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Vicinage--Part II

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III. SUBSEQUENT LEGISLATIVE AND DECISIONAL HISTORY

Whereas Parts I and II of this article are meant to show the significance and importance of the issue of vicinage to the draftsmen of the sixth amendment and the Judiciary Act of 1789, Part III is intended to show how it came to pass that the concept of vicinage faded from the consciousness of legislators, judges, lawyers, and law professors. An explanation will be provided of how and why the concept of vicinage could pass from being a major topic of debate and dispute in the First Session of the First Congress to being considered today as only a technical distinction from venue having no independent significance. Such an explanation can be given if the legislative and decisional history of four concepts—jurisdiction, venue, locality of crime, and vicinage—is detailed from 1789 to the present.

A. Jurisdiction Distinguished From Venue

When Congress set forth the jurisdiction of the district courts in the Judiciary Act of 1789, it specified that the district court was to have cognizance of certain crimes carrying limited punishments, exclusive of the state courts and concurrent with the circuit courts, so long as these crimes were "committed within their respective districts." In the same Act, the circuit courts were granted jurisdiction, either exclusive of all other courts or concurrent with the district courts, "of all crimes and offenses cognizable under the authority of the United States." Although no express territorial limitation was stated in the grant of jurisdiction to the circuit courts, Justice Washington held, in 1818, that if the indictment failed to show that the crime was committed within the territorial limits

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188 Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76. In 1842, the jurisdiction of the district courts was expanded to encompass concurrent jurisdiction with the circuit courts for all crimes except capital crimes. Act of Aug. 23, 1842, ch. 188, § 3, 5 Stat. 516, 517. The jurisdiction of the district courts then remained basically the same, including the express territorial limitation on the exercise of jurisdiction, from 1842 until 1911. See Tit. XIII, § 563, Rev. Stat. 1878.

189 Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78.
of the circuit court, then the defendant was entitled to have a motion in arrest of a verdict of guilty sustained because the court would lack jurisdiction to try the case.²⁰⁰

By including the language "committed within their respective districts" in the grant of jurisdiction to the district courts, and by the decision of Justice Washington in 1818, Congress and the federal courts were giving recognition to the concept of jurisdiction upon which the draftsmen of the Constitution had acted, that the power of a court to conduct criminal proceedings was limited to crimes committed within the territory assigned to the court. Crimes committed outside the territory assigned to the court were simply considered outside the jurisdiction of the court. No distinction between jurisdiction, as we define it today, and venue, as we define it today, was made.

From 1789 until 1878, whenever Congress assigned specific territory to a particular court or to a particular place for holding court, it would almost always proclaim this newly specified territory to constitute a judicial district.²⁰¹ Beginning in 1878, however, Congress began frequently to divide judicial districts into smaller geographical units which were denominated "divisions."²⁰² Because the concept of jurisdiction entailed the belief that

²⁰⁰United States v. Wood, 28 F. Cas. 755 (C.C.D. Pa. 1818) (No. 16,757). In the opinion, Justice Washington had written, "The court has not been able to find any act of congress which in express terms fixes the jurisdiction of the circuit courts in criminal cases by the place in which the offense was committed. But the court is clearly of opinion, upon the fair and reasonable construction of the different laws upon this subject, that the jurisdiction of the circuit court in criminal cases is confined to offenses committed within the district for which those courts respectively sit, where they are committed on land." Id. at 761. Accord, United States v. Ta-Wan-Ga-Ca, 28 F. Cas. 18 (D. Ark. 1836) (No. 16,435) ; United States v. Wilson, 28 F. Cas. 699 (C.C.E.D. Pa. 1830) (No. 16,729).

²⁰¹Two exceptions have been found to the general pattern of Congress prior to 1878 to denominate specified territorial units within the judicial system to be judicial districts. In 1838, the Northern District of New York was subdivided into three divisions. Act of July 7, 1838, ch. 182, § 3, 5 Stat. 295. The Northern District of New York remained subdivided until 1860 when Congress abolished the divisions by repealing the 1838 act. Act of Mar. 24, 1860, ch. 7, 12 Stat. 3. In 1849, Congress subdivided the District of Iowa into three divisions. Act of Mar. 3, 1849, ch. 124, § 3, 9 Stat. 410. The District of Iowa was the only judicial district from 1860 to 1878 to contain territorial units denominated divisions. See also Act of Mar. 3, 1849, ch. 114, § 1, 9 Stat. 401.

²⁰²Reference to an index analysis of federal statutes passed between 1789 and 1907
the power of a court was limited to the territory assigned to that court, the question arose as to whether a federal trial court sitting in one division of a judicial district had jurisdiction with respect to crimes committed in another division of the same district. Or, stated another way, did the creation of the divisions within judicial districts constitute a territorial limitation as to the exercise of jurisdiction by the federal trial courts?

To answer this question, the Supreme Court, in three cases, *Logan v. United States*, *Post v. United States*, and *Rosencrans v. United States*, for the first time began to distinguish between the concepts of jurisdiction and venue in criminal cases. In these three cases, the Supreme Court held that the territorial powers of the federal trial courts were coextensive with the territory encompassed within the boundaries of the judicial district as created by Congress. Hence, the Court ruled, no multiplication of places at which the courts could hold their sessions, nor creation of divisions within a judicial district nullified the territorial power of the federal trial courts, unless the acts creating divisions contained a specific provision requiring that certain criminal proceedings be conducted in the particular division in which the crime was committed.

The decisions in *Logan*, *Post*, and *Rosencrans* indicate that the Supreme Court still believed that the power of the federal trial courts was territorially limited by the concept of jurisdiction to the territory encompassed within a judicial district. Moreover, these three decisions also indi-
cate that the Supreme Court had not completely separated jurisdiction from venue because the Court indicated that if Congress had required certain criminal proceedings to be conducted within a particular division, then this requirement would be a jurisdictional requirement. But the Court had begun to distinguish between jurisdiction and venue through its clear holding that the mere creation of smaller territories (called divisions) within a judicial district did not automatically lead to a territorial restriction on the exercise of jurisdiction by the federal trial courts, while sitting in a division, to criminal events which had occurred within that division. By this holding, the Supreme Court had separated the concept of venue, i.e., the place at which proceedings are conducted, from the concept of jurisdiction, i.e., the power of the court to conduct the proceedings, with respect to criminal events occurring within the boundaries of a single judicial district.

With the abolition of the circuit courts in the Judicial Code of 1911,207 Congress granted criminal jurisdiction to the only remaining federal trial court, the district courts, in Section 24 of the Code, for "all crimes and offenses cognizable under the authority of the United States."208 The language used by Congress in 1911 to grant jurisdiction to the federal district courts was identical to the language used to grant jurisdiction to the federal circuit courts in 1789, which language had been interpreted by Justice Washington in 1818 to limit the power of the circuit courts to the judicial district in which the court sat. In light of the language used to grant jurisdiction to the federal district court, and in light of the common belief that the jurisdiction of a court was territorially limited, defense attorneys persisted in arguing to federal judges that a federal district court sitting in one judicial district, or within one division of a judicial district, lacked jurisdiction over crimes committed in another district or division.

Responding to these defense arguments in 1923, the Supreme Court, in Salinger v. Loisel,209 reaffirmed the holdings of Logan, Post, and Rosenkrans that the power of federal trial courts was coextensive with the territory encompassed within a judicial district unless Congress had specifically limited that power. Since Congress had not limited the power of the federal district courts with respect to the conduct of grand jury proceedings, the Supreme Court held that a district court, sitting in any division of a judicial district, had the power to conduct a grand jury to inquire into crimes committed anywhere within the district. As for the place at which the trial of the indictment should be held, the Supreme Court cited the requirement

208 Id., § 24, 36 Stat. 1091.
209 265 U.S. 224 (1923).
of Section 53 of the Judicial Code of 1911 that the trial must be held in the division where the crime was committed.  

Two years later, in 1925, the Fifth Circuit in *Silverberg v. United States*, citing the *Salinger* case, rejected a defense argument that the place of trial under Section 53 was a jurisdictional requirement that prevented the district court from trying an accused in one division for a crime committed in another division of the district. The Fifth Circuit held:

> The question presented is wholly technical, and merely that of venue, purely personal to the defendants. The crime was committed in the district, whether at Munday [Wichita Falls division] or Stamford [Abilene division], and the court had jurisdiction.  

Because the defendants had failed to raise the venue issue prior to the trial on pleas of not guilty, the court of appeals held that the venue rights under Section 53 had been waived. By 1925, the concepts of jurisdiction and venue had become clearly distinguished with regard to criminal proceedings in a single judicial district.

But it was not until 1931 that a federal court held that jurisdiction and venue could be distinguished when considering the power of a district court in a judicial district to handle criminal proceedings for crimes committed in another district. In *Hagner v. United States*, the court of appeals held that the jurisdictional grant from Congress to the district courts was meant to be a comprehensive grant of power with respect to criminal matters, subject only to limitations that were stated in the Constitution. As for the applicable constitutional limitations, the court held that Article III, Section 2, clause 3 and the sixth amendment conferred a right upon the defendant to have the trial held in the state and district where the crime was committed. But, the court further held, the right conferred by these two constitutional provisions could be waived by the defendant. Because Mr. Hagner had not objected to the place at which the trial was being con-

210 *Id.* at 236-37. Accord, Wallace v. Hunter, 149 F.2d 59 (10th Cir. 1945); Marvel v. Zerbst, 83 F.2d 974 (10th Cir. 1936); Wininger v. United States, 77 F.2d 678 (8th Cir. 1935); Hill v. United States, 15 F.2d 14 (8th Cir. 1926); Chew v. United States, 9 F.2d 348 (8th Cir. 1925); Larramore v. United States, 8 F.2d 736 (5th Cir. 1925); Shaw v. United States, 1 F.2d 199 (8th Cir. 1924); Biggerstaff v. United States, 260 F. 926 (8th Cir. 1919). *But cf.* United States v. Tait, 6 F.2d 942 (S.D. Ala. 1925); United States v. Beaug, 2 F.2d 378 (W.D. La. 1924).

211 4 F.2d 908 (5th Cir. 1925).

212 *Id.* at 909.

213 *Id.* *Accord*, Hanson v. United States, 285 F.2d 27 (9th Cir. 1960); Carrillo v. Squier, 137 F.2d 648 (9th Cir. 1943); McNealy v. Johnston, 100 F.2d 280 (9th Cir. 1938); Marvel v. Zerbst, 83 F.2d 974 (10th Cir. 1936).

214 54 F.2d 446 (D.C. Cir. 1931).
ducted prior to proceedings to trial upon a not guilty plea, he was held to have waived any constitutional objection to improper venue.\footnote{215}

After \textit{Hagner}, the concepts of jurisdiction and venue were seen as distinct concepts in federal criminal procedure. Jurisdiction referred to the power of the district court to handle a particular subject matter; it was conferred upon the court by Congress; it could not be affected by the parties to the proceedings. Venue referred to the particular place at which, or within which, the court was required to conduct the proceedings; it was determined by constitutional, statutory, or rule provisions which expressed a right of a criminal defendant; as a right of the accused, it was subject to waiver by the accused.\footnote{216}

From this history of how the concepts of jurisdiction and venue came to be distinguished, several points require further emphasis. Throughout the nineteenth century, Congress and the federal courts agreed that the power of a court was limited to the geographic territory assigned to that court. Because crimes committed within a particular territory were considered “local” to that territory, this meant that only the court possessing power over the territory in which the crime was committed could conduct any criminal proceedings with respect to that crime. Hence, the place of the commission of the crime was important because determining where the crime was committed indicated which particular court had jurisdiction to conduct the criminal proceedings. Moreover, because the court possessing jurisdiction of the crime could exercise this jurisdiction only within the territory assigned to the court, this meant that the place of the trial of the crime was automatically determined by the concept of jurisdiction. Find the court with jurisdiction over the crime by finding the place where the crime was committed, and the place at which the trial must be held had also been located.

From 1789 until 1878, the territory assigned to federal trial courts was almost always called a judicial “district.”\footnote{217} Congress and the federal courts then operated under the belief that the territorial limitation upon the exercise of jurisdiction by the federal trial courts was the territory encompassed within the judicial district. After 1878, however, when Congress

\footnote{Id. at 448-49. \textit{Accord}, United States v. Jones, 162 F.2d 72 (2d Cir. 1947); Mahaffey v. Hudspeth, 128 F.2d 940 (10th Cir. 1942); Gowling v. United States, 64 F.2d 796 (6th Cir. 1933).}

\footnote{1 C. \textit{WRIGHT}, \textit{FEDERAL PRACTICE AND PROCEDURE} § 193, at 403, 409, § 306, at 598 (1969) [hereinafter cited as \textit{WRIGHT}]. See \textit{generally} Orfield, \textit{Venue of Federal Criminal Cases}, 17 U. \textit{PITT. L. REV.} 375 (1956); Orfield, \textit{The Constitutionality of Federal Criminal Rule 20}, 34 \textit{CORNELL L.Q.} 129 (1948). The first academic writer to argue that the concepts of jurisdiction and venue were clearly distinguishable was Dean Dobie of the University of Virginia, but the cases Dobie cited to support his argument were all civil cases. Dobie, \textit{Venue in the United States District Court}, 2 \textit{VA. L. REV.} 1 (1914).}

\footnote{217 Read notes 201 and 202 \textit{supra}.}
regularly began to create new territorial entities within the federal judicial system, denominated "divisions," the possibility clearly arose that the territory over which the court had power might not coincide with the territory in which the court was to conduct particular criminal proceedings. With respect to a single judicial district, the decisions in Logan, Post, Rosencrans, Salinger, and Silverberg made it clear that the power of a federal court could extend over a larger territory (the judicial district) than the territory (the division) within which the court was required to conduct certain criminal proceedings. The place at which to conduct criminal proceedings within a judicial district had been separated from the power to conduct criminal proceedings for a crime committed anywhere within the judicial district.

But the complete separation of the concept of jurisdiction from the concept of venue was dependent upon the development of the concept of waiver. So long as any congressional requirement that certain criminal proceedings be conducted in specified territorial entities (such as a judicial district or a division within a judicial district) was considered a jurisdictional requirement, then the territory over which the federal district courts exercised power would be limited to and coincide with the territory in which the court was required to conduct its proceedings. More importantly, so long as any constitutional requirement that certain criminal proceedings be conducted in specified territorial entities (such as a state or a judicial district) was considered a jurisdictional requirement, then a federal district court sitting in one judicial district or state would be constitutionally barred from conducting criminal proceedings with respect to a crime committed in another judicial district or state. The concept of waiver, as expressed in Silverberg and Hagner, made it clear, however, that the congressional and constitutional requirements as to the place at which to hold the trial for a criminal offense was not a jurisdictional requirement.218

218 The concept of waiver as developed in Silverberg and Hagner was presaged by two Supreme Court cases. In Rosencrans v. United States, 165 U.S. 257 (1897), the Supreme Court indicated that any congressional requirement that certain criminal proceedings be conducted in a particular division would be a jurisdictional requirement. But the Supreme Court had then added: "So far as the mere transfer of the place of trial from one division to another, it would seem, in the absence of express prohibition, to be within the competency of the court having full jurisdiction over the entire district, and certainly present no ground of error when it is not at the time challenged, and the trial proceeds without objection." Id. at 263 (emphasis added).

Thirty-two years later, in 1929, the Supreme Court ruled that the references to "trial by jury" in Article III, Section 2 and in the sixth amendment of the Constitution did not set forth a jurisdictional requirement that juries be used in criminal trials. Rather, the Supreme Court ruled that the right to jury trial was a privilege granted to an accused who could elect to waive that privilege. Patton v. United States, 281 U.S. 276 (1930). The court of appeals in the Hagner decision then relied heavily upon Patton v. United States to conclude that the constitutional requirements concerning the place of trial could also be waived by an accused.
Through the decisions of Silverberg and Hagner, the federal courts had held that the power of the federal district courts to try criminal matters extended over the entire territory of the United States, while the particular territory in which that power was to be exercised was determined in accordance with waivable constitutional, statutory, or rule provisions concerning venue.219

B. Venue

As discussion of the Judiciary Act of 1789 has indicated, both the Senate and the House were desirous that the newly created federal courts be accessible to the citizenry. To insure accessibility, the Senate had increased the number of judicial districts from 11 to 13; together the House and Senate had added 10 cities as localities in which the federal district and circuit courts were authorized to hold court sessions; and with respect to capital cases, the House and Senate adopted an amendment to the original bill which required the federal trial court to hold the trial in the county where the capital crime was committed, if such trial could be held there without great inconvenience.220 Moreover, the Judiciary Act permitted the district court judges to hold special courts "at such other place in the district, as the nature of the business and his discretion shall direct."221 Four years later, in 1793, similar power was granted to the circuit courts to hold special sessions for "criminal causes, at any convenient place in the district, nearer to the place where the offenses may be said to be committed, than the place or places, appointed by law for the ordinary sessions. . . ."222 Through the years, this concern that federal court be held at places close at hand to the citizens resulted in the passage of numerous acts either altering the place or places at which federal court could be held, or increasing the number of places that could serve as authorized court cities.223

219 By separating the territorial exercise of power by a court (venue) from the grant of power to that court (jurisdiction), the decisions of Silverberg and Hagner permitted the federal district courts to be viewed as a single, unified court system, rather than as separate independent tribunals exercising exclusive power over the territory assigned to the particular tribunal. Compare United States v. Bishop, 76 F. Supp. 866 (D. Ore. 1948) and United States v. Bink, 74 F. Supp. 603 (D. Ore. 1947) with Orfield, The Constitutionality of Federal Criminal Rule 20, 34 CORNELL L.Q. 129 (1948). See also Weinberg v. United States, 126 F.2d 1004 (2d Cir. 1942); FED. R. CRIM. P. 41(a); FED. R. CRIM. P. 4(d)(2).


221 Act of Sept. 24, 1789, ch. 20, § 3, 1 Stat. 73-74.


223 E.g., read the remarks of Congressman Hunt in reference to Act of May 2, 1884, ch. 38, 23 Stat. 18, in 15 CONG. REC. 575 (1884), or read the remarks of Congressman Converse in reference to Act of Feb. 4, 1880, ch. 18, 21 Stat. 63, in 10 CONG. REC. 619 (1880). See
However, when more than one place within a district was authorized as a court city, practical problems immediately arose. At which place of holding court should the litigants file their pleadings? Would two sets of court records be required or would the court carry the records from court city to court city with the dangers of loss or destruction thereby created? At which place of holding federal court could the litigants, the defendants in criminal cases, or the witnesses expect that their legal business would be handled? These practical problems were already apparent by 1790, as shown by the Report on the Judicial System from Attorney General Randolph to Congress. In fact, Attorney General Randolph considered these mischiefs, caused by authorizing the holding of court at more than one place in a district, so severe that he recommended that all federal courts meet in only one central location within each judicial district. 224

Congress did not heed the recommendation of Attorney General Randolph. Rather, in response to these practical problems, Congress, in many instances, decided to assign specified counties of a state to a particular place or places at which federal court would be held. Congress made these assignments through the passage of bills, which either created new judicial districts or further divided judicial districts into judicial divisions. 225 For example, an act of 1794 read:

That the state of North Carolina shall be divided into three districts . . . and that all process, pleas, actions, suits and other proceedings originating in the districts, respectively, shall be returnable to the session of said court to be held at the place directed by law, within the same district, where the cause commenced, and there to be kept with the record thereof, until the final end and determination of the same. 226

In similar legislation creating divisions within the Northern District of New York in 1838, Congress provided,

generally, Table No. II comprising the Acts of Congress from 1789 to 1845, inclusive, relating to the Judiciary, 1 Stat. 69-83; Surrency, supra note 201, at 140, 148.


225 An indication of the number of times Congress has acted to assign specified territory to the particular place or places authorized to be a court city can be gleaned from general reference works that analyze the subject matter of federal legislation. According to one general reference work, Congress enacted 197 bills dealing with the establishment or change of boundaries of judicial districts between 1789 and 1907. During the same period, Congress enacted 76 bills creating divisions within judicial districts or changing the boundaries of those divisions. G. Scott & M. Beaman, Index Analysis of the Federal Statutes, General and Permanent Law 1789-1873, at 509-10 (1911) and 1 G. Scott & M. Beaman, Index Analysis of the Federal Statutes, General and Permanent Law 1873-1907, at 612-15 (1908). See generally, Surrency, supra note 201.

226 Act of June 9, 1794, ch. 64, § 3, 1 Stat. 396.
That, for the purpose of trying all issues of fact, triable by a jury in the district court of the United States for the northern district of New York, the said district shall be subdivided into three divisions, . . . And all such issues of fact shall be tried at a term of court to be held in the division where the cause of action may have arisen, unless the said court, for good cause shown, shall order such issue to be tried elsewhere.\textsuperscript{227}

By assigning specified counties of a state to a particular place or places for holding federal court, Congress had made it clear where litigants should file their pleadings, where court records should be kept, and where those having legal business in the federal courts could expect that business to be handled.

Neither this 1794 act, nor this 1838 act, however, dealt explicitly with the question of venue for criminal cases. The venue language from the cited acts could be interpreted as applying solely to civil cases.\textsuperscript{228} Hence, the quoted venue language left unclear the answer to the question of where the trial of criminal cases should be conducted.\textsuperscript{229} Apparently, prior to 1878, the only federal legislation that specifically dealt with criminal venue was the venue provision of Section 29 of the Judiciary Act of 1789 for capital cases, and the authorization for special sessions in criminal cases to be held nearer the place of the commission of the crime granted to the circuit courts in 1793. Because Section 29 required a federal court to sit in and for a county in capital cases only if no great inconvenience would result, and because the provision of the 1793 act simply authorized extra court cities without specifying the territory assigned to these special court sessions, neither is a satisfactory explanation for the legislative silence with respect to criminal venue prior to 1878.

\textsuperscript{227} Act of July 7, 1838, ch. 182, § 3, 5 Stat. 295.

\textsuperscript{228} Another example of the kind of venue language used by Congress, in acts creating a new judicial district within a state or divisions within a judicial district, which makes even clearer that the venue language had reference solely to civil cases can be found in the act creating divisions within the judicial district of Iowa. Section 3 of that act read: "That all suits hereafter to be brought in the said District Court, not of a local nature, shall be brought in a court of the division of the district where the defendant resides; but if there be more than one defendant, and they reside in different divisions of the district, the plaintiff may sue in either division, and send duplicate writs or writs to the other defendants; . . ." Act of Mar. 3, 1849, ch. 124, § 3, 9 Stat. 412. Section 3 was the only section of the act to speak to the issue of venue. The venue language from this act has an almost identical counterpart in the civil venue statutes currently in force, 28 U.S.C. § 1393 (1970).

\textsuperscript{229} Recall that Article III, Section 2, clause 3 only requires that the trial for all crimes must be held in the state where the crime was committed. Hence, if a state were divided into more than one judicial district, or a judicial district were divided into several divisions, Article III, Section 2, clause 3 would not constitutionally mandate in which district or division the trial must be held. 1 Wright, \textit{supra} note 216, at § 301, p. 579; Orfield, \textit{Venue of Federal Criminal Cases}, 17 U. Pa. L. Rev. 375, 380 (1956).
The most plausible explanation for legislative silence with respect to criminal venue prior to 1878 exists in the concept of jurisdiction prevalent at that time. As indicated earlier, the nineteenth-century concept of jurisdiction entailed the belief that the power of a court was limited to the territory assigned to that court. As a result, the power of a court in criminal matters was limited to crimes committed within the assigned territory, and criminal proceedings relating to those crimes could only be conducted within the boundaries of the assigned territory. Hence, Congress simply assumed that when it passed a law creating a new judicial district, or dividing a judicial district into divisions, the power of the court would be limited to the territorial entity that it had created in the act. It was not necessary to be explicit with respect to criminal venue because the place where the trial would be conducted was automatically determined by the concept of jurisdiction.

After 1878, however, Congress regularly began to pass laws creating divisions within judicial districts; many, but not all, of these laws contained specific provisions for venue in criminal cases. Three variations were most often used:

All criminal proceedings instituted for the trial of offenses against the laws of the United States... shall be brought, had, and prosecuted in the division of said district in which such offenses were committed.\(^{230}\)

All prosecutions for crimes or offenses hereafter committed in either of the divisions of said district shall be cognizable within such division....\(^{231}\)

All offenses committed in either of the sub-divisions shall be cognizable and indictable within said division....\(^{232}\)

Because some congressional enactments creating divisions were silent with respect to criminal venue, while other enactments dealt with criminal venue but with variations in language, litigation concerning this different treatment of criminal venue arose and reached the Supreme Court. In three cases, \(^{233}\)Logan v. United States,\(^{234}\) Post v. United States,\(^{234}\) and Rosenkrans v. United States,\(^{235}\) the Supreme Court clarified the impact of con-


\(^{233}\) 144 U.S. 263 (1892).

\(^{234}\) 161 U.S. 583 (1896).

\(^{235}\) 165 U.S. 257 (1897).
gressional action (or inaction) on criminal venue. In Post and Rosencrans, the Court held that if an act creating a judicial district simply authorized more than one place as a court city, or simply divided a judicial district into divisions, and was silent with respect to criminal venue, then the indictment could be returned and the trial could be held at any place for holding court or in any division within the district. On the other hand, if the act being construed contained either of the first two criminal venue provisions quoted above, the Court ruled in Logan and Post that the indictment could be returned at any place for holding court or in any division within the district, but that the trial had to be held in the division where the crime was committed.\footnote{The Supreme Court reached this conclusion by construing the words “prosecutions” and “criminal proceedings,” the words used in the specific acts in question in the cases, to exclude the activities of the grand jury, including the return of indictments. A criminal prosecution or a criminal proceeding did not begin, the Supreme Court held, until the formal presentation of the indictment to the trial court. Hence, the formal presentation of the indictment (i.e., arraignment) and all later proceedings in the case, including the actual trial, had to be conducted in the division in which the crime was committed. Post v. United States, 161 U.S. 583, 587 (1896); Logan v. United States, 144 U.S. 263, 297 (1892).} By implication from these three cases, if an act contained the third criminal venue provision, quoted above, then both the indictment would have to be returned and the trial would have to be held in the division in which the crime was committed.

By 1910, so many individual statutes had been passed with respect to the judiciary, with numerous variations in provisions, that Congress appointed a Special Joint Committee on the Revision of the Laws, which was assigned the task of drafting a Judicial Code. When Congressman Moon of Pennsylvania reported for the Committee to the House, he commented that the Committee had tried to eliminate provisions that by their own words were applicable only to the act in which the provision was contained. In place of these provisions of limited applicability, the Committee had drafted general provisions that would serve as substitutes for the provisions of limited applicability, and would apply uniformly to all judicial districts and divisions.\footnote{H.R. Doc. No. 743, 61st Cong., 2d Sess. 6 (1910); 46 Cong. Rec. 90 (1910) (remarks of Congressman Moon.)}

With respect to venue in criminal cases, the Committee’s desire to achieve uniformity in all judicial districts led it to combine and to generalize the language on criminal venue contained in the first two criminal venue provisions quoted above. The Committee apparently chose to generalize the first two variations, as opposed to the third variation, because the first two were used in the greater number of laws being consolidated into the general provision, and because requiring only that the trial be held in the
division in which the crime was committed possessed attendant advantages for the speedy disposition of criminal matters. The Committee report did not disclose why it decided to generalize the requirement that trial be held in the division in which the crime was committed, rather than to maintain congressional silence with respect to venue. It is probable, however, that the Committee opted to generalize a divisional venue requirement for the trial of criminal offenses because such requirement more closely matched its conception of jurisdiction as a territorial limitation on a court’s power and because of the rule that crimes committed in a specified territory were considered local to that territory. Moreover, the requirement that the trial of an offense be conducted in the division in which the crime was committed was in accord with the primary impetus behind the creation of divisions—accessibility of the federal courts to the citizens.

Upon recommendation of the Special Joint Committee, the Judicial Code of 1911, as approved by Congress, contained Section 53 which read in part:

All prosecutions for crimes or offenses shall be had within the division of such districts where the same are committed, unless the court, or the judge thereof, upon the application of defendant, shall order the cause to be transferred for prosecution to another division of the district.

238 In commenting on the actions of the Special Joint Committee, the Supreme Court stated:

"Formerly special statutes applicable to particular districts indicated the division in which criminal proceedings should be had, but the statutes were not uniform. Some provided that crimes and offenses should be ‘indictable’ and triable only in the division where committed, or that all criminal proceedings should ‘be brought’ and had in such division. But the greater number, in varying terms, required that the trial be in that division, unless the accused consented to its being in another. In districts where the latter were in force, it was common to impanel a grand jury from the district at large, to charge such grand jury with the investigation and presentment of offenses committed in any part of the district, and when indictments were returned to remit them for trial and other proceedings to the divisions wherein the offenses were committed, save as the defendant assented to a disposal in another division.

"... That practice was attended with real advantages which should not be lightly regarded or put aside. In many divisions only one term is held in a year. If persons arrested and committed for offenses in those divisions were required to await the action of a grand jury impaneled there, periods of almost a year must elapse in many instances before a trial could be had or an opportunity given for entering a plea of guilty and receiving sentence." Salinger v. Loisel, 265 U.S. 224, 236-37 (1924). Cf. H.R. Doc. No. 743, 61st Cong., 2d Sess. 29 (1910).

239 Because of the Supreme Court decisions in Post v. United States, 161 U.S. 583 (1896) and Rosencrans v. United States, 165 U.S. 257 (1897), if the Special Joint Committee had decided to maintain congressional silence with respect to criminal venue simply by deleting the special criminal venue provisions from the Judicial Code, rather than generalizing these venue provisions, the result would have been that the indictment could be returned and the trial could be held at any place for holding court or in any division within the judicial district.

Divisional venue for the trial of criminal cases had become the uniform law of the land.\textsuperscript{241}

In 1940, Congress passed legislation which granted rule-making authority to the Supreme Court for criminal procedure. With the promulgation in 1946 of the Rules of Criminal Procedure, the governing provisions concerning criminal procedure were no longer to be found in congressional statutes but rather in court-promulgated rules. Hence, after 1946, the governing provisions for criminal venue were to be found in Rules 18 through 21 of the Federal Rules of Criminal Procedure.\textsuperscript{242}

As promulgated in 1946, Rule 18 provided the basic criminal venue rule by restating the previous statutory law, taken from Section 53 of the Judicial Code of 1911, that trials for crimes or offenses against the United States were to be held in the district and division in which the crime was committed. Under specified conditions, however, Rules 19, 20, and 21 permitted certain criminal proceedings to be carried out in other districts or divisions.

Rule 19 restated that portion of Section 53 which permitted a de-

\textsuperscript{241} Defense attorneys made the same argument with respect to Section 53 that they had made with respect to the criminal venue provisions in issue in Post v. United States, 161 U.S. 583 (1896) and Logan v. United States, 144 U.S. 263 (1892). Defense attorneys argued that the word "prosecutions" included not only the trial of the criminal case, but also the return of a true bill by the grand jury. Not surprisingly, the Supreme Court interpreted the word "prosecutions," as contained in Section 53, just as the Supreme Court had interpreted the words "prosecutions" and "criminal proceedings" in the Post and Logan cases, i.e., to exclude grand jury proceedings, including the return of a true bill. As a result, the Supreme Court ruled that Section 53 only required that the trial of the criminal offense be conducted in the division in which the crime was committed. Grand jury proceedings could be conducted in any division within the judicial district. Salinger v. Loisel, 265 U.S. 224 (1924).

Section 53, and its successor Rule 18, have been held to be applicable only to divisions within judicial districts which have been created by Congress. Section 53 has been held inapplicable to "divisions" which have been created by court order. Thus, if Congress authorizes several places for holding court within a judicial district to which the district court, by court order, assigns specified counties of the judicial district, these court-rule "divisions" do not constitute divisional venue for crimes committed in these court-rule "divisions." Crimes committed in a judicial district with court-rule "divisions" can be prosecuted at any place authorized by Congress as a place for holding court. Cagnina v. United States, 223 F.2d 149 (5th Cir. 1955); United States v. Ippolito, 16 F.R.D. 588 (S.D. Fla. 1954); United States v. Sutherland, 214 F. 320 (W.D. Va. 1914).

This interpretation of Section 53 (Rule 18) is in accord with the Supreme Court's interpretation of congressional silence with respect to criminal venue, prior to 1911, in acts authorizing more than one place as a court city within a judicial district, or in acts creating divisions within a judicial district. Rosencrans v. United States, 165 U.S. 257 (1897); Post v. United States, 161 U.S. 583 (1896). But after 1911, since Section 53 was meant to generalize divisional venue, so long as Congress had divided a judicial district into divisions by statute, then Section 53 would apply. See text accompanying notes 230-236 supra. Congress has created divisions by statute in approximately one-half the judicial districts. Orfield, Venue of Federal Criminal Cases, 17 U. Prrt. L. Rev. 375, 383 (1956); Surrency, supra note 201, at 149.

\textsuperscript{242} 1 WRIGHT, supra note 216, at § 1, pp. 1-5.
fendant to apply for transfer of the prosecution from the division in which
the crime was committed to another division within the same judicial dis-

trict. Under Rule 20, an accused was permitted to plead guilty or nolo
contendere to the federal criminal charge in any judicial district in which
the accused was arrested upon an indictment or information pending in
another judicial district. Rule 21 permitted motions for change of venue
from one judicial district to another, based either on the ground of preju-
dice (Rule 21(a)), or “in the interest of justice” when, but only when, the
crime was committed in more than one district (Rule 21(b)).

In 1966, major revisions of the rules concerning venue were
adopted. Rule 18 was amended to eliminate the requirement that trial
be held in the division in which the crime was committed. Trial was still
required to be held in the district where the crime was committed, but the
precise location within the district was left to the discretion of the court,
“with due regard to the convenience of the defendant and his witnesses.”
Since divisional venue was eliminated, Rule 19 was rescinded because a
rule for divisional transfer was no longer needed, and all references to
divisions were deleted from Rules 20 and 21. Rules 20 and 21 were then
liberalized to permit the defendant more often to choose to have certain
proceedings, normally required by Rule 18 to be conducted in the district
where the crime was committed, to be conducted in another judicial dis-


243 For a general discussion of the rules as adopted in 1946, see 4 W. BARRON, FEDERAL
PRACTICE AND PROCEDURE: CRIMINAL §§ 2061, 2071, 2081, 2091 (Rules ed. 1951) [hereinafter
cited as BARRON].

244 For a general discussion of the rules as amended in 1966, see 1 WRIGHT, supra note
216, at §§ 305, 311, 321, 343, pp. 596, 603, 606 n.1, 629.

245 Rule 20 was amended in 1975 to permit a defendant to avail himself of the pro-
cedure of Rule 20 whenever he is present in a district other than the district in which an
indictment, an information, or a complaint is pending. This amendment was proposed by the
draftsmen to delete an unnecessary procedural complication. Pub. L. No. 94-64, § 2 (July
31, 1975); H.R. REP. No. 94-247, 94th Cong., 1st Sess., 16, 32 (1975); Advisory Comm. on Rules
of Criminal Procedure, Notes to 1974 Amendments in WEST PUBLISHING CO., FEDERAL RULES
so as to insure that the adjudication of criminal charges is done expeditiously and conveniently for all concerned. To achieve this end, the drafters of the rules have had to take into account both the interests of the defendant and the interests of the government as represented by the federal judge and the federal prosecutor. Rule 19, permitting intra-district transfer upon application of the defendant, gave recognition to the fact that an accused might prefer an expeditious adjudication of his case rather than to languish in jail awaiting the court's return to the division in which the crime was committed in order to hold the trial proceedings. Then, in 1966, when Rule 18 was amended to delete divisional venue, the Advisory Committee on Rules gave two reasons for this change: (1) only half the judicial districts had divisions and comparison of those districts with divisions to those without indicated no relationship to size or population; (2) the requirement of divisional venue meant delay in criminal proceedings, which could be particularly vexatious to a defendant unable to be bailed because often only brief and infrequent terms of court were held in certain divisions. Although it might have been argued that a defendant need not languish in jail awaiting the return of the court to the division because he could utilize Rule 19 to apply for an intra-district transfer, when it was seen that divisions existed haphazardly in judicial districts, then divisions could be viewed simply as organizational impediments requiring, in certain random judicial districts, one more motion to be filed on behalf of a defendant who desired an expeditious disposition of his case. By deleting divisional venue, this structural and paper barrier to expeditious adjudication could be removed while at the same time protecting the interests of the defendant because the place of trial would now be set at the discretion of the court at any place in the district, but "with due regard to the convenience of the defendant and his witnesses."

Rules 20 and 21 introduced new procedures into federal criminal procedure in 1946. Both were promulgated with the express purpose of providing defendants greater control over where criminal proceedings could take place. By availing himself of the procedure of Rule 20 (including the amendments to date), a defendant could achieve a speedy disposition of the charges without undergoing the attendant hardships involved in removal to the district in which the crime was committed.
Through the procedures of Rule 21(a), permitting a change of venue on the basis of prejudice, a defendant was enabled to present his view as to the possibility of receiving an impartial jury in the district in which the trial was scheduled to be held.\textsuperscript{250} As for change of venue "in the interest of justice," when the crime was committed in more than one district, the defendant, via Rule 21(b), was placed on a more nearly equal footing with the federal prosecutor as to the most appropriate district in which to conduct the trial. Prior to the adoption of Rule 21(b), the prosecutor could choose the district in which to bring the charges, so long as the crime was committed in the district chosen, and that choice was final. Now the defendant could present his arguments as to which of the several permissible districts was the most appropriate district in which to hold the trial. With the amendment of Rule 21(b) in 1966 to permit trial in any district, not just the one(s) where the crime was committed, the defendant was able to argue for an even wider number of districts from which to choose the appropriate one for trial "in the interest of justice" and for "the convenience of the parties and witnesses."\textsuperscript{251}

Despite the protection afforded the interests of defendants in the expeditious and convenient disposition of criminal charges, the drafters of the rules on criminal venue did not ignore the interests of the government. Once the court has set the place for trial within a district under Rule 18, or once a prosecutor has presented charges for trial in a particular district, it is the defendant who must file a motion for change of venue\textsuperscript{252} if he is unhappy with the place or district chosen.\textsuperscript{253} If the defendant does file a motion for change of venue, as permitted to another District; Removal); Beavers v. Henkel, 194 U.S. 73 (1904); In re Palliser, 136 U.S. 257 (1890).\textsuperscript{254} 4 BARRON, supra note 243, at § 2091, pp. 149-50. See 1 WRIGHT, supra note 216, at §§ 342, 345, pp. 620, 645.


\textsuperscript{252} A defendant can file a motion for change of venue under three different provisions in federal criminal procedure: (1) motion for change of venue within the district to the county in which the capital crime was allegedly committed. 18 U.S.C. § 3235 (1970); (2) motion for change of venue within the district to another, more convenient, place of holding court. Fed. R. Crim. P. 18; (3) motion for change of venue to another district because of prejudice or in the "interest of justice." Fed. R. Crim. P. 21.

\textsuperscript{253} If the defendant fails to object to the site selected for the trial by the district court, or to the district in which the United States attorney has instituted the trial proceedings, then the site selected by the court or the district chosen by the prosecutor cannot later be challenged by the defendant. Any objections the defendant has to the venue selected by the court or prosecutor must be affirmatively raised by a motion for change of venue or the objections will be held to have been waived. See cases cited in notes 211-215 supra.

It should be noted that Rules 20 and 21, innovations in federal criminal procedure when introduced in 1946, can only be put into operation at the behest of the defendant. The
change of venue, he has the burden of convincing the court that the place or district selected by the court or prosecutor should not be allowed to stand. In reaching a decision on defendant’s motion, the court is permitted to consider the convenience of the suggested place of trial from the viewpoint of the government. The court is permitted to consider such factors as distance from the residence of the witnesses, availability of facilities in which to conduct the proceedings, adequate prosecution personnel to conduct the proceedings, and the conditions of the dockets in the present and proposed locations. Moreover, when a defendant desires to plead guilty via Rule 20 in a district other than the district in which the crime was committed, the defendant is not allowed to choose the forum for the plea in the exercise of unencumbered discretion. On the contrary, legitimate concerns of federal prosecutors that the procedures of Rule 20 may tempt a defendant to forum shop for a lenient judge have been met through the requirement that both United States attorneys for the two districts involved must consent to the defendant’s desired course of action.


Advisory Comm. on the Rules of Criminal Procedure, Note to the Original Rule,
Although the provisions of the current rules of criminal procedure can be interpreted as a compromise between the interests of defendants and the interests of the government with respect to the speedy and convenient handling of criminal charges, the interests of defendants and the interests of the government are not always in conflict. Changes in the venue rules that ensure the defendant an expeditious, convenient adjudication of the charges often also mean an expeditious, convenient disposition of the charges from the perspective of the government. By permitting defendants to have an intra-district transfer under Rule 19, not only were defendants enabled to receive a more expeditious determination of the charges, but the government, too, was able to obtain a speedier clearing of its criminal dockets. When Rule 19 was repealed due to the amendments to Rule 18 in 1966, both defendants and the government were freed from an organizational and paper impediment to a speedy disposition of criminal charges. In addition, the deletion of divisional venue in 1966 meant that the federal judges and federal prosecutors were freed from having to travel from division to division to hold federal court. 258 Or, as another example of coinciding interests, pleas of guilty under Rule 20 not only allowed defendants to avoid the hardship of removal to the district where the crime was committed, but the government, too, was spared the time and expense involved in removing defendants from one district to another. 259

In analyzing these procedural changes in criminal venue from 1789

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258 With the deletion of divisional venue in 1966, the federal district courts were thereby permitted, if the court so desired, to select one court city within the judicial district as the place where federal court proceedings would be conducted, unless the defendant was able to convince the court that another court city within the judicial district was a more convenient location for a particular trial. Compare Local R. 3(b), W.D. Okla., which reads: "All proceedings, both civil and criminal (except petty and minor offenses) in which venue lies in this District shall be commenced at the Clerk's office in Oklahoma City, Oklahoma, and shall be maintained there unless and until transferred." and United States v. Edwards, 465 F.2d 943 (9th Cir. 1972) with Local R. 10, N.D. Ga., which reads: "By order of this court, any civil action may be transferred for trial to any other place or division within the district, but a defendant in a criminal case will ordinarily be tried in the division in which the offense is alleged to have been committed."

In effect, the abrogation of divisional venue in 1966 meant that statutory divisions, created by Congress, within judicial districts could now be treated by the federal district courts identically to court-rule divisions. Both kinds of divisions could be viewed solely as administrative units to be used for the efficient management of court business. See Houston v. United States, 419 F.2d 30, 33 (5th Cir. 1969); Bostick v. United States, 400 F.2d 449, 452 (5th Cir. 1969); Cagnina v. United States, 223 F.2d 149 (5th Cir. 1955); United States v. Ippolito, 16 F.R.D. 588 (S.D. Fla. 1954); United States v. Sutherland, 214 F. 320 (W.D. Va. 1914).

259 1 Wright, supra note 216, at § 321, p. 607.
until today, they must be measured against the reasons for which the colonists and the constitutional draftsmen demanded limited venue. As previously indicated in Part I of this article, the colonists and constitutional draftsmen had demanded limited venue in order to prevent the government from making it inconvenient and expensive for a defendant to present a defense to criminal accusations. These early Americans had acted under the assumption that the place of the commission of the crime and the place of the residence of the accused would almost always be identical. If the place of the commission of the crime and the place of the residence were identical, then an accused would have the advantages of knowing, and being known by, those who prosecuted and tried him, of having friends and relatives close at hand for moral and legal support, of being able easily to present evidence, particularly character evidence, and of knowing the attorneys upon whom he could call for legal assistance.

It must be stressed again, however, that the place at which the trial is to be held, under Article III, Section 2, clause 3, is not the place of residence of the accused, but rather the place of the commission of the crime. As also indicated earlier, the place of the commission of the crime was chosen as the appropriate test for venue because such test accorded with the conception of jurisdiction held by Americans in the late eighteenth century. But the early Americans who discussed venue were also aware that limiting venue to the place of the commission of the crime was much more advantageous to an accused than permitting the government to conduct the criminal proceedings at a distant location that was neither the place of the commission of the crime nor the place of residence of the accused.260

So long as the place at which criminal proceedings could be held was territorially limited by the concept of jurisdiction, and particularly so long as the place of the commission of the crime and the place of the residence of the accused coincided, the primary policy consideration underpinning venue would be the consideration of accessibility, i.e., insuring that courts were close at hand to the citizens who would be involved in the federal criminal proceedings. Various measures have insured that the courts would be accessible to the citizens—the authorization of numerous cities as court cities, the creation of numerous judicial districts and then divisions within those districts, the grant of power to the district and circuit courts to hold special sessions at convenient locations within the district, and the designation of the county where the crime was committed as the appropriate venue in capital cases. These various measures have meant that even within the geographical area of the state—the constitutional

260 For a fuller discussion of points made in these last two paragraphs, read text, Part I(A)(3).
venue under Article III, Section 2, clause 3—the defendant would not be tried at a location distant from the place of the commission of the crime.\[261\]

As the conditions of the country changed, however, the concern that the courts be accessible to the citizens was no longer considered to be as pressing a concern as it had been in 1789. Greater ease of travel between cities and between states meant that courts were accessible to the citizens, even though fairly distant in terms of miles. Greater ease of travel and greater mobility among the population meant that it was much more likely in 1976 than in 1789 that a crime would be committed in more than one district, or that a person accused of a crime would be arrested or found in a district other than the district in which the crime was allegedly committed.\[262\] But more important, greater mobility meant that the assumption upon which the early Americans had acted—that the place of the commission of the crime and the place of residence of the accused would coincide—was no longer as valid. Defendants were quite likely in the modern world to be accused of crimes in places far distant from their homes.\[263\]

Despite the changed conditions which have been delineated, they could have no effect upon the place at which criminal proceedings would be conducted, so long as venue was automatically determined by the concept of jurisdiction with its territorial limitations. But after the Silverberg\[264\] and Hagner\[265\] decisions, in 1925 and 1931 respectively, the concepts of jurisdiction and venue were completely separated and venue was

\[261\] Accessibility of the courts to those citizens who will be involved in the federal criminal proceedings also carries incidental benefits for the government, especially with regard to fees paid to witnesses and to jurors. Judicial Conference of the United States, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 433 (1960); 7 Cong. Rec. 4658 (1878) (remarks of Senator Christiany.)

\[262\] One federal district court judge has commented: "In the first place, enough time has elapsed within which to collect some pertinent statistics [on the operation of Rule 20]. I have no opportunity to collect data from any place except our own court, but I find this—that after some two years and three months of the operation of this rule in the Northern District of California—there have been entered 338 pleas of guilty in cases of defendants who have been apprehended in California and who have been indicted in other districts. These 338 defendants were indicted in 33 different states of the United States. "I have also found that 98 defendants, who were indicted in the Northern District of California, have entered pleas in 34 different states of the United States where they were apprehended. This might seem at first blush to indicate that those who are charged with crime are perhaps the most traveled persons in the United States." See Goodman, *Revolutionary Procedure in Criminal Actions*, 8 F.R.D. 338, 339 (1948).


\[264\] Silverberg v. United States, 4 F.2d 908 (5th Cir. 1925).

\[265\] Hagner v. United States, 54 F.2d 446 (D.C. Cir. 1931).
made waiverable by the defendant. As a result, the conditions of ease of transportation and population mobility could be taken into account in determining the most appropriate place at which to conduct criminal proceedings, particularly trials. After the Silverberg and Hagner decisions, the concept of jurisdiction with its accompanying concept of territorial limitations on the exercise of judicial power had given way to the concept of venue with its accompanying concept of forum non conveniens limiting the exercise of judicial power.

When the draftsmen of the Rules of Criminal Procedure began their work only a decade after the Hagner decision, they acted on the distinction between jurisdiction and venue to draft rules on criminal venue which reflected the changed conditions, as evidenced most clearly by the introduction into federal criminal procedure of the new procedures of Rules 20 and 21. Since the promulgation of the initial Rules of Criminal Procedure in 1946, subsequent amendments in criminal venue, such as the deletion of divisional venue in 1966 and the broadened applicability of Rules 20 and 21, have also been drafted in recognition of both the distinction between jurisdiction and venue and the conditions of transportation and population mobility in the modern world. As a result of the legal concepts and the social conditions upon which the rules of criminal venue have been based since 1946, the primary policy consideration underpinning the concept of venue has changed from the consideration of accessibility to the consideration of handling criminal matters as expeditiously and as conveniently as possible.

But the question immediately arises, whose interest in the expeditious and convenient disposition of the criminal charges should be protected—the defendant's or the government's? As discussion of the Rules of Criminal Procedure concerning criminal venue from 1946 to the present has indicated, both the interests of the defendant and the interests of the government have been protected in an attempt to draft venue rules which permit an expeditious and convenient adjudication for all concerned. At the same time, however, the demand for limited venue by early Americans so as to prevent the government from making it inconvenient and expensive

266 For a fuller discussion of how the concepts of jurisdiction and venue came to be distinguished, see Part Ill(A) supra.

267 See 1 Wright, supra note 216, at §§ 305, 321, 343, pp. 596, 606, 629.

268 As Professor Wright has written: "[V]enue is a privilege provided for the benefit of the accused, rather than a limitation on the jurisdiction of the court, and that this privilege may be waived by the defendant... Indeed Rule 20 expressly and Rule 21 implicitly assume that a defendant can waive venue requirements in proceeding under those rules." Id. § 306, at 598.
to mount a defense to criminal accusations, as recalled by the draftsmen of the federal rules and by the commentators on these rules, has led to a trend in the rules concerning criminal venue toward more sensitivity for the defendant's interests in convenient and quick handling of the criminal charges against him.\textsuperscript{209}

C. Jurisdiction and Vicinage

Congress has enacted hundreds of laws changing the territorial assignments of particular courts, either by expanding or constricting the territory assigned to a particular court, or by creating new courts to replace courts whose powers were diminished.\textsuperscript{270} In light of the nineteenth-century concept of jurisdiction—that the power of a court was limited to the territory assigned to it and, hence, it could be exercised only with respect to crimes committed within its assigned territory—these acts changing the territorial assignments of courts raised a difficult legal question concerning jurisdiction. If a crime were committed within a geographical area which was then reassigned to a different court, which court, if any, possessed the jurisdiction to conduct the criminal proceedings relating to the crime committed in the reassigned territory?

When considering territorial-assignment legislation, Congress could respond to the jurisdictional question raised by this legislation in four different ways. (1) Congress could choose to remain silent on the question by

\textsuperscript{209} See generally, e.g., Johnston v. United States, 351 U.S. 215, 224 (1956) (Douglas, J., dissenting); United States v. Johnson, 323 U.S. 273, 279 (1944) (Frankfurter, J., majority opinion and Murphy, J., concurring); 1 WRIGHT, supra note 216, at §§ 301, 343, pp. 577, 629; Advisory Comm. Notes to the Federal Rules of Criminal Procedure, Rules 18, 19, 20, 21, in 3 WRIGHT, supra note 216, at 471-77; Barber, supra note 263; Orfield, Transfer of Federal Offense Committed in More than One District or Division, 51 MICH. L. REV. 31 (1952) [hereinafter cited as Orfield, Transfer]; Wright, Proposed Changes in Federal Civil, Criminal, and Appellate Procedure, 35 F.R.D. 317 (1964).


As previously indicated, the considerations relevant to a proper determination of a motion for change of venue under Rule 21(b) are quite similar to the considerations that concerned the colonists when they adopted the constitutional limitation, Article III, Sec. 2, cl. 3, on venue. Read note 26 and accompanying text supra.

passing territorial-assignment legislation devoid of any provision dealing with the jurisdictional question.\(^{271}\) (2) Congress could include a provision in the legislation leaving jurisdiction in the federal trial court possessing authority over the territory in which the crime was committed, prior to the reassignment, for all crimes committed in that territory prior to the passage of the legislation.\(^{272}\) (3) Congress could include a provision in the legislation leaving jurisdiction in the court possessing authority over the territory in which the crime was committed, prior to the reassignment, for all crimes where proceedings were already pending in that court at the time of the passage of the legislation; for other crimes committed in the reassigned territory prior to the reassignment for which no proceedings were pending, jurisdiction would be granted to the court possessing authority over the reassigned territory after the passage of the legislation.\(^{273}\) (4) Congress could include a provision in the legislation granting jurisdiction to the court possessing authority over the territory in which the crime was committed, after the reassignment, for all crimes committed within the reassigned territory where no final judgment had been rendered. If Congress responded in the fourth manner, then the crimes committed in the reassigned territory prior to the passage of the legislation, for which proceedings were already pending, would be transferred from the court that had lost authority over the reassigned territory, to the court that had gained authority over the reassigned territory.\(^{274}\) From 1789 until 1911, Congress wrote territorial-assignment legislation which exhibited all four responses.

Comparing the concept of jurisdiction to these acts changing the territorial assignments of courts, some defense lawyers argued, in the mid-nineteenth century, that any change in the territory assigned to a court meant that no court existed with the authority to conduct the criminal proceedings for crimes committed in the territory which had been reassigned. Congress could enact territorial-reassignment legislation, this defense argument contended, but only with the attendant consequence of destroying the power of any court to conduct criminal proceedings with respect to crimes committed in the reassigned territory. This defense argument, if accepted, meant that Congress had none of the options listed above be-


cause any reassignment of territory conflicted with the nineteenth-century concept of jurisdiction.\footnote{275}

However, other defense lawyers argued that only the court possessing authority over the reassigned territory where the crime had been committed, at the time the particular criminal proceeding was being conducted, possessed jurisdiction to conduct that particular criminal proceeding. Under this second defense argument, Congress could pass territorial-assignment legislation, but in order to conform to the concept of jurisdiction, Congress had to adopt the fourth course of action listed above.\footnote{276}

When the issue of the effect of territorial-reassignment acts on the jurisdiction of the courts reached the Supreme Court in \textit{United States v. Dawson,}\footnote{277} the Court clearly stated that when legislation changing territorial assignments was silent on this issue, then the court in which criminal proceedings were pending at the time the act became effective would continue to have jurisdiction over the crime to which the proceedings related for all purposes until final adjudication of the crime.\footnote{278} In a dissenting

\footnote{275}6 Op. ATT'y Gen. 103, 114-16 (C. Andrews ed. 1871) (Opinion on Colliers Case, Sept. 8, 1853). The theory which underpinned the defense argument was that the concept of jurisdiction required the same court to possess authority over the territory in which the crime was committed, at the time the crime was committed, as possessed authority over the territory in which the crime was committed, at the time of all criminal proceedings, including final judgment, relating to that crime. If one court did not possess continuous authority over the territory in which the crime was committed, from the time of the commission of the crime through final judgment with regard to that crime, then jurisdiction in any court had been destroyed. \textit{Id.}

A similar belief also existed that the jurisdiction of a court would be destroyed if the court did not conduct all the criminal proceedings, from indictment through final judgment, with respect to a particular crime at the same term of court. In light of this belief, any attempt to remit criminal proceedings begun at one term of court to another term of court raised difficult legal questions concerning jurisdiction. \textit{United States v. Cornell}, 25 F. Cas. 650, 654 (C.C.R.I. 1820) (No. 14,868); \textit{United States v. Insurgents}, 26 F. Cas. 498, 499 (C.C.D. Pa. 1799) (No. 15,442); \textit{Case of Fries}, 9 F. Cas. 826, 846 (C.C.D. Pa. 1799) (No. 5,126). \textit{Cf. Act of May 25, 1824, ch. 145, § 2, 4 Stat. 34; Act of May 15, 1820, ch. 111, § 2, 3 Stat. 598.}

\footnote{276}United States v. Dawson, 56 U.S. (15 How.) 467, 470-77 (1853). The theory which underpinned this defense argument possibly can best be illustrated by quoting from a treatise on criminal law written in 1870: "The venue must correspond with the jurisdiction of the court. Where an offence is committed within the county of A., and, after the commission of the offence, the county is divided, and the part of the county in which the offence was committed is erected a new county called B., the latter county has jurisdiction over the offence. In such case, however, the indictment properly charges its perpetration in the former county while the trial is in the latter." \textit{1 F. WHARTON, A TREATISE ON THE CRIMINAL LAW IN THE UNITED STATES} § 277, at 184 (1870).

\footnote{277}56 U.S. (15 How.) 467 (1853).

\footnote{278}In effect, the majority in the \textit{Dawson} case concluded that congressional silence on the jurisdictional question raised by territorial assignment legislation should be construed to mean that Congress had adopted the third response to the jurisdictional question. See note 273 and accompanying text supra.

opinion, Justice McLean argued that if the legislation under consideration were silent as to jurisdiction, then the court possessing authority over the territory where the crime was committed at the time the particular criminal proceeding was to be conducted was the appropriate court to conduct that particular criminal proceeding.\textsuperscript{279} But, Justice McLean pointed out that his disagreement with the majority was based on the fact that the relevant legislation contained no express provision concerning the jurisdictional question: he differed from the majority as to the meaning of congressional silence.\textsuperscript{280}

When the majority and dissenting opinions of the \textit{Dawson} case are read together, it seems clear that the Supreme Court had ruled that Congress has the power to grant jurisdiction to either court—the court that had had authority over the territory prior to the passage of the territorial-reassignment legislation, or the court that was granted authority over the territory by the legislation—to conduct criminal proceedings with respect to crimes committed in the territory which Congress had reassigned. Moreover, although Justice McLean expressed an obvious desire (probably on behalf of the entire Court) that Congress specifically speak to the jurisdictional issue when it passed these acts, whether Congress spoke to the issue or was silent on it, the Supreme Court was clearly rejecting defense claims that any change in the territory assigned to courts necessarily led to the conclusion that no court existed with the authority to conduct criminal proceedings for crimes committed in the reassigned territory prior to its reassignment. Congress, the Supreme Court had ruled, could use any of the four possible responses to the jurisdictional question without violating the nineteenth-century concept of jurisdiction.\textsuperscript{281}

\textsuperscript{279} In contrast with the conclusion of the majority, Justice McLean concluded that congressional silence on the jurisdictional question raised by territorial assignment legislation should be construed to mean that Congress had adopted the fourth response to the jurisdictional question. United States v. Dawson, 56 U.S. (15 How.) 467, 489-93 (1853) (McLean, J., dissenting). See note 274 and accompanying text supra.

\textsuperscript{280} Justice McLean wrote: "In the act dividing the district, Congress had power to provide that all offences, committed in the district before the division, should be tried in the Eastern District. But no such provision being made, the question is, whether the jurisdiction may be exercised in that district without it...."

"All this difficulty arises from an omission of Congress to make, in the law dividing the district, the necessary provision; and it appears to me that we have no power, by construction or otherwise, to supply the omission." United States v. Dawson, 56 U.S. (15 How.) 467, 489, 492 (1853).

\textsuperscript{281} Attorney General Caleb Cushing wrote the opinion in \textit{Colliers Case} in September, 1853, and defended the United States in the \textit{Dawson} case, decided in December, 1853. According to Cushing, despite numerous laws changing the territorial assignments of courts, the \textit{Colliers Case} was the first one to challenge the jurisdiction of a court on the basis that the territory assigned to the court had been changed. 6 Op. Att'y Gen. 103, 117-18, 121 (C. Andrews ed. 1871) (Opinion on Colliers Case, Sept. 8, 1853). In presenting his opinion in the
But defense attorneys presented a second argument that territorial-assignment legislation destroyed the jurisdiction of any court with respect to crimes committed in the reassigned territory. They argued for this conclusion based on a claimed relationship between the concept of jurisdiction and the sixth amendment. The argument went as follows: The jurisdiction of a court is territorially limited to the crimes that are committed within the territory assigned to the court, which territory is called a district under congressional legislation and court decisions; the sixth amendment entitles the defendant to "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..."; hence, any change in the territory of the district means that no court exists with jurisdiction over the district which had been "previously ascertained by law." By reading the concept of jurisdiction into the sixth amendment, defense attorneys hoped to obtain a form of amnesty or pardon for their clients in these instances when the territory in which the crime was committed had been changed from one court to another.282

In three separate cases, United States v. Hackett,283 United States v. Benson,284 and United States v. Peuschel,285 federal courts rejected this defense argument. Each court ruled that acts changing the boundaries of the districts assigned to the federal courts did not mean that no district "previously ascertained by law" remained in existence after the act. But in reaching this conclusion, the courts stated two very different definitions of the word "district" in the sixth amendment.

In the Benson case, Justice Field pointed out that the act dividing the District of California into two judicial districts included a jurisdictional provision which expressly provided that "all offenses heretofore committed in the district of California shall be prosecuted, tried, and determined in the same manner, and with the same effect, to all intents and purposes, as if committed in the same judicial district." Cushing had derisively argued, "I do not see why it might not, with equal sense and reason, be pretended that a change in the person of the judge, by the death of one, and the appointment of another, is to take away the jurisdiction of the court over offenses committed before such change of person, as well as in the case of a change of tribunal." Id. at 119.

Cushing's words about a change in personnel being urged as undermining the authority of a court to conduct criminal proceedings have proved to be prophetic. Such an argument has been presented twice and twice rejected. Amsler v. United States, 381 F.2d 37 (9th Cir. 1967); Connelly v. United States, 249 F.2d 576 (8th Cir. 1957). Cf. Gut v. Minnesota, 76 U.S. (9 Wall.) 35 (1869).

283 29 F. 848 (C.C.N.D. Cal. 1887).
284 31 F. 896 (C.C.D. Cal. 1887).
if this act had not passed." Under this jurisdictional provision, crimes committed prior to the passage of the legislation would be required to be prosecuted before the judge, by the district attorney, with the court clerk, and with the court records from the original District of California. Since the crime being prosecuted in Benson, committed prior to the passage of the territorial-assignment legislation, was being prosecuted in accordance with the jurisdictional provision of the legislation through use of the personnel and records of the original District of California, Justice Field ruled that the sixth amendment had not been violated because the district, which had been "previously ascertained by law," had continued in existence after the act. As Justice Field interpreted the word "district" in the sixth amendment, "district" referred to the district court which had to possess jurisdiction over the crime both before and after the act changing the territory assigned to the court. According to Justice Field, the sixth amendment was a jurisdictional provision that prohibited a change in identity of the district court possessing jurisdiction to conduct the criminal proceedings. 

In Hackett and Peuschel, Judges Hoffman and Wellborn, respectively, also noted that in the acts changing the territory assigned to the courts, Congress had included an express jurisdictional provision. Even though

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286 The jurisdictional provision contained in the Act of Aug. 5, 1886, ch. 928, § 11, 24 Stat. 308, to which Justice Field referred, is an example of the adoption by Congress of the second possible response to the jurisdictional question raised by territorial-assignment legislation. See note 272 supra and accompanying text.

The theory which apparently underpinned the conclusion of Justice Field in the Benson case was the belief that the sixth amendment commanded that the same court possess jurisdiction over the crime, as opposed to the territory in which the crime was committed, from the time the crime was committed until the time it was finally adjudicated. To determine if the same court was exercising jurisdiction over the crime following a territorial reassignment, Justice Field attempted to determine the identity of the court through its organizational structure as determined by such indices as personnel and court records. United States v. Benson, 31 F. 896, 898 (C.C.D. Cal. 1887). But the difficulty of determining the "identity" of the district court through its organizational structure is readily apparent from the subsequent history of the prosecution of Mr. Benson. When a demurrer to the indictment against Mr. Benson was sustained in 1893, the presiding federal judge felt compelled to explain why the prosecution of Mr. Benson had lasted from 1886 to 1893. Reasons listed for the delay were the death of one circuit judge, the death of the district court judge, the disqualification of the appointees to both the circuit judgeship and the district judgeship because both persons had had previous professional involvement with the Benson prosecution, and the time needed to obtain the appointment by designation of a federal judge from the state of Washington under Section 592 of the Rev. Stat. 1878 to try the case. In re Benson, 58 F. 962 (C.C.N.D. Cal. 1893). See In re Mason, 85 F. 145 (C.C.S.D. Iowa 1898). See note 281 supra and authorities cited therein.

these jurisdictional provisions were identical to the jurisdictional provision construed by Justice Field in Benson, they interpreted it as solely an exercise of the power possessed by Congress, which appears to have been sanctioned by the Supreme Court in United States v. Dawson, to specify which particular court would be granted jurisdiction to conduct criminal proceedings with respect to crimes committed prior to the legislation in the reassigned territory. As Judges Hoffman and Wellborn interpreted the jurisdictional provisions being construed, Congress had simply opted to leave jurisdiction in the federal trial court possessing authority over the reassigned territory in which the crime was committed at the time of the passage of the territorial-assignment legislation for all crimes committed within the reassigned territory prior to the legislation.

When Judges Hoffman and Wellborn turned to the defense argument that no district “previously ascertained by law” continued to exist, as required by the sixth amendment, they responded that the word “district” referred to the geographical area from which the jurors to try crimes committed in that area must be summoned. As they interpreted the sixth amendment, it prohibited the selection of jurors from a geographical area different from the geographical area designated as the district at the time the crime was committed. The jurisdictional provisions contained in the territorial-assignment legislation were important, therefore, not because these provisions maintained the identity of a district court, but because they specified which particular court was to exercise the power to summon the jurors from the district as the district was geographically delimited prior to the passage of the act reassigning territory. In contrast with Justice Field, who had interpreted the sixth amendment as a jurisdictional provision, Judges Hoffman and Wellborn saw the concepts of jurisdiction and vicinage to be distinct concepts. In their opinion, the sixth amendment was a vicinage provision, not a jurisdictional provision.

United States v. Hackett, 29 F. 848, 849 (C.C.N.D. Cal. 1887); United States v. Peuschel, 116 F. 642, 645 (S.D. Cal. 1902). The interpretation given to the jurisdictional provisions of the relevant legislation by Judges Hoffman and Wellborn was in accord with the second possible response to the jurisdictional question raised by territorial-assignment legislation. See note 272 supra and accompanying text.

Judge Hoffman stated, “Inasmuch as every offender has a right to be tried by a jury of the district in which the crime was committed, which district shall previously have been ascertained by law, it is plain that a jury of the Northern district could not try an offender who has committed a crime while the district comprised the whole state, neither could a jury of the Southern district try him.

“... It was necessary to keep alive the district court of the district of California . . . in order that a court might be organized, and be in existence, competent to call a jury from the body of the district where the crime was committed.” United States v. Hackett, 29 F. 848, 849 (C.C.N.D. Cal. 1887). Cf. United States v. Dixon, 44 F. 401 (N.D. Cal. 1890) (opinion of Judge Hoffman).
It is not surprising that Justice Field confused the concept of jurisdiction with the sixth amendment. From 1789 until 1878, the territory over which the federal trial courts exercised jurisdiction was always called a judicial district.290 In light of the concept of jurisdiction held during that period, lawyers must have heard the statement reiterated constantly that the trial of a crime against the laws of the United States must be held within the judicial district in which the crime was committed.291 Since the sixth amendment also referred to judicial districts which were ascertained by determining where the crime was committed, it is quite conceivable that lawyers confused the concept of jurisdiction with the sixth amendment and began to believe that the sixth amendment stated a constitutional requirement that the trial of a crime be conducted within the judicial district wherein the crime was committed. In the Benson opinion, Justice Field was, therefore, simply exhibiting the belief held by many lawyers that confused the concept of jurisdiction with the sixth amendment, as evidenced by the arguments of defense counsel in the Benson, Hackett, and Peuschel cases.292

Thus as Justice Field looked for a district "previously ascertained by law" to satisfy the sixth amendment, thereby blunting the defense argument that changes in territory assigned to a court resulted in an amnesty or pardon, he recalled the (mistaken) belief that the sixth amendment was a jurisdictional provision. If the sixth amendment were jurisdictional, what should be the impact upon the sixth amendment of the specific jurisdictional provision included in the territorial-assignment legislation by Congress? When Justice Field read the jurisdictional provision, he found that Congress had continued jurisdiction in the district court that had existed prior to the legislation. Justice Field had found his answer to the defense

Similarly, Judge Wellborn in the Peuschel case wrote, "The only constitutional right of the defendant is to a jury of which every member is a resident of a county or locality which, at the time the offense is alleged to have been committed, was a part of the district. To illustrate, if the defendants were brought to trial on this indictment, and while the jury was being impaneled it should be developed that any of the proposed jurors were residents of either of the three counties transferred (from the Northern District of California to the Southern District of California—the indictment alleges crime committed in a county located in the Southern District of California as constituted prior to the territorial transfer) it would be a ground of challenge to such jurors, under the sixth amendment, that the county of which they are residents was not, at the time of the alleged commission of the offense, a part of the district." United States v. Peuschel, 116 F. 642, 646 (S.D. Cal. 1902). See United States v. Maxon, 26 F. Cas. 1220 (E.D.N.Y. 1866) (No. 15,748).

290 See notes 201, 202 supra and accompanying text.
291 For a full discussion of the nineteenth-century concept of jurisdiction, see Part III (A) supra.
292 See note 282 supra and accompanying text.
argument: what was required to be "previously ascertained" was the district court whose identity remained unchanged, due to the jurisdictional provision in the legislation, after the passage of the territorial-assignment legislation. But in reaching his decision in Benson, Justice Field failed to recognize that the jurisdictional provision used by Congress in the act being construed was just one of several permissible provisions, as sanctioned by United States v. Dawson. He also had failed to realize that the sixth amendment is a vicinage provision, not a jurisdictional provision.

In the revision of the judiciary laws in 1911, the Special Joint Committee recommended that the jurisdictional provision that had been at issue in the Benson, Hackett and Penschel cases be generalized so as to apply to all judicial districts and divisions. Upon recommendation of the Committee, Congress adopted Section 59 of the Judicial Code of 1911 which read:

Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. See text accompanying notes 270-281 supra. Justice Field did not mention the Dawson case in his Benson opinion. Except for the discussion of the jurisdictional provision of the relevant territorial-assignment legislation, Justice Field cited no other authority for his conclusion as to the definition of the word "district" in the sixth amendment.

Judge Hoffman also failed to cite any authority for his conclusion as to the definition of the word "district" in the sixth amendment. Judge Wellborn, by contrast, did mention Dawson and also United States v. Maxon, 26 F. Cas. 1220 (E.D.N.Y. 1866) (No. 15,748), in reaching his conclusion, which is the same as the conclusion of Judge Hoffman, as to the definition of the word "district" in the sixth amendment.  

293 See text accompanying notes 270-281 supra. 294 Act of Mar. 3, 1911, ch. 231, § 59, 36 Stat. 1103. The recommendation of the Special Joint Committee that a single jurisdictional provision, applicable to all territorial-assignment legislation, be adopted was in accord with the desire of the Committee to delete specialized provisions of limited applicability from the laws governing the judicial system. H.R. Doc. No. 743, 61st Cong., 2d Sess., 6 (1910); 46 Cong. Rec. 90 (1910) (remarks of Congressman Moon). Apparently the reason that the Special Joint Committee decided on the second of the four possible congressional responses is that the jurisdictional provision was the most common one Congress had written in the various territorial-assignment enactments. H.R. Doc. No. 743, 61st Cong., 2d Sess., 31 (1910); 45 Cong. Rec. 3606 (1910) (remark of Senator Heyburn).

It should be noted that this jurisdictional provision adopted by Congress in 1911, upon recommendation of the Special Joint Committee, grants jurisdiction to a different court than the one which a leading text author of that period concluded should have jurisdiction after a change in territorial assignments. Compare Act of Mar. 3, 1911, ch. 231, § 59, 36 Stat. 1103 with 1 F. Wharton, A Treatise on the Criminal Law in the United States § 277, at 183 (1870). The conclusion of Mr. Wharton is quoted in note 276 supra.
In a series of cases in the 1920's, Lewis v. United States (case 1), Lewis v. United States (case 2), Briggs v. White, Mizzell v. Beard, and Mizzell v. Vickery, Section 59 was the focus of interpretive attention as the federal courts again struggled with defense arguments that changes in territorial assignments to courts meant that no district court existed with jurisdiction over districts “previously ascertained by law.” To answer these defense arguments, the federal courts adopted the definition of the word “district” in the sixth amendment as formulated through the identity test, which had previously been adopted by Justice Field in Benson. In all these cases in the 1920's, the federal courts agreed that Section 59 was important because it continued in existence the district court “previously ascertained by law,” which the courts supposed was the requirement of the sixth amendment. In the language of the Supreme Court in Lewis v. United States:

Rightly construed, the Act of 1925—as shown especially by the specific provisions of § 5, including the reference to § 59 of the Judicial Code—did not create a new court for a new district, but merely amended § 101 of the Judicial Code by limiting the territorial jurisdiction of the court for the Eastern District, for most purposes, to certain counties, while continuing its original territorial jurisdiction for the purpose of commencing and continuing prosecutions for crimes and offenses previously committed therein.

In the five cases listed in the text, the federal courts agreed that Section 59 should be interpreted to mean that Congress had left jurisdiction in the federal district court possessing authority over the territory in which the crime was committed, prior to its reassignment, for all crimes committed in that territory prior to the passage of the territorial-assignment legislation. See also Hale v. United States, 25 F.2d 430 (8th Cir. 1928).

One other court in the 1920's provided a different interpretation of Section 59. In Quinlan v. United States, 22 F.2d 95 (5th Cir. 1927), the court ruled that Section 59 left jurisdiction in the federal district court possessing authority over the territory in which the crime was committed prior to its reassignment, but only for crimes for which criminal proceedings were pending in the court on the effective date of the territorial-assignment legislation. With respect to crimes committed in the reassigned territory for which no proceedings were pending on the effective date of the relevant legislation, the court held that Section 59 was inapplicable. Hence, for these crimes it was ruled that the court possessing authority over the territory in which the crime was committed after its reassignment had jurisdiction to conduct the criminal proceedings. Id. at 97-98. This interpretation of Section 59 (now 18 U.S.C. § 3240) has since been repudiated by the Fifth Circuit in favor of the interpretation given to Section 59 by the five cases listed in the text. Hayes v. United States, 407 F.2d 189, 191 (5th Cir. 1969).
In short, the identity of the court was not changed; and it continued to be as it had been before, the court of the Eastern District.\textsuperscript{301}

Although the Supreme Court in the \textit{Lewis} case did seem to recognize that the sixth amendment demanded that the geographical territory from which to summon jurors should remain unchanged, the emphasis in the opinion of the Supreme Court was upon the identity test interpretation of the sixth amendment.\textsuperscript{302} In the other decisions interpreting Section 59, the interpretation of the sixth amendment as a jurisdictional provision, which is the import of the identity test, was even more predominant. In fact, when a defense attorney raised the vicinage interpretation of the sixth amendment in the \textit{Lewis} case at the Eighth Circuit level, the court of appeals had responded:

Nor is there any merit to the contention that the defendants were entitled to have jurors selected from the counties transferred from the Eastern to the Northern District.

... If jurors from the counties transferred from the Eastern to the Northern district were to be selected, it would necessitate a writ of venire facias to the marshal for the Northern district, for the marshal of the Eastern district has no power to execute it outside of his own district. There is no statute authorizing jurors to be drawn for service out of the district of their residence.\textsuperscript{303}

As the quotation indicates, this court had completely forgotten that the sixth amendment is a vicinage provision, for the court had not only sanc-

\textsuperscript{301} 279 U.S. 63, 70 (1929).

\textsuperscript{302} \textit{Id.} at 72. In \textit{Lewis}, the Supreme Court had opined, “Since the court for the Eastern District was sitting \textit{pro hac vice} as one for the entire district as originally constituted, it had authority for the purposes of the prosecution and trial to draw and summon jurors from the entire district, including the ten transferred counties. . . .” “In the situation in which the court would deal occasionally with past offenses in which jurors from the ten transferred counties would be eligible, but ordinarily with cases in which jurors from such counties would not be eligible, the judge might well have thought that it would be most favorable to impartial trials and avoid unnecessary expense or undue burden to the citizens of these ten counties to return only jurors from the thirty other counties—who would be eligible to serve in all cases.”

For a fuller discussion of the procedures for summoning jurors as they relate to the concept of vicinage, see Parts III(\textit{B}) (2) and IV(A) (1) and (2) \textit{infra}.

\textsuperscript{303} Lewis v. United States, 14 F.2d 369, 371 (8th Cir. 1926). Here the defense attorney raised the vicinage interpretation of the sixth amendment only after he had argued that changes in territorial assignments to courts meant that no district court existed with jurisdiction over districts “previously ascertained by law” as required by the sixth amendment. \textit{Id.} at 369. As previously indicated, the argument the defense attorney first presented confuses the concept of jurisdiction with the sixth amendment. Read text accompanying notes 282-293 \textit{supra}. 
tioned the selection of jurors from a geographical area delimited differently at the time of trial than at the time the crime was committed,\textsuperscript{304} but, due to its reading of the sixth amendment as a jurisdictional provision, had also gone so far as to prohibit the summoning of jurors from certain counties which had partially constituted the judicial district as it was geographically delimited at the time of the alleged commission of the crime. In the opinion of the court of appeals, at issue under the sixth amendment was the continuous identity of the district court, not the continuous territorial integrity of the area from which the jurors were summoned.

It is understandable why the courts in the 1920's decided to adopt the identity test of Justice Field from the \textit{Benson} case, rather than follow the decisions of Judges Hoffman and Wellborn in \textit{Hackett} and \textit{Peuschel}. The concept of jurisdiction was still dominated by the belief that the power of a court was limited to the territory assigned to that court. Although by the 1920's the territorial limitations of the concept of jurisdiction were weakening, as the previous two subparts of this article have indicated, it was not until \textit{Hagner v. United States}\textsuperscript{505} in 1931 that the power of a court was completely freed from territorial limitations. As a result of the prevalent belief concerning jurisdiction, it was possible in the 1920's, just as it had been in 1887 at the time of the \textit{Benson} decision, to confuse the concept of jurisdiction with the sixth amendment. That many lawyers in the 1920's were still confused is clearly evidenced by the defense arguments presented in the cases concerning the interpretation of Section 59 of the Judicial Code of 1911.\textsuperscript{306}

Once the concept of jurisdiction was confused with the sixth amendment, then the attention of the courts would be focused upon the concept of jurisdiction as the courts looked for a "district" "previously ascertained by law." Just as Justice Field in the \textit{Benson} case had looked to the congressional jurisdictional provision to find the previously ascertained district, so the courts in the 1920's looked to Section 59 as the appropriate source for a jurisdictional interpretation of the sixth amendment. In Section 59, the courts in the 1920's found that the district courts which had had jurisdiction over the territory that was reassigned continued to exercise jurisdiction. Section 59 therefore provided the answer to the defense

\textsuperscript{304} As the quotation from the Supreme Court opinion in \textit{Lewis v. United States}, set forth in note 302, \textit{supra}, indicates, the Supreme Court, by granting discretion to the federal district judge to summon jurors solely from the judicial district as geographically constituted after 10 counties had been transferred to a new judicial district, had also sanctioned the selection of jurors from a geographical area differently delimited at the time of trial than at the time the crime was allegedly committed.

\textsuperscript{305} 54 F.2d 446 (D.C. Cir. 1931).

\textsuperscript{306} See notes 295-300 \textit{supra} and accompanying text.
arguments that changes in territory meant that under the sixth amendment no court existed which could exercise jurisdiction. Under Section 59, the district court continued in existence; the district court had been "previously ascertained by law." By confusing the concept of jurisdiction with the sixth amendment, the identity test was adopted as the correct test by which to interpret the word "district."

It must be reasserted that the sixth amendment is a vicinage provision, not a jurisdictional provision. As a vicinage provision, Judges Hoffman and Wellborn were correct in holding that the word "district" in the sixth amendment refers to a geographical territory from which to summon jurors for the prosecution of crimes committed in that territory, and that the area must be ascertained prior to the commission of the offense. If Congress rearranges the geographical territory assigned to the various courts between the time a crime is committed and the time the crime is brought to trial, then Section 59 simply indicates which court is to conduct the trial proceedings, including the issuance of summons for jurors from the district as it was constituted prior to the commission of the crime. The confusion of the concept of jurisdiction with the sixth amendment was a major factor contributing to the concept of vicinage fading from the legal consciousness.

D. Locality of the Crime

When the constitutional draftsmen wrote Article III, Section 2, clause 3 and the sixth amendment, they seemingly acted upon the assumption that a crime could only be committed at one place. In an era when travel was difficult and slow, when commerce between the states was relatively underdeveloped, and when communications systems between the states were rudimentary, it was reasonable to think that all the elements of a crime would occur in one place. Even if the assumption that the place of the commission of the crime would coincide with the place of residence of the accused—an assumption which underpinned the demand for limited venue by the early Americans—proved false in any particular instance, still the assumption that the place of the commission of the crime would be identical to the place at which the accused was physically present at the time of the alleged commission of the crime would almost invariably be true.307 So

307 Comment, Multi-Venue and the Obscenity Statutes, 115 U. Pa. L. Rev. 399, 413 (1967). Cf. 1 WRIGHT, supra note 216, at § 301, pp. 577-83. Although the constitutional draftsmen seemingly acted on the assumption that a crime could be committed in only one place, they were most likely aware that certain exceptional circumstances might exist which would not be in accord with this assumption. For example, already in 1548 the English Parliament had passed a statute to deal with the situation in which a blow was struck in one county but the person struck died in another county. An Act for trial of murders and felonies committed in several counties, 2 & 3 Edw. VI, c. 24, § 2 (1548). In this example, the place at which
long as the accused was physically present at the place where the crime allegedly occurred, then almost invariably all the elements of the crime would be committed at only one location. Hence, when the constitutional draftsmen used the place of the commission of the crime as the appropriate test to determine both venue under Article III and vicinage under the sixth amendment, they were sure that they were prescribing a test that would point to only one specific location within a particular state and judicial district.  

Travel, commerce, and communications between states was not uncommon, however, by the mid-nineteenth century, as steamship lines, railroads, telegraph systems, and mail service developed across the United States. By then, an accused could use the modern means of transportation or communication to set in motion in one location activities with consequences occurring in another location. Since the place at which the accused was physically present was different from the place at which the consequences occurred, the elements of the crime could be considered to have occurred at different locations. The assumption under which the constitutional draftsmen had operated with respect to the locality of the crime had been invalidated by technological changes.

If the place where the accused was physically present at the time of the crime was different from the place where the consequences of his criminal activities occurred, then serious jurisdictional problems thereby arose. As previously established, the nineteenth-century concept of jurisdiction entailed the belief that the jurisdiction of a court could be exercised only with respect to crimes committed within the territory assigned to the court. If the place where the accused initiated his activities was different from the place where the consequences of those activities occurred, then where had the crime been committed—in the territory where the accused had been physically present; in the territory where the consequences occurred; in either territory, because elements of the crime had occurred possibly in each; or, in neither territory because the crime had not been completed wholly within a single territory?

308 The constitutional draftsmen were aware, however, that certain crimes punishable by the federal government would often not be committed in any state. With respect to crimes not committed in any state, Article III, Section 2, clause 3 authorized Congress by law to determine where the trial would be held. Congress exercised this authority in 1790 by declaring "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought." Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 114. See Cook v. United States, 138 U.S. 157 (1890); United States v. Jackalow, 66 U.S. (1 Black) 484 (1861); United States v. Dawson, 56 U.S. (15 How.) 467 (1853).
Although one can understand that the courts, prosecutors, and legislators would be very unsympathetic to the conclusion that no court existed with the power to try a crime that had occurred in more than one territory, some courts apparently felt that this conclusion must be reached due to the concept of jurisdiction. To insure that courts were not ousted of jurisdiction over crimes that had occurred in more than one judicial district, Congress in 1867 passed a provision which read:

When any offense shall be begun in one judicial district of the United States and completed in another, every such offense shall be deemed to have been committed in either of said districts, and may be dealt with, inquired of, tried, determined and punished in either of said districts, in the same manner as if it had been actually and wholly committed therein.

Then, in the Elkins Act of 1903, Congress introduced the concept of a continuing offense, by providing that if a crime were committed through rail transport, the crime could be prosecuted either "within the district in which such violation was committed or through which the transportation may have been conducted. . ." Then, in the Elkins Act of 1903, Congress introduced the concept of a continuing offense, by providing that if a crime were committed through rail transport, the crime could be prosecuted either "within the district in which such violation was committed or through which the transportation may have been conducted. . ."

Defense attorneys attacked this legislation concerning continuing offenses and offenses "begun and completed" in different judicial districts on the grounds that the statutes violated Article III, Section 2, clause 3 and the sixth amendment. They argued that the jurisdiction of a court was limited to crimes committed within its assigned territory and that no crime could be said to be committed in a judicial district unless at the time of the alleged crime the accused either resided in the district, or was physically

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Parliament's passage in 1548 of An Act for trial of murders and felonies committed in several counties, see supra note 307, was accompanied by the statement that the law was needed because without such a law the person responsible for the death would escape punishment for the homicide. It should be pointed out that the reason Parliament felt the legal problems arose when a wound was inflicted in one county and death occurred in another, related to the functioning of the jury (i.e., the concept of vicinage). In contrast, the reason the American courts felt that legal problems arose in this situation related to the power of the court (i.e., the concept of jurisdiction). Compare An Act for trial of murders and felonies committed in several counties, 2 & 3 Edw. VI, c. 24, § 2 (1548) with United States v. Bladen, 24 F. Cas. 1160 (C.C.D.C. 1809) (No. 14,605) and United States v. McGill, 26 F. Cas. 1088, 1090 (C.C.D. Pa. 1806) (No. 15,676). See 18 U.S.C. § 3236 (1970); S. REP. No. 10, pt. 1, 60th Cong., 1st Sess., 12 (1908).


present in the district, which the government had alleged as the place of the commission of the crime. If the government brought charges in a judicial district other than the district where the accused resided or where the accused had been physically present at the time of the commission of the alleged crime, then the court in the judicial district chosen by the government, according to this defense argument, lacked jurisdiction.\footnote{312}

In response to these defense arguments, the Supreme Court in a series of 11 cases decided prior to 1920, replied that neither Article III nor the sixth amendment required that a crime be prosecuted at the place of residence of the accused or at the place at which the accused had been physically present. The correct test, the Supreme Court held, was the place of the commission of the crime.\footnote{313} To determine where the crime had been committed, it was necessary to interpret the statute which had allegedly been violated to determine the elements of the crime charged.\footnote{314} If these elements occurred in only one place, then the prosecution must be brought in that place.\footnote{315} But if the elements occurred in more than one district, then Congress possessed the power to pass jurisdictional statutes authorizing a court possessing power over the territory in which the crime had been "begun or completed," or through which the crime as a continuing offense had passed, to conduct criminal proceedings with respect to that crime.\footnote{316}

When defense attorneys argued that permitting prosecution in more than one district could mean serious hardship to the accused because he could be tried at distant locations from his residence or place of physical presence, the Supreme Court responded:

\footnote{312} E.g., Hyde v. United States, 225 U.S. 347 (1912); Armour Packing Co. v. United States, 209 U.S. 56 (1908); Burton v. United States, 202 U.S. 344 (1906); Hyde v. Shine, 199 U.S. 62 (1905); In re Palliser, 136 U.S. 257 (1890). See generally Barber, supra note 263.


\footnote{314} E.g., United States v. Lombardo, 241 U.S. 73 (1916); Hyde v. United States, 225 U.S. 347 (1912); Horner v. United States, 143 U.S. 207 (1892). Dean Dobie has probably best stated the method of statutory construction adopted by the Supreme Court in the cases under discussion. "All federal crimes are statutory, and these crimes are often defined, bidden away amid pompous verbosity, in the terms of a single verb. That essential verb usually contains the key to the solution of the question: in what district was the crime committed." Dobie, Venue in Criminal Cases in the United States District Court, 12 Va. L. Rev. 287, 289 (1926).

\footnote{315} E.g., United States v. Lombardo, 241 U.S. 73 (1916).

\footnote{316} E.g., Haas v. Henkel, 216 U.S. 462 (1910); Armour Packing Co. v. United States, 209 U.S. 56 (1908); Burton v. United States, 202 U.S. 344 (1906); Putnam v. United States, 162 U.S. 687 (1895).
This situation arises from modern facilities for transportation and intercommunication in interstate transportation, and considerations of convenience and hardship, while they may appeal to the legislative branch of the Government, will not prevent Congress from exercising its constitutional power in the management and control of interstate commerce.\textsuperscript{317}

Although the Supreme Court hoped that the federal prosecutor would not abuse his power,\textsuperscript{318} if the statute were written so that the elements of the crime occurred in more than one district, then, the Supreme Court held, the prosecutor had the right and the duty to elect where to bring the criminal proceedings. So long as the prosecutor chose an appropriate district, then the accused had no basis upon which to complain. The prosecutor's choice would be final.\textsuperscript{319}

Most instructive about the Supreme Court decisions rendered prior to 1920 concerning the locality of the crime are the terms of the argument through which the concept of the locality of the crime was discussed. Defense attorneys, utilizing the nineteenth-century concept of jurisdiction, argued that where the crime was committed was important because locating the place of the commission of the crime located the court empowered to try that crime. Because the place of the commission of the crime was important for the resolution of jurisdictional questions, these defense attorneys then read the language concerning this location contained in Article III, Section 2, clause 3 and the sixth amendment to be jurisdictional language also. In the decisions of the Supreme Court concerning the locality of the crime, the Supreme Court responded in the same terms—the terms of the concept of jurisdiction. Because the attention of the Court was focused upon the concept of jurisdiction, it was interested in finding where a crime was committed solely for the purpose of identifying the court with the power to try the particular crime. As a result, the Supreme Court also treated the language concerning the place of the commission of the crime of Article III, Section 2, clause 3 and the sixth amendment as jurisdictional language.\textsuperscript{320} At the same time, the Supreme Court thereby failed to

\textsuperscript{317} Armour Packing Co. v. United States, 209 U.S. 56, 77 (1908).


\textsuperscript{319} Haas v. Henkel, 216 U.S. 462, 474 (1910). Recall that at the time of the \textit{Haas v. Henkel} decision, there was no procedure in the federal system through which a defendant could move for a change of venue. See text accompanying notes 242-257 \textit{supra}.

\textsuperscript{320} Armour Packing Co. v. United States, 209 U.S. 56 (1908). Even the justices who dissented from the majority holding as to what constituted a continuing offense did so in terms of the concept of jurisdiction. "I am authorized to say that the Chief Justice and Mr. Justice Peckham... are also of the opinion that the trial court, the District Court of the Western District of Missouri, had no jurisdiction of the alleged offense, but that such jurisdiction was vested in the District Court of Kansas, holding that when goods are delivered to
recognize the sixth amendment as a vicinage, not a jurisdictional, provision.

Between 1920 and 1944, the date of the next important Supreme Court case dealing with the concept of the locality of the crime, however, the federal courts in the decisions of Salinger v. Loisel,321 Silverberg v. United States,322 and Hagner v. United States323 had distinguished the concept of jurisdiction from the concept of venue. After Hagner, the power of the court over the subject matter (jurisdiction) was seen to be distinct from the place at which a court should exercise that power (venue). In addition, after Hagner, the concept of venue was subject to waiver by the defendant.324

Due to the decisions of Salinger, Silverberg, and Hagner, the terms of the argument through which the concept of the locality of the crime has been discussed switched from the terms of jurisdiction to the terms of venue. Before 1920, the place of the commission of the crime was considered important because wherever the crime was committed identified the only court (or if the crime was committed in more than one judicial district, the only courts) with the power (i.e., jurisdiction) to conduct the proceedings concerning that crime. After the Hagner decision in 1931, the place of the commission of the crime was still important as locating the particular federal district court that should normally exercise its power over the crime, but the exercise of the power over a crime by a particular court was now subject to waiver under the concept of venue. Once the concept of jurisdiction was distinguished from the concept of venue, the concept of the locality of the crime, previously subsumed within the concept of jurisdiction, became subsumed within the discussion of the concept of venue. Moreover, if the concept of the locality of the crime was now a species of venue, then the language referring to the place of the commission of the crime contained in Article III, Section 2, clause 3 and the sixth amendment, which had also been construed by the pre-1920 cases as jurisdictional language, also should now be construed as venue language.

The history of the concept of the locality of the crime is significant, therefore, in explaining how the sixth amendment has come to be consid-

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321 265 U.S. 224 (1924).
322 4 F.2d 908 (5th Cir. 1925).
323 54 F.2d 446 (D.C. Cir. 1931).
324 For a fuller discussion of how the concept of jurisdiction came to be separated from the concept of venue, see Part III (A) supra.
ered a venue rather than a vicinage provision. After the Hagner decision in 1931, lawyers, judges, and law professors believed that the language in Article III and the sixth amendment, concerning the place of the commission of the crime, was meant solely to determine the court that should normally exercise its power to conduct proceedings with respect to a particular crime.

Beginning in 1944 with United States v. Johnson, the Supreme Court has acted under this belief that the concept of the locality of the crime, the language, “such Trial shall be held in the State where the said Crimes shall have been committed,” contained in Article III, Section 2, clause 3, and the language, “by an impartial jury of the State and district wherein the crime shall have been committed,” contained in the sixth amendment, are concerned solely with the issue of venue. Although the Supreme Court has consistently held that the place of the commission of the crime is the constitutionally mandated test by which to determine proper venue, the justices have regularly disagreed as to the interpretation of that test. All justices have agreed that the duty of the Court is to interpret the statutory language of the criminal provision allegedly violated to determine where the various elements of the crime have been committed. But some justices have argued that because the place of the commission of the crime is related to the policy considerations underpinning venue, the reasons for which the early Americans desired limited venue should be taken into account during the process of statutory interpretation. If the language of the statute could be interpreted to permit prosecution of an accused at a location convenient to the accused, then

325 323 U.S. 273 (1944).
327 See generally 8 R. Cites, Moore’s Federal Practice § 18.02(2) (1965); 1 Wright, supra note 216, at § 301, pp. 577-83.
328 I.e., either at the residence of the accused, or at the place at which the accused was physically present at the time of the alleged commission of the crime.
the statute, according to these justices, should be interpreted to permit that result.\textsuperscript{329} Other justices have argued, however, that the statutory language should be interpreted solely to determine where Congress meant to designate that a crime had been committed, regardless of the convenience to the accused. To take the convenience of the accused into account, these latter justices have argued, undermines the constitutionally mandated test which the Court has consistently recognized to be the place of the commission of the crime.\textsuperscript{330}

The drafters of the Rules of Criminal Procedure have also acted on the belief that the concept of the locality of the crime contained in Article III, Section 2, clause 3 and in the sixth amendment relates solely to the issue of venue.\textsuperscript{331} Since the pre-1920 cases on the locality of the crime had permitted the prosecutor to make the final choice as to where to prosecute a crime that had been committed in more than one judicial district, the drafters of the criminal venue rules introduced Rule 21(b) into federal criminal procedure in 1946. If the crime had been committed in more than one district, Rule 21(b) permitted a defendant to move for change of venue "in the interest of justice" to another district in which the crime had been committed. By promulgating Rule 21(b), the drafters meant to permit an accused to assert his views as to the appropriate venue.\textsuperscript{332} But this


\textsuperscript{331} The best evidence of the attitude of the drafters of the Rules of Criminal Procedure is given in the commentary notes written at the time divisional venue was deleted from the procedural rules in 1966. The drafters wrote: "The amendment eliminates the requirement that the prosecution shall be in a division in which the offense was committed and vests discretion in the court to fix the place of trial at any place within the district with due regard to the convenience of the defendant and his witnesses.

"The Sixth Amendment provides that the defendant shall have the right to a 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. . . . There is no constitutional right to trial within a division." Advisory Comm. on Rules of Criminal Procedure, Notes to 1966 Amendments, in 3 Wright, supra note 216, at 473-74. What is important about the quotation just given is that the Advisory Committee cited the sixth amendment for the proposition that trial must be held within the judicial district. Thus the Advisory Committee interpreted the sixth amendment as a venue provision. See the quotation from Professor Wright with which I began this article at note 1. Argued consistently in this article is the proposition that the sixth amendment is a vicinage provision, not a venue provision. For fuller development of the proper understanding of the concept of venue, once the sixth amendment is recognized as a vicinage provision, see Part IV(B) infra.

\textsuperscript{332} The introduction of Rule 21(b) into federal criminal procedure is discussed more fully in the text accompanying notes 242-257 supra.
option often proved to be unavailable to an accused because the courts failed to interpret crimes as having been committed in more than one district. Because the trend of the venue rules has been toward more sensitivity to the defendant's interests in a convenient and expeditious disposition of the accusations against him, the drafters of the rules liberalized Rule 21(b) in 1966 to permit a defendant to move for a change of venue in all instances. With the liberalization of Rule 21(b), the interpretation of the criminal statutes by the courts as to where a crime had been committed no longer prevented the defendant from gaining an expeditious and convenient handling of the criminal charges. Even if the court interpreted the statute so that the elements of the crime were all committed in the same judicial district, the defendant could utilize Rule 21(b) to move for change of venue "for the convenience of parties and witnesses, and in the interest of justice." Hence, the drafters of the rules governing criminal venue have agreed with those Justices of the Supreme Court who have urged that the place of the commission of the crime should be interpreted primarily from a perspective on venue which permits the defendant to obtain trial at a location considered convenient to him.

It was possible for lawyers, judges, and law professors to decide that the language, "by an impartial jury of the State and district wherein the crime shall have been committed," of the sixth amendment related solely to the court with the power to conduct certain criminal proceedings because they had forgotten that the sixth amendment was a vicinage provision. So long as a crime was clearly committed at only one place, so long as the trial was held in the same place, and so long as the jurors were chosen from that same place, it was not necessary to distinguish the concept of the locality of the crime from the concepts of venue and vicinage. But once courts were faced with crimes that might be considered to have been committed in more than one place, then it became imperative to remember that the test of the place of the commission of the crime serves two purposes in the Constitution: to identify the appropriate place at which a court conducts its proceedings (venue), and to identify the appropriate community from which to summon jurors (vicinage).

333 1 WRIGHT, supra note 216, at § 343, pp. 630-31; Barber, supra note 263, at 44-45; Note, Federal Venue of Offense Allegedly "Begun" in One District and "Completed" in Another, 38 N.D.L. Rev. 574, 580 (1962).

334 For a fuller discussion of the trend favorable to defendants, see text accompanying notes 242-269 supra. See generally 1 WRIGHT, supra note 216, at § 343, pp. 629-34; Barber, supra note 263, at 46, 53-57; Orfield, Transfer, supra note 269, at 35.

335 After the 1966 amendments to Rule 21(b), the only limitation upon defendant's ability to obtain a trial location he considered desirable was the manner in which the district court judge exercised discretion in ruling upon defendant's change of venue motion. 1 WRIGHT, supra note 216, at §§ 344, 347, pp. 635-43, 647-49.
As shown in Part I of this article, the test of the place of the commission of the crime was adopted as the appropriate test in Article III because early Americans considered a crime to be local to the court in whose territory the crime was committed. As was likewise shown in Part I, however, the test of the place of the commission of the crime was adopted as the appropriate test in the sixth amendment because these early Americans also considered crimes to be local to the jurors in whose community the crime was committed. Failure to remember that the place of the commission of the crime serves two distinct purposes in the Constitution has meant that the concept of vicinage faded from the legal consciousness.

E. Vicinage

As indicated in Parts I and II of this article, when the federal judicial system was created in 1789, the geographical area surrounding the place of the commission of the crime from which to summon jurors to try the crime, i.e., vicinage, was determined both by the sixth amendment and by the Judiciary Act of 1789. The sixth amendment set forth the constitutional limitation that the jurors to try a criminal case must be chosen from the state and district wherein the crime was committed, which district was to be established by legislative enactment. The Judiciary Act of 1789 then implemented this through the creation of judicial districts in Section 2 and the delineation of procedures for summoning jurors from specified geographical areas in Section 29. Hence, to follow the concept of vicinage from 1789 to the present day, it is necessary to trace two lines of legislative and decisional history—one dealing with the creation of judicial districts and the second detailing the procedures for summoning jurors from specified geographical areas to serve in the federal courts for criminal cases.

1. Creation of Judicial Districts

Because the judicial districts of Section 2 of the Judiciary Act of 1789 were identical in territory to the states of the Union, the vicinage command of the sixth amendment was, therefore, identical to the venue command of Article III, Section 2, clause 3, i.e., the jurors to try crimes committed within the state could constitutionally be summoned from anywhere within the state; the trial of crimes committed within the state could also constitutionally be held anywhere within the state. But whereas the boundaries of the states would remain relatively unchanged through the years, the boundaries of the judicial districts were subject to constant change due

336 See text accompanying notes 27-30, in Part I.
337 See text accompanying notes 144-45, in Part II.
to the legislative power granted to Congress by the sixth amendment to create judicial districts.

As early as 1794, Congress exercised its legislative power in such a way as to divide a state into more than one judicial district. In that year, Congress divided a state, for the first time, into more than one judicial district when the state of North Carolina was divided into three districts. From that time until the present, Congress has passed hundreds of laws dividing states into more than one judicial district or changing the boundaries of the judicial districts within the various states. Each time Congress created a second, third, or fourth judicial district in a state, then the vicinage command of the sixth amendment diverged from the venue command of Article III, Section 2, clause 3, i.e., the geographical area of the judicial district—from which jurors constitutionally must be summoned—was smaller in territory than the geographic area of the state, within which the trial constitutionally could be conducted.

When, prior to 1878, Congress created a second, third, or fourth judicial district within a state, it seems to have taken this action for one of three reasons. In certain instances, Congress created a second judicial district because it desired to assign specified territory to particular places for holding federal court. By assigning specified territory to particular court cities, Congress was attempting to solve the practical problems of judicial administration arising when a judicial district had more than one authorized court city within the district. These practical problems had been pointed out to Congress as early as 1790 by the Report on the Ju-

338 Act of June 9, 1794, ch. 64, § 3, 1 Stat. 395; Surrency, supra note 201, at 252.
339 See notes 201, 202, 225 supra and authorities cited therein. The present organization of the judicial system into judicial districts can be found in 28 U.S.C. §§ 81-131 (1970). Of the 50 states in the Union, 26 each comprise one judicial district in the judicial system. Twenty-four states have two or more judicial districts within the boundaries of the state. Three states, California, New York, and Texas, are divided into four judicial districts, the largest number of districts within a single state.
340 Comments in the text as to the divergence between the geographical area from within which the jurors must be summoned and the geographical area within which the trial can be conducted are directed to the constitutional requirements of the sixth amendment and Article III, Section 2, clause 3. Under federal criminal procedure today, the trial must be conducted in the judicial district in which the crime was committed. But this requirement is found in Rule 18, Federal Rules of Criminal Procedure, not, as many have incorrectly concluded, in the sixth amendment. To reiterate, the sixth amendment is a vicinage provision, not a jurisdictional or venue provision.

Two commentators who have seen the distinction between the sixth amendment and Article III, Section 2, clause 3, but who have not understood its importance, are Professor Orfield and Professor Wright. Professor Orfield has written: "If the Constitution were literally read it would seem to require trial in the state and by a jury of the state and district in which the offense was committed. Literally read, the sixth amendment guarantees a jury of the district and not a trial in the district. Nevertheless the cases construe it as guaranteeing a trial
In other instances, Congress created a second judicial district because it desired to make the federal courts more accessible to the citizens of a particular geographic area. Although accessibility to the federal courts could have been achieved by simply increasing the number of court cities within a district, this solution caused the practical problems of judicial administration identified by Attorney General Randolph. Creation of a new judicial district provided accessibility without creating practical problems of judicial administration. Finally, in still other instances, Congress created a second judicial district because it concluded that the judicial business of a particular district was sufficiently heavy to warrant the appointment of a second federal district judge. Rather than having two federal district judges serving the same judicial district, Congress created new districts for which new federal district judges were then appointed.

in the district. This seems sensible since if the defendant asserts his constitutional right to a trial by a jury of the vicinage, he may not be tried in any district other than that in which the crime was committed since only there can such a jury be impaneled. Orfield, Venue of Federal Criminal Cases, 17 U. Pitt. L. Rev. 375, 380 (1956). Professor Orfield appears to have confused the concept of jurisdiction with the concept of vicinage. See Part III(C) supra.

Professor Wright has written: "Strictly speaking the former constitutional provision [Art. III, § 2, cl. 3] is a venue provision, since it fixes the place of trial, while the latter [sixth amendment] is a vicinage provision, since it deals with the place from which the jurors are to be selected. This technical distinction has been of no importance. Although in theory both constitutional provisions could be satisfied by trying a defendant in one district of a state though the offense was committed in another district, so long as the jurors were selected from the district of the crime, no such procedure has ever been attempted, and it has been considered that trial in the district of the offense is required." 1 Wright, supra note 216, at § 301, p. 579. It would seem that Professor Wright has confused the concept of the locality of the crime with the concept of venue, to the detriment of the concept of vicinage. See Part III(D) supra.

See note 224 supra and accompanying text.

10 Annals of Cong., 6th Cong., 1st Sess., 878-80 (1800) (debate concerning the creation of a second judicial district in the state of Virginia); 40 Annals of Cong., 17th Cong., 2d Sess., 696 (1823) (petition of citizens of South Carolina for establishment of judicial district in the western part of the state); Cong. Globe, 30th Cong., 2d Sess., 373, 410-11 (1849) (debate concerning the creation of a second judicial district in the state of Texas); 1 S. Misc. Doc. No. 102, 31st Cong., 1st Sess. (1849) (petition from the Legislature of the State of Texas for the establishment of a second judicial district in Texas); Surrency, supra note 201, at 148.

Cong. Globe, 30th Cong., 2d Sess., 373, 410-11 (1849) (debate concerning the creation of a second judicial district in the state of Texas); Surrency, supra note 201, at 148, 150-51.

In 1812, Congress authorized a second district judge for the District of New York without dividing the state of New York into two judicial districts. Act of Apr. 29, 1812, ch. 71, § 1, 2 Stat. 719. But in 1814, Congress divided the state of New York into two judicial districts and assigned Judge Tallmadge as the district court judge for the newly created Northern District of New York, with Judge Van Ness, the other federal judge, as the district court judge for the newly created Southern District of New York. Act of Apr. 9, 1814, ch. 49, 3 Stat. 120. During the nineteenth century, Congress never again authorized more than one federal district judge per judicial district. Surrency, supra note 201, at 150-51. It may have been feared...
After 1878, however, Congress, rather than continue constantly to create new judicial districts, began to subdivide judicial districts into divisions.344 The reasons for creating divisions within a judicial district paralleled the reasons which motivated Congress to create judicial districts from 1789 until 1878: practical problems of judicial administration, accessibility of the courts to the citizens, and management of the judicial workload.345 Because Congress created divisions within judicial districts for these same reasons, several attorneys for defendants argued that the creation of divisions was, in fact, an exercise by Congress of its power under the sixth amendment to designate constitutional vicinage. Hence, they argued, jurors to try crimes committed within a particular division established by Congress could be summoned only from the division in which the crime was committed. In effect, the argument claimed that Congress had simply attached a new label, "division," to a geographical area which constitutionally should be considered a "district" under the sixth amendment.

In two cases, Clement v. United States346 and Spencer v. United States,347 both decided by the Eighth Circuit, this defense argument was rejected. The court relied on the distinction between jurisdiction and venue, which had begun to be developed by the Supreme Court in Logan that two judges in the same judicial district might be unable to cooperate with respect to assignment of judicial responsibilities, and there would be a possibility of conflicting decisions between the two judges. See Act of Apr. 29, 1812, ch. 71, §§ 2-3, 2 Stat. 719. Compare United States v. Coit, 25 F. Cas. 489 (D.N.Y. 1812) (No. 14,829) (opinion by Van Ness, J.) with United States v. Price, 27 F. Cas. 620 (D.N.Y. 1810) (No. 16,088) (opinion by Tallmadge, J.). These clearly were the reasons Congress authorized a third judicial district for the state of Oklahoma. Case v. United States, 14 F.2d 510 (8th Cir. 1926); Act of Feb. 16, 1925, ch. 233, 43 Stat. 945.

The creation of a second or third judicial district within a state did not mean, however, that a second or third federal district court judge was always then appointed. In some instances, Congress would create a second or third judicial district within a state while authorizing the federal district judge for the original district in the state to be the federal judge for the newly created district(s). See Surrency, supra note 201, at 153-58, 282-83 and authorities cited therein. Even today, Congress may appoint a "roving" judge for more than one judicial district. See H. Rep. No. 1970, 87th Cong., 2d Sess., in 1 U.S. Code Cong. & Admin. News 2019 (1962).

344 See notes 201 and 202 supra.
346 149 F. 305 (8th Cir. 1905).
347 169 F. 562 (8th Cir. 1909).
v. United States,\(^{348}\) Post v. United States,\(^{349}\) and Rosencrans v. United States,\(^{350}\) to rule that the creation of divisions within judicial districts was meant solely to regulate the appropriate places for holding the trial of crimes committed within the divisions. Hence, the creation of divisions, the Eighth Circuit held, affected the question of venue but did not determine the question of vicinage.\(^{351}\)

To answer the question of vicinage, the court stated that it was necessary to ascertain the definition of the word "district" from the sixth amendment. Construing the sixth amendment as a jurisdictional provision, the court then held that the judicial district from which jurors could be summoned was coextensive with the judicial district as determined for purposes of territorial jurisdiction under grants of jurisdiction to the trial courts by Congress. Since the acts of Congress creating the divisions within the judicial districts in question, relevant to these cases, had not restricted the territorial jurisdiction of the district courts to the territory embraced within the division, the Eighth Circuit Court of Appeals ruled that divisions were not "districts" under the sixth amendment. Hence, jurors to try crimes committed within a particular division of a judicial district could constitutionally be summoned from the entire judicial district.\(^{352}\)

What is instructive about the legislative and decisional history concerning the creation of judicial districts is how the actions of Congress and the decisions of the Eighth Circuit reinforced the concepts of venue and jurisdiction while denigrating the concept of vicinage. Because the

\(^{348}\) 144 U.S. 263 (1892).
\(^{349}\) 161 U.S. 583 (1896).
\(^{350}\) 165 U.S. 257 (1897).
\(^{351}\) Spencer v. United States, 169 F. 562, 563-64 (8th Cir. 1909); Clement v. United States, 149 F. 305, 308-309 (8th Cir. 1906). For a more complete discussion of the distinction between jurisdiction and venue as developed by the Supreme Court, see text accompanying notes 201-210 supra.
\(^{352}\) Spencer v. United States, 169 F. 562, 563-65 (8th Cir. 1909); Clement v. United States, 149 F. 305, 310-11 (8th Cir. 1906). See May v. United States, 199 F. 53 (8th Cir. 1912); Billingsley v. United States, 178 F. 653 (8th Cir. 1910).

It should be pointed out that Congress has, at times, divided a state into two judicial districts for the purposes of the organization of the district courts, while maintaining the state as a single judicial district for the purposes of the organization of the circuit courts. Compare Act of Feb. 24, 1807, ch. 16, § 2, 2 Stat. 420 with id. § 4, at 421 and Act of Mar. 22, 1808, ch. 38, § 1, 2 Stat. 478. See Surrency, supra note 201, at 148. In one instance, the Supreme Court failed to realize that the judicial district for the circuit courts need not be territorially identical to the judicial district for the district courts. The case arose in South Carolina and required the Supreme Court to interpret congressional legislation relating to the organization of the federal courts in South Carolina. Barrett v. United States, 169 U.S. 218 (1898). Cf. Act of Mar. 3, 1911, ch. 231, §§ 1 & 105, 36 Stat. 1087, 1123. With the abolition of the circuit courts in the Judicial Code of 1911, only the district courts were left as the trial courts in the federal judicial system. Hence, after 1911, the possibility of judicial districts encompassing different territories within a state no longer existed.
sixth amendment was adopted by the First Congress as a vicinage provision, when Congress exercised its power to create judicial districts, these districts should have been created for reasons related to the concept of vicinage. But the historical truth is that from 1789 until the present, Congress has passed laws creating geographical areas denominated judicial districts for reasons unrelated to the concept of vicinage—for reasons of practical problems of judicial administration, accessibility of the courts to the citizens, and management of the legal workload—without express recognition, when creating these judicial districts, of its power under the sixth amendment. Since these reasons are more closely related to the policy considerations of convenient and expeditious handling of criminal cases, which underpin the concept of venue, whenever Congress created a geographical area denominated a judicial district, it was the concept of venue that was emphasized, rather than the concept of vicinage. Hence, the actions of Congress with respect to the creation of judicial districts impressed the legal consciousness of lawyers, judges, and law professors with the idea that judicial districts were related to venue, not vicinage. These actions simply ignored the distinctions that ought to exist between the concept of venue and the concept of vicinage.

When the courts were then faced with the question of whether divisions were to be considered judicial districts under the sixth amendment, reference to the intention of Congress in creating the divisions was not helpful. Congress had created divisions for the same reasons that had previously motivated the creation of judicial districts: reasons which em-

353 Congress has realized that the creation of judicial districts does have constitutional implications under the sixth amendment. But the reasons motivating Congress to create judicial districts have not been reasons which relate to the concept of vicinage in the sixth amendment. Compare H. REP. No. 1094, 89th Cong., 1st Sess., in 2 U.S. CODE CONG. & ADMN. NEWS 3449, 3452 (1965) with id. at 3450-51 and H. REP. No. 1277, 89th Cong., 2d Sess., in 2 U.S. CODE CONG. & ADMIN. NEWS 2040-53 (1966) and H. REP. No. 1970, 87th Cong., 2d Sess., in 1 U.S. CODE CONG. & ADMIN. NEWS 2019 (1962).

Moreover, Congress has mistakenly believed that the constitutional implications under the sixth amendment raised by the creation of judicial districts relate to the maintenance of the "identity" of the district court. H. REP. No. 1094, 89th cong., 1st Sess., in 2 U.S. CODE CONG. & ADMIN. NEWS 3450, 3452-53 (1965). As previously indicated, to construe the sixth amendment as requiring the "identity" of the district court to be maintained, when territory is reassigned among judicial districts, is to forget that the sixth amendment is a vicinage provision and to confuse the concept of jurisdiction with the concept of vicinage. See Part III(C) supra.

Clearly the practical problems of judicial administration, accessibility of the courts to the citizens, and management of the legal workload are legitimate considerations when Congress is determining the proper organization of the judicial system. It is also clear that the judicial system cannot be organized solely in light of the concept of vicinage, with its attendant concerns about the proper functioning of the jury as an institution, as found in the sixth amendment. But it is suggested that when Congress is determining the organization of the judicial system, it ought to possess a correct understanding of the sixth amendment.
phasized, as the Eighth Circuit Court of Appeals correctly held in *Clement v. United States* and *Spencer v. United States*, the issue of venue, not of vicinage. The Eighth Circuit was therefore forced to look for other evidence to decide the question of the meaning of the word "district" under the sixth amendment. As discussion of the *Clement* and *Spencer* cases has indicated, the other evidence upon which the Eighth Circuit relied was the concept of jurisdiction. By construing the sixth amendment as a jurisdictional provision, the Eighth Circuit ruled that the geographical area from which the jurors could constitutionally be summoned was identical to the geographical area constituting the territorial jurisdiction of the trial court. However, reading the sixth amendment as a jurisdictional provision did not add to a clear understanding of its meaning as a vicinage provision. On the contrary, this reading simply confused the concept of vicinage with the concept of jurisdiction. As shown earlier, reading the sixth amendment as a jurisdictional provision eventually resulted in the concept of vicinage being subsumed within the concept of venue.

2. Procedures for Summoning Jurors from Specified Geographical Areas

Under Section 29 of the Judiciary Act of 1789, three geographical areas were specified by Congress as permissible areas from which to summon jurors to try criminal cases in federal courts. In capital cases, Section 29 required the trial to be held in the county where the crime was committed, if this could be done without "great inconvenience." As earlier indicated, this venue provision for capital cases in Section 29 was written under the assumption that if the trial were held in the county where the crime was committed, then all the jurors to try that capital crime would also be summoned from the county where the crime was committed. Hence, the first geographical area from which jurors were to be summoned was the

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354 149 F. 305 (8th Cir. 1906).
355 169 F. 562 (8th Cir. 1909).
356 Another court which reached the same conclusion as the Eighth Circuit Court of Appeals expressed its holding as follows: "In support of this contention [that trial of the defendant at Lewisburg, rather than Scranton, would deprive the defendant of a ‘jury of the peers of his vicinage’], defendants quote from Cooley’s Constitutional Limitations. An examination of the text, however, discloses in the footnotes that as to offenses against the United States the terms ‘vicinage’ and ‘district’ are synonymous.

357 The comment in 50 C.J.S. Juries, § 8 p. 721 is pertinent, that ‘In this connection, the term “vicinage,” while subject to various definitions depending on the sense in which it is used, has been held to refer to an area corresponding with the territorial jurisdiction of the court in which trial is had.’ United States v. Katz, 78 F. Supp. 21, 23 (M.D. Pa. 1948). Neither the editor of *Corpus Juris Secundum* nor the federal district judge have the concepts of jurisdiction and vicinage clearly separated.

357 See Part III(C) and (D).
geographical area encompassed within a particular county. If all the jurors to try the capital crime were summoned from the county where the crime was committed, then the jury of the vicinage as at common law would be preserved in these cases.\textsuperscript{358}

With respect to noncapital cases, Congress had granted to the federal trial courts the discretion to summon the jurors “from such parts of the district, from time to time as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services.” Through this grant of discretionary power to the trial courts, the geographical area from which jurors could be summoned was specified to be the judicial district itself, but from what areas precisely within the district the jurors would be summoned was left to the discretion of the federal trial courts. Hence, the second geographical area from which jurors were to be summoned was the geographical area encompassed within a judicial district. Under this grant of discretionary power to the courts, the accused received a jury of the vicinage, not as the word “vicinage” was defined at common law, but as the word “vicinage” had been redefined in the compromise reached concerning the sixth amendment.\textsuperscript{359}

The third geographical area specified by Congress in Section 29 was an attempt to obtain a jury panel composed of jurors chosen partly from the county where the crime was committed and partly from the remainder of the judicial district where the crime was committed. In capital cases in which “great inconvenience” would result if the trial were held in the county where the crime was committed, the court could hold the trial in another county so long as at least twelve jurors were summoned from the county wherein the crime was committed. By this requirement, Congress had specified a particular county as the source of at least twelve persons on the jury panel to be used in a capital case. As for the other persons to complete the jury panel, however, the court could exercise its discretion to summon them from such parts of the district as the court determined was appropriate. Hence, the third geographical area from which jurors were to be

\textsuperscript{358} For a discussion of the adoption of the venue provision for capital crimes in Section 29 of the Judiciary Act of 1789, see Part II.

\textsuperscript{359} For a discussion of the vicinage language as finally adopted in the sixth amendment, see text accompanying notes 83-92, 192-194, in Parts I and II.

The federal trial courts, in the exercise of the discretionary authority granted in Section 29 with respect to the summoning of jurors, could, even in noncapital cases, summon all the jurors from the county in which the crime was committed. Exercise of the discretionary authority in such a manner would have preserved the common law jury of the vicinage even for noncapital crimes. The adoption of such a procedure by the federal trial courts was highly unlikely, however, especially in light of the criteria for summoning jurors set forth in Section 29. See text accompanying notes 196-197, in Part II.
summoned combined the vicinage as at common law (the appropriate county) and the vicinage as defined by the sixth amendment (the appropriate judicial district). 360

From the provisions of Section 29, it is clear that Congress expected that jurors to form jury panels to try federal criminal cases would often be summoned from geographical areas which were significantly smaller in extent than the judicial district in its entirety. Jurors would be summoned either from a particular county within the judicial district, under express congressional mandate, or they would be summoned from a smaller area within the judicial district, which the trial court had decided would insure an impartial jury, limit expense, and spread the obligation of jury service among the citizens. Moreover, it is also clear that the specific county or smaller area that was to be used as the geographical source from which to summon jurors was to be determined primarily by the assumption that the place at which the trial was held would also be the place from which the jurors were summoned. Thus, if the trial were held in the county where the crime was committed, then the county in which the crime was committed would also be the geographical source from which the jurors would be summoned. On the other hand, if the trial were held in a county other than the county where the crime was committed, then the federal court, in the exercise of its discretion, would most likely summon jurors from the immediate geographical area surrounding the place of the trial, as opposed to the county where the crime was committed, if that county were distant from the place of the trial. But Section 29 also contained a reminder that the designation of venue did not always determine the appropriate vicinage because in capital cases, even if the trial were held in a county other than the county in which the crime was committed, at least twelve persons for the jury panel were still required to be summoned from the county where the crime was committed. By this requirement, Congress gave recognition to the fact that the trial of a crime can be conducted in one geographical unit, a county chosen for reasons of convenience, while the jurors are summoned from another geographical unit, the county wherein the crime was committed, that is, the vicinage as at common law. 361 (See Chart A.)

360 Through the requirement that at least twelve jurors, in capital cases, must come from the county in which the crime was committed, the jury of the vicinage as at common law was given partial legal protection, no matter how the court exercised its discretionary authority with respect to summoning jurors beyond the first twelve. Of course, which twelve persons from the jury panel summoned actually would constitute the jurors who would hear the case depended upon other factors. See note 375 infra.

361 Recall that when Congress first created judicial districts for the judicial system, it made them identical in size to the states of the federal Union, except for two judicial districts identical in size to the territorial entities which later became the states of Kentucky and Maine. Act of Sept. 24, 1789, ch. 20, §§2, 4, 1 Stat. 73-74.
In 1791, North Carolina comprised one judicial district for the organization of the circuit courts and the district courts of the federal system. Both the circuit court and the district court met in Newbern, the city appointed court city by Congress. Act of June 4, 1790, ch. 17, §§ 2-3, 1 Stat. 126.

If a capital crime were allegedly committed in Duplin County, the federal court sitting in Newbern, if it were not inconvenient, would conduct the trial for the capital crime in Duplin County. All persons to comprise the jury panel would then be summoned from Duplin County. The jury of the vicinage as at common law would be utilized.

If a capital crime were allegedly committed in Buncombe County, the federal court sitting in Newbern could decide that the distance to Buncombe County made it "inconvenient" to conduct the trial of the capital crime there. But under Section 29, the federal court would be required to summon at least twelve persons from Buncombe County, while the remainder of the jury panel would be summoned from counties closer to Newbern. The jury panel would thereby be composed of members from the vicinage as at common law and of members from the vicinage as defined by the sixth amendment.

If a noncapital crime were allegedly committed in Rowan County, the federal court sitting in Newbern would most likely exercise its discretion under Section 29 to summon the members of the jury panel from the geographical area immediately surrounding Newbern in order to reduce expense for juror fees and to reduce travel inconvenience for the persons summoned. The jury panel would thereby be composed of members solely from the vicinage as defined by the sixth amendment.
Although Section 29 set forth three geographical areas as the sources from which jurors could be summoned in the appropriate instances, the federal trial courts from 1789 to 1862 rarely used the first geographical area permitted under Section 29. With respect to the capital venue provision of Section 29, which would have limited the geographical source of the jurors to the county where the crime was committed, the courts almost invariably found that "great inconvenience" would result if the trial were held in the county where the crime was committed. Hence, for all practical purposes, the provision of Section 29 specifying the first geographical area from which jurors could be summoned, the vicinage as at common law, became a dead letter.\(^6\)

However, from 1789 to 1862, the courts did utilize the other two geographical areas which had been designated in the provisions of Section 29. When conducting trials for capital crimes in counties other than the counties where the crimes were committed, the courts did summon at least twelve persons for the jury panel from the county where the crime was committed.\(^6\) With respect to additional persons to complete the jury panel for capital cases, and with respect to jurors for noncapital cases, the federal courts exercised the discretion granted to them by Section 29. As to the exercise of this discretion, the courts ruled that the federal judge had wide latitude: he could follow the procedures of the state in which the court sat with respect to the locality from whence to summon the jurors;\(^6\)


In contrast to the decisions just cited, in which the federal courts held that utilization of a jury of the vicinage as at common law by conducting the trial of the offense in the county where the crime was allegedly committed would be inconvenient, Attorney General Randolph, in his Report on the Judiciary to Congress, had recommended that Section 29 of the Judiciary Act of 1789 be changed so as to require that juries of the vicinage as at common law be utilized in all criminal cases. Report of Att'y Gen. Edmund Randolph on the Judiciary System, Dec. 27, 1790, in 1 American State Papers 21, 32 (Class X-Misc. W. Lowrie & W. Franklin eds. 1834). Congress did not amend Section 29 to conform to the recommendation of Attorney General Randolph.


\(^6\)United States v. Woodruff, 28 F. Cas. 761 (C.C.D. Ill. 1846) (No. 16,758); United States v. Insurgents, 26 F. Cas. 499, 514 (C.C.D. Pa. 1795) (No. 15,443). Due to three laws...
could designate specifically in the *venire facias* issued to the marshal the geographical area from whence the marshal should summon the jurors; or, he could grant to the marshal himself, through the *venire facias*, the power to summon the jurors from such parts of the district as the marshal deemed appropriate. As a result of this permissibly wide discretion as to the geographical source of the jurors, no uniformity existed among the various federal district and circuit courts. So long as the jurors were summoned by the court from the appropriate judicial district so as to insure an impartial jury, to reduce expense, and to spread the burden of jury duty, no abuse of the discretionary power granted by Section 29 would be found.

In 1862, Congress, for the first time since 1789, changed the procedures concerning the geographical area from which the petit jurors to try crimes in federal courts should be summoned. On July 15, 1862, Senator Foster of Connecticut moved, as an additional section to an act dealing with the competency of witnesses in equity and admiralty: "That so much of section twenty-nine of an act entitled (Judiciary Act of 1789), as requires, in cases punishable with death, twelve petit jurors to be summoned from the county where the offense was committed, be, and the same is hereby, repealed." In a comment accompanying the motion, Senator Foster remarked, "[T]he same section which was moved the other day to another bill, and agreed to unanimously by the Senate." Without further discussion in the Senate, and without any comment in the House, Senator Foster's motion was adopted into law.

Although the congressional debates give no indication of the reason for the adoption of Senator Foster's motion, undoubtedly the repeal of the requirement from Section 29 that at least twelve petit jurors in capital
cases be summoned from the county where the crime was committed was purposefully adopted to insure that conviction for treason against American citizens in the secessionist states could more easily be obtained. By adopting Senator Foster’s motion, Congress was reacting to the same fears that had been expressed by the Federalists in the First Session of the First Congress in 1789: the smaller the geographic area from whence the jurors were summoned, the more likely that a local hero engaged in rebellion would be protected by those local jurors.

Congress assuredly knew that the capital venue provision of Section 29, whereby trial of a capital crime would be held, if not inconvenient, in the county where the crime was committed (which would have meant a jury chosen entirely from the county where the crime was committed), had become a dead letter. Hence, Congress had no reason to fear that a jury of the vicinage as at common law would be utilized to try charges of treason and no reason, therefore, to repeal the capital venue provision of Section 29. Congress did have reason to fear, however, the provision of

As might be expected, the federal courts of the United States had held that the secession ordinances of the southern states did not abrogate membership in the United States of America. Thus, citizens of those states, even after attempted secession, could be indicted for acts which were treasonable toward the United States of America. United States v. Smith, 27 F. Cas. 1134 (C.C.E.D. Pa. 1861) (No. 16,318). Accord, United States v. Cathcart, 25 F. Cas. 344 (C.C.S.D. Ohio 1864) (No. 14,756). But, because southern states could not secede, then citizens of those states who committed treasonable acts within those states (such as participation in the seizure of Fort Pulaski by a member of the Georgia militia) were entitled, under the United States Constitution, to trial in the state and by a jury of the state and district in which the crime was committed. This was true, a court held, even though the courts of the United States were unable to function in the secessionist states. United States v. Greiner, 26 F. Cas. 36 (E.D. Pa. 1861) (No. 15,262). For a discussion of the fears of the Federalists, see text accompanying notes 62-63, 78-79, 134-143, 179-184, Parts I and II. See authorities cited in note 362 supra and accompanying text. In 1911, when Congress was debating the adoption of a judicial code, an attempt was made to repeal the capital venue provision of Section 29. Although the capital venue provision was not repealed, the debate concerning its repeal is very illuminating:

"Mr. Sutherland: I move to strike out that section [pertaining to the requirement that in capital cases the trial be held, if not inconvenient, in the county where the crime was committed]. It is wholly unnecessary. It serves no useful purpose. If it ever had any use at all, it has become obsolete. Probably when the section was first passed, I think about 1789, there may have been some occasion for it. That was before the day of railroads, when travel was inconvenient and was either by stagecoach or team."

"Mr. Hughes: Why not have the trial in the county where the offense is committed?"
"Mr. Sutherland: To my mind, the reason is that there are no facilities. It upsets the whole establishment..."

"Mr. Sutherland: As I have said, in this day of rapid transit it is no more difficult for witnesses to be brought to some central point in a district or in a division than it was in that day to have them brought from the surrounding country to each county seat."
Section 29, agreed to as part of the compromise between supporters and opponents of the jury of the vicinage as at common law in the First Congress, requiring that at least twelve jurors be summoned from the county where the crime was committed. If twelve persons were summoned to serve on the jury panel from the county where the crime was committed, it might just be possible for the accused to use his challenges, both peremptory and for cause, to insure that some, maybe all, of those twelve assumed local friends would constitute the petit jury to try the treason charge. Therefore, Congress decided to repeal the requirement that in

"Mr. Hughes: That might be; but a man is known in his own county, and the purpose of that provision was not merely to save the expense of witnesses, but to secure to a man a trial where he was known, where he could have the advantage of his life, and where he would be subject to the disadvantage of it. I think it is more than the matter of expense." 45 Cong. Rec. 3603-604 (1910). When the House acquiesced in the Senate action which restored the capital venue provision to the judicial code, Congressman Moon remarked: "The House acquiesced in this action because this provision was existing law and had been in operation since 1789. It has been thoroughly adjudicated in the courts, was carried on by the revision in 1873, and has created no confusion by reason of its existence as part of our judicial system." 46 Cong. Rec. 4001 (1911). See 46 Cong. Rec. 565 (1910) (remarks of Congressmen Mann, Moon, and Bartlett.)

As the debate indicates, Senator Sutherland and Congressman Moon were completely unaware of the reasons why the capital venue provision was adopted in 1789. Senator Sutherland believed that the capital venue provision only related to the concerns of venue about a convenient and expeditious handling of criminal charges. Congressman Moon was apparently even unsympathetic to the venue concerns mentioned by Sutherland, but was willing to agree to the Senate action because the capital venue provision was a harmless relic (a dead letter). Only Senator Hughes had intimations that the capital venue provision was adopted in 1789 for reasons other than concerns with convenient and expeditious handling of criminal charges. But even he did not clearly recollect that the capital venue provision was adopted as a compromise provision whereby the jury of the vicinage as at common law was given statutory protection.

The capital venue provision, which originated in Section 29 of the Judiciary Act of 1789, is found today in 18 U.S.C. § 3235 (1970). The courts, since 1911, have continued to interpret the capital venue provision to find invariably that "great inconvenience" would result if the trial of a capital crime were held in the county where allegedly committed. E.g., Hayes v. United States, 296 F.2d 657 (8th Cir. 1961); Bickford v. Looney, 219 F.2d 555 (10th Cir. 1955); Barrett v. United States, 82 F.2d 528 (7th Cir. 1936); Davis v. United States, 32 F.2d 860 (9th Cir. 1929); Greenhill v. United States, 6 F.2d 134 (5th Cir. 1925); Brown v. United States, 257 F. 46 (5th Cir. 1919); United States v. Parker, 19 F. Supp. 450 (D.N.J. 1937).

See authorities cited in note 363 supra and accompanying text.

374 The possibility that some, maybe even all, of the twelve jurors, summoned from the county in which the capital crime was committed, would be on the petit jury which determined the verdict in the case, arises from the following factors. Under the applicable federal statutes, a criminal defendant in 1862 was entitled to 35 peremptory challenges in cases of treason and 20 peremptory challenges in cases involving any other capital crime. Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119. Cf. United States v. Cottingham, 25 F. Cas. 673 (C.C.N.D.N.Y. 1852) (No. 14,872); United States v. Gee, 25 F. Cas. 1273 (C.C.D.C.C. 1819) (No. 15,196); United States v. Carrigo, 25 F. Cas. 310 (C.C.D.C.C. 1802) (No. 14,735). The number of persons summoned to constitute the jury panel from which the petit jury would be selected was, however, a...
capital cases at least twelve jurors must come from the county where the crime was committed. Once this requirement was repealed, the geographic area from which jurors would be summoned would be the entire judicial district. Moreover, the precise parts of the judicial district from which the jurors would be summoned would be within the discretion of the federal trial judge, who was likely to be sympathetic to the sovereign to whom he owed his commission, to be exercised in such a manner as to obtain an impartial jury—impartial to both the defendant and to the United States government.

Aside from the political motivations of the 1862 amendment to Section 29 of the Judiciary Act, the action taken by Congress in 1862 also significantly contributed to the fading of the concept of vicinage from the legal consciousness. By repealing that portion of Section 29 requiring that at least twelve jurors be summoned from the county where the capital crime was committed, the only statutory reminder that designation of the place of trial did not also designate the place from which the jurors would be summoned had been removed from the written laws governing federal criminal procedure. The assumption, usually correct, that designation of venue would also determine the appropriate vicinage had thereby been strengthened. Moreover, this repeal, when combined with the recognition that the capital venue provision of Section 29 had become a dead letter, meant that the discretionary power of the federal courts to summon jurors from such parts of the judicial district as the court thought appropriate

relatively small number. United States v. Matthews, 26 F. Cas. 1205 (C.C.S.D.N.Y. 1843) (No. 15,741) (72 jurors summoned in response to two writs of venire facias, each directing 36 persons be summoned); United States v. Wilson, 28 F. Cas. 699, 714 (C.C.E.D. Pa. 1830) (No. 16,730) (the practice was to summon either 48 or 60 persons through the writ of venire facias); United States v. Insurgents, 26 F. Cas. 499, 511 (C.C.D. Pa. 1795) (No. 15,443) (72 persons summoned for the treason trial). As one can readily see, if a defendant could peremptorily eliminate 35 persons from a jury panel numbering between 48 and 72 persons, the defendant was in a fairly good position to select a jury favorable to his defense—if the twelve jurors summoned from the county in which the capital crime allegedly was committed were indeed "local friends" of the accused.

On the other hand, the prosecutor in 1862 was not entitled to any general peremptory challenges. The prosecutor was only entitled to a qualified peremptory challenge: "[T]hat is, the right to set aside a juror without cause, and to have him finally excluded from the jury unless the panel is exhausted by the challenges of the prisoner. If the jury-list is exhausted before the panel is completed it is admitted that the juror thus set aside must be called and must serve, unless he is challenged by the government for cause." United States v. Douglas, 25 F. Cas. 896, 897 (C.C.S.D.N.Y. 1851) (No. 14,989). Accord, United States v. Merchant, 25 U.S. (12 Wheat.) 480 (1827); United States v. Wilson, 28 F. Cas. 699, 701 (C.C.E.D. Pa. 1830) (No. 16,730). The prosecutor finally obtained peremptory challenges in 1865. At that date, Congress passed a statute which gave the accused 20 peremptory challenges in all capital crimes, including treason, and the prosecutor 5 peremptory challenges for the same crimes. Act of Mar. 3, 1865, ch. 86, § 2, 13 Stat. 500.
had been greatly enhanced. Except for the vicinage requirement of the sixth amendment, the concept of vicinage had become subject to the exercise of a discretionary power by the federal courts. In effect, the adoption of the 1862 amendment, in conjunction with the fact that the capital venue provision of Section 29 was not utilized, meant that the narrower vicinage requirements for which the supporters of vicinage as at common law, particularly Senator Lee of Virginia, had so determinedly struggled in the First Congress no longer existed.

Beginning in 1878, as the expansion of interstate commerce led to increased use of the federal courts, Congress began to subdivide judicial districts into divisions, making the federal courts more accessible to the citizenry.376 Included in many of the bills creating divisions within judicial districts was a provision restricting the geographical area from which jurors were to be summoned to try certain crimes. For example, in “An act to provide for circuit and district courts of the United States at Toledo, Ohio,” the act first prescribed the dates and places for holding court, then created two divisions within the Northern District of Ohio, specified that the venue for crimes committed within a division would be the division in which the crime was committed, permitted transfer of cases between divisions, and then continued: “All grand and petit jurors summoned for service in each division shall be residents of such division.”377 By requiring jurors to be summoned from a geographical area denominated a division, Congress had designated an area smaller in extent than the constitutional vicinage (a judicial district) under the sixth amendment, but larger in extent than the vicinage as at common law (a county) incorporated into the capital venue provision of Section 29 of the Judiciary Act of 1789, as the geographical source of jurors. Hence, Congress had introduced a new definition of “vicinage” into federal criminal procedure—divisional vicinage.378

376 See note 345 and authorities cited therein.
378 In the only two instances, prior to 1878, in which judicial districts were divided into divisions, no provision explicitly specified the geographical area from which jurors to try crimes committed within the division would be summoned.

The enactments did contain the following language, however:

“That for the purpose of trying all issues of fact, triable by a jury in the district court of the United States for the northern district of New York, the said district shall be subdivided into three divisions, as follows, to wit: . . . And all such issues of fact shall be tried at a term of said court to be held in the division where the cause of action may have arisen, . . . . Act of July 7, 1838, ch. 182, § 3, 5 Stat. 295.

“That, for the purpose of trying all issues of fact, triable by a jury in the District
However, many other acts passed by Congress creating divisions within judicial districts did not contain a provision mandating that jurors be selected from a particular division of the district.\textsuperscript{379} Thus, when the Special Joint Committee on the Revision of the Laws began its codification of the laws relating to the judiciary in 1911, no uniformity existed in the acts creating divisions within judicial districts with respect to the geographical source of jurors. As indicated earlier, the Special Committee decided to achieve uniformity by repealing these specialized provisions of the various acts on the judiciary, and adopting in their stead generalized provisions applying to all judicial districts.\textsuperscript{380} But on the topic of vicinage, the Committee felt differently. As the Committee saw the issue, no need existed to change the special provisions requiring jurors to be chosen from a particular division of a judicial district into a general provision applicable to all judicial districts. Rather, Congressman Moon, Chairman of the Committee in the House, reported,

\begin{quote}
In a number of the laws are likewise provisions requiring jurors to be drawn from the division in which the court is to be held. These [the provisions mandating divisional vicinage] have been omitted, leaving the general law, revised in chapter 12, which has been the law from the foundation of the Government, to control in the drawing of jurors.\textsuperscript{381}
\end{quote}

Chapter 12, to which Mr. Moon referred, contained one section on the geographical source of the jurors. Section 277 read:

\begin{quote}
Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and
\end{quote}

\footnotesize

\textsuperscript{380} 46 Cong. Rec. 90 (1911) (remarks of Congressman Moon); H. Doc. No. 743, 61st Cong., 2d Sess., 6 (1910) See notes 237, 238, and 294 \textit{supra} and accompanying text, for examples of the adoption of a generalized provision to replace nonuniform specialized provisions.
\textsuperscript{381} H. Doc. No. 743, 61st Cong., 2d Sess., 6 (1910).
so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.\footnote{Act of Mar. 3, 1911, ch. 231, § 277, 36 Stat. 1164. It should be noted that this section is almost identical to that portion of Section 29 of the Judiciary Act of 1789, which granted discretionary power to the federal courts with regard to the geographical area from whence to summon jurors.}

All congressional provisions requiring jurors to be summoned from a particular division of a judicial district were repealed with the enactment of the Judicial Code of 1911.

Although in the acts creating divisions within judicial districts, passed between 1878 and 1911, Congress often included provisions mandating that grand and petit jurors be summoned from a particular division, the passage of these divisional vicinage provisions did not in truth serve to recall the concept of vicinage to the consciousness of lawyers, judges, and law professors. If the concept of vicinage had been clearly in mind when these acts were passed, Congress would have mandated divisional vicinage for reasons related to the desirability of drawing jurors from the locality of the crime.\footnote{\textit{i.e.}, the belief that jurors from the locality of the crime (jurors of the vicinage) are the jurors best able to perform the functions of a jury: to determine the facts, to apply the law to the facts, and to serve as the conscience of the community. For a fuller discussion of the jury of the vicinage as it relates to the functions performed by a jury, see Part I(B)(5) and Part III(F) \textit{infra}.} As indicated previously, however, the creation of divisions within judicial districts was motivated not by concerns about the jury as an institution, but by reasons of efficient judicial administration, accessibility of the courts to the citizens, and workloads within the federal courts.\footnote{\textit{I.e.}, the expeditious and convenient handling of criminal charges.} Because these reasons upon which Congress acted closely related to the policy considerations underpinning the concept of venue,\footnote{See note 345 \textit{supra} and authorities cited therein.} Congress considered the acts in which these divisional vicinage requirements were included to be acts concerning venue, not acts concerning vicinage.

Moreover, this congressional emphasis on the concept of venue, to the detriment of the concept of vicinage, was especially reinforced by the fact that the place from which the jurors were to be summoned in these acts, \textit{i.e.}, the appropriate division, was not determined in accordance with the concept of vicinage, but rather in accordance with the concept of venue. According to the concept of vicinage, the locality of the crime is first determined and then jurors are summoned from that locale. But in these acts creating divisions within judicial districts, the place at which trial was to be held was first determined, and then jurors were summoned from the place of trial. Congress included a divisional vicinage provision in these acts, therefore, not because of the merits of using a jury drawn from the
division wherein the crime was committed, but because using a jury from the division in which the trial would be held would be an easy, inexpensive jury selection method. Divisional vicinage was adopted by Congress solely as an adjunct to divisional venue.\textsuperscript{386}

When Congress then repealed all divisional vicinage requirements in the Judicial Code of 1911, it simply exhibited its belief that the concept of vicinage had been completely subsumed within the concept of venue. As stated by the spokesman for Congress, Congressman Moon, the passage of Section 277 of the Judicial Code of 1911 had reestablished the "general law . . . which had been the law from the foundation of the Government." Congressman Moon and his colleagues were simply incorrect in their knowledge of the history of the concept of vicinage.\textsuperscript{387} Section 277 of the Judicial Code did not preserve the smaller geographical areas from which jurors to try crimes committed in those areas would be summoned—that for which the supporters of the jury of the vicinage had so strenuously labored during the debates of the Judiciary Act of 1789, with eventual triumph in Section 29 of the Act.\textsuperscript{388} On the contrary, Section 277 only referred to one of the three possible geographical areas authorized as the geographical source of jurors by Section 29 of the Judiciary Act of 1789.\textsuperscript{389} Section 277 had preserved the geographical area of the judicial district as a whole, as the source of jurors,\textsuperscript{390} while it ignored the county in which the crime was committed as the source of jurors, either all jurors if the trial .

\textsuperscript{386} A good illustration of this point is found in "An act to provide for the division of the eastern district of Michigan into the northern and southern divisions and for holding the circuit and district courts of the United States therein, and for other purposes." Act of Apr. 30, 1894, ch. 66, 28 Stat. 67. Section 6 of this act reads as follows: "That any person charged with violating any of the penal or criminal statutes of the United States in which said circuit or district courts have jurisdiction shall be proceeded against by indictment or otherwise within the division of said district where the alleged offense . . . shall be committed, and shall have his or her trial at a term of said court held in said division, unless, for cause shown, the judge shall otherwise direct; and one grand and one petit jury only shall be summoned, and serve in both said courts at each term thereof; jurors shall be selected and drawn from the division of said district in which they reside and in which the terms of said circuit and district court to which they are summoned are held." As the quoted language indicates, the place from which the jurors were to be summoned was determined by the place for holding the trial courts where they would be summoned for service.

\textsuperscript{387} See the discussion of the attempted repeal in 1911 of the capital venue provision of federal law, note 373 supra, for another example indicating a lack of correct historical knowledge by Congressman Moon and his congressional colleagues with respect to the concept of vicinage.

\textsuperscript{388} See Part II.

\textsuperscript{389} The three geographical areas authorized by Section 29 are explained more fully in the text accompanying notes 358-361 supra.

\textsuperscript{390} See note 382 supra.
were held in the county,\textsuperscript{301} or at least twelve jurors from that county if it were inconvenient to hold the trial in the county.\textsuperscript{302} Hence, Section 277 did not reestablish the law as it had been at the foundation of the government.

Nor did Section 277 recall to the minds of congressmen, federal judges, lawyers, and law professors the reasons relating to the jury as an institution which had prompted the supporters of the concept of vicinage to be so insistent, in 1789, that these smaller geographical areas be designated within judicial districts. What Section 277 did reflect was the belief of Congress that the discretionary power granted to the federal district courts by Section 277 would be controlled by the concept of venue. Thus, if the judicial district were divided into divisions, Congress apparently believed that the federal district courts would exercise their discretionary power, as to the geographical source of jurors, in accordance with the divisional venue requirement of Section 53 of the Judicial Code. By contrast, if the judicial district were not divided into divisions, then Congress apparently believed that the federal district courts would exercise their discretionary power as to the geographical source of jurors so as to summon them from the geographical area immediately surrounding the place at which trial was held. In either instance, Congress apparently believed that the concept of venue (the place of trial) controlled the concept of vicinage (the geographical source of jurors). After 1911, so far as Congress was concerned, the concept of vicinage had disappeared as an independent, significant concept.

Because many acts of the 1878-1911 period, which created divisions within judicial districts, did not contain a divisional vicinage provision but did contain a divisional venue requirement, and because the Judicial Code of 1911 repealed all divisional vicinage provisions while retaining, through Section 53 of the Judicial Code, the divisional venue requirement, the question arose as to what area—the division or the district as a whole—should serve as the geographic source from which the federal courts should summon jurors to serve in criminal cases. Two divergent practices became common in the federal courts.

In many, the federal judges acted under the assumption that the geographical area within which the court conducted the proceedings should also be the geographical area from which jurors were summoned. Judges acting under this assumption summoned grand jurors from the division of

\textsuperscript{301} The provision of Section 29 of the Judiciary Act of 1789 requiring the trial of capital crimes to be conducted in the county in which the crime occurred, if that could be done without "great inconvenience," had long since become a dead letter. See notes 362 and 373 and authorities cited therein.

\textsuperscript{302} This provision of Section 29 of the Judiciary Act of 1789 was repealed in 1862. For a discussion of the repeal, see text accompanying notes 368-375 supra.
the judicial district in which the federal court convened the grand jury. If an indictment returned by that grand jury charged that the crime had been committed in another division of the district, then the indictment would be transferred to the division in which the crime was committed for trial in that division. Such transfer was required by the divisional venue requirement of the specific act in question, or, after 1911, Section 53 of the Judicial Code. Once transferred to the appropriate division, petit jurors to try the crime would then be summoned solely from the division in which the trial was being held.\textsuperscript{393}

In other federal courts, however, the practice was adopted that both grand jurors and petit jurors would be summoned from the judicial district as a whole, irrespective of the geographical boundaries of the divisions. Courts adopting this second practice ruled that divisions had been created by Congress solely for the purpose of designating the appropriate place at which various criminal proceedings should take place. These courts did not consider the existence of divisions relevant to the question of the geographical area from which jurors should be summoned.\textsuperscript{394}

\textsuperscript{393} Ruthenberg v. United States, 245 U.S. 480 (1918); Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938); Marvel v. Zerbst, 83 F.2d 974 (10th Cir. 1936); Wininger v. United States, 77 F.2d 678 (8th Cir. 1935); Frantz v. United States, 62 F.2d 737 (6th Cir. 1933); Hill v. United States, 15 F.2d 14 (8th Cir. 1926); Larramore v. United States, 8 F.2d 736 (5th Cir. 1925), cert. denied, 269 U.S. 586 (1926); Shaw v. United States, 1 F.2d 199 (8th Cir. 1924); United States v. Tait, 6 F.2d 942 (S.D. Ala. 1925); United States v. Beaugh, 2 F.2d 378 (W.D. La. 1924).


\textsuperscript{394} Cf. Post v. United States, 161 U.S. 583 (1896); Logan v. United States, 144 U.S. 263 (1892); United States v. Titus, 210 F.2d 210 (2d Cir. 1954); Wallace v. Hunter, 149 F.2d 59 (10th Cir. 1945); United States v. Murphy, 224 F. 554 (N.D.N.Y. 1915); United States v. Kessel, 63 F. 433 (N.D. Iowa 1894).

In 1948, 28 U.S.C. § 1865 (the successor provision for Section 277 of the Judicial Code of 1911) was amended by adding the following sentence: "To this end the discretionary exercise of power with respect to geographical areas from whence to summon jurors the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place." The revisor's notes added: "The last sentence . . . was added to conform with existing practice in many districts." 28 U.S.C.A. § 1865. From the cases cited in this note and the amendment adopted in 1948, to sanction separate jury boxes for the places of holding court, it can be concluded that the procedure described in the text was the most common procedure used for summoning jurors for service in the federal courts. \textit{Cf.} Watkins, \textit{Selecting Jurors}, 48 W. Va. L.Q. 47, 49 (1941).
Defense attorneys attacked the first practice, which restricted the jurors, either grand jurors or petit jurors, to the division in which the indictment was returned or in which the trial was held, as depriving defendants of their constitutional rights under the sixth amendment. They argued that an accused was entitled to a grand jury and petit jury drawn from the entire judicial district and that any geographical restriction of the source of the grand jurors and petit jurors to a smaller area than the judicial district would be in violation of the sixth amendment.\textsuperscript{395} Except for one decision,\textsuperscript{396} the federal courts consistently rejected this defense argument. They held that a judicial district under the sixth amendment is the maximum geographical area from which grand jurors and petit jurors can be summoned. But the sixth amendment, the federal courts ruled, does not require that grand jurors and petit jurors to a smaller area than the judicial district judicial district. Citing Section 29 of the Judiciary Act of 1789, which had been passed in conjunction with the sixth amendment, the courts noted that Section 29, through the capital venue provision and the grant of discretionary power to the courts to summon jurors from such parts of the district as the court deemed appropriate, had authorized the summoning of jurors from areas smaller in extent than the entire judicial district. Since assuredly Section 29 of the Judiciary Act was not in conflict with the sixth amendment, the federal courts ruled that both Congress and the courts possess the power to designate areas smaller in extent than the judicial district as a whole, as the geographical source of jurors for federal criminal proceedings.\textsuperscript{397}

Defense attorneys attacked the second practice which summoned jurors from throughout the judicial district on the ground that because Congress had designated divisions as specified geographical areas, an accused was entitled to have jurors summoned solely from the division in which the crime was committed. As previous discussion of \textit{Clement v. United States}\textsuperscript{398} and \textit{Spencer v. United States}\textsuperscript{399} has indicated, the federal

\textsuperscript{395} This argument by defense attorneys can be discerned in the cases cited in note 393 supra.

\textsuperscript{396} United States v. Dixon, 44 F. 401 (N.D. Cal. 1890).


\textsuperscript{398} 149 F. 305 (8th Cir. 1906).

\textsuperscript{399} 169 F. 562 (8th Cir. 1909).
courts rejected this defense argument by ruling that divisions were not districts under the sixth amendment. 400

Although the arguments attacking the two common practices for summoning jurors were contradictory, the rulings of the federal courts against these defense arguments were not inconsistent. With respect to the arguments attacking the selection of jurors from the entire judicial district, the federal courts in Clement and Spencer had ruled that it was constitutionally permissible to summon jurors from the entire judicial district; the Clement and Spencer cases made no ruling, however, on whether it was constitutionally mandatory to do so. Then, in response to the defense arguments attacking the selection of jurors from smaller geographical areas within judicial districts, the federal courts ruled that it was constitutionally permissible to summon from geographical areas smaller in extent than the judicial district as a whole; the sixth amendment, these federal courts held, did not require that jurors be summoned from the entire judicial district. When these federal cases are read together, it becomes clear that the discretion of the federal judge as to the precise geographic area from which to summon jurors had been strongly affirmed. So long as the federal judge summoned jurors from the judicial district in which the crime was committed, whether the jurors were summoned from the district as a whole or from some lesser area within the judicial district, discretion would be exercised properly. Either practice for summoning jurors was constitutional. 401

In the combination of the broad discretion granted to the federal courts to summon jurors from anywhere within the judicial district, with the assumption that designation of the place at which a particular criminal proceeding is to be held also determines the place from which jurors are to be summoned for that particular proceeding, is the source of the final demise of the concept of vicinage as an independent, significant concept. To understand why and how this is so, it is necessary to examine more closely the procedures through which grand jurors were summoned, after 1911, to form a federal grand jury.

As previously stated, the practice became quite common in the federal courts for the federal district judge to convene a grand jury composed

400 See text accompanying notes 344–352 supra.

For further discussion of the discretionary power possessed by federal courts with respect to the geographical source from which to summon jurors, see Part IV(A)(1) infra.
solely of grand jurors summoned from the division in which the court sat when it convened the grand jury. In many instances, use of this procedure meant that a grand jury was returning indictments for crimes that had occurred in another division of the judicial district.\footnote{Marvel v. Zerbst, 83 F.2d 974 (10th Cir. 1936); Wininger v. United States, 77 F.2d 678 (8th Cir. 1935); Hill v. United States, 15 F.2d 14 (8th Cir. 1926); Larramore v. United States, 8 F.2d 736 (5th Cir. 1925); Shaw v. United States, 1 F.2d 199 (8th Cir. 1924); United States v. Tait, 6 F.2d 942 (S.D. Ala. 1925); United States v. Beaug, 2 F.2d 378 (W.D. La. 1924).}

Defense attorneys attacked this procedure on two distinct grounds. First, some argued that a grand jury convened in one division lacked jurisdiction to return indictments for crimes committed in another division. The courts rejected this argument on the basis that the grand jury, as an adjunct of the federal court, has the same territorial jurisdiction as the federal court. Since this extended throughout the judicial district, the territorial jurisdiction of the grand jury would likewise extend throughout the entire judicial district. Hence, a grand jury convened in one division and composed entirely of jurors from that division possessed the jurisdiction to indict for crimes committed anywhere within the judicial district.\footnote{See cases cited supra note 402.}

Second, defense attorneys argued that summoning grand jurors solely from a division which was not the division where the crime was committed was in violation of the sixth amendment. Reading the sixth amendment as a jurisdictional provision, the federal courts responded that the federal trial judge possessed the power to summon the grand jurors from anywhere within the territory encompassed in the judicial district. The sixth amendment, these courts held, simply set the maximum area over which the trial court possessed territorial jurisdiction. Moreover, from where precisely within the judicial district the federal trial judge should summon grand jurors, the federal courts referred to the broad discretion granted to the federal judges to summon from such parts of the district as was most convenient and least expensive. Summoning grand jurors solely from the division in which the federal court sat when convening the grand jury, the courts held, was more convenient to the jurors summoned, and less expensive to the government in terms of juror fees. Furthermore, such practice accorded with the assumption that the place at which a criminal proceeding was held also designated the place from which the jurors would be summoned. In light of these considerations, the federal courts ruled that summoning grand jurors solely from a single division within the judicial district was a proper exercise of discretion by the federal trial judges.\footnote{Seadlund v. United States, 97 F.2d 742, 747 (7th Cir. 1938). Cf. United States v. Marcello, 423 F.2d 993, 998-99 (5th Cir.), cert. denied, 398 U.S. 959 (1970); United States v. United States}
What is most important to note from these cases is that the courts held that grand jurors could be summoned from one geographically delimited community (i.e., one division within a judicial district), which was distinct from the geographically delimited community (i.e., another division within the judicial district) in which the crime was actually committed. While it is proper to summon grand jurors from a community other than the one in which the crime was committed, this is so because the sixth amendment was written with a recognition that the functions performed by the grand jurors are significantly different from the functions performed by petit jurors. The sixth amendment is a vicinage provision concerned with the geographical source of the petit jury and has, therefore, no application to grand jurors or grand juries.405 But unless this is remembered—because the


405 The language of the sixth amendment itself makes clear that it applies only to petit juries: "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, which district shall have been previously ascertained by law, . . ." The vicinage language of the sixth amendment, the only vicinage language in the United States Constitution, modifies the word "trial"; this language is, therefore, meant to apply to the petit jury. By contrast, the grand jury is guaranteed as a right in the fifth amendment because it is the grand jury which returns indictments. The sixth amendment then lists the rights of an "accused" after the indictment has been returned by the grand jury. This grouping was deliberate. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 426-27 (1968).

Moreover, although the early Americans considered the right to indictment by a grand jury to be a fundamental right, as is evidenced by the protection afforded the grand jury by the adoption of the fifth amendment in the Bill of Rights, nowhere during the debates about the concept of vicinage, in the ratification conventions of the states or in the First Congress, is there found any reference to the grand jury that relates the grand jury to the concept of vicinage. The debate about the concept of vicinage, as indicated in Parts I and II of this article, was conducted solely in terms of the appropriate functions to be performed by a petit jury. Thus, when the concept of vicinage was afforded protection in the sixth amendment, the entire discussion of why the concept should be constitutionally protected had been conducted solely with reference to the petit jury. Similarly, when the concept of vicinage was afforded further protection in Section 29 of the Judiciary Act of 1789, the entire debate in Congress had been conducted solely with reference to the petit jury.

No case has been found prior to 1891 which indicated that the sixth amendment vicinage provision might be applicable to grand jurors. In 1891, a defense attorney challenged the summoning of grand jurors solely from one division within a judicial district. The defense attorney claimed that such a procedure would violate the sixth amendment. In discussing this defense argument, the court stated, "Even if the construction of this amendment is admissible that would hold it applicable to grand juries, it does not bear the meaning sought to be given it," because the sixth amendment, the court ruled, sets the maximum geographical area from within which jurors can be summoned, but does not require that the jurors be summoned from throughout the entire judicial district. United States v. Ayres, 46 F. 651, 652 (D.S.D. 1891). Since this case in 1891, many attorneys and many federal judges have assumed that the sixth amendment is applicable to grand jurors.

Then, in 1897, the Supreme Court ruled that the word "jurors" in Section 802 of the Revised Statutes of 1878 (the successor statute to that portion of Section 29 of the Judiciary
functions performed by grand jurors and petit jurors are significantly different—then the danger exists that these cases—permitting the separation of the community from which the grand jurors are chosen from the one in which the crime was actually committed—will be applied as precedent to cases bearing on the relationship between the community from which petit jurors are chosen and the community in which the crime was committed. Unfortunately, the cases dealing with the summoning of grand jurors failed to note the functional differences between grand jurors and petit jurors and, at the same time, misread the sixth amendment as a jurisdictional provision, rather than as a vicinage provision.\textsuperscript{406}

Despite the federal decisions permitting grand jurors to be chosen from a division other than the one in which the indictment alleged the crime had been committed, the concept of vicinage retained some vitality, even if unrecognized by members of the legal profession, so long as the divisional venue requirement—that the trial must be held in the division in which the crime was committed—was retained. If the trial must be held in the division in which the crime was committed, and if the federal trial judge then acted, as many judges did, upon the assumption that designation of the place of trial also designated the place from which jurors should be summoned in the exercise of discretion granted the court,\textsuperscript{407} then the petit jurors would be summoned, as the concept of vicinage demanded, from the same community as the one in which the crime was committed. But the vitality of the concept of vicinage, due to the divisional venue requirement, was a tenuous, inadvertent vitality. Petit jurors were being summoned from the community in which the crime was committed, not for reasons related to the functioning of the jury as an institution, but solely because the community in which the crime was committed coincided, due to the divisional venue requirement, with the place

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Act of 1789 granting discretionary power to the federal trial courts to summon jurors from such parts of the judicial district as the court deemed appropriate) should be construed to mean both "grand" and "petit" jurors. Agnew v. United States, 165 U.S. 36 (1897). Unfortunately, the Supreme Court failed to realize that Section 29 of the Judiciary Act of 1789 was drafted solely with reference to petit jurors. Indeed, the Supreme Court in the Agnew decision was apparently unaware that Chief Justice Marshall had ruled, in 1809, that the power of the federal courts to summon grand jurors was based on the inherent power of a court to exercise its jurisdiction, because Congress had passed no statutes concerning procedures relating to the use of grand jurors. United States v. Hill, 26 F. Cas. 315, 317-18 (C.C.D. Va. 1809) (No. 15,364).

Hence, by 1897, both the vicinage provision of the sixth amendment, and the vicinage provisions of Section 29 of the Judiciary Act of 1789, had been misconstrued as applicable to grand jurors. For further discussion of the relationship between grand juries and the concept of vicinage, see Part IV(D).

\textsuperscript{406} See cases cited in notes 402 and 404 \textit{supra}.

\textsuperscript{407} See note 393 \textit{supra} and accompanying text.
at which the trial was being conducted. Hence, after 1911, the federal courts, just like Congress, totally identified the geographical source from which petit jurors were summoned with the place at which the trial was being held. For the courts, too, the concept of vicinage had been subsumed within the concept of venue.

By 1966, the divisional venue requirement, through which the concept of vicinage had received inadvertent protection, was thought to be an "irrational" requirement. Divisional venue was considered to be an impediment to a convenient and expeditious handling of criminal prosecution from both the perspective of the government and of the accused. Since the rules governing venue were meant to encourage expeditious and convenient disposition for all concerned, the Advisory Committee on the Federal Rules of Criminal Procedure recommended in 1966 that Rule 18 be amended to delete the requirement that the trial of a crime be conducted in the division in which the crime was committed.

It is not surprising that when the Advisory Committee made this recommendation, its members were thinking solely in terms of venue, unaware that deletion of divisional venue would also destroy the inadvertent protection afforded the concept of vicinage by that requirement. For mem-

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410 See text accompanying notes 244-247 supra.

411 No better evidence of the Advisory Committee's complete preoccupation with the concept of venue can be offered than the comments of the Committee at the time of the decision to abolish divisional venue. "The amendment eliminates the requirement that the prosecution shall be in a division in which the offense was committed and vests discretion in the court to fix the place of trial at any place within the district with due regard to the convenience of the defendant and his witnesses."

"The Sixth Amendment provides that the defendant shall have the right to a 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.... There is no constitutional right to trial within a division. [Citation to six cases omitted.]"

"The former requirement for venue within the division operated in an irrational fashion. Divisions have been created in only half of the districts, and the differentiation between those districts with and those without divisions often bears no relationship to comparative size or population. In many districts a single judge is required to sit in several divisions and only brief and infrequent terms may be held in particular divisions. As a consequence under the original rule there was often undue delay in the disposition of criminal cases—delay which was particularly serious with respect to defendants who had been unable to secure release on bail pending the holding of the next term of court."

"If the court is satisfied that there exists in the place fixed for trial prejudice against the defendant so great as to render the trial unfair, the court may, of course, fix another place of trial within the district (if there be such) where such prejudice does not exist. Cf. Rule 21 dealing with transfers between districts." Advisory Comm. on Rules of Criminal Procedure,
bers of the Advisory Committee to have realized that their recommendation affected a concept of vicinage that once had, and which still could have, and which still should have independent significance, would have required that they understand the decisional and legislative history which has been detailed in Part III. With the adoption of this recommendation of the Advisory Committee, the concept of vicinage disappeared from federal criminal procedure in even its inadvertently protected form. By deleting the divisional venue requirement, the federal courts were now authorized by Rule 18 to hold the trial anywhere within the judicial district, so long as the place of trial was selected "with due regard to the convenience of the defendant and the witnesses." Under Rule 18 as now written, the federal courts can summon petit jurors in a manner similar to the most common procedure by which they had previously summoned grand jurors. If the federal court decides that "convenience" dictates that all trials be held in one particular division, or at one particular place for holding court, within the judicial district, and if the federal judge then decides that separate jury boxes should be kept for each division, or place for holding court, of the judicial district, and then further, if the federal courts decide to maintain separate jury boxes for each division, or place for holding court, within a judicial district, the courts shall devise and place into operation a written plan for random selection of grand and petit jurors. The statutory authorization to the federal district courts to maintain separate jury boxes for each division, or place for holding court, within a judicial district is found in 28 U.S.C. §§ 1863, 1869 (Supp. 1976). Section 1863 states: "(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors. . . . Separate plans may be adopted for each division or combination of divisions within a judicial district." Section 1869 then defines the word "division" as follows: "(e) 'division' shall mean: (1) one or more statutory divisions of a judicial district; or (2) in statutory divisions that contain more than one place of holding court, in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district court plan shall determine: Provided, that each county, parish or similar political subdivision shall be included in some such division." See also H. REP. No. 1076, 90th Cong., 2d Sess., in 2 U.S. CODE CONG. & ADMIN. NEWS 1793, 1807 (1968).
judge exercises his discretion to summon petit jurors only from the jury box for the division, or the place for holding court, in which all trials are to be held (under the assumption that the designation of the place of trial also designates the geographical source of the jurors), then the following consequence often occurs: a crime is committed in one division of the judicial district, but the jurors to try that crime are summoned from a completely separate division of the district. When petit jurors are summoned from the division in which the trial is held, as opposed to being selected from the division in which the crime was committed, then the concept of vicinage has been swallowed by the concept of venue. Because those who drafted and promulgated the 1966 amendment had already forgotten the concept of vicinage, they were unaware that the 1966 amendment constituted the complete triumph of the concept of venue over the concept of vicinage.

In light of the legislative and decisional history of the concepts of venue and vicinage, which have been detailed in Part III of this article, it is understandable that Professor Wright could say, in the quotation at the beginning of this article, that the distinction between venue and vicinage

Under the authority granted by 28 U.S.C. § 1863, the United States District Court for the Western District of Oklahoma has promulgated the following local rule: "The Court has considered parts of the district from which jurors should be selected for the places where Court is held,. . . For this purpose there shall be four divisions as follows:

1. Oklahoma City, Guthrie, Chickasha, Pauls Valley, and Shawnee Division: Blaine, Canadian, Cleveland, Garvin, Grady, Kingfisher, Lincoln, Logan, McClain, Oklahoma and Pottawatomie Counties.

2. Enid and Ponca City Division: Alfalfa, Garfield, Grant, Kay, Noble and Payne Counties.


This plan shall apply separately to each place of holding court designated herein, except that Oklahoma City, Guthrie, Shawnee, Chickasha and Pauls Valley shall have the same jury wheel; Enid and Ponca City shall have the same jury wheel; Lawton and Mangum shall have the same jury wheel and Woodward a jury wheel." LOCAL R. 30, W.D. OKLA. See note supra.


416 United States v. Florence, 456 F.2d 46 (4th Cir. 1972). Under the procedure outlined in the text, it will also happen that, in some instances, the crime will be alleged to have been committed in the division in which the federal court is sitting. In these circumstances, if the procedure outlined is followed, then the jurors to try the crime would also be summoned from the division in which the crime occurred. But in this situation, the fact that the jurors are summoned from the same community as the one in which the crime was allegedly committed is entirely coincidental. United States v. Edwards, 465 F.2d 943 (9th Cir. 1972).
is a "technical distinction having no importance." It is also understandable that Professor Blume could write as early as 1944: "The tendency of modern law is to think of the place of trial rather than the place from which the jury must be summoned. From vicinage to venue has been the pattern of development, and the transition is about complete." With the deletion of divisional venue in 1966, Professor Blume's prediction was fulfilled: the transition was completed.

F. Vicinage: Fundamental Themes

In the previous subparts of Part III of this article, it has been shown how the concept of vicinage disappeared from the legal consciousness of present-day legislators, judges, lawyers, and law professors. But the legislative and decisional history of this gradual disappearance does not explicitly reveal several, more fundamental, beliefs about the jury system, held by members of the legal profession today, which greatly contributed to the disappearance of the concept of vicinage as a meaningful, independent concept. The "pattern of development" from vicinage to venue, to use Professor Blume's language, found in the legislative and decisional history was not some form of inevitable historical trend, but rather reflected deeper currents shaping the legal consciousness.

As indicated in Part I of this article, those who supported a jury of the vicinage in 1789 did so because they firmly believed that a jury of the vicinage was essential to the proper functioning of the jury as an institution in criminal law. Supporters of the jury of the vicinage knew that this jury would function differently from a jury of any other location with respect to all three functions performed by a jury in our system: to find the facts, to apply the law to the facts, and to serve as the conscience of the community. Hence, it should not be surprising to learn that the disappearance of the concept of vicinage from federal criminal procedure has occurred contemporaneously with changed conceptions about the proper functioning of the jury as an institution in criminal law.

1. Function One—To Find the Facts

When the concept of vicinage was protected in the sixth amendment and the Judiciary Act of 1789, supporters of the concept praised the use of jurors of the vicinage because these jurors would usually possess the most

417 Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue, 43 MICH. L. REV. 59, 91 (1944) [hereinafter cited as Blume].
418 See Part I(B) (5).
419 For an excellent analysis of the changed concepts concerning petit jurors, see Comment, The Changing Role of the Jury in the Nineteenth Century, 74 YALE L.J. 170 (1964).
knowledge concerning the character of the accused, the character of the victim and witnesses, the incident itself, and the setting in which the incident occurred, which knowledge would be helpful in obtaining a proper determination of the facts. But today, rather than considering knowledge of a case possessed by the jurors to be a desirable attribute, the goal of federal criminal procedure is to use jurors who are completely unfamiliar with and uninformed about all aspects of the specific criminal case. Although the jury is still to find the facts in dispute, the kind of jury desired today more closely resembles that described by Judge Clark in Parker v. United States:

...The entire effort of our criminal (civil too) procedure is to secure a jury which is ignorant of repute either in its sense of character or in its sense of events. ... In fact the zeal displayed in this effort to empty the minds of the jurors has been the subject of some unfavorable and even humorous comment. We can conclude then that the jury no longer represents the voice of the countryside, but rather, like the court itself, is an impartial organ of justice.420

As the quotation from Judge Clark intimates, "modern" judges, lawyers, and law professors desire a jury with empty minds concerning the case for fear that if jurors possess personal knowledge of the case, they will either be prejudiced by this knowledge, or will use it as the basis upon which to decide the case. If jurors are prejudiced by their personal knowledge, then the sixth amendment guarantee to a defendant of an impartial jury would be violated.421 If jurors use their personal knowledge to decide the case, rather than the evidence presented at trial, then the sixth amendment guarantee that a defendant can confront witnesses against him would be violated.422 In order to avoid these problems presented by personal knowledge of the jurors, judges, lawyers, and law professors began to demand that jurors be ignorant of the facts of the case. An easy way to insure that jurors are ignorant about the case is simply not to use jurors of the vicinage, but rather to use jurors chosen from another community unrelated to the crime.423

422 E.g., United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970); United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970).
423 If a crime were committed in the Western District of Oklahoma but the jurors were selected from the District of Wyoming, as a hypothetical example, the likelihood that the people summoned for jury service in Wyoming would have any personal knowledge about the crime is significantly less than the likelihood that persons summoned from the Western District of Oklahoma would have any personal knowledge about the crime. If the sole concern
The demand that jurors be ignorant about the case is a demand with a misplaced emphasis. Those who have made this demand have seemingly come to assume that the sixth amendment requires that jurors not possess personal knowledge of the facts of the case or the persons involved. Those who have made this demand seem to assume that if a juror does possess personal knowledge of the case, then that juror is, under the sixth amendment, disqualified from being a juror in that case. But as the history of the debates leading to the drafting of the sixth amendment shows, possession of personal knowledge about the case by the jurors is not prohibited. On the contrary, during the debates which ultimately led to the sixth amendment, Gore of Massachusetts and Johnston of North Carolina explicitly objected to protecting the jury of the vicinage because such jurors were likely to possess personal knowledge of the case. In the face of these objections, which in 1789 argued for the “modern” conception of the jury, the draftsmen of the sixth amendment (and the Judiciary Act of 1789) provided protection for the jury of the vicinage. Moreover, they provided protection for this jury precisely because they considered personal knowledge about the criminal case to be an attribute, not a defect, of the jury.

At the same time, the draftsmen of the sixth amendment were concerned about the possible abuse of personal knowledge of the case by the jurors. Hence, the sixth amendment was drafted to provide that the jury be “impartial” and that witnesses must be confronted. If an accused claims that a juror is not impartial, or that the jury decided the case on evidence presented in the juryroom rather than by witnesses from the witness stand, possession of personal knowledge about the case, by a juror or the jury, is obviously relevant in making a proper determination of whether the sixth amendment protections have been provided an accused. But it should be stressed that possession of personal knowledge alone is not sufficient to establish juror bias or to establish that the jury decided the case on extrajudicial evidence. The appropriate demand is that the jurors be impartial and decide the case on the evidence presented during the trial, not that they of the federal court were to insure jurors with “empty” minds, then it could be argued that it would be easier to summon jurors from Wyoming than to attempt to weed out those jurors from the Western District of Oklahoma, where the crime was committed, who might possess, even minutely, information about the criminal incident, the persons involved in the incident, and the setting in which the incident occurred. See Myers v. United States, 15 F.2d 977, 979 (8th Cir. 1926); Hill v. United States, 15 F.2d 14, 16 (8th Cir. 1926); Shaw v. United States, 1 F.2d 199, 201 (8th Cir. 1924).

424 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 112-13 (1836) (Gore of Massachusetts) [hereinafter cited as Elliot]; IV Elliot, at 150 (Johnston of North Carolina).

425 See text accompanying notes 113-123, Part I.
be completely ignorant of the facts of the case or the persons involved in the case. 426

Once it is recognized that the sixth amendment is concerned with impartiality and confrontation, and not with personal knowledge by the jurors about the case per se, then it is possible to face squarely the issue the early Americans faced: is it desirable to utilize jurors of the vicinage, who are more likely than jurors from anywhere else to have knowledge about the case, even if such knowledge only extends to the general setting in which the incident occurred; or, should the federal courts purposely strive to summon jurors from a community unrelated to the crime so as to insure the use of jurors who are ignorant of all aspects of the case? 427

The early Americans who supported a jury of the vicinage were correct in their assessment that jurors of the vicinage would be the jurors best able to determine the disputed facts of any case. Jurors of the vicinage are the ones most likely to have personal knowledge of the character of the accused, the victim, and the witnesses, permitting meaningful evaluation of their testimony—particularly character testimony. If jurors are purposely summoned from a community unrelated to the crime so as to insure their ignorance of the character of the parties and witnesses involved, then evaluation of the credibility of these persons is likely to depend upon juror preconceptions about what kinds of people, as a class, are credible persons, or is likely to become a swearing-match between prosecution and defense witnesses that may be particularly acute with respect to character wit-


427 If the goal is to have jurors who are completely ignorant of all aspects of the criminal case, it is agreed that that goal may be achieved without summoning the jurors from a community unrelated to the crime. Depending on the size and population of the community where the crime was allegedly committed, it may well be possible to summon jurors from that community and still obtain jurors with “empty” minds. See 4 BARRON, supra note 243, at § 2091, pp. 149-50. Comments in the text assume that jurors chosen from the community where the crime was allegedly committed are substantially more likely to have personal knowledge of some aspect of the criminal case than jurors chosen from a community unrelated to the crime. Comments in the text are also directed toward the wisdom of a policy to summon jurors from a community unrelated to the crime so as to insure jurors with “empty” minds. A discussion of whether it is constitutionally permissible to adopt such a policy is discussed in Part IV(B) infra.

An interesting article that provides some indication as to how important, in modern times, any personal knowledge of the jurors is about the participants, the incident, and the setting, with regard to the verdict reached, is Broeder, The Impact of the Vicinage Requirement: An Empirical Look, 45 Neb. L. Rev. 99 (1966) [hereinafter cited as Broeder].

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nesses for the opposing sides. In addition, jurors of the vicinage are more likely to be familiar with the setting in which the incident occurred, and the mannerisms and colloquialisms of the people involved, facilitating intelligent comprehension and evaluation of the evidence being presented. If jurors are purposely summoned from a community unrelated to the crime so as to insure ignorance of the geographical and cultural setting in which the incident occurred, they are likely to misinterpret evidence, or not to understand certain evidence, or to become confused about the evidence, precisely because of the lack of knowledge of the context of the incident.

Unless personal knowledge indicates bias, or that extrajudicial evidence will be used to decide the case, a jury of the vicinage is more likely than a jury from anywhere else to reach a proper determination of the facts. While ascertainment of truth may not be the only, or primary, goal of a criminal trial, assuredly if the trial is to be perceived as a rational process, then the ascertainment of truth must be a highly valued goal. Using a jury of the vicinage promotes the ascertainment of truth without denigrating the other goals of a criminal trial.

2. Function Two—To Apply the Law to the Facts

With respect to the second function of a jury—application of the law to the facts—supporters of the jury of the vicinage in 1789 praised these

See generally Broeder, supra note 427, at 108-11. In our society, racial stereotyping has been strong and pervasive. Jurors of the vicinage may be able, however, to overcome any racial stereotypes because they possibly possess personal information about the particular witness whose testimony is being evaluated. Hence, that witness' credibility can be judged on an individual, rather than stereotyped, basis. By contrast, where jurors from a community unrelated to the crime have been purposefully chosen to reduce the possibility of knowledge of the particular individuals involved in the criminal case, these jurors would be more likely to have no information other than racial stereotypes upon which to base evaluations of credibility.

In the same vein, if witness after witness gives credible, but contradictory, testimony concerning the incident or the character of the accused or the victim, the jurors of the vicinage may be able to break through this swearing-match because they have the possibility of possessing personal information about the witnesses that provides a basis for judging which witness is being truthful. In contradistinction, jurors chosen from a community unrelated to the crime have no information concerning the witnesses that might permit an evaluation of the testimony. If all the witnesses sound credible, the jurors from a community unrelated to the crime really have no way to resolve the contradictory testimony. Information obtained through direct examination and cross-examination should balance out to be a neutral factor in the decision as to which is the better "fact-finding" jury because the information from the witness stand should be equally helpful to either a jury of the vicinage or to a jury from a community unrelated to the crime.


For a discussion of instances in which the use of a jury of the vicinage may denigrate an accused's rights, with possible remedies, see Part IV(B) (2) infra.
jurors because they would apply the law to the facts in such a way as to reflect the mores of the community in which the crime was committed. Although the jurors were instructed on the law by the courts, they were also admonished that the instructions from the court on the law simply expressed the opinion of the court which the jury was entitled to disregard. Instructions on the law, courts informed juries in the early years of our nation, were meant to provide guidance to their decision, but not to control it. As a result of these beliefs of supporters and these instructions from the courts, jurors of the vicinage were expected consciously to mold—the law when reaching a verdict so as to reflect the sense of justice of the community.

Beginning around 1850, however, the courts began to insist that jurors take the law as given to them through the instructions. Courts now held that questions of law were properly to be decided by the court alone, while questions of fact were properly within the province of the jury. Questions of law needed to be distinguished from questions of fact, the courts ruled, because the law was too complex to be understood by laymen who did not possess the professional expertise of lawyers and judges. Moreover, questions of law must be distinguished from questions of fact, these courts stated, because only if the jurors obeyed the law as given to them through the instructions could uniformity in the application of the law be insured and certainty in result be provided to the legal system. While the jury still had the duty to apply the law to the facts, this application was now to resemble a mechanical procedure—find the facts, then fit them within the molds of law as fashioned by the judge in the instructions. By 1895, in federal criminal procedure, the image of the jury as consciously shaping the law to reach a verdict in accord with the sense of justice of the community had been replaced with the image of the jury as mechanically applying the law to the facts to reach a verdict in accord with the instructions of the court.

Underpinning the allocation of questions of fact to the jury and questions of law to the court was the belief that a sharp distinction between fact and law could be drawn. Throughout the second half of the nine-

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432 For a fuller discussion of the changing relationship between judge and jury, which began around 1850, see Howe, supra note 431 and Comment, The Changing Role of the Jury in the Nineteenth Century, 74 Yale L.J. 170 (1964).

433 Sparf v. United States, 156 U.S. 51 (1895).

434 Unless a sharp distinction exists, the allocation of questions of fact to the jury and questions of law to the court is a frustrating one; the determination as to when the allocation is being violated becomes exceedingly difficult, if not impossible.
teenth century and well into the twentieth, the intellectual climate was conducive to the growth of the belief that fact and law could be sharply distinguished. As the prestige of the physical sciences steadily increased, the belief became stronger that facts were objective data in the physical world and could be accurately determined if proper techniques of observation were adopted. Although it might be true that observation of facts alone would not reveal the scientific laws which provided coherence to the facts, this question about how scientific laws were formulated did not contradict the belief that facts were objective data in the physical world entirely unaffected by the perceptual and conceptual predispositions of individual scientists. 435

As judges, lawyers, and law professors began to conceive of law as a science, 436 undoubtedly the basic beliefs about science were adapted to fit the discipline of law. Hence, questions of fact could be separated from questions of law in the legal system just as questions of fact of the objective world could be separated from the formulation of scientific laws in the scientific disciplines. Just as questions of fact in science were determined by appropriate observational techniques, while the formulation of scientific laws was assigned to the expert scientist, so questions of fact in the legal system were then assigned to the jury, the proper observational technique in that system, while questions of law were assigned to judges who possessed the proper expertise to formulate the instructions of law that would be used to provide the legal meaning to the facts. This belief that a sharp distinction exists between questions of fact and questions of law carries two implications, both of which undermine adherence to the concept of vicinage.

**Implication One.** If facts are facts, independent of the perceptual predispositions of any particular observer, then possession of personal knowledge of the case by the jurors of the vicinage does not really give this jury any “fact-finding” advantage over a jury drawn from a community unrelated to the crime. If facts are facts, jurors drawn from any community are equally competent to determine the facts, so long as the lawyers for the opposing sides of the legal dispute present all the factual evidence to the jury. Indeed, one could reasonably argue that jurors from a community unrelated to the crime are better jurors, because then all questions about perceptual predispositions, or, to use the language of the sixth


amendment, all questions about lack of perceptual impartiality become moot because supposedly those jurors are persons with blank minds ready to record only the objective facts as presented during the trial. However, not only is it clearly false that jurors chosen from a community unrelated to the crime will have tabula rasa minds, but, as previously argued, the kinds of perceptual predispositions permissible to jurors of the vicinage under the sixth amendment indeed aid, rather than hinder, a proper determination of the facts in dispute.\(^{437}\)

**Implication Two.** After questions of fact and questions of law had been sharply distinguished, with questions of law being allocated to the judge for decision, the legal meaning to be given a particular incident no longer came from the mores of the jurors, but rather from the instructions of the trial judge. Since correct instructions and proper rulings of law would be binding precedent on other judges, the legal system would thereby attain greater uniformity and certainty. In contrast, to permit the jury to interpret the law according to the mores of the jurors would not only be an invasion of the judicial function, but more importantly, because the interpretation of the jury would not be binding on any subsequent jury, the law would not achieve the desired uniformity of interpretation and certainty of result. Although any jury, regardless of its geographical origin, would be invading the judicial function and destroying uniformity and certainty if it interpreted the law, a jury of the vicinage, it could be argued, might be particularly susceptible to overstepping its proper role-allocation because local passions and prejudices concerning a particular case would provide an incentive to the jury of the vicinage to ignore the instructions from the court. If questions of law and questions of fact can be sharply distinguished and have been properly allocated to judges and juries, respectively, then one can reasonably argue that to insure that this separation in competence is maintained, jurors chosen from a community unrelated to the crime should be utilized in preference to jurors of the vicinage.

Although it is believed unlikely that questions of fact and questions of law can be sharply distinguished,\(^{438}\) even if a distinction can be drawn, the reasons motivating the courts to draw this sharp distinction—those of legal expertise, uniformity, and certainty in the legal system—are still unsatisfactory. By insisting that the jurors take the law as given to them by

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\(^{437}\) See text accompanying notes 420-430 *supra*.

\(^{438}\) For an excellent presentation of the relationship between questions of fact and questions of law, see W. BISHIN & C. STONE, LAW, LANGUAGE AND ETHICS (1972), especially Part Three: Skepticism and the Nature of Knowledge. See also Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150 (1952).
the court, legal expertise was emphasized while uniformity and certainty
in the law were promoted, but only by degrading the jury from a collective
body reaching a verdict through the articulation of the community sense
of justice, to a collective body reaching a verdict through the mechanical
application of the instructions received from the trial judge. Yet the articu-
lation of the community sense of justice through the rendition of a general
verdict in a criminal trial is precisely what ought to be demanded of a
petit jury. A petit jury is, and ought to be, burdened with the responsibility
to pass a judgment shaped by the jurors, not prefabricated by others, upon
an accused. To believe that the jurors are mechanical applicators of legal
meaning provided by a judge is to hold beliefs that radically attack the
sense of responsibility and the kind of judgment a petit jury ought to feel
and ought to render. Unless the jury applies the law to the facts so as to
articulate the community sense of justice, there is justifiable fear that the
jury will not feel responsibility for the verdict rendered. Unless the jury
renders a verdict in which the community sense of justice is articulated,
an accused may not feel that he has been judged, but rather may feel he
has been processed. Although expertise, uniformity, and certainty are
worthwhile goals for a legal system, assuredly these goals must be of lesser
importance than the goal of an articulation of the community sense of jus-
tice in a criminal verdict.439

If one agrees that what ought to be demanded of a jury is the articu-
lation of the community sense of justice through rendition of the general
verdict, then the question that must be faced is which jury—a jury of the
vicinage or a jury chosen from a community unrelated to the crime—
should be permitted to articulate the sense of justice of the community. It
should be concluded today, as it was in 1789 during the debates in the
First Congress, that the jury of the vicinage is the appropriate articulator
of the community sense of justice.440

As Thomas Jefferson stated, participation of the ordinary citizen on a
jury permits a democratic element to be preserved in the administration of
justice by the judicial branch of the government. Each verdict rendered

439 Views on the appropriate role of the jury which are similar to the views expressed
herein may be found in United States v. Brawner, 471 F.2d 969, 1010 (D.C. Cir. 1972)
(opinion of Chief Judge Bazelon).

440 As already indicated, the precise geographical size of the vicinage, i.e., the precise
geographical size of the place—the community—where the crime was committed, was left
to congressional control under the sixth amendment. See Part III supra. But once geographical
boundaries are placed on the vicinage, then any jurors summoned from beyond those bound-
aries would have been summoned from a community unrelated to the crime. For a further
discussion of how to define the boundaries of the vicinage in federal criminal procedure today,
see Part IV(A) (1).
by a jury is a vote by the jurors on what the appropriate standards of conduct for a community will be; each verdict permits the jurors to engage in "law-making" for the community. But it is also a fundamental tenet of democracy that those who will be subject to the laws, those who will be expected to abide by the standards of conduct being articulated, are the people who should then be permitted to "make" the laws. While using jurors from a community unrelated to a crime does preserve popular participation in the administration of justice, use of these jurors does not conform with the fundamental tenet of democracy just stated. Hence, it follows that a jury of the vicinage, that is, a jury drawn from the community where the crime was committed and which will also be the community expected to abide by the standard of conduct as articulated in the verdict relating to that crime, should be the jury permitted to pass judgment in criminal cases.

In addition, implicit in the tenet that those who are expected to abide by certain standards ought to be the persons who articulate the standards, is the recognition that such a tenet permits the proper assignment of responsibility for the decisions reached as to the content of those standards. Because the verdict they will render will affect their own community, not another, the jurors of the vicinage will likely feel an obligation to articulate as accurately and conscientiously as possible the sense of justice of the community. Moreover, because the jury of the vicinage represents its own community, the community as a whole, and in particular cases the members of the community who make up the jury of the vicinage, will realize they have only themselves to praise or blame for the sense of justice reflected in the verdicts of the juries of the vicinage. By contrast, using jurors from a community unrelated to the crime poses significant dangers that these jurors will not sufficiently feel the desired sense of obligation for the verdict rendered because the verdict will not affect their own community. At the same time, even if jurors from a community unrelated to the crime do act as conscientiously as possible in reaching a verdict, the community where the crime was committed would be unable to feel responsible for the verdict. If the verdict reached by the jury from the community unrelated to the crime was a praiseworthy verdict, the community where the crime was committed could not claim the praise. If the verdict reached by the jury from the community unrelated to the crime was a condemnable verdict, the community where the crime was committed could avoid the blame. Under the tenets of democratic responsibility, a community ought to be permitted to take the praise, and conversely, ought not to be permitted to avoid the blame, for the standards required of the community as articulated in verdicts concerning crimes committed in that
community. Today, as in 1789, a jury of the vicinage best preserves the jury as a democratic institution in the administration of justice. 441

3. Function Three—To Serve as the Conscience of the Community

During the debates in the ratification conventions and the First Congress concerning the concept of vicinage, the most important disagreement between supporters and opponents of the jury of the vicinage related to the third function performed by a jury—to serve as the conscience of the community. 442 Translated into the practical realities of social organization,

441 Assume a crime has been committed in the Western District of Oklahoma, but that the people of that district announce they no longer intend to serve on juries. If the federal courts acquiesced in this announcement and summoned jurors from the District of Wyoming (even if the trial were transferred to the District of Wyoming for the convenience of the jurors to be summoned), the people of Wyoming understandably could feel that crimes committed in the Western District of Oklahoma are the responsibility of the people of the Western District and should be tried by them unless legitimate reasons for shifting the burdens of jury service to the shoulders of the people of Wyoming can be given.

On the other hand, assume a crime has been committed in the Western District of Oklahoma, but that the people of the District of Wyoming announce that henceforth they will serve as the jurors for all crimes committed in the Western District of Oklahoma. If the federal courts acquiesced in this announcement and summoned jurors from the District of Wyoming (even if the trial were still held in the Western District of Oklahoma for those people to attend), the people of the Western District understandably could feel that the people of Wyoming were meddling in affairs which did not directly concern them. The people of the Western District of Oklahoma could justly feel that crimes committed in the Western District are the responsibility of the people of that district and should be tried by them, unless legitimate reasons for depriving them of the right to serve as jurors can be given. Cf. United States v. Bishop, 76 F. Supp. 866 (D. Ore. 1948); United States v. Bink, 74 F. Supp. 603 (D. Ore. 1947).

442 Note the distinction between the second function performed by a petit jury—to apply the law to the facts—and the third function performed by a petit jury—to serve as the conscience of the community. That the jury applies the law to the facts is inevitable in every trial in which the jury returns a general verdict. Because the jury must apply the law to the facts, the debate about the performance of the second function by the jury has centered, as the discussion of this second function has indicated, on whether the jurors should feel they are consciously molding the law to reflect the community sense of justice when they render a general verdict, or whether they should feel they are mechanical applicators of the law as given to them by the trial judge. Even if it is concluded that jurors performing this second function should consciously mold the law, when doing so, the jurors will be acting in a manner very similar to the manner in which a judge acts to reach a conclusion of law concerning a given set of facts. This second function of the jury might, therefore, be called the “judicial” function of the jury.

By contrast, when the jury serves as the conscience of the community, the jurors are not simply interpreting the law. When the jury performs this third function, the law is presumed to be clearly applicable to the facts of the case. The debate about this third function thus centers on whether the jurors have the right to disregard clearly applicable law. If the jurors perform this third function, they will be acting either like legislators, determining the wisdom of the adoption of the law, or like judges, determining whether the law is constitutional. This third function of the jury might, therefore, be called the “legislative” function of the jury.
this third function, when performed by a jury of the vicinage, raised the fear that they would act upon local passions and prejudices to acquit defendants accused of crime by the new sovereign entity, the United States government. Whereas Patrick Henry praised the jurors of the vicinage because they would protect him against a tyrannous government, James Madison worried that when counties were in rebellion local heroes would be protected by jurors chosen from those counties. As shown in Parts I and II of this article, the sixth amendment and the Judiciary Act of 1789 were drafted in such a way as to provide protection for the concept of vicinage while at the same time allaying the fears of the Federalists about the forces for disunion which the jury of the vicinage represented.

By 1895, when the Supreme Court declared in Sparf v. United States\(^{443}\) that the jury did not possess the right to decide questions of law,\(^{444}\) sympathy for the jury as the conscience of the community to interpose itself between an accused and a tyrannous government had largely disappeared. Jurors no longer intervened, as in colonial times, between American colonists and royal judges and royal prosecutors interpreting and enforcing laws approved in the Privy Council or in Parliament. American judges and American prosecutors now interpreted and enforced laws passed by democratically elected legislatures. To permit the jurors to determine questions of law would, it was now argued, change our government of laws, passed by democratically elected legislature and constitutionally tested by a democratically accountable judiciary, into a government of men ruled by the changing whims of those who served on juries as shaped by the passions and prejudices of the moment. If the laws were to be obeyed, if the constitutional decisions of the judiciary were to be protected, then jurors should not be encouraged to nullify the law by permitting them to decide questions of law.\(^{445}\)

The distinction made here between the second and third functions performed by a jury is also made by Professor Simson in his article on jury nullification. Simson, \textit{supra} note 431, at 505-507.

\(^{443}\) 156 U.S. 51 (1895).

\(^{444}\) \textit{Sparf v. United States} actually focused on whether jurors had the right to decide questions of law through the exercise of the second function—to apply the law to the facts—performed by a jury. But the Supreme Court made it clear that it was also deciding whether jurors had the right to decide questions of law through the exercise of the jury's third function—to serve as the conscience of the community. \textit{Id.} at 71. With respect to both functions, the Supreme Court responded that the jury did not possess the right to decide questions of law.

\(^{445}\) See generally \textit{Sparf v. United States}, 156 U.S. 51 (1895) (opinion of Justice Harlan); Howe, \textit{supra} note 431; Simson, \textit{supra} note 431 \textit{passim}. It should be pointed out that the period from 1850 to 1895, during which the concept of the jury as decider of law (through the second and third functions performed by juries) came into disrepute, was dominated, of course, by the searing experience of the American Civil War and its Reconstruction aftermath. The
While the ruling in *Sparf v. United States* indicated a changed concept of the appropriate functions of the jury, this decision of the Supreme Court particularly undermined the concept of vicinage. Under the *Sparf* decision no jury possessed the right to decide questions of law, but at the same time the Supreme Court was forced to admit that because juries returned general verdicts, based on the application of the law to the facts, juries had the power to decide questions of law. Moreover, because a verdict of acquittal cannot be questioned by a court, if the jury exercised its power to decide questions of law in such a manner as to return a verdict of acquittal contrary to the evidence and the instructions of the court, the jury could, even after the *Sparf* decision, interpose itself between the accused and the prosecution. In this manner, the general verdict of acquittal permitted the jury to nullify the law. If a person who agreed with the *Sparf* decision were then asked from whence should jurors be summoned—the community where the crime was committed or a community unrelated to the crime—the person could reasonably respond that the jurors should be summoned from a community unrelated to the crime because these jurors would be less likely to be stirred by passions or prejudices with respect to a particular case, which would provide an incentive to exercise the power to nullify the law. Utilization of a jury of the vicinage, it could be argued, might, in certain instances, be an open invitation to disregard the ruling of *Sparf* that the law as determined by the court must control.

forces of disunion, the forces of localism, which are embodied to some extent in the jury of the vicinage, had been defeated. After the Civil War, the fourteenth amendment made it clear that a person who lived in Virginia or Wisconsin was not just a citizen of the state in which he lived, but was also a citizen of the United States of America. Identification with the Union and its governmental branches, the democratically elected federal legislature, and the democratically accountable federal judiciary, had been strengthened. An American citizen, it could be argued, did not need a jury of the vicinage to intervene between him and his government.

At the same time, at a more personal level, recollection of the devastation brought by those who had defied the Constitution, who had taken "the law" into their own hands, through attempted secession, must have been quite vivid to many people, including those federal judges, professionally dedicated to the rule of law and judicially commissioned by the United States of America, who served during this period. Permitting jurors to decide questions of law, particularly through the exercise of the third function of the jury, must have raised spectres of lawlessness in the minds of many federal judges which were frightening indeed.

These ideas have been greatly stimulated by a superb article, Paludan, *The American Civil War Considered as a Crisis in Law and Order*, 77 Am. Hist. Rev. 1013 (1972).

446 Id. at 79, 90 (Harlan, J., majority), 174 (Gray, J., dissenting). See also Howe, supra note 431, at 583; Simson, supra note 431, at 488; Comment, *The Changing Role of The Jury in the Nineteenth Century*, 74 Yale L.J. 170 at n.2 (1964).

447 A good illustration of this point is found in a decision by District Judge Speer in 1911. In an opinion rejecting a challenge to the method through which the grand jurors were summoned for jury service, Judge Speer commented: "Now the object of the court was to get
It is understandable that thoughtful people could be worried by the possibility that juries would consistently act as the conscience of the community in such a way as to interpose themselves between an accused and the prosecution.\textsuperscript{448} If juries did consistently carry out this third function, then policies set by the national government might be thwarted by local parochialism;\textsuperscript{449} or even more frightening, because no verdict rendered by one jury binds or sets precedent for any other jury, if every jury interposed its own "collective" conscience between the prosecution and the accused, then inconsistent verdicts could create a state of affairs approaching anarchy.\textsuperscript{450} While these are possibilities about which society should be concerned, it is not agreed that those possibilities are as likely to occur, or are as destructive of social order as it has been argued. Underpinning jurors from all the counties of the district. We have not always been able to do that. From the time of my appointment as judge, almost down to the present time, we have been obliged to omit certain counties. We now at times draw jurors from every county in the Southern district of Georgia. Formerly certain communities had a cheerful way of shooting at our officers. I remember a case in which Mr. Adams was for the defense, and his client sat on the side of the road with a loaded shotgun and fired at a party of revenue officers riding along in their buggy. He dropped the mule, but missed the officers. Now we did not for some time thereafter select any jurors from that immediate locality. We regarded them as having perhaps some objection to the court, if they felt so hostile towards the officers." United States v. Merchants' & Miners' Transp. Co., 187 F. 355, 359 (C.C.S.D. Ga.), cert. denied, 225 U.S. 711 (1911). See also, e.g., Jarl v. United States, 19 F.2d 891 (8th Cir. 1927); Myers v. United States, 15 F.2d 977 (8th Cir. 1926).

\textsuperscript{448} For recent examples of thoughtful people disagreeing on the issue of the jury as the conscience of the community, compare United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972) (Leventhal, J., majority) and Simson, supra note 431 with United States v. Dougherty, 473 F.2d 1113, 1138 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) and Scheffin, Jury Nullification: The Right to Say No, 45 S. CAL. L. REV. 168 (1972).

\textsuperscript{449} During the latter half of the nineteenth century, the period during which juries lost the right to decide questions of law, the national government was pursuing several policies whose supporters could justifiably worry would be thwarted by local parochialism. Two specific examples relate to civil rights and control over interstate commerce. Southern juries in civil rights cases and western juries (Granger juries) in interstate commerce cases were likely to present substantial opposition to national policies on these two topics. For two very fine discussions of federal responses to these challenges to national policy, through legislation affecting the judicial branch of government, see S. Kutler, Judicial Power and Reconstruction Politics 143-60 (1968); Wiecek, The Reconstruction of Federal Judicial Power, 1863-1875, 13 AM. J. LEG. HIST. 333 (1969).

\textsuperscript{450} Although the fear of anarchy is often mentioned as a reason for denying juries the right to decide questions of law, either through the exercise of the second or the third function, (see United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972) (Leventhal, J., majority)), a persuasive argument can be made that local people making local laws promotes stability and an attachment to the institutions of government, just the opposite of anarchy. Paludan, The American Civil War Considered as A Crisis in Law and Order, 77 AM. Hist. Rev. 1013, 1029-34 (1972). Jurors of the vicinage deciding questions of law for the vicinage, through the second and third functions performed by juries, is an example of local people making local laws.
the arguments of those who fear the jury serving as the conscience of the community are two assumptions which are not compelling.

The fear that permitting juries to serve as the conscience of the community would lead constantly to contradictory verdicts among different juries assumes that those individual citizens who make up the juries do not share enough values, mores, and customs to permit them to reach consistent verdicts. Undeniably individual citizens do not all share identical values, mores, and customs; undeniably different communities exhibit a diversity of values, mores, and customs. But if jurors are consistently chosen from the community in which the crime was committed—the vicinage—to pass judgment on those alleged crimes, then not only will the individual jurors share similar community experiences, portending consistent verdicts, but the deliberative process of the jury itself shapes and reaffirms a community conscience, which fairly well insures the rendition of consistent verdicts. Using a jury of the vicinage as the jury in criminal cases militates against, not for, anarchy arising from inconsistent verdicts.461

The fear that permitting juries to serve as the conscience of the community would lead to constant interposition of the jury between national policies, as represented by the prosecution, and a local defendant, assumes that the national policies and the local policies are in continuous disagreement. On the contrary, in most instances the national and local interests are likely not in conflict; hence, if the jurors are in accord with the national policies then no interposition will occur. But when the national policies and the local policies are in conflict, the further assumption of those who argue against the jury as the conscience of the community is that the national policies should prevail. Although due to the issue of civil rights, the assumption that national policies ought to prevail over local parochialism appears compelling, it is not, because to adopt this assumption is to attack at its roots the basic concept upon which our democratic society is founded—the concept that the people are sovereign.462

461 Those who argue that juries should not be permitted to decide questions of law because the result will be, *inter alia*, inconsistent verdicts, ignore the experience of practicing lawyers, either prosecution or defense, who constantly discuss the consistent, but differing, verdicts rendered by juries of different communities. Practicing lawyers know, without having taken sociological surveys, that it matters whether juries are summoned from the Western District of Oklahoma or from the District of Maine. Underpinning this knowledge of practicing lawyers is the ability to predict; prediction requires patterns of consistency.

462 To deny juries the right to serve as the conscience of the community in order to protect national policies is too drastic a reaction on the part of the federal judiciary. Assume that a jury has returned a verdict of guilty against a black citizen for assault and battery when all the evidence in the case indicates that the accused was doing nothing more than attempting to register to vote. Although such a verdict is a shockingly unjust decision, it is
By 1895, when the Supreme Court ruled that the jury did not have the right to decide questions of law, the language used by those who opposed the jury serving as the conscience of the community were the words "lawlessness" and "nullification." Supporters of the jury of the vicinage in 1789, who had succeeded in protecting the jury of the vicinage in the sixth amendment and the Judiciary Act of 1789, would have blanched at the use of the words "lawlessness" and "nullification" to describe the jury serving as the conscience of the community. In truth, these supporters of the jury of the vicinage would have found these words totally inapplicable to the jury as an institution. Rhetorically, these supporters of the jury of the vicinage would have asked: How can jurors be described as acting not necessary to attack the right of the jury to act as the conscience of the community to find a remedy for this situation. For this situation, federal judges have three legal remedies. (1) The federal judge could have taken the case from the jury and, as a matter of law, directed a verdict of acquittal. (2) The federal judge could have sent the case to the jury under appropriate instructions of law, with the hope that the jury, as the conscience of the community, would vindicate the right of the accused to vote. When that hope was dashed by the verdict contrary to the instructions and the evidence, the federal judge could then have set aside the verdict of guilty. (3) If the local federal district judge also believes that attempts of black citizens to register to vote constitute the crime of assault and battery, the federal judge could then have set aside the verdict of guilty. (3) If the local federal district judge also believes that attempts of black citizens to register to vote constitute the crime of assault and battery, then the federal appellate courts can reverse as a matter of law and remand with instruction to dismiss the prosecution. See Scheffin, \textit{Jury Nullification: The Right to Say No}, 45 \textit{S. Cal. L. Rev.} 168, 178 (1972).

On the other hand, assume a jury has returned a verdict of acquittal against a white citizen who has without justification or excuse beaten a black citizen. Admittedly the federal judiciary is powerless to question this verdict of acquittal. The federal judge is prohibited from directing a verdict of guilty due to the accused's constitutional right to jury trial. And, the double jeopardy clause of the fifth amendment prohibits a federal judge from setting aside the verdict of acquittal and ordering another trial. No legal control is available, therefore, to remedy this unjust verdict. But it is suggested that the reason unjust verdicts of acquittal occur in cases such as this example lies in the failure of the legal system to insure that all citizens are provided the chance to serve on juries. Juries easily acquitted white defendants who had abused the rights of black citizens because black citizens were excluded, until very recently at best, from any opportunity to serve on federal juries. See Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966); Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States, \textit{Operation of the Jury System}, 42 F.R.D. 353 (1967). So long as any appreciable segment of the community is excluded from jury service, verdicts rendered by juries cannot be said to reflect the conscience of the community. Rather, the verdicts would then represent only the views of those being permitted to participate in the jury selection process. Moreover, these views, as translated into verdicts, would have been formulated in the jury without having being tested in a bona fide deliberative process, which inclusion of all segments of the community in the jury system would make inevitable, that constitutes a thoughtful, conscientious articulation of the community conscience. See S. Brown Miller, \textit{Against Our Will: Men, Women and Rape} 230-48, 366-74, 387-88 (1975); Copelon, Schneider, Stearns, \textit{Constitutional Perspectives on Sex Discrimination in Jury Selection}, 2 \textit{Women's Rights L. Rep.} 3 (1975). Cf. Apodaca v. Oregon, 406 U.S. 404 (1971); Johnson v. Louisiana, 406 U.S. 356 (1971). For fuller discussion of the relationship between the concept of a jury as a fair cross-section of the community and the concept of vicinage, see Part IV(A)(1) and (2), infra.
lawlessly when the function expected of them is to serve as the conscience of the community when reaching a general verdict? How can jurors be described as nullifying the law when the jurors more clearly are part of the sovereign people who possess the power to decide what is and what is not the law? To use the words "lawlessness" and "nullification" to describe juries acting as the conscience of the community is to adopt the belief that the legislature and the judiciary are the sovereigns in our society. A reading of American history indicates that the theories of legislative and judicial supremacy were discredited and defeated during the formative period of our nation. 463 Although the fears which have motivated thoughtful persons to desire to strip the jury of its function as the conscience of the community are worthy of serious consideration, assuredly these fears are not so compelling as to make us abandon the most basic concept upon which this nation was founded. Today, as in 1789, the people are sovereign and a powerful manifestation of that sovereignty is for the jury to decide questions of law while serving as the conscience of the community. 464


464 See generally A. de Tocqueville, Democracy in America 219, 358-67 (Bowen ed. 1876). Whether the jury is a direct manifestation of the sovereignty of the people is, of course, a subject of tremendous debate. It is argued that the jury is a direct manifestation of the sovereignty of the people. Because others have commented eloquently on this issue, however, their views should be considered: "Very simply, while Congress is elected by the people, a jury is a collection of a dozen randomly selected individuals with no constituency but themselves; and, while congressmen remain accountable to the people for their decisions, jurors can decide as they please and then escape public accountability as they return to anonymity in the general population." Simson, supra note 431, at 512.

"Inherent in the concept of a lay jury composed of citizens who leave their normal life patterns, meld into a decision-making unit for the purposes of judging one of their number, and melt back into the community, is the ability to say no and the knowledge that it cannot be held against them. The jury serves as an ameliorating force tempering the rigidity of the law, and of the professionals who administer it, with the common sense realities of the community." Scheffin, Jury Nullification: The Right To Say No, 45 S. Cal. L. Rev. 168, 192 (1972).

"The system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. . . ."

". . . If the question arises as to the proper qualification of jurors, it is confined to a discussion of the intelligence and knowledge of the citizens who may be returned, as if the jury was merely a judicial institution. This appears to me the least important part of the subject. The jury is pre-eminently a political institution; it should be regarded as one form of the sovereignty of the people: when that sovereignty is repudiated, it must be rejected, or it must be adapted to the laws by which that sovereignty is established. . . ."

"The jury, then, which seems to restrict the rights of the judiciary, does in reality consolidate its power; and in no country are the judges so powerful as where the people share their privileges. It is especially by means of the jury in civil causes, that the American magistrates imbue even the lower classes of society with the spirit of their profession. Thus
But the issue of where the power of the sovereign people more clearly resides—in the jury, in a democratically elected legislature, or in a democratically accountable judiciary constitutionally empowered to pass on the validity of legislative enactments—need not be settled in order to determine that if the jury does exercise some degree of sovereign power, then the jury of the vicinage is the best one to exercise this sovereign power.

As previously indicated, the Supreme Court has recognized, along with other courts and commentators, that a jury has the power, even if the right be denied, to interpose itself between the prosecution and the accused as the conscience of the community. In light of this power of the jury, the most that can be done by those who oppose the jury deciding questions of law while acting as the conscience of the community is to attempt to insure that the power remains unexercised. Using juries from communities unrelated to the crime possibly can assure that the power to interpose will remain unexercised because these jurors will not feel the passions, or the prejudices, which provide an incentive to the jurors of the vicinage to act as the conscience of the community. But our society has not concluded that the power should remain unexercised. We hold too dearly those examples in our history when ordinary citizens, through jury interposition, stood fast for liberty and democracy.545 Once it is recognized that our society does desire the jury to serve as the conscience of the community, then the question can be starkly faced: which jury, the jury of

455 For examples, read the quotation from United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972), set forth in note 137, Part I. While this power to interpose between an accused and the prosecutor, like all power, will at times be abused by the possessor of the power, I am not as willing as Judge Leventhal in Dougherty to denigrate the interposition by juries between an accused and the prosecution in cases such as liquor violations during Prohibition. In those instances, refusals by juries to convict conveyed a clear message to those who enacted the laws that the laws were considered unjust or too severe. If the refusal to convict is consistently followed by juries throughout the sovereign jurisdiction, then legislative change in response to these verdicts may well occur.

Possibly the best example of the refusal of the jury to convict by juries, which then led to legislative changes in the laws, is found in the history of the repeal of the laws setting mandatory death sentences. Woodson v. North Carolina, 44 U.S.L.W. 5267, 5270-74 (U.S. July 2, 1976). Ordinary citizens refused to follow blindly the law, as given through the statutes and the instructions of the courts, which would have resulted in the mandatory execution of a fellow citizen. Rather, jurors felt personal responsibility for the verdict they had been asked to render and refused to convict for crimes carrying a mandatory death sentence. These examples of jury interposition, from the era of Prohibition and the era of mandatory death sentences, indicate that we, as a society, do desire that the power to nullify be exercised by the jury. For it is through the exercise of this power that the ordinary citizen has a chance to make a direct, powerful statement about justice in his or her community.
the vicinage, or a jury chosen from a community unrelated to the crime, should be permitted to serve as the conscience of the community?

Just as the jury of the vicinage, due to the tenet of democratic responsibility, is preferable to a jury from a community unrelated to the crime when applying the law to the facts, so a jury of the vicinage is preferable to any other when serving as the conscience of the community. Indeed, the tenet of democratic responsibility even more strongly requires that jurors be summoned from the community where the crime was committed if the function of the jury as the conscience of the community is to be preserved. If the power to interpose between an accused and the prosecution is to be used correctly, a jury should exercise that power only when interposition is an expression of the deepest moral feelings of the community that an accused should not be convicted. But it is the community where the crime occurred that should be permitted— and required—to come to terms with its deepest moral feelings about the conduct of the accused. It is the community where the crime occurred that should be permitted to express, and should be required to articulate, these deepest moral feelings in the verdict of acquittal. Once the community where the crime occurred has been permitted, nay required, to articulate a community conscience, then that community cannot escape responsibility for the rendered verdict. If the verdict of acquittal reflects praiseworthy moral feelings, then the community can bask in the knowledge that its citizens stood fast when their consciences were tested. If, on the other hand, the verdict of acquittal fails to reflect acceptable morals, then the community—the vicinage—cannot avoid the knowledge that it has only itself to blame for the baseness expressed in the verdict.

By contrast, if a jury from a community unrelated to the crime is utilized as the trial jury, a situation of bifurcated responsibility is created. The community where the crime was committed would have the responsibility for the occurrence of the crime, while the community from whence the jurors were chosen would have the responsibility for the verdict of acquittal rendered. While both communities may desire to claim credit when a verdict of acquittal reflects praiseworthy moral feelings, when the power to return a verdict of acquittal is, like all power, abused through the return of an unjust verdict of acquittal, this bifurcated responsibility

456 See text accompanying notes 438-441 supra.
457 Recall that the power of a jury to act as the conscience of the community by returning a verdict contrary to the evidence and the instructions of the court is only unchallengeable when the verdict returned is one of acquittal. If the jury returns a verdict of guilty contrary to the evidence and the instructions from the court, the federal courts have ample remedies to rectify this verdict. See note 452 supra.
458 See note 441 supra.
provides each community with an excuse through which it can attempt to avoid responsibility. The community from which the jurors were chosen could claim that, after all, it was not responsible for the occurrence of the crime; the community where the crime was committed could claim that, after all, it was not responsible for the rendition of the unjust verdict. Unnecessary excuses should not be provided to citizens, or the communities in which they live, for the avoidance of responsibility. The responsibility for the moral feelings expressed in the verdict of acquittal should be clearly attributable to one community.  

It should be concluded today, as it was in 1789, that the responsible community should be the community of the vicinage of the crime. For today, as in 1789, utilization of a jury of the vicinage best insures that the moral judgments which are expressed in verdicts of acquittal are the kinds of considered, accountable moral judgments that ought to be demanded from a petit jury.

IV. PRACTICAL PROBLEMS IN FEDERAL CRIMINAL PROCEDURE

In the first three parts of this article, historical information has been presented to provide a clear understanding of the concept of vicinage itself, to indicate the importance of the concept of vicinage to the drafts-

459 Another reason for avoiding bifurcated responsibility should be mentioned. As indicated, a verdict of acquittal cannot be questioned by the federal courts. Hence, if a particular verdict of acquittal is an unjust one, no legal remedy exists to rectify it. Of necessity, therefore, the search for a remedy must be a search for a preventative remedy. While a possible preventative legal remedy was suggested in note 452 supra, this preventative legal remedy will, at times, fail to prevent an abuse of the power possessed by the jury. When all legal remedies have failed, then it is essential to have the responsibility clearly attributable to one community so that the search for political remedies can be sought in the appropriate community. As Judge Bazelon has stated, in a slightly different context: “But whether a nullification instruction would make such acquittals more common is problematical, if not entirely inconceivable. In any case, the real problem in this situation is not the nullification doctrine, but the values and prejudice that prompt the acquittal. And the solution is not to condemn the nullification power, but to spotlight the prejudice and parochial values that underlie the verdict in the hope that public outcry will force a re-examination of those values, and deter their implementation in subsequent cases.” United States v. Dougherty, 473 F.2d 1113, 1143 (D.C. Cir. 1972).

All that should be added to Judge Bazelon’s comments is the statement that the principles of democracy only guarantee that citizens are entitled to govern themselves. The principles of democracy do not guarantee that these citizens will always do so responsibly. That the citizens will always govern themselves responsibly is a hope—a sense of trust in the citizenry. When the trust placed in the jury is abused, utilization of the jury of the vicinage insures that an accountable community exists to which those outraged by the unjust verdict of acquittal can turn to locate a political remedy. Utilization of the jury of the vicinage means that a jury cannot be insulated ultimately from political accountability. And it should not be forgotten, as the quotation from Alexis de Tocqueville states, in note 454 supra, the jury is a political institution.
men of the Constitution and the Judiciary Act of 1789, to detail how and why the concept of vicinage faded from the legal consciousness between 1789 and 1976, and to show that the concept of vicinage should not be considered—if remembered at all—as a quaint, antiquarian concept, but rather should be considered as still vitally relevant to our criminal justice system today.

It is to address the practical significance of the concept of vicinage that Part IV is written. By using this ancient, nearly forgotten concept, hopefully ideas and values will be recalled to the legal consciousness that will permit us to reach more informed and just solutions to problems currently before our federal courts.

A. The Concept of Vicinage and the Jury Selection Process

It should be kept constantly in mind that participation on a jury is participation by ordinary citizens in a democratic institution of self-governance. The jury performs two functions that allow the fulfillment of the democratic tenet that citizens should be permitted to govern themselves. Through the function of applying the law to the facts, the jury participates directly in "lawmaking." Every verdict of a jury represents a vote by twelve citizens as to the meaning of the law when applied to a particular fact situation. At the same time, through the function of serving as the conscience of the community, the jury provides a direct manifestation of the sovereignty of the people in our democratic society. The jury ultimately possesses the power, if not the right, to declare through a verdict of acquittal which law(s) passed by the legislature and upheld by the judiciary will be permitted to be enforced in the community from which the jurors are drawn.\footnote{These two functions of the jury of the vicinage are fully discussed in Part I(B) (5) and Part III(F) (1) and (2) supra.}

Once it is recognized that service on a jury is participation in the process of self-governance, then it becomes clear that the jury selection process should be designed to insure that every eligible citizen is given an opportunity to be selected for jury service. If certain segments of a community are excluded from participation, then those excluded citizens are divested of authority they should legitimately share. By being barred from jury service, they have been denied the right to participate in the deliberative process, culminating in the rendition of a verdict, through which the standards, to which the members of the community will be held accountable, are set. At the same time, these citizens are further deprived in the sense that, although excluded from jury service, they are still re-

\footnote{These two functions of the jury of the vicinage are fully discussed in Part I(B) (5) and Part III(F) (1) and (2) supra.}
quired to abide by the standards articulated for the community through jury verdicts rendered by other segments of the community. Hence, excluded citizens are not members of the community for the purpose of making the law, but are members of the community for the purpose of obeying it.

The Supreme Court has long recognized that the second deprivation suffered by excluded citizens—accountability to standards set by a limited portion of the community—is in violation of the Constitution of the United States.\textsuperscript{461} Utilizing the concepts of equal protection and due process, the Supreme Court has on numerous occasions permitted criminal defendants to challenge successfully the petit jury panels used as the source of jurors that convicted the defendant.\textsuperscript{462} In one line of cases, beginning in 1880, the Supreme Court focused on the concept of equal protection to hold that an accused, invariably a black or chicano, could not be convicted by a petit jury chosen in such a manner as to systematically exclude members of the class to which the accused belonged.\textsuperscript{463} In a second group of decisions, beginning around 1940, the Supreme Court focused on the concept of due process to hold that an accused, regardless of racial, sexual, or personal characteristics, could not be convicted by a petit jury selected by a process which did not insure that those on the jury lists, and therefore

\textsuperscript{461} The first cases to discuss exclusion of eligible citizens from jury service all occur around 1880, shortly after the end of the Civil War and the Reconstruction Era. Bush v. Kentucky, 107 U.S. 110 (1882); Neal v. Delaware, 103 U.S. 370 (1881); Ex parte Virginia, 100 U.S. 339 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880).


Daughtrey, Cross Sectionalism in Jury Selection Procedures after Taylor v. Louisiana, 43 Tenn. L. Rev. 1 (1975), an excellent article on the concepts of equal protection and due process as these concepts relate to jury selection procedures, deserves special mention. Even though it appeared after completion of this article, it seems permissible to indicate that although the historical conclusions reached are identical, these conclusions were reached independently here. One major difference between this article and Professor (now Judge) Daughtrey's article with regard to the concepts of equal protection and due process should be mentioned: Professor Daughtrey does not relate these concepts to the concept of vicinage. Indeed, the word "vicinage" is never used in her article.

liable to be chosen, represented a fair cross-section of the community.\textsuperscript{464} By 1975, in Taylor v. Louisiana,\textsuperscript{465} the Supreme Court had reached the conclusion that the concerns for equal protection and due process, expressed in the earlier cases, were all contained within the right to a jury trial stated in the sixth amendment. As summarized by the Supreme Court in Taylor: "The unmistakable import of this Court's opinions, at least since 1941, . . . and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial."\textsuperscript{466}

Recognition that the first deprivation suffered by excluded citizens—deprivation of the right to participate—is also a constitutional violation is much more recent. While criminal defendants have always had the incentive to raise the second deprivation in an attempt to have their convictions reversed, it was not until the civil rights movement and the women's movement of the 1960's that the federal courts began to recognize affirmative claims by blacks and women that they were constitutionally entitled to participate in the jury system.\textsuperscript{467} When such a claim is given recognition, it is clear that the reason for recognizing the right to participate is not to protect an accused from a verdict rendered by a jury chosen from an unrepresentative portion of the community, nor to protect an


The concept of the jury as a fair cross-section of the community was first mentioned by the Supreme Court in Smith v. Texas, 311 U.S. 128 (1940), but the Smith case is more properly classified as an equal protection case similar to the cases cited in the preceding note.

\textsuperscript{465} 419 U.S. 522 (1975).

\textsuperscript{466} Id. at 528, citing Smith v. Texas, 311 U.S. 128 (1940). The dissenting opinion of Justice Rehnquist, although his conclusion is, in my opinion, incorrect, is accurate when he argues that the majority opinion in the Taylor case has shifted the emphasis from equal protection and due process concepts of the fifth and fourteenth amendments to the right to jury trial concept of the sixth amendment. Id. at 538. Accord, Note, The Jury: A Reflection of the Prejudices of the Community, supra note 462, at 1433 et seq.

Two excellent articles which discuss both lines of cases mentioned in the text are Kairys, Juror Selection: The Law, A Mathematical Method of Analysis and a Case Study, 10 AM. CAMR. L. REV. 771 (1972), and Finklestein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 HARV. L. REV. 338 (1966).

accused from a verdict rendered by a jury likely to be prejudiced against him because members of the class to which he belongs were excluded from the jury, but rather primarily to protect the integrity of the jury as a democratic institution. Eligible citizens have a right to participate in the jury system precisely because they are eligible citizens, irrespective of whether their participation is needed to obtain a fair cross-section of the community in the jury selection process. In this regard, the right to participate in the jury system should be considered a fundamental right like the right to vote in elections. Eligible citizens are entitled to vote irrespective of whether their individual votes are going to affect, or are likely to affect, the outcome of the election, and irrespective of whether their individual votes are going to provide, or are likely to provide, a better representative cross-section of the community in which the election is being conducted.

Copelon, et al., supra note 467, at 3, 10-11. An example clarifies the comment in the text. Let us assume that every eligible citizen, except one, has had his or her name placed in the jury selection wheel by the appropriate clerk. When that one citizen comes to complain about being excluded, the person would have an extremely difficult, if not impossible, task of establishing that her exclusion skewed the fair cross-sectional quality of the names placed in the jury wheel. But that one citizen could easily claim that her exclusion, if intentional, was impermissible no matter whether the reason for her intentional exclusion was a "beneficial" reason ("You were excluded because a famous rodeo performer like you should not have to be bothered with such interferences as jury service"), or an "evil" reason ("You were excluded because you are the only eligible citizen in this community whom I hate"). The excluded citizen can demand to be treated similarly to all other citizens and to be accorded the benefits and burdens of citizenship like all other citizens.

Van Dyke, Jury Service is a Fundamental Right, 2 Hastings Const. L.Q. 27 (1975). The interrelationship between the right to vote and the right to serve on a petit jury has long been recognized. B. BarcoCK, ET AL., supra note 463, at 61-68. The most recent, explicit recognition of this relationship in the federal system is the Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53, which mandates that the federal courts use as the primary source of names for the jury selection process either the voter registration lists or the lists of actual voters. 28 U.S.C. § 1863(a)(2) (1970).

If it were true that eligible citizens are entitled to vote only if their ballot would affect the outcome of the election and only if their ballot would mean that a more representative cross-section of the community had participated in the election, then the electoral process could be greatly simplified by using as the electoral technique that adopted by the news agencies to predict election results. Imitating the news media, the election board of the appropriate geographical area would let only preselected precincts, which provide the proper cross-section of the community, cast ballots. Not only would such a technique be cheaper and more efficient, but, as is known from the success with which the news media have been able to declare quickly the eventual winner of an election contest, no loss in the representativeness of the citizenry casting ballots or in the result would occur. Such a technique is, of course, inimical to our concept of citizen participation in self-governance—participation which is predicated on eligible citizenship alone.

Participation in the jury selection process should also be predicated on eligible citizenship alone. Jury commissioners, who prepare the lists from which petit jurors will eventually be selected, should not be permitted to limit the source of the initial list to preselected areas or groups, even if it were possible to establish according to scientifically accurate statistical calcu-
Although the Supreme Court has now held that the jury selection process must insure both that eligible citizens are given the right to participate and that eligible citizens are not arbitrarily excluded, the Court has never rendered a decision mandating that any particular jury selection process be used. So long as the jury selection process does provide for "the selection of a petit jury from a representative cross section of the community," it will be held to be constitutionally valid.

Even though the Supreme Court has not prescribed a jury selection process, in 1968, as concern mounted over the fact that jury selection processes being used in many federal district courts seemingly failed to comply with applicable constitutional standards, Congress passed the Jury Selection and Service Act of 1968. Under this Act, federal district courts are required to select juries from a representative cross section of the community. The preselected areas or groups would not affect the outcome of the verdicts or the representativeness of jury composition.


The history of jury selection procedures in the federal courts needs to be briefly recited in order to have a proper perspective on the passage of the Act. Under Section 29 of the Judiciary Act of 1789, the federal trial courts were to form petit juries so far as "practicable" in accordance with the procedures of the state in which the federal trial court sat. Moreover, those eligible for jury service in the federal courts were required to have the same qualifications as those eligible for jury service in the various states.

"Practicable" conformity between the state and federal procedures for selecting petit juries remained the law until 1879. In 1879, Congress passed a law which permitted the federal trial courts to create jury commissions responsible for placing a minimum of 300 names in a jury box, from which box the names to form the various jury panels would be publicly drawn. Act of June 30, 1879, ch. 52, § 2, 21 Stat. 43. Cf. United States v. Collins, 25 F. Cas. 543 (C.C.S.D. Ga. 1873) (No. 14,837) ; United States v. Gardner, 25 F. Cas. 1254 (C.C.S.D. Ga. 1873) (No. 15,187). The method through which the jury commissioners were to acquire the 300 names was not set forth and this led to diverse practices. Some jury commissioners utilized names suggested to them by "key men" in the community; other jury commissions used various lists of citizens, particularly voter lists, as the source of names. Hence, it was not until the passage of the Jury Selection and Service Act of 1968 that a uniform source of names was mandated for all federal trial courts. See authorities cited above and in the preceding note.

With respect to the mandatory conformity between the qualifications for state and federal jurors, this continued until 1948 when Congress, for the first time, passed a statute that prescribed qualifications as set by Congress rather than the state legislatures. Act of June 25, 1948, ch. 646, § 1861, 62 Stat. 951. The 1948 Act did, however, incorporate into the federal juror qualifications state laws which excluded certain persons as incompetent to serve as
required to draft jury selection plans that must use either voter registration lists, or the lists of actual voters, as the initial source of names for a selection process that is to be based solely upon methods of random selection at all stages, except voir dire, of choosing citizens for jury service.\textsuperscript{478} Congress mandated the use of the voter lists because these were considered most likely to insure the broadest and most representative participation by eligible citizens in the jury system. At the same time, however, Congress also required the federal district courts to supplement the voter lists by the use of other lists, if necessary, to insure this broad and representative


\textsuperscript{472} 28 U.S.C. § 1863 (1970); H. Rep. No. 1076, 90th Cong., 2d Sess., in 2 U.S. CODE CONG. & ADMIN. NEWS 1793-94 (1968). The importance of a random selection of names to form the petit jury panel was recognized as early as 1789. During the debates about the Judiciary Bill in the House, Congressman Burke had complained that no requirement of random selection was included. Without such a requirement, he feared that federal judges or federal marshals would "hand-pick" a jury to suit their view of a particular criminal case. See note 166, Part II, and accompanying text. As a result, the Judiciary Bill was eventually amended in the Senate to provide that petit jurors would be drawn "by lot or otherwise" in the federal courts in conformity with the methods used in the states where the federal court sat. See note 194, Part II, and accompanying text.

In 1801, Senator Pickney claimed that the protection afforded the random selection of jurors by Section 29 was inadequate: "One great defect in our present jury system is that it introduces an inequality in the proceedings in our courts. In some districts the juries are drawn by lot in one mode; and in other districts drawn in a different one; in many they are not drawn by lot at all, but summoned at the will of the marshal; whereas in courts emanating from the same authority, held by the same judges, and administering the same laws, there should be uniformity in all the proceedings.... But, sir, the greatest of all its defects is the placing it all in the power of the marshal to exercise his discretion in so important a manner as to select a jury as he pleases. The danger and consequences of this power vested in a ministerial officer, appointed by the President, holding his office during his pleasure, and looking up to him for other and more honorable and more lucrative appointments, appear to me not only to be one of the greatest evils under which a part of the American people at present labor, but one which does not seem before this, to have claimed from them or their Government the attention due to its importance." 10 ANNALS OF CONGRESS OF THE UNITED STATES, 6th Cong., 1st Sess., 36 (1801). No action was taken on the bill Senator Pickney introduced to alleviate the problem he described. Id. at 107. Indeed, no action was taken to require random selection in choosing the names from the jury list to comprise the jury panel until 1879. In that year a statute was passed that required the names to be drawn publicly from jury boxes containing at least 300 names. Act of June 30, 1879, ch. 52, § 2, 21 Stat. 43. Cf. United States v. Lewis, 192 F. 633 (E.D. Mo. 1911). Random selection as the method by which to form the jury list, i.e., the initial juror pool, was not adopted in the federal system, however, until 1968 with the passage of the Jury Selection and Service Act. 28 U.S.C. § 1865 (1970); H. Rep. No. 1076, 90th Cong., 2d Sess., in 2 U.S. CODE CONG. & ADMIN. NEWS 1793-94 (1968). Read note 472 supra.
participation of eligible citizens in the jury system.\textsuperscript{474} Through the procedures mandated by the Jury Selection and Service Act of 1968, Congress hoped to achieve the policies set forth in the initial section to the Act:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.\textsuperscript{475}

From the preceding discussion, it is clear that the jury selection process has been found to have two distinct but related goals: (1) to insure that an accused faces a jury chosen from a fair cross-section of the community; and (2) to protect the right of all citizens to participate in the jury system. What the Supreme Court and Congress have failed to realize, nonetheless, is that without conscious attention to the concept of vicinage, neither goal of the jury selection process can be achieved.

1. \textit{Defining the Geographical Community Which Constitutes the Vicinage}

As indicated in Part III of this article,\textsuperscript{476} Rule 18 of the Federal Rules of Criminal Procedure was amended in 1966 to delete the requirement that the trial of a crime be held in the division in which the crime was committed. In 1968, through the Jury Selection and Service Act, Congress authorized the federal district courts to maintain separate jury boxes for each division or place of holding court within the judicial district.\textsuperscript{477}

In addition, the Act stated that petit jurors are to be selected, under the jury selection plan to be promulgated by the federal district court, from "the community in the district or division wherein the court convenes."\textsuperscript{478}


\textsuperscript{476} See text accompanying notes 242-247 and 407-417 \textit{supra}.

\textsuperscript{477} 28 U.S.C. §§ 1863(a), 1869(e) (1970). Section 1869(e) defines the word "division" as follows: "'division' shall mean: (1) one or more statutory divisions of a judicial district; or (2) in statutory divisions that contain more than one place of holding court, or in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district plan shall determine: \textit{Provided}, That each county, parish, or similar political subdivision shall be included in some such division." Read note 258 and accompanying text \textit{supra}.

When these three grants of authority to the federal district courts are construed together, a jury selection plan having the following attributes can be adopted. Under the authority of Rule 18, the federal district court can adopt a local court rule stating that all criminal proceedings will be instituted at one place for holding court within the judicial district, and will be maintained at that place, unless intra-district transfer is approved by the court upon a showing of good cause. Simultaneously, in accordance with the authority granted by the 1968 Act, the federal district court can promulgate a local rule creating a separate jury box for each division, or place of holding court, within the judicial district. Into these jury boxes are placed the names of eligible citizens who reside in the division, or within the geographical area assigned to a place of holding federal court, for which the particular jury box is maintained. However, because a court only conducts its proceedings at one location, the federal court then further concludes that petit jurors will only be drawn from the jury box maintained for the location at which the court conducts its proceedings. As a result, citizens whose names are in the jury boxes kept for the other divisions, or in the other places for holding court, within the judicial district, will never be called for petit jury service because the federal

479 E.g., Local R. 3(b), W.D. Okla., reads: "All proceedings, both civil and criminal (except petty and minor offenses) in which venue lies in this District shall be commenced at the Clerk's office in Oklahoma City, Oklahoma, and shall be maintained there unless and until transferred." Similarly, Local R. 7(c), N.D. Cal., reads: "All proceedings, both civil and criminal, in which venue lies in the Northern District of California shall be commenced at San Francisco and shall be maintained there unless and until transferred to Eureka, Oakland, or San Jose." See United States v. Edwards, 465 F.2d 943 (9th Cir. 1972).

Fed. R. Crim. P. 18 provides: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

480 Local R. 30, W.D. Okla. This Local Rule is quoted in note 414 supra. Other examples of district courts that have created separate jury boxes for each division, as defined by 28 U.S.C. § 1869(e) (1970), are the Northern District of California, the Northern District of West Virginia, and the Middle District of Florida. United States v. Edwards, 465 F.2d 943 (9th Cir. 1972); United States v. Florence, 456 F.2d 46 (4th Cir. 1972); United States v. Gurney, 399 F. Supp. 688 (M.D. Fla. 1974).

The practice of maintaining a separate jury box for each division or place of holding federal court has been a long-established practice in many federal district courts. In the Revisor's Note to 28 U.S.C. § 1865 (1948), it is stated that the last sentence of § 1865 was added in 1948 "to conform with existing practice in many districts." The last sentence of § 1865(a) from 1948 until 1968 read as follows: "To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place." Hence, the authority granted by 28 U.S.C. § 1865(a) and § 1869(e) of the Jury Selection and Service Act of 1968 is simply a reaffirmation of authority previously granted and a reconfirmation of practices that have existed for a long time.

district court never conducts its proceedings in those other divisions, or at those other places for holding federal court, within the judicial district unless good cause is shown for an intra-district transfer under Rule 18.482.

The consequences of the preceding paragraph can be illustrated by referring to the jury selection process as it occurs in the Western District of Oklahoma. By district court order, the Western District of Oklahoma is divided into four divisions—the Oklahoma City division, the Enid-Ponca City division, the Lawton-Mangum division, and the Woodward division—with a separate master jury wheel for each division. At the same time, also by local court rule, all criminal trials are conducted at Oklahoma City, located, of course, in the Oklahoma City division of the district. When the district court convenes for a criminal trial in Oklahoma City, the petit jury is then drawn, as seems to be required by the Jury Selection and Service Act of 1968, exclusively from the jury wheel maintained for the Oklahoma City division of the Western District of Oklahoma. Because the petit jurors are chosen only from the jury wheel for the Oklahoma City division, the practical effect is that all citizens residing in the other three divisions of the Western District of Oklahoma will never, under the present system, serve on a petit jury.483 When the voting population of the Oklahoma City division is compared to the voting population of the other three divisions, the comparison shows that 41 per cent of all citizens eligible for jury service will never be called.484

482 United States v. Edwards, 465 F.2d 943 (9th Cir. 1972). In two telephone conversations with Mr. Rex Hawkes, Clerk, United States District Court of the Western District of Oklahoma, conducted on Dec. 15, 1972 and July 26, 1976, Mr. Hawkes informed me that since 1968 no criminal trials in the Western District of Oklahoma have been conducted at any place of trial other than Oklahoma City, Oklahoma. Moreover, Mr. Hawkes stated that the petit jurors for trials conducted in Oklahoma City, Oklahoma, are drawn exclusively from the jury wheel maintained for the Oklahoma City division of the Western District of Oklahoma. Hence, no persons other than eligible citizens residing in the Oklahoma City division have served as a petit juror in the Western District of Oklahoma since 1968.

483 The statutory and rule provisions authorizing the jury selection plan as it exists in the Western District of Oklahoma are cited in notes 477-482 supra.

484 Under Local Rule 30 of the Western District of Oklahoma, voter registration lists have been selected as the initial source from which names will be randomly chosen in order to form the jury list from which the jury panels will in due course be selected.

When the voter registration statistics are compared for the four divisions of the Western District of Oklahoma, the figures reveal that 58.9 per cent of the registered voters of the Western District reside in the Oklahoma City division; 14.8 per cent in the Enid-Ponca City division; 17.7 per cent in the Lawton-Mangum division; and 8.5 per cent in the Woodward division. Thus 41 per cent of the eligible citizens of the Western District of Oklahoma reside in divisions other than the Oklahoma City division. STATE ELECTION BOARD, ELECTION RESULTS AND STATISTICS 1972.

If the voter registration figures for 1976 are used, the following population pattern emerges: 60.5 per cent of the registered voters reside in the Oklahoma City division; 12.6 per cent in the Enid-Ponca City division; 18.2 per cent in the Lawton-Mangum division; and 8.8...
When a jury selection process, as illustrated by the one in the Western District of Oklahoma, can produce a result whereby a substantial number of citizens eligible for jury service will never be given the opportunity to be called to serve on a petit jury, it is submitted that it fails to comply with either the Jury Selection and Service Act of 1968 or the sixth amendment. To articulate the reasons for so concluding, the jury selection process under discussion needs to be examined from two perspectives. Each perspective posits different definitions of the "community" wherein the crime was committed and from which the petit jurors are summoned.

**Perspective One.** Recall that the sixth amendment requires that petit jurors be drawn from the "State and district wherein the crime shall have been committed." Recall also that the Jury Selection and Service Act of 1968 mandates that petit jurors be selected from a fair cross-section of the "community in the district or division wherein the court convenes." If a crime were committed in the state of Oklahoma, in its Western District, then it is quite easy to conclude that under the sixth amendment, the community wherein the crime was committed is the state of Oklahoma and the district is the Western District of Oklahoma, and to further conclude that under the Jury Selection and Service Act of 1968, the community wherein the court is convened is the Western District of Oklahoma. But if the Western District of Oklahoma is the proper definition of "community" under both the sixth amendment and the 1968 Act, then the problem concerning the jury selection process used in the Western District can be stated as follows: Is it a permissible jury selection process if it excludes a substantial number of the eligible citizens of the proper community, appropriately defined as the judicial district as a whole, solely because those citizens reside within geographical areas of the judicial district which have not, as a matter of course, been included in that process?

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\[485\] See notes 482-484 supra and accompanying text. For a visual representation of the "community" as defined under **Perspective One**, see Chart B.
Geographical area of the Western District included within the definition of “community” for Perspective One under both the sixth amendment and the Jury Selection and Service Act of 1968. The entire district is one community.


Authorized places for holding federal court in the Western District of Oklahoma, Letter \(a\) represents the location of Oklahoma City, the only authorized court city in which court is held under local rules promulgated in accordance with the authority of Rule 18.
Under the holding in *Taylor v. Louisiana* 486 and the provisions of the Jury Selection and Service Act, 487 an accused is entitled to a petit jury that has been selected through a jury selection process involving a fair cross-section of the community in that process. 488 But the Supreme Court has never reversed a conviction on the ground that exclusion of citizens from the jury selection process, by reason of their geographical residence within the judicial district, destroyed the fair cross-section requirement demanded of the jury selection process. The Supreme Court has, however, listed citizens excluded from the jury lists on the basis of geography as a "cognizable group," whose systematic and intentional exclusion would be a ground for judicial relief. 489 Nevertheless, many cases considering claims that geographical exclusion has undermined the fair cross-section requirement have implied that geographical exclusion is impermissible only if the geographical exclusion overlaps with the exclusion of other cognizable groups, such as racial groups or rural-urban groups. 490 These cases have seemingly concluded that geographical exclusion per se does not violate the fair cross-section requirement, particularly if the geographical exclusion was ordered by the federal district court as a means to reduce govern-

488 For a fuller discussion of the judicial origin of the fair cross-section requirement, see text accompanying notes 461-466 supra.
489 Thiel v. Southern Pac. Co., 328 U.S. 217 (1946). In the opinion for the Court, Justice Murphy wrote: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." Id. at 220. See also NATIONAL JURY PROJECT & THE NATIONAL LAWYERS GUILD, THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE 13 (1975).
490 See, e.g., United States v. Gottfried, 165 F.2d 360 (2d Cir.), cert. denied, 333 U.S. 860 (1948); Beckett v. United States, 84 F.2d 731 (6th Cir. 1936); United States v. Kenner, 36 F.R.D. 391 (S.D.N.Y. 1965). The first case that has been discovered discussing the need for the jury selection process to involve a fair cross-section of the citizenry of the community was a case in which the exclusion was a geographical exclusion. However, the geographical exclusion in that particular instance also coincided with exclusion on the basis of urban versus rural groupings. Thus when the trial court quashed the petit jury panel and ordered another formed, the trial court emphasized the urban-rural discrimination rather than the geographical exclusion alone. United States v. Standard Oil Co., 170 F. 988 (N.D. Ill. 1909).

In a recently published manual discussing challenges to the composition of the jury, uncertainty as to whether geographical exclusion is by itself sufficient to establish a violation of the fair cross-section requirement is evident from the brief discussion of the issue which reads: "Geographic groupings, which usually overlap with racial, ethnic, and economic groupings, constitute cognizable classes." NATIONAL JURY PROJECT, supra note 489, at 13.
mental expense incurred for juror fees and to reduce juror inconvenience incurred for travel time.\textsuperscript{491}

It is submitted that those cases indicating that geographical exclusion per se does not violate the fair cross-section requirement should be considered of doubtful authority. They were decided prior to the enactment of the Jury Selection and Service Act and prior to the decision by the Supreme Court in \textit{Taylor v. Louisiana}, in which, for the first time, the fair cross-section idea received explicit statutory and constitutional protection.\textsuperscript{492} If, prior to the enactment of the Act and the decision of \textit{Taylor v. Louisiana}, the federal district courts possessed the discretionary power to exclude certain geographical areas from the jury selection process, after the Act and the \textit{Taylor} decision it is urged that automatic exclusion of citizens on a geographical basis is a systematic and intentional exclusion of a "cognizable group" that undermines the fair cross-section requirement thereby imposed.\textsuperscript{493} Certainly, exclusion of 41 per cent of the eligible


\textsuperscript{492} For fuller discussion of the adoption of the fair cross-section requirement by the Supreme Court and Congress, see text accompanying notes 461-466 and 472-475 \textit{supra}.

Section 1863(b)(3) of the Jury Selection and Service Act now indeed seems to prohibit exclusion of eligible citizens on the basis of geography. "These procedures . . . shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions." \textit{Compare} the cases cited in notes 490 and 491 with United States v. Owen, 492 F.2d 1100 (5th Cir. 1974); United States v. De Alba-Conrado, 481 F.2d 1266 (5th Cir. 1973); and United States v. Anzelmo, 319 F. Supp. 1106 (E.D. La. 1970). \textit{Cf.} United States v. Test, 399 F. Supp. 683 (D. Colo. 1975).

\textsuperscript{493} From 1789 until 1968, the federal statutes included a provision substantially similar to the following: "Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services." Rev. Stat. 1878 § 802. Under the authority granted to the federal courts by this statute, the courts consistently concluded that so long as the federal trial court summoned the jurors from the proper community, then the discretionary power of the court to limit the geographical area within the proper community from which the jurors would be summoned was quite broad. Read notes 359, 363-367, 386-406 and accompanying text in Part III(E)(2) \textit{supra}.

As early as 1801, in the same speech in which Senator Pickney complained that the principle of random selection was given insufficient protection in the jury selection process, he also complained about the discretionary power in the federal court to summon the jurors from such parts of the district as the federal court thought desirable. Senator Pickney argued: "Another (great defect) is, that the districts or portions of territory out of which the juries are to be drawn are not precisely fixed; but, in many instances, perhaps in all, it is left to the clerk and the marshall to draw or summon them as they please; whereas the boundaries of the
citizens from the jury selection process solely on the basis of geography,

counties or districts from which they are to be drawn ought to be so fixed as to leave no discretion on this subject to the officers of the court, and while a sufficient number of jurors are secured to answer the end, to prevent them being drawn at such distances as would probably produce inconvenience or delay, or in many instances, inevitable absence." 10 ANNALS OF CONGRESS OF THE UNITED STATES, 6th Cong., 1st Sess., 36 (1801). (The portion of Senator Pickney's speech quoted in this note was delivered at the point in the speech quoted in note 473 supra where the deletion marks are located.) See H. REP. No. 2034, 60th Cong., 2d Sess., 1-5 (1909).

As the 1801 speech indicates, Senator Pickney realized that there are two ways in which the personnel of the federal trial courts can skew, intentionally or unintentionally, the representativeness of the jury panel as a reflection of the community. First, if a random selection method is not utilized at any stage of the jury selection process, the court personnel might select jurors in a manner that fails to insure that all segments of the community are represented in the jury lists or jury panels being formed. Read notes 472 and 473 supra. Second, even if random selection is utilized in the jury selection process, the court personnel can skew the representativeness of the jury panel by limiting the geographical source of the jurors, within the proper community, to a particular geographic area whose citizens do not accurately reflect the population of the community as a whole. Cf., e.g., Walker v. United States, 116 F.2d 458 (9th Cir. 1940); Walker v. United States, 93 F.2d 383 (8th Cir. 1937); Beckett v. United States, 84 F.2d 731 (6th Cir. 1936); Frantz v. United States, 62 F.2d 737 (6th Cir. 1933); Jarl v. United States, 19 F.2d 891 (8th Cir. 1927); Myers v. United States, 15 F.2d 977 (8th Cir. 1926); United States v. Merchants & Miners' Transp. Co., 187 F. 355 (C.C.S.D. Ga. 1911); United States v. Clark, 19 F. Supp. 972 (W.D. Mo. 1937); United States v. Coit, 25 F. Cas. 489 (D.N.Y. 1812) (No. 14,829); United States v. Price, 27 F. Cas. 620 (D.N.Y. 1810) (No. 16,088). See also text accompanying notes 165-166, Part II.

As has been shown in the text accompanying notes 462-466 supra, the Supreme Court has only recently (since 1940) begun to develop the concept of the jury as a fair cross-section of the community. But as the text immediately preceding this note has indicated, in developing the fair cross-section concept, the Supreme Court has concentrated on the exclusion of various kinds of persons as opposed to the exclusion of geographical areas. The Supreme Court seemingly has only vaguely realized what Senator Pickney advocated in 1801: a fair cross-section of the community can only be achieved if the selection process includes both all kinds of persons residing in the community and all areas of the community which is to be accurately represented. But at the same time, now that the Supreme Court in Taylor v. Louisiana, 419 U.S. 522 (1975), has clearly made the fair cross-section concept a constitutional requirement in its own right, the broad discretion previously permitted the federal courts with respect to the geographical source of the jurors is almost assuredly constitutionally impermissible. Application of a purely random selection process to a complete list of names of eligible citizens from a limited geographical area of the appropriate community would still violate the fair cross-section requirement if the citizens of the limited geographical area are not representative of the larger community for which the jury is being chosen.

Due to the passage of the Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53, however, so long as the appropriate community from which to summon the jury is correctly identified, the Supreme Court is unlikely to decide a federal case that raises the constitutionality of a discretionary power like Rev. Stat. 1878 § 802. In the 1968 Act, the statutory provision similar to Section 802 was repealed. In its place, Congress substituted Section 1863(b)(3) which mandates that each political subdivision of the community for which the jury box is maintained must be "substantially proportionally represented" in the jury box. See note 492 supra. Congress was clearly worried that automatic exclusion of geographical areas, within the appropriate community, as had been done in the past under statutes like Section 802, would undermine the cross-sectional goal of the jury selection process set forth in Section 1861 of the Act.
as occurs in the Western District of Oklahoma, should raise serious doubts about whether that jury selection process satisfies the fair cross-section requirement.

Moreover, even if it is decided that geographical exclusion does not destroy the fair cross-section requirement demanded of the jury selection process, exclusion of eligible citizens on the basis of geography fails to conform to the statutory and constitutional requirement that eligible citizens have a right to participate in the jury system.\textsuperscript{494} Service on a jury, to

At the same time, Congress nonetheless recognized that certain political subdivisions within the community for which the jury box was being maintained might be quite distant from the place at which court was held. But rather than permit automatic exclusion of these distant subdivisions, Congress passed Section 1863(b)(7) which permits the court “[t]o fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefor, be excused from jury service on the ground of undue hardship in traveling to the place where court is held.” Providing an individual excuse upon request prevents hardship from being imposed upon the citizen without undermining the cross-sectional goal of the 1968 Act. Moreover, making the travel hardship excuse available only upon request insures that all eligible citizens are given the opportunity for jury service, even if a particular individual citizen decides to decline the opportunity. H. Rep. No. 1076, 90th Cong., 2d Sess., in 2 U.S. Code Cong. & Admin. News 1801 (1968). \textit{Compare} Committee on the Operation of the Jury System, supra note 472, at 364, \textit{with} Judicial Conference of the United States, \textit{The Jury System in the Federal Courts}, 26 F.R.D. 409, 433 (1960).

Local Rule 30 of the Western District of Oklahoma implements the travel hardship excuse provision of the 1968 Act by permitting an excuse to “any person who resides more than 150 miles from the place of holding court.” If a circle with a radius of 150 miles is measured from Oklahoma City, the only place where federal criminal trials are held in the Western District, then only eligible citizens residing in the counties in the Oklahoma Panhandle—Cimarron, Texas, and Beaver—and small parts of the other counties—Harper, Ellis, and Harmon—are able to claim the travel hardship excuse. When the voter registration population of Cimarron, Texas, Beaver, and Harper counties is compared to the voter registration population of the entire Western District of Oklahoma, the community as defined under \textit{Perspective One}, it is seen that only 2.5 per cent of the citizens eligible for jury service are entitled to claim an individual hardship excuse. \textit{State Election Board, Registrants By Party As of January 15, 1976; State Election Board, Election Results and Statistics} 61 (1972). Hence, the exclusion from jury service on the basis of geography of 41 per cent of the eligible citizens of the Western District cannot be justified under the travel hardship excuse.

\textsuperscript{494} See text accompanying notes 467-469 \textit{supra}. It is crucial that the courts clearly recognize that the right to participate in the jury system is a fundamental right of the citizen eligible for jury service. The following hypothetical illustrates why this is true.

Assume that a federal prosecutor personally believes that women and blacks are inferior human beings who should in no instance be permitted to serve as jurors. Due to statutory and constitutional provisions, however, the prosecutor is unable to effectuate his personal beliefs. But then the federal prosecutor files charges against a white defendant for the rape of a black woman. For reasons of self-interest, the white defendant has also decided that women and blacks should not serve as jurors, at least not in his rape case. During discussions between the prosecutor and the defense attorney, an agreement is reached that the defendant will waive his right to a representative jury so that all blacks and all women will be purposefully excluded from the jury panels to be summoned for this particular case.

If the court concentrates solely on the right of the \textit{accused} to a jury chosen through methods involving a fair cross-section of the community, the court is likely to sanction the
reiterate, is a fundamental right analogous to the right to vote. Through participation on a petit jury, the citizen is permitted to vote, during the deliberative process leading to a verdict, on the legal standards to which citizens of that community will be held accountable. By being denied the opportunity to be included in the jury selection process, the excluded citizen never even has the possibility of being chosen for service on a particular petit jury. Hence, exclusion of citizens on the basis of geography from participation in the jury system is comparable to exclusion of citizens on the basis of geography from participation in the electoral system. While it may be true that citizens can be granted an excuse, if personally claimed, from service on a petit jury panel due to the inconvenience of travel distance, no rational reason exists that would permit the federal district court automatically to exclude eligible citizens from participation in the jury system based solely on their geographical residence.\textsuperscript{495} So long above-described agreement. The court is likely to sanction the agreement because it would fail to realize that the waiver by defendant is not only a waiver of his rights, but is also a waiver of the rights of the eligible citizens. Possibly even worse, if a black woman citizen were to file a class action asking for an injunction against the enforcement of the agreement in order that members of the class to which she belongs might be included in the selection process, the court might rule that only the defendant has any "rights" in the selection process. To sanction the above-described agreement, either inadvertently or overtly, would, in my opinion, be a devastating wound to the body politic of our American democracy. See United States v. Edwards, 465 F.2d 943 (9th Cir. 1972); Penn v. Eubanks, 360 F. Supp. 699, 702 (M.D. Ala. 1973). Cf. B. Babcock et al., supra note 463, at 68 n.28; Oklahoma City Times, June 3, 1976, at 6, col. 1.

Of course, the accused is entitled to an impartial jury, but impartiality is to be determined on the basis of individual responses at voir dire of those persons summoned for jury duty. It is impermissible to exclude citizens who are members of a class, whether the class be racial, sexual, or geographic, on the presumption that these citizens are biased simply because they are members of the class. Cf. Peters v. Kiff, 407 U.S. 493, 503-504 (1972) (Marshall, J.); Ballard v. United States, 329 U.S. 187, 193 (1946) (Douglas, J.); Thiel v. Southern Pac. Co., 328 U.S. 217, 220-24 (1946) (Murphy, J.).

It should also be emphasized that a citizen cannot insist upon being included upon a jury panel or the petit jury for any particular case, just as an accused cannot insist that a particular percentage or number of certain kinds of persons be included in the jury panel or on the petit jury for his particular case. The right of the citizen is to be included in the jury selection process. Once included in the selection process, the individual citizen, or the members of the class which the citizen represents, may well not be selected for service upon any particular jury panel or for any particular petit jury. See Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946); United States v. Johnson, 386 F. Supp. 1034 (W.D. Pa. 1974).

\textsuperscript{498} Fuller discussion of the distinction between an automatic exclusion based on geography and an individualized excuse based on travel hardship is presented in note 493 supra.

Granting citizens an excuse based upon travel hardship, if the individual citizen desires to claim the excuse, is analogous to the nonexistence in the United States of laws requiring citizens to vote in elections. Just as individual citizens, under the laws that presently exist, can decide in this country that they do not desire to be inconvenienced by casting a ballot, so Congress in Section 1863(b)(7) of the Jury Selection and Service Act of 1968 has permitted certain citizens to opt, due to travel hardship, not to be inconvenienced by serving on a jury.
as the eligible citizen is a resident of the appropriate community—which, under this perspective has been defined as the judicial district as a whole—that citizen is entitled both by the Jury Selection and Service Act and the sixth amendment to a right to participate in the jury selection system. Exclusion of eligible citizens from the jury selection process solely on the basis of geography violates the statutory and constitutional right to jury participation possessed by all citizens.

**Perspective Two.** The discussion of the jury selection process, as illustrated by the plan of the Western District of Oklahoma, under **Perspective One**, can easily be challenged on the basis that the definition of "community" utilized therein is incorrect. While the sixth amendment does require that the petit jurors be drawn from the “State and district wherein the crime shall have been committed,” it should not be forgotten that the sixth amendment only sets the maximum geographical area from within which the petit jurors must be summoned. Hence, it could be concluded that the “community” wherein the crime was committed is the entire judicial district, but that the “community” from which the petit jurors will be summoned for crimes committed anywhere in the judicial district will be a smaller geographical unit contained within the district. As to which smaller geographical unit would be a proper source of the jurors, it could be concluded that since the Jury Selection and Service Act requires that petit jurors be summoned from the “community in the dis-

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*But see 28 U.S.C. § 1861 and § 1864(b) (1970).* Unfortunately, too many citizens are willing to forego their right to vote and their right to serve on a jury. But permitting citizens to decide personally to avoid their civic responsibilities is a far cry from excluding them, irrespective of their individual desires, from participation in either the electoral process or the jury selection process.

It should also be mentioned that due to the right of the defendant to a jury chosen through a process involving a fair cross-section of the community, the excuse for travel hardship should only be permissible if the excuse does not undermine the fair cross-sectional quality of the selection process. Thus, if a federal court were to provide in its local rules that all citizens who live more than 500 feet from the courthouse are eligible for a travel hardship excuse upon request, and then, due to civic irresponsibility, 100 per cent of the citizens living more than 500 feet from the courthouse request to be excused, an accused should be able to challenge the jury selection process. See 28 U.S.C. § 1863(b)(5), (6) (1970). Cf. Copelon, et al., *supra* note 467 *passim.*


467 Under the sixth amendment, the citizens possessing the right to be involved in the jury selection process for a particular case are the citizens who reside in the vicinage. Determining the definition of the word “vicinage” is the task toward which the text throughout Part IV(A) is directed. The discussion in Part IV(B) is also directly related to the clarification of the meaning of the word “vicinage.”

468 Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938); United States v. Maxon, 26 F. Cas. 1220 (E.D.N.Y. 1866) (No. 15,748). Fuller discussion of the history of the concept of vicinage relevant to this point is given in Part III(E) *supra.*
trict or division wherein the court convenes,” the “community” from which the petit jurors will be summoned is the division in which the court convenes, if the judicial district is divided into divisions either by statute or court order.

When the definitions of “community” from the preceding paragraph are translated into the terms of the jury selection plan for the Western District of Oklahoma, then the examination of the jury selection process under Perspective Two substantially differs from the examination under Perspective One. If a crime were committed in the state of Oklahoma, anywhere within the Western District of Oklahoma, then under the sixth amendment the definition of the “community” in which the crime was committed would be the entire judicial district of the Western District of Oklahoma. Under the Jury Selection and Service Act, however, the definition of the “community” from which the petit jurors would be summoned would be the Oklahoma City division of the Western District of Oklahoma, the only division in which the court, by local rule, convenes. Utilizing these definitions of “community,” then, the problem concerning the jury selection process used in the Western District can be stated as follows: Is it a permissible jury selection process if it delimits the geographical boundaries of the community wherein the crime was committed differently from the geographical boundaries of the community from within which the petit jurors will be summoned?499

499 For a visual representation of the definitions of “community” utilized under Perspective Two, see Chart C.
Under *Perspective Two*, the Western District of Oklahoma is composed of four distinct communities under the sixth amendment and the Jury Selection and Service Act of 1968.

- **s** The community of the Woodward division and the authorized court city for the community.
- **p-q** The community of the Lawton-Mangum division and the authorized court cities for the community.
- **h-l** The community of the Enid-Ponca City division and the authorized court cities for the community.
- **a-e** The community of the Oklahoma City division and the authorized court cities for the community.

The only community from which petit jurors are summoned to try a crime committed in any of the four communities which comprise the Western District of Oklahoma. This result occurs because the "community"—for purposes of the community in which the crime was committed—is defined as the entire geographical area of the Western District of Oklahoma (the same definition of community where the crime was committed adopted in *Perspective One*), while the "community," for purposes of the community from which petit jurors are summoned, is defined as the geographical area of the Oklahoma City division.
As has been indicated throughout this article, central to the concept of vicinage is the requirement that the geographical boundaries of the community where the crime was committed be identical to the geographical boundaries of the community within which the petit jurors must reside.600 Although the sixth amendment states only a maximum geographical area (the judicial district as a whole, which can be designated by Congress or the federal courts as the vicinage), when Congress or the federal courts delimit smaller geographical areas within the judicial district as the specific geographical source of petit jurors, then these smaller geographically defined areas must also be the area in which the crime was committed.601 Only

500 For discussion of the reasons why the community in which the crime was committed must be identical to the community from which the petit jurors are summoned, see Part I(B)(5) and Part III(F) supra.

501 Recall that under Section 29 of the Judiciary Act of 1789, the geographical area from which jurors must be summoned for capital crimes was set as the county in which the crime was committed. At the same time, the geographical area from which the jurors must be summoned for noncapital crimes was set as the judicial district as a whole in which the crime was committed. Hence, it is clear that the word "vicinage" possessed two meanings under the Judiciary Act of 1789. What it is essential to note, however, is that whichever meaning of vicinage was appropriate due to the particular species of crime being prosecuted—the county for capital crimes, the judicial district for noncapital crimes—the geographical boundaries of the community from which the jurors were to be summoned were identical to the geographical boundaries of the community in which the crime was said to have been committed. No separation between the community from which the jurors were summoned and the community in which the crime was committed was allowed by the Judiciary Act of 1789. The provisions of the Judiciary Act of 1789 are, therefore, in accord with the concept of vicinage as embodied in the sixth amendment.

As has been indicated in Part III(E)(2), as the concept of vicinage was slowly forgotten, the identity between the community in which the crime was committed and the community from which the jurors were summoned also weakened. By 1966, when the divisional venue requirement of Rule 18 was deleted, lawyers, judges, and law professors no longer even had an inkling that the sixth amendment required the community in which the crime was committed to be identical to the community from which the petit jurors were summoned.

Section 29 of the Judiciary Act of 1789 did permit one exception to the identification between the geographical community in which the crime was committed and the geographical community from which the jurors must be summoned. That exception occurred when "great inconvenience" prevented the trial of the capital crime from being conducted in the county where it was committed. For a full discussion of this one exception, see Part IV(B)(1) infra.

Moreover, under Section 29, in cases of noncapital crimes, although the community in which the crime was committed was identical to the community from which the jurors were summoned, i.e., the judicial district as a whole, it was true that the federal trial courts were empowered to summon the jurors from portions of the judicial district close to the place where the court conducted the trial. But this discretionary power to summon the jurors only from portions of the community was exercised prior to the emergence of the constitutional doctrines, previously discussed in Part IV(A), that the accused has a right to a jury drawn from a fair cross-section of the community and that an individual citizen has a right to participate in the jury selection process. Read notes 493 and 494 supra. More importantly, the discretionary power of the court to determine from which portions of the vicinage (community) to summon the jurors is entirely distinct from the designation of a particular geographical area as a vicinage (community). For discussion of the power to designate a particular geographical area as a vicinage, see text accompanying notes 529-530 infra.
by preserving an identity between the community in which the crime was committed and the community within which the jurors must reside can the concept of vicinage—the local nature of the crime to the citizens of the community—be given the constitutional protection accorded it in the sixth amendment. 502

When the jury selection plan of the Western District of Oklahoma, as defined through Perspective Two, is tested against the concept of vicinage embodied in the sixth amendment, it can be found, in certain instances, to be constitutionally defective. If a crime were alleged to have been committed in the Woodward division of the Western District of Oklahoma, under the local rules the petit jurors to try that crime would be summoned solely from the Oklahoma City division because the court only convenes in that division. If an accused were then to challenge the petit jury panel summoned from the Oklahoma City division, or if a citizen from the Woodward division were to claim a right to participate in the jury selection process for the crime committed in the Woodward division, the federal district court should properly conclude that these claims are meritorious. These claims are meritorious, however, not because a "cognizable group" of citizens has been excluded on the basis of geography from the jury selection process, nor because the Woodward division citizen can claim to be equally entitled with the Oklahoma City division citizen to participate in the jury system, 503 but rather because use of jurors from the Oklahoma City division is simply use of jurors from the wrong community. Because the federal district court has divided the Western District of Oklahoma into four geographically distinct divisions, with a separate jury box for each division, 504 the correct community from which to summon jurors for crimes committed in the Woodward division is the Woodward division. Using jurors from the Oklahoma City division, or any division other than the Woodward division, as the petit jurors for crimes committed in the Woodward division violates the sixth amendment’s concept of vicinage requiring that the geographical boundaries of the community in which the crime was committed be iden-

502 See text accompanying notes 144 and 145, Part I.
503 The challenge to the jury selection process by an accused for the reason that a cognizable group of citizens, defined on the basis of geographical residence, has been excluded from the jury selection process, and the affirmative claim to participation by a citizen who lives in a geographical area excluded from the selection process, both presuppose that the geographical area that has been excluded is part of the community for which the jury is to be chosen. The accused’s challenge and the citizen’s affirmative claim, on the presupposition that the Western District of Oklahoma only constitutes one community, have been discussed in the text and accompanying notes 485-497 under Perspective One, supra.
504 Locp R. 30, W.D. Okla. This local rule was promulgated by the federal district court in accordance with the authority delegated to the court by Congress in the Jury Selection and Service Act of 1968. 28 U.S.C. §§ 1863(a), 1869(e) (1970).
tical to the geographical boundaries of the community from within which the jurors are summoned.

On the other hand, if a crime were alleged to have been committed within the Oklahoma City division of the Western District of Oklahoma, then the jurors to try that crime would, under the local rules, still be summoned solely from the Oklahoma City division. If an accused were then to claim that the petit jury was not chosen from a fair cross-section of the community because 41 per cent of the citizens of the Western District, those residing in the other three divisions of the district, were excluded on a geographical basis, or if a citizen from another division in the Western District were to claim the right to participate in the jury system for a crime committed in the Oklahoma City division, the federal district court should properly conclude that these claims are without merit. Because the geographical boundaries of the community in which the crime was committed and the geographical boundaries of the community from within which the jurors would be summoned are identical, the fact that 41 per cent of the citizens of the Western District are excluded in this instance, or that a citizen from another division is not permitted to participate on the jury for this crime, is simply irrelevant because the citizens residing in the other divisions of the Western District are residents of the wrong community. In accordance with the jury selection plan of the Western District of Oklahoma, which creates four geographically distinct divisions, the correct community from which to summon petit jurors for crimes committed in the Oklahoma City division is the Oklahoma City division. So long as the jury selection process involves a fair cross-section of the community of the Oklahoma City division, then the accused has been tried by a properly chosen petit jury and the citizens of the Oklahoma City division have been given their constitutional right to participate in the jury selection process. Using jurors solely from the Oklahoma City division for crimes committed in the Oklahoma City division is in accord with the concept of vicinage as embodied in the sixth amendment.505

505 As is indicated in the text, when a crime is committed in the Oklahoma City division of the Western District of Oklahoma, the jury selection process utilized in the district does achieve an identity between the community in which the crime was committed and the community from which the petit jurors will be summoned. But such identity is fortuitous rather than planned, as the sixth amendment would require. Because the identity is fortuitous, even when the federal courts are able to reach the correct result with respect to a challenge to the jury selection process, the federal courts are unable to articulate the correct conceptual basis for the result. See United States v. Jobe, 487 F.2d 268 (10th Cir. 1973); United States v. Edwards, 465 F.2d 943 (9th Cir. 1972). When the federal courts are faced with a jury selection challenge wherein the fortuitous identity between the community in which the crime was committed and the community from which the jurors will be summoned does not exist, the courts are completely unable to handle the challenge. See, e.g., United States v. Florence, 456 F.2d 46
As the foregoing analysis had indicated, whether *Perspective One* or *Perspective Two* is adopted for the purpose of examining the jury selection process, as illustrated by the jury selection process of the Western District of Oklahoma, the current process is found to be impermissible. Without doubt, the source of the statutory and constitutional infirmities of the jury selection process described is the failure to consider consciously the concept of vicinage during the formulation of the jury selection process to be used by the federal trial courts. So long as the identity of the geographical boundaries of the community where the crime is committed and the community in which the jurors reside is maintained, either the community defined as the entire judicial district, or the community defined as a smaller geographic area contained within the judicial district, can constitutionally be designated as the vicinage because the sixth amendment only sets the maximum geographical area which can be designated “by law” as the vicinage.

Because Congress and the federal courts have forgotten the concept of vicinage, the laws governing the jury selection process—whether detailed by statutory law or promulgated by federal court order—have not clearly designated the vicinage. On the contrary, the delimitation of the geographical boundaries of the vicinage have been so improperly defined that the statutory and constitutional infirmities depicted in the foregoing analysis have been the result. These deficiencies can, however, be removed easily if Congress and/or the federal courts will clearly recall the concept of vicinage and cleanly delimit the geographical boundaries of the community wherein the crime was committed and wherein the jurors must reside.  

2. Making Sense of Challenges to the Jury Selection Process on a Fair Cross-section Theory

After Congress or the federal courts have cleanly delimited the geographical boundaries of the area from within which the jurors must be summoned for crimes committed in that area, it becomes possible to handle correctly the challenges to the petit jury selection process on the ground that the process does not provide a fair cross-section of the community. Designation of the vicinage makes the correct handling of these challenges possible by setting the parameters of the community upon which the fair

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506 For fuller discussion of how and when Congress or the federal courts can exercise the power to designate a particular geographical area as a vicinage, see text accompanying notes 529-530 infra.
cross-section argument focuses. Without designation of the vicinage, the arguments about whether the jury selection process provides a fair cross-section of the community have often become "apples-compared-to-oranges" arguments because the participants in the arguments set different parameters—use different definitions—for the community which is to be reflected in the fair cross-section.\(^{507}\)

An example of the inability to handle correctly a challenge to the jury selection process because neither the federal judge, the prosecutor, nor the defense attorney realized that no vicinage had been cleanly delimited is found in the case of *United States v. Florence*.\(^{608}\) Mr. Florence had been indicted in the Northern District of West Virginia for a crime that had been committed entirely within the Parkersburg division of the Northern District. The petit jurors to try the case were summoned, however, entirely from the Elkins division of the Northern District. Mr. Florence's defense attorney objected to this procedure and claimed that Mr. Florence was entitled to a jury of his "peers and representative of his hometown as well as representative of the Northern District of the State of West Virginia." To buttress the challenge, the defense attorney then presented statistical evidence comparing Mr. Florence's home county, located in the Parkersburg division, to the counties comprising the Elkins division.\(^{609}\)

On appeal of the conviction, the Fourth Circuit Court of Appeals responded to the statistics presented on behalf of Mr. Florence by stating:

> These data have little probative value because Wood County is only one of four counties from which jurors for the Parkersburg place of holding court are drawn, and no data is supplied with respect to the other three. . . . We take judicial notice that the Northern District of West Virginia has no cities having a population in excess of 50,000 persons and that the district—indeed the state—generally is rural in character. Even Parkersburg, which is the second largest city in the district, was shown by the 1970 census to have a population of only 44,208.\(^{510}\)

The court of appeals then proceeded to agree with the district court that the challenge to the jury selection process should really be treated as a motion, under Rule 18, for intra-district change of venue from the Elkins division to the Parkersburg division. Under this interpretation, the court of appeals determined that the district court had not abused the


\(^{608}\) 456 F.2d 46 (4th Cir. 1972).

\(^{509}\) Id. at 46-48.

\(^{510}\) Id. at 48-49.
discretionary power under Rule 18 to set the place of trial for the "convenience of the defendant and the witnesses." As the court of appeals concluded: "Certainly, there was not such persuasive proof of geographical disparity between the two 'divisions' that transfer should have been granted for that reason."511

By treating the challenge to the jury selection process as a motion for intra-district transfer, the federal judges in the Florence case had compared the population of the Parkersburg division to the population of the Elkins division without realizing the spurious quality of the comparison. To have had a valid comparison of populations for the purpose of the fair cross-section challenge, the federal judges should have first determined the geographical boundaries of the vicinage. If the geographical boundaries of the vicinage were the boundaries of the Northern District of West Virginia, then exclusion of all eligible citizens from the jury selection process, except those residing in the Elkins division, raises the same statutory and constitutional problems discussed earlier in Perspective One on the jury selection process.512 If the entire Northern District of West Virginia is the vicinage,

511 Id. at 50.

512 Read text accompanying notes 485-497 supra. If the Northern District of West Virginia constitutes only one community, one might wonder why the federal district court would then maintain four separate jury boxes for four different portions of the community. It might seem more desirable to maintain just one jury box for the entire community. An explanation may be found in the following hypothetical.

Assume that four counties constitute Judicial District Z, which has been designated as a vicinage in its entirety. County A has 50 per cent of the population of the judicial district; County B, 30 per cent; County C, 15 per cent; County D, 5 per cent. If only one jury box is maintained for the community of the judicial district, then in accordance with the random selection methods required by the Jury Selection and Service Act of 1968, if 60 names are ordered drawn from the box to form a jury panel, then 30 names should be from County A, 18 names from County B, 9 names from County C, and 3 names from County D. But since the laws of statistics only provide probabilities, rather than results, it could occur that with respect to a 60-person jury panel, the names of 37 persons residing in County A and 23 persons residing in County B would be randomly drawn. If this latter random result occurred, obviously Counties C and D would have no representatives on that particular jury panel.

In recognition of these statistical probabilities, the federal district court for Judicial District Z could decide to maintain a jury wheel for each county that comprises the judicial district. By maintaining four jury wheels for the community, the federal district court would insure that each time a 60-person jury panel is formed for the community (Judicial District Z in its entirety), each county would be proportionally represented on the jury panel. County A would always have 30 names randomly chosen; County B, always 18 names randomly chosen; County C, always 9 names randomly chosen; and County D, always 3 names randomly chosen. Either maintenance of one jury box for the community from which names are randomly selected, or maintenance of more than one jury box for the community from which names are proportionally randomly selected, is statutorily and constitutionally permissible. Pure random selection from a box containing the total population, or proportional random selection from boxes containing the total population, are simply two different methods by which to obtain a fair cross-section of the community in the jury selection process.
then the proper comparison of populations is to ask whether the population of the Elkins division (a subpopulation of the Northern District) does indeed provide a fair cross-section of the population of the entire Northern District. If, on the other hand, the divisions of the Northern District are to be considered distinct vicinages, then use of jurors from the Elkins division for crimes committed in the Parkersburg division raises the same constitutional problems discussed earlier in Perspective Two. If the divisions are distinct communities, then comparison of the population of the Parkersburg division with the population of the Elkins division is a completely meaningless comparison—apples (the citizens of the Parkersburg division) are simply not oranges (the citizens of the Elkins division). Failure to apply the concept of vicinage resulted in the federal judges' inability to make sense of the challenge to the jury selection process.

At the same time, the information provided by the defense attorney did not assist the federal judges in resolving the challenge because the population comparisons offered by the defense attorney were also spurious comparisons. The defense attorney presented population statistics comparing the home county of the accused with the counties comprising the Elkins division. The basic thrust of the defense argument was that the accused was entitled to a "jury of his peers," i.e., people with his same status and characteristics. However, in this country there are no peer classes, there are only equal citizens. An accused in this country is not entitled to a "jury of peers," but rather is entitled to a jury summoned through a selection process involving a fair cross-section of equal citizens, whatever their status or characteristics, who reside in the proper vicinage. Hence, if the defense attorney had remembered the concept of vicinage, the evidence he needed to present would have been clear. If the entire Northern District of West Virginia were the vicinage, then the defense attorney should have challenged the Elkins jury panel by showing that the population of the Elkins division did not reflect a fair cross-section of the population of the Northern District of West Virginia. If the divisions were distinct vicinages, then the defense attorney simply should have pointed out to the federal trial and appellate courts that use of jurors from the

513 See text accompanying notes 498–505 supra.
514 U.S. Const. art. I, § 9. "No title of nobility shall be granted by the United States:—And no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office, or title, or any kind whatever, from any king, prince, or foreign state." U.S. Const. art. XIV, § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
Elkins division for a crime committed in the Parkersburg division was use of jurors from the wrong community. No population comparisons would need to have been made. As with the federal judges, however, the defense attorney also could make no sense of the fair cross-section challenge without considering the vicinage concept.

3. The Conflict Between the Jury Selection and Service Act of 1968 and Rule 18

Clear recognition of the concept of vicinage reveals a possible conflict between the Jury Selection and Service Act of 1968 and Rule 18 of the Federal Rules of Criminal Procedure, while simultaneously clarifying the issues relating to where within a judicial district the trial court should convene the trial of a particular crime. It could be argued that the reason why the federal trial courts in the Western District of Oklahoma and the Northern District of West Virginia, as examples, summon the trial jurors solely from one division within the judicial district is because Sections 1861 and 1863 of the Jury Selection and Service Act require the trial court to summon the jurors from the “district or division wherein the court convenes.” Because both the Western District and the Northern District are divided into divisions, the federal district court seemingly is complying with the 1968 Act when it summons petit jurors solely from the “division wherein the court convenes” the trial for a particular crime. As the discussion of the jury selection process through Perspective Two has shown, however, to interpret the 1968 Act as requiring the federal district court to summon jurors solely from one division when the crime was committed in another division would be to give the 1968 Act, if each division constitutes a vicinage, an interpretation that violates the concept of vicinage contained in the sixth amendment. If Sections 1861 and 1863 of the 1968 Act are to be saved from being declared unconstitutional, another interpretation of these sections must be provided. Two such interpretations exist.

Interpretation One. If the judicial district as a whole has been designated as the vicinage by law, either by a statute passed by Congress or a court rule promulgated by a federal court in accordance with delegated authority from Congress, then a crime committed anywhere within the judicial district would be committed in the vicinage, and citizens residing anywhere within the judicial district would be entitled to participate in the jury selection process as the jurors of the vicinage. In such case, conducting the trial in any division, or in any authorized court city of the district, while summoning the jury panel from throughout the district would be summoning the jurors, as Sections 1861 and 1863 allow, from
the "district . . . wherein the court convenes." At which particular court
city, or in which particular division, the court would actually schedule the
trial of a particular crime could then be set, under Rule 18, for the con-
venience of all the persons involved in that particular criminal trial. For
the jurors, who are being summoned from throughout the judicial district,
the only difference between conducting the trial at one location, as opposed
to another, is the address of the courthouse to which they are told to report
for jury duty. Thus, to designate the entire judicial district as the vicinage
permits an interpretation of Sections 1861 and 1863 consistent with the
sixth amendment and avoids any conflicts with Rule 18.\textsuperscript{516}

\textit{Interpretation Two.} In contradistinction, if the separate jury box kept
for each division, either a statutory or a court rule division, of the judicial
district is meant to designate the division as the vicinage, then a crime
committed in a division must be tried by citizens summoned solely from
that division. If Sections 1861 and 1863 are then interpreted as setting a
mandatory requirement that the federal district court summon jurors only
from the "division wherein the court convenes," this mandatory require-
ment can withstand constitutional challenge only if the district court con-
venes in the division wherein the crime was committed (the designated
vicinage). This interpretation of the 1968 Act, while preserving its con-
stitutionality, would mean that the federal district court would have to
travel from division to division to conduct the trial of crimes committed
in the various divisions. However, such an interpretation of the 1968 Act
would, of course, directly conflict with Rule 18, which was amended in
1966 to delete the requirement that the trial courts must conduct the trial
in the division where the crime was committed.\textsuperscript{517} Moreover, this inter-
pretation of the 1968 Act might be thought (mistakenly) to mean that an

\textsuperscript{516} Apparently the jury selection plan of the Eastern District of Kentucky has adopted,
unknowingly, the position that the entire judicial district constitutes one vicinage. Thus "inter-
pretation one," being discussed in the text, is applicable to the jury selection process for the
Eastern District of Kentucky. United States v. Lewis, 504 F.2d 92 (6th Cir. 1974). See also
Spencer v. United States, 169 F. 562 (8th Cir. 1909) ; Clement v. United States, 149 F. 305 (8th
Cir. 1906). The \textit{Spencer} and \textit{Clement} cases are discussed in the text at Part III(E)(1) and (2)
accompanying notes 344-356 and 394-401 \textit{supra}. Read also notes 258 and 512 \textit{supra}.

\textsuperscript{517} When divisional venue was deleted in 1966, the Advisory Committee commented: "The
former requirement for venue within the division operated in an irrational fashion. Divisions
have been created in only half of the districts, and the differentiation between those districts
with and those without divisions often bears no relationship to comparative size or population.
In many districts a single judge is required to sit in several divisions and only brief and infre-
quent terms may be held in particular divisions. As a consequence under the original rule
there was often undue delay in the disposition of criminal cases—delay which was particularly
serious with respect to defendants who had been unable to secure release on bail pending the
holding of the next term of court." Advisory Comm. on the Federal Rules of Criminal Pro-
cedure, \textit{Notes to the 1966 Amendments}, in 3 \textit{Wright}, \textit{supra} note 216, at 474.
accused has a constitutional right to trial in a division within a judicial district. Numerous cases were cited by the Advisory Committee on the Federal Rules of Criminal Procedure in 1966, when the divisional venue requirement was deleted from Rule 18, to show that no such constitutional right to trial in the division exists. 518

Under Article III, Section 2, clause 3, the sole venue provision in the Constitution, the accused is only entitled to trial in the state wherein the crime was committed. So long as an accused is tried in the appropriate state, he has been afforded his constitutional venue rights, regardless of the number of judicial districts, or the number of divisions within those judicial districts, which exist within the state. 519 Despite this constitutional provision, Rule 18 has imposed stricter venue requirements on the federal courts by mandating that the trial be conducted in the judicial district in which the crime was committed. Congress or the federal courts could, and did prior to 1966, impose even stricter venue limitations on the federal courts by requiring that the trial be conducted in the division of

518 Id. For fuller discussion of the 1966 amendment to Rule 18, see text in Part III(B) and (E) (2) accompanying notes 242-247 and 407-417 supra.

519 Professor Charles A. Wright has written: "Although in theory both constitutional provisions [Art. III, Sec. 2, cl. 3 and the sixth amendment] could be satisfied by trying a defendant in one district of a state though the offense was committed in another district, so long as the jurors were selected from the district of the crime, no such procedure has ever been attempted, and it has been considered that trial in the district of the offense is required." 1 WRIGHT, supra note 216, § 301, at 579.

The reason "it has been considered that trial in the district of the offense is required" is because very few judges, lawyers, and law professors have considered the historical relationship between the concept of jurisdiction and the concept of venue. So long as the jurisdiction of a court was considered territorially limited to the geographical area assigned to a particular court, then the concept of venue (i.e., the geographical area within which the trial must be conducted) was automatically determined by the concept of jurisdiction. Hence, under the original concept of jurisdiction, the trial of a crime committed in a judicial district assigned to a particular federal court had to be tried in that judicial district because no other court possessed jurisdiction over the crime. But once the concept of jurisdiction was freed from territorial restrictions, then it became conceptually possible for a federal court in one judicial district to conduct the trial for a crime committed in another judicial district and not violate Article III, Section 2, clause 3, so long as the two judicial districts were located in the same state. After the concepts of jurisdiction and venue were distinguished, the reason that trial continued to be conducted in the judicial district where the crime was committed related not to the constitutional venue provision of Article III, but rather to the statutory and rule venue provisions of federal criminal procedure. For fuller discussion of this history, see Part III(A) and (B) and text accompanying note 340 supra.

Of course, as Professor Wright indicated in the quoted language, recognition that the trial for a crime can be conducted anywhere within a state does not answer the question of from where the jurors must be summoned. To answer this latter question requires the person pondering it to consider the concept of vicinage as embodied in the sixth amendment. Read text accompanying notes 521-524 infra.
the judicial district wherein the crime was committed. Hence, the conflict between Sections 1861 and 1863 of the 1968 Act and Rule 18 now becomes clear: Did Congress inadvertently—because the concept of vicinage had been forgotten—reimpose a divisional venue requirement in 1968 through the passage of Sections 1861 and 1863?

To resolve this question, it must be clearly recalled that designation of venue does not automatically determine vicinage. While the place at which the trial is conducted is usually set within the geographical boundaries of the vicinage, the colonial practice of Virginia and the capital venue provision of Section 29 of the Judiciary Act of 1789 made it clear that the legislature or court could prescribe, for reasons of convenience, a particular location, outside the geographical boundaries of the vicinage, as the place of trial, so long as the petit jurors were summoned from within the geographical boundaries of the vicinage. Such a procedure is still

Through the imposition of district or divisional venue requirements, Congress and the federal courts have, in effect, interpreted the constitutional venue requirement of Article III to set the maximum geographical area within which the trial for a crime can be conducted. Considering Article III as setting a maximum limitation means that the trial cannot be conducted outside the boundaries of the state where the crime was committed, but that within the boundaries of the state, Congress and the federal courts can restrict the place of trial to smaller portions of the state.

For fuller discussion of the colonial practice of Virginia, see text in Part I(B) accompanying notes 38-41 and 103-107.

For fuller discussion of the capital venue provision of Section 29, see text accompanying notes 193-194, Part II, and 358-375, 501 supra.

The first United States Attorney General, Edmund Randolph, clearly knew that the place of trial could be set, for reasons of convenience, at a location outside the boundaries of the designated vicinage so long as the jurors to try the crime committed in the vicinage were summoned from the vicinage. In his 1790 report to Congress, Attorney General Randolph recommended that the federal courts only sit at one central location within a judicial district. He made this recommendation due to problems of judicial administration, which he predicted would arise if more than one court city were authorized within a single judicial district. At the same time, in the draft bill submitted to Congress for revision of the judicial system in accordance with his recommendations, Attorney General Randolph had prescribed “that, in criminal cases, juries of the vicinage shall be summoned according to the course of the common law.” Report of Att’y Gen. Edmund Randolph on the Judiciary System, Dec. 27, 1790, in 1 American State Papers 21, 25, § 6, at 27 (Class X-Misc. W. Lowrie & W. Franklin eds. 1834). Hence, it is clear that Attorney General Randolph meant for the jurors from the county where the crime was committed (the vicinage at common law) to have to travel from their county of residence to the place, chosen for reasons of convenient judicial administration, where the court conducted its business.

These recommendations were obviously based on the procedures utilized in the General Court of Virginia. Due to his extensive experience in private practice, Randolph knew that the General Court only sat in the state capital, but that jurors for trials conducted in the General Court were summoned from the county where the crime was committed. Indeed, as a delegate to the Virginia ratification convention, Randolph had argued that those who opposed ratification on the ground that inadequate protection was afforded the concept of vicinage were acting too precipitously because
constitutionally permissible today because the federal trial courts possess territorial power over the entire judicial district within which the division (the designated vicinage) is contained and can, therefore, summon the citizens of the division to any location within the judicial district for jury duty for crimes committed in the division from which summoned. Hence, the conflict between Rule 18 and Sections 1861 and 1863, as to where within a judicial district to conduct the trial of a particular crime, can be resolved by deciding which is preferable: Rule 18, which permits the federal district judge to make the jurors of the vicinage travel to the place of trial selected on the basis of the convenience of the "defendant and the witnesses"; or Sections 1861 and 1863, which require the federal court to travel to the community wherein the crime was committed and from which the petit jury panel must be summoned. If Rule 18 is thought preferable, then the Jury Selection and Service Act should be amended; if Sections 1861 and 1863 are thought preferable, then Rule 18 should be amended. Either approach, however, is constitutional because neither the sixth amendment vicinage provision, nor the Article III, Section 2, clause 3 venue provision, states who must do the traveling, the jurors or the court.\textsuperscript{524}

The federal government could adopt procedures to govern the federal judicial system that would be similar to the procedures utilized in the General Court.\textsuperscript{3} ELLIOTT, supra note 424, at 467. Thus, the 1790 report can be viewed as Randolph's attempt to fulfill the prediction he made in 1788 at the ratification convention.

\textsuperscript{524} The comments in the text emphasize that the concepts of vicinage and venue are independent concepts. The geographical area within which the jurors must reside is determined by the concept of vicinage with its underpinning policy considerations relating to the jury as an institution in our governmental structure. The geographical area within which, or the geographical place at which, the court must sit is determined by the concept of venue, with its underpinning policy considerations of convenient and expeditious handling of court business. Hence, just because a particular geographical area has been designated as a vicinage does not mean that the court must sit within the vicinage when conducting judicial proceedings with respect to crimes committed in the vicinage. Conversely, just because a particular geographical area or geographical place has been designated as the venue does not mean that the jurors to service that court are to be summoned from the geographical area or the geographical place wherein the court sits. If the concepts of vicinage and venue are properly understood and if the rules governing vicinage and venue are properly written so as not to conflict, then the place at which the court will conduct the trial of a particular crime (so long as the court has jurisdiction with respect to the crime) can be selected for the convenience of all the parties involved, while the place from which the jurors must be summoned has been predetermined and is fixed by the concept of vicinage. For a case clearly exhibiting the court's failure to realize that changing the location of the place of trial does not change the vicinage from which the jurors must be summoned, see United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973). See also People v. Jones, 510 P.2d 705, 103 Cal. Rptr. 345 (1973); People v. Jones, 103 Cal. Rptr. 475 (2d Dist. 1972). \textit{But compare} Maryland v. Brown, 295 F. Supp. 63, 78-83 (D. Md. 1969).
B. Motions for Change of Venue and the Concept of Vicinage

In accordance with Article III, Section 2, clause 3 and Rule 18 of the Federal Rules of Criminal Procedure, the prosecution for a crime must be commenced by the United States Attorney within the state and the judicial district wherein the crime was committed. Once the prosecution has been initiated in the appropriate place, there are three general situations in which it might be argued that a motion for change of venue would be appropriate: (1) the government might desire a change of venue if the place at which the prosecution is being conducted is so heavily biased in favor of the defendant that the government contends it cannot receive an impartial jury to hear its case;\textsuperscript{525} (2) the defendant might desire a change of venue if the place at which the prosecution is being conducted is so heavily biased against him that he contends he cannot receive an impartial jury to hear his case;\textsuperscript{526} (3) the defendant might desire a change of venue if the place at which the prosecution is being conducted is "inconvenient" from his viewpoint.\textsuperscript{527} Without conscious attention to the concept of vicinage and the political compromises whereby the concept acquired protection in Section 29 of the Judiciary Act of 1789 and the sixth amendment, however, the motion for change of venue in any of the three situations enumerated cannot be properly evaluated.

1. Motion for Change of Venue by the Government

To take the most extreme example, the government might well desire to file a motion for change of venue when a particular county, division, district, or state in which the crime was committed is in rebellion under the leadership of a person against whom the government desires to bring criminal charges. Although assuredly not all residents of the governmental unit in rebellion are supporters of the rebellion and its leaders, the govern-

\textsuperscript{525} No federal statute exists authorizing the federal government to obtain a change of venue. \textit{But see} 18 U.S.C. § 3235 (1970). Fuller discussion of 18 U.S.C. § 3235, the capital venue provision that originated in Section 29 of the Judiciary Act of 1789, is found in the text accompanying notes 252-255, 358-362, 373 \textit{supra} and note 543 \textit{infra}.

Many states have passed statutes authorizing the state prosecutor to obtain a change of venue. \textit{See generally} Comment, \textit{Criminal Law—Place of Trial—Jury of Vicinage}, 1 Cal. L. Rev. 272 (1913); Note, \textit{Validity of a Statute Granting the State Change of Venue in a Criminal Trial}, 17 Iowa L. Rev. 399 (1932); Note, \textit{Constitutional Limitation on Change of Venue in Criminal Cases}, 13 Md. L. Rev. 344 (1953).

\textsuperscript{526} \textit{Fed. R. Crim. P.} 21(a). \textit{See generally} 1 \text{Wright}, \textit{supra} note 216, at § 342, p. 620; Orfield, \textit{Transfer of Federal Offenses for Prejudice in the District or Division}, 27 Temp. L.Q. 21 (1953).

\textsuperscript{527} \textit{Fed. R. Crim. P.} 18 (intra-district transfer) and \textit{Fed. R. Crim. P.} 21(b) (interdistrict transfer). \textit{See generally} 1 \text{Wright}, \textit{supra} note 216, at § 305, p. 596 and §§ 343-44, p. 629; Orfield, \textit{Transfer, supra} note 269.
ment could justifiably be concerned that if the trial were held within that governmental unit, using jurors drawn therefrom, then the likelihood of a verdict of acquittal would be quite high. Moreover, even if the government were convinced that the leader of the rebellion would just as easily be found guilty by jurors drawn from the governmental unit in rebellion, the fact of the rebellion could well mean that the federal government is unable to conduct the trial there because of the unsafe conditions that exist. In these circumstances, is the government entitled to have its motion for change of venue granted?

To answer this question, the concept of venue and the concept of vicinage must be clearly distinguished and then properly applied as distinct concepts. If Congress or the federal courts have designated a smaller geographical area within a judicial district, such as a county or a division, as the appropriate vicinage either for certain crimes, such as capital offenses, or for all crimes committed in that geographical area, then the accused is constitutionally entitled to a jury selected from that geographical area. By so designating, Congress or the federal courts have denominated that smaller geographical area both as the relevant community whose citizens are entitled to serve on juries for crimes committed in that area, and as the relevant community whose citizenry must be represented by a fair cross-section through the jury selection process. At the same time, to permit the government, after the crime has been committed, to change the geographical boundaries from within which the jurors must reside would violate the requirement of the sixth amendment that the geographical area designated as the vicinage must be previously ascertained by law and would allow the two evils of "jury-shopping" and "ex post facto" judgment to occur. If Congress or the federal courts are wary of smaller commu-

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528 Fuller discussion of the relationship between the citizens of a community and the geographical definition of the community constituting the vicinage is presented in Part IV(A)(1) and (2) supra.

529 Because the vicinage created by the sixth amendment referred to the judicial district, a geographical entity—unlike a county or a state—without prior existence and delimitation within our governmental structure, Congress was also mandated by the sixth amendment to give existence to this new governmental unit through the passage of laws. These laws could then make the judicial district as large or as small as Congress thought appropriate, with one limitation upon the power of Congress to establish the vicinage through the creation of judicial districts: these districts, as required by the sixth amendment, must be "previously ascertained by law." This "previous ascertainment" requirement was purposefully adopted to prevent two evils, "jury-shopping" and "ex post facto" judgment by a jury.

During the debates which led to the adoption of the sixth amendment, supporters of the concept of vicinage complained that Article III, Section 2, clause 3 permitted too much leeway to the federal government to summon jurors from anywhere within a state where the crime was committed. These supporters worried that the federal government might use this discretionary power to search for a geographical area within the state from which a jury could

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ties within a judicial district serving as the vicinage, then they have the power to avoid using these smaller communities simply by designating the judicial district as a whole as the vicinage. Under the sixth amendment, Congress or the federal courts are empowered by law to set the geographical boundaries of the vicinage, but once the boundaries have been fixed, the vicinage cannot be redefined by law except prospectively.  

be summoned to reach the verdict which the government desired. Moreover, these supporters believed that an accused would normally come from the same community as the community in which the crime was committed. Hence, that community could justifiably expect the accused to be aware of the prevailing standards of conduct in that community; concomitantly, the accused could justifiably expect to have his conduct judged by comparison to those standards with which he was familiar. To permit the government to summon jurors from some distant portion of the state would destroy this reciprocal link between the community and the accused and would expose the accused, even if the government had no malevolent motives for using jurors from a different community, to judgment by standards with which he was not familiar and with which he could not have been expected to conform. See Part I(B) (2) and (5).  

One compromise ultimately reached in the First Congress was to provide constitutional protection for the concept of vicinage through the reference to judicial districts to be "previously ascertained by law." See Part II. Since the judicial district must be geographically defined prior to the commission of the crime, the government could not, in response to a particular crime, change the boundaries of the judicial district so as to obtain a jury that would render the verdict the government desired. United States v. Maxon, 26 F. Cas. 1220 (E.D.N.Y. 1866) (No. 15,748). Cf. United States v. Greiner, 26 F. Cas. 36 (E.D. Pa. 1861) (No. 15,262). In addition, since the judicial district must be geographically defined prior to the commission of the crime, the government could not subject an accused to judgment by jurors summoned from a community differently defined after the crime than before it. As a result, the integrity of the deliberative process of the jury—to return a verdict in accord with the sense of justice of the community affected by the crime and to exercise the sovereign power of the jury to intervene between the prosecution and the accused—would be protected, while the evils of jury-shopping and ex post facto judgment by a jury would have been prevented. But see notes 472-473, 493, 512 supra.  

A second compromise ultimately reached in the First Congress was to provide statutory protection for the common law concept of vicinage through the venue provision concerning capital crimes contained in Section 29 of the Judiciary Act of 1789. When the second compromise is compared to the first, its importance becomes evident because it is then clear that smaller geographical areas contained within the judicial district could be designated a vicinage by Congress through the passage of laws regulating the jury selection process. Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938); United States v. Ayers, 46 F. 651 (D.S.D. 1891). See Part III(E)(2). The debates of the First Congress do not indicate, however, whether the "previous ascertainment" requirement of the sixth amendment, clearly applying to "laws" passed by Congress to create judicial districts, also applies to "laws" passed by Congress regulating the procedures for summoning citizens for jury service. Nevertheless, in light of the reasons for the "previous ascertainment" requirement, it should be concluded that any law whereby Congress designates a vicinage—either the maximum geographical area of the judicial district through laws creating judicial districts, or a smaller geographical area within the judicial district through laws creating the procedures for summoning jurors—must satisfy the "previous ascertainment" requirement. See Part IV(A)(1) and (2).  

Because the concept of vicinage has been forgotten by the legislature and the federal judiciary, those empowered to designate geographical areas as a vicinage have forgotten that the size of the geographical area to be designated as the vicinage was purposefully left open to
While the preceding paragraph surely states the usually applicable principles, it should be recalled that when James Madison first introduced the amendment that eventually became the sixth amendment into the First Congress, he included a provision that read as follows:

\[
\text{Provided that in cases of crimes committed within any county which may be in possession of any enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offense.}
\]

Through this language Madison meant to make it clear that while an accused was ordinarily entitled to a jury of the vicinage as at common law, this entitlement could be lost if the county were under the control of an enemy or in rebellion.\(^{531}\)

The language quoted in the preceding paragraph did not survive the debates of the First Congress. Congress deleted that language from the sixth amendment and instead drafted it to give Congress the power to set the maximum geographical limits of the vicinage through its power to create judicial districts that could be as large as a state. However, the proposal by Madison did leave echoes that are found in Section 29 of the Judiciary Act of 1789. In Section 29, the jury of the vicinage as at common law was protected through the requirement that all capital crimes must be prosecuted in the county where the crime was committed. But this capital venue requirement of Section 29 was itself subject to an exception: if “great inconvenience” would result from holding the trial in the county where the capital crime was committed, then the trial could be held in another county so long as “at least” twelve jurors were summoned from the county where the crime was committed, while the remaining number

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\(^{531}\) Full discussion of this proposal is found in Part I(B) (3).
of jurors were summoned from other parts of the appropriate judicial district. Hence, the language of Section 29 made it clear that while an accused in a capital case was ordinarily entitled to a jury of the vicinage as at common law, this entitlement could be lost if "great inconvenience" existed in the county where the crime was committed.532

When this constitutional and legislative history is recalled, then the usually applicable principles concerning vicinage are changed as follows. If Congress or the federal courts have designated a smaller geographical area within the judicial district as the vicinage, then the defendant is entitled to jurors solely from that geographical area unless the government can present a compelling reason as to why the vicinage must be enlarged.

From the constitutional and legislative history just presented, the only compelling reason permitting the government to enlarge the vicinage should be where the government has been prevented from exercising full sovereignty over the geographical area originally designated as the vicinage due to conditions of occupation or rebellion.533 But, when the government is permitted to enlarge the geographical definition of the vicinage, two limitations exist. First, the government cannot enlarge the vicinage, under the circumstances of occupation or rebellion, beyond the geographical area encompassed within the entire judicial district within which the smaller

532 Full discussion of the reasons leading to the "great inconvenience" exception to the capital venue provision of Section 29 is given in Part II.

533 In light of the comments in the text, it is instructive to recall how President Washington and his Cabinet handled the Whiskey Rebellion of 1794 in Pennsylvania. After receiving reports of the seriousness of the situation in the four western counties of Pennsylvania, Attorney General William Bradford sought an opinion of Associate Justice Wilson as to whether the normal judicial processes could function in those counties. Justice Wilson responded: "From the evidence which has been laid before me, I hereby notify you that, in the counties of Washington and Allegany, in Pennsylvania, laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal of that district." 1 AMERICAN STATE PAPERS 85 (Class X-Misc. W. Lownie & W. Franklin eds. 1834). Attorney General Bradford apparently sought the opinion in order to permit President Washington to issue a proclamation calling upon federalized militia forces to suppress the rebellion.

A secondary consequence of the opinion by Justice Wilson, however, was to permit the courts to rule that due to rebellion "great inconvenience" existed in those counties. Thus, the courts held that those accused of treason with regard to the Whiskey Rebellion were not entitled under Section 29 to be tried in the county where the treason was allegedly committed. See United States v. Insurgents, 26 F. Cas. 499 (C.C.D. Pa. 1795) (No. 15,443); United States v. Insurgents, 26 F. Cas. 498 (C.C.D. Pa. 1799) (No. 15,442); Case of Fries, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5,126). Cf. United States v. Stewart, 27 F. Cas. 1338 (C.C.D. Pa. 1795) (No. 16,401); United States v. Hamilton, 3 U.S. (3 Dall.) 17 (D. Pa. 1795).
vicinage is contained. Even if the judicial district as a whole is in rebellion, an attempt by the government to expand the vicinage beyond the judicial district would violate an accused's right under the sixth amendment to a "jury of the State and district wherein the crime shall have been committed." Second, even when the government is permitted to obtain jurors from the broader geographical area encompassed within the judicial district as a whole, it must still utilize, to some extent, jurors from the smaller geographical area designated as the vicinage but now under occupation or in rebellion. In terms of Section 29, this second limitation meant that "at least" twelve jurors must come from the county where the crime was committed, but in which it was a "great inconvenience" to hold the trial. In terms of present-day constitutional standards, as set forth in *Taylor v. Louisiana*, this second limitation means that the citizens of the geographical area occupied or in rebellion cannot be excluded from the jury selection process. These citizens are still entitled to be considered for jury duty with respect to the crimes committed in their community.

But what if the rebellion or the occupation has ended in the smaller geographic area designated as the vicinage and the judicial power of the federal government is once again functioning in that geographical area— can the government utilize jurors from other parts of the judicial district simply because the prosecutor and judge are worried that to summon jurors solely from the original vicinage may mean that local heroes who led the rebellion or cooperated with the occupying enemy will be acquitted by jurors of the vicinage? The answer is clearly no. During a rebellion or an occupation, the government could present a compelling reason for the expansion of vicinage—to prevent a complete ouster of governmental sovereignty, either by an occupying enemy or by citizens in rebellion, through the inability of the courts to function. Once the federal sovereignty has been reestablished, however, this compelling reason has ceased to exist.

534 United States v. Greiner, 26 F. Cas. 36 (E.D. Pa. 1861) (No. 15,262). See Part III(E)(2) and note 370.
536 To understand the comments in the text, it is helpful to visualize the smaller geographical area (a county or a division) that has been designated as the vicinage as a small circle contained within the larger circle of the judicial district. When the government establishes that governmental judicial power cannot be exercised in the small circle, then the government has presented a compelling reason to expand the geographical source of the jurors to the entire area encompassed within the larger circle, i.e., the judicial district. In truth, the government has not been permitted to change the definition of vicinage; rather the government has been permitted to enlarge the definition of vicinage from the smaller geographical area to the larger geographical area of the judicial district. As has been indicated in the text accompanying note 534 supra, under the sixth amendment, the previously ascertained judicial district is the maximum geographical area that can be utilized as the vicinage for past crimes committed in that geographical area.
The only reason the government can now give for seeking an expansion of vicinage is to find a jury favorable to the conviction the government desires. To permit the government to expand the vicinage in order to obtain a jury favorably inclined to convict is completely contradictory to the reasons for which the previous ascertainment requirement was included in the sixth amendment. 537

Those who drafted the sixth amendment and the Judiciary Act of 1789 meant to allow the government to expand the vicinage only in instances when it was necessary to prevent a complete ouster of federal governmental sovereignty. It is submitted that that intention made eminently good sense in 1789 and continues to make eminently good sense today. This interpretation of the sixth amendment provides adequate protection to the interest of the government in upholding its power, to the interests of the citizens of the vicinage in being the petit jurors, and to the interest of the accused in being tried by a jury of the vicinage. At the same time, it prevents a vindictive use of the judicial system, after a rebellion or an occupation has ended, to eliminate political opponents of the federal government. In effect, the interpretation of the sixth amendment permitting an expansion of vicinage during rebellion or occupation, but not afterwards, means that the federal government can crush a rebellion or defeat any hostile forces on the battlefield, but that it cannot then use the judicial system, by searching for a favorable jury, to obtain foreordained verdicts of guilty against those citizens in rebellion or those who cooperated with the enemy. 538 The federal government can bring those rebellious or collab-

537 The comments in the text purposefully assume that the rebellion or the occupation has indeed ended, and do not address the question as to how to determine when a rebellion or occupation has ended so that it can be said that the federal judicial power is once again being exercised within the geographical area that constitutes the vicinage. Thus, the comments in the text do not address the question of whether it should be permissible for the federal courts to permit an expansion of vicinage from the smaller geographical area to the larger geographical area of the judicial district as a whole on the ground that although the rebellion has been crushed or the occupying enemy expelled, federal troops are still stationed in the area to insure federal sovereignty. See United States v. Insurgents, 26 F. Cas. 498 (C.C.D. Pa. 1799) (No. 15,442); Case of Fries, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5,126). Read also note 533 supra.

The comments in the text also are not directed to the question of the proper relationship between civilian judicial authority and military court-martial authority. If it is permissible to try citizens for crimes allegedly committed during a rebellion or occupation by enemy forces before a military commission, as opposed to a federal court, then because a military commission does not utilize civilian jurors, the question about the geographical source of the jurors, i.e., the question of vicinage, simply becomes irrelevant. See Ex parte McCord, 74 U.S. (7 Wall.) 506 (1868); Ex parte McCord, 73 U.S. (6 Wall.) 318 (1867); Ex parte Vallandigham, 68 U.S. (1 Wall.) 243 (1863). For an informative discussion on the relationship between civilian authority and military authority with respect to police functions, see Note, The Pass Comitatus Act: Reconstruction Politics Reconsidered, 13 AM. CRIM. L. REV. 703 (1976).

538 To permit the federal government to search for a jury favorable to conviction by
orating citizens to trial, after the rebellion has been crushed or the enemy defeated, but only before a jury of the vicinage as defined prior to the commission of the crimes being brought to trial. Maximum protection is thereby accorded the jury as a democratic institution in our governmental structure, because it is the jury of the vicinage where there was rebellion or occupation that ought to be permitted to determine the distinction between the right of rebellion\footnote{539} and the crime of treason, or the distinction between necessary cooperation with the enemy in order to survive and collaboration for purposes of self-aggrandizement.\footnote{540}

From what has been said about the problems of rebellion and occupation, it should be obvious that the government is not permitted to redefine the vicinage in any other instance after a particular crime has been committed simply because it believes that the geographical area designated as the vicinage prior to the commission of the crime is populated by citizens who are antagonistic to the enforcement of that particular federal criminal

expanding the vicinage from a smaller geographical area, previously designated as the vicinage, to the maximum geographical area that can be designated as the vicinage (the judicial district) under the sixth amendment, or indeed to permit the government (in direct violation of the constitutional limitation on vicinage by the sixth amendment) to change the vicinage completely by utilizing jurors from another judicial district, would mean in effect that the federal government could pass laws similar to 35 Henry VIII, c. 2 (1543), 12 Geo. III, c. 24 (1772), or 14 Geo. III, c. 39 (1774), about which the colonists so loudly complained in the period immediately preceding the American Revolution. See Part I(A)\footnote{539} (1) and Part I(B)\footnote{540} (1).

\footnote{539}“Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security. Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former System of Government.” Declaration of Independence, United States of America, July 4, 1776.

\footnote{540}The appropriate role for the jury of the vicinage with respect to the issues being discussed in the text has been eloquently expressed by Justice Black. In Green v. United States, 356 U.S. 165 (1958), Justice Black dissented because the Court upheld a conviction for contempt after trial by a judge alone. Justice Black argued that the accused was entitled to a trial by a jury. “As one of the more perceptive students of our experiment keenly observed, ‘The institution of the jury... places the real direction of society in the hands of the governed, or a portion of the governed, and not in that of the government.’ 1 De Tocqueville, Democracy in America (Reeves Trans., 1948 ed.), 282. The jury injects a democratic element into the law. This element is vital to the effective administration of criminal justice, not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application. It can hardly be denied that trial by jury removes a great burden from the shoulders of the judiciary. Martyrdom does not come easily to a man who has been found guilty as charged by twelve of his neighbors and fellow citizens.” Id. at 215-16.
Just as obvious, the government is not permitted to redefine the vicinage, with respect to previously committed crimes, for reasons of the convenient administration of justice. Neither community antagonism nor division of the vicinage diameter, with respect to previously committed crimes, for reasons of convenient judicial administration, of course, the government can also obtain a jury favorable to the verdict it desires if jury selection procedures can be manipulated so as to ensure that only those persons supportive of the government's view are selected for jury service. To prevent manipulation of the jury, selection procedures must involve a fair cross-section of the appropriate community and be dependent upon a random selection method. See notes 472-473, 493, 512 supra.

To permit the government to redefine the vicinage, with respect to previously committed crimes, for reasons of convenient judicial administration (should the appropriate division's federal courthouse be accidentally destroyed, for example) would erroneously assume that the place of trial (venue) controls the geographical source of the jurors (vicinage). Venue and vicinage are independent concepts with distinctly different underpinning policy considerations. See text accompanying notes 521-524 supra.

In light of the comments in the text, it seems appropriate to discuss a rather unique problem of judicial administration in the federal system that has been created by Congress with respect to the Yellowstone National Park. Section 131 of Title 28 of the United States Code (1970) creates one judicial district for the state of Wyoming and defines the District of Wyoming also to encompass "those portions of Yellowstone National Park situated in Montana and Idaho."

Let us assume that X purposefully kills one of a federally protected animal species in that portion of the Yellowstone National Park located in the state of Idaho. Charges are duly instituted against X by the United States Attorney for the District of Wyoming. At that point, X insists on his constitutional rights under Article III, Section 2, clause 3 (to trial "in the state where the said crimes shall have been committed") and under the sixth amendment (to a jury "of the State and district wherein the crime shall have been committed"). In addition, X insists upon his statutory venue rights, under Rule 18, to be tried in the judicial district wherein the crime was committed. Although it might be greatly inconvenient to conduct the trial in the District of Wyoming in the state of Idaho, the accused can be provided his constitutional and statutory venue rights by creating a makeshift courtroom of park benches in that portion of Yellowstone National Park located in the state of Idaho at which the trial, presided over by the district judge of the District of Wyoming, could be conducted.

But significant problems arise in attempting to provide the accused his constitutional rights under the sixth amendment. Since the number of citizens eligible for jury service who reside within the District of Wyoming in the state of Idaho is very likely quite small, it may not be possible to form a petit jury, due simply to an insufficient number of eligible citizens. If the district judge were to order the summoning of jurors from the larger population of the state of Wyoming, the accused could respond that these jurors are being summoned from the wrong state. The crime was alleged to have been committed in the state of Wyoming, not the state of Idaho. If the district judge were then to order the summoning of jurors from the larger population of the state of Idaho, the accused could respond that these jurors are being summoned from the wrong district—the crime was alleged to have been committed in the District of Wyoming.

If the prosecutor were then to argue to the federal judge that due to these unique circumstances, a "compelling reason" has been presented to permit the government to change the
nor governmental convenience provides a compelling reason to permit the
government, by redefining the vicinage, to deprive both the citizens of the
vicinage of their constitutional right to serve as the petit jurors for crimes
committed in their community and also to deprive the accused of his consti-
tutional right to be tried by a jury of the vicinage as ascertained prior to
the commission of the crime. Only prevention of the ouster of federal
governmental sovereignty, during times of actual rebellion or occupation
in the vicinage as previously designated by law, carries sufficient import
to outweigh the constitutional rights possessed by the citizens of the
vicinage and the accused.543

The geographical source of the jurors, the accused could—and rightfully—point out that at the
time Congress created the District of Wyoming, it had the ability to take this problem of
population and geography into account when setting the boundaries of the judicial district.
Just because Congress failed to create a judicial district adequate to the needs of the judicial
system does not mean that the accused can be deprived of his constitutional vicinage rights.
See note 530 supra.

In order to prevent these problems from arising, Congress should amend Sections 92, 106,
and 131 of Title 28 to make the judicial districts conform to the geographical boundaries of
the states of Idaho, Montana, and Wyoming. Indeed, it is this writer's opinion that Congress
does not possess the power to create a judicial district larger in geographical extent than the
state for which the judicial district is being created. See text accompanying notes 193-195, Part II.

Some courts and commentators have argued that the place of trial (venue) and the
geographical source of the jurors (vicinage) should be completely subject to legislative control.
E.g., State v. Holloway, 19 N.M. 528, 146 P. 1066 (1914); F. Heller, The Sixth Amendment
92-101 (1951); Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and
Venue, 43 Minn. L. Rev. 59, 92-94 (1944). Two reasons are given for this conclusion favoring
legislative power.

First, it is argued that venue and vicinage are synonymous. Then, once the concept of
vicinage has been forgotten, the argument proceeds that venue relates to a convenient and ex-
peditious handling of cases filed in the courts. Thus, it is concluded, the legislature ought to be
permitted to devise an efficiently functioning court system. The thesis argued throughout this
article is that venue and vicinage are independent concepts embodying completely distinct policy
considerations.

Second, even if the state or federal Constitution contains a vicinage provision, recognized
as such, it is argued that in English law the legislature possessed the power to abrogate the
common law vicinage limitation. Thus, it is concluded that the legislature possesses such power
in this country. To adopt this second line of reasoning is to ignore a fundamental premise of
governmental power in this country: legislatures are not permitted to pass statutes that derogate
the Constitution. More radically, to adopt this second line of reasoning is to reject the basic
premise of American democracy—the premise that the people are the ultimate sovereigns who
express their sovereignty directly through participation in constitutional conventions, through
participation in the electoral process, and, of especial importance to this article, through
participation as jurors of the vicinage. See Part III(F) supra.

In light of the comments in the text, it should be made explicit that the words "great
inconvenience" from Section 29 of the Judiciary Act of 1789, permitting a change of venue
from the county where the capital crime was committed to another location in the judicial
district, were intended to apply only when the county where the capital crime was committed
was in rebellion or under occupation, thereby threatening governmental judicial power with
complete ouster. See Part II. Indeed, the first two courts to rule on the proper interpretation
An objection might be raised, however, that to limit so narrowly the ability of the government to obtain a change of vicinage would mean that the government possesses no remedies whereby it can insure that it would receive an impartial jury, i.e., a jury that would give a fair hearing to the prosecution evidence. Prohibiting the government from enlarging the vicinage, it could be argued, would assuredly mean that in certain instances the government would be forced to try the case before jurors who are so favorably inclined toward the accused as to indicate certain acquittal.

However, it is not correct that the government has no remedies to protect its interest in an impartial jury. On the contrary, the government can use three distinct remedies. (1) If the Congress or the federal judges, who have the power to designate the vicinage, are concerned that local communities might be too unsympathetic to the prosecution's cases, then Congress or the federal courts can set the boundaries of the judicial district within a state to be as large as Congress, or the federal court, considers it necessary to avoid the antagonism of the local communities. By expanding the geographical area within which the jurors must reside, the pool of jurors is also expanded. The larger the number of persons who are available for jury service in a vicinage, the less likely that the government will have to present its cases to unsympathetic jurors.\footnote{The words “great inconvenience” were faced with situations of rebellion and did rule that the existence of rebellion constituted “great inconvenience.” See text and authorities presented in note 533 supra. Not until 1820, in United States v. Cornell, 25 F. Cas. 650 (C.C.R.I. 1820) (No. 14,686), did a federal court intimate that the words “great inconvenience” might be interpreted to encompass governmental inconvenience founded upon such factors as court dockets, term times, or facilities. In Cornell, Justice Story discussed the meaning of the words “great inconvenience” within a broader discussion of federal jurisdiction and waiver of venue by an accused. Ultimately, Justice Story concluded that because of jurisdictional and waiver considerations, the capital venue provision of Section 29 was inapplicable to the case. See also United States v. Wilson, 28 F. Cas. 699 (C.C.E.D. Pa. 1830) (No. 16,730). Due to Justice Story’s strong nationalistic beliefs a la the Federalists of 1789, however, it should not be surprising that he showed little sympathy for the concept of vicinage as protected through the capital venue provision of Section 29. J. McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION ch. 1 (1971) passim.}

After the 1862 repeal of that portion of Section 29 which required that at least twelve jurors come from the county where the capital crime was committed, even in cases of “great inconvenience,” the protection afforded the jury of the vicinage as at common law by the capital venue provision of Section 29 was simply forgotten. Indeed, the capital venue provision itself, as a venue provision and nothing more, became an anachronism. Once the courts thought of the capital venue provision, which exists today as 28 U.S.C. § 3235 (1970), solely in terms of the policy considerations underpinning the concept of venue, the federal courts consistently ruled it was too inconvenient to conduct the trial of a capital offense in the county where the crime was committed. See notes 362–375, Part III.

\footnote{This first remedy is, of course, only a prospective one due to the fact that the vicinage must be previously ascertained prior to the commission of the crime. Hence, the law-
geographical area has been delimited, however, then the government must present its case concerning crimes committed in that area to jurors from that area. With respect to these jurors, the government can protect its interest in an impartial jury through challenges for cause or peremptory challenges exercised at the time of voir dire. Finally, the government may be able to protect its interest in an impartial jury by obtaining a change of venue. If the jurors of the vicinage are being threatened, for example, by crowds gathering at the courthouse, or if they are being improperly influenced by newspaper publicity, to the detriment of the government’s case, then the government may be able to ask that the place of trial (venue) by transferred to another location within the state. While transferring the trial to another location does not mean that the government will be permitted to use jurors from the geographical area to which the trial has been transferred, it does mean that the jurors of the vicinage will be removed from influences that threaten the proper performance of their duties. Once the trial has been transferred to another location, the jurors of the vicinage will be able to hear the evidence and to deliberate on a verdict in an appropriately dispassionate atmosphere.

The second remedy to insure an impartial jury for the government was expressly mentioned by Edmund Randolph during the Virginia ratification convention. Randolph argued: “If the whole country be in arms, the prosecutor for the commonwealth can get a good jury, by challenging improper jurors. The right of challenging, also, is sufficient security for the person accused. I can see no instance where this can be abused. It will answer every purpose of the government, and individual security.” III J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 574 (1836). For the context in which Governor Randolph made the quoted statement, see text accompanying notes 134-142, Part I. Governor Randolph was speaking about governmental challenges for cause. With respect to governmental peremptory challenges, see note 375, Part III. For both challenges for cause and peremptory challenges, see generally 3 WRIGHT, supra note 216, at §§ 381-87, pp. 26-48.

Transferring a trial from one location to another within a state does not violate the limitations on venue expressed in Article III, Section 2, clause 3. Transfer from one judicial district to another within the same state does, however, violate the language of Rule 18 requiring the trial to be conducted in the judicial district in which the crime was committed unless the defendant requests a change of venue under other rules of criminal procedure. Read text accompanying notes 517-520 supra. The transfer from one location to another within the same judicial district is permissible under the discretionary powers granted to the federal courts by Rule 18. Cf. 1 WRIGHT, supra note 216, at § 341, p. 619. At the same time, conducting the trial of a crime at a geographic location outside the boundaries of the designated vicinage is consistent with both the concept of vicinage and the concept of venue. See text accompanying notes 520-524 supra.
Despite the remedies listed, a strict limitation on the instances in which the government is permitted to obtain a change of vicinage admittedly does mean that there will be times when the government will be forced to present its case to a jury favorable to the accused. However, it is submitted that protection of the accused by the jury is precisely an attribute for which the jury system has been constantly praised.\(^{547}\) Moreover, if juries constantly react negatively to the government's case, and the prosecution complains that an impartial jury cannot be obtained because the government is not permitted to change the vicinage, then it is doubtful that the jurors of the vicinage are at fault. Rather, the fault lies with the prosecutor, and other government officials, who seem to be unable to hear the voice of the community as expressed through verdicts rendered by juries of the vicinage.\(^{548}\)

2. Motion for Change of Venue for Reasons of Prejudice by the Defendant

Under the sixth amendment, an accused is entitled not only to a jury of the vicinage (either from the judicial district as a whole, or some smaller geographical area within the judicial district, whichever has been designated as the vicinage), but the accused is also entitled to an "impartial jury" and "to be confronted with the witnesses against him."\(^{549}\) If the influences impinging upon the citizens of the vicinage are such that the persons called for jury service cannot be impartial or cannot decide the case on the evidence presented during the trial, then the question arises: is the accused entitled to have a motion for change of venue granted in order to obtain an impartial jury that will decide the case only upon the evidence presented during the trial?

The easy, quick answer to the question asked is "Yes," with a citation


\(^{548}\) The comments in the text are premised on the inclusion of the entire citizenry of the vicinage in the jury selection process so that the verdicts rendered by this jury of the vicinage speak as the voice of the community. Should verdicts rendered by the juries of that community be contrary to those which federal officials feel should have been rendered, then respect for the opinions of the citizenry requires that these officials attempt to persuade the citizenry that the policies contained within the laws which the community, through its jury, is refusing to enforce should also be adopted by them. Respect for the opinions of the citizenry is not shown by ignoring the arena of political persuasion in favor of tampering with the institution of the jury of the vicinage. See text accompanying notes 452-459 \textit{supra}.

\(^{549}\) Fuller discussion of what it means to say that the jurors are "impartial" and are able to decide the case upon the evidence presented at trial through the "confrontation of witnesses" is presented in Part III(F) (1) \textit{supra}. 
to *Rideau v. Louisiana*,550 *Groppi v. Wisconsin*,551 and Rule 21 (a)552 of the Federal Rules of Criminal Procedure. But this answer, because it fails to distinguish between the concepts of venue and vicinage, does not adequately deal with the issues concealed within the question. To reveal the hidden issues, it is helpful to think of the following situation. Let us assume that Congress, or the federal court, has designated the judicial district as a whole, or some smaller geographical area within a judicial district, as the vicinage. Let us further assume that the accused then is able to present absolutely incontrovertible proof that the citizens of the vicinage are so prejudiced against him, or have been so influenced by information received outside the courtroom, that the defendant will be unable to receive his sixth amendment right to an impartial jury and the confrontation of witnesses. Then concurrently, the accused also asserts his sixth amendment right to a jury of the vicinage as previously ascertained by Congress or the federal court. Because no impartial jury of the appropriate vicinage able to decide the case solely on the evidence presented during trial can be found, as established by the proof the accused has presented, he then requests that the federal judge dismiss the criminal charges, as the only effective remedy that can protect his constitutional rights under the sixth amendment.553 Must the federal judge grant the motion to dismiss, or can the government intervene at that point to request a change of vicinage in order to obtain, on behalf of the accused, a jury that will be impartial and decide the case only on the evidence presented during the trial?554

551 400 U.S. 505 (1971). *Rideau* and *Groppi* hold that a state must permit and grant a change of venue if necessary to insure the accused a trial by an impartial jury, which will decide the case on the evidence produced during the trial.
552 Although the language in the text refers only to Rule 21(a), which permits inter-district transfer on the ground of prejudice, it should not be forgotten that an intra-district transfer on the ground of prejudice, from one division within a judicial district to another, should be available under Rule 18 of the Federal Rules of Criminal Procedure. 1 Wechs, supra note 216, at § 305, p. 597. The comments in the text relating to Rule 21(a) should also be considered applicable to intra-district transfers for prejudice under Rule 18. See note 571 infra.
553 This presumes that other remedies, such as challenges at voir dire, sequestration of the jurors, or continuances until public passion and/or public interest subsides, have been considered and rejected, either on the ground of ineffectiveness or the violation of other constitutional rights possessed by the accused. See *Strunk v. United States*, 412 U.S. 434 (1973) (dismissal only effective remedy to protect an accused's constitutional right under the sixth amendment to a speedy trial).
554 It appears that only one federal case has been dismissed for the reason that the accused demanded trial by a jury of the vicinage but then established that no jury of the vicinage could meet the "impartiality" and "confrontation" requirements of the sixth amendment. *Transcript Dismissing Federal Indictment--Milwaukee 14, 28 Guild Prac. 101* (1970). Numerous state courts have considered the question asked in the text. As could be expected, the decisions reach contradictory results. *Compare In re Nelson*, 19 S.D. 214, 102 N.W. 885.
The answer must be that the federal judge must dismiss the criminal charges. The constitutional rights enumerated in the sixth amendment are conjunctive, not alternative, rights. The accused cannot be told that he can have either a jury of the vicinage, or an impartial jury with confrontation of witnesses, but not both. Moreover, the constitutional rights enumerated in the sixth amendment are provided for the benefit of the accused, to be foregone at his option. The prosecution is not permitted to invoke constitutional rights on behalf of the accused, especially when such invocation by the government means that the accused will be forced to surrender other constitutional rights. In the situation being discussed, to permit the government to invoke on behalf of the defendant the sixth amendment rights to an impartial jury and the confrontation of witnesses would necessitate the accused's surrender of the sixth amendment right to trial by a jury of the vicinage. Unless he "knowingly and intelligently" waives a constitutional right, he is entitled to all those listed in the sixth amendment.

However, this analysis itself may not present sufficient reason for the imposition of the remedy of dismissal, which would assuredly mean that, in certain instances, a guilty person would escape deserved punishment. Rather, the analysis presented is but a surface ripple evidencing deeper


556 In Delaney v. United States, 199 F.2d 107, 116 (1st Cir. 1952), the court of appeals stated: "Under the Sixth Amendment the accused enjoys the constitutional right to a speedy and public trial 'by an impartial jury of the State and district' wherein the alleged crimes are charged to have been committed—in this case the District of Massachusetts. The right to apply for a change of venue [under Rule 21(a)] is given for the defendant's benefit and at his option. He is not obligated to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed; and under the circumstances of this case we do not think that the defendant's appeal stands any worse for the failure on his part to apply for a change of venue." Cf. Simmons v. United States, 390 U.S. 377, 394 (1968) ("In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.") Harlan, J., majority opinion concerning assertion of fourth and fifth amendment rights). But see Bailey & Golding, Remedies for Prejudicial Publicity—Change of Venue and Continuance in Federal Criminal Procedure, 18 FED. B.J. 56 (1958).


currents relating to the interaction between the concept of vicinage and the tenet of democratic responsibility. When these deeper currents concerning this relationship are clearly recalled and properly applied to the situation depicted, then sufficient reasons for the imposition of the remedy of dismissal are found.558

Jurors of the vicinage are drawn from the community whose citizens have the responsibility to find the facts, to apply the law to the facts, and to serve as the conscience of the community. But jurors of the vicinage are only permitted to perform their functions in accordance with the sixth amendment. If the community from which the jurors of the vicinage are drawn is so inflamed with prejudice toward the accused, or so inundated with influences from outside the courtroom, that persons chosen from that community cannot perform their functions impartially and responsively to the legal evidence, as the sixth amendment requires, then the courts must vindicate the rights of the accused by dismissing the proceedings through which the community is attempting to convict him. The courts are not permitted to stand by idly while "lynch-mob rule" or "kangaroo justice" is dispensed to the accused under a thin veneer of compliance with constitutional standards. The trial must indeed be a trial as demanded by the Constitution under the sixth amendment; the trial cannot be a formalistic mask for illegality.559

At the same time, imposition of the remedy of dismissal, when the community from which the jurors of the vicinage are drawn refuses to abide by the relevant constitutional standards, makes clear to that community that the responsibility to act in accordance with constitutional standards is solely its responsibility. If the courts were to permit the gov-

558 Full discussion of the relationship between the concept of vicinage and the tenet of democratic responsibility is given in Part I(B)(S) and Part III(F) supra.

559 The classic statement of the constitutional principles expressed here is found in the language of the Supreme Court in Brown v. Mississippi, 297 U.S. 278, 285-86 (1936), where Mr. Chief Justice Hughes, for a unanimous Court, wrote: "But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. . . . Nor may a State, through action of its officers, contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' . . . And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' " Similar sentiments may be found in Rideau v. Louisiana, 373 U.S. 723, 726 (1963).
ernment to obtain a change of vicinage, then the community in which the
crime was committed could avoid having to come to terms with actions of
its citizens, because no matter how unlawfully they acted, the community
would suffer no detrimental consequences from their impermissible actions.
On the contrary, another community, unrelated to the crime, would thereby
be forced to shoulder the burdens of the trial, including the burden of
providing responsible jurors, because the community where the crime was
committed has been allowed to evade its responsibilities.

Furthermore, unlike the ouster of federal judicial power discussed
in Part IV(B)(1), for which the accused through participation in rebel-
lion, or a foreign enemy through occupation, can be held responsible, the
imposition of the remedy of dismissal in this situation is the result of
actions attributable to the community in which the crime was committed.

Should the remedy of dismissal be available, the sources of the prejudicial or improper
extrajudicial information resulting in the impossibility of obtaining an impartial jury of the
vicinage capable of deciding the case upon the evidence presented in court—whether the sources
are governmental officials involved in the prosecution, or the news media within the community
—will be charged with that responsibility by the community. The possibility that the federal
court may require that charges be dismissed would create more individual responsibility within
the governmental staff and the news media, certainly greater than that created by the knowledge
that the prejudicial or improper extrajudicial information could lead to, at the “worst,” a
change of vicinage. It could be anticipated that these sources would act with greater self-
restraint should the federal courts dismiss charges in cases where it is impossible to obtain a
jury of the vicinage capable of acting in accordance with the sixth amendment standards of
“impartiality” and “confrontation of witnesses.”

Even assuming that the remedy of dismissal does not provide an incentive to govern-
mental officials or news personnel to respect the defendant’s constitutional rights, the remedy
of dismissal does provide an incentive to the community to hold those persons accountable who
caused the dismissal through their actions. With respect to appointed governmental officials,
such as the United States Attorney or the United States marshal, the citizens of the community
can complain to the appropriate authority to have the official’s commission revoked if he can-
not, or will not, abide by constitutional standards relating to prosecution functions. With respect
to the news media, citizens of the community can complain through letters to the editor or equal
time editorials in the broadcast media; or, ultimately, the citizens can exercise their power as
consumers to cease purchasing from or advertising in that media until it exhibits a sense of
responsibility to the community it claims to serve. See Rideau v. Louisiana, 373 U.S. 723 (1963)
(official misconduct, abetted by news media irresponsibility, arising in a state prosecution).

One other consequence flowing from the remedy of dismissal with respect to the interplay
between “free press” and “fair trial” should be mentioned. So long as the remedy of dismissal
is available, no conflict exists between the first amendment rights of freedom of the press and
the sixth amendment rights to an impartial jury and the confrontation of witnesses. The news
media can be left totally unfettered because the accused’s sixth amendment rights can be com-
pletely vindicated through dismissal of the charges. Methods of court intervention, such as a
“gag order,” would no longer be necessary to instill responsibility in the news media. Due to
the remedy of dismissal, responsibility will be instilled either through editorial self-restraint or
citizen complaints and actions. Both self-imposed responsibility and communally imposed
responsibility upon the news media avoid judicial interference with the first amendment rights
of freedom of the press. Court action is not needed except to rule upon a motion for dismissal
Although the accused may well have committed the criminal acts with which he is charged, he is not responsible for the inundation of the citizenry with information which inflames prejudice or precludes a verdict based on the legal evidence. The source of this prejudicial or improper extrajudicial information is to be found in the mores of the community or the selfish interests of particular individuals or groups within the community. By refusing to permit a change of vicinage, the courts force the community to confront those prejudices and selfish interests in order to expose them and to control them. Through this confrontation, the community is forced to accept ultimate political accountability for the institutions through which it governs itself. Although the dismissal of the case is a harsh alternative, it is preferable that the community be required to accept ultimate political accountability for its governing institutions, than that it be permitted to evade the responsibility through a change of vicinage.

Once it is understood that an accused, via a motion to dismiss, can insist upon his sixth amendment right to a jury of the vicinage, then it becomes possible to understand properly the motion for change of venue under Rule 21(a) and the decisions of Rideau v. Louisiana and Groppi v. Wisconsin because it is now possible to contrast the constitutional violation and the standard of proof involved in the motion to dismiss with those involved in a Rule 21(a) motion. When the accused files a motion to dismiss, he is required to establish that the community designated as the vicinage is so prejudiced against him, or so inundated with improper extrajudicial information that would preclude a decision based

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561 The comment in the text assumes that the accused has not generated the prejudicial or improper extrajudicial information upon which the motion for dismissal is based. If the accused has generated the information, either personally or through an agent, an argument could be made that the accused's actions indicate a waiver of the sixth amendment rights relating to impartiality of jurors and the confrontation of witnesses at trial. Cf. Illinois v. Allen, 397 U.S. 337 (1970).

562 See notes 454, 459, and 560 supra.

563 Fed. R. Crim. P. 21(a) provides: "The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district."


566 In the only federal case in which a motion to dismiss has been granted on the ground that no jury of the vicinage could meet the "impartiality" and "confrontation" requirements of the sixth amendment, United States District Judge Gordon of the Eastern District of Wisconsin recognized that a distinction should be drawn between a motion for dismissal and a Rule 21(a) motion, but Judge Gordon did not clearly articulate the constitutional basis for the distinction. Transcript Dismissing Federal Indictment—Milwaukee 14, 28 Guild Prac. 101, 102 (1970).
on the legal evidence, that no jury meeting sixth amendment constitutional standards can be sworn to try the case. By contrast, when the accused files a motion under Rule 21(a), he is required to establish that the likelihood of prejudice or improper extrajudicial information influencing the jurors of the vicinage is so great that he cannot, under the standards of due process set forth in Rideau and Groppi, be required to accept the risk of jury misconduct.\textsuperscript{667}

In terms of the flow of events in the federal criminal justice system, the comments of the preceding paragraph have the following consequences. If the accused files a motion to dismiss and the motion is denied, the accused can then proceed to trial before a jury of the vicinage. The decision to proceed should be interpreted as a waiver by the accused of the use of the motion available under Rule 21(a).\textsuperscript{668} If the accused then appeals the denial of the motion to dismiss, the legal issue on appeal will be whether the accused presented sufficient proof to support the motion to dismiss; if the appellate court determines that the proof does establish that no jury of the vicinage able to function in accordance with the sixth amendment could have been sworn, the appellate court must reverse and remand with instructions to dismiss. In contradistinction, if the accused files a motion under Rule 21(a), regardless of when the motion is filed, then the decision to file a Rule 21(a) motion should be interpreted as a waiver by the accused of his sixth amendment right to a jury of the vicinage upon which he could insist through a motion to dismiss. If the Rule 21(a) motion is denied, then on appeal the legal issue will be whether the accused presented sufficient evidence to establish such a great likelihood of prejudicial or improper extrajudicial information influencing the jurors of the vicinage

\textsuperscript{567}Although both the Rideau and Groppi decisions concerning an accused's constitutional right to a change of venue are based on the due process clause of the fourteenth amendment, assuredly the due process clause of the fifth amendment would be interpreted to require the same constitutional standards for change of venue in federal cases. Hence, a motion for change of venue under Rule 21(a) is, at its core, a claim that failure to grant the motion would result in a denial of due process under the fifth amendment.

Professor Wright correctly comments in his treatise that the standard of proof required to obtain relief under Rule 21(a) is a standard of likelihood of prejudice. 1 Wright, supra note 216, at § 342, pp. 622-23. Professor Wright does not, however, discuss the motion to dismiss because the remedy of dismissal only becomes relevant if the accused's right to trial by a jury of the vicinage is recalled.

\textsuperscript{568}At the pretrial stage, however, the motion to dismiss and the motion for change of venue are compatible motions. Even if the accused fails to present evidence sufficient to merit the standard of proof required to obtain the remedy of dismissal, the same evidence may be sufficient to meet the lesser standard of proof required to obtain a change of venue. Denial of the motion to dismiss does not preclude the federal court from considering a motion for change of venue, if timely filed under Rule 22 of the Federal Rules of Criminal Procedure, should the accused decide to pursue his rights under Rule 21(a). Cf. 1 Wright, supra note 216, at § 342, p. 627, § 361, p. 650.
that he should not be forced to undergo that risk at trial. If the appellate court determines that the proof was sufficient to establish the Rule 21(a) allegations, then the court should reverse and remand with instructions to grant the Rule 21(a) motion.\(^{569}\)

\(^{569}\) Although both Rideau v. Louisiana, 373 U.S. 723 (1963), and Groppi v. Wisconsin, 400 U.S. 505 (1971), involve appeals from state, as opposed to federal, convictions, the comments in the text concerning the distinctions between the motion to dismiss under the the sixth amendment and the motion for change of venue under Rule 21(a) help clarify the majority and dissenting opinions in those cases.

In *Rideau*, Justice Stewart, writing for the majority, held that the Supreme Court did not need to examine a transcript of the voir dire examination in order to decide whether the defendant was entitled to a change of venue under the due process clause of the fourteenth amendment. Justice Clark, for the dissenters, argued that no violation of due process could be established unless it was established through the record of the voir dire examination that the defendant had suffered prejudice because of those selected to serve as the petit jurors.

In *Groppi*, Justice Stewart, again for the majority, concluded that a state must accord an accused the opportunity in every case to show that a change of venue is required to protect his due process rights under the fourteenth amendment. Dissenting Justice Black contended that the state was not constitutionally required to provide a change of venue procedure because a motion for continuance, challenges at voir dire, and a motion for new trial were adequate remedies to protect the defendant's sixth amendment rights.

The disagreement between the majority and minority opinions in these two cases rests on the failure to articulate clearly the constitutional violation involved in the cases and the standard of proof required to establish that the constitutional violation has occurred. Both Rideau and Groppi, it must be emphasized, sought relief through a motion for change of venue. Such motion only requires that the defendant establish such a *likelihood* of prejudicial and improper extrajudicial information influencing the jurors of the vicinage that he cannot be forced to undergo that risk at trial. Once he has met that standard of proof, the due process clause of the fifth and fourteenth amendments mandates that he be permitted trial before jurors chosen from a community unrelated to the crime.

In light of the relief sought by Rideau and Groppi, the majority opinions of Justice Stewart in these two cases reach the correct conclusion. In every prosecution, the defendant should be permitted to raise the claim that a due process violation will occur unless a motion for a change of venue is granted so as to obtain impartial petit jurors who can decide the case upon evidence presented during the trial. Moreover, the requisite standard of proof could be met by the accused's evidence without ever reaching the voir dire stage of the criminal prosecution. The accused may well be able to show that the amount of prejudicial and improper extrajudicial information reaching the citizens of the vicinage is so great that the court does not need to question potential jurors in order to reach the conclusion that the likelihood of jury misconduct establishing the due process violation has been proven.

On the other hand, if the relief sought by Rideau and Groppi had been the remedy of dismissal, then the dissenting opinions of Justice Clark and Justice Black would be correct. By filing a motion for dismissal, the accused does not assert a due process claim under the fifth or fourteenth amendments, but rather a claim to all the rights of jury trial provided by the sixth amendment—the right to a jury of the vicinage, the right to an impartial jury, and the right that the jury render a verdict based upon evidence presented during the trial. Here the defendant must prove that no jury of the vicinage can meet the impartiality and confrontation requirements of the sixth amendment. Since the standard of proof for the remedy of dismissal requires evidence that no jury of the vicinage meeting sixth amendment standards can be sworn, Justice Clark would be correct that that standard cannot be met until after the court has attempted to impanel a petit jury through the voir dire process. Only if the voir dire process
From what has been said about the distinction between the motion to dismiss and the Rule 21(a) motion, it is also now evident that the motion under Rule 21(a) is, in truth, a motion for change of vicinage, not a motion for change of venue.570 Under Rule 21(a), the accused is presenting proof to support his claim that he should not be tried by a jury of the vicinage, as ordinarily required by the sixth amendment, but rather by a jury from a community unrelated to the crime. If the evidence presented in support of the Rule 21(a) motion established the great likelihood of prejudicial or improper extrajudicial information influencing the jurors of the vicinage, then the accused has presented a compelling reason why the citizens of the vicinage should be deprived of their constitutional right to serve as the petit jurors to try crimes committed in their community, and why the burdens of jury service should be imposed upon citizens of another community unrelated to the crime.571 Moreover, while successful establish-

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570 Because the concept of vicinage has been forgotten, judges, lawyers, and law professors have used the terminology "change of venue" to refer to the motion authorized by Rule 21(a). While such denomination of the Rule 21(a) motion may be permissible, due to this past history concerning the concept of vicinage, neither this past history nor present terminology can alter the fact that Rule 21(a) is a motion for a change of vicinage. When a defendant files a motion under Rule 21(a), he is not seeking a different location at which to conduct the trial for reasons relating to a convenient and expeditious handling of the criminal charges—the policy reasons underpinning the concept of venue. Rather, he is seeking a different geographical area from which to summon the jurors because the citizens of the vicinage have been subjected to prejudicial or improper extrajudicial information. Under a Rule 21(a) motion, arguments are presented relating to the proper functioning of the jury as an institution—the policy reasons underpinning the concept of vicinage. Cf. 1 Wright, supra note 216, at § 345, pp. 644-45.

571 When the Advisory Committee on the Federal Rules of Criminal Procedure drafted Rule 21(a) in 1946, it apparently believed that Rule 21(a) introduced an entirely new procedure...
ment of the motion for change of vicinage under Rule 21 (a) would usually also result in a change of venue, a change of venue is not a necessary consequence of a change of vicinage because venue and vicinage are independent concepts. Hence, an accused could successfully establish the need for a change in the geographical source of the jurors, due to the likelihood of prejudicial or improper extrajudicial information influencing the citizens of the vicinage, but at the same time establish under Rule 18 that reasons of convenience to "defendant and the witnesses" indicate that the trial should remain in the judicial district where the crime was committed. Under these conditions of proof, the consequence would be that the federal district court, possessing plenary criminal jurisdiction devoid of territorial restrictions, would order that jurors be summoned from another judicial district for jury service in the judicial district where the crime was committed.

572 Indeed, the wording of Rule 21(a) may make it mandatory that if the accused successfully establishes the need for a change in the geographical source from which to summon the jurors (a change of vicinage), then the location at which the trial will be conducted must also be changed to the place from which the jurors will now be selected (a change in venue). See note 563 supra.

573 Graham v. United States, 257 F.2d 724 (6th Cir. 1958). See generally Note, Community Hostility and the Right to an Impartial Jury, 60 Colum. L. Rev. 349, 365-67 (1950); Note, The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury, 42 Notre Dame Law. 925, 940 (1966). Normally, of course, these conditions of proof do not exist. The improper influences that convinced the court that the citizens of the vicinage could not be permitted to serve as the petit jurors would likely continue to exist in the vicinage even after the "foreign" jurors had been summoned from another judicial district. The court might conclude, therefore, that importation of "foreign" jurors would not be desirable because they could not adequately be insulated from these improper influences. Moreover, the costs and inconveniences involved may well convince the court that it is better to transfer the trial to the judicial district from which the jurors will now be summoned. See note 572 supra.

A defendant may, in certain instances, desire a change of venue without desiring a change of vicinage. For example, although satisfied with citizens of the vicinage serving as the petit jurors, he may be able to establish that a hostile atmosphere exists in the community where
3. Motion for Change of Venue for Reasons of Convenience by Defendant

As the history of the statutes and rules governing venue in criminal proceedings has indicated, the trend has been toward greater protection of the defendant's interest in a convenient and expeditious handling of the criminal charges against him. The draftsmen of the Rules of Criminal Procedure have especially recalled the reasons for which the early Americans were desirous that venue be limited—to control the ability of the government to make it expensive and inconvenient to defend against a criminal accusation by conducting the prosecution in some distant location. Of immediate concern are two particular rules of criminal procedure that evidence the desire of the drafters of the rules to permit a defendant to obtain an expeditious and convenient trial. Rule 19, which was rescinded in 1966, permitted an accused to obtain a change of venue from the division of the judicial district in which the crime was committed to another division of a judicial district simply by consenting to the conduct of the particular proceeding in the other division. Rule 21(b),

the crime was committed that might prevent the jurors of the vicinage from deliberating in an appropriately dispassionate atmosphere. In these circumstances, he would request that a change of venue be granted so that the jurors of the vicinage would be removed to another location where the hostile atmosphere present in the vicinage does not exist. For a similar remedy available to the government, see text accompanying note 546 supra.

See Part III(B) and (D) supra, text accompanying notes 242-269 and 325-337.

See Part I(A)(3).

From 1946 until 1966, Rule 19 read as follows: "In a district consisting of two or more divisions the arraignment may be had, a plea entered, the trial conducted or sentence imposed, if the defendant consents, in any division and at any time." Rule 19 was necessary because Rule 18, as originally drafted, required the prosecution to be conducted in the division in which the crime was committed. When divisional venue was repealed in 1966, the federal district courts were then given the power to set the place of prosecution anywhere within the judicial district where the crime was committed, so long as the place was chosen with "due regard to the convenience of the defendant and the witnesses." With the amendments of Rule 18 in 1966, Rule 19 was rescinded as unnecessary.

Rule 19, permitting intra-district transfers between divisions, was a restatement of a similar provision contained in Section 53 of the Judicial Code of 1911. In turn, the intra-district transfer provision of Section 53 had been patterned after a provision authorizing transfers between certain divisions in the Western District of Arkansas. Act of June 2, 1906, ch. 2569, § 2, 34 Stat. 206. In the report accompanying Section 53 as proposed, the Special Committee had stated: "The purpose of this latter [intra-district transfer] provision is to facilitate the early disposition of criminal cases, especially in minor cases, where the defendant is unable to give bail, and may, in view of the fact that in many divisions but one term of court is held each year, possibly be compelled to remain in jail nearly a year before a trial may be had or before an opportunity will present itself for him to plead guilty." H.R. Doc. No. 743, 61st Cong., 2d Sess., 29 (1910). Although the discussion in the text makes reference only to intra-district transfers under Rule 19, the comments concerning intra-district transfer for reasons of convenience made in the text are also applicable to such transfers under Rule 18. See note 584 infra.
as amended after 1966, permits an accused to obtain a change of venue from the judicial district in which the crime was committed to another judicial district, irrespective of whether the crime or an element of the crime was committed in the other judicial district, upon proof of the "convenience of parties and witnesses, and in the interest of justice."

When Rules 19 and 21(b) are considered in conjunction with the concept of vicinage, the following situation arises. Because prior to 1966 Rule 18 required the trial to be conducted in the division in which the crime was committed, while after 1966 Rule 18 has required that it be conducted in the judicial district in which the crime was committed, without the change of venue provisions of Rule 19 and Rule 21(b) the defendant would be precluded, in those instances when the crime was committed solely within one division or one judicial district, from arguing for another division or district as a better place at which to conduct the trial. However, if Congress or the federal court has designated the divisions within a judicial district as the vicinage, or if Congress or the federal court has designated the judicial district in its entirety as the vicinage, then the change of venue authorized by Rules 19 and 21(b) could be interpreted to permit the defendant, when the rules are found to be applicable, to obtain a jury composed of persons who are resident citizens, not of the vicinage as had been previously ascertained, but of communities unrelated to the crime. Is an accused entitled to obtain a change of venue, based on reasons of convenience, when the consequence of that change of venue is that citizens from a community unrelated to the crime are utilized as the petit jurors?

In light of the distinctions between the concept of venue and the concept of vicinage, and the reasons for the protection of the jury of the vicinage in the sixth amendment, the answer to this question is no. In contrast with the prevention of the ouster of federal judicial power, which is the only compelling reason that permits the government to obtain an

577 Since 1966, Rule 21(b) has read: "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district." Prior to 1966, interdistrict transfer under Rule 21(b) had been permitted only if the offense had been committed in more than one judicial district and only between the districts in which the offense had been committed. The amendments to Rule 21(b) adopted in 1966 were meant to authorize the federal district court, in every instance, to select the most convenient forum for the trial, upon the defendant's initial request for transfer. 1 WRIGHT, supra note 216, at § 343, pp. 629-34; Advisory Comm. on Rules of Criminal Procedure, Notes to 1966 Amendment, in 3 WRIGHT, id. at 477. Part IV(B)(3) discusses only the situation in which it can be said that a crime has been committed solely in one division (Rule 19 transfer), or solely in one judicial district (Rule 21(b) transfer). See the discussion in Part IV(C), infra, on crimes committed in more than one division of a judicial district, or more than one judicial district (the 1946 Rule 21(b) transfer).
expansion in the geographical source of the jurors, and in contrast with the prevention of the danger of prejudicial or improper extrajudicial information influencing the jurors of the vicinage, which presents a compelling reason for the defendant under Rule 21 (a) to obtain a change in the geographical source of the jurors, reasons of convenience for the defendant are not compelling reasons entitling the accused to a change in the geographical source of the jurors.

Defendant cannot argue that Rules 19 and 21 (b) simply implement his constitutional right not to be tried far from his place of residence, because an accused's place of residence is irrelevant under the Constitution. While the draftsmen of Article III, Section 2, clause 3, which sets the maximum venue as the state, and of the sixth amendment, which sets the maximum vicinage as the judicial district, assumed that the place of commission of the crime and the place of residence of the accused would usually be identical, the test adopted for constitutional venue and constitutional vicinage was not the place of residence of the accused. The test purposefully and informedly adopted for constitutional venue and constitutional vicinage was the place of the commission of the crime.578

Nor can defendant argue that the policy considerations—considerations of an expeditious and convenient handling of criminal charges—underpinning the concept of venue as embodied in Article III, Section 2, clause 3 coincide with the considerations of an expeditious and convenient handling of criminal charges infusing the venue provisions of Rules 19 and 21 (b). Under either rule it is possible for an accused to argue for a change of venue by listing as the reason for the change the accused's convenience: the fact that his attorney and character witnesses live in another community, or that the change would permit the defendant an earlier trial date.579 It would be correct to comment, however, that those reasons of convenience listed by the accused are not the reasons of convenience Article III, Section 2, clause 3 meant to encompass. Under Article III, Section 2, clause 3, the policy considerations underpinning venue are specifically adapted to considerations of an expeditious and conven-

578 The draftsmen of Article III, Section 2, clause 3 and the sixth amendment purposefully adopted the place of the commission of the crime as the appropriate test because they considered crimes to be “local” to the court possessing jurisdiction over the territory where the crime was committed, and to be “local” to the citizens who would serve as the petit jurors for the community where the crime was committed. See text accompanying notes 27-30 and 144-145, Part I. The distinction between the accused's place of residence and the place of the commission of the crime was specifically mentioned both at the Constitutional Convention in 1787 and in the debates concerning the concept of vicinage which occurred in the Virginia ratification convention. I Elliott, supra note 545, at 177 (Resolution of Mr. Patterson); IV id., at 547 (Comments of Mr. Pendleton).

579 See generally 1 Wright, supra note 216, at § 344, pp. 635-43. See note 576 supra.
ient handling of the criminal charges at the place of the commission of the crime. Hence, the clause contemplates the place of the commission of the crime as the convenient, expeditious location for trial because at that place would most likely be found the evidence about the crime, the victim of the crime, and the actual witnesses to the crime, which should normally permit an inexpensive and easy investigation and presentation of the case for both the prosecution and the defense. In light of the reasons of convenience considered relevant by this clause, it seems clear that the constitutional venue provision does not contemplate that the evidence, the victim, and the witnesses should be taken from the community in which the crime was committed to another community considered more desirable by the defendant. Such a change of venue at the behest of the defendant will simply mean, in almost all cases, that the costs and the delays prior to completion of the prosecution will be greater for all concerned. On the contrary, Article III, Section 2, clause 3 contemplates that the accused, the defense attorney, and the character witnesses, if these people live in another community, are the persons who must travel to the community where the crime was committed.580

Yet, it is not argued, based on the conflict between the concepts of convenient venue found in Article III, Section 2, clause 3, and in Rules 19 and 21(b) as presently written, that these rules are unconstitutional. Because the concept of venue, as distinct from that of jurisdiction, has been held subject to waiver by an accused, no such argument can be made.581 It is submitted, however, that if Rule 19, as it existed prior to 1966, and Rule 21(b), as presently written, are interpreted so as to permit an accused to obtain a change in the geographical source of the jurors through a change in venue, then Rule 19 and Rule 21(b) are unconstitutional because their provisions violate the concept of vicinage embodied in the sixth amendment. Under the sixth amendment, persons who are residents of the vicinage, as previously ascertained by Congress or the federal court, are the persons who possess the constitutional right to serve as petit jurors for crimes committed in the vicinage.582 Jurors of the vicinage, not jurors from a community unrelated to the crime, are the ones who have the constitutional responsibility to find the facts, to apply the law to the facts, and to serve as the conscience of the community.583 Although he can waive

580 A more complete discussion of the policy reasons underpinning the adoption of Article III, Section 2, clause 3 is given in Part I(A) (3).
581 Hagner v. United States, 54 F.2d 446 (D.C. Cir. 1931); Silverberg v. United States, 4 F.2d 908 (5th Cir. 1925). See generally 1 WRIGHT, supra note 216, at § 306, pp. 598-601. See Part III(A) supra.
582 See authorities in Part IV(A) (1) and (2) supra.
583 See Part I(B) (3) and Part III(F) supra.
his rights of venue, an accused is not entitled to waive the constitutional rights of the citizens of the vicinage to serve as petit jurors with respect to crimes committed in the vicinage, unless the accused can present a compelling reason why such rights should be abrogated. So long as the jurors of the vicinage are able to perform as impartial jurors who can decide the case upon the evidence presented in the courtroom, the responsibilities of jury service cannot be taken from them and imposed upon citizens of another community unrelated to the crime. Reasons of convenience, in contrast to reasons of prejudice under Rule 21(a), do not establish that citizens of the vicinage are unable to fulfill properly their constitutional responsibilities as jurors. Rules 19 and 21(b), by permitting the accused to obtain a change in the geographical source of the jurors without establishing a compelling reason for so doing, are, therefore, in violation of the sixth amendment to the United States Constitution. 584

584 Of course, the accused does have a right to waive trial by jury or to plead guilty. Patton v. United States, 281 U.S. 276 (1930). But, if he desires a trial by jury, then the petit jurors must be chosen from the vicinage unless he can present a compelling reason for depriving the citizens of the vicinage of their constitutional right to serve as petit jurors for crimes committed in the vicinage. Through the use of Rule 19 or Rule 21(b), the defendant is permitted, as an attendant consequence of the change of venue, to obtain a trial utilizing jurors from a community unrelated to the crime, solely upon proof relating to a convenient and expeditious handling of the criminal charges from the defendant's viewpoint. Reasons of convenience to him, however, are not compelling reasons for depriving the citizens of the vicinage of their constitutional rights. Similarly, if the defendant cannot inadvertently waive the constitutional rights of the citizens of the vicinage, he cannot inadvertently waive the constitutional rights of the citizens of the vicinage through his failure to object to improper vicinage. United States v. Strewl, 99 F.2d 474 (2d Cir. 1938).

For the identical reason that Rules 19 and 21(b) are unconstitutional, 18 U.S.C. § 3237(b) (1970) is also unconstitutional. Under this section, the defendant is permitted as a matter of right, in certain enumerated instances, to obtain a change of venue from the judicial district in which the offense was committed to the judicial district in which he resides. While it often occurs that the place of residence of the accused and the place of commission of the crime coincide, as has already been shown, if the two do not coincide, then the place of the residence of the accused is constitutionally irrelevant. The appropriate test chosen by the draftsmen of the Constitution was the place of the commission of the crime. See text accompanying note 578 supra. By adopting Section 3237(b), Congress has completely annulled the appropriate constitutional test and has permitted an accused to change the geographical source of the jurors without presenting a compelling reason for so doing. Permitting the defendant to obtain a change of vicinage, as an attendant consequence of a mandatory change of venue, for a non-compelling reason violates the concept of vicinage embodied in the sixth amendment. See generally 1 WRIGHT, supra note 216, at § 301, pp. 582-83; S. Rep. No. 1952, 85th Cong., 2d Sess., in 2 U.S. CODE CONG. & ADNMT. NEWS 3261 (1958). See note 608, infra.

These comments indicate why Rule 20 of the Federal Rules of Criminal Procedure is constitutional. Under Rule 20, a defendant may plead guilty in the judicial district in which he is arrested, held, or present without having to be removed to the judicial district where the crime was committed. By pleading guilty, of course, no jury is utilized, and so the procedures of Rule 20 do not permit the substitution of citizens from a community unrelated to the crime as petit jurors, as is done under Rule 19, Rule 21(b), and Section 3237(b). Indeed, if the defendant then decides to plead not guilty, Rule 20(c) requires the case to be returned to the
Even if this argument were not accepted, recollection of the concept of vicinage does provide new insight into the appropriate relationship between these two rules and Rule 23 of the Federal Rules of Criminal Procedure. Under Rule 23, an accused is permitted to waive trial by jury, but only with the consent of the court and the government. When a defendant challenged this consent requirement on constitutional grounds in Singer v. United States, the Supreme Court unanimously responded:

In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.

While the conclusions reached by the Supreme Court are correct, this quotation demands amplification by recalling the concept of vicinage. Once vicinage is recalled, then the quotation should be amended to read that an accused only has a constitutional right to an impartial jury of the vicinage judicial district in which the crime was committed. Furthermore, because the 1906 statute relating to judicial procedures in the Western District of Arkansas, the initial source of Rule 19, had limited transfers to those situations in which the defendant desired to plead guilty, the 1906 statute is actually more closely related to Rule 20 than to Rule 19. See note 576 supra.

Rule 19, Rule 21(b), and Section 3237(b) could be interpreted to permit a change of venue without permitting a change of vicinage. This would mean that Congress had decided as a matter of policy under Section 3237(b), and the defendant was allowed to prove under Rules 19 and 21(b), that a court-city outside the geographical boundaries of the vicinage was the most convenient place at which to conduct the trial, even though the jurors would have to be summoned from the vicinage. By bringing the jurors from the vicinage, as previously ascertained in accordance with the sixth amendment, the unconstitutional consequence presently attending the application of Rules 19, 21(b), and Section 3237(b) would be avoided. See text accompanying notes 521-524 supra. Refer to note 573 supra for an analogous interpretation of Rule 21(a).

585 Fed. R. Crim. P. 23 reads: "(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." See generally 2 Wright, supra note 216, at §§ 371-72, pp. 4-11.


587 Id. at 36.
and that the government's interest in seeing the case tried before the tribunal most likely to reach a fair result means the tribunal of the jury of the vicinage.\textsuperscript{588}

When this amended statement from Singer is considered in conjunction with a motion for change of venue under Rules 19 and 21(b), then it becomes clear that the use of these two rules to obtain a change in the geographical source of the jurors does involve an attempted waiver of the right to trial by jury of the vicinage. Hence, even if reasons of convenience, in contrast to reasons of prejudice covered by Rule 21(a), were to be deemed by the courts as sufficient reasons to permit an accused to obtain a change in the geographical source of the jurors, via Rules 19 and 21(b), the federal court could not grant the motion for change of venue without determining whether the court and the prosecutor, as required by Rule 23, consented to the waiver of this right. And, under the Singer decision, such consent may be hard to obtain, for no matter the reasons of convenience given by the accused for desiring to waive the jury of the vicinage, the court or the prosecutor cannot be forced to give consent.\textsuperscript{89}

C. The Concept of Vicinage and the "Crime Committed" Formula

As explicated in Part III(D), the concept of the locality of the crime was originally subsumed within the concept of jurisdiction. As jurisdiction became distinguished from venue, the concept of the locality of the crime came in turn to be subsumed within the concept of venue. Through this process, the concept of the locality of the crime suffered several conse-

\textsuperscript{588} The reasons the draftsmen of the sixth amendment considered a jury of the vicinage the tribunal most likely to produce a fair and just result are discussed in Part I(A) (5) and Part III(F) supra.

\textsuperscript{89} Singer v. United States, 380 U.S. 24, 37 (1965): "In upholding the validity of Rule 23(a), we reiterate . . . that the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer.' It was in light of this concept of the role of prosecutor that Rule 23(a) was framed, and we are confident that it is in this light that it will continue to be invoked by government attorneys. Because of this confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor should we assume that federal prosecutors would demand a jury trial for an ignoble purpose. We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial . . . However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case, and petitioner does not claim that it is." The distinction, for purposes of Rule 23(a), the Supreme Court is making between reasons of prejudice and reasons of convenience is very supportive of the argument presented in Part IV(B) (2) and (3), that reasons of prejudice are compelling reasons for granting a change of vicinage, while reasons of convenience are not. Cf. 1 Wright, supra note 216, at § 345, p. 645; id. at § 372, p. 9.
quences: (1) During the period that the concept of the locality of the crime was subsumed within the concept of jurisdiction, the Supreme Court basically upheld an unlimited power of Congress to define where a crime had been committed. Because Congress has the power to confer jurisdiction upon the federal courts, so long as it had declared that a particular crime had been committed, begun, completed, or continued in a particular judicial district, the federal trial court sitting in that judicial district had jurisdiction with respect to that crime. (2) After the federal district courts were granted plenary jurisdiction with respect to all federal crimes in the Judicial Code of 1911, and after the concepts of venue and jurisdiction were determined to be distinguishable notions with the concept of venue waiverable by an accused, the concept of the locality of the crime, now classified as a species of venue, also became subject to waiver by an accused. (3) Once a crime could be adjudicated by any federal district court, with the particular district court that should exercise its power a question of venue subject to waiver by an accused, then the only limitation on prosecuting a crime anywhere in the federal judicial system was the rule that the prosecution would remain in the judicial district in which initiated by the United States Attorney, so long as that attorney had initiated the prosecution in a judicial district in which Congress had declared the crime had been committed, begun, completed, or continued. Because this rule permitting the government to make the final selection as to the place of trial, even when the prosecution could have been initiated in several districts, provided the possibility of prosecutorial abuse, the drafters of the Federal Rules of Criminal Procedure introduced rules permitting the transfer of a prosecution to another judicial district upon application and appropriate proof by a defendant. Through the use of these transfer provisions, the defendant had acquired the power—controlled only by the discretionary ruling of the district court to grant or deny the motion for transfer—to ignore the concept of the locality of the crime.

As is also shown in Part III(D), however, these consequences reveal that the relationship between the concept of the locality of the crime and the jury of the vicinage—a relationship preserved in the sixth amendment—has been forgotten. When this relationship is recalled, our understanding of the "crime committed" formula is significantly altered.

1. **Limitations on the Power of Congress to Define Where a Crime Has Been Committed**

So long as the concept of the locality of the crime is classified as subsidiary to the concepts of jurisdiction and venue, legislators, judges,
lawyers, and law professors have focused upon the idea that a crime is considered local to a sovereign government both with respect to the territory within which the criminal statute is deemed applicable, and with respect to the court possessing delegated authority to conduct the prosecution of crime occurring in a particular portion of the government's territory. But when a crime is considered local to the territory over which a court exercises power, in a jurisdictional as opposed to a venue sense, then the considerations of an expeditious and convenient handling of criminal charges, which underpin the concept of venue, primarily emphasize that the place of the commission of the crime is the place at which most likely will be found the victim of the crime, the witnesses to the crime, and the evidence of the crime. These affiliating circumstances between the place of the commission of the crime and the place of trial are most often likely to promote considerations of convenience from the perspective of the government, for the government will then be able to investigate the crime and present the case with relative ease, accessibility, and economy.

The term "affiliating circumstances" is borrowed from von Mehren and Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121 (1966).

While a civil litigant is entitled to a trial by jury under the seventh amendment to the Constitution, the seventh amendment, in contrast to the sixth amendment dealing with criminal cases, does not contain an express vicinage limitation. The existence of an express vicinage provision in the sixth amendment assuredly reflects the much greater significance attached to the use of jurors in criminal litigation. As a result, one must be extremely careful not to transpose the concepts of jurisdiction and venue from civil litigation into the area of criminal litigation. While observing that caution, the author must acknowledge that the ideas expressed in Part IV(C) have been greatly stimulated and clarified by the cited article and F. James, Civil Procedure §§ 12.1, 12.7, 12.10-18, at pp. 613-20, 627-29, 644-72 respectively.

While the statement in the text is correct that the selection of the place of the commission of the crime as the place at which to conduct the trial is the selection of a trial forum usually more convenient to the government than to the defendant, no contradiction exists between this statement and the argument previously presented that the adoption of the place of the commission of the crime as the constitutional test by which to limit venue was done primarily to benefit defendants. Although the constitutional draftsmen specifically rejected the accused's place of residence as the test for venue, the draftsmen further considered the place of the commission of the crime as more advantageous to the accused than trial at a location distant from the place of the commission of the crime. See Part I(A)(3) and text accompanying notes 578-580 supra. The constitutional limitation on venue was adopted, therefore, so as to require the federal government to conduct the trial at the place at which the crime was committed. Without such limitation, the constitutional draftsmen feared that the federal government might pass statutes similar to those passed by Parliament immediately prior to the Revolutionary War that permitted American colonists to be transported great distances from the place of the commission of the crime for trial. See Part I(A)(1). Hence, even though the draftsmen of Article III, Section 3, must have been aware that the test for venue being adopted in the constitutional provision provided distinct advantages to the government, the immediate impetus for the adoption of the constitutional provision was to prevent abuse of venue by the government in order to protect defendants, rather than to select a test which favored governmental convenience with respect to the trial forum.

It should also be recalled that the colonists complained about the parliamentary enact-
After the concepts of jurisdiction and venue are distinguished, however, then a crime can no longer be considered local to the territory of a particular court because now any federal court possesses the jurisdiction to conduct the criminal proceedings. Although the previously mentioned considerations of convenience are still relevant with respect to the determination of which federal court should exercise its power in a particular instance, other considerations, particularly the consideration of convenience from the perspective of the defendant, can now be considered relevant also. Accordingly, considerations such as the residence of the accused, if different from the place at which the crime was committed, plus any other consideration the defendant feels important, can be weighed by a court to determine "in the interest of justice" where a suitable location for the trial exists. Moreover, because any federal court has jurisdiction over the crime, the crime is now considered local to the entire territorial expanse of the United States, throughout which the federal government maintains courts, judges, prosecutors, court clerks, marshals, and jails financed through public taxation. When a particularized location for trial favorable to the defendant is then compared to the power and resources of the government, it seems unfair to permit the government to make a final selection of the site of the trial. As a result, transfer provisions are adopted that afford the defendant's interests in a convenient and expeditious handling of the criminal charges much greater protection.

What has been ignored in this discussion, of course, is that a crime is not just considered local to the territorial expanse and courts of a

ments permitting trial at great distances from the place of the commission of the crime not only because they deprived the colonists of proper venue, but also because they deprived the colonists of a trial by a jury of the vicinage. Read text accompanying notes 5-16 and 43-47, Part I.

592 See generally Barber, supra note 263; Orfield, Transfer, supra note 269; Orfield, Venue of Federal Criminal Cases, 17 U. Pitt. L. Rev. 375 (1956).

593 The attitude expressed in the text is exemplified by a quotation from Professor Wright discussing proposed amendments to Rule 21 in 1964: "A new subdivision (c) would permit transfer of a case to a specified district, even though no offense was committed there, if the defendant so moves and the government consents. These are useful improvements on the present practice, but they do not go far enough. Thus the only proper venue for a charge of filing a false non-Communist affidavit under the Labor Relations Act is Washington, D.C. In such a case, all the witnesses may well be from a district in some other part of the country where the defendant resides, and the historic policy of venue is to permit defendant to be tried where he lives and where his defense will be most convenient for him. Yet, under the proposed amendments, the case could not be transferred to his home district unless the government consents. It is hard to see why the United States, which has prosecutors and investigators in every district, should have an absolute right to force trial at an inconvenient forum." Wright, Proposed Changes in Federal Civil, Criminal, and Appellate Procedure, 35 F.R.D. 317, 329 (1964). See 1 Wright, supra note 216, at § 343, pp. 630-34.
sovereign government. A crime also has always been considered local to the jurors of the vicinage because those jurors, in comparison to jurors chosen from any other community, are the ones best able to determine the facts, best able to articulate the standards of conduct existing in the relevant community, and best able to reflect the moral conscience of the relevant community. It is precisely this connection between a crime and the community whose citizens would serve as the petit jurors for that crime that the sixth amendment vicinage provision is meant to protect.\textsuperscript{594}

Once the relationship between the concept of the locality of the crime and the jurors of the vicinage, preserved by the sixth amendment, is recalled, it becomes clear that the place at which a crime is said to have been committed cannot be determined unless it is seen whether affiliating circumstances exist between the particular crime being located and the citizens who are being considered as the potential petit jurors for that particular crime. Hence, to determine the place at which a particular crime was committed, the following questions must be posed. Who are the citizens possessing, or likely to possess, the greatest amount of relevant information about the characters of the victim, defendant, witnesses, the incident itself, and the setting in which the incident occurred, that will insure the greatest likelihood that the truth about the crime will be found? Who are the citizens possessing a significant substantive law concern that their sense of justice be expressed in the interpretation of the law which will emerge in a general verdict? Who are the citizens possessing a significant sovereign concern as to whether the jury will intervene between the accused and the prosecution through a verdict of acquittal? If the answers to these three questions all signify the citizens of the same community, “previously ascertained” in accordance with the sixth amendment as the appropriate citizens to serve as the petit jurors with respect to a particular crime, then that crime has been committed in that community and those citizens are the persons from whom the jurors of the vicinage must be summoned under the sixth amendment.\textsuperscript{595}

\textsuperscript{594} See arguments and authorities presented in Part I(B)(4) and (5) and Part III(F), supra.

\textsuperscript{595} In light of the questions that must be posed before a crime can be “located,” it is obvious that the determination of the place of the commission of the crime raises fundamental issues about the allocation of power among the citizens to govern themselves through participation in the judicial system. However, if a person fails to realize that the place of the commission of the crime raises these fundamental issues through its relationship to the concept of vicinage and concomitantly thinks that the place of the commission of the crime only raises questions about a convenient forum through its relationship to the concept of venue, then it is possible to conclude that the “crime committed” test, prescribed by both Article III, Section 2, clause 3 and the sixth amendment, is a formalistic test often impeding a convenient and expeditious handling of criminal charges. E.g., Abrams, Conspiracy and Multi-Venue in Fed-
must be asked and answered before the place of the commission of the crime can be determined under the sixth amendment also reveals significant limitations on the power of Congress to define where a crime has been committed.

Section 3237(a) of Title 18 contains the following paragraph:

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

When this provision is compared to the constitutional requirements of the sixth amendment, it is submitted that the idea of a continuing offense must be declared unconstitutional. Passage of a particular mode of transportation or a particular piece of mail through a particular community, either the judicial district as a whole, or a smaller geographical area within the judicial district, which has been previously designated as a vicinage, is not in itself a sufficient affiliating circumstance between a crime and the citizens of that community to permit those citizens to be considered the jurors of the vicinage for that crime. For this reason, any interpretation of Section 3237(a) requiring or permitting the jurors to be summoned from the community through which the transportation or the mail merely passed would mean that Congress had exceeded its constitutional power under the sixth amendment to define where a crime was committed.

A similar analysis clarifies the proper relationship between the crime

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*Cf. State v. Anderson, 191 Mo. 134, 90 S.W. 95 (1905).*
of conspiracy and the community from whose citizens the jurors to try that crime should be summoned. Although it seems that the community in which the conspirators plan their eventual crime, and the community in which the conspirators do substantial acts to bring into fruition their design, are communities with sufficient affiliating circumstances to that crime so that their citizens can be used as the jurors of the vicinage, this does not mean that any minor overt act to further the conspiracy provides sufficient contacts between the crime and the community under the sixth amendment to permit that community to be defined as the place of the commission of the crime of conspiracy. Thus, for example, if three persons develop the design for the robbery of a federal bank located in the District of Kansas while residing in the Western District of Oklahoma, and then perform overt acts in the District of Kansas such as scouting escape routes, photographing the exterior of the bank, and entering the bank to determine its internal arrangement, it seems that either judicial district can permissibly be considered the place of the commission of the crime for purposes of the sixth amendment. But if one of the three conspirators visits the Southern District of Texas immediately prior to the planned performance of the crime, and while there calls via interstate telephone to inquire if the "job" is still scheduled, the overt act involving the telephone does not provide sufficient contact between the crime of conspiracy and the community of the Southern District of Texas to qualify that community as the place of the commission of the crime under the sixth amendment. Any requirement or attempt to use citizens from the Southern District of Texas as the petit jurors to try that crime of conspiracy should be ruled unconstitutional.\textsuperscript{599}

Another situation that illuminates a different facet of the limitation on the power of Congress to define where a crime was committed is found in the language of Article III, Section 2, clause 3 and the language of the sixth amendment. Under Article III, an accused is entitled to be tried in the "State" where the crime was committed, while under the sixth amendment the accused is entitled to be tried by a jury from the "State and district" where the crime was committed. But the final proviso of Article III, Section 2, clause 3 reads: "[B]ut when not committed within any State,\textsuperscript{699} Under the element analysis of the place of the commission of the crime, the Southern District of Texas would be a permissible vicinage because the overt act element—use of the telephone—had taken place in that district. Hyde v. United States, 225 U.S. 347 (1912); Hyde v. Shine, 199 U.S. 62 (1905). Such element analysis of the crime of conspiracy obviously provides the possibility for abuse. Abrams, Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula, 9 U.C.L.A. L. Rev. 751 (1962). Professor Abrams complained about this potential abuse, however, for reasons relating to proper venue, not, as is done in the text, for reasons relating to proper vicinage. See note 595 supra.
the Trial shall be at such Place or Places as the Congress may by Law have directed.\textsuperscript{600} Although the final proviso of Article III does not really empower Congress to define where a crime was committed, it produces that effect because when a crime is not committed in "any State," Congress is permitted to select any place as the geographical location at which the trial will be held and from which the jurors to try the crime will be summoned. In light of the use of the word "State" in the two relevant constitutional provisions, could Congress by law declare that all crimes committed in the District of Columbia or in the Commonwealth of Puerto Rico would henceforth be prosecuted in the Western District of Oklahoma by an impartial jury of the Western District of Oklahoma? In order to answer this question, it must be determined whether a specified geographical territory has been assimilated into the federal judicial system.

The most obvious method through which a geographical territory is assimilated into the federal judicial system is for that geographical area to be admitted into the Federal Union as a member state. Thus, when the United States Constitution was ratified by the required number of confederated states in 1789, Congress, in the First Session of the First Congress, assimilated these former confederated states into the federal judicial system through the adoption of the Judiciary Act of 1789. By the provisions of that Act, each former confederated state was constituted a judicial district, with federal courts exercising federal judicial power, and presided over by a federal judge possessing life tenure in the position.\textsuperscript{601}

But it should be recalled that from the very beginning of our nation, geographical territories that were not member states of the Federal Union have been assimilated into the federal judicial system. By the Judiciary Act of 1789, Kentucky and Maine were both constituted judicial districts, each with a federal court exercising federal judicial power and presided over by a federal judge possessing life tenure.\textsuperscript{602} By Congress' act assimila-

\textsuperscript{600} Congress first exercised this power in 1790. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113. An almost identical counterpart to the 1790 Act exists today in 18 U.S.C. § 3238 (1970). Section 3238 reads: "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." For interpretation of this statute, see United States v. Erdos, 474 F.2d 157 (4th Cir.), cert. denied, 414 U.S. 876 (1973); United States v. Jackalow, 66 U.S. (1 Black) 484 (1861); United States v. Bird, 24 F. Cas. 1148 (D. Mass. 1855) (No. 14,597).

\textsuperscript{601} Act of Sept. 24, 1789, ch. 20, §§ 2, 3, 4, 9, 11, 1 Stat. 73, 74, 76, 78.

\textsuperscript{602} Act of Sept. 24, 1789, ch. 20, §§ 2, 3, 10, 1 Stat. 73, 74, 77. Kentucky did not become a state until 1792, Maine, until 1820. President Washington presented nominations for the
lating Kentucky and Maine into the federal judicial system, the power granted to Congress by the final proviso of Article III, Section 2, clause 3 was withdrawn. Hence, despite the fact that Kentucky and Maine were not yet states of the Federal Union, after 1789 Congress could not direct that persons accused of federal crimes in those geographical areas would be prosecuted in another geographical location before a petit jury chosen from that other geographical area. With the passage of the Judiciary Act of 1789, the constitutional limitations with respect to venue and vicinage, embodied in Article III, Section 2, clause 3 and the sixth amendment, had attached to the geographical areas of Kentucky and Maine.

When these principles are applied in our modern context, it can be concluded that Congress does not have the power to direct that federal crimes committed in the District of Columbia or the Commonwealth of Puerto Rico can be prosecuted elsewhere by jurors summoned from another geographical area. Both the District of Columbia and the Commonwealth of Puerto Rico have been assimilated into the federal judicial system. Each has been constituted a judicial district, with a federal court exercising federal judicial power, presided over by a federal judge whose tenure is for life. Through this assimilation, Congress has declared, even positions of district judge to the Senate for approval on September 24 and 26, 1789. I ANNALS OF CONGRESS, 1st Cong., 1st Sess., 86, 90 (1789).

Due to this assimilation, the District of Columbia and the Commonwealth of Puerto Rico are not unorganized federal territories that Congress can attach to whatever judicial district it considers appropriate. See Cook v. United States, 138 U.S. 157 (1890); United States v. Dawson, 56 U.S. (15 How.) 467 (1853); Surrency, supra note 201, at 262 (Oklahoma). Moreover, the District of Columbia and the Commonwealth of Puerto Rico are also not geographical entities which Congress has organized into territories, possessing only territorial courts. Balzac v. Porto Rico, 258 U.S. 298 (1922); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1820); United States v. Newth, 149 F. 302 (W.D. Wash. 1906); United States v. Ta-Wan-Ga-Ca, 28 F. Cas. 18 (D. Ark. 1836) (No. 16,435); Surrency, supra note 201, at 180 (Florida), 192 (Idaho), 205 (Kansas), 224 (Mississippi), 241 (New Mexico). The status of Guam, Virgin Islands, Canal Zone, and Mariana Islands within the federal judicial system has not been researched.

if unknowingly, that persons accused of crimes in those geographical areas cannot be sent to a distant location, unrelated to the crime, for trial, and that the citizens of those geographical areas possess the constitutional right to serve as jurors of the vicinage for crimes committed in their respective communities. By this assimilation, any statute passed by Congress requiring or permitting the utilization of citizens from communities unrelated to the crime as the petit jurors for crimes committed in those geographical areas would violate the constitutionally protected relationship between the concept of the locality of the crime and the jurors of the vicinage as embodied in the sixth amendment.605

2. Forum Non Conveniens

It has been shown that the place where a crime has been committed cannot be determined, for purposes of the sixth amendment, unless questions probing the existence or nonexistence of affiliating circumstances between the alleged crime and the citizens being considered as the potential petit jurors are posed. But even when these factors have been considered, two or more communities, previously ascertained by law, may well indicate sufficient contact between the crime and its citizens to be able rightfully to claim to be the vicinage for that particular crime.606 When such a situation occurs, which community should be permitted to be the source of the petit jurors for the trial of that particular crime?

Because Congress has the authority to allocate jurisdiction among the federal courts as it sees fit, it has the power, so long as both communities possess sufficient contacts between the crime and its citizens to qualify as a permissible vicinage, to mandate that one permissible community be


605 The importance of the conclusion that the District of Columbia and the Commonwealth of Puerto Rico are vicinages under the sixth amendment becomes clear when the discussion of Rule 21(a) and Rule 21(b) from Part IV(B) (2) and (3) is recalled. Thus, if a crime is committed solely in the District of Columbia, the citizens of the District of Columbia are constitutionally entitled to serve as the petit jurors for the trial of that crime and they cannot be deprived of that right unless the accused can satisfy the standard of proof under Rule 21(a). Hence, Rule 21(b), or any similar law passed by Congress, cannot sanction the use of petit jurors at the trial of a federal official for a crime committed solely in the District of Columbia who are summoned from another judicial district which encompasses the "home" constituency of the federal official.

606 A good example of when two communities may qualify as a vicinage under the sixth amendment is given in the discussion of the crime of conspiracy at note 599 supra.
favored over another permissible community as the source of the petit jurors. With respect to most crimes, Congress has not taken any action to make such an allocation, but rather has simply authorized the United States Attorney to initiate the prosecution in any judicial district in which the crime was committed. Under Section 3239 of Title 18 of the United States Code, however, an accused, upon filing a request, is entitled as a matter of right to be tried for certain enumerated crimes in the judicial district from whence threatening communications, which constitute the social harm of the federal crimes enumerated, were introduced into interstate commerce. By passing this statute, Congress has mandated that the community from which the social harm originated must be preferred as the source of the petit jurors instead of the community in which the threatened person resides.

Note that under the provisions of 18 U.S.C. § 3239 (1970), the community where the threatened person resides, i.e., the community where the consequences of the threat would occur, can be the community in which the crime is prosecuted, but the defendant always has the option to insist as a matter of right that the community where the threatened communication originated be used instead. Entrekin v. United States, 508 F.2d 1328 (8th Cir. 1974). This right was granted in a 1939 act. No indication was given in the Senate report accompanying the act of the reason Congress decided to grant this right. Act of May 15, 1939, ch. 133, 53 Stat. 742; S. Rep. No. 349, 76th Cong., 1st Sess., 1 (1939). In light of the fact that the right is subject to optional invocation by the defendant, however, it can safely be surmised that Congress was thinking in terms of the defendant's interests in a convenient and expeditious handling of the criminal charges (venue), rather than the interests of the citizens of the community where the threat originated to serve as the petit jurors (vicinage), when this portion of Section 3239 was drafted. See text accompanying notes 387-392 supra. These comments concerning Section 3239 are written on the assumption, of course, that both communities have sufficient affiliating circumstances with the crime to qualify as a vicinage under the sixth amendment.

The above comments also provide the key to a possible interpretation of 18 U.S.C. § 3237(b) (1970), which would prevent it from being found unconstitutional. See note 584 supra. Under Section 3237(b), a defendant is entitled as a matter of right in certain enumerated instances to have the prosecution conducted in the judicial district in which the defendant resides. If Section 3237(b) is interpreted to apply only to crimes that are committed in two judicial districts, one of which is coincidentally the defendant's place of residence, then Section 3237(b) would be analogous to Section 3239: For certain criminal cases Congress has simply mandated that one of two permissible vicinages be preferred as the source of the petit jurors. If this interpretation of Section 3237(b) was what Congress intended, however, then the original draft of Section 3237(b), which was amended to its present form due to constitutional objections raised by the Department of Justice, would have been constitutionally acceptable. S. Rep. No. 1952, 85th Cong., 2d Sess., in 2 U.S. CODE CONG. & ADMIN. NEWS 3261 (1958).
Other substantive laws may dictate that one particular community be favored as the source of petit jurors over other communities which may also have sufficient contacts with the crime committed to be considered the vicinage under the sixth amendment. The rules in the area of obscenity present such an example. The Supreme Court has held that obscene publications or obscene motion pictures are not entitled to protection under the first amendment. Additionally, in *Hamling v. United States*, the Court held that the standards for what is or is not obscene are local, as contrasted with nationwide, standards. In light of this decision, it appears that the

What the entire legislative history of Section 3237(b) shows, however, is that both Congress and the Department of Justice had forgotten the concept of vicinage and had thereby mistakenly construed the sixth amendment as a venue provision.


In holding that local standards are to be used to judge obscenity, the Supreme Court used the word "vicinage" several times, but apparently without clear recognition of the content of the concept of vicinage under the sixth amendment. For example, the Supreme Court in *Hamling v. United States*, 418 U.S. 87 (1974) explained: "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw." *Id.* at 105 (emphasis added). Then, in *Jenkins v. Georgia*, 418 U.S. 153 (1974), a case arising in a state criminal proceeding (thus, the precise vicinage language of the sixth amendment is not directly applicable), the Supreme Court wrote: "We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.'" *Id.* at 157 (emphasis added). These excerpts from *Hamling* and *Jenkins* indicate that the Supreme Court is greatly confused about the importance of the geographical definition of the relevant community from which petit jurors are to be summoned. Cf. Note, *Community Standards, Class Actions, and Obscenity under Miller v. California*, 88 Harv. L. Rev. 1838, 1843 (1975). If the concept of "local standards for obscenity" is to have any meaningful content, both substantively and predictively, then those standards must be articulated by a petit jury selected through a process involving a fair cross-section of the relevant community. As has been previously indicated, however, unless the jury selection process is applied to a specifically defined geographical area, then no sensible understanding of the jury selection process is possible. On the contrary, without a specific geographical definition of the relevant community, spurious comparisons are made between differently defined communities. See Part IV(A)(1) and (2), *supra*. So long as the concept of "local standards for obscenity" is left free of ties to any specific geographical area, the concept will be amorphous and elusive.

Of equal importance, these excerpts indicate that the Supreme Court has failed to appreciate the "previous ascertainment" requirement of the sixth amendment. Congress must designate the vicinage prior to the commission of the crime, either by laws delimiting the geographical area constituting a judicial district, or by laws delimiting a smaller geographical area within a judicial district as a result of the procedures for summoning jurors. But whichever law(s) identify the vicinage, once it is designated it cannot be changed prospectively. See notes 529-530

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Supreme Court has held, as a matter of first amendment law, that the citizens of the community in which the questionable material was sold or distributed, as opposed to the citizens of the community in which the material was produced or printed or from which it was mailed, must serve as the petit jurors to try the obscenity charges.612 In terms of the relation-

supra. In the context of obscenity prosecutions, to permit a prospective change of the geographical source of the petit jurors, due to unclear definition, would clearly permit the two abuses against which the "previous ascertainment" requirement was directed. (1) A federal prosecutor could intentionally jury-shop for a jury favorably inclined toward convictions for obscenity crimes. (2) Even if a federal prosecutor had no malevolent intentions, changing the geographical source of the jurors would mean changing the "local community standards," resulting in an ex post facto juror judgment. Cf. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 74 (1973) (Brennan, J., dissenting).

612 Two glosses on the statement in the text need to be made. (1) Just because the standards for obscenity have been allocated to jurors of the vicinage does not mean that the duty of the courts to reach decisions concerning the substantive law of the first amendment has ended. If a jury of the vicinage were to return a conviction against an accused for distributing obscene material which was an unjust verdict, the courts still have a duty to rule as a matter of law that the material is not obscene and to reverse the conviction. Jenkins v. Georgia, 418 U.S. 153, 160, 162 (1974) (Rehnquist, J., majority opinion, and Brennan, J., dissenting). See text accompanying note 452, supra. At the same time, it should be recalled that ultimately a petit jury will be utilized to pass judgment upon the alleged criminal conduct of an accused. Hence, despite the dispute between proponents and opponents of "local" versus "nationwide" standards as a matter of first amendment law, the issue of the appropriate standards for obscenity is no excuse for warping the concept of vicinage as embodied in the sixth amendment. If the holding that obscenity is to be tested by local standards is considered repugnant, then this holding should be reversed as a matter of substantive first amendment law. Such reversal would simply mean that the instructions as to the proper standard to apply to the facts by the jurors of the vicinage would be different. Compare Travis v. United States, 364 U.S. 631 (1961) (Douglas, J., majority opinion) with id. at 637 (Harlan, J., dissenting). A legitimate suspicion can be raised that Justice Douglas warped the conclusion as to where the crime had been committed, which, due to the relationship between the concept of the locality of the crime and the concept of vicinage, then warps the latter concept, because he was opposed, on first amendment grounds, to laws requiring the filing of non-Communist affidavits. Substantive law concerns of the sixth and first amendments should be kept distinct and dealt with on their own merits. See note 560 supra.

(2) The community where the allegedly obscene material was sold or distributed must have sufficient affiliating circumstances with the particular crime being prosecuted to qualify as a vicinage for that crime. Assuming a federal criminal statute is relevant, three examples make this point clear. (a) An owner of a bookstore in the Western District of Oklahoma sells allegedly obscene material in the Western District. (b) An owner of a publishing house ships allegedly obscene material to a bookstore in the Western District of Oklahoma for the purpose of sale. (c) An owner of a bookstore in the Central District of California sells allegedly obscene material to a citizen of the Western District of Oklahoma, who brings the material with him to the Western District upon his return. In situations (a) and (b), sufficient affiliating circumstances exist between the citizens of the Western District of Oklahoma and the alleged crime of sale and the alleged crime of distribution, respectively, to permit the Western District to be considered the vicinage. In situation (c), however, insufficient affiliating circumstances exist between the crime of sale and the citizens of the Western District of Oklahoma. If the bookstore owner in situation (c) has committed any crime, that crime has been committed in the Central District of California.
ship between the concept of the locality of the crime and the jurors of the vicinage, the Supreme Court has held that the citizens of the community in which the questionable material was sold or distributed possess the significant substantive-law concern that their interpretation of the obscenity statutes be used, and also possess the significant sovereign concern that their moral consciences concerning the material be expressed.  

Statutory or decisional rules favoring one permissible community over another permissible community as the geographical source from which petit jurors will actually be summoned do not exist, however, with respect to most crimes. Usually if sufficient affiliating circumstances exist between a crime and the citizens of several communities to permit those communities to be marked as the vicinage for the crime, then the several communities are, as a matter of law, equally valid sources from which to summon the petit jurors. The jurors chosen from either community possess the jurisdictional power, as jurors of the vicinage, to adjudicate the criminal charges.

Possession of jurisdiction by an adjudicatory agency, though, does not mean that that particular agency must exercise its jurisdiction when the United States Attorney files criminal charges for prosecution within its territorial limits. Acting on behalf of one community, among several, which can permissibly be considered the vicinage, the federal district court can properly decline by reason of the concept of forum non conveniens to permit the prosecution to proceed in that community. The federal district court could hold that another qualified community is still better suited, for reasons unrelated to the jurors of the vicinage, to be the place at which the trial should be conducted. When two or more communities exist that are equally valid sources from which to summon the petit jurors, the federal district court should be permitted to consider other factors which relate to a convenient and expeditious handling of the criminal charges.

These introductory comments clarify the importance of the adoption of Rule 21(b) in 1946 and explain why Rule 21(b), as it was worded from 1946 to 1966, satisfied constitutional standards. As adopted in 1946, Rule 21(b) read:

The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed


in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

Prior to 1946, the prosecution was permitted under Supreme Court rulings615 to make the final selection of the location of the trial where two or more communities could qualify as the vicinage. Once the prosecution had been initiated in an appropriate venue, the prosecution remained in that venue because there were no procedures for transfer to another community where the crime also had been committed. As a result of this rule, not only was the government given an advantage in selecting the trial forum, but, more importantly, the federal courts were thereby precluded from taking into consideration the interests of the defendant in an expeditious and convenient handling of the criminal charges. Only the governmental interests with respect to the proper forum were deemed relevant. The adoption of Rule 21(b) in 1946 made it possible thereafter for the court to consider the interests of both parties to the litigation and then to make a determination “in the interest of justice” as to where the trial should be conducted.616 By Rule 21(b), the federal district court, although it possessed jurisdiction and presided over a permissible vicinage, was permitted to declare itself a forum non conveniens for a particular crime.617

This can be illustrated through a hypothetical situation. Assume that D, a resident of community X, kidnaps V, also a resident of community X. D forcibly detains V in a hidden spot located in community X for three days. Then D forces V to flee with him to community Y where V is forcibly detained for three more days before being rescued by police authorities. Both community X and community Y have been previously designated, either by statute or court rule, as the vicinage for crimes committed in the respective communities. Both communities X and Y have sufficient affiliating circumstances between the particular crime of kidnapping and its citizens that those citizens permissibly can be considered jurors of the vicinage under the sixth amendment. Moreover, the federal district courts presiding over the two communities also possess jurisdiction with respect to the federal crime. Hence, the charges can be initiated and the prosecution completed in either federal district court, utilizing citizens of either community as the petit jurors, without violating any constitutional standards.


616 See authorities cited in notes 242-251 and 313-319, supra.

It is urged, however, that the federal district court presiding over community Y should decline, as a forum non conveniens, to exercise its jurisdiction. Factors of convenience from the perspective of both the accused and the victim point to community X as the appropriate forum in which to conduct the trial. Community X should be the community that will permit the most expeditious and convenient trial for both the accused and the victim. It might be countered, however, that because both the accused and the victim in this situation were from community X, the citizens of that community are better qualified to serve as the petit jurors because they possess a greater amount of information concerning the character of the two principal participants in the crime, a greater amount of information concerning the setting in which the crime originated, a more significant substantive-law concern relating to the interpretation of the kidnap statute, and a more significant sovereign concern relating to the enforcement of the kidnap statute. Upon closer analysis, citizens of community Y, it would be argued, do not equally satisfy these standards. As a result, an examination of the relationship between the concept of the locality of the crime and the citizens being considered as the potential petit jurors indicates that the citizens of community X are the more appropriate jurors of the vicinage. Notice that the decision as to which of the two communities should serve as the source of the petit jurors has been based on factors related to the connection between the crime and the citizens who would make the best jurors. The decision has been a juror non conveniens, not a forum non conveniens, decision.

Consider the result should the facts of the hypothetical be changed so that V is a resident of community Y. Now assuredly, the citizens of both communities are equally capable of performing as jurors of the vicinage and have equally significant reasons for desiring to be selected. Indeed the crucial forum non conveniens issue can now be starkly stated: should the community where the accused resides or the community where the victim resides be considered the more desirable location in which to conduct the trial?\footnote{V's residence in community Y is relevant here because the citizens of community Y are thereby better able to satisfy the requisite juror-related questions under the sixth amendment. The place of the victim's place of residence, just as the defendant's place of residence, is otherwise irrelevant for purposes of the sixth amendment. However, the victim's place of residence, like defendant's place of residence, is relevant to a determination of questions of venue concerning a convenient and expeditious handling of criminal charges.}

When the forum non conveniens issue is raised in this form, Rule 21 (b) as originally drafted in 1946 sets the proper balance with respect to the manner in which the decision should be reached. Via Rule 21 (b), the federal district court is permitted to consider all relevant information.
which relates to the question as to which of the permissible vicinages best provides a forum for the convenient and expeditious handling of criminal charges. Defendant can present arguments based on the history of the adoption of the constitutional limitation on venue to urge a particular forum—a history that indicates that the early Americans were worried that the government would attempt to make it inconvenient and expensive for an accused to present a defense. Defendant can also urge that the importance of the victim's residence in a permissible vicinage has purposefully been downgraded as a factor upon which to choose a forum because in criminal proceedings the prosecution is handled by a governmental official who represents the sovereign interest, as opposed to the victim's interest. At the same time, the government can argue that the victim's interest in a convenient, expeditious forum should certainly not be ignored. The choice of forum between one permissible vicinage—the victim's place of residence, and another permissible vicinage—the defendant's place of residence, is certainly one for which no predetermined rule ought to exist. Each concrete situation ought to be resolved by the federal court, as Rule 21(b) provided, "in the interest of justice."

While Rule 21(b), as drafted in 1946, set the proper balance as to the determination of the choice of forum question, the original Rule 21(b) also meets the constitutional limitations embodied in the sixth amendment. Under Rule 21(b) as originally written, an accused was able to present a motion for transfer to another district or division only if "the offense was committed in more than one district or division." The transfer motion authorized by the 1946 Rule 21(b) thus avoids the constitutional infirmity of Rule 21(b) as it was amended in 1966. When a defendant moves for a transfer under the 1946 Rule 21(b), the defendant is not attempting to waive the constitutional rights of citizens of the vicinage to serve as petit jurors. On the contrary, either community, as previously ascertained, is a permissible vicinage under the sixth amendment. Under the 1946 Rule 21(b), the defendant is only being permitted to bring to the attention of the court other relevant information relating to the most appropriate location for the trial after significant contacts, which satisfy the sixth amendment, have been found to exist between the crime and the citizens of both permissible communities.

619 McDonald, Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 AM. CRW. L. REV. 649 (1976). The victim does, of course, have a legally cognizable grievance against the perpetrator of the crime. But the victim must seek redress as a personal plaintiff in a civil suit.


621 See Parts IV(A) (3) and IV(B) (3) supra.
D. Inapplicability of the Concept of Vicinage to Grand Juries

Although the grand jury and the petit jury have intertwined origins, the grand jury is clearly the more ancient institution. The petit jury does not arise until after the year 1215 when the Fourth Lateran Council forbade the clergy to participate in the trial by ordeal. Since the other methods of trial, battle and compurgation, were also abandoned by 1215, the English courts were faced with the necessity of creating a new method of trial. English courts found the new method by adapting the grand jury, with its citizen involvement in the administration of justice, into the petit jury.

Despite this intertwined origin, the functions performed by the grand jury have been, from the beginning, clearly differentiated from those of the petit jury. The grand jury was part of the governmental apparatus through which wrongdoers were brought to trial. To accomplish their assigned task, the grand jurors were empowered to perform two functions: the investigation of suspicious persons and events and the accusation of those persons who should be brought to trial. In the performance of their powers, the grand jurors were permitted to investigate persons and events and to accuse persons based upon suspicion, rumor, and hearsay, even though the grand jurors lacked personal knowledge of the persons or events from which the accusations arose.

By contrast, the petit jury was the part of the governmental apparatus through which the trial result was reached. To accomplish their assigned task, the petit jurors were also empowered to perform two functions: to determine the facts and to apply the law to the facts to reach a verdict. In the performance of their powers, the petit jurors were required to have personal knowledge of the persons and events involved in the trial so that truth and justice could be ascertained in the particular instance.

As the years passed, both the grand jurors and the petit jurors acquired independence from the judicial agencies under which they served. Grand jurors won the right to deliberate in secret without being required to account to the court for their votes or conclusions. As a result, grand jurors were able to ignore an indictment presented to them by the prosecutor, and could thereby shield an accused from malicious governmental

623 Id. 1-18.
624 Id. at pt. 1, passim.
625 Id. at 21-29. See generally W. Forsyth, History of Trial by Jury 130-38, 159-72, 178-86 (Reprint 1971); Warner, The Development of Trial by Jury, 26 Tenn. L. Rev. 459 (1959).
Meanwhile, petit jurors also won the right to deliberate in secret without being required to account for their votes or conclusions. As a result, they were able to return a verdict of acquittal contrary to the law and the evidence. Petit jurors could thereby intervene between an accused and the government to prevent the enforcement of a particular law in a particular instance. The third functions performed by the grand jury and the petit jury had now evolved.

By 1789 when the United States Constitution was drafted, the distinction between trial juror and trial witness had become firmly established. Petit jurors were no longer required to possess direct personal knowledge of the persons and events involved in the criminal incident because evidence concerning the persons and events would be presented by witnesses to the petit jurors during the trial. However helpful to the ascertainment of truth it might be to utilize petit jurors summoned from the community in which the crime was committed, the relationship between the concept of the locality of the crime and the citizens of the community where the crime was committed, for purposes of determining the facts, was no longer essential. However, with respect to the other two functions performed by a petit jury—to engage in "law-making" through the interpretation of the law as applied to the facts, and to reach sovereign decisions through the return of a verdict of acquittal—the relationship between the concept of the locality of the crime and the citizens of the community who ought to be permitted to perform these two functions was still highly significant. Indeed, if the jury were to perform the "law-making" and sovereign functions in accordance with the tenets of democratic responsibility, then an affiliation between the concept of the locality of the crime and the citizens of the community where the crime was committed was absolutely essential. To preserve this essential relationship, the sixth amendment was adopted.

Grand jurors, on the other hand, do not perform any adjudicatory functions. Not only have grand jurors always been permitted to indict upon hearsay, but even when the grand jury hears competent trial evi-
dence, the jurors only hear the prosecution’s evidence. Moreover, while the grand jury can exercise independence by ignoring an indictment prepared by the prosecutor, the prosecutor, at least with leave of the court, can in turn undermine the decision of the grand jury simply by presenting the indictment, with accompanying evidence, to another grand jury. Any determination of the meaning of a law or of the desirability of enforcing a particular law made by a grand jury is, therefore, only a temporary annoyance to a determined prosecutor. Although the early Americans considered the grand jury an important institution worthy of constitutional protection, the grand jury was granted that protection in the fifth amendment. By this placement, the draftsmen of the Bill of Rights gave recognition to the fact that because grand jurors do not perform any adjudicatory functions, they need not come from the community where the crime was committed. The concept of vicinage is inapplicable to the grand jury.


634 See text accompanying notes 402-416 supra. The mistaken belief that the concept of vicinage is applicable to the grand jury has two historical sources.

(1) As the text indicates, the origins of the grand jury and the petit jury were intertwined. Moreover, throughout the history of the English common law, the grand jury and the petit jury have been closely associated because both concern citizen involvement in the judicial processes. See generally Edwards, supra note 622 passim. Unless a person is careful to recall the differing functions performed by these two different juries, a person could believe that concepts applicable to one jury are equally applicable to the other. As the authorities cited in note 405 indicate, however, those who supported the concept of vicinage in the formative years of the American Republic were aware of these differing functions and therefore were also aware that the concept of vicinage did not apply to the grand jury as an institution.

(2) Specifically in the context of the American judicial system, confusion of the concept of vicinage with the grand jury arose due to the normal practices through which citizens were obtained for grand jury service. As Chief Justice Marshall pointed out in United States v. Hill, 26 F. Cas. 315 (C.C.D. Va. 1809) (No. 15,364), “It has been justly observed, that no act of congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indispensable implication.” Id. at 317. Because the power to summon grand jurors resided in the inherent power of the court, rather than procedures defined by statute, courts could utilize such procedures as the presiding judge thought appropriate. Apparently many judges felt that the procedures to summon grand jurors should, for the sake of convenience, be basically the same as the procedures through which petit jurors were summoned. United States v. Richardson, 28 F. 61, 70-71 (C.C.D. Me. 1886). But the
In light of the significantly different functions performed by grand juries and petit juries, several consequences follow that clarify our understanding of the grand jury as an institution in the criminal justice system and indicate how the institution of the grand jury should be treated differently from the institution of the petit jury.

1. The Grand Jury as An Appendage of the Court

As an investigatory/accusatory institution whose independent determinations can be undermined by a determined prosecutor, the grand jury emerges as an institution whose authority clearly emanates from and is subordinate to the authority of the court under whose supervision it operates. As a result of this dependence, two limitations upon grand jury authority are easily identifiable. First, if the concept of jurisdiction entails territorial limitations upon the power of a court, then the grand jury will similarly be limited. Thus, in the early days of the Republic when both the district court and the circuit courts were believed to be territorially limited to adjudicating crimes committed in the judicial district in which the court sat, the grand juries impaneled by those respective courts were similarly considered limited to the indictment of crimes committed within the judicial district. Now that territorial limitations on the jurisdiction

procedures for summoning petit jurors were governed by Section 29 of the Judiciary Act of 1789, which mandated conformity "so far as . . . practicable" to the procedures utilized in the state in which the federal court sat. By the mid-nineteenth century, after more than 60 years of summoning grand jurors in a manner similar to that used for petit jurors, it should not be surprising to read cases in which the federal trial courts began to interpret Section 29, including its vicinage language, as applicable to grand jurors. United States v. Lewis, 192 F. 633 (E.D. Mo. 1911); United States v. Chaires, 40 F. 820 (C.C.N.D. Fla. 1889); United States v. Eagan, 30 F. 608 (C.C.E.D. Mo. 1887); United States v. Antz, 16 F. 119 (C.C.E.D. La. 1883); United States v. Ambrose, 3 F. 283 (C.C.S.D. Ohio 1880); United States v. Tallman, 28 F. Cas. 9 (C.C.S.D.N.Y. 1872) (No. 16,429); United States v. Williams, 28 F. Cas. 666 (C.C.D. Minn. 1871) (No. 16,716); United States v. Wilson, 28 F. Cas. 725 (C.C.N.D. Ohio 1855) (No. 16,737); United States v. Reed, 27 F. Cas. 727 (C.C.N.D.N.Y. 1852) (No. 16,134). Then finally in 1879, when Congress for the first time passed a statute prescribing procedures for summoning jurors that did not conform to the procedures of the states, the Act specifically stated that the procedures would apply to both grand and petit jurors. Act of June 30, 1879, ch. 52, § 2, 21 Stat. 43. Utilization of similar procedures to summon citizens to grand jury or petit jury service does not, however, make the concept of vicinage applicable to grand juries.


of the federal courts have been removed by Congress, a grand jury impaneled by a federal court should also be empowered to investigate and to indict for "all crimes committed against the United States," no matter where those crimes occur.\textsuperscript{637} Second, even though a federal district court possesses plenary jurisdiction with respect to crimes against the United States, the federal district court need not grant that plenary jurisdiction to the grand jury when one is formed. Thus, in the order forming a grand jury, the federal district court can stipulate that the grand jury is authorized to investigate and to accuse solely for crimes committed in a particular division of the judicial district, or a particular judicial district, even though the court could have granted it broader jurisdiction.\textsuperscript{638} The jurisdiction of the grand jury is, therefore, dependent upon both the jurisdiction conferred upon the court by Congress and the jurisdiction specifically conferred upon it by the court.\textsuperscript{639}

\textsuperscript{637} Plenary jurisdiction for all crimes against the United States, without regard to territorial limitations on the exercise of that jurisdiction, has existed in the federal trial courts since the adoption of the Judicial Code of 1911. See text accompanying notes 207-219 supra.


\textsuperscript{639} See generally Edwards, \textit{supra} 622, at pt. III passim. The conclusion that grand juries have plenary jurisdiction because of being appendages to district courts having plenary juris-
Due to the plenary jurisdiction in the federal district courts, which particular grand jury should be authorized to investigate and to indict for which particular crimes is then purely a matter of discretion for the federal court to decide. Although the District Court of the Western District of Oklahoma could authorize its grand jury to investigate and to accuse for all federal crimes committed in the states of Texas, Oklahoma, and Kansas, unless the crimes being investigated were connected with the Western District of Oklahoma, or some other good reason could be given as to why the grand jury for the Western District of Oklahoma should exercise its admitted jurisdiction, the court of the Western District should decline as a forum non conveniens to grant such broad jurisdiction to its grand jury. At the same time, the federal district court for the Western District of Oklahoma could impanel a grand jury, either from the district as a whole or from a particular division in the district, with the authority to investigate and to indict for all crimes committed anywhere within the judicial district. The federal court need not impanel a grand jury for

diction obviously raises the spectre of abuse. In light of this conclusion, a prosecutor can summon persons from anywhere in the United States to a grand jury sitting in a distant, inconvenient, hostile location. See Fed. R. Crim. P. 17(e) (1). But saying that the power of a grand jury is limited by the jurisdiction of the court of which it is an appendage does not prevent this possible abuse because this statement assumes, incorrectly, that the jurisdiction of the court is territorially restricted. Compare Orfield, The Federal Grand Jury, 22 F.R.D. 343, 438 (1958) and Note, Powers of Federal Grand Juries, 4 Stan. L. Rev. 68, 73 (1951) with authorities cited in notes 207-219 supra. Specific statutory, rule, or court-order provision is needed to limit the power of the grand jury so as to prevent this prosecutorial abuse.

The plenary jurisdiction of the grand jury should be contrasted with the limited jurisdiction of the petit jury. A petit jury only has the power to adjudicate a crime if it is drawn from a community qualifying as a vicinage under the sixth amendment. See Part IV(B) (3) and Part IV(C) supra.

A district court might permit its grand jury to investigate and indict for crimes allegedly committed in another judicial district when the court has received information of official corruption involving both the federal district judge and the United States Attorney for the other district. Even if a grand jury in the other district wanted to take action, without the support of the federal court and the United States prosecutor, the grand jury would be stymied. Comment, Problems, supra note 630, at 699-705.

The statement in the text sets forth the two procedures for summoning grand jurors that have most often been used in the federal district courts. See text accompanying notes 230-241 and 393-404 supra. At present, grand jurors for the Western District of Oklahoma are summoned from throughout the judicial district, in proportion to the population of each division, to indict for crimes committed anywhere within the district. Telephone conversations with Mr. Rex Hawkes, Clerk, United States District Court of the Western District of Oklahoma, conducted on Dec. 15, 1972, and July 26, 1976. By contrast, grand jurors for the District of Maine are summoned from only one division within the district, although the grand jurors are empowered to indict for crimes committed anywhere within the district. United States v. Cates, 485 F.2d 26 (1st Cir. 1974).
each division within the judicial district, even though the divisions of the judicial district have been designated, either by statute or court rule, as the vicinage for crimes committed in the various divisions. Once the grand jury has returned an indictment for a crime committed within the judicial district, the federal court can then, in accordance with the constitutional provisions, statutes, and rules controlling venue and vicinage, determine the best location for the trial in the judicial district.  

2. The Grand Jury Selection Process

As early as the time of the enactment of the Judiciary Act of 1789, the federal trial courts were endowed by Congress with jurisdiction over a wider geographical area (the judicial district) than the geographical area (the county where the crime was committed) that had been designated by Congress as the vicinage for capital crimes. Furthermore, since the Judiciary Act of 1789 contained no provisions applicable to grand juries, the federal trial courts possessed inherent power to summon the grand jurors from anywhere within the territorial jurisdiction of the court. As a consequence, as early as 1789, the petit jurors, those who tried the capital crime, had to be summoned from the county in which the capital crime was committed, but the grand jurors, those who returned the capital indictment, could have been summoned from another portion of the judicial district, or the judicial district as a whole, as the federal trial court thought appropriate.

This discretionary power in the federal trial courts in summoning grand jurors has remained basically intact to the present day. During the last quarter of the nineteenth century, Congress did pass a number of laws which contained a provision that the grand jurors be residents of the division to which they were summoned for service. These limited provisions, however, were repealed by the Judicial Code of 1911, and the pattern of discretionary power in the federal court was restored for all federal district courts. Even today under the Jury Selection and Service Act of 1968,

644 See text accompanying notes 230-241, 393-416, and Part IV(A)(3) supra.
645 Compare Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 76, 78 with id. § 29. Fuller discussion of the capital venue provision of Section 29 is given in the text accompanying notes 179-197, in Part II, and notes 358-375, 531-540 supra.
although the grand jurors must be summoned from the community in which the court convenes, the federal court is permitted to define the "community" as either the judicial district as a whole or a division within the judicial district.\textsuperscript{649}

These procedures for summoning grand jurors are constitutionally permissible. Because the concept of vicinage is inapplicable to the grand jury, grand jurors are not required by the sixth amendment to be selected from among citizens of the community in which the crime was committed. Hence, the community from which the grand jurors can be summoned need not be identical to the community from which the petit jurors must be called.\textsuperscript{650} At the discretion of the federal court, grand jurors can properly be summoned from a larger area (the judicial district) than the community which has previously been designated as the vicinage (a division or a county within the judicial district); alternatively, grand jurors can properly be summoned from an entirely different community (a division in which the court is convened that is unrelated to the crime), than that which has previously been designated as the vicinage (another division of the judicial district in which division the crime was committed).\textsuperscript{651}

Citizens called as grand jurors, in contrast with citizens called as petit jurors, have no constitutional right to serve as grand jurors with respect to crimes committed in the communities from which they are summoned. These principles present two implications which should be stressed. (1) Although the Supreme Court has held,\textsuperscript{652} and the Jury Selection and Service Act provides,\textsuperscript{653} that all eligible citizens must be given an opportunity for grand jury service, the constitutional basis for this opportunity is the equal protection clause, \textit{i.e.}, the idea that if certain citizens are afforded the opportunity for grand jury service, then other similarly situated citizens must also be afforded the opportunity for grand jury service. By contrast, the constitutional basis for requiring that citizens be given the opportunity for petit jury service is the concept of vicinage in the sixth amendment, \textit{i.e.}, that citizens from the community where the crime was committed have a constitutional right to perform the "law-making" and "sovereign" functions of the petit jury for crimes committed in their com-

\textsuperscript{650} The comment in the text should, of course, be clearly contrasted with the requirement of vicinage applying to petit juries, that the geographical boundaries of the community in which the crime was committed must be identical to the geographical boundaries of the community within which the petit jurors must reside. See Part IV(A)(1) and (2) supra.
(2) Although the Supreme Court has held,\textsuperscript{654} and the Jury Selection and Service Act provides,\textsuperscript{655} that an accused is entitled to a grand jury selected from a fair cross-section of the community, the constitutional basis for this requirement is to be found in the due process clause of the fifth amendment. An accused is entitled to a grand jury selected from a fair cross-section of whatever community is being used as the source of the grand jurors in order to protect the independence of the grand jury—to prevent a grand jury from being picked in such a way as to insure that the grand jurors will not exercise their power to ignore the indictments prepared by the prosecutor. In contradistinction, the constitutional reason why an accused is entitled to a fair cross-section on the petit jury panels of the community in which the crime was committed is to be found in the sixth amendment vicinage provision. An accused is entitled to a fair cross-section of the vicinage on the petit jury panels to insure that the jury's verdict does indeed express the views of the community, rather than the views of some limited segment thereof. Through the requirement of a fair cross-section of the vicinage, not only is the government prevented from purposefully tampering with the appropriate community's verdicts, but the accused need not fear that the verdict of his petit jury has been unintentionally skewed by the selection process.

**CONCLUSION**

It has been shown that the concept of vicinage was a highly significant concept during the debates which led to the adoption of the basic structural documents of the Republic. The concept of vicinage then became subsumed by degrees within the ken of other concepts until the concept of vicinage had faded from the legal consciousness of lawyers, judges, legislators, and law professors. Yet, several immediate practical problems in federal criminal procedure will be better solved if the concept of vicinage is lucidly recalled and properly applied.

Central to the thesis expressed in this article is the belief that the jury of the vicinage as a democratic and sovereign institution in our society ought to be respected and nurtured. This thesis is neither pro-prosecution nor pro-defense, not only because it is unclear whether recollection of the concept of vicinage would ultimately be considered more helpful to the government or to the defendant, but because the concept of vicinage itself cannot be evaluated on that basis. The concept of vicinage must be judged


on its own merits—do we desire to reaffirm our confidence in the jury of the vicinage as the seeker of truth, the interpreter of justice, and the articulator of moral sentiments, regardless of who benefits in a particular case?\textsuperscript{656} It is urged that the answer must be an affirmative one. The jury of the vicinage, to paraphrase the language of Alexis de Tocqueville,\textsuperscript{657} is the most energetic means through which the people govern themselves, and is also the most efficacious means of teaching them to rule well.

\textsuperscript{656} Nor should the concept of vicinage be considered a pro-state's rights concept. On the contrary, the concept of vicinage is oriented toward local citizens governing their own lives through involvement in the judicial processes. Hence, the concept of vicinage permits the citizens to interpret the laws and to exercise sovereign power against the wishes of governmental officials at any level of government—municipal, county, state, or federal. Trust in the ordinary citizen is the basis of the concept of vicinage.

\textsuperscript{657} I. A. de Tocqueville, Democracy in America 367 (Bowen ed. 1876).