and most importantly, courts could apply it fairly.

First, Congress could easily revise the language to incorporate in-flight crimes into a preexisting venue framework. It would take only nine words to rewrite § 3238 to encompass in-flight crimes, with no change to the meaning of the rest of the statute. A re-written § 3238 could look something like the passage below, with the proposed addition emphasized:

> The trial of all offenses begun or committed upon the high seas, *or within the navigable airspace of the United States*, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.[136]

This rewritten § 3238 thus provides a tiered progression of sensible venue options for in-flight defendants, just as the statute already does for crimes committed upon the high seas. First, § 3238 would typically allow defendants to be tried in the district where the aircraft lands, which will be the first district that the defendant enters, and will likely be the district where the

134 *See* United States v. Lozoya, 920 F.3d 1231, 1241 (9th Cir. 2019).
135 18 U.S.C. § 7(1), (5).
136 *Id.* § 3238.

arrest occurs.[137] Given that this district was the defendant's flight destination, that defendant would presumably have a stronger connection with this venue than with any fly-over state, as will victims or other witnesses aboard the aircraft. If the defendant is not arrested immediately on the tarmac, however, § 3238 then permits venue in the district where the defendant resides, where fairness concerns are likewise minimal.[138] And even if neither of those options are available—perhaps for the international traveler—the statute provides a fallback venue in the District of Columbia.[139] Thus, under a revised § 3238 the prosecutor would always have an available venue and the defendant would face trial in a familiar place.

Second, legislative history supports § 3238's application in this setting. Congress has previously used § 3238's *exact* language to provide venue for in-flight crime. Originally passed in 1961, 49 U.S.C. § 1473(a) combined the text of §§ 3237(a) and 3238.[140] Indeed, the only language from these two statutes that was not added to 49 U.S.C. § 1473(a) was § 3237(a)'s interstate commerce hook. Congress subsequently deleted 49 U.S.C. § 1473(a) as unnecessary in light of this overlap,[141] but before its repeal, courts relied on the statute to create venue for in-flight crimes.[142] Indeed, the political and legislative history behind 49 U.S.C. § 1473(a) also suggests that Congress in-

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137 *See id.* ("[T]rial . . . shall be in the district in which the offender . . . is arrested or is first brought . . . .").

138 *Id.*

139 *Id.*

140 49 U.S.C. § 1473(a) (repealed 1990). The statute read:

> The trial of any offense under this chapter shall be in the district in which such offense is committed; or, if the offense is committed out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender, or any one of two or more joint offenders, is arrested or is first brought. If such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia. Whenever the offense is begun in one jurisdiction and completed in another, or committed in more than one jurisdiction, it may be dealt with, inquired of, tried, determined, and punished in any jurisdiction in which such offense was begun, continued, or completed, in the same manner as if the offense had been actually and wholly committed therein.

Id.; *see also* United States v. Busic, 549 F.2d 252, 255 n.6 (2d Cir. 1977) (describing statute).

141 *See* H.R. REP. NO. 103-180, at 587 tbl. 2A (1990), *as reprinted in* 1994 U.S.C.C.A.N. 818, 1404.

142 *See, e.g.*, United States v. Hall, 691 F.2d 48, 50 (1st Cir. 1982) (Breyer, J.) (holding that venue was proper in landing district because defendant's intimidation of flight crew had forced a diverted landing into that district); *Busic*, 549 F.2d

tended that statute to reach "point-in-time" offenses "with a minimum of technical barriers."[143] Because the same language in the present-day § 3238 has encompassed navigable airspace in the past, a revision to the statute would break little new ground.

Third, and most importantly, courts could apply § 3238 to any in-flight offense. By using § 3238, a prosecutor would not have to prove which district the aircraft was flying over at the time of the offense, which the dissent in *Lozoya* feared could be impossible.[144] Instead, prosecutors would only need to prove that the offense occurred while the aircraft flew in navigable airspace—a much more straightforward task that would not depend on navigational charts or the testimony of traumatized victims. Section 3238's removal of this procedural snafu is warranted given that venue technicalities should not bar an otherwise meritorious criminal prosecution.[145]

C. Addressing Potential Objections to § 3238

Despite these reasons why § 3238 seems tailor-made for in-flight venue, a "high skies" clause could face at least two challenges rooted in state sovereignty and a defendant's constitutional right to venue. However, supporters of § 3238 could respond that these objections rely on an outdated and formalistic conception of our venue spaces.

It is true that, as a national venue statute, § 3238 would create limits on individual states' vertical boundaries. While cabining the states' airspace is perhaps a radical change in theory, little would change in practice. Indeed, such limita-

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at 257 (holding that venue was proper in take-off district, before hijacking had begun).

143 *Busic*, 549 F.2d at 256 n.7. As the Second Circuit recounted:

> [I]n describing the history of the Air Piracy Act, the House Committee stated that the assault on an airline captain during a July 8, 1960 nonstop flight from Chicago to Los Angeles, which could not be prosecuted because of problems of jurisdiction, "resulted in an acceleration of efforts to plug loopholes in existing laws affecting air commerce and in the introduction of legislation to extend Federal jurisdiction into areas which are not satisfactorily covered by State laws due to the nature of modern aircraft flights."

Id. (quoting 1961 U.S.C.C.A.N. 2563, 2566). For more discussion on this legislative history, see Allan I. Mendelsohn, *In-Flight Crime: The International and Domestic Picture under the Tokyo Convention*, 53 VA. L. REV. 509, 532–35 (1967).

144 *See supra* notes 105–107 and accompanying text.

145 *See* Geoffrey S. Mearns & Stanley J. Okula, Jr., *Venue and Federalizing Crime: Will Supreme Court Tell Prosecutors Where to Go?*, 13 CRIM. JUST. 20, 21–22 (1999) (noting that venue's lower standard of proof of preponderance of the evidence is "particularly appropriate in light of technological advances in travel and communication").

tions already exist in statute and Supreme Court precedent. Congress has long carved out "exclusive" federal control over navigable airspace above the United States.[146] The Supreme Court has likewise stated that airspace is a channel of commerce where state law is preempted.[147] Thus, for the most part,[148] the states have never exercised power over the navigable skies in the first place.

Despite this federal preemption of airspace, the notion lingers that state sovereignty extends infinitely skyward under the doctrine of *cujus est solum ejus usque ad coelum*.[149] After all, the *Lozoya* court relied on Ninth Circuit precedent from 1973 stating that "navigable airspace above [a] district is a part of the district."[150] Certainly, there is an intuitive appeal in organizing the skies with the same spatial divisions that we use at sea level. However, it is unclear where the Ninth Circuit gleaned this proposition from, and no other circuit appears to have considered this issue since then.

Perhaps, then, venue in navigable airspace could be reframed in a more common-sense way. Practically, the spatial organization of state and district borders on the ground has little impact on how Americans navigate the skies. Further, the Supreme Court long ago acknowledged that the development of air travel rendered the doctrine of *cujus est solum* without a "place in the modern world."[151] Thus, the crux of a "high skies" clause would be to assume that an offense in navigable airspace is committed in *no* state or district (to use the language of § 3238, "outside" of any district), just as the high seas exist outside of any state or district. Conceptually, the high skies

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146 *See supra* note 16.

147 *See* Braniff Airways, Inc. v. Neb. State Bd. of Equalization & Assessment, 347 U.S. 590, 596–97 (1954); *see also* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 107 (1948) ("[Air] travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past."); *but cf.* Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1260 (2011) (suggesting that federal preemption over airspace might be weaker than federal preemption over navigable waters).

148 States and municipalities are not precluded "from passing *any* valid aviation regulations . . . but courts generally recognize that Congress extensively controls much of the field." Singer v. City of Newton, 284 F. Supp. 3d 125, 129 (D. Mass. 2017) (citation omitted).

149 One of the many ways to translate this phrase is: "He who owns the land owns up to the Sky." Yehuda Abramovitch, *The Maxim "Cujus Est Solum Ejus Usque Ad Coelum" as Applied in Aviation*, 8 MCGILL L.J. 247, 247 (1961).

150 United States v. Lozoya, 920 F.3d 1231, 1241 (9th Cir. 2019) (alteration in original) (emphasis removed) (quoting United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973)).

151 United States v. Causby, 328 U.S. 256, 260–61 (1946).

are very similar to the high seas.[152] Both zones are "channel[s] of transportation and commerce shared by actors moving between multiple jurisdictions under circumstances requiring uniform rules."[153] Like the high seas, the high skies should be a zone of undisputed national concern.

Would this new spatial framework require a fundamental redrawing of national and state sovereignty? Admittedly, a vertical limit on state borders—one that would be drawn by congressional statute—is troubling, even if only symbolically. In 1954, the Supreme Court stated that federal jurisdiction over the skies is "bottomed on the commerce power of Congress, not on national ownership of the navigable air space, as distinguished from sovereignty."[154] Under this reading, declaring national sovereignty over the high skies might require amending the Constitution. However, given the uniform federal control over every state's airspace today,[155] the Supreme Court might view the issue differently today than it did over sixty-five years ago.[156] And we recognize a vertical limit to the venue requirement when prosecuting crimes committed in outer space, even if those crimes occur over the physical United States.[157] In other words, "state jurisdiction must end *somewhere*"; it is just a matter of determining the "altitude beyond which the fiction of territorial jurisdiction evaporates."[158] Arguably, the altitude where state sovereignty ends should be the altitude where navigable airspace begins: a height at which states lack any power to govern because they lack any reason to do so.

Nor would a "high skies" zone violate a defendant's constitutional right to venue. After all, if state and district borders no longer exist in navigable airspace, then the defendant's right

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152 *See* United States v. Georgescu, 723 F. Supp. 912, 919 (E.D.N.Y. 1989) ("[T]he analogy of the 'high skies' to the 'high seas' is apt . . . .").

153 Erbsen, *supra* note 147, at 1259.

154 Braniff Airways, Inc. v. Neb. State Bd. of Equalization & Assessment, 347 U.S. 590, 596 (1954) (holding that federal regulation of air commerce did not preempt a state tax on aircraft doing business within that state).

155 *See supra* note 16 and accompanying text.

156 *See* Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1218 n.12 (Fed. Cir. 2005) (interpreting the *Braniff* decision to "indicate[ ] that the states may retain some authority to regulate intrastate airspace," but holding that, at the very least, private property laws are inapplicable in navigable airspace).

157 *See* Mike Baker, *NASA Astronaut Anne McClain Accused by Spouse of Crime in Space*, N.Y. TIMES (Aug. 7, 2020), https://www.nytimes.com/2019/08/23/us/nasa-astronaut-anne-mcclain.html [https://perma.cc/9CFU-6DN5] (reporting that alleged identity theft committed aboard the International Space Station would potentially be the first "criminal wrongdoing in space").

158 Erbsen, *supra* note 147, at 1259 (emphasis added).

would not be tethered to any particular venue under Article III, Section 2 in the first place. Further, an originalist interpretation of the Constitution would not shed much light on where to lay venue for in-flight crimes. The Constitution does not discuss airspace, which comes as no surprise given that it was ratified more than a century before the invention of flight.[159] Yet it is clear that venue serves nebulous policy interests of fairness and convenience. Accordingly, courts recognize a degree of flexibility in the venue provisions, where the passage of "two centuries ha[s] wrought changes in our society that have increased both the range of crimes that federal courts confront and the factors underlying the selection of the proper situs of trial."[160] Courts, then, would do well to avoid the pitfalls of rigid formalism when interpreting § 3238. A more flexible reading will better adapt the venue framework to the fast-changing realities of air travel.

CONCLUSION

In *United States v. Lozoya*, the Ninth Circuit disrupted a heretofore-settled interpretation of § 3237(a) to reach any in-flight crime—an interpretation that paid little regard to a crime's elements or duration. Whether or not the *Lozoya* decision is correct, it has revealed the headaches that courts create when they use § 3237(a) to reach point-in-time offenses committed during flight. With the Supreme Court's locus delicti test firmly established, courts would write legal fiction if they reasoned that a brief passenger-to-passenger assault, committed unbeknownst to the cabin or crew, truly affected interstate commerce or continued across multiple districts. Yet without a statute to provide an alternative venue, the Constitution would require that the defendant face trial in a state and district whose only connection to the offense is its location five miles below an aircraft moving at 500 miles per hour. Even the *Lozoya* majority recognized this result creates "a creeping absurdity."[161]

This Note has presented a third pathway: a short revision to § 3238, the "high seas" venue statute. Congress could easily rewrite § 3238 to encompass crimes that occur in navigable

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159 *See id.* While conceding that "Benjamin Franklin observed the first hot air balloon flights near Paris," Judge Jack Weinstein has quipped that "[m]ost of the Framers were probably not prescient enough to foresee the age of air flight." United States v. Georgescu, 723 F. Supp. 912, 919 (E.D.N.Y. 1989).

160 United States v. Busic, 549 F.2d 252, 253 (2d Cir. 1977).

161 United States v. Lozoya, 920 F.3d 1231, 1242 (9th Cir. 2019).

airspace. Section 3238 already provides sensible venue options for crimes committed outside of any state or district, including the district where the defendant is first brought (for flights, the district where the aircraft lands) or the district where the defendant resides. Given that venue is meant to safeguard fairness for the defendant as well as efficiency for all parties, these venues will share a much stronger connection to the dispute than a fly-over venue would.

Yet while it might present the best candidate for addressing in-flight venue, adding a high skies clause to § 3238 might signal a symbolic shift in how we define our national spaces. Defining the "high skies" as outside of any state or district would suggest that those states and districts have clear vertical borders. Given that state sovereignty emanates from the people themselves, acknowledging federal dominance of this zone might arguably require not just a rewritten statute but an amendment to the Constitution itself. Ultimately, whether or not the Constitution foresees state sovereignty in the high skies, Congress should take action to address the in-flight venue gap as the United States advances through the twenty-first century.