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Transfer of Venue in Income Tax Prosecutions: 18 U.S.C. Section 3237(b)'s Use of the Mails Requirement

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TRANSFER OF VENUE IN INCOME TAX PROSECUTIONS: 18 U.S.C. § 3237(b)'s USE OF THE MAILS REQUIREMENT

INTRODUCTION

Section 3237(a)1 of the federal "continuing offense" statute2 allows the government broad discretion in establishing venue in criminal prosecutions.3 Certain income tax violations, however, are not subject to this discretion.4 In a prosecution for any of these offenses, section 3237(b)5 gives the defendant the option to transfer venue from the government's chosen forum to the forum in which he was residing at the time of the alleged violation.6 The purview of subsection (b)7 includes tax evasion,8 fraud,9 perjury10 and the improper disposal or withholding of property or records regarding tax liability.11 Subject to one exception not relevant

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2. See United States v. Clemente, 608 F.2d 76, 82 (2d Cir. 1979) (Kearse, J., dissenting) (§ 3237 is commonly referred to as the "continuing offense" statute), cert. denied, 446 U.S. 908 (1980); United States v. Bozza, 365 F.2d 206, 220 (2d Cir. 1966) (same); Travis v. United States, 247 F.2d 130, 133 (10th Cir. 1957) (same).
3. See United States v. Gillette, 189 F.2d 449, 452 (2d Cir.), cert. denied, 342 U.S. 827 (1951). Section 3237(a) provides that crimes committed in more than one district, or begun and completed in different districts, may be prosecuted "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a) (1982). Offenses involving use of the mails or transportation in interstate or foreign commerce may be prosecuted "in any district from, through, or into which such commerce or mail matter moves." Id.
7. Section 3237(b) provides:
   Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of the law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.
8. 18 U.S.C. § 3237(b) (1982) (emphasis in original). If at the time of the prosecution the defendant has established a residence in the government's chosen forum, he may not transfer venue to the district in which he was residing at the time of the alleged offense. See United States v. Rosenstein, 303 F. Supp. 210, 212 (S.D.N.Y. 1969).
9. See id. § 3237(b) (1982).
10. See id. § 7206(2) (aiding or assisting in producing false or fraudulent statement).
11. See id. § 7206(5) (in a compromise decision with IRS, concealing property or withholding, concealing, or destroying records regarding tax liability).
here, application of subsection (b) requires that the predicate tax offense "involve[e] use of the mails." Therefore, absent some use of the mails in the commission of the alleged violation, the defendant may not obtain a transfer of venue pursuant to section 3237(b).

For example, assume defendants A and B commit tax fraud with respect to the subleasing of coal fields located in district 1. Defendants A and B reside in districts 2 and 3 respectively. Upon discovering the fraud, the government initiates a single prosecution against both defendants in district 1. In response, A and B, invoking section 3237(b), move to sever the prosecution and transfer venue to districts 2 and 3.

The success or failure of defendants' motions would depend largely on the jurisdiction in which the case was being heard. A majority of courts would grant the transfers of venue, thus compelling the government to

12. See id. § 7203. This offense, the willful failure to file a return, supply information, or pay tax, id., is expressly exempted from § 3237(b)'s use of the mails requirement. See 18 U.S.C. § 3237(b) (1982). It was not originally included among that statute's predicate offenses. See Act of Aug. 6, 1958, Pub. L. No. 85-595, 72 Stat. 512 (codified as amended at 18 U.S.C. § 3237(b) (1982)). Section 3237(b) was amended in 1966 to include this offense within its purview. Act of Nov. 2, 1966, Pub. L. No. 89-713, § 2, 80 Stat. 1107, 1108 (codified as amended at 18 U.S.C. § 3237(b) (1982)). The analysis of this Note will be limited to those predicate offenses subject to the mailing requirement.


14. See United States v. DeMarco, 394 F. Supp. 611, 613 (D.D.C. 1975). A defendant who cannot gain a transfer of venue under § 3237(b) may move for a transfer pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure. See United States v. Hurwitz, 573 F. Supp. 547, 551-52 (S.D. W. Va. 1983); United States v. Scott, 472 F. Supp. 1073, 1075 n.2 (N.D. Ill. 1979), aff'd mem., 618 F.2d 109 (7th Cir. 1980); Fed. R. Crim. P. 21(b). Rule 21(b) provides: "For the convenience of parties and witnesses, and in the interests 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." Id. The Treasury and Justice Departments opposed enactment of § 3237(b), arguing that it was unnecessary in light of Rule 21(b)'s transfer of venue provisions. See S. Rep. No. 1952, 85th Cong., 2d Sess. 3, 6 [hereinafter cited as S. Rep. No. 1952], reprinted in 1958 U.S. Code Cong. & Ad. News 3261, 3263, 3265. Despite these objections, § 3237(b) was enacted. See Act of Aug. 6, 1958, Pub. L. No. 85-595, 72 Stat. 512 (codified as amended at 18 U.S.C. § 3237(b) (1982)). Unlike Rule 21(b), which allows transfers at the court's discretion, see United States v. Garza, 664 F.2d 135, 139 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982), § 3237(b), when its statutory requirements are fulfilled, provides for transfers of venue as an absolute right, see United States v. Youse, 387 F. Supp. 132, 134 (E.D. Wis. 1975). Furthermore, § 3237(b) requires a transfer to the defendant's home district. See 18 U.S.C. § 3237(b) (1982). In comparison, Rule 21(b) allows the court to choose the new venue, see United States v. Marcello, 280 F. Supp. 510, 520 (E.D. La. 1968), aff'd, 423 F.2d 993 (5th Cir.), cert. denied, 398 U.S. 959 (1970); Fed. R. Crim. P. 21(b), and the defendant has no right to demand that venue be transferred to any particular forum, see Marcello, 280 F. Supp. at 520.

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carry out two separate but substantially similar prosecutions. A minority of courts, however, would deny the motions and oblige the defendants to face a single prosecution in the original forum, district 1.

The significant difference between the majority and minority analyses of section 3237(b) ultimately arises from their respective interpretations of the statute's use of the mails requirement. The majority view maintains that any use of the mails during the course of the predicate offense will support the application of section 3237(b). This includes, for example, such insubstantial uses as communication with others regarding the preparation and filing of tax returns. In the hypothetical example, therefore, any correspondence by mail between individuals A and B in regard to their tax fraud would satisfy the use of the mails requirement under the majority view.

In contrast, the minority analysis maintains far stricter criteria for the fulfillment of section 3237(b)'s use of the mails requirement: The statute can be applied only in those cases in which the defendant's use of the mails constitutes the prosecution's sole basis for establishing venue. Consequently, a defendant's motion for transfer would be granted only when his offense has no contact with the original forum other than that...


gained through a use of the mails. In the hypothetical example, the presence of the subject of the fraud—coal fields—in district 1 would justify the government’s choice of venue and preclude defendants’ motions to transfer.

This Note contends that courts should apply the minority view of section 3237(b), tempered by a minimum contacts analysis. Part I analyzes the language and legislative history of section 3237(b) and concludes that both support the minority view. Part II examines the consequences of the majority and minority approaches to section 3237(b) transfer motions in view of Congress’ dual interest in protecting the convenience of defendants and attaining judicial and administrative economy. In an effort to reconcile these disparate interests, this Note concludes that a defendant should be granted a transfer of venue only when his contact with the government’s chosen forum is based entirely on his use of the mails or on otherwise negligible connections.

I. STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 3237(b)

A. Language

The phrase “involves use of the mails” is dispositive of the question whether a defendant may successfully invoke section 3237(b)’s transfer of venue provision; however, it is not defined in the statute. Although it has been averred that this language is unambiguous, the phrase supports at least two possible interpretations of the degree of mail use necessary to satisfy that threshold requirement. Most broadly, the phrase could be construed to encompass any use of the mails by the defendant in the course of committing one of the predicate offenses. Under this view, which has been adopted by a majority of courts, any use, however insubstantial, entitles a defendant to invoke his statutory right to transfer venue. A more narrow reading similarly requires some use of the mails

26. See United States v. Clemente, 608 F.2d 76, 79 (2d Cir. 1979), cert. denied, 446 U.S. 908 (1980). The court in Clemente, in fact, posited three possible interpretations of the phrase “involves use of the mails.” See id. One interpretation—that a use of the mails must be an element of the crime charged, id.—has not, however, been adopted by any jurisdiction.
27. Id.
28. See United States v. United States Dist. Court, 693 F.2d 68, 69-70 (9th Cir. 1982) (per curiam); United States v. DeMarco, 394 F. Supp. 611, 614-17 (D.D.C. 1975); United
for the provision to be applicable, but would deny transfer unless that use is shown to be the sole basis on which the government establishes venue. The statutory language, however, “does not unambiguously require any one of these . . . interpretations.”

Of these interpretations, only the minority view finds support in the standard procedures used to interpret ambiguous statutory provisos. When the language of such a statutory exception is sufficiently ambiguous to generate several conflicting interpretations, the rules of statutory construction suggest that the most narrow interpretation should be applied. This rule provides as a matter of policy that only those parties expressly exempted by the proviso should be removed from the statute’s ambit. Underlying this policy is the belief that the modified statute in fact manifests the legislature’s general intent. Section 3237(b), by allowing certain defendants to temper the broad prosecutorial venue-setting powers conferred by section 3237(a), operates as such an exception and should therefore be construed narrowly.

The dispute over the interpretation of section 3237(b) precludes the blind adoption of the statutory language’s supposed plain meaning. Therefore, to understand the meaning of section 3237(b)’s use of the mails requirement, it is necessary to examine that statute’s legislative history.

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31. See, e.g., In re United States, 706 F.2d 494, 496 (4th Cir.), cert. denied, 104 S. Ct. 496 (1983); United States v. Dorison, 573 F. Supp. 809, 811 (S.D. W. Va.), appeal denied, 723 F.2d 903 (4th Cir. 1983), cert. denied, 104 S. Ct. 2346 (1984); see also United States v. Clemente, 608 F.2d 76, 81 (2d Cir. 1979) (“The statute does not enable a taxpayer who has violated the law in a district by means other than use of the mails to escape prosecution in that district simply by mailing a letter.”), cert. denied, 446 U.S. 908 (1980).

32. See 2A N. Singer, Sutherland Statutory Construction § 47.08, at 135 (C. Sands rev. 4th ed. 1984) (statutory provisos “serve the purpose of restricting the operative effect of statutory language to less than what its scope of operation would be otherwise”); see also 1A C. Sands, Sutherland Statutory Construction § 20.22, at 75 (4th ed. 1972) (savings clauses, exceptions and provisos are all strictly interpreted).

33. See United States v. Clemente, 608 F.2d 76, 79 (2d Cir. 1979) (noting § 3237(b)’s ambiguity), cert. denied, 446 U.S. 908 (1980). See also supra notes 27-31 (discussing alternative interpretations of § 3237(b)).

34. See 2A N. Singer, supra note 32, § 47.08, at 135.

35. See id.

36. See id.

37. See id. § 45.05, at 20-21.
B. Legislative History of Section 3237(b)

1. Meaning of Use of the Mails

The legislative history of section 3237(b) clearly indicates that the defendant's use of the mails in the course of committing the predicate offense would not by itself be sufficient to satisfy the mailing requirement. In hearings before the House Judiciary Subcommittee, Representative Prince Preston, section 3237(b)'s sponsor, testified that his proposed bill would apply only to those situations in which a mailing was an essential element of the predicate offense. Accordingly, in the opinion of the bill's sponsor, not...
all uses of the mails would fulfill section 3237(b)’s mailing requirement.41

2. Legislative Purpose

The particular problem Preston contemplated in proposing section 3237(b) involved the government’s use of section 3237(a) to set venue for tax prosecutions in districts far distant from the defendants’ homes.42 Preston’s congressional district was located in the Southern District of Georgia.43 His constituents, however, were obliged to mail their tax returns to the Internal Revenue Service (IRS) center in the Northern District of that state.44 By invoking the broad venue provisions of section 3237(a), the government would often pursue tax prosecutions in the Northern District even though the defendants resided and had prepared their returns hundreds of miles away.45

As a result, Preston’s constituents were required to face prosecutions in a district with which they had no contacts other than those gained through the mailing of their tax returns.46 By allowing defendants to transfer the venue of these tax prosecutions to the district in which they resided at the time of the offense, Congress sought to protect the defendant from prosecution in a distant forum.47

At the same time, Congress expressed its belief that the implementation of section 3237(b) would result in “inconsequential,” if any, additional costs to the government.48 It contemplated that the venue established as a result of a section 3237(b) motion would encompass the situs of the offense,49 thus sparing both the defendant and the government the inconvenience and expense of transporting witnesses and evidence to a distant forum.50 Thus, any interpretation of section 3237(b) should reconcile Congress’ intent to protect the defendant’s interest in a convenient forum and its desire to avoid significantly increased governmental costs.

II. POLICY CONSIDERATIONS

A. Criticism of the Majority View

The majority view, by liberally granting venue transfers, promotes the

41. See United States v. Clemente, 608 F.2d 76, 79 n.5 (2d Cir. 1979), cert. denied, 446 U.S. 908 (1980).
42. See id. at 79; Hearings, supra note 38, at 7, 10-12 (defendants required to stand trial in Atlanta, 285 miles from their homes in Savannah).
43. See Hearings, supra note 38, at 7, 10-12.
44. See id.
45. See id.
46. See id.
defendant's convenience interests, but fails entirely to recognize Congress' corresponding desire to limit governmental expenditures. Consequently, courts adopting this view have applied section 3237(b) to situations that are clearly beyond the contemplation of Congress. The majority's broad reading of section 3237(b) allows transfers of venue when defendant's convenience is not even at issue. In fact, that construction, by escalating government costs and facilitating delay without direct benefit to the defendant, makes it possible for a defendant to contravene the intent of Congress.

For example, the majority interpretation of section 3237(b) has allowed transfer of venue between two districts that were equally accessible to the defendant. In such a situation, the defendant's position is not materially improved by his use of section 3237(b), yet the government is nevertheless compelled to suffer the expense and inconvenience of transferring its prosecution. Similarly, broad application of section 3237(b) enables a defendant to transfer venue when his only purpose is to delay trial. Because the satisfaction of section 3237(b)'s statutory requirements confers a statutory right not subject to the court's discre-

51. See United States v. Clemente, 608 F.2d 76, 80 (2d Cir. 1979), cert. denied, 446 U.S. 908 (1980); see also United States v. United States Dist. Court, 693 F.2d 68, 70 (9th Cir. 1982) (per curiam) (court conceded defects in majority view but adopted it).

52. See United States v. Clemente, 608 F.2d 76, 78, 79 (2d Cir. 1979) (identifying courts adhering to majority view and criticizing their disregard of congressional intent), cert. denied, 446 U.S. 908 (1980).


54. See United States v. Wortman, 26 F.R.D. 183, 192 (E.D. Ill. 1960), rev'd on other grounds, 326 F.2d 717 (7th Cir. 1964). In Wortman, the distance between the defendant's home and the original forum was approximately nine miles. Id. After the transfer of venue, the distance between the defendant's residence and the court house was approximately 100 miles. Id. Although the defendant's action did not further Congress' intent to protect the convenience of the defendant, the Wortman court nevertheless allowed the transfer of venue. See id. Although the defendant arguably derives indirect benefit by delaying final resolution of the dispute, it is unlikely that Congress intended to promote defendant's convenience in this way.

55. See In re United States, 706 F.2d 494, 496 (4th Cir.), cert. denied, 104 S. Ct. 496 (1983); see also United States v. United States Dist. Court, 693 F.2d 68, 70 (9th Cir. 1982) (per curiam) (noting problems with majority view); United States v. Clemente, 608 F.2d 76, 86 (2d Cir. 1979) (Kearse, J., dissenting) (same), cert. denied, 446 U.S. 908 (1980).


57. See United States v. Wortman, 26 F.R.D. 183, 192 (E.D. Ill. 1960), rev'd on other grounds, 326 F.2d 717 (7th Cir. 1964); see also United States v. Clemente, 608 F.2d 76, 86 (2d Cir. 1979) (Kearse, J., dissenting) (noting that some transfers cause inconvenience to defendant), cert. denied, 446 U.S. 908 (1980).

58. See supra note 54 and accompanying text.
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A court adhering to the broad view must grant the motion even when the desired transfer in no way serves the defendant's or his witnesses' geographic convenience. Applied in this manner, the majority view of section 3237(b) unjustifiably depletes governmental and judicial resources, a situation hardly foreseen or approved by Congress. These additional costs may prove to be significant. This is best illustrated by defendants' use of section 3237(b) to generate multiple, substantially similar prosecutions. Under the majority view, each defendant in a case involving several defendants would be entitled to a transfer to his own home district even if the defendants were all involved in criminal activity in the government's chosen forum. The impact of such transfers on the government would necessarily be far from "inconsequential." Ironically, in ordering that a joint prosecution be severed in precisely this way, one court conceded:

There is much to be said for the government's position [urging the adoption of the minority view]. It does not appear that the sponsors of

59. See United States v. Youse, 387 F. Supp. 132, 134 (E.D. Wis. 1975); United States v. Wortman, 26 F.R.D. 183, 192 (E.D. Ill. 1960), rev'd on other grounds, 326 F.2d 717 (7th Cir. 1964); S. Rep. No. 1952, supra note 14, at 2, reprinted in 1958 U.S. Code Cong. & Ad. News at 3262. Before a defendant may invoke § 3237(b)'s mandatory transfer provision, he must fulfill that statute's express requirements. See United States v. DeMarco, 394 F. Supp. 611, 613 (D.D.C. 1975) (listing prerequisites to application of § 3237(b)). The scope of this Note is limited to an examination of the criteria needed to satisfy the use of the mails requirement.

60. See United States v. Wortman, 26 F.R.D. 183, 192 (E.D. Ill. 1960), rev'd on other grounds, 326 F.2d 717 (7th Cir. 1964).

61. See In re United States, 706 F.2d 494, 496 (4th Cir.) (minority view "avoids the judicial inefficiency and duplicative proceedings that would be the inevitable result of a broader interpretation of that language"), cert. denied, 104 S. Ct. 496 (1983). In an attempt to avoid the wasteful consequences of the majority view, the government has been prompted to take extreme measures. In one case, the government commenced a prosecution against two defendants in the District of Columbia. See United States v. DeMarco, 401 F. Supp. 505, 507 (C.D. Cal. 1975), aff'd on other grounds, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977). Both defendants moved to transfer venue to their respective home courts in Chicago and Los Angeles. Id. at 508. In response, the government threatened to add new charges to the original indictment in order to dissuade the defendants from persisting in their motions. Id. Noting a "potential for vindictiveness," however, the court thwarted the government's efforts. Id. at 507 (citing Blackledge v. Perry, 417 U.S. 21, 28 (1974)).

62. See United States v. Clemente, 608 F.2d 76, 80 (2d Cir. 1979), cert. denied, 446 U.S. 908 (1980).

63. United States v. United States Dist. Court, 693 F.2d 68, 70 (9th Cir. 1982) (per curiam).


65. United States v. United States Dist. Court, 693 F.2d 68, 69-70 (9th Cir. 1982) (per curiam).

66. See S. Rep. No. 1952, supra note 14, at 2, reprinted in 1958 U.S. Code Cong. & Ad. News at 3262 (Congress' view that any costs involved in enacting § 3237(b) would be "inconsequential"); see, e.g., In re United States, 706 F.2d 494, 496 (4th Cir.), cert. denied, 104 S. Ct. 496 (1983); United States v. United States Dist. Court, 693 F.2d 68, 70 (9th Cir. 1982) (per curiam); United States v. Clemente, 608 F.2d 76, 80 (2d Cir. 1979), cert. denied, 446 U.S. 908 (1980).
H.R. 8252 [enacted as section 3237(b)] actually considered the type of situation presented in this case when the statute was drafted. . . . Application of the law to this case . . . would require the government to conduct two lengthy and similar trials at considerable expense and inconvenience. One of these trials would be in a remote district with no connection with the crime except for the fortuity of the defendants’ residence there.67

Under the minority analysis, the problem of duplicative prosecutions will generally not arise.68 Unless use of the mails was the defendants’ sole connection to the original forum and, as such, constituted the government’s exclusive basis for jurisdiction under section 3237(a), motions by multiple defendants for severance and transfer would be denied.69 In other words, proof of some “nonmail” connection or contact with the original forum will support the government’s choice of venue and will preclude operation of section 3237(b).70 This will enable the government to conduct a single unified prosecution against multiple defendants for offenses arising out of a common nucleus of facts.71

B. Criticism of the Minority View

Although there is firm support in the legislative history for the adoption of the minority view,72 that view fails fully to realize congressional intent.73 As a result of its parsimonious application of section 3237(b)’s transfer of venue provision, this view promotes administrative efficiency and judicial economy at the expense of the interests and convenience of

67. United States v. United States Dist. Court, 693 F.2d 68, 70 (9th Cir. 1982) (per curiam).
68. See In re United States, 706 F.2d 494, 496 (4th Cir.) (denies transfer because it would produce two substantially similar trials), cert. denied, 104 S. Ct. 496 (1983); see also United States v. United States Dist. Court, 693 F.2d 68, 69-70 (9th Cir. 1982) (per curiam) (conceding possibility of duplicative prosecutions under majority view); United States v. Clemente, 608 F.2d 76, 80 (2d Cir. 1979) (denies transfer, noting dangers of duplicative prosecutions under majority view), cert. denied, 446 U.S. 908 (1980).
69. See United States v. Dorison, 573 F. Supp. 809, 811 (S.D. W. Va.), appeal denied, 723 F.2d 903 (4th Cir. 1983), cert. denied, 104 S. Ct. 2346 (1984). By denying transfer, the government maintained a single prosecution in the Southern District of West Virginia. If the Dorison court had adopted the majority view, three separate but substantially similar prosecutions would have been pursued in New Jersey, New York and Florida. See id. at 810; see also In re United States, 706 F.2d 494, 496 (4th Cir.) (maintaining unified prosecution by denying motion for transfer), cert. denied, 104 S. Ct. 496 (1983).
72. See supra notes 38-41 and accompanying text.
73. See United States v. United States Dist. Court, 693 F.2d 68, 69-70 (9th Cir. 1982) (per curiam); United States v. Clemente, 608 F.2d 76, 83-84 (2d Cir. 1979) (Kearse, J., dissenting), cert. denied, 446 U.S. 908 (1980).
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the defendant. Where the majority view would impose more than "inconsequential" costs on the government, the minority view would ignore Congress' equally clear belief that the government can expect to sustain some inconvenience and expense to preserve the defendant's right to transfer venue. Just as it would be contrary to the spirit of the statute to allow section 3237(b) to be used for obstructive purposes by sophisticated defendants, so it would also be unfair to force defendants to stand trial far from home because of insubstantial contacts with the government's chosen forum. The minority analysis should therefore be tempered to promote fairness and protect the convenience of the defendant without unduly taxing administrative and judicial resources.

C. The Alternative: Implementing a Minimum Contacts Standard

1. Balancing Interests

Under both the majority and minority views, a defendant is entitled to a transfer of venue pursuant to section 3237(b) when a use of the mails is his sole connection with the government's chosen forum. The two views diverge, however, when the defendant's offense has some contact with the original venue beyond those gained through a use of the mails. This additional contact would not prevent a transfer under the majority view, but under the minority analysis, any connection with the original forum not based on a mailing would preclude the application of section 3237(b).

74. See United States v. United States Dist. Court, 693 F.2d 68, 70 (9th Cir. 1982) (per curiam). In establishing the minority analysis, the court in United States v. Clemente, 608 F.2d 76 (2d Cir. 1979), cert. denied, 446 U.S. 908 (1980), did not treat the defendant unfairly. Clemente's contact with the government's chosen forum was substantial. See id. at 78 (fraudulent tax returns prepared in Southern District of New York, the government's chosen forum). Furthermore, the defendant's home and the original venue were geographically close. See id. at 77 (defendant's residence located in Eastern District of New York). There is no guarantee, however, that future cases would reach equally fair results. A possible example of a less significant contact precluding the application of § 3237(b) may be found in United States v. Hurwitz, 573 F. Supp. 547 (S.D. W. Va. 1983). In that case, defendant's agent visited an airport in the forum in order to make a payment on a coal sublease. Id. at 550. That contact denied the defendant, a New York resident, access to § 3237(b). See id. at 548, 550 & n.10.

75. See supra note 66 and accompanying text.

76. In protecting the defendant's convenience, it may be necessary to increase governmental expenditures. See United States v. United States Dist. Court, 693 F.2d 68, 70 (9th Cir. 1982) (per curiam).

77. See United States v. Wortman, 26 F.R.D. 183, 192 (E.D. Ill. 1960) (defendant used § 3237(b) for unarticulated purposes other than promoting his own convenience), rev'd on other grounds, 326 F.2d 717 (7th Cir. 1964).


79. See supra notes 15, 17.

80. See supra note 15.

81. See In re United States, 706 F.2d 494, 496 (4th Cir.), cert. denied, 104 S. Ct. 496
Those courts adopting the minority view have failed to specify what type of contact would be significant enough to deny the defendant access to section 3237(b).\textsuperscript{82} Negligible contacts with a forum constitute a sufficient basis for the government to establish venue under section 3237(a).\textsuperscript{83} However, a defendant should not be required to face a tax prosecution in a given forum merely because of an inconsequential contact if section 3237(b) would permit a transfer in the absence of that contact.\textsuperscript{84} Congress intended section 3237(b) to protect the convenience of defendants by limiting the purview of section 3237(a).\textsuperscript{85} To be fairly denied a transfer of venue, therefore, defendants’ connections with the government’s chosen forum must be substantial.

Section 3237(b) was designed to achieve the dual goal of preserving the defendant’s interests while simultaneously conserving the government’s resources.\textsuperscript{86} When the defendant has a significant contact\textsuperscript{87} with the original forum, both goals are realized.\textsuperscript{88} Because the defendant has intentionally developed a substantial association with the forum, it is fair to require him to stand trial there.\textsuperscript{89} Economy would also be served insofar


82. Although the denial of transfer in In re United States and Clemente would not have been unfair because of the substantiality of the defendants’ contacts with the government’s chosen forum, see infra note 87, the courts there declined to offer a rule explicitly identifying the type of contact that would be sufficient to deny a transfer of venue. See In re United States, 706 F.2d 494, 496 (4th Cir.), cert. denied, 104 S. Ct. 496 (1983); United States v. Clemente, 608 F.2d 76, 81 (2d Cir. 1979), cert. denied, 446 U.S. 908 (1980).

83. For example, merely passing through a district in the course of committing a crime may constitute a sufficient basis under § 3237(a) for establishing venue there. See, e.g., Clinton v. United States, 293 F.2d 47, 47-48 (10th Cir. 1961) (kidnapping); Reed Enters. v. Clark, 278 F. Supp. 372, 374 (D.D.C. 1967) (mailing pornography), aff’d per curiam, 390 U.S. 457 (1968); United States v. Duma, 228 F. Supp. 755, 756 (S.D.N.Y. 1964) (committing mail fraud).


86. See id. at 1-2, reprinted in 1958 U.S. Code Cong. & Ad News at 3262. Although expressing a desire to protect the convenience of the defendant, Congress did not anticipate that it would require significant expenditures to achieve that end. See id., reprinted in 1958 U.S. Code Cong. & Ad. News at 3262.

87. A significant contact might be one integrally connected with the predicate offense. For example, the preparation of the tax returns in the government’s chosen forum would have been a sufficiently significant contact in United States v. Clemente, 608 F.2d 76 (2d Cir. 1979), cert. denied, 446 U.S. 908 (1980), to have warranted denial of transfer. Id. at 77-78.

88. See infra notes 89, 90 and accompanying text.

89. In limiting the states’ jurisdiction over nonresident defendants, the Supreme Court sought, in part, to protect the convenience of the defendant. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); see also In re United States, 706 F.2d 494, 496 (4th Cir.) (“If Nardone [the defendant, a New York resident] is inconvenienced by a trial in the Southern District of West Virginia, it is only because he chose
as evidence of activity relating to the offense—and witnesses with knowledge of that activity—would probably be found in that district.\textsuperscript{90}

If the defendant’s contacts with the original forum are merely negligible,\textsuperscript{91} however, it would defy congressional purpose to require prosecution there.\textsuperscript{92} Arguably, denying a section 3237(b) transfer in that situation would still inure to the government’s economic advantage,\textsuperscript{93} but, it would in effect completely disregard Congress’ desire to protect the convenience of the defendant.\textsuperscript{94} It would be unfair to require a defendant to face a prosecution in a distant district.\textsuperscript{95} Similarly, witnesses would be compelled to travel to and testify in the government’s chosen forum, even though their testimony relates to facts and events occurring in other districts.\textsuperscript{96} Thus, to fulfill the dual purposes underlying section 3237(b), defendants with merely negligible contacts with the original venue should be allowed access to the transfer of venue provisions.

Under both the majority and minority views, if the defendant has no contact with the forum other than a use of the mails, he may transfer venue pursuant to section 3237(b).\textsuperscript{97} A similar result would be reached to go into that district to accomplish his allegedly fraudulent scheme."), \textit{cert. denied}, 104 S. Ct. 496 (1983).

\textsuperscript{90} See United States v. United States Dist. Court, 693 F.2d 68, 69 (9th Cir. 1982) (per curiam) (virtually all of the defendants’ criminal activity occurred in government’s chosen forum); United States v. Scott, 472 F. Supp. 1073, 1077 (N.D. Ill. 1979) (witnesses and records located in government’s chosen forum), \textit{aff’d mem.}, 618 F.2d 109 (7th Cir. 1980).

\textsuperscript{91} A negligible contact might be one involving only tangential connection to the predicate offense. A contact of short duration might also be considered negligible. \textit{See}, e.g., Corley v. Milliken, 633 F.2d 1135, 1136-37 (5th Cir. 1981); Rollins Nursing Home, Inc. v. M & LC/Stillwell Mortgage Co., 267 Ark. 369, 370, 379, 593 S.W.2d 1, 2, 7 (1979); Floyd J. Harkness Co. v. Haberman, 60 Cal. App. 3d 696, 698, 131 Cal. Rptr. 672, 673 (1976).

\textsuperscript{92} See United States v. United States Dist. Court, 693 F.2d 68, 69 (9th Cir. 1982) (per curiam) (original goal of § 3237(b) was to spare defendant burden of facing trial in unfamiliar district); United States v. Clemente, 608 F.2d 76, 83 (2d Cir. 1979) (Kearse, J., dissenting) (same), \textit{cert. denied}, 446 U.S. 908 (1980).

\textsuperscript{93} By establishing venue on the basis of negligible contacts, the government might, for example, seek to find a common forum in which several defendants could be jointly tried. Presumably, the prosecution would set venue in such a district only when doing so would confer an economic or tactical advantage on the government. For illustrations of fora chosen by the government on the basis of minor contacts, see supra note 83.

\textsuperscript{94} See supra note 84.


\textsuperscript{96} See United States v. United States Dist. Court, 693 F.2d 68, 69-70 (9th Cir. 1982) (per curiam). In this case, although almost all of the criminal activity connected with the predicate offense took place in or around San Diego, venue was nevertheless transferred over 450 miles to San Francisco. \textit{See id.; see also In re United States}, 706 F.2d 494, 496 (4th Cir. 1983) (expressing concern for witnesses’ convenience), \textit{cert. denied}, 104 S. Ct. 496 (1983).

under the proposed analysis. Under the minority view, both significant and insubstantial contacts could potentially preclude application of section 3237(b). The proposed approach, on the other hand, would allow transfer of venue if the defendant's connections with the forum were merely negligible. Under the majority analysis, a defendant may transfer venue regardless of the extent or nature of his contacts with the government's chosen forum. Under the proposed view, however, a defendant could not transfer venue from a forum with which he has significant contacts.

2. Establishing the Criteria

In determining whether a contact is significant enough to preclude a transfer of venue, a court might consider such factors as the type and duration of the contact and its connection to the predicate offense. A court might also consider the inconvenience to the defendant and the danger of duplicative prosecutions. All these factors should be weighed in forging an equitable result. To achieve this end, an analysis similar to that used in limiting states' in personam jurisdiction over nonresident defendants should be used.

Since its decision in *Pennoyer v. Neff*, the Supreme Court has adopted in succession several different criteria regarding the minimum contacts necessary for the exercise of in personam jurisdiction. In *In-
INTERNATIONAL SHOE CO. V. WASHINGTON,

the Supreme Court asserted that "'traditional notions of fair play and substantial justice'" must be satisfied before a defendant can be compelled to face trial in the forum state.\(^\text{108}\) Congress' goal in enacting section 3237(b) embodies similar concerns of convenience and fairness to the defendant.\(^\text{109}\) This minimum contacts standard might therefore provide some guidance to a court in analyzing the application of section 3237(b).\(^\text{110}\)

A minimum contacts analysis would attempt to reconcile the conflicting interests inherent in a transfer of venue pursuant to section 3237(b).\(^\text{111}\) A defendant would not be compelled to stand trial in a forum in which he has negligible contacts or none at all.\(^\text{112}\) For example, if the negligible contact was a mere passing of an item in interstate commerce through that district, venue could be set there pursuant to section 3237(a).\(^\text{113}\) The minimum contacts analysis, however, would allow the defendant to transfer venue to his home forum.\(^\text{114}\) Under this view, the government would still be able to bring unified prosecutions against defendants who have availed themselves of the benefits of the government's chosen forum.\(^\text{115}\) Moreover, the convenience of witnesses would be served because the government could bring prosecutions in the forum in which the criminal activity occurred.\(^\text{116}\) Thus, witnesses would be spared

diction did not extend beyond the forum's boundaries. See Pennoyer v. Neff, 95 U.S. 714, 722 (1878). In International Shoe, the Court limited the exercise of jurisdiction to those instances where it would be fair and just to bring the defendant into the forum. See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). More recently, the Court has asserted that the defendant must purposefully avail himself of the benefits of the forum before jurisdiction may be exercised. See Hanson v. Denckla, 357 U.S. 235, 253 (1958).

109. Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
110. See id.
113. Cf. Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (conflicting interests must be weighed in minimum contacts analysis); Varsic v. United States Dist. Court, 607 F.2d 245, 249 (9th Cir. 1979) (quoting Kulko v. Superior Court, 436 U.S. 84, 92 (1978)). In a transfer pursuant to § 3237(b), the defendant seeks to protect his own convenience. See United States v. United States Dist. Court, 693 F.2d 68, 70 (9th Cir. 1982) (per curiam).

115. See supra note 83.
116. Cf. Hanson v. Denckla, 357 U.S. 235, 251 (1958) (defendant may not be haled into court in jurisdiction with which he has merely negligible contacts).
118. See supra note 90.
the inconvenience of testifying at a trial in the defendant’s home district when their testimony relates to activities occurring in the government’s chosen forum.\(^{119}\)

Accordingly, the application of a minimum contacts analysis would make it possible to protect the convenience of the defendant while also conserving the government’s limited prosecutorial resources.

**CONCLUSION**

Section 3237(b) was designed to give the defendants in certain income tax prosecutions the opportunity to transfer venue from the government’s chosen forum to their respective home districts. Such transfer, however, is limited to those instances in which the tax violation involves a use of the mails. The better of the two current interpretations of this statutory requirement maintains that a defendant may invoke section 3237(b) only when such use of the mails was the government’s sole basis for establishing the original venue. This view would preclude transfer when the defendant’s offense has some contact with the government’s chosen forum other than those gained through a use of the mails.

The use of a minimum contacts analysis, however, would allow defendants access to section 3237(b) when their connections with the original forum are not based solely on mere use of the mails but are nonetheless negligible. Congress’ purposes in enacting section 3237(b)—protecting the interests of defendants while limiting government expenditures—would thus be realized.

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\(^{119}\) See United States v. United States Dist. Court, 693 F.2d 68, 69, 70 (9th Cir. 1982) (per curiam). The court’s adoption of the majority analysis resulted in a trial being held hundreds of miles from the actual situs of the offense. *See id.* at 70.