Georgia Law Review

Volume 53 | Number 1 Article 6

2018

Detainee Transfers and Immigration Judges: ICE Forum-Shopping Tactics in Removal Proceedings

Roger Grantham
University of Georgia School of Law, roger.grantham@uga.edu

DETAINEE TRANSFERS AND IMMIGRATION JUDGES: ICE FORUM-SHOPPING TACTICS IN REMOVAL PROCEEDINGS

Roger C. Grantham, Jr.[*]

U.S. immigration policy and ICE tactics have been greatly scrutinized over the past year. While many criticisms focus on border policy and the conditions of detention, scholars have also raised concerns over ICE's unfettered discretion to transfer detainees to different detention centers. Not only may ICE transfer detainees anywhere in the country, ICE has gradually expanded this practice. Now, on average, every detainee is transferred at least once each year. ICE, however, is not the sole point of criticism for immigration advocates. Recently, Immigration Judges' decisions have been scrutinized for their lack of consistency. Wide variations in IJ decision making indicates that the judge assigned to a case heavily influences the likelihood of a favorable outcome to ICE. The intersection of these two distinct problems—immigration detainee transfers and inconsistent IJ decisions—effectively allows ICE to forum shop by transferring detainees to detention centers with IJs who are likely to issue rulings favorable to ICE. This amounts to a crisis of justice, as ICE may transform facially neutral proceedings into judicial rubber stamping for the case outcomes ICE desires.

[*] J.D. Candidate, 2019, University of Georgia School of Law; B.A. Philosophy, History, 2016, University of Georgia. I am grateful to Professor Jason Cade and Amy Helmick for their guidance in writing this note. I would also like to thank the editors of the Georgia Law Review for their helpful criticisms and recommendations.

TABLE OF CONTENTS

I. INTRODUCTION

Ruben Lima-Diaz has continuously lived in the United States for twenty-one years since he entered the country from his native Mexico when he was three years old.[1] On more than one occasion during those two decades, Lima-Diaz had run-ins with the law.[2] After Lima-Diaz was first arrested for possession of marijuana in 2012, he was detained pursuant to removal proceedings by Immigration Customs and Enforcement ("ICE"). [3] In less than three weeks, ICE released him after deciding to close his case.[4] This would not be Lima-Diaz's last encounter with ICE.

Four years later, Lima-Diaz was arrested for a DUI and ICE reinstated removal proceedings against him.[5] He was detained at Stewart Detention Center—one of four ICE detention facilities in Georgia and the second largest facility in the country[6]—in the small, rural town of Lumpkin, Georgia.[7] After being detained for two months and managing to secure counsel, an Immigration Judge ("IJ") released Lima-Diaz on a $2,000 bond on Christmas Eve of 2016.[8] ICE did not appeal this grant of bond to the Board of Immigration Appeals.[9]

Here is where the story gets more interesting. After Lima-Diaz had been free on bond for over four months, ICE agents rearrested and detained him during a routine check-in with his probation

---

[1] Petition for a Writ of Habeas Corpus at 4, Lima-Diaz v. Gallagher, No. 7:17-cv-131 (M.D. Ga. July 18, 2017).

[2] Respondent's Opposition to Petition for Writ of Habeas Corpus at 2–3, Lima-Diaz v. Gallagher, No. 7:17-cv-131 (M.D. Ga. Aug. 1, 2017) (indicating arrests for misdemeanor possession of marijuana, tattooing a minor, driving without a license, and DUI).

[3] *Id.* at 3.

[4] *Id.*

[5] *Id.*

[6] *Where Are Immigrants with Immigration Court Cases Being Detained?*, TRAC IMMIGRATION (Mar. 29, 2018), http://trac.syr.edu/immigration/reports/504 (last visited Aug. 15, 2018) ("Los Angeles County, California with its Mira Loma Detention Facility (and San Pedro) accounted for the largest number of detainees among all counties in the United States. It was followed by Stewart County, Georgia which has the Stewart Detention Center."); PENN STATE LAW CENTER FOR IMMIGRANTS' RIGHTS CLINIC & PROJECT SOUTH, IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS 26 (2017), http://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf [hereinafter IMPRISONED JUSTICE]

[7] Petition for a Writ of Habeas Corpus, *supra* note 1, at 5.

[8] *Id.*

[9] *Id.* at 6.

officer.[10] Rather than returning Lima-Diaz to Stewart Detention Center where he was previously detained, ICE agents moved him to the Irwin County Detention Center in Ocilla, Georgia.[11] There, ICE incarcerated him for over two months without a bond hearing until he appeared before a new IJ on July 11, 2017.[12] This time, the IJ set a $25,000 bond, even though Lima-Diaz had neither been arrested for another crime nor had he violated the terms of his previous bond.[13] When Lima-Diaz's counsel protested the high amount, the IJ crossed out the $25,000 amount by hand and denied bond entirely.[14] Lima-Diaz's habeas petition was dismissed on January 18, 2018, and, as of the time of writing, he remains in detention at Irwin Detention Center.[15]

Lima-Diaz's story is common. Like the 34,376 aliens who remain in ICE custody on an average day, he was subject to immigration detention in an isolated, rural area of the United States, awaiting potential deportation.[16] He was also one of the 374,059 ICE detainees who are transferred to different detention facilities each year.[17] He may yet become one of the 240,255 aliens removed from the interior United States by ICE each year.[18]

Each of these common components of immigration detention—transfers of detainees,[19] denials of bond,[20] and prolonged detention

---

[10] *Id.* at 7.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 9–10.

[15] Order at 1, Lima-Diaz v. Gallagher, No. 7:17-cv-131 (M.D. Ga. Jan. 10, 2018).

[16] *See* U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2018 33 (2017), https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf (noting that in FY 2016, "[ICE Enforcement and Removal Operations] housed a daily average of 34,376 aliens").

[17] *New Data on 637 Detention Facilities Used by ICE in FY 2015*, TRAC IMMIGRATION (Apr. 12, 2016), http://trac.syr.edu/immigration/reports/422 (last visited Aug. 15, 2018) ("All totaled, there were 374,059 recorded transfers among ICE facilities during FY 2015.").

[18] *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 166, at 33.

[19] *See* César Cuauhtémoc García Hernández, *Due Process Rights and Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 19–23 (2011) (arguing that transferring detainees to isolated prisons effectively prevented them from obtaining counsel).

[20] *See* Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 159–61 (2016) (explaining that failures in the bond determination process force immigration detainees to remain incarcerated for unnecessarily long periods of time).

periods[21]—raises serious concerns about the fundamental justice of the immigration detention system. Simultaneously occurring, these concerns amount to a crisis of justice. This Note explains how the tremendous discretion afforded to IJs to make decisions in immigration cases interacts with the ample discretion that immigration enforcers possess to transfer detainees. IJs are afforded broad discretion in deciding the availability of pretrial release and the final outcome of detainees' cases.[22] Meanwhile, ICE has the authority to transfer detainees to any detention facility in the country, where local IJs are appointed to preside over bond and merits hearings.[23] Thus, ICE can effectively choose which IJ will make a critical case determination. Because IJ decision making is inconsistent, this choice of IJ is almost outcome-determinative, allowing ICE to forum shop to secure favorable rulings.

This Note argues that ICE's unconstrained ability to transfer immigration detainees to any detention center allows the agency to engage in judge shopping to secure favorable rulings. Part II outlines the statutes presently governing immigration detention, explains how ICE transfers detainees, and discusses the problematic and outcome-influencing conditions of detention. Part III explains the statutory authority of IJs, the factors that influence their decisions, and the tendencies in the outcomes of their decisions. Part IV explains how ICE can judge-shop by transferring detainees, provides possible examples of such judge-shopping, and explains why judge shopping offends critical notions of fairness that are central to both immigration policy and general adjudicatory fairness. Part V concludes that there are few options to foreclose this possibility without an overhaul of the immigration detention framework.

II. THE IMMIGRATION DETENTION FRAMEWORK

Immigration detention is governed by a complex statutory scheme and implemented by multiple federal agencies. This section

---

[21] *See* Michelle Firmacion, *Protecting Immigrants from Prolonged Preremoval Detention: When "It Depends" is No Longer Reasonable*, 42 HASTINGS CONST. L.Q. 601, 603–04 (2017) (analyzing prolonged periods of immigration detention and the proposed solutions to the issue).

[22] *See infra* Part III.A (describing the scant authorities governing IJs' decisions).

[23] *See infra* Part II.B (analyzing ICE's broad authority to transfer detainees and the increasing rate of transfers).

first outlines the relevant laws and policies regarding detention and detainee transfers. It then turns to the problematic and potentially outcome-influencing conditions that prevail in immigration detention facilities.

A. STATUTORY AUTHORITIES FOR DETENTION

Three classes of aliens are subject to immigration detention: (1) arriving aliens, (2) noncitizens subject to possible removal, and (3) noncitizens ordered removed but awaiting deportation.[24] The detention of each class is governed by separate statutory provisions interpreted by the agency and courts.[25]*1. Arriving Aliens* 8 U.S.C. § 1225 provides inspection and detention standards for all aliens "present in the United States who [have] not been admitted or who arrive[] in the United States."[26] The term "arriving aliens" is a misnomer, because this class includes not only aliens who present themselves for admission "at a designated port of arrival," but also aliens who are already present in the country, provided that they meet the other requirements of the statute.[27] All arriving aliens are subject to inspection to determine whether they are admissible to the United States.[28]

1. Arriving Aliens.

Asylum seekers constitute a substantial portion of the arriving aliens subject to §1225's provisions.[29] If an arriving alien applies for asylum or claims a fear of persecution if not admitted, then an asylum officer must assess the alien's application and determine whether the alien's fear of persecution is credible.[30] These aliens are

---

[24] *See id.* at 606–07 (outlining these three categories of immigration detainees) (citing Adam Klein & Benjamin Wittes, *Preventative Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 141–44 (2011)).

[25] *See* 8 U.S.C. § 1255 (2012) (governing arriving aliens); 8 U.S.C. § 1226 (2012) (governing noncitizens subject to removal); 8 U.S.C. § 1231 (governing noncitizens ordered removed).

[26] 8 U.S.C. § 1225(a)(1) (2012).

[27] *Id.*

[28] 8 U.S.C. § 1225(a)(3) (2012).

[29] *See* HUMAN RIGHTS FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS 11–12 (2016) ("In fiscal year 2014, ICE held 44,270 asylum seekers in immigration detention facilities, nearly a three-fold increase from 2010 . . . ."); *see also* NADWA MOSSAAD, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2015 7 (2016) ("Overall, grants of asylum increased by [12%] from 23,374 in 2014 to 26,124 in 2015 . . . .").

[30] 8 U.S.C. § 1225(b)(1)(A)(ii) (2012).

subject to mandatory detention pending such a determination.[31] If the asylum officer denies the application or finds the fear of persecution not credible, then the alien is subject to further detention pending removal.[32]

2. Noncitizens Subject to Removal.

Noncitizens are subject to removal based on one of two provisions. First, under §1226(a), the United States Attorney General may generally issue warrants for any noncitizen to determine whether that noncitizen is subject to removal.[33] While noncitizens may be detained until an immigration court determines that they should be removed, their detention is discretionary because an IJ may release them on bond or conditional parole.[34] However, the Attorney General may revoke any bond or other form of release at any time.[35]

Second, certain criminal noncitizen aliens are subject to removal under §1226(c).[36] Unlike detainees under §1226(a), aliens arrested under §1226(c) are subject to mandatory detention pending determination of their removal.[37] Only certain crimes warrant detention, and §1226(c) incorporates these crimes by reference to other statutes.[38] Those crimes include various controlled substance

[31] 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2012).

[32] *Id.*

[33] *See* 8 U.S.C. § 1226(a) (2012) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.").

[34] *See* 8 U.S.C. § 1226(a)(1) (2012) ("[The Attorney General] *may* continue to detain the arrested alien." (emphasis added)); 8 U.S.C. § 1226(a)(2)(A)–(B) (2012) (permitting the release of an arrested alien on a "bond of at least $1,500" or conditional parole); *see also* Firmacion, *supra* note 21, at 606 ("Detention under [1226(a)] is discretionary and aliens are entitled to bond hearings.").

[35] *See* 8 U.S.C. § 1226(b) (2012) ("The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of this section, rearrest the alien under the original warrant, and detain the alien.").

[36] 8 U.S.C. § 1226(c) (2012).

[37] *See* 8 U.S.C. § 1226(c)(1) (2012) ("The Attorney General *shall* take [the alien] into custody . . . ." (emphasis added)).

[38] *See id.* (listing the relevant statutes for crimes sufficient to warrant arrest).

crimes,[39] possession or sale of a firearm,[40] terrorist activities,[41] multiple crimes with an aggregate sentence of more than five years,[42] aggravated felonies,[43] and "crimes of moral turpitude" with a sentence of one year or longer.[44] Once a noncitizen is released from criminal incarceration based on a conviction for one of these crimes, ICE may subject the noncitizen to civil detention pursuant to §1226(c) at any time.[45] Once noncitizens are placed in immigration detention under §1226(c), there is no statutory provision authorizing their release on bond.

3. Noncitizens Ordered Removed.

Once an immigration court has ordered a noncitizen's removal, the Attorney General has ninety days to deport the noncitizen.[46] Noncitizens are subject to mandatory detention during this removal period.[47] If a noncitizen is not deported during the ninety-day removal period, the Attorney General must release the noncitizen

[39] *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2012) ("[V]iolation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . ."); 8 U.S.C. § 1227(a)(2)(B)(ii) (2012) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.").

[40] 8 U.S.C. § 1227(a)(2)(C) (2012).

[41] *See* 8 U.S.C. § 1182(a)(3)(B) (2012) (listing as "terrorist activities," among others, membership in a terrorist organization, engagement in terrorist activity, and likelihood to engage in terrorist activity).

[42] 8 U.S.C. § 1182 (a)(2)(B) (2012).

[43] 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

[44] 8 U.S.C. § 1227(a)(2)(A)(i) (2012).

[45] *See* Jenna Neumann, *Proposing a One-Year Time Bar for 8 U.S.C. § 1226(c)*, 115 MICH. L. REV. 707, 712–13 (2017) (alteration in original) (stating that the Board of Immigration Appeals has held that §1226(c) "allow[s] for mandatory detention any time after the alien's release") (citing *In re* Rojas, 13 I. & N. Dec. 117, 127 (2001) (interpreting §1226(c) to permit arrest of a criminal noncitizen at any time after release from state criminal custody)). *But see* Castañeda v. Souza, 810 F.3d 15, 42 (1st Cir. 2015) (disagreeing with the BIA's interpretation and holding that §1226(c) did not authorize ICE to detain a criminal noncitizen after the "alien's years of living freely").

[46] *See* 8 U.S.C. § 1231(a)(1)(A) (2012) ("[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days. . . .").

[47] 8 U.S.C. § 1231(a)(2) (2012) ("During the removal period, the Attorney General *shall* detain the alien . . . ." (emphasis added)); Firmacion, *supra* note 21, at 606–07 ("Section 1231(a)(1) authorizes mandatory detention during a ninety-day removal period.") (citing Klein & Wittes, *supra* note 24, at 144).

from detention.[48] However, §1231(a) also allows for discretionary detention of criminal noncitizens[49] beyond the removal period.[50]

4. Statutory Overview.

To illustrate the operation of §§1225, 1226, and 1231, assume that X is an alien who arrives at the United States border and claims a fear of persecution if denied entry into the country. Customs and Border Patrol ("CBP") of the Department of Homeland Security ("DHS") subjects X to mandatory detention until an immigration court decides whether X's claimed fear is credible. CBP and ICE detain X for one month before an immigration court grants X asylum.[51] X is released and decides to settle in Georgia.

Later, X is arrested and convicted in a Georgia state court for possession of one gram of cocaine and is sentenced to the statutory minimum one-year incarceration.[52] Upon X's release from a Georgia prison, the Attorney General issues a warrant for X's arrest, as a criminal noncitizen who is subject to removal pursuant to §1226(c). After X's arrest, ICE may detain X under §1226(c) until an immigration court determines whether to remove X. ICE detains X for six months under §1226(c) before X appears in an immigration court for removal proceedings.[53] Totaling X's detention times under §§1225 and 1226(c), X has been detained by ICE for seven months.

The immigration court decides that X will, in fact, be removed. ICE then continues to detain X for the ninety-day removal period under §1231. The ninety-day removal period expires, and X has not been deported. Nevertheless, because X committed a requisite crime

---

[48] *See* 8 U.S.C. § 1231(a)(3) (2012) (mandating the release of the alien after the removal period, but imposing supervision requirements on the alien, including periodic appearances before an immigration officer, medical and psychiatric exams, and reports of activities).

[49] *See supra* Part II.A.2 (describing the status of criminal noncitizens).

[50] *See* 8 U.S.C. § 1231(a)(6) (2012) ("An alien ordered removed [who has committed a requisite crime under 1226(c)] . . . *may* be detained beyond the removal period . . . .") (emphasis added).

[51] *See* García Hernández, *supra* note 19, at 33 (noting that the average detention period among all classes of ICE detainees is 37 days) (citing DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., IMMIGRATION AND CUSTOM ENFORCEMENT'S TRACKING AND TRANSFERS OF DETAINEES 2 (2009)).

[52] *See* O.C.G.A. § 16-13-30(c)(2) (2017) (imposing a minimum one-year prison sentence for the possession of at least one gram of a controlled substance).

[53] *See* Rodriguez v. Robbins, 804 F.3d 1060, 1084–85 (9th Cir. 2015) (imposing a six-month time limit for pre-removal detention under §1226(c) before a detainee is entitled to a bond hearing), *rev'd by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018). As the six-month limit is no longer valid in light of *Jennings*, detention times may now greatly exceed six months.

under §1226(c)—possession of a controlled substance—ICE continues to detain X. ICE finally deports X six months after the immigration court ordered X's removal.[54] X's total civil detention time since arriving in the United States was 13 months—exceeding X's one-year criminal prison sentence by one month.[55]

B. PREVALENCE OF DETAINEE TRANSFERS

ICE uses three types of facilities to house immigrant detainees. First, Service Processing Centers (SPCs) are owned by ICE but operated by private contractors.[56] Second, Contract Detention Facilities (CDFs) are both owned and operated by private contractors.[57] Third, ICE has Intergovernmental Agency Service Agreements (IGSAs) with certain local jails to house detainees.[58] All in all, ICE maintains over 300 detention facilities to house over 30,000 detainees per day.[59] 50% of detainees are housed in 240 IGSAs with county prisoners and other non-immigration inmates.[60] In 2016, ICE spent $6.1 billion on immigration detention.[61]

Under §1231(g)(1), the Attorney General and ICE determine where to house each detainee in their custody.[62] Courts have held that this statutory power further authorizes ICE (through the

[54] *See* Zadvydas v. Davis, 533 U.S. 678, 700–01 (2001) (establishing a presumptive six-month maximum term for post-removal detention under §1231).

[55] This assumes that X was not paroled during his state prison sentence.

[56] DORA SCHRIRO, DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENF'T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 10 (2009)

[57] *Id.*

[58] *Id.*

[59] *See id.* ("ICE assigns aliens to over 300 detention facilities."); BUDGET-IN-BRIEF: FISCAL YEAR 2018, *supra* note 16, at 33 ("[ICE Enforcement and Removal Operations] housed a daily average of 34,376 aliens.").

[60] IMPRISONED JUSTICE, *supra* note 6, at 19 ("Overall, in 2015, 72% of immigration detention beds were located in facilities run by for-profit prison corporations under ICE contracts. This is in stark contrast to the 7% of federal and state non-immigration related incarcerated individuals who were held in for-profit detention in 2014." (footnotes omitted)); SCHRIRO, *supra* note 56, at 10 ("50 percent of the population is detained primarily in non-dedicated or shared-use county jails through IGSA. These facilities, approximately 240 in number, also house county prisoners and sometimes, other inmates.").

[61] IMPRISONED JUSTICE, *supra* note 6, at 18.

[62] 8 U.S.C. § 1231(g)(1) (2012) ("The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal."); *see also* García Hernández, *supra* note 19, at 22 ("[T]he Secretary of Homeland Security now carries discretionary authority [to arrange for immigration detention].").

Attorney General) to transfer detainees as the agency sees fit.[63] ICE has regularly utilized this authority to move detainees from one detention facility to another; the number of annual detainee transfers doubled from 122,783 in 2003 to 261,941 in 2007.[64] For instance, in 2007, it is estimated that ICE transferred eighty-four percent of all immigration detainees to different facilities.[65]

In response to highly publicized studies criticizing this increasing rate of detainee transfers,[66] ICE altered its policy in 2012 by limiting the transfer of detainees who had family or retained counsel near their location of detention or who had open proceedings in immigration court at their current detention center.[67] But so long as one of these factors is not present, ICE may transfer a detainee for any number of reasons, including preventing the overcrowding of a facility, ensuring the safety of a detainee and ICE personnel, or removing detainees from a substandard facility.[68] While the reform was initially praised by critics,[69] the number of transfers has not declined as expected, suggesting that ICE has derogated from its own standards. In 2015, for instance, ICE recorded 374,059 detainee transfers[70]—nearly a 50% increase from the 2008 total that motivated criticism and ICE's resulting policy shift.[71] Transfer of detainees thus remains a markedly widespread procedure, as, on

---

[63] *See, e.g.,* Van Dinh v. Reno, 197 F.3d 427, 433 (10th Cir. 1999) ("The Attorney General's discretionary power to transfer aliens from one locale to another, as she deems appropriate, arises from [§1231's] language."); *see also* García Hernández, *supra* note 19, at 22 ("Federal courts have consistently held that [§1231] grants the executive branch almost limitless authority to house detainees wherever the government sees fit.").

[64] HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 2 (2009).

[65] García Hernández, *supra* note 19, at 20.

[66] *See, e.g.,* HUMAN RIGHTS WATCH, *supra* note 64, at 3–4 (arguing that ICE's detainee transfer policy hinders detainees' access to counsel, prevents full adjudication of claims on the merits, and unnecessarily alienates detainees from their families).

[67] U.S. IMMIGRATION CUSTOMS AND ENF'T, POLICY 11022.1: DETAINEE TRANSFERS 2–3 (2012), https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf.

[68] *Id.* at 3.

[69] *See Update: ICE Limits Immigrant Detainee Transfers*, HUMAN RIGHTS WATCH (May 22, 2012, 2:32 PM), https://www.hrw.org/news/2012/05/22/update-ice-limits-immigrant-detainee-transfers (last visited Aug. 15, 2018) ("Human Rights Watch considers ICE's new policy directive a positive step toward protecting the basic rights of immigrants and urges the agency to implement it efficiently and rigorously.").

[70] *New Data on 637 Detention Facilities Used by ICE in FY 2015*, *supra* note 17,("All totaled, there were 374,059 recorded transfers among ICE facilities during FY 2015.").

[71] HUMAN RIGHTS WATCH, *supra* note 64, at 2.

average, every ICE detainee is transferred at some point during the year.[72]

C. OUTCOME-DETERMINATIVE CONDITIONS OF DETENTION

While the bases for ICE detention and transfers present important problems, the actual conditions of immigration detention are the most unsettling aspects of the detention system. These conditions not only offend notions of fairness, but also often affect the outcome of immigration court decisions on the merits.

ICE detainees may be housed in detention centers in remote, rural areas.[73] For example, Stewart Detention Center in Lumpkin, Georgia is the second largest immigration detention facility in the country, maintaining 1,752 beds.[74] Meanwhile, Lumpkin, Georgia has an estimated total population of only 2,741 according to the 2010 U.S. Census.[75] This tendency to house detainees in rural areas has several deleterious effects on detainees.

First, the remoteness of the detention locations severely hinders detainees' access to counsel. Fewer attorneys are present in these isolated regions, and thus detainees are far less likely to retain a lawyer to represent them in immigration proceedings.[76] Inability to secure counsel also seems to have a significant effect on the outcome of immigration cases themselves. For example, of the deportation proceedings that began in fiscal year (FY) 2016 and have now concluded, 41% of immigrants who were represented by counsel were ordered removed,[77] while by contrast, 89% of pro se

---

[72] *See id.*

[73] *See* García Hernández, *supra* note 19, at 35 (comparing detention center populations to U.S. Census data to show that, at times, detainees actually account for a significant portion of a town's total population).

[74] *See* IMPRISONED JUSTICE, *supra* note 6, at 26.

[75] *Community Facts: Lumpkin city, Georgia*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmk (last visited Aug. 15, 2018).

[76] *See* Ingrid Eagly and Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 40–41 (2015) ("[I]mmigrants with court hearings in large cities had a representation rate of 47%, more than four times greater than the 11% representation rate of those with hearings in small cities or rural locations.").

[77] *See Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/nta (last visited Aug. 15, 2018). This percentage was calculated by comparing the fiscal year the case began, the immigrant's representation status, and the outcome of the case. Immigrants were represented in 45,248 of the cases decided, and 18,359 were ordered removed. *Id.*

immigrants were ordered removed.[78] Immigrants who are represented by lawyers who specialize in immigration proceedings are even more likely to secure relief.[79]

Second, isolated detention locations separate detainees from their families and support networks. As noted above, on average, every detainee is transferred at some point in a given year.[80] Additionally, when detainees are transferred, they are more likely to be moved from states with high-density immigrant populations to more sparsely populated states.[81] Thus, more likely than not, detainees will be housed in locations far from their homes, which makes it difficult for family members to visit.[82] This toxic combination of being placed in legal limbo and being isolated from supportive personal relationships is psychologically detrimental for many detainees.[83] These emotional factors can directly influence the outcome of legal proceedings, as feelings of desperation motivate

[78] *Id.* (showing that immigrants were unrepresented in 61,662 of the cases decided, and 55,089 were ordered removed).

[79] *See* JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 44–46 (2009) (analyzing the results of asylum cases from 2000 to 2004 and finding that asylum grant rates varied significantly based on representation—16% of unrepresented asylum seekers, 45% of represented asylum seekers, and 89% of asylum seekers represented by the Georgetown Clinic, and 96% of asylum seekers represented by pro bono lawyers from Human Rights First were granted asylum). By contrast, Lumpkin, Georgia, "which completed 42,006 removal cases during the study period, did not have a single practicing immigration attorney in the city." Eagly and Shafer, *supra* note 76, at 42.

[80] *See supra* notes 72–72 and accompanying text.

[81] *See* HUMAN RIGHTS WATCH, *supra* note 64, at 32 ("[T]here is a great deal of transfer traffic originating in and going to Arizona, California, Florida, Pennsylvania, and Texas. However, Louisiana is far more likely to receive transferred detainees than it is to originate transfers, and California, New Jersey, New York, and Oregon are more likely to originate transfers than they are to receive transferred detainees."); García Hernández, *supra* note 19, at 37–38 ("The prevalence of immigrant communities in large urban areas suggests that [lawful permanent residents] . . . are likely to have been initially apprehended at great distance from the rural immigration prisons where they are forced to wage their last battle to stay in this country.").

[82] *See* IMPRISONED JUSTICE, *supra* note 6, at 28 ("[N]on-legal visits [at Stewart Detention Center] are permitted once a week for an hour, though the remote location limits the ability of many family members to visit."). Furthermore, detainees' family members may also face possible detention due to their legal status, compelling them to avoid visitations entirely. *Id.*

[83] *See* HUMAN RIGHTS WATCH, *supra* note 64, at 79 (reporting that detainees who underwent psychological analysis were "already in a desperate place, and they are being separated from anyone who can be any kind of support to them").

some detainees to abandon legitimate claims in order to secure a more expedient release.[84]

Third, the location of detention can affect the substantive law applied during immigration proceedings. This is especially true for criminal aliens because the U.S. Courts of Appeals interpret the severity of certain felonies differently, affecting whether an alien's crimes are sufficient to warrant §1226(c) detention.[85] Thus, a detainee could face an increased likelihood of deportation based solely upon a transfer to a different jurisdiction that more harshly interprets the detainee's criminal history.[86]

In response to these problems, ICE asserts that its tendency to locate immigration detention facilities in sparsely populated areas serves important policy interests. Specifically, ICE has cited detention costs, proximity to airports, and the availability of employees as rationales that influence these choices.[87] While ICE may offer facially legitimate reasons for its detention centers' locations, the detrimental effects on detainees nonetheless continue.

III. IMMIGRATION JUDGES AND ADJUDICATORY INCONSISTENCY

Immigration Judges (IJs) are the principal administrative adjudicators for both bond and merit decisions in the immigration courts. Like all judges, the IJ has a substantial effect on the outcome of legal proceedings. The standards governing IJ decisions, however, are unique and distinguishable from those of other federal judges. This section examines (1) the statutory authorities governing IJs, (2) the resulting variations that prevail in IJ decisions, and (3) the factors that predominantly influence IJs in reaching their decisions.

---

[84] *See id.* at 81 ("[T]he transfers of detainees away from family members wore down the detainees' willingness to spend the time in detention necessary to pursue appeals of their cases. Eventually, many signed voluntary departure agreements.") (footnote omitted).

[85] *See id.* at 73 ("Since the federal circuit courts of appeals vary in their interpretations of criminal offenses, the transfer of a detainee can affect the way the court will interpret whether the criminal offense he is being deported for is an 'aggravated felony.'").

[86] *See id.* at 73–74 (demonstrating the difference between Michigan's and Louisiana's interpretations of two misdemeanor controlled substance charges as an example of this phenomenon).

[87] *See* García Hernández, *supra* note 19, at 36 (reporting the factors included by ICE in its meetings on detention maintenance).

A. THE SCANT AUTHORITIES GOVERNING IMMIGRATION JUDGES

Few authorities provide direct guidance regarding IJs. 8 U.S.C. § 1101(b)(4) defines an "immigration judge" as "an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under §1229a of this title."[88] It is important to note several details in this initial definition. First, IJs serve at the pleasure of the Attorney General and do not receive lifetime appointments.[89] As a result, "IJs arguably have less structural independence than federal judges and potentially less independence than administrative law judges."[90] Second, the Executive Office of Immigration Review ("EOIR") directly oversees IJs for the Attorney General.[91] Although the statute itself does not outline specific hiring criteria for IJs, the EOIR currently requires only that IJs have seven years of prior legal experience.[92]

Among their duties, IJs must "administer oaths, receive evidence, and interrogate, examine, and cross-examine aliens and any witnesses" at the court to which they are assigned.[93] IJs are provided little guidance as to how they should "exercise their independent judgment and discretion"[94] in carrying out these duties, but agency policy documents give some structure. For example, the Immigration Judge Benchbook lists several factors that IJs may consider in deciding whether to grant bond and the

[88] 8 U.S.C. § 1101(b)(4) (2012).

[89] *See* Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117, 123 (2016) ("[I]mmigration judges do not enjoy life tenure and can be removed from the bench for misconduct or reassigned to another position at the discretion of the Attorney General.").

[90] BANKS MILLER, LINDA CAMP KEITH & JENNIFER S. HOLMES, IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 9 (2015).

[91] *See id.* ("The EOIR is charged with administering immigration courts nationwide. . . . Within the EOIR, the Office of the Chief Immigration Judge . . . has administrative supervision for approximately 260 IJs.").

[92] *Id.*

[93] 8 C.F.R. § 1003.10(b).

[94] *Id. See also In re* Guerra, 24 I.&N. Dec. 37 (2006) ("An Immigration Judge has broad discretion in deciding the factors that he or she may consider in custody redeterminations. The Immigration Judge may choose to give greater weight to one factor over others, as long as the decision is reasonable."), *abrogated by* Pensamito v. McDonald, No. 18-0475-PBS, 2018 WL 2305667 (D. Mass. May 21, 2018).

amount of bond to set.[95] These factors include the immigrant's length of residence, family ties to the United States, employment history, prior evasions of ICE custody, and criminal record.[96] IJ decisions are also reviewable by the Board of Immigration Appeals.[97]

B. THE WIDE VARIATION IN IMMIGRATION CASE OUTCOMES

IJ decisions have recently faced heavy criticism for their inconsistency across and within jurisdictions.[98] While much of the recent research focuses on the wide variation of results in asylum cases,[99] some research now implicates other types of IJ decisions as well.[100] The results of these studies demonstrate that there is an increasingly wide variation in the outcome of immigration court decisions.[101] Such inconsistency in adjudication raises important questions about the fairness of the process afforded immigrants in immigration courts.

Asylum cases are classic examples of such inconsistency because the prevalence of variability can be demonstrated at multiple levels of abstraction. For example, the rate of granting asylum to immigrants from countries that produce large numbers of asylum seekers ranges from 52% in New York immigration courts to only 12% in Atlanta immigration courts.[102] When analysis is restricted

---

[95] U.S. DEP'T OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK: BOND WORKSHEET, https://www.justice.gov/eoir/page/file/987996/download.

[96] *Id. See also* Ryo, *supra* note 89, at 131 (listing these factors among others).

[97] 8 C.F.R. § 1003.10(c).

[98] *See, e.g.,* MILLER, KEITH & HOLMES, *supra* note 90, at 16 ("[D]isparities across courts and across judges have raised significant questions about the quality and consistency of justice in immigration courts . . . ."); RAMJI-NOGALES, SCHOENHOLTZ & SCHRAG, *supra* note 79, at 3 ("[T]he result may be determined as much or more by who [the adjudicator] is, or where the court is located, as by the facts and the law of the case."); Ryo, *supra* note 89, at 119 (analyzing immigration bond hearings and finding only one significant variable influencing bond decisions).

[99] *See generally* MILLER, KEITH & HOLMES, *supra* note 90 (analyzing the factors that contribute to IJ decisions in asylum cases); RAMJI-NOGALES, SCHOENHOLTZ & SCHRAG, *supra* note 79 (focusing upon the variation in asylum grant rates for different nationalities).

[100] *See* Ryo, *supra* note 89, at 119 ("I examine for the first time judicial decision making in immigration bond hearings.").

[101] *See infra* notes 99–108 and accompanying text (illustrating the variations in different types of IJ decisions).

[102] RAMJI-NOGALES, SCHOENHOLTZ & SCHRAG, *supra* note 79, at 36–37.

to a single nationality, the results are even more pronounced.[103] For example, "a Chinese asylum seeker unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her asylum claim, as compared to 47% nationwide."[104] However, inconsistency is prevalent *within* immigration courts as well, as a survey of seventy-four IJs from the five immigration courts that heard the most asylum cases revealed that "32% [of those IJs] decided asylum cases . . . at rates significantly discrepant from *their court's* average grant rate."[105]

These wide variations are not limited to asylum decisions. Emily Ryo analyzed bond decisions for detainees held for longer than six months in immigration courts in the Central District of California and found that some judges granted bond in 75% percent of cases, while others granted bond in only 22% of cases.[106] Additionally, when IJs granted bond, the amounts varied significantly—$10,667 to $80,500—and were well above the statutory minimum bond amount of $1,500.[107]

IJ decisions also vary widely concerning the outcomes of removal proceedings. For example, of removal cases that began in FY 2016 and have reached an outcome, the San Francisco Immigration Court ordered removal for 47% of immigrants.[108] By contrast, the Atlanta Immigration Court, which decided a similar number of cases,

[103] *Id.* at 34 ("[E]ven for asylum seekers from countries that produce a relatively high percentage of asylees, there are serious disparities among immigration courts in the rates at which they grant asylum . . . .").

[104] *Id.* at 35.

[105] *Id.* at 40 (emphasis added).

[106] Ryo, *supra* note 89, at 118–19. Notably, the class of detainees at the basis of Ryo's analysis is the same class at issue in *Rodriguez v. Robbins*, in which the Ninth Circuit held that detainees who are detained by ICE for longer than six months were entitled to a bond hearing. 804 F.3d 1060, 1082 (9th Cir. 2015) ("[T]he mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the alien shifts to § 1226(a), which is discretionary and which we have already held requires a bond hearing." (citation omitted)). The United States appealed and the U.S. Supreme Court reversed. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[107] Ryo, *supra* note 89, at 119.

[108] *See Details on Deportation Proceedings in Immigration Court*, *supra* note 77. This percentage was calculated by comparing the fiscal year the case began, the immigration court that decided the case, and the outcome of the case. Of the 4,874 cases that reached an outcome—calculated by subtracting the number of pending cases from the total number of cases heard—2,296 immigrants were ordered removed. *Id.*

ordered removal for 87% of immigrants.[109] Of all removal cases in the United States during the same period, immigration courts ordered removal for 69% of immigrants.[110] There are thus wide variations in IJs' decisions regarding asylum, and bonds, and removal.[111] Such statistics indicate a startling conclusion: the location of detention and the individual IJ who decides an immigrant's case may substantially influence the outcome of the detainee's case.

C. NON-MERITORIOUS FACTORS INFLUENCING IJ DECISIONS

While it is relatively easy to demonstrate that IJ decisions vary widely, it is much more difficult to adequately explain why the variation occurs. Shedding some light on this more difficult inquiry are multiple studies which show that IJs' personal tendencies and predispositions on certain social and legal issues strongly influence the decisions they reach in immigration cases.[112]

ICE provides IJs with very little guidance regarding the appropriate factors to consider in reaching decisions, so IJs enjoy broad discretion in their judgments[113] and often disproportionately consider a small number of issues in ruling on cases. For example, in deciding bond requests, the IJ Benchbook instructs IJs to consider a number of factors, including criminal history, family ties to the United States, and employment history.[114] Nevertheless, bivariate analysis of the relation of these factors to the outcome of bond hearings shows that "[t]he only legally relevant factors significantly related to bond grant/deny decisions are those

---

[109] *See id.* (showing that of the 4,656 cases that reached an outcome—calculated by subtracting the number of pending cases from the total number of cases heard—4,052 immigrants were ordered removed).

[110] *See id.* (showing that of the 106,910 cases that reached an outcome—calculated by subtracting the number of pending cases from the total number of cases heard—73,448 immigrants were ordered removed).

[111] *See supra* notes 97–102.

[112] These studies have predominantly analyzed asylum grant rates, rather than IJ decisions more generally. However, it is likely that the factors that prevailed in granting asylum similarly influence decisions in other types of proceedings, since the same IJs handle all types of immigration cases.

[113] *See* Ryo, *supra* note 89, at 131 (providing the eight factors included in the IJ Benchbook for bond hearings, yet acknowledging that IJs are under no obligation to abide by these factors so long as the decision is "reasonable").

[114] *See supra* notes 96–96 and accompanying text.

pertaining to the detainees' criminal history."[115] Thus, it is unclear whether and to what extent ICE's promulgated standards for deciding cases influence IJ decisions.

Statistical analysis of IJs' asylum decisions indicate that many personal characteristics of IJs might directly influence their decisions. For example, an IJ's prior work experience has a significant effect on asylum grant rates.[116] Specifically, an IJ's prior positions in the government, positions with the Department of Homeland Security, and military experience all decrease an IJ's likelihood of granting asylum by at least seven percentage points.[117] On the other hand, IJs who have had previous careers with NGOs, academia, or private practice are at least 6% more likely to grant asylum.[118] An IJ's sex also exerts a substantial influence on asylum grant rates, as women grant asylum in 53.8% of cases, while men only grant asylum in 37.3%of cases.[119]

More nuanced factors can also influence an individual IJ's decision-making. For example, immigrants who are detained during asylum proceedings "are [twelve] to [fifteen] percentage points less likely to receive relief than are those who have never been detained."[120] Even economic trends play a role in decisions, as increases in the national unemployment rate correspond to decreases in asylum grant rates by as much as eight percentage points.[121]

Finally, systemic issues in immigration courts play a role in the variation of decision rates. IJs face a severe backlog of cases, as "IJs typically handle sixty-nine cases a week and must dispose of twenty-seven cases per week."[122] Currently, there are 733,365 pending immigration cases nationwide that must be adjudicated by fewer than 300 IJs.[123] This number is up from 516,031 cases in 2016 and 174,935 in 2007.[124] In handling this massive case backlog, IJs lack the staff support that is typical of other federal judges, as most

---

115 Ryo, *supra* note 89, at 135.
116 RAMJI-NOGALES, SCHOENHOLTZ & SCHRAG, *supra* note 79, at 49–50.
117 *Id.* at 50.
118 *Id.*
119 *Id.* at 47.
120 MILLER, KEITH & HOLMES, *supra* note 90, at 71.
121 *Id.*
122 *Id.* at 16 (citing TRAC statistics).
123 *See Immigration Court Backlog Tool*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog (last accessed Aug. 15, 2018).
124 *Id.*

immigration courts go without bailiffs, clerks, and assistants.[125] Thus, the individualized factors listed above may play an even greater influence in cases, as IJs must look to dispose of matters quickly in order to stay up to date with their incessant workload. Also, because IJs are not appointed for life and are removable by the Attorney General, they may be less likely to grant release for certain detainees at the risk of the detainee's recidivism or commission of other harm.[126]

The critical takeaway from these tendencies is that IJ decisions may be influenced by a plethora of factors, many of which are entirely unrelated to the merits of the immigrants' cases. A normative stance on these issues is outside the scope of this Note. Rather, this Note observes that an immigration detainee's case may be more likely to be determined by external factors rather than the actual merits of the claim.

IV. ICE JUDGE-SHOPPING TACTICS

Immigration detainee transfers, detention conditions, and variability in IJ decision-making all raise independent causes for concern about the current immigration court system. Taken together, however, these factors may combine to present a true crisis of justice. In particular, current legal standards make it possible for ICE to use detainee transfers in the service of intentional judge-shopping in order to secure favorable bond or case outcomes. In this Part, I explain this potential for abuse, demonstrate possible evidence of its occurrence, and argue that it offends notions of fundamental justice and legal ethics.

[125] *See* MILLER, KEITH & HOLMES, *supra* note 90, at 16 ("IJs typically have little staff assistance; most courts are not assisted by a clerk or bailiff, and the judges often have to operate their own tape machines.").

[126] *See* Ryo, *supra* note 89, at 147 ("Given that immigration judges may be removed from the bench, the desire to not 'rock the boat' may be common. In this context, immigration judges may be especially motivated to avoid erroneous bond decisions involving detainees with certain types of convictions.") (citation omitted).

A. POTENTIAL FOR ICE TO ABUSE THE DETENTION FRAMEWORK

As outlined above, ICE has nearly unlimited authority to transfer detainees to different facilities in the United States.[127] The frequency of transfers has recently reached an all-time high,[128] and, on average, every detainee is transferred at least once in a given year.[129] Additionally, because IJs only hear cases in the immigration courts to which they are assigned, ICE effectively determines which IJ will preside over a detainee's case by transferring the detainee to a location within the IJ's jurisdiction.

Normally, this arrangement would not be problematic, as a case's outcome would ideally remain relatively consistent since all IJs apply the same body of law. As indicated by the wide variation in IJ decisions explained above, however, the individual characteristics and background of the IJ deciding a detainee's case can be outcome-determinative.[130] This presents the potential for ICE to abuse such variation, as moving a detainee to a certain facility not only determines who will hear the case, but also how the case will likely be decided.

As others have already argued, the transfer of detainees to detention facilities in rural areas effectively prevents them from accessing counsel and subjects them to prolonged isolation from their families and networks of support.[131] Together, these phenomena greatly reduce the likelihood that a detainee can obtain

---

[127] *See* Van Dinh v. Reno, 197 F.3d 427, 433 (10th Cir. 1999) ("The Attorney General's discretionary power to transfer aliens from one locale to another, as she deems appropriate, arises from [§1231's] language.").

[128] *See supra* note 62–63, 68–70 and accompanying text (indicating that ICE has derogated its own internally-imposed standards by continuing to increase the rate of detainee transfers).

[129] *See Details on Deportation Proceedings in Immigration Court*, *supra* note 77("[E]ach detainee experienced, on average, at least one transfer to another facility."). Because this is an average for all detainees, however, many detainees may have simply been transferred more than once.

[130] *See, e.g.,* MILLER, KEITH & HOLMES, *supra* note 90, at 16 ("[O]utcomes of individual asylum claims have come to depend largely on chance; namely, the IJ who happens to be assigned to hear the case.") (internal quotations omitted).

[131] *See* Eagly and Shafer, *supra* note 76, at 40–42 ("[I]mmigrants with court hearings in large cities had a representation rate of 47%, more than four times greater than the 11% representation rate of those with hearings in small cities or rural locations."); García Hernández, *supra* note 19, at 37–38 ("The prevalence of immigrant communities in large urban areas suggests that [lawful permanent residents] . . . are likely to have been initially apprehended at great distance from the rural immigration prisons where they are forced to wage their last battle to stay in this country." (footnote omitted)).

relief from an immigration court.[132] Therefore, ICE may use the transfer of detainees to particular locations to reduce a detainee's ability to secure a favorable outcome. When considered in conjunction with well-documented IJ tendencies, as well as the varying interpretations of the immigration consequences of criminal statutes among the Courts of Appeals,[133] a detainee's prospects of success may be entirely changed solely by moving that detainee to a different facility.

B. POSSIBLE EVIDENCE OF ICE FORUM-SHOPPING TACTICS

While this interrelatedness shows how ICE agents could take advantage of the system, proving actual malicious intent is quite difficult. ICE has provided facially neutral policy justifications for its decisions to transfer detainees and maintain detention facilities in remote areas.[134] Nonetheless, recent cases shed some light on ICE's other possible motivations.

By transferring detainees, ICE can avoid unfavorable IJ determinations made at the detention center of departure. For example, in *Lima-Diaz*, described above, [135] an IJ at Stewart Detention Center granted bond, and the detainee was released upon payment.[136] However, ICE simply re-apprehended the detainee a few months later without appealing the bond to the Board of Immigration Appeals.[137] ICE then detained the immigrant at a different facility, where the IJ denied bond.[138] Thus, even after an IJ grants relief to a detainee, ICE can circumvent the result by transferring the detainee to a different facility where another IJ may reach a different judgment.[139] ICE can even foreclose the possibility of relief entirely. For example, in *Brito-Ramirez v.*

---

[132] *See* HUMAN RIGHTS WATCH, *supra* note 64, at 81 (indicating that some detainees stopped pursuing their claims solely to escape detention); Eagly and Shafer, *supra* note 76, at 57 ("[A]t every stage in immigration court proceedings, representation was associated with dramatically more successful case outcomes for immigrant respondents.").

[133] *See supra* notes 83–84 and accompanying text.

[134] *See supra* notes 68, 87 and accompanying text.

[135] *See supra* notes 1–5, 7–15 and accompanying text.

[136] Petition for a Writ of Habeas Corpus, *supra* note 1, at 5.

[137] *Id.* at 7.

[138] *Id.* at 7–10.

[139] *See* Patel v. Gonzales, No. 06-0702-WS-M, 2007 WL 445463, at *1 (S.D. Ala. Feb. 8, 2007) (detailing how the immigrant was granted bond after being detained in St. Thomas, rearrested, taken to a detention center in Alabama, and denied bond by a different IJ).

Kelly,[140] an IJ granted a bond redetermination hearing to an immigrant detained in Charlotte, North Carolina.[141] The day after the IJ granted the hearing, ICE transferred the detainee to a different detention center in Charleston, South Carolina.[142] The IJ at the Charlotte facility then denied bond based solely upon the detainee's failure to attend the hearing in Charlotte.[143]

By transferring detainees, ICE also prevents detainees from utilizing retained counsel to argue for relief on their behalf. For example, in *Maling v. Johnson*,[144] the detainee retained counsel while detained in California to challenge his order of removal.[145] ICE then transferred the detainee to Alabama, and the detainee was unable to adequately communicate with counsel representing him in California.[146] ICE can also transfer detainees to take advantage of favorable substantive law in a jurisdiction. In *Ballesteros v. Ashcroft*,[147] the immigrant was arrested in Idaho for possession of a controlled substance.[148] This crime would not be sufficient for removal under Ninth Circuit law if the immigrant were detained in Idaho, but ICE then transferred him to a detention center in Colorado.[149] There, the IJ applied Tenth Circuit law, under which the detainee's prior drug conviction was sufficient to warrant § 1226(c) removal.[150] ICE can even interfere with proceedings in federal district courts by transferring detainees. For instance, ICE has transferred detainees who attempted to file habeas petitions in federal court from their original place of detention to more rural

140 No. 0:17-463-TMC-PJG, 2017 WL 1363904 (D.S.C. Mar. 17, 2017).
141 *Id.* at *1.
142 *Id.*
143 *Id.*
144 No. 2:16–cv–1263–JAM–EFB P, 2017 WL 1740636 (E.D. Cal. May 4, 2017).
145 *Id.* at *2.
146 *Id.*
147 452 F.3d 1153 (10th Cir. 2006).
148 *Id.* at 1155.
149 *Id.*
150 *Id.*

areas in other jurisdictions.[151] Some federal courts have even recognized such practices as attempts by ICE to forum-shop.[152]

These examples illustrate the different ways in which ICE can transfer detainees to obtain the outcomes it prefers in immigration proceedings. While they do not conclusively establish that ICE has intended to manipulate the transfer system, these examples show how such a strategy might be employed.

C. OFFENDING NOTIONS OF JUSTICE

ICE judge shopping offends notions of arbitral neutrality, fundamental justice, and legal ethics. Specifically, judge shopping enables ICE, the party that wields disproportionate power in a proceeding, to use that power to secure a favorable outcome solely by exerting control over the detainee, the weaker party. While many of these criticisms may apply to forum shopping generally, the power relationship between ICE and immigration detainees makes this a particularly egregious example of such a practice.

"Statistical disparities—especially when there is some expectation of similarity, such as when courts are construing the same law or constitution—embarrass the courts."[153] A neutral arbitrator is central to the United States' conception of the rule of law as a blind application of the norms created by legislatures and courts.[154] By permitting one party to circumvent this norm and secure an advantage that is unrelated to the merits of the dispute,

---

[151] *See, e.g.,* de Jesus Paiva v. Aljets, No. CIV036075 (DWF/AJB), 2003 WL 22888865, at *1 (D. Minn. Dec. 1, 2003) (issuing an injunction to prevent ICE from deporting a claimant from Minnesota to Pennsylvania); Farah v. INS, No. Civ. 02-4725 DSDRLE, 2002 WL 31828309, at *1 (D. Minn. Dec. 11, 2002) (staying ICE's removal of petitioner from Minnesota to Louisiana that prevented his filing of a habeas petition "[b]ecause of the haste with which he was removed").

[152] *See de Jesus Paiva*, 2003 WL 22888865, at *4 ("The Court finds that the practical effect of ICE's decision to transport Petitioners from Minnesota to Pennsylvania was to prevent them from filing their Petition while they were present in this state. To now hold that Petitioners may only file their Petition in the state that the ICE determines to send them would be to allow the ICE to forum shop, intentionally or not.") (citations omitted); *Farah*, 2002 WL 31828309, at *3 ("Although the Court refuses to find that the INS intentionally tried to manipulate jurisdiction in this case, the practical effect of its sudden decision to transport Farah from Minnesota to Louisiana overnight was to prevent him from filing his Petition while he was present in this state.").

[153] Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1689 (1990).

[154] *See id.* at 1687–89 (analyzing the "'sporting theory of justice,' according to which the law is a sort of game in which the contestants must surmount the obstacles that chance or the system impose, with no assistance given to either side").

we remove law from the realm of detached judgments and subject it to a reality of disproportionate power dynamics. ICE forum-shopping is an extreme instantiation of this concept because it permits the powerful party not only to take advantage of a forum, but also to manufacture a forum by forcibly moving an opposing party to a different location.

ICE's use of forum-shopping tactics also implicates the ICE attorneys who prosecute removal cases in which these tactics are employed. As representatives of the government, criminal prosecutors have a responsibility to temper zealous advocacy and seek justice in pursuing a case.[155] ICE attorneys, as representatives for the government in immigration proceedings, should be seen as sharing this responsibility in prosecuting removal cases.[156] ICE attorneys and other agency representatives exercise "broad discretion" in deciding whether and how to prosecute a removal case.[157] In doing so, ICE attorneys should recognize that the "[d]iscretion in the enforcement of immigration law embraces immediate human concerns."[158]

ICE's duty to consider the interests of justice in deciding whether to pursue an immigrant's removal should correspondingly extend to its decisions on which tactics to employ in the removal process. ICE's increasingly common use of forum-shopping tactics to take advantage of inconsistencies in IJ decision-making would constitute a departure from that duty. "While our adversarial system may permit such advocacy by private parties,"[159] the use of forum-shopping by government agents departs from the goal of seeking

---

[155] *See* Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 21 (2014) (arguing that this prosecutorial duty extends to ICE attorneys as well); Erin B. Corcoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law*, 48 LOY. L.A. L. REV. 119, 157–60 (2014) (analyzing how criminal prosecutors' duties to seek justice affects their use of prosecutorial discretion).

[156] *See* Kang v. Attorney Gen., 611 F.3d 157, 167 (3d Cir. 2010) (holding that the United States may not use the adversarial tactics of "private parties" in immigration cases, as it "is duty-bound to 'cut square corners' and seek justice rather than victory"); Cade, *supra* note 155, at 20–21 (arguing that ICE attorneys' obligation to seek justice is "similar to that of prosecutors in the criminal system").

[157] Arizona v. United States, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.").

[158] *Id.* (noting that that the "human concerns" include "whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service").

[159] *Kang*, 611 F.3d at 167.

justice. In an area that unavoidably "embraces immediate human concerns,"[160] advantage-taking by the party which wields nearly plenary power should be viewed with a skeptical eye and condemned when it contradicts that party's fundamental ethical duty.

V. CONCLUSION

ICE has the authority to transfer immigration detainees to any facility, with few checks on that power. The location of detention, especially in isolated, rural areas, has deleterious and outcome-determinative effects on a detainee's ability to litigate a removal case. Additionally, there is a wide variation in IJ decision-making in removal cases. Because the location of detention determines which IJ will hear a detainee's case, ICE can transfer detainees to facilities with IJs who are statistically more likely to grant ICE's preferred form of relief. Thus, ICE effectively has the ability to forum-shop by transferring detainees to take advantage of inconsistent IJ decisions and secure favorable outcomes in immigration cases. This ability to essentially determine the result of a case independent of the merits departs from ICE's duty to pursue justice in removal cases.

While the possibility of ICE's forum-shopping in prosecuting removal cases constitutes a serious problem, instituting solutions to that problem presents an even greater one. Possibilities might include granting ICE attorneys the authority to control all aspects of a removal case[161] or increasing ICE attorneys' ability to screen and decline to prosecute cases.[162] These options, however, merely provide an additional check on forum-shopping; they do not foreclose use of the tactic. Because the problem of ICE's forum-shopping implicates two of the most fundamental aspects of federal immigration policy—detainee transfers and non-lifetime IJ appointments—entirely preventing ICE from forum shopping would require a comprehensive overhaul of both of these systems.

---

[160] *Arizona*, 567 U.S. at 396.

[161] *See* Cade, *supra* note 155, at 66–68 (arguing that assigning a single attorney to control the path of the case will give the prosecutor a greater sense of responsibility for his tactics); Corcoran, *supra* note 155, at 169 (indicating that an ICE attorney could "serve as the gatekeeper to determine if removal hearings are appropriate") (footnote omitted).

[162] *See* Cade, *supra* note 155, at 70–71 (arguing that the attorneys who will be tasked with prosecuting a case are in the best position to determine whether to proceed).

Unfortunately, such an intensive change in immigration policy is unlikely. Nonetheless, increasing awareness, especially among the primary actors in the immigration system, including IJs themselves, of ICE's forum-shopping tactics and the outcome-determinative effect they have on detainees' cases is a step in the right direction. In particular, non-ICE actors—such as district court judges who hear detainees' habeas cases and immigration attorneys who defend detainees—should take note of this problem and emphasize that such departures from justice must never be permitted in a system that "can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."[163]

[163] *Arizona*, 567 U.S. at 395.