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NOTE

Identifying Limits to Immigration Detention Transfers and Venue

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Abstract. The government claims that it may transfer immigration detainees to any detention facility across the country. The scale of the current transfer practice is staggering—more than half of all detainees experience at least one transfer, and detainees are often transferred to the Fifth or Eleventh Circuits. This choice in detention location, in turn, essentially determines where venue rests for immigration court proceedings and limits where detainees may access Article III courts. In other words, the government has broad discretion to choose where to detain an immigrant and which courts will hear the immigrant's case. Despite the immense impact on immigrant communities, there is a dearth of legal scholarship examining this practice.

This Note aims to fill that gap. It first thoroughly analyzes immigration detention transfers and venue—the legal framework for this arrangement, the scope of the transfer practice, the government's justifications, and how these justifications are mostly exaggerated and ultimately outweighed by the hardships inflicted on detainees. This Note then explores where to look for possible protections. Although there is a trend in immigration law scholarship over the last two decades to argue for importing criminal law protections into the immigration system, this Note argues that the relevant criminal analog here is insufficient. Instead, the civil context offers a better possible constraint on the government's discretion: There might be an unrealized Fifth Amendment due process limit to whether a court can exercise personal jurisdiction over an immigration detainee if the particular forum is exceedingly unfair and burdensome.

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Introduction

Ravi Ragbir has lived in the United States for over two decades, is a lawful permanent resident, has a wife and daughter who are both American citizens, and is a prominent interfaith community leader on immigrants' rights issues.[1] He has perfectly complied with the conditions of his supervised release under stays of removal for nearly a decade.[2] But on January 11, 2018, Ragbir went in for a routine immigration check-in near where he resided in New York City, only to be abruptly arrested, handcuffed, and forced onto a plane to a detention facility in Miami, Florida.[3] For hours, his family, friends, and attorneys did not know where he was sent.[4] The Trump Administration had decided to enforce an old removal order against Ragbir and provided no reason for its choice to detain him 1,200 miles away—where it would be exceedingly difficult for his attorneys to represent him and his family to visit, and where the law of the Eleventh Circuit would now apply to his case.[5]

Such confusion and panic are unfortunately commonplace in the U.S. immigration system. The government currently exercises almost unfettered discretion in choosing where to detain immigrants, often inexplicably transferring them far from their communities and counsel.[6] The location of detention, in turn, essentially determines the proper venue for immigration court proceedings and has important consequences for where detainees may access Article III courts.[7] In other words, for immigration detainees, the government typically controls both their detention location and the courts

1. *See* Petition for Writ of Habeas Corpus at 1-3, 8, Ragbir v. Sessions, No. 18-cv-236 (KBF), 2018 WL 623557 (S.D.N.Y. Jan. 29, 2018).

2. *See id.* at 3.

3. *See Ragbir*, 2018 WL 623557, at *3; Respondents' Memorandum of Law in Opposition to Petitioner's Motion to Enforce the Court's January 11, 2018 Order, & in Support of the Respondent's Motion to Vacate Portions of the Court's January 11, 2018 Order at 1, *Ragbir*, 2018 WL 623557 [hereinafter Respondents' Memorandum]; Petition for Writ of Habeas Corpus, *supra* note 1, at 3; Tiziana Rinaldi, *A Prominent Immigrant Advocate Has Been Detained by Immigration Agents in New York City*, PUB. RADIO INT'L: WORLD (Jan. 11, 2018, 6:30 PM EST), https://perma.cc/7J4V-C56P.

4. *See* Rinaldi, *supra* note 3.

5. *See* Petitioner's Motion to Enforce the Court's Order of January 11, 2018 at 1-2, *Ragbir*, 2018 WL 623557; Tiziana Rinaldi, *An Immigrant Detainee Is Sent Over 1,000 Miles Away from His Family and Lawyer—and Fights to Return*, PUB. RADIO INT'L: WORLD (Jan. 24, 2018, 5:30 PM EST), https://perma.cc/NCX7-24F7.

6. *See infra* Part I.

7. *See infra* Part I.A.

they will face. Over half of all immigration detainees experience at least one transfer, and one-fourth of all transfers cross state lines,[8] yet there is a dearth of scholarship examining this issue.[9]

This Note aims to fill that gap. Part I provides a thorough analysis of the mechanics of immigration detention transfers and venue. The legal framework that supports this system emerged over time through a combination of various statutory, regulatory, and policy changes. The end result of these decisions is that the number of detainees experiencing transfers is increasing—as is the number experiencing multiple transfers, and the number experiencing transfers to the Fifth and Eleventh Circuits. The government claims that these transfers are necessary to manage a massive detention system with limited bed space. But these justifications are exaggerated and ultimately outweighed by the hardships inflicted on detainees—including changing the applicable substantive law by crossing jurisdictions, interfering with access to counsel and the attorney-client relationship, creating barriers to gathering evidence, and causing severe psychological and emotional harm.

This Note then explores where to look for possible protections. There are two distinct issues here—where detainees may be *physically transferred* and where *venue rests*—and there are many angles from which to approach possible legal challenges. This Note examines constraints on the government's choice of venue in other contexts, as a starting place and in the hope that such protections could limit where the government moves detainees.

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8. *See infra* Part I.B.

9. A few law review articles have briefly discussed immigration transfers as part of larger arguments about problems with detention or the right to counsel. *See, e.g.*, Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 37-38 (2014) (identifying transfers as one of "multiple reasons" why "[d]etainees have more difficulty winning cases"); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 47-48 (2010) (citing transfers as one of many "detention-related policies and practices" that have "exacerbated" the hardships of detention); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1651-52, 1678-79 (1997) (explaining that transfers are an obstacle to accessing counsel); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J.C.R. & C.L. 113, 128-29, 132-33 (2008) (citing transfers as one way to "interfere[] with the right to retain counsel").

   Two articles have addressed this issue in greater depth, focusing on different issues from those addressed in this Note. *See* César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17 (2011) (analyzing the impact of transfers on legal permanent residents' right to counsel under the procedural due process test from *Mathews v. Eldridge*, 424 U.S. 319 (1976)); Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153 (2014) (arguing for constitutionalizing venue doctrine to protect immigration detainees from transfers). Markowitz and Nash's proposal is discussed in Part III.C below.

Part II turns to the criminal context. This is the obvious starting point given the overwhelming trend in immigration law scholarship over the last two decades to focus on the convergence of the criminal justice and immigration systems.[10] However, the relevant criminal law analog here proves to be insufficient. At first glance, it seems promising that the U.S. Constitution itself limits venue to the judicial district where the crime was committed.[11] But this restraint on the government's choice of forum has collapsed under the weight of modern crimes and—even if a sufficient protection for criminal defendants—would be difficult to translate into the immigration context. The inapplicability of criminal protections reinforces a growing body of scholarship critiquing this trend of borrowing from criminal law.[12]

Part III turns to the civil context and finds the comparison to be more helpful. There might be an unrealized Fifth Amendment due process constraint on immigration venue from personal jurisdiction doctrine. After all, personal jurisdiction governs where an individual may be haled into court. Most of the doctrine was developed under the Due Process Clause of the Fourteenth Amendment in the context of state courts and federal courts hearing cases based on diversity jurisdiction. This doctrine generally follows a two-step test to determine whether: (1) the defendant has "minimum contacts" with the forum and (2) the forum is reasonable.[13] Personal jurisdiction doctrine for cases arising under federal law is less developed, but it is clear that in a subset of cases—including immigration—it is generally only required that an individual

10. *See generally* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639 (2004); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

11. *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . . ."); U.S. CONST. amend. VI (providing that juries in criminal trials shall be "of the State and district wherein the crime shall have been committed").

12. *See generally* Allegra M. McLeod, Essay, *Immigration, Criminalization, and Disobedience*, 70 U. MIAMI L. REV. 556 (2016); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012) [hereinafter McLeod, *U.S. Criminal-Immigration Convergence*]; Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491 (2011); Mark Noferi, Note, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. C.R. & ECON. DEV. 533 (2014).

13. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

have "minimum contacts" with the United States as a sovereign to authorize *any* federal court to exercise personal jurisdiction.[14]

However, even when an individual has enough contacts with the United States to satisfy this "national contacts" standard, the Due Process Clause of the Fifth Amendment might further constrain choice of forum when a forum is unduly burdensome for the individual. The possibility of this constraint is certainly an open question as the U.S. Supreme Court has expressly declined to address this issue on multiple occasions.[15] Many lower courts and scholars believe that Fifth Amendment due process fairness limits indeed exist, with their views ranging from mandating a full independent fairness inquiry to merely recognizing that national contacts might not be enough in some circumstances—including if there are no liberal statutory transfer and venue safeguards, or if the forum poses an "extreme inconvenience" that would severely disadvantage the defendant.[16]

This Note applies the possible Fifth Amendment due process constraint in personal jurisdiction doctrine to the immigration context for the first time. The issue of immigration transfers and venue presents a compelling circumstance in which courts might be able to find such a limit on the government's choice of forum. This is because the immigration system is a rare instance in which there are no adequate statutory venue or transfer safeguards.[17] And the inconvenience is often so extreme that transferred detainees frequently face insurmountable obstacles in presenting their cases. Thus, unless there is meaningful legislative immigration transfer and venue reform, there will be instances in which the unreasonableness of a particular forum could prevent the court from exercising personal jurisdiction over an immigrant detainee. This Note also briefly explores what the due process test for this approach might entail and other considerations in utilizing this possible protection.

I. Immigration Detention Transfers and Venue

The U.S. government currently operates a massive system of far and frequent transfers of immigration detainees. This choice of detention location, in turn, usually determines where venue rests for immigration proceedings. Despite the fact that the government exercises tremendous power to control both an immigrant's detention location and which courts he will face, this phenomenon has largely gone unnoticed outside circles of immigrants' rights

14. *See infra* Part III.

15. *See infra* note 179 and accompanying text.

16. *See infra* Part III.B.

17. *See* Markowitz & Nash, *supra* note 9, at 1197-98.

and human rights advocates. This Part discusses (A) the legal framework for immigration transfers and venue; (B) the scope of the transfer practice; (C) the government's justifications; and (D) the consequences of transfers for detainees.

A. Legal Framework

The legal framework supporting the system of immigration detention transfers and venue was not the result of any single decision. Instead, it emerged piecemeal through a combination of statutory provisions, regulations, and policies.

The government claims it may detain noncitizens anywhere there is available bed space, without any duty to consider where a noncitizen resides or is arrested. More specifically, the Immigration and Nationality Act (INA)[18] provides the government broad authority to detain noncitizens it seeks to remove.[19] In addition to the power to detain noncitizens, the government argues it has complete control over *where* to detain them—though the precise source for this authority is less clear. The government usually points to the Attorney General's general authority to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal."[20] But as described in Part I.C below, this provision read in context arguably pertains more to the construction and management of brick-and-mortar facilities.

The choice of detention location typically determines venue for immigration courts. To initiate removal proceedings, Immigration and Customs Enforcement (ICE) issues a charging document—a Notice to Appear (NTA)—that commands the noncitizen's appearance before an immigration judge.[21] Regulations specify that jurisdiction vests with the particular immigration court in which the NTA is filed.[22] A separate regulation deems that "[v]enue

18. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of the U.S. Code).

19. For example, arriving noncitizens seeking admission "*shall* be detained" if they are "not clearly and beyond a doubt entitled to be admitted." *See* 8 U.S.C. § 1225(b)(2) (2017) (emphasis added). Noncitizens already in the United States, including lawful permanent residents, generally "*may* be arrested and detained" while removal proceedings are pending. *See id.* § 1226(a) (emphasis added). And importantly, detention is *mandatory* for a vast number of noncitizens with certain criminal convictions. *See id.* § 1226(c).

20. *Id.* § 1231(g)(1); *see, e.g.*, Respondents' Memorandum, *supra* note 3, at 4 (citing this provision); The Government's Memorandum of Law in Opposition to the Petition for a Writ of Habeas Corpus at 11, Zheng v. Decker, No. 14cv4663 (MHD), 2014 WL 7190993 (S.D.N.Y. Dec. 12, 2014) (same).

21. *See* 8 U.S.C. § 1229(a).

22. *See* 8 C.F.R. § 1003.14(a) (2018) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by [ICE].").

shall lie at the Immigration Court where jurisdiction vests."[23] In other words, these two regulations together mean that filing the NTA determines which immigration court may hear the case.

Regulations also provide that the decision to initiate removal proceedings must be made "within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance."[24] If ICE were to follow this tight timeline, NTAs would usually be filed where the noncitizen was arrested. In practice, however, there is no formal deadline, and ICE can wait days—even weeks—before filing the NTA with an immigration court, giving ICE time to transfer detainees. This is because ICE policy allows for detention without an NTA when there is a "compelling law enforcement need," a vague standard that includes circumstances where there simply is an "influx of large numbers of detained aliens that overwhelms agency resources."[25] The Department of Homeland Security (DHS) Office of Inspector General—the internal watchdog for the agency—has confirmed this policy, stating that "ICE is not required to file the Notice to Appear with the immigration court within a specified time after it has been served."[26] Instead, "ICE may decide for operational or other reasons to transfer a detainee from the jurisdiction where the detainee was arrested to a detention facility outside of that jurisdiction."[27] And "[f]or those [transferred] detainees, ICE files the Notice to Appear with the immigration court that has jurisdiction over the *receiving* detention facility."[28]

This choice in venue for immigration courts, in turn, restricts noncitizens' access to Article III courts in at least two important ways.

First, the location of the final removal hearing determines which federal court of appeals may hear a detainee's appeal. After all, because Congress ratcheted up the harshness of immigration law in 1996 by limiting judicial review, the only avenue to challenge a final order of removal is to file a petition for review in a federal court of appeals.[29] The INA specifies that "[t]he

23. *Id.* § 1003.20(a).

24. *Id.* § 287.3(d).

25. *See* Memorandum from Asa Hutchinson, Undersecretary, Border & Transp. Sec., to Michael J. Garcia, Assistant Sec'y, U.S. Immigration & Customs Enf't, and Robert Bonner, Comm'r, U.S. Customs & Border Prot. 3 (Mar. 30, 2004), https://perma.cc/ZL7E-DYY5.

26. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-10-13, IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS 2 (2009), https://perma.cc/33J6-M4CF.

27. *Id.*

28. *Id.* (emphasis added).

29. *See* 8 U.S.C. § 1252(a)(5) (2017); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, div. C, § 306, 110 Stat. 3009, 3009-607 to -612 (codified as amended at 8 U.S.C. § 1252).

petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."[30]

Second, the location of detention also usually determines which district court has jurisdiction over habeas corpus petitions. Habeas is generally available to noncitizens challenging their physical detention.[31] But these habeas petitions must be filed in "the district of confinement."[32] And the proper respondent for a habeas petition is usually the person who has immediate physical custody over the detainee.[33]

A change in venue is possible after venue attaches in a particular immigration court, but it is exceedingly difficult for a detainee to succeed in a challenge. After all, immigration judges cannot change venue sua sponte. While they may consider a motion to change venue if the detainee has the knowledge and resources to bring one,[34] the decision to change venue is discretionary and requires a showing of "good cause."[35] And immigration judges often defer to assertions by ICE that it might be inconvenient to return the immigrant.[36] In addition, according to U.S. Department of Justice policy, before granting a motion for a change of venue, "the assigned Immigration Judge should make every effort, consistent with procedural due process requirements, to complete as much of the case as possible in the time available."[37] This instruction means that even if a noncitizen has a valid claim to change venue, the original immigration judge is instructed to decide as much of the case as possible—including the

30. 8 U.S.C. § 1252(b)(2); *see also* Trejo-Mejia v. Holder, 593 F.3d 913, 914 (9th Cir. 2010) (transferring a petition for review to the Fifth Circuit, where immigration proceedings concluded).

31. *See* 8 U.S.C. § 1252(a)(5); 28 U.S.C. § 2241 (2017).

32. *See* Rumsfeld v. Padilla, 542 U.S. 426, 443 (2004).

33. *See* 28 U.S.C. § 2242; *Padilla*, 542 U.S. at 444; *see also* Bell v. Ashcroft, No. 3 Civ. 0766(HB), 2003 WL 22358800, at *3 (S.D.N.Y. Oct. 15, 2003) ("[T]here are fewer if any restraints on the government's ability to shop for the most amenable forum or to transfer detainees en masse to one location and thus seriously undermine habeas relief by overwhelming the courts in that district.").

34. *See* 8 C.F.R. § 1003.20 (2018).

35. *See id.*; *see also* Lovell v. INS, 52 F.3d 458, 460 (2d Cir. 1995) ("Good cause is determined by balancing such factors as administrative convenience, the alien's residence, the location of witnesses, evidence and counsel, expeditious treatment of the case, and the cost of transporting witnesses and evidence to a new location.").

36. *See* Markowitz & Nash, *supra* note 9, at 1203-04, 1204 n.246 (listing cases in which the government's claims of "administrative convenience" end up "dominat[ing] all other factors" as judges consider change of venue motions).

37. Memorandum from The Office of the Chief Immigration Judge, Exec. Office for Immigration Review, U.S. Dep't of Justice, to All Immigration Judges et al. 4 (Oct. 9, 2001), https://perma.cc/6DV9-WX4Q (discussing operating policies and procedures regarding changes of venue).

ultimate "issue of deportability, removability, or inadmissibility."[38] Once the case is transferred, the new immigration judge "is not free to hear the case *de novo*" and is bound by the decisions of the previous immigration judge.[39]

B. Scope of the Current Transfer Practice

The scale of transfers in the immigration detention system is staggering. Four observations about the current transfer practice help illustrate its scope.[40]

First, the number of transfers has steadily increased over time. For instance, the total annual transfers surged from around 47,000 in 1999 to around 406,000 in 2009.[41] In fact, as of 2008, the number of detainee transfers actually exceeds the total number of immigrants in the U.S. detention system.[42]

Second, the percentage of detainees who experience at least one transfer is also on the rise. In 1999, approximately one out of every five detainees (19.6%) was transferred to a new facility; in 2008 the majority of detainees (52.4%) were transferred.[43]

Third, there is a shocking growth in the use of multiple transfers, increasing from approximately one out of twenty detainees (5.6%) who experienced

38. *See id.*

39. *See id.* at 2. The new immigration judge may depart from previous decisions only if there are exceptional circumstances, such as new evidence, a clear error of law, or a supervening law. *See id.* at 3.

A small group of Salvadoran nationals receive greater protections. In *Orantes-Hernandez v. Meese*, the court found that government officers had engaged in a pattern and practice of intimidating detained Salvadoran asylum seekers. *See* 685 F. Supp. 1488, 1505 (C.D. Cal. 1988), *aff'd sub nom.* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990). The court granted multifaceted injunctive relief. *See id.* at 1513. Salvadoran class members must be afforded at least seven days to obtain counsel where they are originally arrested, and venue must rest where their counsel is located. *See id.* The government can still transfer class members, but they must be returned to the original venue in advance of proceedings with enough time to consult with their counsel. *See id.*; *see also* U.S. Immigration & Customs Enf't, Policy 11022.1: Detainee Transfers 3-4 (2012), https://perma.cc/3N4K-TZQF (providing guidance on transfers for *Orantes-Hernandez* class members).

40. This Subpart heavily relies on the work completed in 2011 by Human Rights Watch and the Transactional Records Access Clearinghouse at Syracuse University, which has published the most comprehensive public data on transfers. The over 3.4 million records obtained from public sources and multiple FOIA requests covered the detention history of individual detainees from 1998 to 2010. *See generally* ALISON PARKER, HUMAN RIGHTS WATCH, A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES (2011), https://perma.cc/BSP9-UFA8; *Huge Increase in Transfers of ICE Detainees*, TRACIMMIGRATION (Dec. 2, 2009), https://perma.cc/6FAA-SRBA.

41. *See* PARKER, *supra* note 40, at 18 fig.1.

42. *See Huge Increase in Transfers of ICE Detainees*, *supra* note 40.

43. *Id.*

multiple transfers in 1999, to approximately one out of every four (24%) in 2008.[44] In addition, thousands of detainees have experienced ten or more transfers.[45]

Fourth, when detainees are transferred, they are often moved far from where they reside and frequently cross jurisdictions. The average distance of any single transfer is 370 miles,[46] or about the distance from Washington, D.C., to Cleveland, Ohio. One of the most frequent interstate transfer paths—Pennsylvania to Texas—crosses 1,642 miles.[47] From 1998 to 2010, there were 11,000 transfers along this path, costing the government $13.2 million.[48] A stunning one-fourth of all transfers cross state lines.[49] And over 15% of all transfers even cross into the jurisdiction of a different federal court of appeals.[50] As the United States operates the largest immigration detention system in the world, detaining around 325,000 immigrants in 2017,[51] this amounts to thousands of immigrants being forced into a different jurisdiction each year. Strikingly, the Fifth Circuit receives—"by a large margin"— the most transfers.[52] One state in the Fifth Circuit, Louisiana, receives the most transfers of any state—19% of all interstate transfers.[53] The Eleventh Circuit receives the second most interstate transfers.[54] In fact, 757the most frequent interstate transfer movement is from a facility in North Carolina (in the Fourth Circuit) to a facility in Georgia (in the Eleventh Circuit).[55]

This last observation is especially important. The government itself has confirmed this trend of frequent transfers to the Fifth and Eleventh Circuits. For example, in 2009, the Director of ICE's Office of Detention Policy and Planning examined the geographic distribution of arrests and bed spaces

44. *Id.*

45. *See* PARKER, *supra* note 40, at 17.

46. *See id.* at 20.

47. *See id.* at 19, 20 tbl.2.

48. *See id.* at 29, 30 tbl.11.

49. *See id.* at 19.

50. *See id.* at 22.

51. *See United States Immigration Detention Profile*, GLOBAL DETENTION PROJECT, https://perma.cc/4URY-AWHC (archived Jan. 14, 2019); *see also* Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support exhibit A at 8, United States v. California, No. 2:18-cv-490-JAM-KJN, 2018 WL 1535725 (E.D. Cal. Mar. 6, 2018) (confirming this number).

52. *See* PARKER, *supra* note 40, at 22, 23 fig.5.

53. *See id.* at 22 tbl.4.

54. *See id.* at 23 fig.5.

55. *See id.* at 20 tbl.2.

available for detention.[56] She found that "significant detention shortages exist in California and the Mid-Atlantic and Northeast states" and that "arrestees are transferred to areas where there are surplus beds"—that is, to the southern United States, where there are more beds than arrestees.[57]

As the Trump Administration cracks down on immigration, there is good reason to think that this trend of far and frequent transfers will continue. For instance, President Trump has strongly prioritized greater immigration enforcement. He has already removed protections against deportation for over one million immigrants.[58] He has also called for the hiring of at least 10,000 additional ICE officers.[59] In addition, he seeks to increase local cooperation with ICE, so that law enforcement and government officials at the city and county level will assist in immigration enforcement.[60] These policy changes are already having an effect: ICE arrests are up 43% since President Trump took office.[61] To support this increased enforcement, the Trump Administration plans to increase the number of detention facilities, but the sites currently being considered are not in the identified detention shortage regions discussed above.[62] In other words, ICE is currently detaining more people, and bed space shortages will continue in many parts of the country, if not worsen. Thus, for the foreseeable future, the current transfer practice will likely not solve itself and might even increase in scope.

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56. *See* DORA SCHRIRO, IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2, 6-9 (2009), https://perma.cc/NKH2-DLRJ.

57. *Id.* at 6; *see also id.* at 8. This resource scarcity argument is addressed in Part I.C below.

58. Nearly 800,000 undocumented immigrants are at risk after the Trump Administration ended the Deferred Action for Childhood Arrivals program. *See* Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs. et al. (Sept. 5, 2017), https://perma.cc/X34S-8KDW; *see also* Jens Manuel Krogstad, *DACA Has Shielded Nearly 790,000 Young Unauthorized Immigrants from Deportation*, PEW RES. CTR.: FACT TANK (Sept. 1, 2017), https://perma.cc/VX37-CS25. In addition, hundreds of thousands of immigrants are to lose their Temporary Protected Status in 2019. *See* Press Release, U.S. Dep't of Homeland Sec., Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti (Nov. 20, 2017), https://perma.cc/6ZBB-VKQH; Press Release, U.S. Dep't of Homeland Sec., Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for El Salvador (Jan. 8, 2018), https://perma.cc/TH3C-FKPE; *see also* Zuzana Cepla, *Fact Sheet: Temporary Protected Status*, NAT'L IMMIGR. F. (Oct. 12, 2018), https://perma.cc/KXL9-QZ9G (estimating that over 250,000 immigrants are affected).

59. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017).

60. *See id.*

61. *See* Laurel Wamsley, *As It Makes More Arrests, ICE Looks for More Detention Centers*, NPR: TWO-WAY (Oct. 26, 2017, 4:36 PM ET), https://perma.cc/7N8U-KL34.

62. *See id.*

C. The Government's Justifications

The government offers two main justifications for immigration detention transfers, but as explained below, most of the expressed concerns are exaggerated.

The first justification is simply that Congress gave ICE the authority to engage in this practice if it so chooses. As described in Part I.A above, the government points to the INA provision authorizing the Attorney General to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal."[63] Yet Congress may not have intended for the provision to give ICE unrestrained power to move detainees around the country. The provision, read in context, seems to pertain to the construction and management of brick-and-mortar detention facilities. For example, it also discusses the Attorney General's authority to "expend from the appropriation . . . amounts necessary to acquire land and to acquire, build, model, repair, and operate facilities . . . necessary for detention."[64]

Aside from this provision, it is unclear what statutory authority the government might rely on. ICE could point to the INA's general articulation of the Attorney General's duty to carry out immigration enforcement[65] and to the lack of any INA provision *limiting* transfers or venue. Or maybe the government would claim that even without an explicit statutory grant, it has plenary power in the realm of immigration.[66] But such sweeping claims have been criticized and narrowed over time.[67]

The second justification is that there are practical reasons why the system operates as it does. For instance, there are certainly important reasons why the government might need to transfer a detainee. As the DHS Inspector General describes, "ICE transfers detainees to other detention facilities to prepare for

63. 8 U.S.C. § 1231(g)(1) (2017); *see supra* text accompanying note 20.

64. 8 U.S.C. § 1231(g)(1).

65. *See id.* § 1103(g).

66. In the immigration context, the plenary power doctrine, a rationale for extreme deference to the political branches, dates back to *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603-06 (1889) (declaring that the government has nearly absolute power over foreign affairs and citizenship matters).

67. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (stating that Congress's plenary power is "subject to important constitutional limitations"). *See generally* Louis Henkin, Essay, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987).

final removal, reduce overcrowding, or meet the specialized needs of the detainee."[68] Medical and security issues can also cause transfers.[69]

The DHS Inspector General has recognized, though, that the increase in transfers over time has occurred for a different reason: "insufficient bed space in some facilities."[70] ICE argues that exercising its full power to transfer detainees is an operational necessity.[71] After all, the government claims that building new facilities in the regions with bed shortages is not financially feasible. For example, one ICE official described the difficulty of building detention facilities in places like the Northeast because of the lack of land availability, higher costs (likely due to more expensive land and labor), and local communities that would fight against having a facility in their backyard.[72] Similarly, another former ICE official stated, "At the end of the day, is it most important that there's outside recreation, as required by the standards, a certain [number of] times a week? Or is it more important that the alien be in a facility that's otherwise up to par but is closer to the alien's attorney?"[73]

Resource constraint is certainly a pressing consideration. On the one hand, the government manages the detention of hundreds of thousands of individuals, so utilizing the current facility supply is critical. On the other hand, the bed space concern might be overstated: Aside from the deportation grounds that trigger *mandatory* detention,[74] including serious crimes and terrorism activities, the government is not necessarily obligated to detain as many people as it currently does. Parole and alternatives to detention could be considered in cases where the immigrant is not a flight risk or a danger to the community.[75] Although implementing such a shift would inevitably come with its own set of difficulties,[76] all options should be considered in light of the

68. OFFICE OF INSPECTOR GEN., *supra* note 26, at 1.

69. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-07-08, REVIEW OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S DETAINEE TRACKING PROCESS 2 (2006), https://perma.cc/2A9N-SZSJ.

70. OFFICE OF INSPECTOR GEN., *supra* note 26, at 1.

71. *See* U.S. Immigration & Customs Enf't, ICE/DRO Detention Standard: Transfer of Detainees 2 (2008), https://perma.cc/4JXB-VW2Q.

72. *See* Jennifer Ludden, *Immigration Transfers Add to System's Problems*, NPR: ALL THINGS CONSIDERED (Feb. 11, 2009, 4:00 PM ET), https://perma.cc/6B4R-F68Z.

73. *Id.*

74. *See supra* note 19 and accompanying text.

75. *See* Am. Immigration Lawyers Ass'n, AILA Position Paper: Alternatives to Detention 1 (2008), https://perma.cc/32HY-KFR2; Mark Noferi, Am. Immigration Council, A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers 9 (2015), https://perma.cc/Q9PL-QAXG.

76. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-17-51, ICE DEPORTATION OPERATIONS 3 (2017), https://perma.cc/Z39Z-7ESD ("ICE does not

footnote continued on next page

significant problems with the current transfer practice. Furthermore, the claim that sudden transfers are often necessary for bed space management should be viewed with some skepticism, as many immigration lawyers claim that their clients were transferred for illegitimate reasons, including retaliatory transfers after detainees asserted their rights.[77] At the very least, the DHS Inspector General has found that this discretion exercised by ICE officers leads to inconsistent reasons for transfers.[78]

Moreover, disparities in the cost of land and labor, as well as "NIMBYism,"[79] are certainly valid concerns. But the current practice has its own inefficiencies driving up costs. The status quo is expensive given that over half of all detainees experience at least one transfer and are often transferred across the country.[80] For instance, ICE contracts for charter flights to move thousands of detainees.[81] The DHS Inspector General has criticized ICE for "redundant transfers that may not have been necessary," including flying some detainees "multiple times between the same cities."[82] Furthermore, transferring detainees after they already have a hearing scheduled causes additional costs and delay—typically because detainees experience delays in obtaining counsel and gathering evidence, have to refile bond and custody determinations, or might need to be returned to where their NTAs were filed.[83] In fact, the extra detention time due to transfers might be the single highest cost of the current

effectively manage the supervision and deportation of non-detained aliens . . . mak[ing] it difficult for ICE to deport aliens expeditiously.").

77. *See, e.g.*, ACLU OF N.J., BEHIND BARS: THE FAILURE OF THE DEPARTMENT OF HOMELAND SECURITY TO ENSURE ADEQUATE TREATMENT OF IMMIGRATION DETAINEES IN NEW JERSEY 12 (2007), https://perma.cc/63FK-7ZES ("Many detainees believe that ICE uses transfers as a way of punishing detainees who stand up for their rights."); Memorandum from Laura Rótolo, ACLU of Mass., to Santiago Canton, Exec. Sec'y, & Mark Fleming, Inter-Am. Comm'n on Human Rights 2 (July 20, 2009) (on file with author) (describing a "troubling trend" of detainees being "transferred . . . after speaking out or filing complaints about detention conditions, due process concerns or treatment by guards").

78. *See* OFFICE OF INSPECTOR GEN., *supra* note 26, at 3.

79. "NIMBYism" refers to the "Not In My Back Yard" phenomenon of not wanting something undesirable in your own neighborhood. *See, e.g.*, Peter D. Kinder, *Not in My Backyard Phenomenon*, ENCYCLOPÆDIA BRITANNICA, https://perma.cc/HGJ6-TFKD (archived Jan. 16, 2019).

80. *See supra* Part I.B.

81. From October 2010 through March 2014, ICE charter flights moved "218,490 detainees among ICE field offices for various reasons, including lack of bed space." OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-15-57, ICE AIR TRANSPORTATION OF DETAINEES COULD BE MORE EFFECTIVE 2-3 (2015), https://perma.cc/HN7N-VZVC.

82. *See id.* at 10.

83. *See* OFFICE OF INSPECTOR GEN., *supra* note 26, at 2-4.

transfer practice.[84] After all, ICE's projected cost of detention per day for an adult detainee is $133.99 for fiscal year 2018.[85] In sum, the government's financial concerns are well founded, but a more accurate cost-benefit analysis would consider the broader array of inefficiencies involved.

D. Hardships for Detainees

Even if the government's stated justifications were valid, they are outweighed by hardships that make it extremely difficult for immigrants to present their cases after a transfer.

1. Changes in substantive law

Immigrants transferred to a new jurisdiction often find that the substantive law that applies to their cases has changed overnight, sometimes with devastating results. Jurisdictions are split on numerous important matters of immigration law, including whether a particular criminal conviction counts as an "aggravated felony" ground for mandatory deportation;[86] whether noncitizens are eligible for adjustment of status to a become lawful residents;[87] whether noncitizens may get stays of removal to remain in the country as their challenges are considered;[88] whether noncitizens may get

84. *See* PARKER, *supra* note 40, at 29.

85. *See* U.S. IMMIGRATION & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., BUDGET OVERVIEW: FISCAL YEAR 2018, at 14 (2018), https://perma.cc/WN5P-W3FE.

86. *See, e.g.*, Petition for a Writ of Certiorari at 19 & nn.3-4, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017) (No. 16-54), 2016 WL 3681106 (noting that a state sex crime is not an aggravated felony in the Ninth Circuit, but is one in the Sixth Circuit); Brief for the Petitioner at 3, 7, Moncrieffe v. Holder, 569 U.S. 184 (2013) (No. 11-702), 2012 WL 2561164 (noting that a state marijuana crime is not an aggravated felony for immigration purposes in the Second and Third Circuits, but is one in the Fifth Circuit).

87. *See* ALISON PARKER, HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 75 (2009), https://perma.cc/4CVU-EB95 ("The Fifth Circuit Court of Appeals has determined that detainees in Texas, Mississippi, and Louisiana may not change their immigration status in this way if they have certain types of criminal convictions. If these same immigrants are detained in the Ninth or Tenth Circuits, such convictions are not determinative." (footnote omitted)).

88. *See, e.g.*, Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L.J. 13, 18-30 (2005) (discussing denials of stays in the Western District of Louisiana, where the court takes the position that "no power exists to stay deportation irrespective of the merits of the case").

bond hearings;[89] and under what circumstances district courts can hear habeas petitions of detained immigrants.[90]

This patchwork of case law leads to what advocates have referred to as a "crazy-quilt situation"—an "irrational scheme" in which "[n]oncitizens may suddenly become removable just by stepping across state lines."[91]

Given that there are numerous areas of disagreement among circuits, transfers raise reliance concerns as immigrants might make choices in the context of their original jurisdiction's law. For example, an immigrant might choose to accept a plea bargain in his criminal case after considering the immigration consequences in that jurisdiction, serve his time, and then put down roots in a community—only to be suddenly arrested and transferred to a new jurisdiction where he can be deported based off of that conviction.[92] This concern is especially problematic in light of the fact that the government most frequently transfers detainees to the Fifth Circuit, which has the reputation of having the substantive law most hostile to immigrants.[93]

2. Interference with the right to counsel

The INA guarantees that immigrants in removal proceedings have the right to be represented by the counsel of their choice,[94] but transfers often severely impede their ability to work with counsel or even have access to counsel.

89. *See, e.g.*, Petition for a Writ of Certiorari at 29, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 1239224 (stating that the Ninth and Second Circuits each have a "bright-line" rule requiring bond hearings after six months for those detained under certain INA provisions, but the Third and Sixth Circuits require bond hearings in a "reasonable" time for the same detainee population).

90. *See, e.g.*, Vasquez v. Reno, 233 F.3d 688, 694 (1st Cir. 2000) ("The petitioner's decision to seek habeas relief in Massachusetts likely was motivated by the fact that the law of the Fifth Circuit is markedly less favorable to alien habeas petitioners than the law of the First Circuit.").

91. *See* Petition for a Writ of Certiorari, *supra* note 86, at 19.

92. *See* PARKER, *supra* note 87, at 75; *see also, e.g.*, Petition for a Writ of Certiorari, *supra* note 86, at 6-7 (explaining that the petitioner relied on Ninth Circuit law when pleading guilty).

93. *See* PARKER, *supra* note 87, at 6; S. POVERTY LAW CTR. ET AL., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 9 (2016), https://perma.cc/8G9S-HNCK ("Many detainees found themselves without opportunities for release that they would have enjoyed in their home jurisdictions before their transfer to the South."); *see also, e.g.*, Brief of Amici Curiae Ass'n of Mexicans in North Carolina et al. in Support of Petitioner-Appellee & in Support of Affirmance at 21, Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012) (No. 11-1763) (noting that a drug possession offense is an aggravated felony for immigration purposes in the Fifth Circuit, but not in the Second Circuit).

94. *See* 8 U.S.C. § 1362 (2017).

If a detainee has already retained counsel, a transfer significantly interrupts that attorney-client relationship. The government often fails to notify attorneys that their clients are being transferred.[95] This results in tremendous confusion and panic, as attorneys can spend days or weeks calling different facilities to track down their clients.[96] This wastes precious time that could have been used to prepare evidence or meet filing deadlines.[97] Detainees also often *lose* their attorneys because most removal defense attorneys are pro bono and lack the resources to travel.[98] Attorneys may also withdraw if they are not familiar with the new jurisdiction's law—or if an immigration judge does not allow remote representation via telephone or videoconference, a practice that itself is criticized as an inadequate form of representation.[99]

If a detainee did not obtain counsel prior to a transfer, or lost his counsel after a transfer, it is usually even more difficult to find an attorney in the new location.[100] Many transfers are to regions with relatively few immigration attorneys.[101] In fact, the Fifth Circuit—the circuit most likely to receive detainees—has the worst detainee-attorney ratio in the county.[102] Compounding these difficulties, transferred detainees are separated from their families, employers, churches, and other support networks that might help connect them with counsel.[103]

95. *See* SCHRIRO, *supra* note 56, at 23; *see also, e.g.*, Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1500 (C.D. Cal. 1988) (finding that class members were "routinely transfer[red] . . . from areas where they are represented by counsel," and that the government "routinely does not notify attorneys that their clients have been transferred"), *aff'd sub nom.* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).

96. *See* PARKER, *supra* note 87, at 3-4; Ludden, *supra* note 72.

97. *See* PARKER, *supra* note 87, at 46.

98. *See id.* at 46-48; *see also* OFFICE OF INSPECTOR GEN., *supra* note 26, at 4.

99. *See* PARKER, *supra* note 87, at 49-50.

100. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 40 n.144 (2015) ("For example, a case study of New York City immigration courts found that immigrants who were transferred to a different court jurisdiction were less likely to obtain counsel than those who remained in the urban New York court.").

101. *See* PARKER, *supra* note 87, at 37-38; *see also, e.g.*, Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1500 (C.D. Cal. 1988) (finding that the government "knowingly" built detention facilities in locations "with little or no legal representation available to indigent detainees"), *aff'd sub nom.* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).

102. *See* PARKER, *supra* note 87, at 37-38, 38 tbl.12.

103. *See id.* at 53-54, 69; *see also, e.g., Orantes-Hernandez*, 685 F. Supp. at 1500 (finding that the government "deprives class members of address books and telephone numbers in the course of transfer, such that transfer serves to place them completely out of touch with friends and relatives who could assist them").

This interference with the right to counsel can have devastating consequences. Studies show that access to counsel is often a determinative factor in an immigrant's case.[104] This is especially true for asylum cases, where representation in court is deemed "the single most important factor affecting the outcome."[105] A national study about access to counsel revealed that detained immigrants who have representation are over ten times more likely to obtain a successful outcome and be allowed to remain in the United States.[106]

3. Reduced access to evidence

Transfers often create barriers to gathering the evidence necessary to present a case. As the DHS Inspector General has explained, after transfer, "[a]ccess to personal records, evidence, and witnesses to support bond or custody redeterminations, removal, relief, or appeal proceedings can also be problematic."[107] More specifically, it might be harder to prove ties to the community and good moral character. These factors are especially crucial for determining bond or discretionary relief from deportation—proceedings where immigration judges weigh testimony about close family relationships, employment, church involvement, and more.[108] For instance, the Attorney General may grant a cancellation of removal if an immigrant proves he is of

104. *See, e.g.*, Eagly & Shafer, *supra* note 100, at 9 ("Among similarly situated respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief and five-and-a-half times greater that they obtained relief from removal.").

105. Jaya Ramji-Nogales et al., Feature, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007); *see also id.* ("Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel."). The American Bar Association has similarly recognized the importance of legal representation in the asylum context:

> Legal representation is often a deciding factor in whether a detained asylum-seeker passes a credible or reasonable fear interview and ultimately obtains asylum. A recent study conducted in the New York immigration courts found that 74% of immigrants who are represented and not detained have successful outcomes. However, only 3% of those who are unrepresented and remain in detention have successful outcomes.

COMM'N ON IMMIGRATION, AM. BAR ASS'N, FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE 31 (2015) (footnotes omitted), https://perma.cc/PAX6-4BV4.

106. *See, e.g.*, Eagly & Shafer, *supra* note 100, at 9.

107. OFFICE OF INSPECTOR GEN., *supra* note 26, at 4.

108. *See* PARKER, *supra* note 87, at 60, 66, 68. It is also not uncommon, if a noncitizen is facing deportation on a minor criminal ground, for the victim of the crime to want to testify on behalf of the noncitizen. *See id.* at 59-60. The victim might be a family member who turned in the noncitizen without realizing the immigration consequences, or someone who believes justice was already served by the noncitizen going to prison or paying a fine. *See id.* After a transfer, however, "it is extremely unlikely that the victim will be able to travel to the new location in order to testify." *Id.* at 60.

good moral character and his removal would pose an "exceptional and extremely unusual hardship" to a U.S. citizen spouse, parent, or child.[109] Also, some detainees might be able to prove that they are actually U.S. citizens or that they have pending applications for adjustment of status to become citizens, but the necessary documents and family witnesses are difficult to gather from a long distance.[110]

Furthermore, immigrant detainees with mental disabilities are often entitled to additional procedural protections—including bond hearings and government-appointed counsel—because their disabilities may make it impossible for them to present their cases, examine the evidence against them, or even understand the proceedings.[111] But proving a mental disability often requires extensive documentation, and transfers between detention centers might make finding and gathering such records difficult.[112] Instead of being able to gather basic evidence to prove their disabilities, mentally disabled detainees are often thrown into proceedings with little hope of success.

4. Psychological and emotional burden

Transfers can be psychologically and emotionally devastating. Transfers unexpectedly and abruptly isolate detainees far from their loved ones and support networks. Families are often unable to visit distant facilities, and phone calls to and from detention facilities can be prohibitively expensive.[113]

The toll can be even greater for the most vulnerable populations. Because there are relatively fewer female detainees, they are often dispersed across the country to a smaller number of facilities.[114] Children are typically transferred farther than adults because there are few facilities designated for minors.[115]

109. *See* 8 U.S.C. § 1229b(b)(1)(D) (2017).

110. *See* PARKER, *supra* note 87, at 67.

111. *See* Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *3, *16 (C.D. Cal. Apr. 23, 2013) (establishing new procedural protections for detained immigrants with mental disabilities); SARAH MEHTA, HUMAN RIGHTS WATCH & ACLU, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 25-31 (2010), https://perma.cc/A3BY-KL33.

112. *See* MEHTA, *supra* note 110, at 33.

113. *See* SCHRIRO, *supra* note 56, at 24; *see also* Complaint ¶¶ 73-99, Torres v. U.S. Dep't of Homeland Sec., No. 5:18-cv-02604 (C.D. Cal. Dec. 14, 2018).

114. *See* SCHRIRO, *supra* note 56, at 27.

115. *See* PARKER, *supra* note 87, at 5. For example, in 2017, ICE picked up a number of juvenile immigrants in Long Island, New York, who were suspected of having gang affiliations. *See* First Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Injunctive and Declaratory Relief at 1, 9, Saravia v. Sessions, 280 F. Supp. 3d 1168 (N.D. Cal. 2017) (No. 17-cv-03615-VC). ICE transferred many of them to one of the few facilities for minors who might be a danger to themselves or the

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The Trump Administration has even been charged with forcibly separating hundreds of parents from their minor children and sending them to separate facilities.[116] For example, a Congolese asylum seeker was recently sent to a detention facility in San Diego as her seven-year-old daughter was torn from her—screaming and crying—and sent to a detention facility in Chicago, with no explanation provided as to why.[117] The mother and daughter remained separated for months and could only speak occasionally on the phone.[118] The medical community has raised concerns that these family separations cause "toxic stress" that may "cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health."[119]

Given this psychological and emotional toll, many immigrants decide to give up on their claims and opt for voluntary removal.[120] As one transferred detainee put it: "After a while, some guys just sign for their [voluntary] departure, because they don't have a lawyer and don't feel able to fight."[121]

* * *

While refusing to recognize any constraints on its authority to transfer, the government nonetheless recognizes that the current practice is highly problematic.[122] But change has been slow.

For example, in 2009, ICE announced reforms to locate new immigration facilities in needed regions and to reduce transfers overall.[123] Two years later, however, Human Rights Watch reported that—with the exception of plans to

community—a detention center across the country in Northern California. *See id.* at 3-5, 9-10, 18, 24.

116. *See* Memorandum in Support of Motion for Class Certification at 1, Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18cv0428 DMS (MDD)), 2018 WL 1310170. A judge issued a nationwide injunction to stop the family separation policy. *See Ms. L.*, 310 F. Supp. 3d at 1149, *appeal docketed*, No. 18-56151 (9th Cir. Aug. 27, 2018). But the Trump Administration is continuing to keep more children detained, and for longer. *See* Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. TIMES (Sept. 12, 2018), https://perma.cc/72PH-8CZB.

117. *See* Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 1-2, *Ms. L.*, 310 F. Supp. 3d 1133 (No. 18cv0428 DMS (MDD)), 2018 WL 1310160.

118. *See id.* at 2, 6.

119. Press Release, Colleen Kraft, President, Am. Acad. of Pediatrics, AAP Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), https://perma.cc/R8WM-B42U.

120. *See* PARKER, *supra* note 87, at 56, 64, 79-83; *see also, e.g.*, Ludden, *supra* note 72.

121. PARKER, *supra* note 87, at 56 (alteration in original) (quoting interview with detainee at Eloy Detention Facility in Arizona).

122. *See* SCHRIRO, *supra* note 56, at 23-25.

123. *See* PARKER, *supra* note 40, at 3 & n.2 (describing a document circulated by ICE at the "Northeast Detention Briefing, Stakeholders Meeting").

expand bed space in two New Jersey facilities and a new locator system to track detainees—most of the promised reforms "ha[d] yet to be implemented" and the "rising tide of detainee transfers" had continued.[124] In 2012, ICE tried again, announcing a directive aimed at limiting its ability to transfer detainees who have nearby family, attorneys of record, or pending hearings.[125] Experts are skeptical that these reforms are being effectively implemented.[126] And there is no indication that the Trump Administration seeks to advance these reforms.[127]

Reform to the current transfer and venue practice will almost certainly not come from within ICE in the foreseeable future. This raises the question driving the rest of this Note: Where should immigration scholars look for possible protections?

II. Comparison to the Criminal Context

When searching for potential protections to import into the immigration system, the obvious first place to look is the criminal realm, given the current state of immigration law scholarship. Immigration law scholars have dedicated a substantial amount of literature over the last two decades to the accelerating "criminalization" of immigration law.[128] This body of work describes the increasing convergence with criminal law across many features of immigration law—including increasing the criminal consequences for violations of immigration law, expanding possible criminal grounds for deportation, and deepening reliance on local law enforcement officers to enforce immigration law.[129] Scholars also point to the increased harshness of

124. *See id.* at 4, 10-12.

125. *See* U.S. Immigration & Customs Enf't, *supra* note 39, at 1-3.

126. *See, e.g.*, REBECCA SCHOLTZ & MICHELLE MENDEZ, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., PRACTITIONER'S GUIDE: OBTAINING RELEASE FROM IMMIGRATION DETENTION 9 (2018), https://perma.cc/S83Z-TCAP; Alison Parker, Commentary, *Lost in Detention*, MARSHALL PROJECT (Mar. 4, 2015, 10:23 AM), https://perma.cc/GP8U-86SV.

127. The Trump Administration is rolling back numerous Obama-era immigration reform efforts, as well as putting more pressure on the immigration system. *See, e.g.*, Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (proposed Sept. 7, 2018) (to be codified in scattered sections of 8 and 45 C.F.R.) (expanding detention of families and children in less regulated facilities); *see also* Juliet Eilperin & Darla Cameron, *How Trump Is Rolling Back Obama's Legacy*, WASH. POST (updated Jan. 20, 2018), https://perma.cc/AZ4V-QBDT; Dara Lind, *Jeff Sessions Is Exerting Unprecedented Control over Immigration Courts—by Ruling on Cases Himself*, VOX (updated May 21, 2018, 1:06 PM EDT), https://perma.cc/N57Z-FR2G.

128. *See* sources cited *supra* note 10.

129. *See generally* Chacón, *supra* note 10; Legomsky, *supra* note 10.

immigration detention, which has come to include locking up immigrants in prison-like facilities or in actual prisons alongside inmates.[130]

Scholars agree that this convergence has been asymmetric—that is, crime control norms and enforcement mechanisms have been imported into the immigration system, but without the accompanying "bundle of procedural rights recognized in criminal cases."[131] Thus, much of immigration scholarship has argued for importing criminal procedural rights into the immigration context, such as the right to counsel and the exclusionary rule for evidence obtained through a constitutional violation.[132]

The inclusion of such protections in the immigration context would certainly be a substantial and transformative expansion of immigrants' rights. However, criminal law protections are not a good fit for the particular issue of transfers and venue. This Part analyzes (A) the relevant constitutional criminal analog and (B) why these protections are difficult to translate into the immigration context.

A. Constitutional Venue and Vicinage Constraints

At first glance, the analogous criminal protections seem to be a stark improvement. This is because the U.S. Constitution itself restricts where the government may hale criminal defendants into court, even down to the level of which federal judicial district.

The Constitution provides two protections that limit venue for criminal defendants. First, Article III's Venue Clause restricts venue for prosecutions to a specific state by providing that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."[133] Second, the Sixth Amendment's Vicinage Clause further constrains which district may hold the trial by providing criminal defendants the right to a trial "by an impartial jury

130. *See, e.g.*, Kalhan, *supra* note 9, at 42-44; Miller, *supra* note 10, at 614-15; *see also* COMM'N ON IMMIGRATION, *supra* note 105, at 29-30.

131. Legomsky, *supra* note 10, at 472; *see also* Chacón, *supra* note 10, at 135-36, 140-41; Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1314-16 (2011).

132. *See, e.g.*, Jennifer M. Chacón, *A Diversion of Attention?: Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1624-27 (2010) (advocating for the exclusionary rule in the immigration context); Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1125-26, 1139-40 (same); Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1475 (2011) (advocating for the right to counsel in the immigration context); Lindsay Macdonald, Note, *Why the Rule-of-Law Dictates That the Exclusionary Rule Should Apply in Full Force to Immigration Proceedings*, 69 U. MIAMI L. REV. 291, 302 (2014).

133. U.S. CONST. art. III, § 2, cl. 3.

of the State and district wherein the crime shall have been committed."[134] Together, these protections guarantee that a defendant will be prosecuted in the district where the crime was committed.

More precisely, "venue refers to the locality in which charges will be brought and adjudicated, [and] vicinage refers to the locality from which jurors will be drawn."[135] Thus, venue and vicinage do not necessarily have to overlap, but in practice the vicinage right to a jury from a particular district "also grant[s], by implication, a parallel right to be tried in that judicial district."[136]

B. The Difficulty Applying These Constraints in the Immigration Context

A deeper analysis of the constitutional venue and vicinage protections reveals that there is a misalignment between these protections and their potential application in the immigration context, for at least three reasons. And these reasons map onto a small but growing body of literature reacting to the "crimmigration" trend in legal scholarship.[137]

The first reason that the criminal analog is a poor fit is that even in the criminal context, these constraints have been significantly weakened. Though a criminal defendant must be prosecuted where the crime was committed, this limit buckles under the realities of modern crimes. First, a vast number of crimes, such as conspiracy, can easily cross state lines.[138] Changes in technology have also enabled crimes to reach across jurisdictions. For instance, a hacker in Arkansas collected over 100,000 personal email addresses and left them available on public servers in Atlanta and Dallas—and the government convicted him in New Jersey, where only a small percentage of the email address owners resided.[139] Because these crimes were "committed" in multiple jurisdictions, the government could—consistent with constitutional limits—

134. *Id.* amend. VI.

135. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 16.1(b), at 989 (6th ed. 2017).

136. *See id.* The Federal Rules of Criminal Procedure mirror these protections. *See* FED. R. CRIM. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed."). The Rules also authorize transfers that help protect defendants. *See* FED. R. CRIM. P. 21(a)-(b) (providing for the transfer of trials upon the defendant's motion to escape prejudice or for convenience).

137. *See generally, e.g.*, sources cited *supra* note 12.

138. *See, e.g.*, Robert L. Ullmann, *One Hundred Years After* Hyde*: Time to Expand Venue Safeguards in Federal Criminal Conspiracy Cases?*, 52 SANTA CLARA L. REV. 1003, 1005 (2012) (describing a history of lax jurisprudence for crimes that cross jurisdictions).

139. *See* Paul Mogin, *"Fundamental Since Our Country's Founding":* United States v. Auernheimer *and the Sixth Amendment Right to Be Tried in the District in Which the Alleged Crime Was Committed*, 6 U. DENV. CRIM. L. REV. 37, 39-40 (2016) (discussing *United States v. Auernheimer*, 748 F.3d 525 (3d Cir. 2014)).

have chosen any one of those jurisdictions.[140] Criminal law scholars have written extensively about courts' struggles to develop venue jurisprudence that keeps up with multistate crimes.[141]

Crimes that occur entirely internationally also sidestep the venue and vicinage requirements. Over the last few decades, the U.S. government has increasingly conducted extraterritorial prosecutions—of Algerian terrorists, Colombian drug lords, European weapons traffickers, and more.[142] Given that these crimes were technically committed in *no* U.S. district, it is consistent with the constitutional venue protections to bring prosecutions anywhere in the United States.[143] A growing number of scholars are writing about extraterritorial prosecutions, recognizing that constitutional protections do little to restrain the government's choice of forum in these circumstances.[144]

This observation is in line with arguments by legal scholars such as Allegra McLeod, who has suggested that criminal procedures often do not even provide adequate protections in the criminal context, as the promises of the Warren Court criminal procedural rights revolution have been largely unrealized, and courts have created many exceptions to these protections.[145] For example, the right to counsel is often reduced to minimal interaction with a public defender before being rushed into a plea deal.[146] In addition, the procedural protections might have licensed an "excessive ratcheting up of the harshness of substantive criminal law," as the Supreme Court-led procedural

140. In fact, the statutory provision for offenses involving multiple districts says as much. *See* 18 U.S.C. § 3237 (2017) ("[A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.").

141. *See, e.g.*, Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1134-35 (2005); Mogin, *supra* note 139, at 38-40; Ullmann, *supra* note 138, at 1005-06; Emily C. Byrd, Comment, *When Does the Clock Stop?: An Analysis of Point-in-Time and Continuing Offenses for Venue Purposes*, 11 LOY. MAR. L.J. 175, 176 (2012).

142. *See* Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625, 626, 631-32 (2016).

143. The Venue Clause even expressly states that "when [crimes are] not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. CONST. art. III, § 2, cl. 3. The relevant statutory provision also provides the government with significant flexibility to choose a forum. *See* 18 U.S.C. § 3238 ("The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender . . . is arrested or is first brought . . . .").

144. *See, e.g.*, Farbiarz, *supra* note 142, at 627; Megan O'Neill, Comment, *Extra Venues for Extraterritorial Crimes?: 18 USC § 3238 and Cross-Border Criminal Activity*, 80 U. CHI. L. REV. 1425, 1447-48 (2013).

145. *See* McLeod, *Immigration, Criminalization, and Disobedience*, *supra* note 12, at 564-69.

146. *See id.* at 567.

rights revolution caused a backlash.[147] Overall, McLeod argues that "[i]t is not hard to imagine a similar series of developments in the immigration context" if the focus remains mostly on importing criminal procedural protections.[148] Other scholars have made similar observations.[149]

The second reason that the criminal analog is a poor fit is that, practically speaking, it is unclear how exactly the protections would apply in the immigration context. For example, if an immigrant is in removal proceedings for illegal entry, and the proceedings are to be held where he "committed" the immigration law violation, where is venue proper? Perhaps the port of entry he passed through, but such a rule might overwhelm courts at the border, which are already under pressure with their growing caseloads.[150] Or perhaps the crime is continuous in nature, and the immigrant "committed" the crime everywhere he went. But then the unlucky immigrant who took a cross-country road trip might be subject to the jurisdiction of any forum through which he passed. Neither option seems better than tethering venue to where an immigrant resides or is arrested.

Again, this echoes concerns that borrowing from criminal procedural protections might not be as protective of immigrants' rights as scholars hope. For example, Anne Traum has argued that many "features of criminal law have no clear analogs in immigration court."[151] Thus, importing some criminal protections would require a complicated process of developing new rules.[152] In addition, Traum asserts that it is an uphill battle to get courts to recognize immigration proceedings as "sufficiently criminal" for certain criminal constitutional protections to apply.[153]

The third and final reason is that the historical roots of the constitutional clauses are specific to criminal jury trials. The primary underlying reason behind the vicinage requirement was to guarantee a jury of peers.[154] During the ratification debates, the Venue Clause was criticized for not expressly

147. *See* McLeod, *U.S. Criminal-Immigration Convergence*, *supra* note 12, at 171.

148. *See id.* at 172.

149. *See, e.g.*, Noferi, *supra* note 12, at 572-74.

150. *See* Laura Meckler & Alicia A. Caldwell, *The Glitch in Trump's Immigration Campaign: Overloaded Courts*, WALL ST. J. (May 23, 2018), https://perma.cc/4ZU4-WENS.

151. Traum, *supra* note 12, at 534.

152. *See id.* McLeod raises a similar critique but takes it even further—arguing that for some categories of immigrants, there are no clear criminal procedural protections, citing "the vulnerability of those millions of people without any path to lawful status." *See* McLeod, *Immigration, Criminalization, and Disobedience*, *supra* note 12, at 565.

153. *See* Traum, *supra* note 12, at 533.

154. *See* LAFAVE ET AL., *supra* note 135, § 16.1(b), at 991; Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1684-85 (2000); Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1616-17 (2011).

encompassing the common law vicinage concept for juries.[155] After all, a jury from the local vicinage was viewed as better able to evaluate the credibility of the accused and witnesses, and could draw on personal experience in the community. These concerns led to the Sixth Amendment's Vicinage Clause.[156]

However, the Framers seemed to have a second motivation. They sought to protect defendants from the disadvantages of being haled to a faraway venue.[157] They expressed concerns about defendants being "dragged to a distant county" where they would be "deprived of the support and assistance of friends."[158] On the Framers' mind was the recent controversy in which revolutionary leaders were arrested and transferred to London for trials.[159] Anti-Federalist writers also emphasized that the expense of far-flung trials would further disadvantage poor defendants.[160] Although this secondary motivation speaks to some of the hardships immigrant detainees face, it would still be an uphill battle to convince a court to import the criminal analog given that the primary jury-of-peers rationale is not implicated.

This misalignment between criminal protections and their potential application in the immigration context has led scholars like Traum to argue that immigration law scholars and advocates should focus more on the Fifth Amendment's Due Process Clause, because courts already recognize due process rights for immigrants, and the doctrine might be more "flexible and forgiving" in crafting protections specifically tailored for the immigration context.[161] Because the criminal analog is likely unhelpful for the issue of immigration detention transfers and venue, it is indeed worth looking for potential limits in the civil context.

III. Comparison to the Civil Context

Given the shortcomings of the criminal analog, this Part turns back to the civil context. This comparison proves to be more helpful. Fifth Amendment due process limits to civil personal jurisdiction might offer unrealized constraints on where the government may hale an immigrant detainee into

155. *See* LAFAVE ET AL., *supra* note 135, § 16.1(b), at 991; *see also* Williams v. Florida, 399 U.S. 78, 93 (1970).

156. *See Williams*, 399 U.S. at 93-96.

157. *See* Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 741-42 (1985).

158. *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS § 12.2.2.2 (Neil H. Cogan ed., 2d ed. 2015).

159. *See* Engel, *supra* note 154, at 1685-87.

160. *See, e.g.*, The Federal Farmer, No. 4 (1787), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 158, § 12.2.4.4.

161. Traum, *supra* note 12, at 511-12.

court. As explained below, the U.S. Supreme Court has not yet defined the Fifth Amendment due process limits to personal jurisdiction, but its dicta, academic scholars, and lower courts have suggested that such limits indeed exist. The current practice of far and frequent transfers of immigrant detainees presents an opportunity for courts to settle whether and how the Due Process Clause of the Fifth Amendment restricts personal jurisdiction when a forum is unduly burdensome to the immigrant. After all, the government currently has almost unfettered discretion over where to detain immigrants—and this choice usually determines where immigrants will face removal proceedings and have access to Article III courts. It is possible that a forum is so burdensome for some detainees as to violate Fifth Amendment due process.

This Part (A) explains how personal jurisdiction doctrine works in federal question cases generally; (B) analyzes courts' and scholars' different approaches to whether Fifth Amendment due process limits personal jurisdiction in federal question cases if a particular forum is exceedingly unfair; and (C) applies these possible fairness limits to immigration transfers and venue.

A. Personal Jurisdiction in Federal Question Cases Generally

Personal jurisdiction pertains to a court's power over the parties before it. Limiting courts' ability to exercise personal jurisdiction means limiting which courts across the United States may hear a particular case. As discussed below, personal jurisdiction doctrine for cases involving diversity jurisdiction or state law is well defined—but personal jurisdiction for federal question cases is less developed and generally allows a court anywhere in the United States to exercise jurisdiction as long as the individual has contacts with the United States as a whole.

More specifically, most of personal jurisdiction doctrine was developed in the context of state courts[162] and federal courts with jurisdiction based on diversity,[163] grounding the doctrine in the Due Process Clause of the Fourteenth Amendment.[164] As announced by the Supreme Court in *International Shoe Co. v. Washington*, courts may generally exercise personal jurisdiction over a defendant if (1) the defendant has sufficient "minimum contacts" with the state and (2) the choice of forum does not "offend 'traditional

162. That is, the power of state courts over cases involving an out-of-state citizen.

163. That is, the power of federal courts over cases between citizens of different states.

164. *See* 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1068.1, at 691 (4th ed. 2015) (discussing the evolution of personal jurisdiction doctrine in federal question cases).

notions of fair play and substantial justice.'"[165] Under the Fourteenth Amendment, the second prong involves a five-factor "reasonableness" test examining: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution; and (5) the shared interest of the states in furthering social policies.[166]

However, personal jurisdiction doctrine in federal question cases[167] is more complicated and not as fully developed. The difficulty stems from the fact that these cases are purely federal in nature. In such cases, courts have struggled over whether and how to borrow from *International Shoe* and its progeny.

Some features of personal jurisdiction doctrine for federal question cases are clear. For one, it is well established that Fifth Amendment due process applies to personal jurisdiction in federal question cases.[168] And Rule 4(k) of the Federal Rules of Civil Procedure provides that federal question cases generally must follow the state long-arm statute—that is, the personal jurisdiction statute for the state where the court sits.[169] Thus, federal courts usually treat federal question jurisdiction cases the same as diversity jurisdiction cases.

However, Rule 4(k) provides two important exceptions. First, Congress may pass statutes with nationwide service of process provisions for actions arising under federal law.[170] In such cases, any federal court may generally exercise jurisdiction over the defendant as long as the defendant has sufficient contacts with the United States as a whole.[171] Second, federal courts may have jurisdiction when a defendant is not subject to any state's long-arm statute.[172] This provision mainly refers to the scenario in which an international defendant has diffuse contacts across the United States.[173] As with nationwide

165. *See* 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985) (interpreting personal jurisdiction doctrine as requiring both "minimum contacts" and "reasonableness"); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980) (same).

166. *See World-Wide Volkswagen*, 444 U.S. at 292.

167. That is, the power of federal courts over cases arising under federal law or the Constitution.

168. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102-04, 102 n.5 (1987).

169. *See* FED. R. CIV. P. 4(k)(1); *see also Omni Capital*, 484 U.S. at 101 (discussing Rule 4(e) of the Federal Rules of Civil Procedure, which at the time served as the provision for authorizing service of process).

170. *See* FED. R. CIV. P. 4(k)(1)(C); Markowitz & Nash, *supra* note 9, at 1188-89, 1188 n.170 (compiling examples of statutes that provide for nationwide service of process).

171. *See* Markowitz & Nash, *supra* note 9, at 1188-89.

172. *See* FED. R. CIV. P. 4(k)(2).

173. *See* Synthes (U.S.A.) v. G.M. dos Reis Jr. Ind. Com. de Equip. Medico, 563 F.3d 1285, 1296 (Fed. Cir. 2009) ("Rule 4(k)(2) . . . allows a district court to exercise personal jurisdiction

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service of process, the defendant's contacts with the United States as a sovereign may be enough, as long as "exercising jurisdiction is consistent with the United States Constitution and laws."[174]

In other words, in each scenario, the Rule 4(k) framework permits what is known as a "national contacts" approach for some federal question cases. Once a defendant has sufficient contact with the United States, any federal court may be able to exercise personal jurisdiction.

There are multiple rationales behind the national contacts approach. For instance, the Fourteenth Amendment—and the doctrine developed under it—only applies to the states;[175] thus, the Fifth Amendment can allow for a uniquely federal standard. Also, analogizing to a state court's power to exercise jurisdiction over anyone within its borders, perhaps federal courts should be able to exercise jurisdiction over anyone within the United States.[176] Specifically for statutes authorizing nationwide service of process, Article III recognizes Congress's power to "ordain and establish" federal judicial courts,[177] so perhaps Congress also has the power to authorize federal courts' personal jurisdiction broadly.

Overall, courts and commentators generally agree that it is constitutional for Congress to authorize nationwide service of process and for courts to look at minimum contacts with the United States as a whole.[178] However, as described below, there might still be a limit if a forum is exceedingly unfair or unreasonable.

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over a foreign defendant whose contacts with the United States, but not with the forum state, satisfy due process.").

174. *See* FED. R. CIV. P. 4(k)(2).

175. *See* Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 122-23, 128 n.159 (1983).

176. *See* Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 293-294 (3d Cir. 1985) ("The hallmark of the [national contacts] theory is that 'it is not the territory in which a court sits that determines the extent of its jurisdiction, but rather the geographical limits of the unit of government of which the court is a part.'" (quoting Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287, 291 (D. Conn. 1975))).

177. *See* U.S. CONST. art. III, § 1.

178. *See, e.g.*, Bally Gaming, Inc. v. Kappos, 789 F. Supp. 2d 41, 45 (D.D.C. 2011); Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After* Walden v. Fiore, 19 LEWIS & CLARK L. REV. 769, 775-76 (2015). *See generally* 4 WRIGHT ET AL., *supra* note 164, § 1068.1.

B. Potential Fifth Amendment Due Process Constraints on Personal Jurisdiction

Even if a defendant has sufficient contacts with the United States as a whole to satisfy the national contacts standard, the Due Process Clause of the Fifth Amendment may still limit how inconvenient a particular forum may be.

The Supreme Court, on three occasions, has expressly left open the question of whether and how Fifth Amendment due process restricts the scope of personal jurisdiction when a national contacts standard seems to apply.[179] Thus, this possibility remains an open question. Most lower courts and scholars seem to agree—or at least leave room for argument—that Fifth Amendment due process limits personal jurisdiction when a forum is unduly burdensome to the defendant. These approaches to incorporating fairness generally fall into three categories.

1. Separate reasonableness inquiry

Fifth Amendment due process might require an inquiry into the reasonableness of a particular forum, independent of whether a defendant has established national contacts. Some supporters of this approach argue that the Fifth Amendment standard should borrow directly from the Fourteenth Amendment standard, including a separate reasonableness prong that considers the same factors. The prominent Wright and Miller treatise, for instance, has noted that—even if a statute authorizes nationwide service—"the court still must conduct a *separate* inquiry to determine whether that assertion of jurisdiction satisfies the Due Process Clause of the Fifth Amendment."[180] It further explains that "[d]espite the relative dearth of case law on this point, it seems fair to generalize that an inquiry into fairness under the Due Process Clause of the Fifth Amendment tends to focus on the same factors considered under the minimum contacts test," including considering "the burden on the defendant."[181]

179. *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783-84 (2017) ("[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987) ("Under Omni's theory, a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits. As was the case in *Asahi Metal Industry Co.* . . . , '[w]e have no occasion' to consider the constitutional issues raised by this theory." (quoting Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987))).

180. *See* 4 WRIGHT ET AL., *supra* note 164, § 1068.1, at 727 (emphasis added).

181. *Id.* § 1068.1, at 714 (acknowledging that these factors "are applied with more flexibility than under the Fourteenth Amendment analysis").

The Eleventh Circuit follows this approach, reasoning that "[a]s the language and policy considerations of the Due Process Clauses of the Fifth and Fourteenth Amendments are virtually identical, decisions interpreting the Fourteenth Amendment's Due Process Clause guide us in determining what due process requires in the Fifth Amendment jurisdictional context."[182] The Second Circuit has similarly stated that "the due process analysis is basically the same under both the Fifth and Fourteenth Amendments."[183] The Federal Circuit also affords "the defendant the opportunity to defeat jurisdiction by presenting a compelling case that other considerations render the exercise of jurisdiction so unreasonable as to violate 'fair play and substantial justice.'"[184]

Many other courts and commentators have argued that a separate fairness inquiry indeed exists, but should be tailored specifically for the Fifth Amendment context—usually meaning a more flexible standard that considers the federal interests at stake. For instance, the Tenth Circuit held that even if a defendant satisfies the national contacts standard under a nationwide service of process statute, the Fifth Amendment "requires something more" to "protect[] individual litigants against the burdens of litigation in an unduly inconvenient forum."[185] The court further explained that in the context of federal nationwide service of process, a broad and flexible standard must be used that includes five specific factors, including how the forum impacts the defendant's access to counsel.[186] Similarly, Maryellen Fullerton has argued that "[a] defendant must be afforded the opportunity to demonstrate that the location of the litigation is fundamentally unfair to him"; otherwise, the national contacts test alone "would permit harassment by plaintiffs."[187] Fullerton proposes a three-factor test, evaluating "(1) the severity of the inconvenience, if any, to the defendant; (2) the defendant's reasonable anticipation of litigation at the site chosen by the plaintiff; [and] (3) the federal interests furthered by permitting

182. Oldfield v. Pueblo de Bahia Lora, S.A., 558 F.3d 1210, 1219 n.25 (11th Cir. 2009); *cf.* Republic of Panama v. BCCI Holdings (Lux.), 119 F.3d 935, 947 (11th Cir. 1997).

183. Chew v. Dietrich, 143 F.3d 24, 28 n.4 (2d Cir. 1998).

184. Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found., 297 F.3d 1343, 1351 (Fed. Cir. 2002) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)); *see also, e.g.*, Xilinx, Inc. v. Papst Licensing GmbH, 848 F.3d 1346, 1353 n.2 (Fed. Cir. 2017); Touchcom, Inc. v. Bereskin & Parr, 574 F.3d 1403, 1411 (Fed. Cir. 2009).

185. *See* Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1211-12 (10th Cir. 2000) (quoting *BCCI Holdings*, 119 F.3d at 945).

186. *See id.* at 1212.

187. *See* Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 85-86 (1984).

litigation to proceed at that location."[188] Other courts and scholars are not as specific about the precise due process test, but still express that there should be a separate inquiry into fairness.[189]

2. Limits when statutory transfer and venue safeguards are inadequate

Even supporters of the "pure" national contacts approach—that is, the view that due process only requires sufficient contact with the United States and nothing more—find that such an outcome does not raise any due process concerns. This is largely because of the availability of robust statutory transfer and venue safeguards. These safeguards typically include limiting venue to the district where the defendant resides or where significant acts occurred.[190] But when those statutory protections do not exist or are inadequate, courts are left to grapple with whether a particular forum is unduly inconvenient. As the Eleventh Circuit has pointed out, "inconvenience 'most frequently can be accommodated through a change of venue,'" but "[a]lternative methods of addressing inconvenience do not . . . do away with the need for a constitutional floor to protect litigants against truly undue burdens."[191]

More specifically, the courts that first approved of the national contacts approach recognized that defendants have a right to a fair forum, and found that this concern was adequately addressed by the liberal use of subconstitutional transfer and venue protections.[192] This assumption regarding the sufficiency of subconstitutional protections continues today—one of the main arguments to support the national contacts standard is "the availability of

188. *Id.* at 85.

189. *See, e.g.*, Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio, 870 F. Supp. 1102, 1106 (S.D. Ga. 1994) (stating that to accept that national contacts are all that is needed with a statute authorizing nationwide service of process "divorces due process from personal jurisdiction inquiries, affords plaintiffs inordinate flexibility and does not provide enough due process protection for defendants"); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 48 (1988) (arguing that Congress may create nationwide service of process statutes, but that the Supreme Court's precedent from the Fourteenth Amendment context makes it "clear that this congressional power should be limited by a case by case analysis of the fairness of a forum to hear a particular matter"); Ariel Winawer, Comment, *Too Far from Home: Why* Daimler*'s "at Home" Standard Does Not Apply to Personal Jurisdiction Challenges in Anti-Terrorism Act Cases*, 66 EMORY L.J. 161, 185 (2016) (arguing that after determining whether a defendant's national contacts are sufficient, "[a]n additional consideration should be whether the forum is fair and reasonable").

190. *See, e.g.*, 28 U.S.C. § 1391 (2017) (limiting venue to where a defendant resides or where a substantial part of the events giving rise to a claim occurred).

191. Republic of Panama v. BCCI Holdings (Lux.), 119 F.3d 935, 947 n.25 (11th Cir. 1997) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 484 (1985)).

192. *See* 4 WRIGHT ET AL., *supra* note 164, § 1068.1, at 701-10.

transfer within the federal court system [as] an adequate remedy for any unfairness to the defendant caused by the location of the suit."[193]

As courts rely heavily on the availability of statutory protections to uphold the national contacts approach, it is often unclear which of two positions they are taking. There is what I call an *absolute* position—that personal jurisdiction doctrine only requires contacts with the United States, and that the proper place to deal with any additional fairness concerns is thus at the subconstitutional level. Or there is what I call an *avoidance* position—that subconstitutional protections mean that courts do not have to decide how fairness is considered as part of constitutional personal jurisdiction doctrine.

Few scholars seem to stake out the absolute position.[194] To take such an extreme position would overlook the vast amount of literature about the role of individual liberty in civil personal jurisdiction doctrine. After all, the academic literature emphasizes two possible theoretical bases for personal jurisdiction: individual liberty and federalism.[195] The individual liberty theory is concerned with fairness to the defendant, including considerations of "litigational convenience";[196] the federalism theory is concerned with state sovereignty, "the maintenance of a union of 50 coequal sovereigns."[197]

In the context of federal question cases, the federalism basis is irrelevant because the United States is the relevant sovereign and state sovereignty is not implicated. Thus, if personal jurisdiction were based purely on federalism, the doctrine might not do much work in federal question cases. However, the Supreme Court has often mentioned both bases,[198] even though it has been

193. Fullerton, *supra* note 187, at 7; *see, e.g.*, Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 40 n.163 (1987) (linking the pure national contacts standard with "liberal venue transfers" to alleviate inconveniences); Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 854 (1988) ("The inconvenience of a particular forum may be addressed through the ability of the courts to transfer cases and to dismiss for *forum non conveniens*."); Erbsen, *supra* note 178, at 779 (explaining that for a specific case, a "successful venue challenge" or a transfer to a more convenient forum would "resolve[] fairness concerns").

194. *See, e.g.*, Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1592 (1992); Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 468-69 (2004).

195. *See generally* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015 (1983); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RES. L. REV. 769 (2016); Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501 (2015).

196. *See* William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 600 (1993); *see also* Redish, *supra* note 195, at 1133.

197. *See* Drobak, *supra* note 195, at 1016 n.7.

198. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).

inconsistent or vague about which interest matters most.[199] Most scholars conclude that liberty does more work than federalism.[200] They argue, for instance, that the doctrine is based in due process, and that "the Fourteenth Amendment was enacted to protect people . . . from states, not to protect states from other states."[201] This argument makes sense given that individuals can *waive* personal jurisdiction—suggesting it must be a right personal to them—but they cannot waive state sovereignty.[202] Thus, individual liberty is indeed a basis to limit personal jurisdiction. This means that there should still be a limit to personal jurisdiction in federal question cases—that is, cases that do not implicate state sovereignty.

Most scholars and courts seem to ascribe to the avoidance position instead of the absolute position. As the Fifth Circuit has described, "[s]trict federal venue requirements . . . have made it unnecessary to develop a judicial doctrine of the limits of personal jurisdiction in federal cases."[203] The Third Circuit has similarly observed that "[t]hose few courts which have adopted the national contacts theory have relied upon federal transfer provisions to reduce any inconvenience that results from an alien defendant's broadened susceptibility to suit."[204] Scholars have also recognized that the availability of statutory protections helps explain why courts have not yet developed a coherent theory of Fifth Amendment due process restrictions on personal jurisdiction.[205]

This reliance on statutory transfer and venue provisions masks the fact that there are many defendants for whom those provisions do not exist or are inadequate.[206] Robert Lusardi has explained that pushing fairness considera-

199. *See, e.g.*, Schmitt, *supra* note 195, at 770 ("Although personal jurisdiction is perhaps the most fundamental subject in Civil Procedure, the Supreme Court has never articulated a coherent account of its theoretical underpinnings. In particular, the Justices have been unable to agree on whether the doctrine is based, even in part, on state sovereignty."); Trammell, *supra* note 195, at 532 ("The Supreme Court has vacillated over the years about whether and to what extent state sovereignty figures into the personal jurisdiction calculus.").

200. *See* Schmitt, *supra* note 195, at 771 ("Most scholars of jurisdiction have rejected state sovereignty as a meaningful basis for personal jurisdiction. They generally argue that . . . the substance of the doctrine should be derived exclusively from the Due Process Clause's concern for fairness.").

201. Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It?: Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 738-39 (2012); *see also* Redish, *supra* note 195, at 1114-15 ("[F]ederalism is in no way relevant to the language, policies, or history of the due process clause.").

202. *See* Drobak, *supra* note 195, at 1047; Richman, *supra* note 196, at 607.

203. Terry v. Raymond Int'l, Inc., 658 F.2d 398, 402 (5th Cir. 1981), *overruled on other grounds by* Point Landing, Inc. v. Omni Capital Int'l, Ltd., 795 F.2d 415 (5th Cir. 1986).

204. Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 294 n.5 (3d Cir. 1985).

205. *See* Fullerton, *supra* note 187, at 76; Markowitz & Nash, *supra* note 9, at 1181.

206. *See* Markowitz & Nash, *supra* note 9, at 1197-205.

tions into statutory venue analysis might have the practical effect of "de-emphasiz[ing]" the burden on the individual, because courts often give transfer arguments short shrift once they determine that personal jurisdiction is proper.[207] Some scholars also argue that the judiciary is abdicating its duty to provide an important check on Congress.[208]

3. Limits when the forum poses "extreme inconvenience"

At the very least, even the more absolute arguments for the pure national contacts approach tend to provide a safety valve for the rare cases where a particular forum would cause extreme inconvenience.

For instance, the Fourth Circuit, while upholding the national contacts approach under a nationwide service statute, recognized that—to "comport[] with the Fifth Amendment"—it cannot allow "such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy of allowing the assertion of *in personam* jurisdiction."[209] This limit is consistent with the Supreme Court's declaration that "jurisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent."[210] Scholars and courts also generally recognize this boundary, finding the national contacts test appropriate only "as long as the choice of districts is not so irrational as to deprive the defendant of a reasonable opportunity to defend itself."[211]

Even for circuits that, like the U.S. Supreme Court, have not yet ruled on whether Fifth Amendment due process limits personal jurisdiction doctrine

207. Lusardi, *supra* note 189, at 38-39, 39 n.178.

208. *See* Fullerton, *supra* note 187, at 36 ("[I]f protection of defendants against an inconvenient trial location is only a matter of legislative grace rather than constitutional requirement, then nothing prevents Congress from repealing the transfer statute and eliminating the *forum non conveniens* doctrine."); Lusardi, *supra* note 189, at 38 ("The purpose of a constitutional limitation on jurisdiction is to serve as a floor which limits Congress' legislative use of venue . . . .").

209. *See* ESAB Grp., Inc. v. Centricut, Inc., 126 F.3d 617, 627 (4th Cir. 1997).

210. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985) (first quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972); and then quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)).

211. *See* David S. Welkowitz, *Beyond* Burger King*: The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1, 40 n.224 (1987); *see also, e.g.*, Republic of Panama v. BCCI Holdings (Lux.), 119 F.3d 935, 947 (11th Cir. 1997) ("[E]ven when a defendant resides within the United States, courts must ensure that requiring a defendant to litigate in plaintiff's chosen forum is not unconstitutionally burdensome."); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 904 (1989) ("In unusual cases where the burden of litigating in the distant forum is so great that the noncitizen cannot present a fair defense, Congress is and should be barred from conferring jurisdiction upon either state or federal courts.").

beyond requiring national contacts, dicta suggest that a constitutional floor exists.[212] For instance, the Third Circuit in *DeJames v. Magnificence Carriers, Inc.* assumed for the purpose of the appeal that the international defendant's contacts with the United States were enough "to support jurisdiction in the District of New Jersey, even if these contacts are limited exclusively to Hawaii, to Alaska, or to a few states on the west coast."[213] But the court expressed some skepticism at this result, leaving open the possibility that it would examine the fairness of a particular forum in the future.[214] Similarly, as the D.C. Circuit noted in *Livnat v. Palestinian Authority*, "some courts have also suggested that under the Fifth Amendment, even if the defendant has sufficient nationwide contacts, a plaintiff must additionally justify jurisdiction in the particular state."[215] The court, however, "express[ed] no view on that issue" because it could decide the case on other grounds.[216]

C. The Potential of Applying These Constraints in the Immigration Context

Under the potential limits described above, it is possible that as a result of the current practice of far and frequent transfers of immigrant detainees, a forum may be so burdensome for a detainee as to violate Fifth Amendment due process.

As a threshold matter, the national contacts approach applies in the immigration context. This is because immigration cases arise under federal immigration law.[217] And courts have expressed that immigrants need "minimum contacts" with the United States as a whole to justify a court's exercise of personal jurisdiction over them—a standard easily met for immigrants who reside in the United States.[218]

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212. Even circuits that seem to take the pure national contacts approach are not always consistent. *Compare, e.g.*, Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1258 (5th Cir. 1994) (holding that Fifth Amendment due process is satisfied when the court exercises personal jurisdiction over a defendant residing in the United States), *with* Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Mich., 97 F.3d 822, 826 (5th Cir. 1996) (disagreeing with *Busch* "to the extent it concludes that the proper personal jurisdiction test in a national service of process case is whether minimum contacts exist between the individual and the national sovereign").

213. 654 F.2d 280, 286 n.3 (3d Cir. 1981).

214. *See id.*

215. 851 F.3d 45, 55 n.6 (D.C. Cir. 2017).

216. *See id.*

217. Even though immigration cases involve a federal question, Congress has limited the ability of courts to review some discretionary decisions. *See, e.g.*, 8 U.S.C. § 1252(a)(2) (2017).

218. *See* Sinclair v. Attorney Gen. of the U.S., 198 F. App'x 218, 223 (3d Cir. 2006); Markowitz & Nash, *supra* note 9, at 1204-05.

The possibility of Fifth Amendment due process constraints in personal jurisdiction doctrine has never been fully explored in immigration cases. Some courts have lightly touched on the issue, but have never deeply engaged or created authoritative case law on the matter.[219]

There is also a dearth of literature on this possibility, with one notable exception: Peter Markowitz and Lindsay Nash have aptly explained that removal proceedings are a rare circumstance that reveals the "constitutional floor of venue."[220] Personal jurisdiction doctrine allows for a national contacts approach, but there are no adequate statutory venue protections to protect immigration detainees—revealing the fact that there is no constitutional floor to venue doctrine.[221] Markowitz and Nash advocate for *constitutionalizing* venue protections—which thus far have only been recognized as *statutory* protections—so venue doctrine could independently protect individuals when personal jurisdiction doctrine falls short.[222] This proposal is certainly worth exploring further.

Taking a step back, this Note finds that personal jurisdiction doctrine may be able to do more work to protect immigrants from unfair forums than it currently does. There are many advantages to finding more safeguards in constitutional personal jurisdiction doctrine. First, as described in Part III.B above, most courts are already open to the idea of fairness constraints in personal jurisdiction doctrine grounded in Fifth Amendment due process. Additionally, it is well established that Fifth Amendment due process applies in the immigration context for immigrants who have entered the country.[223] Furthermore, as Lusardi has described, courts might give short shrift to fairness concerns in venue analysis once it is established that personal jurisdiction is proper.[224] Thus, it is important to incorporate considerations of inconvenience into the doctrine where courts might afford such concerns the most weight.

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219. *See, e.g.*, *Sinclair*, 198 F. App'x at 223 (leaving open the question whether there is a separate fairness inquiry in the national contacts analysis); *cf.* Aguilar v. U.S. Immigration & Customs Enf't Div. of the Dep't of Homeland Sec., 510 F.3d 1, 7 (1st Cir. 2007) (rejecting the idea that there is "any constitutional right to have a removal proceeding held in a particular venue," but vaguely acknowledging that immigration detainees are still entitled to the "due process guarantees of the Fifth Amendment"); Perez v. Reno, No. 97 Civ. 6712(KMW), 2000 WL 686369, at *5 (S.D.N.Y. May 25, 2000) ("The Court need not decide whether [due process] standards apply without modification to the rather different context of this federal habeas action directed to a federal official in his official capacity and concerning exclusively federal questions of immigration law.").

220. *See* Markowitz & Nash, *supra* note 9, at 1197.

221. *See id.* at 1156, 1197.

222. *See id.* at 1205-14.

223. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

224. *See supra* text accompanying note 207.

Although there is generally a lack of case law and scholarship on point, the Third Circuit's unreported decision in *Sinclair v. Attorney General of the United States*[225] is helpful because it illustrates how a court might approach this issue.

In *Sinclair*, an immigrant argued that his transfer from New York City to Pennsylvania for his immigration court removal proceeding meant that "he was subjected to [the Third] Circuit's less favorable analysis" of the central issue in his case.[226] He claimed that "ICE's exercise of personal jurisdiction over him in Pennsylvania violated the Due Process Clause" of the Fifth Amendment because he "had no ties" to that state.[227] The Third Circuit rejected his claim, explaining that he "misidentifie[d] the relevant sovereign that exercised jurisdiction over his person" because the United States was the correct unit of government.[228] The court reasoned that while Rule 4(k) of the Federal Rules of Civil Procedure generally limits jurisdiction to the bounds of the relevant state's long-arm statute, "Congress has not provided for any such limitation with respect to immigration courts."[229] Thus, any minimum contacts test "would be an inquiry analogous to that attendant to a federal statute authorizing service of process based on 'national contacts.'"[230] In this case, by virtue of being a lawful permanent resident, the immigrant had sufficient national contacts.[231]

Importantly, though, the court recognized that the analysis under the Fourteenth Amendment required an additional inquiry into whether its exercise of personal jurisdiction "is consistent with 'traditional notions of fair play and substantial justice,'" but that the Third Circuit was one of the jurisdictions that has "not yet decided whether such an inquiry is required by Fifth Amendment due process."[232] Because the immigrant did not make any arguments for why Pennsylvania was an unfair forum aside from his lack of contacts there, the court did not need to reach the issue.[233] But the court suggested that there might have been a viable unfairness argument if he had, for example, "argued that the location of the proceeding interfered with his right to counsel."[234]

225. 198 F. App'x 218 (3d Cir. 2006).

226. *See id.* at 220.

227. *See id.* at 221.

228. *See id.* at 222 (citing cases that generally approve of the national contacts standard).

229. *See id.*

230. *Id.* at 223.

231. *See id.*

232. *See id.* (quoting Pinker v. Roche Holdings, 292 F.3d 361, 370 (3d Cir. 2002)).

233. *See id.*

234. *See id.*

Despite not settling the due process fairness issue, the *Sinclair* court's logic seems correct: For immigration courts, the United States is the relevant unit of government. Congress has essentially created a national contacts scheme because it has not specified that immigration courts must follow states' long-arm statutes. Or, viewed a slightly different way, Congress has created a framework for removal proceedings analogous to nationwide service of process statutes because the INA places almost no restriction on where service of process may take place.[235] Thus, the same possible Fifth Amendment due process limits discussed above in Part III.B are relevant for the immigration context as well.

Applying those limits here, it is strikingly clear that immigrants in removal proceedings do not have the necessary transfer and venue statutory safeguards to justify a pure national contacts approach.[236] As described in Part I above, the government frequently transfers immigration detainees across the country to places with which they have absolutely no relationship, and the government's choice of detention center in turn determines the venue for immigration proceedings and access to Article III courts.[237] It is exceedingly difficult for immigrants to obtain a transfer of venue, and even if they prevail, the original immigration court might still decide the most critical issues of removability.[238] More often, immigrants end up unable to challenge the government's choice of forum.[239] Given that the assumed liberal statutory safeguards are not present in the immigration system, courts might need to rigorously assess whether the government's choice of forum violates immigrants' due process rights.

Even if adequate statutory safeguards existed, there is a separate question as to whether a forum poses extreme inconvenience.[240] The hardships inflicted on immigration detainees under current transfer and venue practices cannot be overstated. As described in Part I above, the government frequently moves detainees to the Fifth Circuit, where the law is less favorable to immigrants.[241] Transfers also impede the ability of detainees to work with their counsel, and they often lose their counsel after a transfer and are unable to find new counsel

235. *See* 8 U.S.C. § 1229(a)(1) (2017) (stating that the NTA document to initiate removal proceedings can be served "in person to the alien" or "by mail to the alien or to the alien's counsel of record").

236. Markowitz & Nash, *supra* note 9, at 1197-205.

237. *See supra* Parts I.A-.B.

238. *See supra* Part I.A.

239. *See supra* Parts I.A, .D.

240. *See supra* Part III.B.3 (explaining how lower courts and legal scholarship have proposed an "extreme inconvenience" floor to personal jurisdiction).

241. *See supra* Parts I.B, I.D.1.

in their new locations.[242] In addition, immigrants are often transferred away from the evidence necessary to present their defenses.[243] Sudden transfers far from support networks, moreover, can cause severe emotional and psychological harm.[244] Such extreme inconveniences make it almost impossible for immigrants to win their cases, and often lead them to opt for voluntary removal.[245]

The possibility of Fifth Amendment due process constraints on where the government can hale immigration detainees into court raises the question of what such a test should look like. As described in Part III.B above, there are multiple proposed fairness tests. One possible test could adapt the "fair play and substantial justice" prong from the Fourteenth Amendment context for this purely federal context: Starting with a presumption of reasonableness if the detainee has minimum contacts with the United States,[246] a court could undertake a fairness inquiry that looks to at least three factors, including (1) the severity of the burden on the individual, including whether the forum interferes with the right to counsel and the ability to gather evidence; (2) the federal government's interest in adjudicating the dispute, both as a litigant with an interest in convenience and as a sovereign with an interest in furthering substantive policies; and (3) the judicial system's interest in obtaining efficient and accurate resolution of controversies.[247]

Undoubtedly there is a weighty federal interest, given that immigration enforcement concerns foreign affairs and the nation's borders. But this interest might still be outweighed by severe unfairness to the individual, especially for immigrants who are long-term residents, and those who have counsel and evidence in their original locations. Similarly, litigating in the government's chosen forum—even if efficient—might lead to inaccurate results if detainees cannot gather the necessary evidence.

One possible benefit of this due process test is that it might incentivize legislative transfer and venue reform, given that a court would be less likely to find that an individual burden outweighs the government interest if there were adequate safeguards. Reform could include providing immigrants with a certain amount of time to obtain counsel where they are arrested, providing

242. *See supra* Part I.D.2.

243. *See supra* Part I.D.3.

244. *See supra* Part I.D.4.

245. *See supra* Part I.D.4.

246. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (establishing this presumption in the Fourteenth Amendment context).

247. These factors are generally included in the five-factor reasonableness inquiry presented in *World-Wide Volkswagen Corp. v. Woodson*, *see* 444 U.S. 286, 292 (1980), but some of the factors are combined to reflect the fact that the federal government is a party to the case.

that venue rest only where their attorneys are located, and—if transferred—returning them to their original venues with enough time before their proceedings to consult with counsel.[248] Such formal limits on venue might indirectly constrain transfers. For example, if the government has a duty to return the immigrant, then it might be less likely to transfer the immigrant in the first place.

One main difficulty that remains with this personal jurisdiction approach is how to deal with the fact that after transfer, an immigrant detainee is physically present in the new jurisdiction. Historically, "tag" or "transient" jurisdiction—personally serving an individual when she is in the state—is an acceptable way for courts to exercise personal jurisdiction.[249] However, a divided Supreme Court in *Burnham v. Superior Court* implied that it is an open question whether jurisdiction based on physical presence alone is valid if that presence is involuntary.[250] In *Burnham*, the Court unanimously affirmed California courts' jurisdiction over a New Jersey resident who was personally served with process while he briefly visited San Francisco.[251] Justice Scalia's plurality opinion noted that physical presence alone satisfies Fourteenth Amendment due process—with no minimum contacts or fairness inquiry needed.[252] Conversely, Justice Brennan's concurrence, joined by three other Justices, argued that "the Due Process Clause of the Fourteenth Amendment generally permits a state court to exercise jurisdiction over a defendant if he is served with process while *voluntarily* present in the forum State."[253] And even voluntary presence may not "*automatically* comport[] with due process"; an independent fairness inquiry is always needed.[254] In addition, Justice White, who joined Justice Scalia's plurality opinion in part, wrote a separate concurrence emphasizing that personal service to an individual physically within a state is enough to satisfy due process—with the caveat that "[a]t least

248. Such protections are already in place for the *Orantes-Hernandez* class members. *See supra* note 39.

249. *See* Burnham v. Superior Court, 495 U.S. 604, 610-11 (1990) (plurality opinion).

250. *See id.* at 637 n.11 (Brennan, J., concurring in the judgment).

251. *See id.* at 607-08, 628 (plurality opinion).

252. *See id.* at 619.

253. *Id.* at 628-29 (Brennan, J., concurring in the judgment) (emphasis added).

254. *See id.* at 629.

this would be the case where presence in the forum State is *intentional*."[255] In other words, for five Justices in *Burnham*, involuntary presence is a different situation.[256] Applied to the immigration context, even if immigrants are technically physically present wherever the government unilaterally moves them, this fact alone should not be enough to justify a court's exercise of personal jurisdiction.[257]

There are certainly many other considerations to examine if Fifth Amendment due process limits to personal jurisdiction were to be applied with force in the immigration context. This is especially the case given that immigration involves administrative proceedings that are a hybrid of the civil and criminal models. For instance, it is unclear whether immigrants would be required to exhaust their administrative remedies before an Article III court may hear whether their Fifth Amendment rights have been violated.[258] Also, the fact that personal jurisdiction is *waivable* has created significant problems in the civil context, as more companies are including binding forum selection clauses in contracts.[259] It is easy to see how this might be problematic in the immigration context—recent legislative proposals have included requiring immigrants to sign waivers giving up some rights before they may receive important immigration benefits.[260]

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255. *See id.* at 628 (White, J., concurring in part and concurring in the judgment) (emphasis added).

256. The remaining opinion, Justice Stevens's concurrence, did not expressly address voluntariness, but favorably noted "the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White." *See id.* at 640 (Stevens, J., concurring in the judgment).

257. There is a related difficulty with the issue of physical presence: If a detainee's immigration violation is considered continuous in nature, it might also be "committed" wherever the detainee is held. A full analysis of this continuous violation wrinkle is beyond the scope of this Note, but again, the involuntariness of presence would likely be a significant part of the analysis.

258. *See, e.g.*, Aquilar v. U.S. Immigration & Customs Enf't Div. of the Dep't of Homeland Sec., 490 F. Supp. 2d 42, 48 (D. Mass. 2007) (discussing the exhaustion requirement for due process claims), *aff'd sub nom.* Aguilar v. U.S. Immigration & Customs Enf't Div. of the Dep't of Homeland Sec., 510 F.3d 1 (1st Cir. 2007).

259. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (upholding a forum selection clause), *superseded in part by statute*, Act of Oct. 6, 2006, Pub. L. No. 109-304, sec. 6(c), § 30509, 120 Stat. 1485, 1514-15 (codified at 46 U.S.C. § 30509 (2017)).

260. For example, in 2017, a proposed bill to provide a path to citizenship for a subset of undocumented immigrants would have required them to sign a waiver stating that if they violated certain terms of their path to citizenship, they would be unable to get any future immigration benefits. *See* Seung Min Kim, *GOP Senators Unveil New "Dreamers" Bill*, POLITICO (updated Sept. 25, 2017, 4:01 PM EDT), https://perma.cc/L2PM-3LTR; *see also* Solution for Undocumented Children Through Careers, Employment, Education, and Defending Our Nation (SUCCEED) Act, S. 1852, 115th Cong. (2017).

Conclusion

Every day, the U.S. government transfers immigrant detainees to remote detention facilities across the country, far from their families and attorneys. As venue rests in the new jurisdiction, the chance of detainees prevailing sharply decreases because they often face insurmountable barriers in presenting their cases. This transfer practice has steadily increased over time, but has gone largely unexamined by legal scholarship. This Note aims to shed light on this issue and begin exploring possible protections. Although there is no effective criminal law analog, civil personal jurisdiction doctrine might offer a constraint under Fifth Amendment due process when a particular forum is exceedingly unfair. Ultimately, the possibility of this Fifth Amendment due process protection is just a starting point for addressing immigration detention transfers and venue, as the scope and severity of what detainees routinely experience warrants more detailed consideration by scholars. Future scholarship should further explore what exactly a Fifth Amendment due process test would look like, which venues would be fair and reasonable, whether this approach might lead to unintended consequences, and—more broadly—whether civil procedure doctrine is the right place to look when searching for protections in the immigration realm.