What's Our Venue, Victor? A Statutory and Constitutional Analysis of *United States v. Lozoya*

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I. Introduction

On April 11, 2019, the Ninth Circuit Court of Appeals decided *United States v. Lozoya*,[1] which held that venue for criminal prosecution of in-flight crimes was proper in the district that the airplane was flying over when the crime occurred (the "flyover district"), and was not proper in the district where the airplane landed (the "landing district").[2] This decision created a split with the Tenth[3] and Eleventh[4] Circuits. Both the Tenth and Eleventh Circuits held that venue was proper in the landing district.[5] The Ninth Circuit subsequently decided to rehear *Lozoya* en banc,[6] and on December 3, 2020, reversed the original decision by holding that venue was proper in the landing district.[7] By making this decision, the court in *Lozoya II*[8] ignored its own precedent and cherry picked the law to come to its ideal conclusion. Despite this, the Ninth Circuit actually moved closer to achieving the ideal result regarding the issue to venue for in-flight crimes.

This Note will discuss how the Ninth Circuit erred in deciding *Lozoya II* and argue that its holding from *Lozoya I* was the correct decision under the law of the Ninth Circuit, as well as explain how *Lozoya II* should have been decided to achieve the ideal outcome. Part II will discuss

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[1] United States v. Lozoya, 920 F.3d 1231 (9th Cir. 2019), *rev'd en banc*, 982 F.3d 648 (9th Cir. 2020).
[2] *Lozoya*, 920 F.3d at 1243.
[3] United States v. Cope, 676 F.3d 1219 (10th Cir. 2012).
[4] United States v. Breitweiser, 357 F.3d 1249 (11th Cir. 2004).
[5] *Cope*, 676 F.3d at 1225; *Breitweiser*, 357 F.3d at 1254.
[6] United States v. Lozoya, 944 F.3d 1229 (9th Cir. 2019).
[7] United States v. Lozoya, 982 F.3d 648, 657 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 128 (2021).
[8] Throughout this Note the original 2019 decision of *Lozoya* will be referred to as *Lozoya I*, the 2020 en banc re-hearing will be referred to as *Lozoya II*, and when referring to the case or the facts generally *Lozoya* will be used.

the background of the law regarding venue for crimes committed on airplanes.[9] Part III will discuss the facts,[10] procedural history,[11] opinion,[12] and concurrence in part[13] from *Lozoya II*. Part IV will analyze and discuss both the majority[14] and concurring opinions,[15] and make a legislative recommendation[16] as well as an illustration of the proposed rule.[17] Part V will be a conclusion for this Note.[18]

II. Background

The United States Constitution, federal statutes, as well as federal caselaw provide the framework for venue analysis of in-flight crimes.

Those being Article III, Section 2, Clause 3 of the United States Constitution[19] (the "Venue Clause"), the Sixth Amendment to the United States Constitution,[20] 18 U.S.C. § 3237(a), 18 U.S.C. § 3238, the United States Supreme Court's decision in *United States v. Rodriguez-Moreno*,[21] the Eleventh Circuit's decision in *United States v. Breitweiser*,[22] and the Tenth Circuit's decision in *United States v. Cope*.[23]

A. Constitutional

Beginning with the Venue Clause, the Constitution requires crimes to be tried in the state in which they were committed in.[24] However, if a crime is not committed within any state, then

[9] *See infra* Part II.
[10] *See infra* section III.A.
[11] *See infra* section III.A. This will include a summary of the majority opinion of *Lozoya I*.
[12] *See infra* section III.B.
[13] *See infra* section III.C.
[14] *See infra* section IV.A.
[15] *See infra* section IV.B.
[16] *See infra* section IV.C.
[17] *See infra* subsection IV.C.1.
[18] *See infra* Part V.
[19] U.S. CONST. art. III, § 2, cl. 3.
[20] U.S. CONST. amend. VI.
[21] United States v. Rodriguez-Moreno, 526 U.S. 275 (1999).
[22] United States v. Breitweiser, 357 F.3d 1249 (11th Cir. 2004).
[23] United States v. Cope, 676 F.3d 1219 (10th Cir. 2012).
[24] U.S. CONST. art. III, § 2, cl. 3.

the Venue Clause allows an act of Congress to determine the venue.[25] The Sixth Amendment further refines the Venue Clause by narrowing down the venue requirement to the state and district where the crime was committed.[26]

The history of the constitutional venue provisions is important, not only to understand why they are in the Constitution to begin with, but also to understand the guiding principles for any venue rule that a court or legislature will make. The Constitution essentially codified a pre-existing notion that in order to ensure fairness in criminal trials, the trial should be held where the crime was committed, and the jurors should be selected from the vicinity of where the crime was committed.[27] This notion ensured that defendants were not unfairly burdened by potential prosecution in remote areas and prevented the prosecution forum shopping for a favorable court.[28] This concept is known as vicinage and was attempted to be cast aside by the British Empire in the years leading up to the Revolutionary War.[29]

The seizure of John Hancock's sloop in 1769 by British customs officials resulted in riots and the burning of a British ship.[30] In the wake of these riots, King George and Parliament sought to invoke the 1543 Treason Act[31] to have the Colonists who refused to testify in court against the rioters transported to England to stand trial.[32] This led to a back and forth of the colonial legislatures creating resolutions protecting the right of vicinage in the state where the treason was committed, and Parliament creating a new statute that explicitly allowed for venue in England for

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[25] *Id.*
[26] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"). *See also* FED. R. CRIM. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed.").
[27] *See* Emily A. Kingsley, *We're Halfway There:* Lozoya *and Determining Proper Venue for Crimes Committed In-Flight*, 57 GONZ. L. REV. 617, 619 (2021).
[28] *Id.* (quoting United States v. Johnson, 232 U.S. 273, 275 (1944)).
[29] *Id.* at 620.
[30] *Id.*
[31] This act allowed the Crown to decide at its discretion where to have venue for the trial of a traitor. *See id.*
[32] *Id.*

trials of English citizens charged with destroying the King's ships, dockyards, ammunition, and magazines.[33] Although no Colonists were ever tried in England for crimes committed in the colonies, the actions of the British Empire left an impression on the Founding Fathers that led them to create the venue principles that are currently enshrined in the Constitution.[34]

B. Relevant Statutes

Referring briefly to the statutes that may govern venue, § 3237(a) deals with venue for crimes that are either continuing offenses or crimes that involve transportation in interstate commerce.[35] The first paragraph states that any offense that is either "begun in one district and completed in another," or is carried out in multiple districts, can be "prosecuted in any district in which such offense was begun, continued, or completed."[36] The second paragraph further says that crimes that involve the use of transportation in interstate commerce are to be treated as continuing offenses and can therefore be prosecuted in any district "from, through, or into which such commerce . . . moves."[37]

The second relevant statute,§ 3238, deals with venue for crimes that occur outside of the jurisdiction of a particular state.[38] It says that venue is proper in the district that the offender "is

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[33] *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, 41 (2016) (describing the Virginia and Massachusetts resolutions that were passed as well as the new 1772 statute by Parliament.) For a more comprehensive overview of the multiple statutes that Parliament passed in order to restrict the venue rights of colonists prior to the American Revolution *see* William Wirt Blume, *Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 62–63 (1944).

[34] Mogin, *supra* note 33, at 41–42 (listing examples from the language in the Declaration and Resolves of the First Continental Congress ("the respective colonies are entitled to . . . the great and inestimable privilege of being tried by their peers of the vicinage"), the Declaration of Independence ("denounce[ing] King George III '[f]or transporting us beyond Seas to be tried for pretended [offenses]'"), and the Constitution ("[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.") to prove the Founding Fathers intent and views on criminal venue).

[35] *See* 18 U.S.C. § 3237(a).

[36] *Id.*

[37] *Id.*

[38] 18 U.S.C. § 3238.

arrested or is first brought," and in the absence of such a district then "in the district of the last known residence of the offender."[39]

C. Caselaw

Moving on to the case law, on March 30, 1999, the Supreme Court decided *Rodriguez-Moreno*, which laid out the constitutional foundation regarding venue for criminal prosecution.[40] The Court held that Article III of the Constitution, coupled with the Sixth Amendment, requires that the trial of crimes must be held in the state and district where the crime was committed.[41] The Court reaffirmed the use of a two-pronged test to determine where the crime was committed in order to determine the proper venue.[42] To determine where the crime was committed, "a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts."[43] While not a case that specifically deals with crimes on airplanes,[44] *Rodriguez-Moreno*, is a case that laid out the general rule for venue and a case that the court in *Lozoya I* used to justify its split from the Tenth and Eleventh Circuits.[45]

On January 6, 2004, the Eleventh Circuit decided *Breitweiser*, which held that venue was proper in the district where the airplane landed, which in this case that was the Northern District of Georgia.[46] *Breitweiser* was a case that involved a man who was convicted of abusive sexual contact with a minor and simple assault of a minor when he touched a girl's inner thigh along with other parts of her body during a flight from Houston, Texas, to Atlanta, Georgia.[47] The court held

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[39] *Id.*
[40] United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] It was a case dealing with a drug related kidnapping. *See id.* at 276.
[45] United States v. Lozoya, 920 F.3d 1231, 1240 (9th Cir. 2019), *rev'd en banc*, 982 F.3d 648 (9th Cir. 2020).
[46] United States v. Breitweiser, 357 F.3d 1249, 1253–54 (11th Cir. 2004).
[47] *Id.* at 1251–52.

that because the crime took place on a form of transportation in interstate commerce, § 3237(a) applied and the offense was deemed to be a continuing offense that can be tried in the district in which the airplane landed.[48] The court justified this conclusion by citing a previous Eleventh Circuit opinion[49] that held § 3237(a) to be a catchall provision that is "designed to prevent a crime which has been committed in transit from escaping punishment for lack of venue."[50] The court further justified its decision by claiming that it would be difficult, if not impossible, to prove by a preponderance of the evidence which district the airplane was above at the time the defendant committed the crimes.[51]

On May 1, 2012, the Tenth Circuit decided *Cope*, which, like *Breitweiser*, held that venue was proper in the district where the airplane landed, which in this case was the District of Colorado.[52] In *Cope*, the defendant was a pilot on a flight from Austin, Texas, to Denver, Colorado.[53] After the flight it was determined that Mr. Cope was intoxicated while he flew the plane and he was subsequently charged with "operating a common carrier while under the influence of alcohol."[54] The Tenth Circuit held that because the offense was one that involved the use of transportation of interstate commerce, it was a continuing violation that can be tried in the landing district of the District of Colorado.[55] To come to this conclusion the court relied on § 3237(a) as well as the ruling of *Breitweiser*.[56]

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[48] *Id.* at 1253–54.
[49] United States v. McCulley, 673 F.2d 346 (11th Cir. 1982).
[50] *Breitweiser*, 357 F.3d at 1253–54 (quoting *McCulley*, 673 F.2d 346, at 350).
[51] *Id.* at 1253.
[52] United States v. Cope, 676 F.3d 1219, 1224–25 (10th Cir. 2012).
[53] *Id.* at 1221.
[54] *Id.* at 1222.
[55] *Id.* at 1225.
[56] *Id.*

III. *United States v. Lozoya*

A. Facts and Procedural History

Monique Lozoya ("Lozoya") was on an airplane flying from Minneapolis, Minnesota, to Los Angeles, California.[57] During this flight, Oded Wolff ("Wollf") was seated behind Lozoya and tapped on the in-flight TV screen attached to Lozoya's chair, which caused Lozoya to become annoyed.[58] Sometime after this, Lozoya's open hand came into contact with Wolff's face.[59] There are three accounts of when the slap took place.[60] Lozoya claimed the slap occurred an hour before the airplane landed, Lozoya's boyfriend claimed it was two hours before landing, and the flight attendant claimed it was ninety minutes before landing.[61] Wolff later reported the incident to the Federal Bureau of Investigation (FBI), and Lozoya was later sent a violation notice for misdemeanor assault.[62]

The trial was held in the Central District of California,[63] the landing district, and Lozoya moved for acquittal on the grounds that venue was not proper in the Central District of California.[64] The magistrate judge that presided over the case denied the motion, holding that because it was an offense involving interstate commerce, the assault was a continuing offense and therefore the landing district was proper.[65] Lozoya was subsequently found guilty of simple assault.[66] The magistrate judge denied an untimely and, in the court's opinion, meritless[67] post-trial motion for

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[57] United States v. Lozoya, 920 F.3d 1231, 1233 (9th Cir. 2019), *rev'd en banc*, 982 F.3d 648 (9th Cir. 2020).
[58] *Lozoya*, 920 F.3d at 1233.
[59] *Id.*
[60] United States v. Lozoya, 982 F.3d 648, 650 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 128 (2021).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Lozoya*, 920 F.3d at 1235.
[65] *Id.*
[66] *Id.* at 1236.
[67] *Id.* (the magistrate judge concluded the motion was meritless because 18 U.S.C. § 3237(a), as well as the difficulties in determining in which airspace the crime occurred, made venue in the landing district proper).

acquittal due to lack of venue.[68] After the denial of the motion, Lozoya appealed her conviction to the United States Court of Appeals for the Ninth Circuit.[69]

In *Lozoya I*, the court held that venue was not proper in the Central District of California and concluded that venue was proper in the flyover district.[70] The court determined that under Supreme Court precedent[71] and the Venue Clause, the location of the conduct making up the criminal assault did not occur in the Central District of California.[72] The court went on to hold that neither paragraph of § 3237(a) applied to make venue proper in the Central District of California.[73] In discussing the first paragraph, the court held that under a plain reading of the statute, it only applied to continuing offenses that occur in multiple districts.[74] The court held that due to the instantaneous nature of the crime, it was likely that it only occurred in the airspace of a single district.[75]

Regarding the second paragraph, the court held that the paragraph did not apply to the case at hand because the assault did not implicate foreign or interstate commerce.[76] The court reasoned that just because the offense happened on an airplane does not mean the offense became one that involves transportation in interstate commerce.[77] The court stated that being on the airplane was a circumstance element of the offense, as opposed to a conduct element, and therefore cannot support venue.[78]

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[68] *Id.*
[69] *Id.*
[70] *Id.* at 1243.
[71] *See* United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999) (holding to determine the locus delicti of an offense the court must look at "the nature of the crime alleged and the location of the act or acts constituting it").
[72] *Lozoya*, 920 F.3d at 1238–39.
[73] *Id.* at 1239–41.
[74] *Id.* at 1239.
[75] *Id.*
[76] *Id.* at 1240.
[77] *Id.*
[78] *Id.*

The court in *Lozoya I* recognized that its decision created a circuit split between the Tenth and Eleventh Circuits[79] and still decided to split off.[80] Following the decision, the Ninth Circuit elected to rehear the case en banc.[81]

B. Opinion of the Court

In the opinion of *Lozoya II*, the majority decided the case using two analytical pathways: first the court analyzed the case under the constitutional requirements of venue,[82] and second it looked at the statutory requirements of § 3237(a) and § 3238.[83]

1. Constitutional Analysis

Beginning with a constitutional analysis, the court reiterated the two main constitutional venue rules of Article III and the Sixth Amendment.[84] The court referred to the second half the Venue Clause,[85] which says that crimes not committed in any state shall be tried in a place that a law of Congress has directed.[86] In response to Lozoya's argument that the flyover district is the proper venue for her trial because the Constitution requires her to be tried in the district she committed the crime in, the court concluded that the Constitution does not state that the airspace above a district is part of the district.[87] It reasoned that because the Constitution makes no mention of whether the airspace above a district is part of that district, and because a crime in an airplane would have been foreign to the Framers, the Constitution therefore does not require the trial to be held in the flyover district.[88] The court justified its constitutional conclusion by citing a Supreme

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[79] *Id.*
[80] *Id.* at 1243.
[81] United States v. Lozoya, 982 F.3d 648, 650 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 128 (2021).
[82] *Id.* at 651–52.
[83] *Id.* at 652–57.
[84] *Id.* at 651.
[85] U.S. CONST. art. III, § 2, cl. 3 (allowing statutes like 18 U.S.C. § 3237(a) to be applicable in this case according to the majority of circuits. *See supra* Part II).
[86] *Lozoya*, 982 F.3d at 651.
[87] *Id.* at 652.
[88] *Id.* at 651–52.

Court decision[89] which stated that the purpose of the Constitution's venue provisions is to prevent the defendant from having to stand trial in a place that is alien to them.[90] In a footnote of the opinion, the court refused to apply its holding in *United States v. Barnard*[91] to the case before them to justify its decision.[92] The court then concluded that because the Constitution did not require the case to be brought in the flyover district, venue could be determined by an act of Congress.[93]

2. Statutory Analysis

The court then moved on to analyze the case under § 3237(a), and chose to focus its analysis on the second paragraph of the statute.[94] The court joined the Tenth and Eleventh Circuits and held that the second paragraph of § 3237(a) made Lozoya's assault a continuing offense, and therefore made venue proper in the landing district.[95] The court held that the assault involved transportation in interstate commerce under a plain reading of the word "involve," thereby activating the language of § 3237(a) to make the assault a continuing offense which is triable in any district the offense moved through or into.[96] The policy the court used to justify its decision was that the landing district "is where arrests are made and witnesses interviewed, and is often the defendant's residence or travel destination;" therefore, the landing district was the ideal location for venue.[97] The court coupled this reasoning with the difficulties in determining the precise district the airplane would be over when an in-flight crime is committed, as well as the difficulties of prosecuting in-flight

[89] United States v. Johnson, 323 U.S. 273, 275 (1944) (holding that the Framers were aware of the unfairness that would come from not requiring venue to be in the state of the crime, and this is what lead to the Framers adopting the venue clause as well as the sixth amendment).
[90] *Lozoya*, 982 F.3d at 652 (quoting United States v. Johnson, 323 U.S. 273, 275 (1944)).
[91] *See* United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973) (holding "the navigable airspace above [the] district is a part of the district").
[92] *Lozoya*, 982 F.3d at 652 n.3.
[93] *Id.*
[94] *Id.* at 652–55.
[95] *Id.* at 653.
[96] *Id.*
[97] *Id.* at 654.

sexual assaults that often occur with no witnesses "when the victim is sleeping."[98] The court feared that these problems would lead to defendants escaping prosecution because of a lack of venue.[99]

Before concluding, the court moved on to discussing § 3238 in an attempt to rebut the concurrence's argument.[100] The majority cited Ninth Circuit precedent[101] which held that § 3238 only applies to crimes committed entirely outside of the United States and declined to hold that crimes committed in airspace above the United States are entirely outside the United States.[102] The majority reasoned that § 3238 does not apply because "states routinely assert jurisdiction for crimes committed in [their] airspace."[103] It went on to explain that this finding did not contradict its earlier Venue Clause holding[104] because § 3238 regards the jurisdiction of a state and not its territory.[105] The majority concluded its opinion by restating its conclusion that venue was proper in the landing district of Central District of California via § 3237(a).[106]

C. Concurrence in Part

Judge Ikuta began their concurrence with the conclusion that venue cannot be determined under § 3237(a) because it would produce the "absurd result" of venue being proper in any flyover district, and therefore venue must be analyzed under § 3238.[107] The concurrence began by agreeing with the majority that the Venue Clause does not require venue to be in the flyover district because crimes in navigable airspace are not committed within any state for purposes of the Venue

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98 *Id.* at 654–55.
99 *Id.* at 655.
100 *See infra* section III.C.
101 United States v. Pace, 314 F.3d 344, 351 (9th Cir. 2002).
102 *Lozoya*, 982 F.3d at 655.
103 *Id.* at 656.
104 *See* supra subsection III.B.1.
105 *Lozoya*, 982 F.3d at 656–57.
106 *Id.* at 657.
107 *Lozoya*, 982 F.3d at 657–58 (Ikuta, J., concurring in part).

Clause.[108] The concurrence also agreed with the reasoning of the majority[109] on this issue, and argued that the Framers would not have understood the Venue Clause to apply to in-air crimes that have no impact on the ground below.[110] However, the concurrence does acknowledge that this finding required the majority to overturn *Barnard* in order to reach this conclusion.[111]

The concurrence then analyzed the case under § 3238 because the Venue Clause allows for venue to be decided by an act of Congress when a crime is not committed in any state,[112] which the concurrence believes is the case here.[113] It discussed the history of § 3238 and the Supreme Court case *United States v. Dawson*[114] to prove that the language "offenses . . . committed . . . elsewhere out of the jurisdiction of any particular State . . . "[115] from § 3238 actually means crimes committed outside a state's territory.[116] The concurrence used this interpretation of § 3238, along with a plain reading of the statute, to rebut the majority's interpretation that it only applied to crimes outside the United States.[117] The concurrence concluded this analysis by finding venue to be proper in the Central District of California under § 3238, because it was the district where Lozoya was first brought or arrested.[118]

The concurrence continued by analyzing and critiquing the majority's application of § 3237(a).[119] The discussion began by reciting the history of the statute and subsequently concluded that the second paragraph is not a catch-all provision that applies to any crime involving

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[108] *Id.* at 658.
[109] *See supra* subsection III.B.1 for the majority's argument.
[110] *Lozoya*, 982 F.3d at 658–59 (Ikuta, J., concurring in part).
[111] *Id.* at 659.
[112] *See* U.S. CONST. art. III, § 2, cl. 3.
[113] *Lozoya*, 982 F.3d at 660–68 (Ikuta, J., concurring in part).
[114] United States v. Dawson, 56 U.S. 467 (1853).
[115] 18 U.S.C. § 3238.
[116] *Lozoya*, 982 F.3d at 660–66 (Ikuta, J., concurring in part).
[117] *Id.* at 662–63.
[118] *Id.* at 663.
[119] *Id.* at 664–68.

aircrafts, but instead defines a particular category of continuing offenses as described in the first paragraph.[120] The concurrence then explained that, unlike § 3238, § 3237(a) does not deal with crimes committed outside of a state for purposes of the Venue Clause, but instead deals with crimes that occur in multiple districts.[121] Because § 3237(a) deals with crimes committed within districts, the concurrence reasoned that it must conform to the rules of the Venue Clause, which forbids labeling a point in time offense as a continuing offense that can be tried in multiple states or districts as defined under § 3237(a).[122]

The concurrence then criticized the majority's interpretation of the word "involve" from § 3237(a) by giving an example of an on-ground baggage handler pointing a laser pointer at a flying airplane in violation of federal law.[123] The concurrence said that under the majority's interpretation of the word "involve," this crime would involve transportation in interstate commerce, and therefore would be a continuing offense that can be tried in any district the airplane flies through or lands in.[124] The concurrence mentioned that the majority recognized that Lozoya's offense could be tried in any of the flyover districts, which would be inconsistent with the purposes of the Venue Clause.[125] The concurrence concluded with the principle that when there are multiple plausible statutory interpretations, there is a presumption that Congress did not intend the alternative that raises constitutional doubts, and therefore the majority's interpretation of § 3237(a) is not workable.[126]

[120] *Id.* at 665.
[121] *Id.*
[122] *Id.* at 665–66.
[123] *Id.*
[124] *Id.* at 666–67.
[125] *Id.* at 667–68.
[126] *Id.* at 668.

IV. Analysis

A. Majority

1. Majority's refusal to apply *Barnard*

The majority quickly dismissed the Venue Clause argument even though doing so completely disregarded its own precedent in *Barnard*. The majority claimed that *Barnard* did not purport to interpret the Venue Clause,[127] however the court is still bound by *Barnard*, and therefore the navigable airspace above a district is part of that particular district. Therefore, the Venue Clause should apply to require the venue to be in the flyover district. The majority is correct that this rule will produce absurd results, however the court cannot simply make the rule it wants to make with wanton disregard of the law by which it is bound. The majority's policy is valid because requiring the flyover district to be the venue can, and likely will, lead to issues in determining venue,[128] thereby log-jamming otherwise valid cases. The facts from *Lozoya I* and *II* are proof of this because there were three separate accounts of when the assault occurred.[129] However, no amount of good policy is an excuse to not apply the binding authority of *Barnard*.

Had the majority followed *Barnard*, it would have had to analyze the case under the rule from *Rodriguez-Moreno*. An analysis of *Lozoya* under *Rodriguez-Moreno* would produce the result the majority from *Lozoya I* produced. *Rodriguez-Moreno* is explained above,[130] but the test from the case bears repeating. To determine where a crime was committed for the purposes of determining venue, "a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts."[131]

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[127] *Lozoya*, 982 F.3d at 652.
[128] *See id.* at 654.
[129] *See supra* section III.A.
[130] *See supra* section II.C.
[131] United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999).

To determine the first element, the nature of the crime alleged, the court must look at the "conduct that constituting the offense."[132] In this case, the crime was assault that, according to the statute used to charge Lozoya, consists of "[a]ssault by striking, beating, or wounding."[133] Lozoya's action on the flight that caused her to be charged with assault was her open palm coming into contact with Wolff's face.[134] Clearly this constitutes "assault by striking" as required by 18 U.S.C. § 113(a)(4).

Moving on to the next element, which is the location of the act constituting the crime.[135] This is where the Ninth Circuit's precedent in *Barnard* would become relevant. Since "the navigable airspace above [a] district is part of the district," the location of the act constituting the crime would have occurred in the district that the plane was flying over at the time of the offense.[136] The court in *Lozoya I* did not make a factual finding of where the plane was at the time the slap occurred, but it did remand the case back to the district court.[137] If the court had made a factual finding, then after applying the *Rodriguez-Moreno* test, the location of the crime that Lozoya committed would be in the district that the plane was above when the assault occurred. Since the crime occurred in the district where the plane was flying over, the Venue Clause would have required the proper venue to be in that district.

2. Majority's misapplication of § 3237(a) and misunderstanding of § 3238

The majority then moved on to apply § 3237(a), which by its text requires a crime to be committed in a district.[138] This creates a contradiction because the court had just concluded that

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[132] *Id.*
[133] 18 U.S.C. § 113(a)(4).
[134] United States v. Lozoya, 920 F.3d 1231, 1233 (9th Cir. 2019), *rev'd en banc*, 982 F.3d 648 (9th Cir. 2020).
[135] *Rodriguez-Moreno*, 526 U.S. at 279.
[136] United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973).
[137] *Lozoya*, 920 F.3d at 1241.
[138] *See* 18 U.S.C. § 3237(a) (since the statute applies to offenses that "begun in one district and [are] completed in another, or committed in more than one district," which presupposes that the crime must be committed in a district, as opposed to committed outside of a district like the majority in *Lozoya II* says, for the statute to be applicable.).

under the Venue Clause, the airspace is not part of the district.[139] The majority seems to cherry pick when the airspace is part of the district and when it is not to reinforce its decision. This should not and cannot be tolerated. By holding that the airspace is simultaneously part of and not part of a district, the majority created vague law. This creates a situation where the either rule can be cherry picked by future attorneys and courts to support their arguments, as opposed to creating consistent law that everyone must follow.

The majority also is incorrect regarding its interpretation of the word "involve" from the second paragraph of § 3237(a). The majority cited to the dictionary definition of the word involve as "[t]o relate to or affect" to explain how Lozoya's crime falls within § 3237(a).[140] However, this definition does not help the majority's argument. Lozoya slapping someone on an airplane has no relation to transportation in interstate commerce besides simply being on the transportation in interstate commerce, nor does it affect it. Lozoya was simply on the airplane when the assault occurred, which does not mean her assault involved interstate transportation. Lozoya's crime could have been completed without being on an airplane, despite the majority's opinion that if it were not for the interstate transportation, it could not have been committed.[141]

The court should have followed its precedent for statutory construction to determine what a crime "involving transportation in interstate commerce"[142] means. In the Ninth Circuit case *United States v. LKAV*,[143] the Ninth Circuit stated a general rule for statutory construction that "[s]tatutory interpretations which would produce absurd results are to be avoided."[144] Here, the court is essentially stuck between a metaphorical rock and a hard place. On one hand, if the court

[139] United States v. Lozoya, 982 F.3d 648, 652 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 128 (2021).
[140] *Id.* at 653 (citing the AMERICAN HERITAGE DICTIONARY (5th ed. 2019)).
[141] *Id.* at 653.
[142] 18 U.S.C. § 3237(a).
[143] United States v. LKAV, 712 F.3d 436 (9th Cir. 2013).
[144] *Id.* at 440 (quoting Ariz. State Bd. for Charter Schs. v. U.S. Dep't of Educ., 464 F.3d 1003, 1008 (9th Cir. 2006)).

interprets the word "involve" narrowly and does not apply § 3237(a) and holds that the crime was committed in the district the plane was flying over, then it would produce an absurd result of requiring the venue to be in the flyover district.

On the other hand, by interpreting the word "involve" broadlyand subsequently applying the second paragraph of § 3237(a), the court allows for venue to be in any district that the plane took off from, traveled through, or landed in. This is another absurd result because venue could be proper in many more flyover districts than it would be had the court not applied § 3237(a). Since the court was stuck between two absurd results, it should have realized the need for an alternative rule for venue with respect to in-flight crimes. The court should have created a new rule or, at the very least, chosen to apply § 3237(a)—probably the least absurd result—and made a legislative recommendation that a new rule is needed in order to avoid these absurd results under the current law.

Lastly, the majority is clearly wrong about § 3238 because the text of the statute does not say that it is only for crimes outside the United States,[145] and its citation of *United States v. Pace*[146] does not support the courts position because *Pace* simply states the conclusion that § 3238 is only for crimes outside the United States without giving an explanation or any kind of citation to justify its holding.[147]

3. Majority's reliance on the Tenth and Eleventh Circuits

When the majority justified its decision to apply § 3237(a) by joining the Tenth and Eleventh Circuits, it offered no justification for doing so other than the fact that the cases "upheld venue in the district where the airplane landed, rather than requiring the government to show

[145] *See* 18 U.S.C. § 3238.
[146] United States v. Pace, 314 F.3d 344 (9th Cir. 2002).
[147] *See id.* at 351.

'exactly which federal district was beneath the plane when [the defendant] committed the crimes.'"[148] The court offered no analysis as to why it should follow the decisions of the Tenth and Eleventh Circuits, nor does it compare the facts of *Cope* or *Breitweiser* to those of the current case.[149] If the court had done an analysis of these decisions, it could have distinguished them from the facts of the current case.

Beginning with the Tenth Circuit's decision in *Cope*, this case can easily be distinguished because the crime that was committed was one that clearly involves transportation in interstate commerce. The facts of this case are laid out earlier in this Note,[150] but the key fact for this analysis is that the offense the defendant committed in *Cope* was "operation of a common carrier while under the influence of alcohol."[151] As applied in *Cope*, this was essentially the crime of piloting a plane while intoxicated. This was clearly an offense that involves transportation in interstate commerce because the crime requires the offender to operate a common carrier, in this case an airplane, to be culpable.[152] This is a far cry from Lozoya slapping someone while on a flight. If the defendant in *Cope* were driving a personal vehicle while intoxicated, then the statute used in *Cope* would not be applicable. Therefore, § 3237(a) could not be applied to make this a continuing offense. Although the statute used to charge Lozoya had a jurisdictional element of being "within the special maritime and territorial jurisdiction of the United States,"[153] the act that constitutes the crime has no relation to transportation in interstate commerce. Again, this is unlike the crime in *Cope* where the act that constituted the crime required the operation of a common carrier, thereby involving transportation in interstate commerce.

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[148] United States v. Lozoya, 982 F.3d 648, 653 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 128 (2021) (quoting United States v. Breitweiser, 357 F.3d 1249 (11th Cir. 2004)).
[149] *See id.* at 653.
[150] *See supra* section II.C.
[151] United States v. Cope, 676 F.3d 1219, 1221 (10th Cir. 2012) (quoting 18 U.S.C. § 342).
[152] *See* 18 U.S.C. § 342.
[153] 18 U.S.C. § 113(a).

Moving on to the Eleventh Circuit's decision in *Breitweiser*, this case can be distinguished from *Lozoya* because *Breitweiser* is an example of the policy behind why we would want to have a rule that makes in-flight crimes a continuing offense, while *Lozoya* is not. The facts of *Breitweiser* are laid out earlier in this Note,[154] but the main takeaway for this analysis is that the crime committed was type of offensive sexual contact.[155] The court in *Breitweiser* did not go into an in-depth policy discussion to reach its conclusion, it just applied § 3237(a) due to the fact that the crime was committed on an airplane, and mentioned that "[i]t would be 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 Breitweiser committed the crimes."[156]

However, the court in *Lozoya II* did have a deeper discussion of the policy of applying the continuing offense rule to in-flight crimes.[157] In *Lozoya II*, the court began by agreeing with the *Breitweiser* court's reasoning regarding the impracticality of determining which district the plane was over at the time of the offense.[158] The court in *Lozoya II* then moved on to note that "reports of sexual assault on commercial flights are at an all-time high"[159] and are "most common on long-haul flights when the victim is sleeping and covered by a blanket or jacket."[160] Because the victims are usually asleep when the assault occurs, the court stated that "[p]roving the precise time of an assault could be impossible, and a flyover venue rule could mean no prosecution at all."[161] The court in *Lozoya II* was spot on with its policy and reasoning for crimes that occur on airplanes, like sexual assault, needing to be deemed continuous in order for offenders to be brought to justice

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154 *See supra* section II.C.
155 The full charge was actually abusive sexual contact with a minor; however, this makes no difference in the analysis. *See* United States v. Breitweiser, 357 F.3d 1249, 1252 (11th Cir. 2004).
156 *See id.* at1253–54.
157 *See* United States v. Lozoya, 982 F.3d 648, 654–55 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 128 (2021).
158 *Id.* at 654.
159 *Id.* at 655 (footnote omitted).
160 *Id.*
161 *Id.*

without the accused using the defense of lack of venue to avoid prosecution. However, there are two issues with this.

The first issue is that just because it is good policy to apply the continuing offense provision of § 3237(a), that does not necessarily mean that the crime in *Breitweiser* was a continuing offense simply because it happened mid-flight. The court in *Breitweiser* did not address the first paragraph of § 3237(a),[162] likely because it did not need to in order to reach its decision. According to its own reasoning and precedent, simply committing a crime on an airplane is sufficient enough to become a continuing offense under the second paragraph of § 3237(a).[163] Since we are only able to see the facts that the court writes in its opinion, it is unknown how long the defendant was committing the crime for.[164] Since this Note has already argued that simply being on an airplane is insufficient to trigger the second paragraph of § 3237(a),[165] the offense in *Breitweiser* needs to be one that was committed in multiple districts to be classified as a continuing offense under the first paragraph of § 3237(a).

The second issue with the court in *Lozoya II* using this policy to justify its decision is that, unlike the offense in *Breitweiser*, which as noted above likely could have been a continuing offense under paragraph one of § 3237(a), the crime in *Lozoya* was almost certainly a point-in-time offense.[166] Although it is possible that when Lozoya slapped Wolff, they had transitioned between federal districts, it is highly unlikely that was the case. Therefore, the slap was likely not a crime that was "begun in one district and completed in another, or committed in more than one district"[167]

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[162] *See* United States v. Breitweiser, 357 F.3d 1249, 1253–54 (11th Cir. 2004).
[163] *Id.*
[164] *See id.* at 1252.
[165] *See supra* subsection IV.A.2.
[166] *See* 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, 179 (2012) ("a point-in-time offense is a crime completed in the district where it was committed.").
[167] 18 U.S.C. § 3237(a).

that would warrant a classification as a continuing crime under § 3237(a). The court should not be using the policy and reasoning from *Breitweiser* when the type of conduct that constituted the crimes in both cases are vastly different. Applying a continuing offense statute to a point-in-time offense goes against the Ninth Circuit's own precedent as Judge Ikuta acknowledges in their concurrence.[168] Of course this means that if the court applied its own precedent, which the court has refused to do in this same opinion,[169] the court should have refused to use the policy justifications of *Breitweiser*, a possibly continuing offense, and apply them to what is almost certainly a point-in-time offense.

B. Concurrence in Part

The concurrence in part at least acknowledged that it needed to overturn *Barnard* to come to its constitutional conclusion.[170] This clearly will lead to better results because then the airspace is not part of a district or state and an act of Congress can apply to determine venue, as opposed to venue being required in the flyover district. However, this still does not give the ideal answer to the venue riddle. Although the concurrence brings up legislative history, the plain text of § 3238 says it is for crimes outside of the jurisdiction of the state.[171] The concurrence fails to acknowledge the difference between territory and jurisdiction that the majority makes.[172] A state's territory is vastly different than its jurisdiction and therefore the airplane could still have been within the

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[168] *See* United States v. Lozoya, 982 F.3d 648, 666 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 128 (2021). (Ikuta, J., concurring in part) (Stating that "Congress cannot avoid the strictures of the Sixth Amendment and Venue Clause merely by labeling a point-in-time offense as a 'continuing offense,'" and that "[c]rimes consisting of a single noncontinuing act are 'committed' in the district where the act is performed.'" (quoting United States v. Pace, 314 F.3d 344, 350 (9th Cir. 2002)).

[169] *See supra* subsection IV.A.1.

[170] *See Lozoya*, 982 F.3d at 659 n.4 (Ikuta, J., concurring in part) ("[t]he conclusion that a crime is not committed within any state if it is committed in navigable airspace requires us to overrule *United States v. Barnard."*)

[171] 18 U.S.C. § 3238.

[172] *See Lozoya*, 982 F.3d at 656–57.

jurisdiction of the flyover state without being within its territory.[173] If the state's jurisdiction or district's jurisdiction, but not its territory, extends to the navigable airspace then neither the Venue Clause nor § 3238 applies, and the question of venue is still left unanswered.

C. Recommendation

To remedy this problem, there should be a new rule that specifically applies to crimes committed on forms of interstate air transportation, as opposed to just vaguely involving them. Under the new rule, venue would default to the landing district unless there is a district with a more significant relationship to the offense; and when there are multiple districts with a more significant relationship to the offense, the one with the most significant relationship shall be chosen. Defaulting to the landing district, as the majority did in *Lozoya II*, is certainly better than the flyover district rule form *Lozoya I*, but it is still not the most ideal solution. Although the landing district can be the place where the defendant and victim reside, and therefore conform to the Venue Clause's purpose of not trying defendants in alien lands, it could be a layover district that is equally foreign to the defendant as the flyover district is. The majority made a valid point that the landing district is usually where arrests are made, witnesses are interviewed, and often where the defendant resides;[174] however this will not always the case. A most significant relationship balancing test solves this problem by weighing things like where the victim and offender reside, where was the arrest made, and where the relationship, if any, between the parties is centered, and convenience of the parties involved.[175]

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[173] *Cf.* Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310, 316 (1945) (holding that personal jurisdiction for civil suits can be established when a defendant has minimum contacts with the forum state and that a defendant need not actually be within the territory of the state to establish these contacts).

[174] *Lozoya*, 982 F.3d at 654.

[175] It should be noted that while the test takes into account the interests of the victim, the interests of the defendant should be given more weight on balance. This is to ensure the defendant is given the most amount of protection while still considering some interests of the victim. Taking into account the interests of the victim in criminal law is not wholly unheard of. *See* FED. R. CRIM. P. 21(b) ("Upon the defendant's motion, the court may transfer the proceeding,

This test ensures that the venue for a crime is in better accordance with the purpose of the Venue Clause. But, because there may not be another district that has a more significant relationship to the offense, the venue will still be proper in the landing district. This rule gives better conformity to the principals of venue by trying the offender in a district that they have a connection to or, to use the language of the court in *Lozoya II*, a district that is not "alien to the accused."[176] This rule also satisfies the principle of preventing forum shopping by the prosecution that the Venue Clause is based on.[177] If a court were to apply § 3237(a), then the policy of not allowing forum shopping becomes relevant since that statute allows prosecution in "any district from, through, or into which such commerce . . . moves."[178] This means that any of the qualifying districts could play host to the trial and therefore could lead to forum shopping. This rule also helps with the policy that the court brings up regarding the landing district having a strong evidentiary relationship with the crime. This is because this rule allows for the landing district the be the default for venue, therefore if there is not a district that the court must transfer too it will be held in the landing district because the evidence will be there, and the defendant has at least a slight connection to it since they booked a plane ticket there.

One critique of this solution is that Rule 21 of the *Federal Rules of Criminal Procedure* already allows for a transfer of Venue by the defendant.[179] Rule 21 provides the ability to transfer for prejudice[180] or for convenience.[181] The prejudice subsection does not apply to this analysis

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or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.").

176 *Lozoya*, 982 F.3d at 652.

177 *See* Kingsley, *supra* note 27, at 619 (quoting United States v. Johnson, 232 U.S. 273, 275 (1944)).

178 18 U.S.C. 3237(a).

179 FED. R. CRIM. P. 21. The majority in *Lozoya II* even mentions this rule in a footnote. *See Lozoya*, 982 F.3d at 654 n8 ("[I]n the event that a choice of venue implicates concerns about fairness or inconvenience, the defendant can request a transfer of venue. See Fed. R. Crim. P. 21(b).").

180 FED. R. CRIM. P. 21(a).

181 *Id.* 21(b).

because that provision is limited to situations where there is "so great a prejudice against the defendant . . . that the defendant cannot obtain a fair and impartial trial there."[182] This subsection does not apply because in cases where the balancing test would be used the trial is not unfair, but instead the venue is improper. The convenience subsection could apply to the analysis at hand; however, the balancing test is preferable due to the fact that it would be a mandatory transfer of venue. Rule 21(b) only says that a court "*may* transfer the proceeding . . . to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice."[183] The balancing test would require the venue to be in either the landing district or the district with the most significant relationship to the offense. This would conform more closely to the purpose and principles of the Venue Clause than a rule that only allows for discretionary transfer in the case of inconvenience.[184]

This balancing test is not a wholly original idea, but instead is an amalgamation of different tests and rules from federal civil procedure,[185] international choice of law for torts,[186] and an

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[182] *Id.* 21(a).

[183] *Id.* 21(b) (emphasis added).

[184] Generally, it is within the courts discretion on whether to make the determination that it is within the interest of justice and for the convenience of the parties, any victim, and the witnesses to transfer under Rule 21(b). *See* United States v. Phillips, 433 F.2d 1364, 1368 (8th Cir. 1970) ("The question of transfer under Rule 21(b), 'for the convenience of parties and witnesses and in the interest of justice', is one involving realistic approach, fair consideration and judgment of sound discretion on the part of the district court."); United States v. Tremont, 351 F.2d 144, 146 (6th Cir. 1965) ("Disposition of a motion for change of venue in a criminal case lies within the discretion of the trial judge.").

[185] *See* 28 U.S.C. § 1404(a) (stating that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." To determine whether transfer is proper a court weighs factors such as

> the availability and convenience of witnesses and parties, the location of counsel, the location of books and records, the cost of obtaining attendance of witnesses and other trial expenses, the place of the alleged wrong, the possibility of delay and prejudice if transfer is granted, and the plaintiff's choice of forum, which is generally entitled to great deference.

Smith v. Colonial Penn Ins. Co., 943 F. Supp. 782 (S.D. Tex. 1996)).

[186] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. L. INST. 1989) (stating that to determine which jurisdictions tort law governs a case, the laws of the state with the most significant relationship to the tort should govern. To determine this "the place where the injury occurred, . . . the place where the conduct causing the injury occurred, . . . the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and . . . the place where the relationship, if any, between the parties is centered" are weighted against each other.

international agreement regarding crimes on aircrafts[187] all of which take into consideration the relationship between a place and an offensive act, and trial as well as the interests of the parties involved. While not all of these deal with criminal venue, they all have factors that can be drawn from and used to create a new rule regarding venue for in-flight crimes to ensure that we have a rule that conforms as closely as possible to the principles of the Venue Clause.

1. Illustration of the Most Significant Relationship Test[188]

To better describe the balancing test in effect the following illustration should prove to be helpful. Maverick is a resident of Denton, Texas, a city located within the Eastern District of Texas. Maverick is on board a non-stop flight from San Antonio, Texas, a city located in the Western District of Texas, bound for Lincoln, Nebraska, a city located in the District of Nebraska. During the flight, Maverick is coincidentally seated next to Iceman, a coworker of Maverick from his job at Top Gun Firearms Store in Dallas, Texas, a city located in the Northern District of Texas. Iceman also is a resident of Dallas, Texas. During the flight they begin discussing work and get into a heated argument regarding the best firearm for goose hunting. During the heat of the argument Maverick slaps Iceman across the face. Iceman does not retaliate, and instead gets up and changes seats. According to the flights GPS system and eye-witness testimony from Charlie, a passenger sitting across the aisle from Maverick and Iceman, the airplane was flying over Wichita, Kansas, a city located within the District of Kansas, when Maverick slapped Iceman. When the plane

[187] *See* Convention on Offences and Certain Other Acts Committed on Board Aircraft arts. 3–4, Sept. 14, 1963, 2 I.L.M. 6, 704 U.N.T.S. 219 (stating that the country with which an aircraft is registered can exercise jurisdiction over crimes committed on board and another country cannot interfere with the aircraft mid-flight to exercise jurisdiction unless "the offense has effect on the territory of such State . . . the offense has been committed against a national or permanent resident of such State . . . the offense is against the security of such State . . . the offense consists of a breach of any rules or regulations relating to the flight or maneuver of aircraft in force in such State [or]. . . the exercise of jurisdiction is necessary to ensure the observance of obligation of such State under a multilateral international agreement.).

[188] As a note, for this test to apply cases such as *Barnard* would need to be overturned in order to allow an act of Congress to decide where venue is proper, since then the airspace above a district would not be part of that district. *See supra* subsection III.B.1.

landed in Lincoln, police were waiting at the gate to detain Maverick because the pilot, Captain Viper, had radioed in the assault to Lincoln Airport prior to landing.

If a court were required to follow the rule from *Lozoya II* and apply § 3237, Maverick could be tried in the Western District of Texas, the District of Nebraska, the District of Kansas, or any other district that the plane flew over en-route to Lincoln, e.g., the three districts in the Oklahoma. Applying the balancing test, a court could easily rule out all of the districts that have little or no relationship to the offense. The court could rule out the Western District of Texas because the fact that the flight was departing from San Antonio has no relationship to the battery that took place mid-flight. The court could also rule out the District of Kansas since although according to the GPS data and eye-witness testimony this is the district in which the assault occurred, it is not connected to the offender or victim in any other way. Requiring venue in the District of Kansas would defeat the purpose of the constitutional venue requirements by requiring the trial to be in a district that is foreign to the defendant. Requiring the District of Kansas to play host also puts a burden on their judicial ecosystem by requiring prosecutors, judges, jurors, and all other court staff to waste their time dealing with the prosecution of a crime that happened tens of thousands of feet above them.[189] The same can be said for the other flyover districts the plane flew over enroute to Lincoln. It would be hard to imagine that a district would want, or even actually accept, venue in their jurisdiction for a crime that happened outside of it.

[189] While it is true that most criminal cases are plead out as opposed to going to trial, the analysis of venue requirements should be conducted on the assumption that the case will not be plead out and will go to trial. This is to ensure that the analysis is based on the highest possible impact on the judicial system of the hosting district. For evidence regarding the plea out rates in federal court, *see* John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, PEW RESEARCH CENTER (Jun. 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ (explaining that out of 80,000 federal defendants in federal criminal cases from the year 2018, only 2% of them went to trial and 90% of them pleaded guilty.).

The remaining districts, the Northern District of Texas, the Eastern District of Texas, and the District of Nebraska, would be weighed against each other by applying the factors test to determine which district has the most significant relationship to the offense. To begin, the court would determine whether the landing district, the District of Nebraska, should be the proper venue or if the remaining two districts have a closer relationship to the offense. While the landing district is where Maverick was arrested, where witnesses were likely interviewed, and where other evidence was likely gathered, there is a stronger argument that the Northern District of Texas has a more significant relationship to the offense. It is the district where the victim Iceman lives therefore giving it a relationship to one of the parties. It is also the district in which the offender Maverick works, as well as the district where the parties' relationship is centered since they are co-workers in Dallas. The convenience factor could be applied to both Districts because Denton, in the Eastern District, is only just outside of Dallas, in the Northern District. This would therefore make it convenient for Maverick to be tried in either the Northern or Eastern District of Texas. While on balance there would be some weight in favor of the Eastern District of Texas, since that is where the offender Maverick resides, but this would likely be defeated on balance by the Northern District of Texas. This is because while it is not where Maverick lives, it is not foreign to him since he regularly travels there for work. This would comport with the purpose of the Venue Clause to have the trial in a venue in which the defender is not an "alien." The Northern District of Texas also has a stronger interest in prosecuting the offense than the District of Nebraska since the victim is a resident of the district and the offender regularly is in the district for work.

V. Conclusion

The court in *Lozoya II* chose to apply the law when and how it saw fit to reach the conclusion it desired. It should have either applied the law and ruled that under the Venue Clause,

venue was not proper in the Central District of California and recommended legislative action, or it should have overturned *Barnard*. The latter means the assault would have occurred outside of the districts territory; meaning neither § 3237(a) nor § 3238 apply and the court could have created a new test to determine the proper venue in a way that comports the most with the principles of the Venue Clause.

Clearly, common sense and policy dictates that the court in *Lozoya II* correctly refused to have venue be required in the flyover district. However, its method of doing so and its solution are subject to scrutiny. Just because the court came out with a better solution than the original hearing does not mean that the court made the right decisions (e.g., applying the law correctly), in getting to that solution. The balancing test, while likely not perfect, does give the courts a better tool to determine venue for in-flight crimes that more closely aligns with the purpose and history of the Venue Clause.