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Venue Misstep Shows Complexity of Prosecuting Cybercrime: Supreme Court to Weigh In



The Supreme Court of the United States will decide an issue impacting charging decisions in criminal cases involving technology and where those cases are tried. Specifically, the Supreme Court will decide whether criminal defendants may be retried after they are convicted in the wrong "venue," i.e., the location where the trial took place.

This constitutional venue requirement—and the Supreme Court's ultimate decision on the remedy for violating it—will influence future cases involving technology, where defendants, victims, servers, and resources used to commit the crime are often in different states or even nations.

In the case at issue, the defendant allegedly hacked into a company's website, obtained certain trade secrets, and offered to sell those trade secrets through various posts on social media. As with many crimes involving technology today, numerous locations were involved: the defendant remained entirely within the Southern District of Alabama, the victim-company was in the Northern District of Florida, and the victim-company's hacked servers were in the Middle District of Florida. But where to conduct the trial? Based on the location of the victim-company's headquarters, the government decided (incorrectly) to indict the defendant in the Northern District of Florida, on three counts: violation of the Computer Fraud and Abuse Act, theft of trade secrets, and extortion. At the end of trial, the jury convicted the defendant of the latter two counts.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit [held](#) that for the trade-secrets conviction "venue was not proper in the Northern District of Florida because [the defendant] never committed any essential conduct in that location." To remedy this violation, the court had two options: (1) vacate the conviction, allowing the defendant to be retried in a (supposedly) proper forum, or (2) acquit the defendant of his conviction in the improper forum, which would bar his retrial in another forum under the U.S. Constitution's Double Jeopardy Clause that prohibits giving "the government . . . a second chance at prosecution." The 11th Circuit chose the first option, endorsing a remedy that effectively allows the government, when it chooses the wrong venue, to retry a defendant in the correct venue.

In vacating the conviction rather than opting for an acquittal, the 11th Circuit joins the 6th, 9th, and 10th Circuits, which have similarly held that the government may re-try the defendant for the same offense in a different, proper venue. However, when faced with similar circumstances, the 5th and 8th Circuits have held that the remedy for the prosecution's failure to bring charges in the proper venue is the defendant's acquittal, which would bar re-prosecution of the offense.

The Supreme Court recently [agreed](#) to hear the case, which would resolve the apparent Circuit split over this issue. The outcome will significantly affect future prosecutions in cases involving technology. With increasing globalization, crimes increasingly involve defendants, victims, third parties, websites, servers, and currency, each in different locations across the globe. As a result, courts have been forced to grapple with tough questions on where crimes were, as a legal matter, "committed." The Supreme Court's ultimate ruling further raises the stakes. If the Court allows repeat prosecutions, defendants may face multiple trials in different venues. If the Court prohibits repeat prosecutions, though, prosecutors will need to choose venues wisely—or risk acquittal—and defendants will want to carefully consider whether (and when) to challenge venue in their cases.

Authors

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