

March 2016

## Different States: Huge Mistakes; The Pitfalls and Consequences of Bringing International Defendants to the Wrong District

Michael Weinstock

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jicl>



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Michael Weinstock (2013) "Different States: Huge Mistakes; The Pitfalls and Consequences of Bringing International Defendants to the Wrong District," *Journal of International and Comparative Law*: Vol. 3 : Iss. 2 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/jicl/vol3/iss2/4>

This Essay is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of International and Comparative Law by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

## **Different States: Huge Mistakes; The Pitfalls and Consequences of Bringing International Defendants to the Wrong District**

Michael S. Weinstock\*

### INTRODUCTION

The United States Department of Justice appears to have made a huge blunder with the prosecution of Alfonso Portillo (“Portillo”), the former President of Guatemala. Although Portillo was indicted and arraigned in the Southern District of New York, the United States government initially flew him to Teterboro Airport in New Jersey.<sup>1</sup> According to the *New York Times*, Portillo was flown into New Jersey on the Friday before Memorial Day weekend and he remained there until the following Tuesday, when he was ultimately placed before Judge Robert P. Patterson of the United States District Court of the Southern District of New York, for arraignment.<sup>1</sup> This weekend sojourn in New Jersey may prove to be a procedural misstep with huge consequences. The stopover in Teterboro could preempt venue from attaching in the Southern District of New York, which may result in the dismissal of the indictment in its entirety.

The cardinal principle of venue, in criminal cases, states that venue lies in the district where the crime was allegedly committed. As Justice Ginsburg wrote in *United States v. Cabrales*, “Proper venue in criminal proceedings was a matter of concern to the Nation's founders. Their complaints against the King of Great Britain, listed in the Declaration of Independence,

---

\* Michael S. Weinstock operates the Law Offices of Michael S. Weinstock LLC. He is a former New York City prosecutor and graduate of St. John's School of Law. He wishes to express his deep appreciation to the late Patrick J. Rohan, the former dean of the law school, for his friendship and support. In the interest of full disclosure, it should be noted that much of this article was drafted and successfully utilized as a Memorandum of Law in the case of *United States v. Dalnave Navigation Inc.* (Crim. No. 09-130). Brian McCarthy, Esq. and Michael Chalos, Esq. of the law firm Chalos and O'Connor were both integral in drafting the initial Memorandum.

<sup>1</sup> Benjamin Weiser, *Ex-President of Guatemala Faces Judge in Manhattan*, N.Y. TIMES, May 28, 2013, at 3; *see also* Indictment of Alfonso Portillo, *available at* <http://www.justice.gov/usao/nys/pressreleases/May13/AlfonsoExtraditionPR/U.S.%20v.%20Alfonso%20Portillo%20Indictment.pdf>.

included his transportation of colonists ‘beyond Seas to be tried.’”<sup>2</sup> The Constitution safeguards a defendant's venue right in two places. First, in Article III, section 2, clause 3, which instructs that the ‘Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.’ Second, in the Sixth Amendment, which calls for trial ‘by an impartial jury of the State and district wherein the crime shall have been committed.’” Outside of the Constitution, Rule 18 of the Federal Rules of Criminal Procedure, mandates that the “prosecution shall be had in a district in which the offense was committed,” an echo of the Constitution’s commands.”<sup>3</sup>

Here, there is no dispute that Portillo was “brought” into Teterboro, New Jersey. This “detention” occurred despite the availability of several airports within the Southern District of New York. While it is plausible that the defense decided to allow the U.S. government to take their client to New Jersey for a long weekend in jail, this rationale seems farfetched, given Portillo was forced to board the plane by police officers, and told reporters that he was being “kidnapped.”<sup>4</sup> Perhaps presciently, Portillo also told reporters that he would be back when the case fell apart.<sup>5</sup> It should be noted that Portillo was loaded upon the jet after a tumultuous extradition fight that lasted two years.<sup>6</sup> Accordingly, the likelihood of a friendly stipulation between the government and defense appears low.

18 U.S.C.A. § 3238 requires that the government show that the defendant was “brought” to New York before reaching any other jurisdiction. Here, the government is unable to do so,

---

<sup>2</sup> *United States v. Cabrales*, 524 U.S. 1, 6 (1998).

<sup>3</sup> *Id.* It is worth noting that this provision of the Constitution was adopted even before the Bill of Rights as a protection against governmental oppression. The Framers responded to the fierce opposition of the Colonists to Acts of Parliament that allowed the Crown to force a defendant to trial in a foreign land or another colony. The outrage at the English colonial practice was not merely symbolic; it was grounded in the practical hardships imposed when a defendant was dragged away from family, friends and work and, sometimes his counsel, to stand trial in a distant locale. Brief for the Nat’l Assoc. of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent at 4–5, *United States v. Cabrales*, 524 U.S. 1 (1998) (No. 97-643), 1998 WL 145342, at \*9.

<sup>4</sup> Randal C. Archibold, *Ex-President of Guatemala Extradited to U.S. in Corruption Case*, N.Y. TIMES, May 24, 2013, at A5.

<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

because Portillo was flown into and detained in New Jersey. When a defendant is brought from overseas, the plain language of 18 U.S.C.A. § 3238 establishes venue as being “in the district in which the offender . . . is arrested or first brought.”<sup>7</sup> In *United States v. Liang*,<sup>8</sup> the Court of Appeals for the Ninth Circuit dismissed an indictment against a defendant brought from international waters, when it determined that the government had intentionally transported the defendant from one district to another for the sole purpose of prosecution.<sup>9</sup> The court held that “[18 U.S.C.] § 3238 cannot apply where the individual is first intercepted in one United States district and then transferred to another for trial.”<sup>10</sup> The appellate court rebuked the prosecutors for the post-crime transportation of the defendant.<sup>11</sup> “There is no provision for new proper venues to be created after the crime is completed and the defendant apprehended in a prior district.”<sup>12</sup> Indeed, the court went so far as to accuse the prosecutors of intentionally “whittling away” the provision in order to bring the defendant to its preferred venue. “But the fact that when an offender has been arrested on the high seas or abroad, the Government may choose the district into which to bring him, does not seem an adequate reason for permitting the Government to take him into custody in a district where a Federal court exists with jurisdiction to try the alleged offense for which he is held in custody and then transport him to another district for trial there. The courts should read the statute’s plain language and should not whittle away the ‘found’ provision by a construction based on formalism rather than substance.”<sup>13</sup> The Ninth Circuit’s ruling in *Liang* represents the federal judiciary’s prohibition against transferring defendants into strategically advantageous districts.

By moving Portillo from New Jersey to New York, the government engaged in the kind of forum shopping that the federal judiciary prohibits. In this case, Portillo was forcibly brought into the United States. The government does not allege that Portillo

---

<sup>7</sup> See *United States v. Erwin*, 602 F.2d 1183, 1185 (5th Cir. 1979); see also *United States v. Robinson*, 275 F.3d 371, 378 (4th Cir. 2001).

<sup>8</sup> See *United States v. Liang*, 224 F.3d 1057 (9th Cir. 2000).

<sup>9</sup> See *id.* at 1062.

<sup>10</sup> See *id.* at 1061.

<sup>11</sup> See *id.*

<sup>12</sup> *Id.* (citing *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1061 (9th Cir. 2000)).

<sup>13</sup> *Id.* at 1062 (citing *United States v. Provoo*, 215 F.2d 531, 538 (2d Cir. 1954)).

ever set foot in the United States. Rather, the Indictment alleges that the former President was part of a conspiracy to embezzle funds while abroad, and that checks supporting the conspiracy were drawn upon a bank account in Manhattan.<sup>14</sup> Nonetheless, the government decided to bring Portillo into New Jersey. As in *Liang*, venue in this case was set in the wrong jurisdiction, and therefore the indictment should be dismissed. When venue is improperly laid in a criminal case, dismissal is the appropriate remedy because a district court has no power to transfer such a case to a proper venue.”<sup>15</sup>

It is beyond dispute that Teterboro, New Jersey is not in the Southern District of New York, and that numerous airports in the Southern District of New York could have accommodated the former President’s jet. The Westchester County Airport, for example, is one airport located in the Southern District of New York; and private planes from Guatemala routinely arrive at that airport.<sup>16</sup> The allegation that the defendant participated in a conspiracy and that checks were withdrawn in a bank in Manhattan does not provide the district with venue. While the general provision of 18 U.S.C.A. § 3237(a), authorizes the prosecution in any district in which an offense "was begun, continued, or completed,"<sup>17</sup> the government has not provided reasonable evidence to support the contention that Portillo “began, continued or completed” any criminal acts in the Southern District of New York.

The principle of venue, in a conspiracy case, is not simply an element of procedure. Rather, venue is a right protected by the Constitution:

A decision by the United States to prosecute for conspiracy is not without some advantage to the government...To add to the advantages already existing by engrafting a forum shopping option as to substantive offenses would, we think, go too far. To repeat, venue is not mere formalism. The right to a trial before a jury of the vicinage is fundamental and such a trial

---

<sup>14</sup> See Indictment, *supra* note 1.

<sup>15</sup> *Id.* at 1062 (citing *United States v. Hilger*, 867 F.2d 566, 567 (9th Cir. Cal. 1989)).

<sup>16</sup> Telephone Interview with representative of the Westchester County Airport (June 14, 2013). The representative confirmed that private planes departing from Guatemala can easily arrive at the airport after first making arrangements with the United States Customs Department.

<sup>17</sup> *United States v. Levy Auto Parts*, 787 F.2d 946, 949 (4th Cir. 1986).

ought to be held at the place of commission of the substantive offense.<sup>18</sup>

Here, venue does not attach in the Southern District of New York simply because the Government of Taiwan, through its Embassy in Guatemala, issued three checks and drew those checks upon an account at the International Bank of China in Manhattan.<sup>19</sup> The only reason that the case is in New York is because the government engaged in forum shopping and transported the defendant to New York. As venue does not exist in New Jersey, the court does not have the power to transfer the case, and the indictment should be dismissed.

*Chandler v. United States*,<sup>20</sup> involved a defendant who was “first brought” into Massachusetts when a plane travelling to Washington DC was forced to make an unscheduled stop because of mechanical difficulties.<sup>21</sup> The defendant was escorted off of the plane in Boston for three hours and then continued his voyage to Washington D.C.<sup>22</sup> In *Chandler*, the First Circuit held that venue was proper in Massachusetts, under the predecessor to 18 U.S.C.S. § 3238.<sup>23</sup> Specifically, the court held that the district into which the accused is first taken under custody and landed is the district into which the accused is “first brought.” The First Circuit’s interpretation of “first brought” creates a convenient and easily applicable rule, because it relies on objective facts and not the intent of those who had the accused in custody.<sup>24</sup> The First Circuit’s interpretation is consistent with federal caselaw. A similar venue matter was addressed in the Second Circuit case *United States v. Holmes*.<sup>25</sup> In *Holmes*, a federal judge reversed and vacated an indictment against a defendant who was “first brought” from overseas into the wrong district and then transported for

---

<sup>18</sup> *United States v. Jordan*, 846 F. Supp. 895, 899 (D. Nev. 1994).

<sup>19</sup> See Indictment, *supra* note 1. According to the Indictment, these checks represented a donation by the Government of Taiwan for a program known as *Bibliotecas Para La Paz* (“Libraries for Peace”) a public project in Guatemala designed to purchase books for school libraries. *Id.*

<sup>20</sup> See *Chandler v. United States*, 171 F.2d 921 (1st Cir. Mass. 1948).

<sup>21</sup> See *id.* at 933.

<sup>22</sup> See *id.* at 927–28.

<sup>23</sup> See *id.* at 932.

<sup>24</sup> See *id.* at 933; see also *United States v. Erdos*, 474 F.2d 157, 160–61 (4th Cir. 1973); *United States v. Guild*, No. 1:07cr404, 2007 U.S. Dist. LEXIS 85271, at \*4 (E.D. Va. Dec. 18, 2007) (unpublished opinion).

<sup>25</sup> See *United States v. Holmes*, 672 F. Supp. 2d 739 (E.D. Va. 2009).

reasons of prosecution.<sup>26</sup> The court in *Holmes* reviewed the history of the venue statute and all recent precedents before dismissing the indictment.<sup>27</sup> The Second Circuit was concerned about the government handpicking the location of its trials. The court concluded that the venue statute must be strictly construed so as to only apply where the defendant was first taken into apprehension, and not so that the place of the trial controls where the place of the arrest. “To hold otherwise would mean ...the Department of Justice, can select any federal district in the United States as the place for trial of a [defendant] charged with...any... offense committed abroad.”<sup>28</sup> Here, there is no dispute that the Portillo was brought to New Jersey and later transferred to New York City. Accordingly, the government is simply attempting to create venue where none exists. “[P]ost-crime transportation of the defendant by the government did not make venue proper in the district where he was taken after arrest. There is no provision for new proper venues to be created after the crime is completed and the defendant apprehended in a prior district.”<sup>29</sup>

#### CONCLUSION

The United States government blundered by bringing Portillo, the former President of Guatemala, into Teterboro, New Jersey. The error is egregious, because Portillo is not alleged to have committed any criminal acts in the District of New Jersey and the nexus to the Southern District of New York is thin. Given the lack of venue, Portillo’s indictment should be dismissed.

---

<sup>26</sup> *Id.* at 751.

<sup>27</sup> *See id.* at 747.

<sup>28</sup> *Id.* at 748 (citing *United States v. Erdos*, 474 F.2d 157 (4th Cir.1973)).

<sup>29</sup> *United States v. Liang*, 224 F.3d 1057, 1062 (9th Cir. 2000) (citing *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1061 (9th Cir. 2000)).