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The Transfer of Immigrants to Remote Detention Centers in the United States

Each year in the United States, several hundred thousand non-citizens[2] (378,582 in 2008) are arrested and detained by Immigration and Customs Enforcement (ICE) officials. They are held in a vast network of more than 300 detention facilities, located in nearly every state in the country. Only a few of these facilities are under the full operational control of ICEthe majority are jails under the control of state and local governments that subcontract with ICE to provide detention bed space.

Although non-citizens are often first detained in a location near to their place of residence, for example, in New York or Los Angeles, they are routinely transferred by ICE hundreds or thousands of miles away to remote detention facilities in, for example, Arizona, Louisiana, or Texas. Detainees can also cycle through several facilities in the same or nearby states. Previously unavailable data obtained by Human Rights Watch show that over the 10 years spanning 1999 to 2008, 1.4 million detainee transfers occurred. The large numbers of transfers are due to ICEs broad use of detention as a tool of immigration control, especially after restrictive immigration laws were passed in 2006, and the absence of effective policies and standards to prevent unnecessary transfers.

Any governmental authority holding people in its custody, particularly one responsible for detaining hundreds of thousands of people in dozens of institutions, will at times need to transport them between facilities. In state and federal prison systems, for example, inmate transfers are relatively common, even required, in order to minimize overcrowding, respond to medical needs, or properly house inmates according to their security classifications. Transfers in state and federal prisons, however, are much better regulated and rights-protective than transfers in the civil immigration detention system where there are few, if any, checks. The difference in the ways the US criminal justice and immigration systems treat transfers is doubly troubling because immigration detainees, unlike prisoners, are technically not being punished. But thus far ICE has rejected recommendations to place enforceable constraints on its transfer power.

This report examines the scope and human rights impacts of US immigration transfers. It draws on extensive, previously unpublished ICE data Human Rights Watch obtained through a Freedom of Information Act request, as well as scores of interviews with detainees, family members, advocates, attorneys, and officials. As detailed below, we found that such transfers are even more common than previously believed and are rapidly increasing in number, more than doubling from 2003 (122,783) to 2007 (261,941) and likely exceeding 300,000 in 2008 once the final numbers are in. The impact on detainees and their families is profound.

Transfers erect often insurmountable obstacles to detainees access to counsel, the merits of their cases notwithstanding. Transfers impede their rights to challenge their detention, lead to unfair midstream changes in the interpretation of laws applied to their cases, and can ultimately lead to wrongful deportations.

Transfers also take a huge personal toll on detainees and their families, often including children. As one attorney who represents immigration detainees explained:

Many detainee transfers are unnecessary and the harms avoidable. ICE needs a transfer policy with greater clarity of purpose and protections against abuse. As detailed in the recommendations section below, better transfer standards can be developed with just a few simple reforms.

An agency charged with enforcing the laws of the United States should not need to resort to a chaotic system of moving detainees around the country in order to achieve efficiency. Immigrant detainees should not be treated like so many boxes of goodsshipped to the location where it is most convenient for ICE to store them. Instead, ICE should hold true to its mission of enforcing the laws of the United States and allow reasonable and rights-protective checks on its transfer power.

The current US approach to immigration detainee transfers interferes with several important detainee rights. To understand the conditions immigration detainees face, it is instructive to compare their situation to that of federal and state prisoners.

In the US criminal justice system, pretrial detainees enjoy the right, protected by the Sixth Amendment to the US Constitution, to face trial in the jurisdiction in which their crimes allegedly occurred.[4] Immigrant detainees enjoy no comparable right to face deportation proceedings in the jurisdiction in which they are alleged to have violated immigration law, and are routinely transferred far away from key witnesses and evidence in their trials. In all but rare cases a transfer of a criminal inmate occurs once an individual has been convicted and sentenced and is no longer in need of direct access to his attorney during his initial criminal trial. Immigrant detainees can be transferred away from their attorneys at any point in their immigration proceedings, and often are. Finally, transferred criminal inmates can usually be located through a state or federal prisoner locator system, which is accessible to the public and in many cases is updated every 24 hours. There is no similar publicly accessible immigrant detainee locator system, meaning that detainees can be literally lost from their attorneys and family members for days or even weeks after being transferred.

All immigrant detainees, however, have the right, protected under US law as well as human rights law, to be represented in deportation and related hearings by the attorney of their choice. Transfers of immigrant detainees severely disrupt the attorney-client relationship because attorneys are rarely, if ever, informed of their clients transfers. Attorneys with decades of experience told us that they had not once received prior notice from ICE of an impending transfer. ICE often relies on detainees themselves to notify attorneys, but the transfers arise suddenly and detainees are routinely prevented from or are otherwise unable to make the necessary call. As a result, attorneys often spend days, even weeks tracking down the new location of their clients. Once a transferred client is found, the challenges inherent in conducting legal representation across thousands of miles can completely sever the attorney-client relationship.

Even when an attorney is willing to attempt long distance representation, the issue is entirely within the discretion of immigration judges, whose varying rules about phone or video appearances can make it impossible for attorneys to represent their clients. In other cases, detainees must struggle to pay for their attorneys to fly to their new locations for court dates, or search, usually in vain, for local counsel to represent them. Transfers create such significant obstacles to existing attorney-client relationships that ICEs special advisor, Dora Schriro, recommended in her October 2009 report that detainees who have retained counsel should not be transferred unless there are exigent reasons.

Still, immigrants who have already retained an attorney prior to transfer are the most fortunate. Detainees are often transferred hundreds or thousands of miles away from their families and home communities before they have been able to secure legal representation. Almost invariably, there are fewer prospects for finding an attorney in the remote locations to which they are transferred. It is therefore not surprising that in 2008, the most recent year for which figures are available, 60 percent of non-citizens appeared in immigration court without counsel.

Although most detained non-citizens have the right to a timely bond hearinga hearing examining the lawfulness of detention (a right protected under US law as well as human rights law)our research shows that ICEs policy of transferring detainees without taking into account their scheduled bond hearings often seriously delays those hearings. In addition, transferred detainees are often unable to produce the kinds of witnesses (such as family members or employers) that are necessary to obtain bond, which means that they usually remain in detention.

Once they are transferred, the vast majority of non-citizens must go forward with their deportation cases in the new, post-transfer location. Some may ask the court to change venue back to the pre-transfer location, where evidence, witnesses, and their attorneys are more readily accessible. Unfortunately, for a variety of reasons discussed in this report, it is very difficult for a non-citizen detainee to win a change of venue motion.

Transfer can also have a devastating impact on detainees ability to defend against deportation, despite their right to present a defense. Transfer often makes it impossible for non-citizens to produce evidence or witnesses relevant to their defense. In addition, the transfer of detainees often literally changes the law that is applied to them. For example, the act of sending a detainee from one jurisdiction to another can determine whether she may ask an immigration judge to allow her to remain in the United States.

Transfer can pose unique problems for detainees who are minor children, without a parent or custodian to offer them guidance and protection. ICE is required to send these unaccompanied minors as soon as possible to a specialist facility run by the Office of Refugee Resettlement (ORR) that is the least restrictive, smallest, and most child-friendly facility available. Placing children in these facilities is a laudable goal, and one that protects many of their rights as children. Unfortunately, there are very few ORR facilities in the United States. Therefore, children are often transferred even further than their adult counterparts, away from attorneys willing to represent them and from communities that might offer them support. The delays and interference with counsel caused by these long-distance transfers of children can cause them to lose out on important immigration benefits available to them only as long as they are minors, such as qualifying for Special Immigrant Juvenile Status, which would allow them to remain legally in the United States.

Finally, the transfer of immigrants across long distances to remote locations takes a heavy emotional toll on detainees and their loved ones. Physical separation from family members when immigrants are detained in remote locations impossible for their relatives to reach creates severe emotional and psychological suffering.

Given the serious rights violations that can occur, Human Rights Watch is concerned by the widespread and increasing use of transfers by ICE. Data obtained from ICE by Human Rights Watch for this report and analyzed by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University reveal that transfers have increased sharply in recent years: of the 1.4 million transfers that have occurred between 1999 and 2008, more than half (53 percent) took place in the last three of those 10 years.

The data show a clear link between ICEs reliance on subcontractors to house immigrant detainees and the burgeoning number of

transfers. The majority of detainees are held in numerous state and local jails and prisons that ICE pays to provide bed space. However, whenever these state and local facilities need to free up space for persons accused or convicted of crimes, or whenever they decide housing ICE detainees is undesirable for whatever reason, ICE must move detainees out. As a result, the vast majority of transfers occur through such subcontracted facilities.

Although transfers occur into, out of, and within almost every state in the country, the three states most likely to receive transfers are Texas, California, and Louisiana. The numbers are so high in each of Louisiana and Texas that the federal Court of Appeals for the Fifth Circuit (which covers Louisiana, Mississippi, and Texas) is the jurisdiction that receives the most transferred detainees. Transfers to states covered by the Fifth Circuit are of particular interest to an assessment of the impact of immigration transfers because the circuit court is widely known for decisions that are hostile to the rights of non-citizens and because the states within its jurisdiction collectively have the lowest ratio of immigration attorneys to immigration detainees in the country.

While it is impossible to determine conclusively based on our data whether there is a net inflow of transfers to the Fifth Circuitand we certainly do not conclude that it is intentional ICE policy to create such an inflowthe data show a large disparity between transfers received in (95,114) and originating from (13,031) the Fifth Circuit state of Louisiana. As detailed below, a detainee whose deportation hearing might have been about to be heard in another jurisdiction may well find out, after transfer to a facility within the Fifth Circuit, that his or her chances of successfully fighting deportation have just evaporated.

As an agency responsible for the custody and care of hundreds of thousands of people, it is clear that ICE will need to transfer detainees. The question is whether all or most of the 1.4 million transfers that have occurred over the past 10 years were truly necessary, especially in light of how transfers interfere with immigrants rights to access counsel and to fair immigration procedures.

Despite such problems, ICE has remained staunchly opposed to limiting its transfer power. According to the agency, any such limits would curtail its ability to make the best and most cost-effective use of the detention beds it has access to across the country. In a time of fiscal downturn in the United States such efficiency concerns are important, but they should never come at the expense of basic human rights. This is especially true for those detainees who have attorneys to consult, defenses to raise in their deportation hearings, and witnesses and evidence to present at trial. Some detainees may not have such issues at stake. But for those who do, the United States government and its immigration enforcement agency should not be allowed to act without restraint.

Due to changes in ICE leadership under the Obama administration, there may be opportunities in the near term for ICE to reduce its increasing reliance on transfers. In August 2009, ICE announced a policy shift to

As a part of this plan to create new detention facilities solely for immigration purposes, ICE should strive to reduce transfers. The agency should ensure that the new facilities are under its full operational control and are located close to the places where the majority of detainees are arrested. Agency regulations should be amended to require that the Notice to Appear (NTA) (the document giving the governments reasons for believing an immigrant is deportable) is filed with the immigration court closest to the location where the detainee is arrested. In addition, new guidelines should be issued by ICE and the Executive Office for Immigration Review (EOIR) so that detainee transfers occur only in instances in which they do not threaten basic human rights. Once ICEs transfer guidelines are developed, they should be made a part of US federal regulations so that if the guidelines are violated, they can be enforced in court. Finally, Congress should consider making a simple amendment to immigration laws to place a reasonable check on ICEs transfer authority.

Transfers do not need to stop entirely in order for ICE to respect detainees rights. They merely need to be reduced through the establishment of enforceable guidelines, regulations, and reasonable legislative restraints.

This report is based on 81 interviews conducted by Human Rights Watch with non-citizen detainees in Texas, Arizona, and New Mexico; detainees family members, immigrants rights advocates, and attorneys located throughout the United States; and ICE officials located in Washington, DC, Arizona, and Texas. Human Rights Watch also reviewed 158 pages of correspondence between ICE and detainees, their family members, and their congressional representatives, which were produced for Human Rights Watch by ICE in response to our Freedom of Information Act (FOIA) request.

The data on transfers (hereinafter transfers dataset) were obtained by Human Rights Watch from ICE on September 29, 2008, in response to a request we filed on February 27, 2008, under the Freedom of Information Act.[6] The numbers were analyzed by the Transactional Records Access Clearinghouse at Syracuse University.

The files released by ICE contain basic information concerning each exit of a detainee from a detention facility during the period October 1, 1998, through mid-April 2008. This information includes the nationality and gender of the detainee, the facility in which he or she had been detained, the ICE regional hub (known as a docket control office or DCO), and the dates of entry to and exit from this particular facility, as well as the date on which the immigrant had first been detained. A code also identified the exit reason such as deported or removed, voluntary departure, or transfer. However, no information concerning the reason for a transfer was provided.

The first step in TRACs research was to develop an analysis database. Initially, this required processing the 68 separate data files that had been released (each containing tens of thousands of records) and combining them into a single database of 3,376,269 records for further analysis. In addition, supplemental translation databases were prepared to map each coded entry to its definition. Consistency checks were also run against available published data. Finally, we checked each record for missing data and for undefined codes to minimize data entry errors.

TRAC also gathered additional information to classify each of the 1,524 detention facilities that appeared in the data. TRAC had previously obtained information on some of the facilities through separate research. For the remaining facilities, TRAC conducted telephone interviews and sought out other publicly available sources identifying the nature of each facility. Using this information each of the detention facilities was classified into broad categories, including Service Processing Centers (ICE owned and operated), Intergovernmental Service Agreement facilities (state and local jails under contract with ICE), private contract detention facilities, federal Bureau of Prisons facilities (under contract with ICE), Office of Refugee Resettlement facilities (under contract with ICE), and Detention and Removal Operations juvenile facilities (ICE owned and operated). Based upon address, each detention facility was also classified by

state and by the federal court circuit in which it was located.

Additional analysis variables were then added to the database. For example, using the information on recorded dates, TRAC was able to compute the length of stay in a facility (number of days) and the fiscal year in which the transfer took place. Using this information along with the reasons a detainee was released from (exited) a detention facility, TRAC was able to classify records into those facilities where a detainee was placed on the initial day of detention (originating facilities) versus facilities to which the detainee was later transferred (receiving facilities).

The data also reveal that often a chain of transfers occurred. For example, records show that many immigrants were transferred to a facility and then shortly thereafter transferred out of the facility to another detention location. Unfortunately, it was not possible to match the transfers concerning the same individual because the files for the most part did not identify the particular detainee involved. As a result, while it was possible to classify in aggregate the originating and receiving detention facilities, it was not possible to directly connect the originating and receiving facility on individual transfers since each record only identified the originating detention facility and did not identify the particular facility to which a detainee was transferred.

Once the analysis database was developed, the actual analysis was carried out in two phases. The focus of the first phase was on the detainee population and transfer trends. All records where the exit reason was recorded as a transfer were included in this phase of the analysis. TRAC first examined changes over time in the volume of transfers. Second, TRAC analyzed national origin, gender, and other characteristics of the transferred detainee population and assessed whether there were any significant changes in the make-up of this population over time.

The second phase of the analysis focused upon the geographic location and other characteristics of the detention facilities, for both the originating facility and the receiving facility for the transfer. While it is known that transfers occur for many reasons, there was no information on why an individual transfer took place. For example, a transfer may occur to move a detainee close to the deportation location just prior to the detainees removal, or a detention facility may serve only as a convenient stopover between the originating and the intended destination facility. At some locations, ICE has specialized facilities that play a role in the intake process so that on initial pickup an immigrant may pass through more than one detention facility as part of the routine intake process.

While it would have been desirable to exclude these types of transfers from the analysis since they were not the focus of the study, there was no direct way to identify such records because the reason for the transfer was not given. However, it was possible to identify transfers involving transient staysdetention facilities in which the immigrant did not remain overnight. As a partial control, the set of receiving detention facilities analyzed in this phase of the research excluded any record where the immigrant arrived and left on the same day (zero-day stays) since these types of transfers clearly were outside the focus of this research. Similarly, the set of originating facilities excluded transfers within the same DCO that involved a zero-day stay to reduce double-counting of originating facilities where the intake process during the same day involved multiple facilities.

The resulting sets of originating and receiving detention facilities were then separately analyzed. For each set, facilities were ranked by the volume of transfers. Counts and rankings for originating and receiving detention facilities were also developed by type and by geographic location (state as well as federal court circuit).

Every day non-citizens in the United States are apprehended by Immigration and Customs Enforcement and placed in a vast network of detention centers that, during the most recent year for which figures are available (2008), housed 378,582 persons.[7] The majority of these non-citizen detainees are held in about 300 state and local jails which, under contract with ICE, receive a daily fee for their bed space. ICE also detains immigrants in nine service processing centers which it operates, as well as in six privately-run contract detention facilities, 42 contracted juvenile facilities, and two family detention centers.

Non-citizens can be apprehended and detained by ICE for a variety of reasons. Many are taken into custody because the legality of their presence in the US is disputed and authorities want to hold them pending a decision on their deportation (or removal)[8] from the United States.[9] Authorities also detain non-citizens arriving in the United States without valid travel or identity documents,[10] including those seeking asylum from persecution, who are detained until they have had a credible fear interview with an asylum officer.[11] In practice, many such asylum seekers are detained even after they have had a successful credible fear interview and have applied for parole or release from detention under conditions intended to guarantee their appearance at future hearings.[12] Finally, existing laws require authorities to detain most non-citizens who are facing deportation after having served a criminal sentence, including those who are legally in the country (for example, with lawful permanent resident status).[13]

The power to issue a warrant to apprehend and detain any non-citizen pending his or her deportation officially rests with the attorney general of the United States.[14] On a day-to-day basis, that power is exercised by immigration officers. An immigration officer also may question a non-citizen as to his or her right to remain inside the United States, and may take into custody without a warrant any non-citizen believed to be in violation of any immigration law who is likely to escape before a warrant can be obtained for his arrest.[15] Finally, the attorney general may enter into a written agreement with local law enforcement officials to arrest and detain non-citizens.[16] In recent years, there has been a marked increase in these agreements with police and sheriffs departments around the country: In 2007, only eight law enforcement agencies took part in agreements with ICE to enforce immigration laws; now a total of 47 agencies in 17 states participate, with 90 more waiting to sign up as of May 2008.[17]

Once a non-citizen has been detained, the immigration authorities have 48 hours to make a determination as to whether he or she should remain in custody. If the immigration authorities continue to believe that the non-citizen is present in the United States in violation of immigration laws, they must also decide whether to issue a Notice to Appear in that same 48-hour window.[18] The NTA is the document that states the agencys factual basis for believing an individual has violated the immigration laws, and in most cases, why he or she should be removed from the United States. It is the linchpin for any non-citizen wishing to defend against the governments claim that he or she should be deported from the United States.

While the NTA must ordinarily be given to the detainee within 48 hours of arrest, that deadline is waived in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time.[19] This extraordinary circumstance loophole was most infamously used by the US government in its treatment of immigrant detainees after the

September 11, 2001 attacks.[20] It does not appear to be in use today. However, a similar policy remains in effect due to a memo issued in 2004 by then Undersecretary of Border and Transportation Security Asa Hutchinson, which extended the 48-hour deadline for service of an NTA to 72 hours in case of emergency, but also stated that prolonged detention without an NTA is permitted [w]henever there is a compelling law enforcement need including, but not limited to, an immigration emergency resulting in the influx of large numbers of detained aliens that overwhelms agency resources.[21]

Under this broad guidance, there is no legally enforceable deadline by which the NTA must be served on the detained immigrant. The lack of a deadline is illustrated by the many detainees identified by NGOs and attorneys who are sitting in detention for days, weeks, and sometimes months at a time without having received an NTA.[22]

There is also no deadline for ICE to file the NTA with the immigration court. This absence of a filing deadline is significant because it is only after this filing occurs that the immigration court has jurisdiction over the case. In other words, it is only after the government files the NTA that the place or venue for the deportation hearings is set.[23] For example, if an immigrant is taken into custody in Pennsylvania and held there for several weeks before an NTA is filed with the immigration court, and then ICE chooses to transfer him to a detention center in Texas and files an NTA there, his entire legal case has been transferred to Texas.

The fact that the government determines where a particular immigrants case will be heard by deciding when and where to file the NTA (for example, waiting until after a transfer has occurred) places a great deal of power in the governments hands. The power that the government has in determining venue is significant because sweeping changes to US immigration law passed by Congress in 1996 made many more non-citizens subject to deportation, and made it much more difficult for them to defend against their deportation.[24]

The United States Congress should amend the immigration laws, or ICE should issue regulations requiring the agency to file the NTA with the immigration court nearest to the place of arrest and within 48 hours of taking a non-citizen into custody, or within 72 hours in exceptional or emergency cases. These relatively simple legislative or regulatory fixes would provide a measure of necessary control over transfers and enhance fairness in immigration proceedings.

Transfers should be expected in any large, multi-institutional system of incarceration. The fact that they occur in ICE facilities is not surprising, nor would it be a cause for alarm if reasonable limits were in place. If the agency worked to emulate best practices on transfers set by state and federal prison systems, it would reduce the chaos and limit harmful rights abuses. Instead, ICE claims an almost unfettered power to transfer detainees at will, resulting in a disorderly system of detainee musical chairs that often violates non-citizens rights.

While some detainees are held in the ICE facility or contract facility closest to the place where they are taken into custody, ICE claims the legal authority to transfer immigrants to detention anywhere in the countryfrom the Dale Correctional Facility in Vermont, to Otero Service Processing Center in New Mexico, and from the Northwest Detention Facility in Tacoma, Washington, to the Oakdale Federal Detention Center in Louisiana. ICE claims that its authority to transfer detained immigrants is contained in section 241 of the Immigration and Nationality Act, which states:

This language, which focuses on ICEs authority to construct detention centers (more of a bricks and mortar orientation[27]), does not clearly address ICEs transfer power. Nevertheless, the provision has been cited by courts as the source of that power, and the interpretation has gone largely unchallenged.[28] The agency claims that [t]he INA contains no language limiting ICEs ability to move detainees from one facility to another.[29] Courts have tended to agree, responding to concerns expressed by detainees about long-distance transfers with relative indifference.[30]

It is hardly surprising that ICE, believing it has limitless transfer powers, pays little attention to a non-citizens prior place of residence when deciding where to transfer him or her. Former Assistant Secretary Julie Myers repeatedly emphasized that ICE maintains the discretion to detain people wherever there is bed space.[31] As a result, the government reports publicly that [d]etainees are often transferred from one facility to another.[32] Immigrants are treated like so many boxes of goodsshipped to the warehouse with the cheapest and largest amount of space available to store them. One ICE official told Human Rights Watch, we transfer where beds are available. Its out of operational necessity.[33] A report released in October 2009 by Dr. Dora Schriro, special advisor on ICE detention and removal, stated:

In discussions with Human Rights Watch, ICE has claimed that the frequency of detainee transfers and its inability to limit their use is partly related to its arrangements with Intergovernmental Service Agreement facilities (IGSAs), which are state and local jails that contract with ICE to hold detainees. In the case of detainees in the custody of one of these facilities, an ICE official told Human Rights Watch,

Data analysis conducted for this report confirms ICEs explanation: the majority of detainee transfers originate from the patchwork of local prisons and jails operating under IGSA contracts with ICE. ICEs haphazard system of placing detainees in a variety of facilities, many of which it has very little control over, helps to explain why its transfer system is equally haphazard.

ICEs chaotic transfer system stands in marked contrast to operational standards used in state and federal prison systems. Although immigration detainees are not technically being punished, transfers of criminal inmates held in state and federal jails and prisons are more closely regulated than transfers of immigrant detainees held in ICE facilities.

Some of the limits on transfers in the criminal system can be attributed to the Sixth Amendment to the US Constitution,[36] which provides criminal defendants the right to face trial in the jurisdiction in which their crimes are alleged to have occurred. As a result, nearly all criminal defendants are held near the location of their trial, and cannot be transferred while court proceedings are ongoing. The federal Bureau of Prisons (BOP) inmate transfer protocol makes explicit mention of the need to coordinate with the federal court system before transfers are implemented. It contemplates that even after the trial is over, criminal defendants may need to be retained at, or transferred to, a place of confinement near the place of trial or the court of appeals, for a period reasonably necessary to permit the defendant to assist in the preparation of his or her appeal.[37] The protocol continues:

Jeanne Woodford, former director of the California Department of Corrections and former warden at Californias San Quentin State

Prison, explains that in Californias prison system:

However, there is no system of court holds in the immigration system, and the prosecuting authoritythe federal governmentis of the view that immigrants can be detained anywhere in the United States. In addition, immigrant detainees enjoy no right to face deportation proceedings in the state or locality in which their immigration law violation allegedly occurred. Therefore, as discussed later in this report, immigrant detainees are routinely transferred far away from their attorneys, key witnesses, and evidence in their trials.

Transfers are common in the criminal context once court proceedings have ended, but even then, transfers are often regulated by policy. Acceptable reasons for transfers in the federal prison system arise when a particular inmate needs to be incarcerated at a higher or lower security level, is nearing his or her release date and should be transferred within 500 miles of his or her release residence,[40] has medical or psychiatric needs that cannot be addressed at the current institution, needs to participate in a program not offered at the current institution, or needs to be sent temporarily to another facility for security reasons (often caused by overcrowding).[41]

Similarly, Jeanne Woodford believes that some transfers in the criminal system are appropriate and necessary

Although access to medical care is one of ICEs stated rationales for detainee transfers, none of the detainees interviewed by Human Rights Watch for this report had been transferred for medical reasons. Similarly, none of the attorneys interviewed for this report recalled ever representing a client who had been transferred to meet his or her medical needs. Indeed, research by our organization and others has documented serious problems with discontinuity in detainees medical care due to medications and records failing to follow when a detainee is transferred between facilities. ICE sends only a summary of a detainees medical records when sending him or her to one of the state and county jails where ICE rents bed space.[43]

Finally, criminal systems track transfers in computerized databases with much more rigor than ICE. For example, the BOP transfer protocol requires that the reason for transfer and whether or not an inmate is eligible for a parole hearing must be entered into the central computer and approved by superiors prior to any transfer.[44] Most of the information relating to ICE transfers is not uploaded into a centralized system; it is sent with the detainee in hard copy on a series of forms and files. Moreover, the reasons for transfer or eligibility for bond are never tracked.[45] In addition, in marked contrast to ICEs policies, most prison inmates can be easily located through a state or federal prisoner location system, which is accessible to the public and in many cases is updated every 24 hours.[46] There is no similar publicly accessible immigrant detainee locator system managed by ICE, meaning that detainees can be literally lost from their attorneys and family members for days or even weeks after a transfer. The lack of such a locator system prompted ICE Special Advisor Schriro to recommend in her October 2009 report that ICE should create and maintain a current detainee locator system on the ICE website.[47]

While it is unrealistic for ICE to completely cease transferring detainees, implementing procedures and controls on transfers akin to those already in place in the criminal context would go a long way toward protecting detainees rights. Unfortunately, the agency has refused to do anything more than adopt a vaguely worded and unenforceable set of standards to govern its transfer power.

In 2000, the Immigration and Naturalization Service (ICEs predecessor) adopted a set of detention standards to provide minimum safeguards for the fair and humane treatment of detainees.[48] These standards were subsequently revised in June 2004[49] and again by ICE in December 2008 after a lengthy review process that included input from nongovernmental organizations.[50] The detention standards are merely internal agency guidelines and do not have the binding authority of federal regulations or statutory law.

Three subsets of those standards are most important from a rights perspective: first, the standards on permissible reasons for transfer; second, the standards on when and how detainees are to be informed that they are being transferred; and third, the standards on when and how detainees attorneys are to be informed that their clients are being transferred.

The 2004 standards provided a vague set of reasons for which ICE may transfer detainees, including medical needs, change of venue, recreation, security, and other needs of ICE, which included various reasons, such as to eliminate overcrowding or to meet special detainee needs, etc.[51] Nowhere was ICE required to indicate which of these amorphous reasons was motivating a particular transfer decision.

In addition, when a detainee was being transferred in accordance with the 2004 standards, he or she was informed only immediately prior to leaving the pre-transfer facility and would normally not be permitted to make or receive any telephone calls.[52]Finally, the detainees attorney was notified of the transfer only once the detainee was en route to the new detention facility.[53]

Because Human Rights Watch believed these vague standards permitted human rights violations to occur, we were pleased to learn that ICE and its department of Detention and Removal Operations were reviewing them and would be issuing a new set of standards in 2008. We brought our concerns to the attention of ICE in a series of letters and through participation in several in-person meetings with senior ICE officials and colleague organizations.[54] Unfortunately, the revised transfer standards issued in December 2008 were almost no improvement over the old.

Once again, although this time even more explicitly, the agency states that its own operational concerns must dictate the transfer decision: [t]he determining factor in deciding whether or not to transfer a detainee is whether the transfer is required for operational needs, for example, to eliminate overcrowding.[55] The standards go on to state that detainees may be transferred after taking into account security, legal representation, change of venue, and medical needs.[56]

While operational needs are the determining factor and therefore override all other considerations, the inclusion of legal representation as a factor to take into account provides some improvement over the 2004 standards:

In addition, the 2008 standards state that [w]hile ICE/DRO transfers detainees from one facility to another for a variety of reasons, a transfer of a detainee shall never be retaliatory.[58]

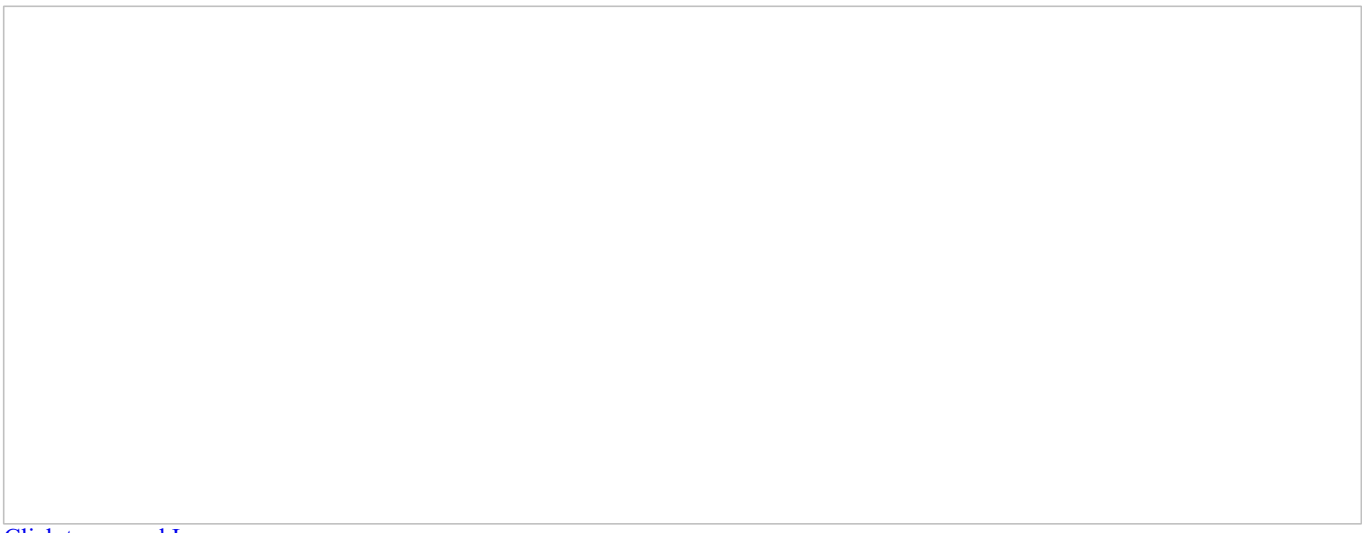
With regard to informing detainees of an impending transfer, the 2008 standards are virtually identical to the 2004 standards, stating that a detainee shall not be informed of the transfer until immediately prior to leaving the facility. After being informed, the detainee shall normally not be permitted to make or receive any telephone calls.[59]

Finally, the 2008 standards provide attorneys even less notice of their clients transfers than the 2004 standards, stating that the attorney shall be notified of the transfer once the detainee *has arrived* at the new detention location.[60] By contrast, the 2004 standards provided that attorneys should be informed once their client was en route to the new location. In reality, this distinction has little effect on a detainees rights, since in either case the attorney has no chance to petition a court to stop the transfer.[61]

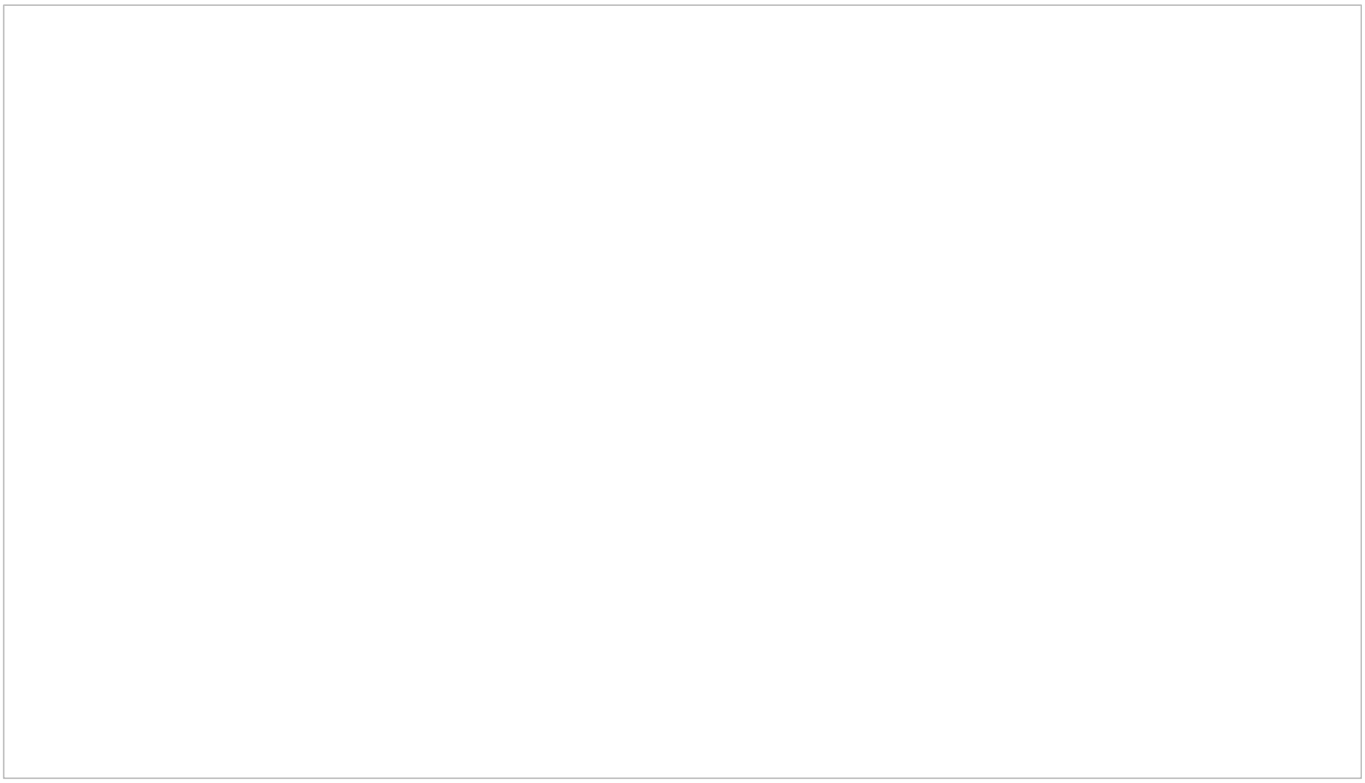
Not only are the 2008 standards unacceptably vague, they are also not codified as federal regulations, and cannot be enforced in court. The Department of Homeland Security (DHS) has refused to turn the standards into regulations, saying that the 2008 standards are preferable to enforceable regulations because they provide the necessary flexibility to enforce standards that ensure proper conditions of confinement.[62]

In recent years, Human Rights Watch has received numerous anecdotal accounts from immigration attorneys across the country alleging that ICE was transferring immigrant detainees with increasing frequency. However, there were no publicly available data against which we could check these claims. Therefore, in February 2008 we submitted a request to ICE under the Freedom of Information Act seeking detailed information about the agencys transfer practices since 1998. In September 2008 we received a response.[63] While the agency did not disclose much of the information we had requested, what it did disclose allowed us to analyze quantitatively what we had heard about anecdotally for years.

The data reveal that between 1999 and 2008, ICE made 1,397,339 transfers of immigrants between detention facilities. Over those 10 years, the use of transfers has been on the rise, as Table 1 and Figure A show. In 2007, 261,941 transfers occurred, more than doubling the number of transfers (122,783) that occurred just four years earlier in 2003. Since the data produced by ICE for Human Rights Watch record each transfer movement but are not linked to individual detainees, and since our qualitative research has shown that some individual detainees are transferred multiple times, the number of detainees who have experienced transfer is less than the total number of transfer movements.



Click to expand Image



Click to expand Image

Source: See Table 1, above.

*Note: Estimate based on transfers continuing at the same volume for all of fiscal 2008 as was observed until April (179,785). This estimate was calculated using a conservative straight-line projection, as opposed to accounting for any exponential growth in transfers.

During the 10 years for which we obtained data, the 20 nationalities most often transferred are shown in Table 2, below. For any given year between 1999 and 2008, these nationalities tended to be the most frequently transferred. Table 3 shows the proportional representation for each of the top 10 nationalities across the 10 years studied.

Click to expand Image

Nationality

1999

2000

2001

2002

2003

2004

2005

2006

2007

2008

Mexico

41%

41%

38%

41%

39%

36%

35%

36%

36%

40%

Guatemala

6%

7%

6%

8%

9%

10%

13%

14%

14%

14%

Honduras

7%

7%

7%

7%

9%

8%

13%

15%

14%

12%

El Salvador

8%

9%

8%

7%

8%

8%

9%

12%

15%

12%

Dominican Republic

3%

3%

3%

3%

3%

3%

3%

2%

2%

2%

China

5%

5%

4%

4%

2%

3%

2%

2%

1%

1%

Cuba

5%

4%

5%

4%

3%

3%

1%

1%

1%

1%

Brazil

0%

0%

1%

1%

2%

5%

5%

1%

2%

1%

Jamaica

3%

2%

2%

2%

2%

2%

1%

1%

1%

1%

Colombia

1%

1%

3%

2%

2%

2%

1%

1%

1%

1%

Source: See Table 1, above.

We were interested in whether particular nationalities were transferred more or less frequently than their proportion of the detained population would suggest. As illustrated by Table 4, during 2008, nationals from Mexico, El Salvador, Guatemala, and Honduras made up larger proportions of the transferred detainee population than their proportional time spent in detention would indicate. Mexicans had the largest disparity (8 percent) between their percentage of total transfers and percentage of bed days in detention.

Country

Percent of total bed days in detention

Percent of total transfers

Mexico

32%

40%

El Salvador

11%

12%

Guatemala

10%

14%

Honduras

10%

12%

Dominican Republic

3%

2%

China

2%

1%

Brazil

2%

1%

Jamaica

2%

1%

Cuba

< 2%

1%

Colombia

< 2%

1%

Sources: See Table 1; Department of Homeland Security, Office of Immigration Statistics, Immigration Enforcement Actions: 2008, July 2009, http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf (accessed November 5, 2009), p. 3.

As with nationality, the gender of persons transferred also remained relatively constant between 1999 and 2008. For any given year, female detainees made up between 9 and 11 percent of the persons transferred, averaging 10 percent across the 10 years studied, as shown in Table 5, below.

Gender

1999-2008

All

1,397,339

Male

1,254,698

Female

142,459

Unknown

182

Source: See Table 1, above.

To examine the geographic patterns in detainee transfers, records were classified into two groupsthose pertaining to detention facilities originating transfers and those pertaining to facilities receiving transfers. Details on the classification process are provided in the methodology section of this report.

Limitations in the information ICE released did not permit analysis of flows of detainees between specific pairs of facilities. This was because while a transfer record showed the detention facility a particular detainee originated from, it did not identify the facility to which he or she was transferred. And because the identity of the detainee was not provided, it was not possible to match up records on the originating and receiving detention facilities for a given transfer. In addition, it is known that a significant portion of transfers take place between facilities in the same state. For these reasons, we cannot assess how many transfers originating in a particular state actually left

that state, nor can we assess how many transfers received in a state began from a location outside of that state.

Over the 10 years studied (1999-2008), the following two tables show the states in which detainee transfers originated (Table 6), and the states that received transferred detainees (Table 7). These tables show that there is a great deal of transfer traffic originating in and going to Arizona, California, Florida, Pennsylvania, and Texas. However, Louisiana is far more likely to receive transferred detainees than it is to originate transfers, and California, New Jersey, New York, and Oregon are more likely to originate transfers than they are to receive transferred detainees.

State

Detainee Transfers Originated

Rank

State

Detainee Transfers Originated

Rank

TX

168,106

1

OH

5,114

28

CA

153,320

2

KS

4,764

29

AZ

106,416

3

NE

4,622

30

FL

45,572

4

AR

4,003

31

PA

26,082

5

MN

3,113

32

NY

24,224

6

NM

3,007

33

OR

19,576

7

IN

2,729

34

NJ

18,503

8

WI

2,667

35

NC

16,602

9

SC

2,650

36

IL

13,621

10

OK

2,630

37

LA

13,031

11

RI

2,505

38

VA

12,672

12

MT

2,492

39

CO

11,327

13

SD

2,208

40

TN

11,321

14

NH

1,793

41

GA

10,600

15

VI

1,787

42

WA

10,137

16

CT

1,685

43

MO

9,810

17

ME

1,546

44

MI

9,551

18

VT

1,349

45

UT

9,100

19

AK

1,326

46

PR

7,578

20

WV

1,249

47

KY

7,243

21

WY

1,148

48

MD

6,643

22

ND

1,048

49

MA

6,523

23

MS

799

50

AL

6,517

24

HI

539

51

ID

5,974

25

GU

69

52

NV

5,626

26

DE

10

53

IA

5,394

27

DC

5

54

Source: See Table 1, above.

State

Detainee Transfers Received

Rank

State

Detainee Transfers Received

Rank

TX

166,628

1

ID

5,313

28

CA

99,556

2

IA

5,026

29

LA

95,114

3

NC

4,175

30

AZ

85,551

4

UT

3,619

31

PA

43,598

5

OK

2,974

32

FL

42,319

6

AR

2,082

33

IL

29,505

7

CT

2,062

34

GA

25,929

8

RI

1,869

35

WA

17,714

9

KY

1,757

36

AL

16,858

10

IN

951

37

CO

16,567

11

ME

685

38

VA

15,317

12

MT

673

39

MI

14,173

13

SD

531

40

NY

11,510

14

NH

518

41

NJ

9,975

15

SC

488

42

NM

9,925

16

ND

422

43

OR

9,503

17

NV

413

44

WI

9,223

18

VT

242

45

MD

8,570

19

MS

217

46

MA

8,240

20

AK

136

47

MO

8,134

21

WY

58

48

PR

7,722

22

GU

34

49

TN

7,650

23

WV

31

50

NE

7,169

24

DE

23

51

MN

6,979

25

HI

20

52

KS

6,941

26

DC

16

53

OH

5,870

27

VI

3

54

Source: See Table 1 above.

Tables 8 and 9 below show that the facility most likely to originate transfers is the Florence Staging Facility in Arizona, while the facility most likely to receive transfers is the Mira Loma Detention Center in California. The tables also show that certain facilities, such as Laredo Contract Detention Facility and Port Isabel SPC in Texas, frequently originate transfers, but are not in the top 20 receiving facilities, while Eloy Federal Contract Facility in Arizona and Pine Prairie Correctional Center in Louisiana frequently receive transfers but are not in the top 20 originating facilities.

Facility

Number

Rank

Florence Staging Facility (AZ)

63,288

1

Los Cust Case (CA)*

52,274

2

Laredo Contract Det. Fac. (TX)

46,602

3

Port Isabel SPC (TX)

31,112

4

Harlingen Staging Facility (TX)

27,690

5

Mira Loma Detention Center (CA)

20,823

6

Krome North SPC (FL)

17,210

7

Corrections Corporation of America (CCA)San Diego (CA)

16,041

8

CCA, Florence Correctional Center (AZ)

14,218

9

El Centro SPC (CA)

13,705

10

Florence SPC (AZ)

13,610

11

Varick Street SPC (NY)

11,991

12

Mecklenburg (NC) County Jail (NC)

10,496

13

San Pedro SPC (CA)

9,346

14

Kern County Jail (Lerdo) (CA)

9,291

15

York County Jail (PA)

8,091

16

El Paso SPC (TX)

7,343

17

Orleans Parish Sheriff (LA)

6,124

18

Tucson INS Hold Room (AZ)

6,106

19

Willacy County Detention Center (TX)

4,767

20

Source: see Table 1, above.

*Note: While the codebook provided to Human Rights Watch does not clarify what this facility code refers to, and TRAC was unable to clarify through its own research, we hypothesize that it might refer to individuals held in the custody of the Los Angeles Sheriffs Department.

Facility

Number

Rank

Mira Loma Detention Center (CA)

30,987

1

York County Jail (PA)

27,728

2

Eloy Federal Contract Facility (AZ)

27,674

3

Florence Staging Facility (AZ)

26,789

4

Pine Prairie Correctional Center (LA)

26,268

5

Tensas Parish Detention Center (LA)

26,205

6

South Texas Detention Complex (TX)

25,375

7

San Pedro SPC (CA)

24,266

8

Houston Contract Detention Facility (TX)

21,583

9

Willacy County Detention Center (TX)

19,528

10

Oakdale Federal Detention Center (LA)

16,287

11

Florence SPC (AZ)

15,796

12

Denver Contract Detention Facility (CO)

14,202

13

Stewart Detention Center (GA)

13,358

14

Etowah County Jail (AL)

12,106

15

Los Cust Case (CA)*

11,976

16

Port Isabel SPC (TX)

11,014

17

Krome North SPC (FL)

10,868

18

Bradenton Detention Center (FL)

9,401

19

Tri-County Jail (IL)

8,090

20

Source: see Table 1, above.

*Note: For a description of this code, see Table 8, above.

There are also trends in the types of facilities originating and receiving transfers. The majority of detainees are held in numerous state and local jails and prisons that ICE pays to provide bed space under Intergovernmental Service Agreements (IGSAs). Table 10, below, shows that IGSAs originate and receive by far the most transferred detainees. This finding is not surprising because ICE must move detainees out whenever state and local subcontractors need to free up space for persons accused or convicted of crimes, or whenever they decide housing ICE detainees is undesirable for whatever reason.

Click to expand Image

Since transfers between facilities often occur across large distances, they can have the effect of altering the law applied to a detainees case, which is determined by the federal circuit court of appeals with jurisdiction over the facility where the detainee is housed. The following table shows the federal circuits with jurisdiction over the detention centers most likely to originate and receive detainee transfers. As Table 11 shows, facilities within the Ninth Circuit are the most likely to originate transfers, although facilities within the Ninth Circuit also receive a very large number of transferred detainees. Facilities within the Eleventh Circuit are more likely to receive detainees than they are to originate transfers, while facilities within the Fourth, Sixth, and Second Circuits are more likely to originate detainee transfers than they are to receive them.

Table 11 also shows that detention facilities within the Fifth Circuit (a federal circuit known for legal precedent hostile to the rights of immigrants)[64] are most likely to receive transfers, although facilities located in the Fifth Circuit also originate a large number of transfers. While it is impossible to determine if there is a net inflow of transfers to the Fifth Circuit, our interviews tend to indicate that a number of detainees from other jurisdictions end up there. Moreover, the data show a large disparity between transfers received in (95,114) and originating from (13,031) Louisiana. Therefore, while this report does not conclude that there is an intentional ICE policy of transferring detainees to the Fifth Circuit, it appears that for at least one of the three states within the Fifth Circuits jurisdiction, there is a significant inflow of detainees from elsewhere.

Click to expand Image

Transfers can also have a serious impact upon detainees access to counsel. As Table 12 shows, in many cases detainees are transferred to circuits with relatively few immigration attorneys. In order to obtain a rough idea of the number of immigration attorneys in a particular circuit, we obtained the number of members of the American Immigration Lawyers Association (AILA) by state.[65] Since not all immigration attorneys are members of AILA, and not every member of AILA is a practicing immigration attorney, these numbers can only provide a rough indication of the distribution of immigration attorneys in the various circuits. Table 12 shows that the circuit most likely to receive detainees, the Fifth Circuit, has the worst (highest) detainee/attorney ratios; whereas the circuits least likely to receive detaineesthe Second and the DC Circuitshave the best (lowest) detainee/attorney ratios.

Circuit

Rank by Number of Detainee Transfers Received 1999-2008

AILA Members as of August 2009

Transferred Detainee to AILA Member Ratio

5th

1

934

280.47

10th

5

388

103.31

3rd

4

600

89.33

9th

2

2642

82.86

8th

7

436

69.59

11th

3

1283

66.33

7th

6

634

62.59

6th

8

629

46.82

1st

10

516

36.89

4th

9

801

35.68

2nd

11

1507

9.17

DC

12

321

0.05

Sources: see Tables 1 and 10, above. AILA membership totals provided to Human Rights Watch by AILA on August 31, 2009.

Finally, in the course of the 10 years studied, 19,384 transfers occurred originating from and going to detention facilities specifically set up to house juveniles. As Table 13 illustrates, certain juvenile detention facilities experience the bulk of transfer traffic: the largest numbers of juvenile detainees are transferred from and to Hutto[66] and IES in Texas, as well as to and from Southwest Key Juvenile Shelter in Arizona, and Barrett Honor Camp in California.

Facility

State

Total Transfer Activity

Hutto CCA

TX

2,722

International Emergency Shelter (IES)

TX

2,242

Southwest Key Juvenile Facility

AZ

1,975

Barrett Honor Camp

CA

1,955

Juvenile Facility (Chicago)

IL

1,374

Southwest Key Juvenile Facility

TX

1,046

Boystown

FL

932

Catholic Charities (Houston)

TX

569

Casa San Juan

CA

540

Berks County Family Shelter

PA

523

Southwest Key Juvenile Facility

CA

500

Gila County Juvenile Detention Center

AZ

419

Berks County Juvenile

PA

400

Southwest Key Juvenile Facility (Houston)

TX

391

Los Padrinos Juvenile Hall

CA

385

Liberty City Juvenile Detention Center

TX

378

Southwest Initiatives Group, LLC

TX

334

Southwest Youth Village

IN

251

Berks County Secured Juvenile

PA

173

Corpus Christi Facility

TX

143

Southwest Key Juvenile (San Jose)

CA

129

Northern Oregon Juvenile Detention

OR

125

Alternative House

TX

118

All

19,358

Source: See table 1, above.

ICE provides no publicly available analysis of the savings or costs associated with transfers. It also does not provide information on the rationales for transfers in particular cases, which might help the agency and others to better understand the savings or costs associated with its practices. For example, although none of the detainees interviewed for this report had been transferred for medical reasons, it is certainly the case that some percentage of transfers are completed in order to provide immigrant detainees with necessary medical care, and that providing such care prevents illness, loss of life, and costly lawsuits. However, there is no way to estimate these savings since the agency does not make public, or even record in a centralized database, the reasons for detainee transfers. Even if one accepts the

notion that transfers for medical care provide cost savings to the agency, it is also true that transfers for medical care are not adequately addressing detainee medical needs: ICEs failure to care for the medical needs of non-citizen detainees (resulting in deaths in several cases) has been the subject of numerous lawsuits, prominent newspaper stories, and congressional action.[67]

We have no independent way of estimating the costs associated with transfers, although we can assume that in addition to the costs of transporting detainees by plane or bus, ICE incurs additional administrative costs, such as personnel time spent on paperwork or other administrative tasks, costs of additional court time or court delays caused by transfers, costs associated with unnecessary transfers of persons who are found to be eligible for bond and therefore are needlessly detained, or costs associated with duplicative medical screenings or tests.

Without better public information on ICEs operational budget related to transfers, it is impossible to conclude whether transfers result in net costs or savings for the agency. Nevertheless, our research for this report allows us to conclude that transfers cost certain detainees a great deal in the form of human rights violations. The following sections describe these violations.

For any detained non-citizen facing deportation from the United States, the importance of legal counsel cannot be overstated. As early as 1931, a national commission charged with studying US immigration policy recognized that in many cases a detainee with counsel would be able to prevent a deportation which would have been an injustice but which the alien herself would have been powerless to stop.[68] Since 1931, immigration law has become only more complex and its procedures more difficult for immigrants to navigate without the aid of legal counsel.[69] Nevertheless, as immigration proceedings are civil and not criminal in nature, non-citizens have no right to court-appointed attorneys and must secure legal counsel at their own expense.

Often, it is only an immigration attorney who can tackle the complex legal questions relevant to whether a particular immigrant will be deported from the United States. These questions include, for example, whether an individuals criminal conviction fits the definitions of deportable offenses in immigration law, whether an immigrant is dangerous or a flight risk, whether the individual has fled persecution in his or her home country, whether a particular non-citizen can marshal enough evidence to prove his good moral character, or whether the law on any of these issues applies retroactively. These are just a sampling of the numerous issues that immigration attorneys must address when representing clients facing deportation.

In fact, immigration laws have been termed second only to the Internal Revenue Code [tax law] in complexity ... [a] lawyer is often the only person who could thread the labyrinth.[70] Add to this the confusion arising from linguistic and cultural differences, as well as the fear and psychological strain caused by the experience of being arrested and detained, and the importance of an attorney becomes even more apparent.

For its part, the United States government appears at every deportation hearing represented by a Department of Homeland Security attorney. In the face of such opposition, an immigrant may be unable to adroitly argue her side of the story without the assistance of legal counsel. The importance of counsel to a non-citizens case has been demonstrated forcefully in the context of refugees seeking asylum in the United States:

The essential relationship between an attorney and an immigrant facing deportation is also protected under human rights law. The International Covenant on Civil and Political Rights (ICCPR), a treaty to which the United States is party, provides in Article 13 for a non-citizens right to defend against deportation and to *be represented for the purpose before* the competent authority or a person or persons especially designated by the competent authority.[72]

US law also provides that immigrants may choose and pay for their own attorneys:

Federal regulations make clear that this right to counsel applies to any proceeding in which an examination of the immigrants case occurs, including a bond hearing, master calendar hearing, merits hearing, and any appeals.[74]

Despite the widespread recognition of the importance of legal counsel during deportation proceedings, as Table 14 illustrates, the majority of immigrants (60 percent in 2008) go through the entire process without an attorney.

Fiscal Year

Percent of Non-Citizens Appearing in Immigration Court *without* Counsel

2008

60%

2007

58%

2006

65%

2005

65%

2004

55%

2003

52%

2002

55%

2001

59% (approximate)

2000

58% (approximate)

Source: US Department of Justice, Executive Office for Immigration Review, Fiscal Year 2008 Statistical Year Book, Office of Planning, Analysis, and Technology, March 2009, p. 5; US Department of Justice, Executive Office for Immigration Review, Fiscal Year 2007 Statistical Year Book, Office of Planning, Analysis, and Technology, April 2008, p. 5; US Department of Justice, Executive Office for Immigration Review, Fiscal Year 2006 Statistical Year Book, Office of Planning, Analysis, and Technology, February 2007, p. 6; US Department of Justice, Executive Office for Immigration Review, Fiscal Year 2005 Statistical Year Book, Office of Planning, Analysis, and Technology, February 2006, p. 6; US Department of Justice, Executive Office for Immigration Review, Fiscal Year 2004 Statistical Year Book, Office of Planning and Analysis, March 2005, p. 7; US Department of Justice, Executive Office for Immigration Review, Fiscal Year 2003 Statistical Year Book, Office of Planning and Analysis, April 2004, p. 7; US Department of Justice, Executive Office for Immigration Review, Fiscal Year 2002 Statistical Year Book, Office of Planning and Analysis, April 2003, p. 7; US Department of Justice, Executive Office for Immigration Review, Fiscal Year 2001 Statistical Year Book, Office of Planning and Analysis, March 2002, p. 24 (fiscal years 2001 and 2000).

Inherent in the right to representation by counsel is the practical requirement that ICE keep attorneys informed of the whereabouts of their detained clients. Despite the requirement in the detention standards that attorneys shall be notified of detainee transfers, the standards are not laws; therefore ICE can violate its own standards with relative impunity. The non-binding nature of the standards is illustrated by the many instances Human Rights Watch documented in which such notifications were either not made at all, or not made until several days or weeks after a detainee was en route to or ha[d] arrived at the new detention location.

In nearly every case documented by Human Rights Watch, attorneys learned of the transfers not from ICE, but rather from the detainee or his family. A March 2009 investigation of ICEs transfer policies conducted by the Department of Homeland Securitys Office of Inspector General (OIG) confirmed this finding when it stated, ICE staff interviewed at the sites visited said they did not notify the detainees legal representative because they considered the notifications to be the detainees responsibility.[76] This belief on the part of ICE staff persisted despite the fact that, as the OIG noted, ICE is required to notify the representative of record that the detainee is being transferred.[77] The 2009 Schriro Detention Report stated that attorneys: Report that their clients are transferred to locations prohibitively far away, and that they are not notified when their clients are moved.[78]

While some detainees do eventually manage to get in contact with their attorneys after transfer, some are unable to tell their attorneys where they are. An attorney in Louisiana told Human Rights Watch that her client had been transferred four or five times. When he called me, he didnt even know where he was. Turned out he is in New Mexico.[79] Still others cannot afford to purchase phone cards to let their family or attorneys know of their new location.[80]

Another immigration attorney in northern California told Human Rights Watch:

In all cases documented by Human Rights Watch in which detainees attorneys were not timely notified of transfers, the attorney had already filed a notice of representation with ICE (this notice is called a G-28) prior to the transfer of his or her client. Therefore, these transfers are also inconsistent with ICEs stated preference: we prefer not to transfer anyone with a G-28 on file. But, there is still a need in some cases.[82]

For example, Natalie S., an immigration attorney in Pennsylvania, had a G-28 on file for a client who was transferred to Willacy Detention Center in Raymondville, Texas, on March 18, 2008. Two days after the transfer, the clients wife called Natalie S. to inform her of the transfer. At the time of the call, ICE had not yet informed Natalie that her client had been transferred.[83]

In another case Lamar P., an immigration attorney in San Francisco, had a G-28 on file for seven months when his client was moved from detention in California to Seattle, Washington. His client was transferred on July 13, 1998, and counsel was not notified of the transfer until seven days later on July 20, 1998.[84]

After their clients were transferred, many attorneys reported to Human Rights Watch that they had to resort to calling detention centers around the country to try to find their clients.[85] One attorney in Chicago explained that she often calls for a regular telephone meeting with one of her detained clients (for whom she always files G-28 forms), only to have to cancel the call when her client cannot be found, at which point she begins calling around to find them.[86]

It is hardly surprising that attorneys are not informed of transfers given that ICE itself does not always keep track of where it has transferred detainees, and detainees remain lost for weeks or months at a time. A 2006 report issued by the Department of Homeland Securitys Office of the Inspector General described a transferred detainee whose new location was not updated for five months: A detainee from CCA [Corrections Corporation of America detention facility in Florence, Arizona][87] was transferred to a Florida detention facility in November 2005. He remained listed in DACS [ICEs computer system] for CCA until April 2006.[88] Although a more recent DHS OIG investigation noted an improvement in ICEs tracking of detainees, with the agency accurately recording the location of 94 percent of detainees in 2009, up from 90 percent in 2006, those who were inaccurately recorded remained lost for 3.7 days

on average.[89]

Although a delay of several days may seem minor, when an attorney is not notified of a transfer it can have a serious impact on a detainees case. Crucial time in which an attorney and client can work together in person on preparing evidence or witness lists is lost, and sometimes filing deadlines are missed. Attorneys have no choice but to resign themselves to the fact that their clients have been transferred and begin to grapple with the challenges inherent in long-distance representation.

The logistics involved in representing a transferred detainee are significant impediments to effective lawyering. Most immigrants in deportation hearings are represented by pro bono attorneys who cannot afford to travel, and telephone communication is simply not adequate for proper representation. One commentator explained:

The Logistical Challenges of Representing a Transferred Client

A pro bono immigration attorney interviewed by Human Rights Watch described the challenges she faced in representing her client, a young man seeking asylum who was first detained by ICE in a facility for children when he was 17 years old. After reaching adulthood, he was transferred to a relatively convenient adult facility located an hours drive away from his attorneys office in Chicago. He was then transferred from that facility to a detention facility 360 miles away in Kentucky. The attorney explained:

An immigration attorney in northern California described what it was like representing her mentally ill client who had been transferred 840 miles away to Arizona. Due to ICEs failure to follow up on his medical care, he was not on his prescribed medications and was talking to himself, urinating on himself ... and they put him in solitary confinement. Once in solitary confinement, all visits were limited to 30 minutes. She explained:

Another immigration attorney in Chicago explained what happened when her client was transferred to Texas:

As these cases indicate, some immigration attorneys struggle to represent their clients after transfer. However, even this limited form of representation can continue only if immigration judges allow attorneys to appear for hearings over the telephone or through video conferencing. One immigration attorney acknowledges that the ability to appear through such alternative means is a privilege that can be abused by unscrupulous attorneys who prefer not to travel to the immigration courts and who will, you know, call in for a hearing from a ball game.[94] Nevertheless, if the right to counsel is to be respected in immigration proceedings, video and telephone accommodations must be made by immigration judges. This is true despite the fact that in some cases, appearance over telephone or video is problematic because it is a less effective means of advocacy.[95]

Human Rights Watch interviewed the sister of a legal permanent resident detainee facing deportation for a criminal conviction who was transferred from detention in New York to New Mexico. Many detained immigrants in New Mexico have their deportation hearings in El Paso, Texas, which was true for this young man as well. While everyone in the family had contributed what they could to pay for a lawyer in Brooklyn, New York, the detainees sister explained that the lawyer was hampered by having to do her work over the phone:

Although testimony or legal representation over the phone or video is never as persuasive as an in-courtroom appearance, an attorney appearing through one of these means is better than no attorney at all. Unfortunately, some immigration judges prohibit attorneys from appearing on behalf of their clients by telephone or video conference. In addition, some judges simply deny motions to appear telephonically because they are filed after the standard two-week deadline for filing motions. However, since immigration attorneys are sometimes not informed of their clients transfers, it may be impossible for them to meet this standard deadline. Judges rigid decisions to bar telephonic or video appearances contrast with the flexibility they could employ, since according to the governmental body that sets policies for immigration judges:

Contrary to this stated flexibility, an immigration attorney in California described the variety of rigid rules she has encountered in her practice:

Transfers do not merely make the ongoing tasks of maintaining an attorney-client relationship more difficult. Sometimes, for one or more of the reasons outlined above, transfers sever the relationship completely. An attorney in El Paso said simply, its a regular occurrence that people lose their attorney after transfer.[99] Some detainees lose their attorneys completely after transfer because of changes in the law in the new jurisdiction, because logistical challenges make ongoing representation impossible, or because the immigration judges in the new location will not allow their attorneys to appear via telephone or video, and the detainee cannot afford to pay for an attorney to travel to appear in court in the new location.

As one attorney told Human Rights Watch, it really snowballs very fast for families as far as cost is concerned. You can imagine ... [after transfer to Texas] theyre going to have to hire another counsel. Its a vast amount of money for people who dont have money to begin with.[100]

Another attorney told Human Rights Watch,

Transfer of Detainee Severs Attorney-Client Relationship

John M., originally from Ukraine and living lawfully in Boulder, Colorado, since 1994, became subject to removal proceedings in 2007 based on a conviction for trespassing and stalking.[102] He retained an attorney in Boulder to represent him. However, on December 21, 2007, John M. was transferred 895 miles away to detention in Arizona, and ICEs motion to change venue was granted.

John M.s attorney explained that since telephone appearances were not allowed by the new immigration judge in Arizona, it would be very costly for him to pay to fly his attorney from Colorado to Arizona for purposes of representation. In addition, his attorney explained that he was not as well informed about the applicable law in Arizona (Ninth Circuit), since he was used to practicing in the TenthCircuit. For these reasons, John M. lost his attorney. He told Human Rights Watch, When I came here I lost my lawyer ... so I tried to hire another lawyer, but I cannot find anyone here.[103]

Kwan I., who lived lawfully in the US with his wife and two US citizen children for 12 years, was arrested by ICE in Philadelphia and put into deportation proceedings after serving time for driving while impaired. He spent three days in a detention facility in York, Pennsylvania. His wife was able to secure an attorney for him there. However, on November 16, 2007 he was put on a plane and transferred [to Texas]. They did not explain why. They just sent me here. His attorney in Philadelphia found an attorney in Texas who was willing to represent him, but, Kwan told Human Rights Watch, I have not talked to [her] yet. I dont have money to hire her. I dont know what is going on. No one here speaks Korean, so I must use my wife to talk over the phone. Commenting on the difference it would have made had he been allowed to remain in Pennsylvania, he said, Absolutely it would have made a difference [if they had kept me in Pennsylvania] because it takes only two hours to drive between York and [my attorneys] office.[104]

A Rare Case of Reversing Transfer

In rare cases, courts have recognized that transfers can deprive non-citizens of the counsel of their choice. Some have ordered the return of the individual to the pre-transfer location, or have enjoined the immigration authorities from engaging in further transfers.[105] An immigration attorney told Human Rights Watch how she eventually managed to get her client, who had been transferred from Chicago to Texas, sent back to Chicago after she had filed a motion to re-open his case. She even managed to get the government attorney to join with her in filing the motion to re-open, and venue was set in Chicago, requiring her client to return there from Texas:

Court decisions to return transferred detainees are few and far between because transfers must be shown to be actually prejudicial to the immigrants case before a judge will take remedial action. This is a very high threshold of proofessentially an exercise in crystal-ball gazing. The immigrant must prove (ironically without access to counsel nearby to aid in making the case) that regular access to a lawyer located in the pre-transfer location would have brought a significantly different result in his deportation case. Moreover, the 1996 laws put jurisdictional hurdles in place, making it increasingly difficult for detainees to obtain judicial review of this issue. The vast majority of cases even considering the issue were decided before 1996, and these decisions regularly found that a transfer does not impede the attorney-client relationship.[107] It is common for detained non-citizens to never raise the issue and give up on their appeals, resulting in their deportation from the United States.

As one attorney explained to a Human Rights Watch researcher:

Transfers create such significant obstacles to existing attorney-client relationships that ICE Special Advisor Dora Schriro recommended in her October 2009 report that:

Immigrants are often taken into custody by ICE at a location near to their home community where their family members, employers, church members, and other support networks are located. Their detention near to these support networks increases the chances that a detainee will be able to obtain legal representation in immigration proceedings. Once detainees are transferred to remote locations, they encounter much greater difficulties in obtaining local counsel. Their families may be able to find a lawyer, but that lawyer is likely to be located thousands of miles away, and may be unable or unwilling to go forward with representation of a distant client. In this way, the policy of transfers is inconsistent with non-citizens statutory right under US law to [be] represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, *as he shall choose*[110]

Like the Difference Between Heaven and Earth

As a nine-year-old in 1970, Michael M. entered the US lawfully from Lebanon.[111] His parents are now US citizens, as are his sister, brother, ex-wife, and two children. His entire family and his support network, including a sizeable Lebanese community, are located in the Los Angeles area.

Michael M. was transferred 1,400 miles away to a detention facility in Texas after a few weeks in detention in southern California. He told Human Rights Watch that the difference for him between being detained in California and being detained in Texas is like the difference between heaven and earth. At least in California I had a better chance. I could hire a Lebanese attorney to represent me. Now, here, I have no chance other than what the grace of God gives me.[112]

A detainee who lived lawfully in the United States since 1990 and was facing deportation because of a drug conviction was transferred after serving his sentence on Rikers Island, New York, to Varick Street Detention Center in New York. From there he was sent to York, Pennsylvania, and finally he was transferred 2,000 miles away to Otero County Processing Center in Chaparral, New Mexico. He said, I cant really do anything on my case and I cant find a lawyer here in New Mexico. Everything would be better if I was nearer to my family and a place where I could find an attorney.[113]

Another detainee, who had fled to the US from Guinea to escape female genital mutilation, had been transferred 2,025 miles from Cleveland, Ohio, to Florence, Arizona. She had spent two years in detention at the time of her interview with Human Rights Watch. She explained that before she could meet with the lawyer her brother had found for her in Cleveland, They transferred me here [to Arizona]. He couldnt do anything for me here. I dont have him anymore.[114]

A detainee from Mexico, who had lived in Los Angeles for 29 years, working in construction and manufacturing, with four US citizen children, was facing deportation because of a criminal conviction. He was transferred from Los Angeles to a detention center 435 miles away in Arizona. He told Human Rights Watch, I tried to call attorneys in California to come and help me. If I was in Los Angeles, it would be easier to find a lawyer. But, here...? One lawyer in California wanted to charge me $3,000 just for the trip to Arizona.[115]

An immigration attorney in Arizona said,

In 2007, Christina Fiflis of the American Bar Association spoke about the paucity of legal counsel for detainees before the Committee on Homeland Security of the US House of Representatives. Remarking on the regular practice of transferring detainees from the east coast to facilities in Texas, she said:

Corroborating this assessment, another detainee who said he feared persecution and torture in his home country of Indonesia based on his Chinese ethnicity was transferred to a detention center in Texas that was 1,400 miles away from his home community in Los Angeles. He

told Human Rights Watch,

As the above testimony indicates, detainees not only have a harder time finding an attorney in the places to which they are transferred, many find that after transfer their willingness to defend against removal wanes as they spend increasing amounts of time in detention, far away from family and their community of support. As one detainee in Arizona put it, After a while, some guys just sign for their [voluntary] departure, because they dont have a lawyer and dont feel able to fight.[119]

The frequency of detainee transfers is also having a chilling effect on whether attorneys are willing to initiate an attorney-client relationship at all. Advocates told Human Rights Watch that attorneys are increasingly reluctant to take on cases from detainees because they can so easily be transferred across the country.[120]

Despite the clear interference transfer creates with a detainees ability to be represented by counsel, which is a right under US statutory and international human rights law, the US Ninth Circuit Court of Appeals has concluded that [t]he government simply is not obligated to detain aliens where their ability to obtain representation is the greatest.[121] While one can understand why a court would not insist on the greatest possible access to counsel, the right has little meaning where the government can regularly and arbitrarily transfer detainees to locations far from their counsel of choice or locate major detention facilities in places where detainees are unable to obtain representation. A middle ground exists between those extremes.

Once an individual is detained, he or she has the right to request what is known as a bond redetermination hearing (or a bond hearing) from the immigration judge. This bond hearing, during which the detainee asks to be released from detention, can go forward irrespective of whether the notice to appear has been issued or filed with the immigration court.[122]

The three factors used by the immigration court in deciding whether to grant a bond, and in what amount, are: (1) the non-citizens danger to the community, (2) his or her risk of flight (or likelihood of appearance for subsequent hearings if released from detention), and (3) whether the non-citizen is subject to mandatory detention provisions, which apply mostly to non-citizens facing deportation for criminal offenses, or is subject to other regulations which deprive the immigration judge of jurisdiction.[123] It is essential that witnesses and evidence relevant to these three factors are presented at the bond hearing. As one attorney advises fellow immigration practitioners:

Unfortunately, ICEs policy of transferring detainees before a bond hearing is even scheduled, as well as transferring them without regard to scheduled bond hearings, often seriously delays their access to such a hearing. In addition, the inability of transferred detainees to produce witnesses or to provide evidence concerning the three relevant factors makes it much more difficult for them to prevail at their hearings.

When transfers interfere in one or both of these ways with bond hearings, the human right of detainees to a speedy decision on the lawfulness of their detention is threatened. Article 9.4 of the ICCPR states:

When an immigration judge weighs the factors at issue in a bond hearing, the detainee needs to present evidence of ties to the community, such as close family relationships, the possibility of employment, and a stable place to live. However, transferred detainees cannot present evidence of these factors through direct testimony from witnesses. As one detainee who was facing deportation because of convictions for assault and for buying and selling food stamps explained,

In addition, since one of the factors weighed in bond hearings is the dangerousness of the individual, if the non-citizen is facing deportation because of a criminal conviction, the victim of the crime can often be a very persuasive witness. Victims of relatively minor crimes committed by non-citizens are often willing to testify. In some cases, their desire for justice already has been satisfied by the individual spending some time in prison or paying a fine. In other cases, victims are relatives who turned in their non-citizen family member for minor crimes.[127] In some of these cases, victims are shocked to learn that, as a result of their holding the non-citizen relative accountable for a minor crime, he or she is facing permanent banishment from the United States.

As one attorney said, for bond hearings, whenever you can, and it happens often since some crimes are relatively minor, you want the victim to testify to disprove the dangerousness.[128] However, after transfer to a remote detention center, it is extremely unlikely that the victim will be able to travel to the new location in order to testify, thereby making it unlikely that the detainee will obtain bond.

Transfer Just Prior to Bond Hearing

Thomas P., a legal permanent resident originally from Jamaica, was placed in removal proceedings in Pennsylvania due to his conviction for drug possession.[129] According to his attorney, some individuals in Pennsylvania with similar convictions had been granted bond in the past. Several aspects of Thomass application, including the lack of violence in his crime, as well as his longstanding employment and residence in the community and close family relationships, would have weighed against his dangerousness and flight risk and in favor of granting him bond. Thomas had lived in Pennsylvania with his wife in a home which they owned and had worked for the same employer for 20 years. His attorney filed a motion for a bond hearing and the hearing was scheduled for March 20, 2008, by the York immigration court. Two days prior to his hearing, Thomas P. was transferred 1,816 miles away to Willacy Detention Center in Texas. His bond hearing was rescheduled in Texas for April 28, 2008. His attorney appeared by telephone, and he was not able to have his wife, two sons, two daughters, or employer present at the hearing. His bond was denied.[130]

As the case above demonstrates, ICE sometimes decides to transfer a detainee just before a bond hearing is to be held. While we have no evidence showing that ICE intends to interfere with bond hearings, frequent interference occurs because ICE does not check whether such a hearing has occurred and is not required to check under existing transfer policies. An immigration attorney in El Paso explained that he often saw detainees transferred to New Mexico or Texas just before their scheduled bond hearings in various east coast detention locations:

In another example, the mother of a young man living in Long Beach, New York, wrote her congressman to express her concern that her son was transferred from a detention facility in New Jersey to New Mexico on the same day as his bond hearing.

Of course, many transferred detainees interviewed by Human Rights Watch did not even know that they had the right to apply for bond.

Many did not have attorneys to advise them of this right. Many of those who somehow learned of the opportunity to apply for bond faced an uphill battle proving, without ready access to witnesses and evidence, that they met the requisite criteria.

ICEs decision to transfer a detainee is a step of immense significance. Even if a detainee has spent all of her time living in the United States within a particular state, and even if her deportation is due to a previous violation of the criminal laws of that state, if a detainee is transferred before the NTA has been filed with the immigration court, she can expect to have her entire case proceed in the new post-transfer state, subject to the law as interpreted by the US Court of Appeals that hears cases originating from that state.

If this occurs, detainees and their lawyers may attempt to change venue back to the original pre-transfer location. However, it is very difficult for a detainee to win a change of venue motion (as discussed below, it appears to be less difficult for government attorneys). In order to change the venue for a deportation case, the judge must find good cause. Good cause is understood to require the balancing of several factors, some that tip the scales in favor of the US government, and some that tend to favor the detainee. Judges typically weigh:

While these factors on their face may appear balanced, detainees and their attorneys confront particular challenges when presenting a change of venue motion, since the mere fact that an applicant allegedly resides ... in another city, without a showing of other significant factors associated with such residence, is insufficient.[134] Moreover, the power rests entirely with the immigration judge, who may base his or her decision on evidence of administrative convenience and/or expeditious treatment of the case alone (both of which are factors weighing against changing venue for a transferred detainee):

Moreover, courts have consistently held that the location of a detainees attorney (often the same location as the detainees witnesses and former place of residence) is insufficient cause for change of venue.[136] Finally, judges have not been required to weigh whether a non-citizen will be subject to a less favorable legal standard in the new venue, which can be decisive.[137]

In cases in which ICE chooses to transfer a detainee after the NTA is filed with the immigration court, the agency consistently files a motion to change the venue to the new, post-transfer jurisdiction. Often, especially when a detainee is unrepresented, he or she may not understand the significance of the change of venue motion filed by the DHS attorney, and therefore may passively agree to the case proceeding in the new jurisdiction. One immigration attorney in Arizona reported to Human Rights Watch that transferred detainees were pressured to sign statements of non-opposition to change of venue motions, or did not fully understand the motions before agreeing not to oppose them.[138]

When detainees are the ones requesting change of venue, many judges seem to take a view similar to the one articulated by a judge in Seattle who, during a hearing, said to the attorney for a transferred detainee:

A court reviewing this and other statements by the Seattle immigration judge (IJ) noted, disapproving of the IJs conduct, the IJ advised counsel that it was her practice to deny motions for change of venue for detained aliens unless the INS agreed.[140]

Interviews with immigration attorneys support the idea that change of venue motions filed on behalf of transferred detainees are rarely won. One attorney represented a mentally ill Cuban asylum seeker, whose father was a key witness in the case and due to age and disability, could not travel from Los Angeles to Eloy, Arizona, where his son was detained. The attorney explained to Human Rights Watch,

A detainee in Texas, who had spent one month in detention in Pennsylvania near to his Pittsburgh attorney, his US citizen wife, and his 15-month-old US citizen daughter, filed a change of venue motion after his transfer to Texas. He told Human Rights Watch

An attorney in Texas explained that the US government opposes everything. So, when you file a change of venue motion, youre going to get a boilerplate opposition from the [DHS] counsels office. This same attorney described one unusual case in which he had been successful in changing venue:

While not every detainee, especially those who are unrepresented, knows to file a change of venue motion, every detainee interviewed by Human Rights Watch in Texas who had managed to file such a motion was denied.[144]

Due to our concerns about ICEs common practice of transferring detainees and subsequently filing change of venue motions or opposing motions filed by detainees, Human Rights Watch asked the Executive Office for Immigration Review to give us statistics on the number of change of venue motions filed by detainees and subsequently granted by immigration courts, as well as the number filed by the government of the United States and subsequently granted by the courts. In its response, EOIR claimed that it had no data responsive to our questions, and specifically did not track change of venue motions based on whether the request was filed by the DHS attorney or the non-citizen detainee.[145]

The difficulties transferred detainees face in changing venue raise concerns that the US is violating its obligation under Article 14 of the ICCPR to ensure everyone ... a fair and public hearing by a competent, independent and impartial tribunal. Impartiality is at risk if one litigant (such as the DHS) is invariably more successful in its attempts to change venue. In addition, the scales of justice are not well balanced when detainees are systematically prevented from vigorously presenting their cases and presenting all necessary evidence due to venue considerations. Moreover, fairness is under threat if judges do not consider whether a change of venue motion will result in the detainee being subjected to less favorable law (a subject discussed in detail in Chapter X), affecting his or her interest in remaining in the United States. Of course, neither detainees nor DHS attorneys should be empowered to shop around for the most favorable forum through change of venue motions, which is why impartiality in deciding these motions is essential.

Despite the US Supreme Courts 1945 admonition about the need for meticulous care in deportation proceedings, transfers of detainees often interfere with their ability to present a defense, which in turn undermines the fairness of the entire procedure. The detrimental effects of transfer on a detainees ability to present a defense were emphasized time and again during our interviews with immigration attorneys for this report.[147] Detainees themselves were also deeply frustrated by the negative effect transfer was having on their deportation cases.

There are several ways in which transfer can impede a detainees defense. Immigration detainees often rely on family members, friends,

and their relationships in churches and communities of origin to defend against deportation. The existence and strength of such relationships are one of the few bases in US law for a non-citizen to argue that he or she should not be deported. For example, in many cases in which the detainee can apply to cancel his or her deportation, the detainees spouse, parent, and/or child is a critical witness to establish that deportation would result in what the law defines as exceptional and extremely unusual hardship.[148]

Human Rights Watch interviewed a 61-year-old man from Mexico who came to the United States in November 1979. His immigration status and conviction would allow him to apply for cancellation of removal based on hardship to his legal permanent resident wife, four US citizen children, one of whom was gravely ill with a spinal injury, and 16 US citizen grandchildren. Nevertheless, he was struggling to present evidence of these relationships to the judge in Texas, since his family members were all in southern California and unable to travel to Texas.[149]

In other cases, a detainee may be able to defend against deportation based on a close family members status as a US citizen, or based on the resolution of a pending application to adjust his or her own status to one that would not result in deportation. Other detainees can defend against deportation by proving that they themselves are US citizens. In any of these scenarios, the detainees spouse, parent, and/or child is a critical witness in establishing the required family relationship. Proximity to ones family may be the only way to gather the necessary evidence to defend against deportation.

For example, the US citizen stepfather of a young man facing deportation wrote to his congressman, begging him to stop his detained stepsons transfer from Boston to Louisiana. The stepfather claimed his stepson was a US citizen due to the US citizenship of his biological father. The stepfather was honorably discharged from the US army in 1992, after seeing combat in the 1991 Gulf War and serving in Saudi Arabia and Germany. In Germany, he met and married his wife, and became stepfather to her then two-year-old son. He wrote to explain:

In asylum cases, detainees family members can sometimes provide the best evidence of the persecution their loved one might face if deported. For example, an Indonesian detainee of ethnic Chinese background told Human Rights Watch he was trying to claim asylum because of the persecution he and his siblings had faced in Indonesia. He was originally detained in Los Angeles, but was transferred to Texas where he was having a very difficult time getting evidence from his family and other sources about the persecution he had experienced and feared in the future:

In still other cases, a detainees moral character is relevant to whether the court will find he or she must be deported. To establish moral character, employers, family members, community witnesses, and even victims of the detainees minor criminal offense can provide essential evidence.

For example, Esteban G. entered the United States from El Salvador as a refugee when he was 17 years old. His mother, sister, and stepfather are all US citizens and all reside in California. Esteban was taken into custody in Los Angeles, but before my Mom and sister could get there to visit me he was transferred to detention in Texas. He was facing deportation because of a drug possession conviction, for which he had been sentenced to probation. He told Human Rights Watch how difficult it has been for him to defend against his deportation, both because his documents were lost during the transfer and because his moral character is an issue in his case:

As this case illustrates, there are also practical ways in which transfers can interfere with detainees ability to present a defense. In some cases, detainees lose access to law libraries after being transferred to contract county jails.[153] In others, detainees lose their legal documents during the transfer process.[154] Finally, family members and friends often provide the critical link between detainees and immigration counsel by helping detainees locate and retain counsel, as well as by assisting in collecting supporting documents and declarations. Transferred detainees in remote locations cannot get such help.

A legal permanent resident from the Dominican Republic detained in Texas who was facing deportation because of a domestic violence conviction explained that his entire family is in Pennsylvania, as are all of his documents. He told Human Rights Watch, I had to call to try to get the police records myself. It took a lot of time. The judge got mad that I kept asking for more time. But eventually they arrived. I tried to put on the case myself. I lost.[155]

The lack of proximity to relevant documents is an enormous hurdle for non-citizens transferred far away from the state in which they received their criminal conviction. This is because

There are numerous federal court cases noting that the government sometimes fails to submit sufficient evidence in support of its claim that a particular non-citizen is deportable.[157] Therefore, a transferred detainees inability to obtain necessary documents from a jurisdiction far away from his or her place of post-transfer detention, even without a strong case against him or her, can have devastating results in his or her case.

In another example, a detainee transferred from southern California to Texas wrote to then Attorney General Alberto Gonzales:

Transferring detainees away from key witnesses and evidence effectively denies them an opportunity to present a defense against removal, which is a violation of their human rights. Article 13 of the ICCPR states:

The UN Human Rights Committee, which monitors state compliance with the ICCPR, has interpreted the phrase lawfully in the territory to include non-citizens who wish to challenge the validity of the removal order against them. In addition, the committee has made this clarifying statement: if the legality of an aliens entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13.... An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.[160]

Despite the principle that the ability to present evidence in ones favor is essential to a fair hearing and despite the many ways in which detaining non-citizens near to their families and communities of origin facilitates access to such evidence, there is no requirement that ICE staff weigh whether a detainee has family and community relationships nearby when making a transfer decision. Therefore, detainees are routinely transferred to remote locations where travel costs or immigration judges refusals to allow video or telephonic appearances prevent the presentation of testimonial evidence essential to the defense against removal.

Despite the serious problems transfer can cause for detainees as they try to present their defenses, US courts have been decidedly unsympathetic to these concerns. As one court states:

Deportation, though not technically recognized under US law as a form of punishment, is a coercive exercise of state power that can cause a person to lose her ability to live with close family members in a country she may reasonably view as home. Most deportees are barred, either for decades or in many cases for the rest of their lives, from ever reentering the United States. Similarly, the decision to grant an individual asylum from persecution is a matter of tremendous significance, even of life and death. Given the serious interests at stake, human rights law requires that the decision to deport or to grant asylum be based on procedures that are scrupulously fair. Unfortunately, the haphazard system of detainee transfers undermines the fairness of immigration proceedings because the law applied to detainees cases is often changed midstream.

Not only are these changes in applicable law contrary to fundamental notions of fairness, they may also contravene international standards on equal treatment under the law. In important ways, immigrants facing removal are akin to persons accused of crimes in the United States. While immigrants facing removal are not technically in criminal proceedings, the penalties they face, detention and deportation, are severe infringements on their libertymuch like criminal defendants who face prison time as punishment. In addition, many immigrants are facing deportation because they violated a particular states criminal laws. However, unlike criminal defendants who normally cannot be transferred until their trial is complete, immigrants are routinely transferred away from the jurisdiction in which they were arrested and the applicable law literally changes beneath their feet.

Transferred immigrants are disadvantaged and denied equal treatment as compared with most criminal defendants in the United States. On multiple occasions documented by Human Rights Watch, ICEs decision to transfer a detainee away from the jurisdiction of his or her arrest has resulted in the application of substantive legal standards that are significantly less beneficial to the aliens application for relief from deportation than the law would have been had the alien not been transferred.

Whenever a detainee is transferred between two of the 12 federal circuit courts of appeals, and his or her removal hearings take place in the new circuit, he or she will have that circuits interpretation of federal laws applied to his or her case.[163] Since the federal circuit courts of appeals vary in their interpretations of criminal offenses, the transfer of a detainee can affect the way the court will interpret whether the criminal offense he is being deported for is an aggravated felony. This is a very important issue for non-citizens facing deportation, because if their convictions are considered aggravated felonies under immigration law, they will be placed into summary deportation procedures. In these summary procedures, a non-citizen cannot ask a judge to consider canceling his deportation even if he can show that his crime was relatively minor or his connections to the United States (such as family relationships) are strong. If a detainee is transferred to the jurisdiction of a court that considers his criminal conviction (for which he has already served his criminal punishment) an aggravated felony, there is very little he can do to defend against his banishment from the United States.

Imagine a non-citizen who has lived as a lawful permanent resident in Detroit, Michigan, and who has two misdemeanor convictions under Michigan law for simple possession of marijuana. After paying his fines or serving his criminal sentence, and assuming he is detained by ICE in Michigan and his deportation hearings proceed there, his two misdemeanor offenses would not be considered aggravated felonies. In other words, they would not be considered serious enough to bar him from asking the immigration judge to allow him to remain in the United States.[164]

However, if ICE decided to transfer him to detention in Texas or Louisiana, a likely outcome as this report has demonstrated, the law applied to his situation would be completely different. In these post-transfer locations, his two state misdemeanor convictions would be considered aggravated felonies and would bar him from being able to ask the judge to cancel his removal.[165] Transfers between other parts of the country would bring similar results, based on differing interpretations of what constitutes an aggravated felony. Such an outcome rarely affects persons accused of violating federal and state criminal laws, whose trials nearly all take place in the jurisdiction where the crime occurred.

Transfer Leads to Deportation after 22 Years of Legal Residence

Jeffrey J., a lawful permanent resident, was interviewed by Human Rights Watch in Texas.[166] He was arrested and detained by ICE in New York, where his two crimes of drug possession did not constitute an aggravated felony.[167] Based on his legal permanent resident status, 22 years of legal residency, and strong family relationships in the US, he would have been eligible for cancellation of removal in New York.

After three months of detention in New York and New Jersey, however, he was transferred to Texas, where the immigration judge interpreted applicable Fifth Circuit law to bar his claim to relief from removal. The Board of Immigration Appeals declined to reverse that ruling and Jeffrey was deported from the United States. In a subsequent phone call to Human Rights Watch from Jamaica, Jeffrey spoke of his sadness and depression, not knowing anyone in Jamaica, and missing his home and family in the United States.[168]

The case of Rafael S., who was interviewed by Human Rights Watch in detention in Texas, illustrates this problem. Rafael was arrested and detained by ICE in California, where he retained an immigration attorney during the two weeks he was detained there.[169] Under applicable law in the Ninth Circuit, Rafaels second offense for drug possession, in which he was neither charged nor convicted as a recidivist, would not constitute an aggravated felony.[170] As a result, based on his legal permanent resident status, 10 years of lawful residence, and strong family relationships in the US, he would be eligible for cancellation of removal. Nevertheless, he was transferred to Texas, where under applicable Fifth Circuit law, his second drug possession offense is likely to be interpreted to constitute an aggravated felony and thereby bar him from applying for cancellation of removal.[171]

This same issue arises with detainees eligibility to change their immigration status to one that will exempt them from deportation based on their close family relationships inside the United States. 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.[172] If these same immigrants are detained in the Ninth or Tenth Circuits, such convictions are not determinative.[173]

In still other cases, a non-citizen may have accepted a plea bargain in his or her criminal case in reliance on that jurisdictions interpretation of the conviction as a non-deportable offense. Later, if this same individual is transferred to a jurisdiction where his or her

guilty plea renders him or her deportablean occurrence that he or she obviously could not have foreseen at the time of the pleahe or she may have serious regrets about his or her decision not to fight the case.

Finally, the Fifth Circuit holds to the view that even if a non-citizens criminal conviction has been subsequently vacated (meaning that the criminal court has rendered the conviction void based on procedural or substantive errors at trial), it is still considered a conviction for the purposes of immigration law. This means that an immigrant who was convicted of a crime in Illinois, for example, but whose conviction was vacated because of errors at trial, if transferred to detention in Texas would still be subject to deportation based on that conviction.[174]

Refugees (defined as non-citizens with a well-founded fear of persecution based on one of the grounds enumerated in the Refugee Convention) are entitled to apply for and be granted asylum in the United States.[175]

Whether or not a particular non-citizen is granted asylum in the United States often involves fundamental questions of life and death. However, because so many asylum seekers in the United States are subject to mandatory detention (at least 16,000 new asylum seekers were detained during each of 2002 and 2003),[176] they are often transferred between detention centers throughout the United States and subject to the vagaries of different interpretations of the law based on where they are transferred.

A statistical study published in the *Stanford Law Review* in November 2007 revealed striking differences in the propensities of each of the circuit courts to reconsider (or remand) the asylum applications of individuals from 15 countries of origin, who had been unsuccessful in having refugee status recognized at the lower levels of the process. The studys authors excluded countries whose nationals were usually not granted asylum in the lower levels of the asylum process. Eight of the eleven circuits that hear asylum appeals had rates of remand that were between 8 percent and 31 percent. But the Fourth, Fifth, and Eleventh Circuits all had remand rates under 5 percent. As noted previously, of these three circuits with very low remand rates, the Fifth Circuit receives the largest number of transferred detainees, and the Eleventh Circuit receives the third largest number. In each case, some of the transferred detainees are refugees seeking asylum, and yet by accident of transfer they have ended up in the circuits least likely to require lower courts to take a second look at their asylum applications. As the authors of the Stanford study recognized,

Substantive interpretations of asylum law also vary by circuit. Human Rights Watch interviewed a woman in Arizona who had been living in Ohio prior to her arrest and detention. She explained that she had been forced to undergo female genital mutilation and several years later fled her native Guinea when she became the mother of a girl whom she wanted to protect from undergoing this same procedure. Had she been detained and put into deportation procedures in Ohio, where Sixth Circuit law applied, this woman would have had a strong chance of being granted asylum.[178] If she had been detained and undergone deportation procedures in the neighboring Seventh Circuit, she most likely would have had her claims denied.[179] However, she was transferred to detention in the Ninth Circuit in Arizona where it was possible, though not as likely as had she remained at home in Ohio, that the court would look favorably on her case.[180]

In yet another example, an asylum seeker who was detained in the Fifth Circuit was denied asylum even though she had been arrested and repeatedly raped while in prison in her home country. She had been arrested after the president was assassinated in the building in which she worked as a government employee but the Fifth Circuit did not find the rapes to have occurred on account of her political opinion or her membership in the social group of government employees, since she could always change her employment; and refrained from considering whether the rapes constituted torture.[181] However, if this same asylum seeker had been detained in Pennsylvania, in the Third Circuit, her rape and imprisonment would have been recognized as persecution and torture, and she likely would have been granted asylum and allowed to remain in the United States.[182]

Another area of asylum law that is especially problematic for transferred detainees relates to whether or not courts will allow them to make a claim for asylum after the one-year filing deadline set in immigration law. US immigration law allows an asylum seeker to apply after the one-year deadline only after showing extraordinary or changed circumstances.[183] However, the rejection of a claim of extraordinary or changed circumstances has been interpreted by some courts as a discretionary decision by the immigration agency or attorney general that no court is able to review or reverse.[184]

The inability to appeal the agencys decision over whether changed circumstances should allow for an extension of the one-year deadline means that many transferred detainees will be denied the opportunity even to apply for asylum. For example, an Egyptian woman applied for asylum because she had received a threat from Islamist extremists after her attendance at a womens rights rally, which occurred after the one-year deadline. Since she was applying for asylum in California, she was able to appeal certain aspects of the immigration judges decision that the new threat did not trigger the changed circumstances exception to the one-year filing deadline.[185] Had she been transferred to Illinois, New Mexico, or Pennsylvania, she would not have been able to make that appeal.[186]

The detrimental effects of detainee transfers go beyond interference with the right to counsel and to fair and equal treatment before the courts. Since detainees are often transferred far away from their family members and communities of support inside the United States, their detention takes an enormous emotional and psychological toll. As described above, ICE does not inform family members about transfers, so relatives often undergo a great deal of stress until detainees can find a way to inform them of their new location. As one attorney said, Its scary for them, because the facilities just tell the families that [their relative has] been released. The facilities have no idea where they have gone, so neither do the families.[188]

One 22-year-old Chinese detainee told Human Rights Watch that his transfer from detention in California to Texas had separated him from his mother, causing them both significant distress. She had been able to make the trip to Texas once during his five months in detention. Reflecting on that visit in a subsequent interview with Human Rights Watch, he said, I made her hair turn from black to grey, and now its white.[191]

Minor children and their parents often suffer acutely when they are separated by transfer, especially when the detained parent is sent to a location so far away that regular visits become impossible. As one detainee who was transferred from New York to New Mexico said, Every time I manage to call, my two little girls are crying by the time we get off the phone. I cant take it.[192]

A spouse of a detainee wrote:

An attorney spoke about how difficult it is for detained mothers to be separated from their children after transfer:

Transfer Devastates Mother Separated from Young Son

A clinical psychologist spoke to Human Rights Watch about an African woman who had been abused and tortured in her country of origin and who had also undergone female genital mutilation. After this abuse, according to the psychologist, she had developed severe post-traumatic stress disorder (PTSD). However, after immigrating to the US, she turned her life around: she had married and had a young son, and trained and ultimately became a nurse.[195]

While working in the hospital, however, she assaulted someone. The psychologists assessment was that an incident in the hospital triggered her PTSD just before the assault. While she was able to serve her criminal sentence in California in a prison near to her husband and young child who visited her regularly, she was subsequently detained by ICE and transferred.

As the psychologist explained:

Several attorneys reported to Human Rights Watch that the transfers of detainees away from family members wore down the detainees willingness to spend the time in detention necessary to pursue appeals of their cases. Eventually, many signed voluntary departure agreements.[197] As one attorney put it:

The sister of a detainee who was transferred from New York to New Mexico told Human Rights Watch:

Another attorney in Arizona said:

An attorney representing an individual from India, who explained that his client had been tortured prior to seeking asylum from persecution in the United States, spoke with Human Rights Watch just days after his client had been transferred away from his family in northern California to detention in Hawaii. The attorney explained:

This same detainees wife wrote to ICE:

In our research, we did not come across a single case in which ICE had granted such a request.[203]

Transfers are uniquely problematic in the case of non-citizens who are unaccompanied minors. An unaccompanied minor is someone below the age of 18 who enters the United States without parents or other legal custodians able to provide him or her with protection and assistance. Since these children are undocumented, they are subject to deportation and most are detained while they await the outcome of their deportation or asylum hearings. The United States policy of detaining unaccompanied minors, particularly those who are seeking asylum, contravenes established international standards on the care and treatment of children.[204] For decades Human Rights Watch has focused on the rights abuses that occur when children are detained far away from their communities of origin. As early as 1998 we recommended that the INS work to house non-citizen children near to their communities of origin, legal services, and support.[205]

Under current operational guidelines, when ICE first apprehends an unaccompanied minor, ICE is required to send him or her as soon as possible to a specialist facility run by the Office of Refugee Resettlement that is the least restrictive, smallest, and most child-friendly facility available. Therefore, as soon as ICE becomes aware that it has an unaccompanied minor in its custody, the agency calls ORR and they tell them where the nearest open bed is, and thats where the child goes.[206]

The Office of Refugee Resettlement maintains 43 facilities for the detention of unaccompanied minor children throughout the United States. The limited number of facilities combined with the increasing number of unaccompanied minors placed in detention (approximately 10,350 in 2007)[207] has exacerbated problems caused by transfers. This is because unaccompanied children are often placed in facilities that are even further away from their support networks than are adult detainees, since there are so few facilities available to accommodate children.[208]

The effects of transfer upon children are really stories of unintended consequences, since the laudable goal of placing children in the least restrictive and most child-friendly facilities has motivated the policy of housing children in facilities run by ORR. Nevertheless, these placements often separate children from pro bono attorneys willing to help them or extended family members who might be able to provide some support. They may also alter the law that will be applied in their deportation cases. According to one expert specializing in this area, What might be best for the child may not be [the] best thing for their case. We are faced with terrible choices. Transfer of children to ORR facilities often just puts people in untenable situations.[209]

Zhen Ching Shui, a Chinese citizen, was put on a boat by his parents while he was a teenager because he had been threatened with sterilization by Chinas birth planning department.[210] Zhen was 17 years old when he reached where his uncle lived in Guam. Since he did not possess a valid entry document, he was placed in detention in a facility for unaccompanied minors in Phoenix, Arizona. Although Zhens uncle retained an attorney for him in Guam, the lawyer experienced difficulties in representing his client because of the distance between them. Zhen filed a motion to change venue to Guam, but it was denied. As a reviewing court explained,

An expert working with children in ORR facilities explained to Human Rights Watch how unaccompanied children can sometimes be transferred over and over again throughout the system, especially if they begin exhibiting behavioral problems that ironically may be exacerbated by detention itself. According to this expert, the more restrictive facilities are often the ones that break down a childs willingness to fight against his or her deportation:

In another case documented by Human Rights Watch, a 17-year-old boy, Ramon M., was eligible for special immigrant juvenile status (SIJS), a classification that allows certain unaccompanied minors to remain in the United States.[213] Ramon had counsel representing him and an ability to prove dependency for foster care purposes in Arizona. However, he was transferred 1,660 miles away to the Southwest Indiana Regional Youth Village, an ORR facility in Vincennes, Indiana. ICE filed a motion for change of venue, which was opposed by Ramons counsel but granted by the immigration judge. Once venue was changed, it was impossible for Ramon to prove dependency under the state laws of Indiana without accruing six months of residency in Indiana. This time requirement caused Ramon to

age out of eligibility for special immigrant juvenile status, which meant he lost the ability to remain lawfully in the United States.[214]

Corroborating this example, the same expert working in ORR facilities told Human Rights Watch that childrens legal cases often are negatively affected by transfers between distant juvenile detention facilities:

This report was researched and written by Alison Parker, deputy director of the US program of Human Rights Watch. The report was edited by David Fathi, director of the US program at Human Rights Watch; Bill Frelick, refugee policy director; Lois Whitman, director of the childrens rights division; Clive Baldwin, senior legal advisor; and Joe Saunders, deputy program director. Layout and production were coordinated by Grace Choi, publications director, Fitzroy Hepkins, mail manager, and Abigail Marshak, US program associate.

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[1]Human Rights Watch telephone interview with Kevin H. (pseudonym), Otero County Processing Center, Chaparral, New Mexico, February 11, 2009.

[2] Throughout this report, the words non-citizen and immigrant are used interchangeably for any person who is not a citizen or national of the United States. These are the same persons defined in immigration law as aliens, and they include persons lawfully present in the United States as well as those unlawfully present. Immigration and Nationality Act, Section 101(a)(3); 8 U.S.C. Section 1101(a)(3).

[3] Human Rights Watch telephone interview with Rebecca Schreve, immigration attorney, El Paso, Texas, January 29, 2009.

[4] US Constitution, Sixth Amendment (in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.).

[5] US Department of Homeland Security, Office of Public Affairs, Fact Sheet, 2009 Immigration Detention Reforms, August 6, 2009, http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm (accessed November 4, 2009).

[6] Letter from Catrina M. Pavlik-Keenan, FOIA officer, US Immigration and Customs Enforcement, US Department of Homeland Security, to Human Rights Watch, September 29, 2008 (letter on file with Human Rights Watch and reproduced in the Appendix to this report).

[7] Dr. Dora Schriro, special advisor on ICE Detention and Removal, Immigration Detention Overview and Recommendations, Department of Homeland Security, Immigration and Customs Enforcement, October 6, 2009, http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf (accessed November 2, 2009), p.2 (hereinafter Schriro Detention Report). This figure refers to the total number of admissions to detention over the course of the year. At any one time, the number of persons detained is about one-tenth this figure.

[8]Throughout this report we use the terms deportation and removal interchangeably to refer to a governments removal of a non-citizen from its territory. We note that the terms had different meanings under earlier versions of US immigration law, and that now all such governmental actions are referred to in US law as removals. Nevertheless, for simplicity we use the more commonly understood term deportation wherever possible.

[9] Immigration and Nationality Act (INA) Section 236(a), 8 U.S.C. Section 1226(a).

[10] INA Section 235(b), 8 U.S.C. Section 1225(b).

[11] 8 C.F.R. Section 235.3.

[12] Letter from Stewart Baker, Assistant Secretary for Policy, Department of Homeland Security, to Felice Gaer, United States Commission on International Religious Freedom, November 28, 2008 (letter on file with Human Rights Watch) (noting that only 50 percent of asylum seekers who were found to have a credible fear of persecution and who applied for parole were actually granted parole and released from detention from November 6, 2007, to June 30, 2008.).

[13] INA Section 236(c), 8 U.S.C. Section 1226(c).

[14] Ibid., Section 1226(a).

[15] INA Section 287(a), 8 U.S.C. Section 1357(a)(2).

[16] Ibid., Section 1357(g).

[17] Daniel C. Vock, States, Locals Swamp Immigration Program, *Stateline.org*, May 13, 2008, http://www.stateline.org/live/details/story?contentId=309055 (accessed November 4, 2009).

[18] 8 C.F.R. Section 287.3(d).

[19] Ibid., Section 287.3(c).

[20] Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, vol. 14, no. 4(G), August 2002, http://www.hrw.org/en/reports/2002/08/15/presumption-guilt.

[21] Memorandum from Asa Hutchinson, undersecretary, Border and Transportation Security, to Michael J. Garcia, assistant secretary, US Immigration and Customs Enforcement, and Robert Bonner, commissioner, US Customs and Border Protection, March 30, 2004, http://www.immigrationforum.org/images/uploads/ICEGuidance.pdf (accessed November 4, 2009).

[22] Shoba Sivaprasad Wadhia, Under Arrest: Immigrants Rights and the Rule of Law, *University of Memphis Law Review*, vol. 38, Summer 2008, p. 853.

[23] Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court. 8 C.F.R. Section 1003.14(a). Venue shall lie at the Immigration Court where jurisdiction vests pursuant to 1003.14. Ibid., Section 1003.20(a).

[24] See the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-628; Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

[25] US Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, part 7, chapter 41, December 2, 2008, http://www.ice.gov/doclib/PBNDS/pdf/transfer_of_detainees.pdf (accessed November 4, 2009), p. 2.

[26] Immigration and Nationality Act Section 241, 8 U.S.C. Section 1231 (g).

[27]*Aguilar v. United States Immigration and Customs Enforcement*, 510 F.3d 1, 20 (1st Cir. 2007).

[28]*Avramenkov v. INS,* 99 F. Supp. 2d 210, 213 (D. Conn. 2000) (Congress has squarely placed the responsibility of determining where aliens are to be detained within the sound discretion of the Attorney General); *Van Dinh v. Reno,* 197 F.3d 427, 433 (10th Cir. 1999) (a district court has no jurisdiction to restrain the Attorney Generals power to transfer aliens to appropriate facilities by granting injunctive relief); *Sasso v. Milhollan*, 735 F. Supp. 1045, 1046 (S.D. Fla. 1990) (holding that the attorney general has discretion over location of

detention); *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) (We wish to make ourselves clear. We are not saying that the petitioner should not have been transported to Florida. That is within the province of the Attorney General to decide.).

[29] Letter from Susan M. Cullen, director of policy, US Immigration and Customs Enforcement, to Human Rights Watch, August 11, 2008 (letter on file with Human Rights Watch).

[30]*Earle v. Copes*, 2005 WL 2999149, *1 (November 8, 2005, W.D. La.) (the transfer of a detained alien from one state to another does not raise any constitutional concerns even if representation of the alien may be less convenient); *Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995) (there is nothing inherently irregular about the [non-citizens] transfer from Virginia to Louisiana); *Sasso v. Milhollan*, 735 F.Supp. 1045, 1047 n.6 (S.D. Fla. 1990) (attorney general had not abused his discretion by ordering hearing in Texas, despite claim that non-citizens witnesses were located in Florida and would not be able to afford travel to Texas to appear at hearing there); *Committee of Central American Refugees v. INS*, 682 F. Supp. 1055, 1060 (N.D. Cal. 1988) (regular transfers from San Francisco district to El Centro, California, or Florence, Arizona, did not rise to the level of due process violations).

[31] ICE Assistant Secretary Julie Myers, untitled contribution to Spring 2007 Liaison Meeting between ICE officials and American Immigration Lawyers Association, March 20, 2007 (minutes on file with Human Rights Watch).

[32] Department of Homeland Security, Office of Inspector General, Review of U.S. Immigration and Customs Enforcements Detainee Tracking Process, OIG-07-08, November 2006, http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-08_Nov06.pdf (accessed November 4, 2009), p. 2.

[33] Human Rights Watch interview with Tae Johnson, acting unit chief, Detention Compliance Unit, Office of Detention and Removal Operations, Washington, DC, May 12, 2008.

[34]Schriro Detention Report, October 6, 2009, http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf, p.6.

[35] Human Rights Watch interview with Sandra Myles, associate legal advisor, Enforcement Law Division, Office of the Principal Legal Advisor, Washington, DC, May 12, 2008.

[36] US Constitution, Sixth Amendment (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.).

[37] US Department of Justice, Federal Bureau of Prisons, Program Statement, Inmate Security Designation and Custody Classification, chapter 7, September 12, 2006, http://www.bop.gov/policy/progstat/5100_008.pdf (accessed November 4, 2009), p. 11.

[38] Ibid.

[39] Human Rights Watch telephone interview with Jeanne Woodford, former director, California Department of Corrections, and former warden, San Quentin State Prison, northern California, August 13, 2009.

[40] US Department of Justice, Inmate Security Designation and Custody Classification, chapter 7, http://www.bop.gov/policy/progstat/5100_008.pdf, p. 4.

[41] Ibid., p. 5.

[42] Human Rights Watch telephone interview with Jeanne Woodford, August 13, 2009.

[43] See Human Rights Watch, *Detained and Dismissed: Womens Struggles to Obtain Health Care in United States Immigration Detention*, March 17, 2009, http://www.hrw.org/en/reports/2009/03/16/detained-and-dismissed-0; Human Rights Watch, *Chronic Indifference: HIV/AIDS Services for Immigrants Detained by the United States*, December 5, 2007, http://www.hrw.org/en/reports/2007/12/05/chronic-indifference.

[44] US Department of Justice, Inmate Security Designation and Custody Classification, chapter 7, http://www.bop.gov/policy/progstat/5100_008.pdf, p.2.

[45] ICE is not required to track the reason for transfer, nor is it required to track a detainees eligibility for a bond hearing. US Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, part 7, chapter 41, http://www.ice.gov/doclib/PBNDS/pdf/transfer_of_detainees.pdf, pp. 5-11, 15.

[46] Human Rights Watch telephone interview with Jeanne Woodford, August 13, 2009; US Department of Justice, Inmate Security Designation and Custody Classification, chapter 7, http://www.bop.gov/policy/progstat/5100_008.pdf, pp.2-3 (requiring the entry of the transfer into the federal SENTRY system prior to transfer of the inmate); Florida Department of Corrections, Frequently Asked Questions Regarding Inmate Transfers, http://www.dc.state.fl.us/oth/inmates/transfers.html (accessed November 4, 2009) (Our websites Inmate Population Information Search database is updated every 24 hours. A completed transfer is reflected on the inmates detail record page in the Current Facility data field.).

[47] Schriro Detention Report, October 6, 2009, http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf, p.29.

[48] US Immigration and Naturalization Service, Detention Operations Manual, September 20, 2000, http://www.ice.gov/pi/dro/opsmanual/index.htm (accessed November 4, 2009).

[49] US Immigration and Customs Enforcement, Detention Operations Manual, June 16, 2004.

[50] US Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards,

http://www.ice.gov/partners/dro/PBNDS/index.htm.

[51] The standards state in full the following reasons for transfer: Medical The Division of Immigration Health Services (DIHS) has the authority to recommend that a detainee in need of specialized or long-term medical care be transferred to a facility that can meet those needs. The DIHS Medical Director or designee must approve transfers for medical reasons in advance. Medical transfers will be coordinated through the local ICE office of jurisdiction using established procedures. Change of Venue A change of venue by the Executive Office of Immigration Review from one jurisdiction to another. Recreation When the required recreation is not available, a detainee will have the option of transferring to a facility that offers the required recreation. Security Security transfers are conducted, for example, when the detainee becomes a threat to the security of the facility, e.g. the detainee is violent or has caused a major disturbance or is threatening to cause one, or a situation exists that is threatening to staff or other detainees and cannot be controlled through the use of segregation housing. In these cases, detainees may be transferred to a higher-level facility. Other Needs of ICE Detainees may be transferred to other facilities for various reasons, such as to eliminate overcrowding or to meet special detainee needs, etc. US Immigration and Customs Enforcement, Detention Operations Manual, Detainee Transfer, June 16, 2004, http://www.ice.gov/doclib/pi/dro/opsmanual/DetTransStdfinal.pdf (accessed November 4, 2009), pp. 2-3.

[52] The detainee shall not be notified of the transfer until immediately prior to leaving the facility. At that time, the detainee shall be notified that he/she is being moved to a new facility within the United States, and not being deported. Following transfer notification, the detainee shall normally not be permitted to make or receive any telephone calls or have contact with any detainee in the general population until the detainee reaches the detention facility. Ibid., p. 2.

[53] When counsel represents a detainee, and a G-28 has been filed, ICE shall notify the detainees representative of record that the detainee is being transferred from one detention location to another. For security purposes, the attorney shall not be notified of the transfer until the detainee is en route to the new detention location. Ibid., p. 2.

[54] Human Rights Watch meeting with various ICE officials, May 2008; letters to Assistant Secretary Julie Myers, Immigration and Customs Enforcement, June 24, 2008, and October 16, 2008 (letters on file with Human Rights Watch); Human Rights Watch meeting with NGO colleagues and various ICE officials, September 2008. We note that other colleague organizations also raised similar concerns. Letter to Assistant Secretary Julie Myers from American Civil Liberties Union, comments on the draft ICE/DRO Performance-Based Detention Standards, February 22, 2008.

[55] US Immigration and Customs Enforcement, Operations Manual ICE Performance Based National Detention Standards, part 7, chapter 41, http://www.ice.gov/doclib/PBNDS/pdf/transfer_of_detainees.pdf, p. 2.

[56] The additional factors to be taken into account are, in full: In addition, a specific detainee may be transferred to meet the specialized needs of the detainee. In making the determination as to whether to transfer a detainee, ICE/DRO will take into account: Security. A detainee may be transferred to a higher-level facility because of circumstances that cannot adequately be controlled through the use of segregation housing. Such security reasons might include, for example: When the detainee becomes a threat to the security of the facility; When the detainee is violent or has caused a major disturbance or is threatening to cause one; or When a detainees behavior or other circumstances present a threat to the safety of staff or other detainees. Legal Representation. ICE/DRO will consider whether the detainee is represented by legal counsel. In such cases, ICE/DRO shall consider alternatives to transfer, especially when the detainee is represented by local, legal counsel and where immigration court proceedings are ongoing. Medical. The Division of Immigration Health Services (DIHS) may recommend that a detainee in need of specialized or long-term medical care be transferred to a facility that can better meet those needs. The DIHS Medical Director or designee must approve transfers for medical reasons in advance. Medical transfers shall be coordinated through the local ICE/DRO office of jurisdiction using established procedures. Change of Venue. A detainee may be transferred from one jurisdiction to another to accommodate a change in venue by the Executive Office for Immigration Review (EOIR). Ibid.

[57] Ibid.

[58] Ibid.

[59] The detainee shall not be informed of the transfer until immediately prior to leaving the facility, at which time he or she shall be notified that he or she is being moved to a new facility within the United States and not being removed. Following notification, the detainee shall normally not be permitted to make or receive any telephone calls or have contact with any detainee in the general population until the detainee reaches the detention facility. Ibid., p. 3.

[60] Ibid. (emphasis added).The full standard states: When a detainee is represented by legal counsel, and a form G-28 has been properly executed and filed. The attorney shall be notified of the transfer once the detainee has arrived at the new detention location. Generally, notification will be made as soon as practicable, but no later than 24 hours after the transfer. When there are special security concerns, the Deportation Officer may delay the notification, but only for the period of time justified by those concerns.

[61] In fact, even if counsel has enough time to protest a clients transfer, many courts have interpreted the immigration laws to strip the courts of power to review any decision to transfer a detainee. *Van Dinh v. Reno*, 197 F. 3d 427, 434 (10th Cir. 1999). Courts are particularly unable to review transfer decisions if these occur before the NTA is filed. US law grants jurisdiction to federal courts over removal proceedings, and removal proceedings do not commence until the NTA is filed, so any actions prior to the filing of the NTA (such as transfer or the timing of when to file the NTA) are generally seen as unreviewable. *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) (We construe 1252(g), which removes our jurisdiction over decision[s] ... to commence proceedings to include not only a decision in an individual case whether to commence, but also when to commence, a proceeding); *Richards-Diaz v. Fasano*, 233 F.3d 1160, 1165 (9th Cir. 2000) (We are in no position to review the timing of the Attorney Generals decision to commence proceedings.).

[62] Letter from Jane Holl Lute, deputy secretary of the Department of Homeland Security, to Michael Wishnie and Paromita Shah, July 24, 2009, http://www.nationalimmigrationproject.org/DHS%20denial%20-%207-09.pdf (accessed November 4, 2009) (denying the Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees.).

[63] See Appendix for Human Rights Watchs original request to ICE and its response.

[64] The Fifth Circuits interpretations of immigration law are discussed in more detail in Chapter X. There we point out, for example, that the circuit has ruled that two or more misdemeanor convictions qualify as aggravated felonies, and therefore bar non-citizens from applying for cancellation of removal (see note 165 and accompanying text). The circuit also has one of the lowest rates of remand for asylum claims, a subject that is also discussed in Chapter X.

[65] Email from Jennifer English Lynch, director of Membership, American Immigration Lawyers Association, Washington, DC, to Human Rights Watch, August 31, 2009 (email on file with Human Rights Watch).

[66] We note that ICE announced in August 2009 that it will no longer house detained immigrant families at the Hutto facility, which will presumably reduce the number of juvenile detainees transferred there. Annabelle Garay, Families Slowly Leaving Texas Facility, Associated Press, September 9, 2009, http://www.ajc.com/news/nation-world/families-slowly-leaving-texas-134942.html (accessed November 4, 2009).

[67] See, for example, ACLU Sues U.S. Immigration Officials and For-Profit Corrections Corporation Over Dangerous and Inhumane Housing of Detainees, ACLU Press Release, January 24, 2007, http://www.aclu.org/prison/conditions/28127prs20070124.html (accessed November 4, 2009) (describing lawsuit brought by the ACLU for failure to provide adequate medical care in immigration detention) ; ACLU Sues Over Lack of Medical Treatment at San Diego Detention Facility, ACLU Press Release, June 13, 2007, http://aclu.org/immigrants/detention/30095res20070613.html (accessed November 4, 2009) (same); Dana Priest and Amy Goldstein, Careless Detention: System of Neglect, *The Washington Post*, May 11, 2008, http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html (accessed November 4, 2009); In Custody Deaths, *The New York Times*, http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration_detention_us/incustody_deaths/index.html (accessed November 4, 2009) (collecting articles published by the *Times* about immigrant detainee deaths and failure to provide medical care from 2005 to 2009); US House of Representatives, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Hearing on Problems with Immigration Detainee Medical Care, June 4, 2008 http://judiciary.house.gov/hearings/hear_060408.html (accessed on November 4, 2009).

[68] National Commission on Law Observance and Enforcement (the Wickersham Commission), Report on the Enforcement of the Deportation Laws in the United States, 1931, p. 109.

[69]See, for example, *Baltazar-Alcazar v. INS*, 386 F. 3d 940 (9th Cir. 2004).

[70] Ibid. (internal citations omitted).

[71] Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication,*Stanford Law Review*, vol. 60, November 2007, p. 340. See also, Human Rights First, In Libertys Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security, 2004, http://www.humanrightsfirst.org/about_us/events/Chasing_Freedom/asylum_report.htm (accessed November 4, 2009), p. 39 (citing Georgetown University Institute for the Study of International Migration analysis of US government statistics showing that asylum seekers are up to six times more likely to be granted asylum when they are represented.).

[72]International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, art. 13 (emphasis added).

[73] Immigration and Nationality Act, Section 292, 8 U.S.C. Section 1362.

[74] 8 C.F.R. Section 292.5(b).

[75] Human Rights Watch telephone interview with attorney Thomas S. (pseudonym), Los Angeles, California, February 2, 2009.

[76] Department of Homeland Security, Office of Inspector General, Immigration and Customs Enforcements Tracking and Transfers of Detainees,OIG-09-41, March 2009, http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf (accessed November 4, 2009), p. 8.

[77] Ibid., p. 7.

[78] Schriro Detention Report, October 6, 2009, http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf, p. 23.

[79] Human Rights Watch telephone interview with attorney JJ Rosenbaum, New Orleans, Louisiana, January 27, 2009.

[80] Human Rights Watch telephone interview with Tom Jawetz, American Civil Liberties Union, National Prison Project, Washington, DC, January 8, 2008.

[81] Human Rights Watch telephone interview with Holly Cooper, immigration attorney and clinical professor of law, University of California Davis School of Law, Davis, California, January 27, 2009.

[82] Human Rights Watch interview with Tae Johnson, May 12, 2008.

[83] Email communication from Natalie S. (pseudonym) to Human Rights Watch, April 16, 2008; Human Rights Watch interview with Thomas P., April 22, 2008.

[84]*Garcia-Guzman v. Reno*, 65 F. Supp.2d 1077, 1079 (N.D. Cal. 1999).

[85] Human Rights Watch telephone interviews with Andrea Black, Detention Watch Network, Washington, DC, October 26, 2007;

attorney Christopher Nugent, Washington, DC, October 31, 2007; Benita Jain, staff attorney, New York Defenders Association, New York, NY, November 7, 2007; Lindsay Marshall, executive director, Florence Project, Florence, Arizona, November 14, 2007; Elizabeth Badger, Political Asylum/Immigration Representation Project, Boston, MA, November 9 2007; Paromita Shah, associate director of the National Immigration Project of the National Lawyers Guild, Washington, DC, December 6, 2007.

[86] Human Rights Watch telephone interview with Eleni Wolfe, immigration attorney, Heartland Alliance, Chicago, Illinois, January 29, 2009.

[87] Although the location of this transferred detainee was not revealed in the OIGs report (report referenced in footnote 32), Human Rights Watch filed a FOIA request to learn his or her pre-transfer location. Letter to Human Rights Watch in response to FOIA Request No. 2009-073 from Katherine R. Gallo, assistant counsel to the Inspector General, US Department of Homeland Security, April 28, 2009 (letter on file with Human Rights Watch).

[88] Department of Homeland Security, Office of Inspector General, Review of U.S. Immigration and Customs Enforcements Detainee Tracking Process, http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-08_Nov06.pdf, p. 4.

[89] Department of Homeland Security, Office of Inspector General, Immigration and Custom Enforcements Tracking and Transfers of Detainees, OIG-09-41, March 2009, http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf (accessed November 4, 2009), p. 5.

[90] Note: INS Transfer Policy: Interference with Detained Aliens Due Process Right to Retain Counsel, *Harvard Law Review*, vol. 100, June 1987, p. 2001.

[91] Human Rights Watch telephone interview with Eleni Wolfe, January 29, 2009.

[92] Human Rights Watch telephone interview with Holly Cooper, January 27, 2009.

[93] Human Rights Watch telephone interview with attorney Anne Relais, Chicago, Illinois, January 27, 2009.

[94] Human Rights Watch telephone interview with Holly Cooper, January 27, 2009.

[95] Cormac T. Connor, Note: Human Rights Violations in the Information Age, *Georgetown Immigration Law Journal*, vol. 16, Fall 2001, p. 217 (Body language is of extreme importance to establishing the credibility of a witness. Numerous studies have shown the overwhelming weight the court places on body language in American culture, failure to make eye contact triggers feelings of distrust in an observer. Thus, one of the main criticisms of the use of videoconference techniques in the courtroom has been the impossibility of maintaining eye contact. Furthermore, studies on effective public speakers have found that 90% of persuasive effectiveness comes from the speakers physical attractiveness, warmth, sympathy, movements, gestures, clothing, and voice.).

[96] Human Rights Watch telephone interview with Yarela Hardwood, Brooklyn, New York, January 23, 2009.

[97] Letter from the Executive Office for Immigration Review to Human Rights Watch, July 1, 2008 (letter on file with Human Rights Watch).

[98] Human Rights Watch telephone interview with Holly Cooper, January 27, 2009.

[99] Human Rights Watch telephone interview with John Lawitt, immigration attorney, El Paso, Texas, January 29, 2009.

[100] Human Rights Watch telephone interview with Rebecca Schreve, January 29, 2009.

[101] Human Rights Watch telephone interview with John Lawitt, January 29, 2009.

[102] Human Rights Watch interview with John M. (pseudonym), Florence Service Processing Center, Florence, Arizona, May 1, 2008.

[103] Ibid.

[104] Human Rights Watch interview with Kwan I. (pseudonym), Port Isabel Service Processing Center, Los Fresnos, Texas, April 23, 2008 (interview conducted with telephone interpreter).

[105]*Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385 (C.D. Cal. 1982) (preliminary injunction); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1511 (C.D. Cal. 1988) (permanent injunction), affd sub nom. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

[106] Human Rights Watch telephone interview with Anne Relais, January 27, 2009.

[107]*Sasso v. Milhollan*, 735 F. Supp. 1045, 1049 (S.D. Fla. 1990) (rejecting detainees claim that attorney will not be able to travel to El Paso, thereby abrogating his right to counsel.); *Dai v. Caplinger*, 1995 WL 241861, *2 (E.D. La.1995) (even though there is a great distance between Louisiana and California, [a]s long as petitioners are given reasonable access to the telephones, they have not been denied their right of access to counsel.).

[108] Human Rights Watch telephone interview with Thomas S., February 2, 2009.

[109] Schriro Detention Report, October 6, 2009, http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf, p.24.

[110] 8 U.S.C. Section 1362 (emphasis added).

[111] Human Rights Watch interview with Michael M. (pseudonym), South Texas Detention Complex, Pearsall, Texas, April 25, 2008.

[112] Ibid.

[113] Human Rights Watch telephone interview with Zubair A. (pseudonym), Otero County Processing Center, February 11, 2009.

[114] Human Rights Watch interview with Paulette F. (pseudonym), Pinal County Jail, Florence, Arizona, May 1, 2008.

[115] Human Rights Watch interview with Roberto G. (pseudonym), Florence Correctional Center, May 2, 2008.

[116] Human Rights Watch telephone interview with immigration attorney Margarita Silva, Phoenix, Arizona, January 29, 2009.

[117] Testimony of Christina Fiflis on behalf of the American Bar Association, Subcommittee on Border, Maritime and Global Counterterrorism, Committee on Homeland Security, US House of Representatives, on Crossing the Border: Immigrants in Detention and Victims of Trafficking, March 15, 2007, http://www.abanet.org/publicserv/immigration/fiflis_testimony_before_subcommittee.pdf (accessed November 4, 2009).

[118] Human Rights Watch interview with Dian K. (pseudonym), South Texas Detention Complex, Pearsall, Texas, April 25, 2008.

[119] Human Rights Watch interview with Javier R. (pseudonym), Eloy Detention Facility, Eloy, Arizona, April 30, 2008.

[120] Human Rights Watch telephone interviews with Megan Mack, American Bar Association, Washington, DC, November 14, 2007; Tom Jawetz, January 8, 2008; Paromita Shah, December 6, 2007.

[121]*Committee of Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1437 (9th Cir. 1986) (quoting and affirming district courts statement).

[122] 8 C.F.R. Sections 3.19, 3.14(a).

[123] Immigration and Naturalization Act, Section 236, 8 U.S.C. Section 1226.

[124] Zachary Nightingale, General Notes on Representing Persons Detained by INS, National Immigration Project, January 21, 2002, http://www.nationalimmigrationproject.org/ImmRightsRes/zachbond.htm (accessed November 4, 2009) (emphasis in original).

[125] ICCPR, art. 9.4 (emphasis added).

[126] Human Rights Watch interview with Yuan Z. (pseudonym), Port Isabel Service Processing Center, Los Fresnos, Texas, April 24, 2008.

[127]Human Rights Watch telephone interview with Holly Cooper, January 27, 2009.

[128] Ibid.

[129] Human Rights Watch interview with Thomas P., April 22, 2008.

[130] Email communication from Natalie S. (pseudonym) to Human Rights Watch, April 16, 2008.

[131] Human Rights Watch telephone interview with John Lawitt, January 29, 2009.

[132] Letter from constituent forwarded by US Representative Peter King to ICE, February 1, 2007 (provided to Human Rights Watch in response to our FOIA request to ICE regarding detainee transfers) (letter on file with Human Rights Watch).

[133]*Matter of Rahman*, 20 I & N Dec. 480, 483 (BIA 1992).

[134] Ibid.

[135]*Sanchez-Fuentes v. INS*, 9 F.3d 1553 (9th Cir. 1993) (unpublished table decision) (emphasis added).

[136]*Matter of Rahman*, 20 I & N Dec. 480, 485 (BIA 1992) (immigration judge not required to change venue to accommodate request for distant attorney); *Mayers v. I.N.S.*, 70 F.3d 1268, 1268 (5th Cir. 1995) (immigration judge not required to change venue despite fact that immigration proceedings were in Louisiana and attorney was in New York, necessitating that Mayers proceed without counsel.).

[137] See Chapter X, below.

[138] Human Rights Watch interview with Christina Powers, Florence Immigrant and Refugee Rights Project, December 27, 2007.

[139]*Garcia-Guzman v. Reno*, 65 F. Supp.2d 1077, 1079 (N.D. Cal. 1999).

[140] Ibid. At least one court has found that an immigration judge abused his discretion when concluding that he simply had no power to consider the issue when a change of venue was requested by a detainee. *Lovell v. INS*, 52 F.3d 458, 460 (2d Cir. 1995). Nevertheless, using the standard applied by all courts reviewing claims that immigration judges abused their discretion, even this court found that there was no need to reverse the immigration judges ruling since the detainee failed to show prejudice resulting from [the judges] failure to consider his motion for a change of venue. *Lovell* at 461.

[141] Human Rights Watch telephone interview with Holly Cooper, January 27, 2009.

[142] Human Rights Watch interview with Nurhan T. (pseudonym), Port Isabel Service Processing Center, Los Fresnos, Texas, April 23,

2008.

[143] Human Rights Watch telephone interview with John Lawitt, January 29, 2009.

[144] Human Rights Watch interviews with: Nurhan T. (pseudonym), April 23, 2008; Patrick H. (pseudonym), South Texas Detention Complex, Pearsall, Texas, April 23, 2008; Salim A. (pseudonym), South Texas Detention Complex, Pearsall, Texas, April 25, 2008; Dian K. (pseudonym), South Texas Detention Complex, Pearsall, Texas, April 25, 2008.

[145] Communication from Executive Office for Immigration Review to Human Rights Watch, July 1, 2008 (communication on file with Human Rights Watch).

[146]*Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

[147] Human Rights Watch telephone interviews with Rebecca Sharpless, supervising attorney at Florida Immigrant Advocacy Center, November 8, 2007; Benita Jain, November 7, 2007; Megan Mack, November 14, 2007; Elizabeth Badger, November 9, 2007; Paromita Shah, December 6, 2007.

[148] INA Section 240A(b)(1)(D), 8 U.S.C. Section 1229b(b)(1)(D) (nonpermanent residents); INA Section 240A(b)(2)(A)(v), 8 U.S.C. Section 1229b(b)(2)(A)(v) (abused spouses).

[149] Human Rights Watch interview with Antonio G. (pseudonym), Florence Correction Center, Florence, Arizona, May 2, 2008.

[150] Letter to Representative Marty Meehan from [name redacted], June 29, 2006 (provided to Human Rights Watch in response to our FOIA request to ICE regarding detainee transfers) (letter on file with Human Rights Watch).

[151] Human Rights Watch interview with Dian K., April 25, 2008.

[152] Human Rights Watch interview with Esteban G. (pseudonym), South Texas Detention Complex, Pearsall, Texas, April 25, 2008.

[153] Human Rights Watch telephone interview with Benita Jain, November 7, 2007.

[154] Ibid.; Lindsay Marshall, November 14, 2007; Tom Jawetz, January 8, 2007; Kathleen Sullivan, Detention Project manager and senior attorney, Catholic Legal ImmigrationNetwork Inc., Washington, DC, December 19, 2007; Paromita Shah, December 6, 2007.

[155] Human Rights Watch interview with Miguel A. (pseudonym), Port Isabel Service Processing Center, Los Fresnos, Texas, April 23, 2008.

[156] Email to Human Rights Watch from attorney Stephanie Goldsborough, San Francisco, California, September 14, 2009.

[157]*Cheuk Fung S-Yong v. Holder*, 2009 WL 2591671, *5 (9th Cir. 2009) (There are no documents of conviction in the administrative record-indeed, there are no documents *at all* in the record, other than the governments two-page notice to appear-and it is impossible to tell from the hearing transcript the exact nature of the document the immigration judge relied upon.) (emphasis in original); *Ba v. Gonzales*, 228 Fed. Appx. 7, 10 (2d Cir. 2007) (the IJ failed to offer a reasoned explanation for deferring to an unauthenticated print-out of a RAP sheet rather than the identity documents submitted by Ba, especially in light of the fact that the name and birth date discrepancies were minor.); *Hernandez-Guadarrama v. Ashcroft,* 394 F.3d 674, 683 (9th Cir. 2005) (In this case, the governments proof (even if it were admissible) is not sufficient to carry its very demanding burden. A single affidavit from a self-interested witness not subject to cross-examination simply does not rise to the level of clear, unequivocal, and convincing evidence required to prove deportability.).

[158] Letter to Attorney General Alberto Gonzales from (name redacted), January 18, 2007 (provided to Human Rights Watch in response to our FOIA request to ICE regarding detainee transfers) (letter on file with Human Rights Watch).

[159]ICCPR, art. 13 (emphasis added).

[160] UN Human Rights Committee, The position of aliens under the Covenant, General Comment No. 15, 1986, http://www.unhchr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument (accessed November 16, 2009), paras. 9 and 10.

[161]*Avramenkov v. INS*, 99 F.Supp.2d 210, 214 (D. Conn. 2000).

[162] US Attorney General Robert Jackson addressing Congress in 1940, as cited by Appellate Division Justice Lawrence H. Cooke, before the Joint Committee on Court Reorganization, Supreme Court Building, Mineola, New York, September 24, 1973, http://www.archive.org/stream/reformoffederalc06unit/reformoffederalc06unit_djvu.txt (accessed November 4, 2009).

[163] The states within the jurisdiction of each circuit are as follows: (District of Columbia: Washington, DC), (1st: Maine, Massachusetts, New Hampshire, Rhode Island, Puerto Rico), (2nd: Connecticut, New York, Vermont), (3rd: Delaware, New Jersey, Pennsylvania, Virgin Islands), (4th: Maryland, North Carolina, South Carolina, Virginia, West Virginia), (5th: Louisiana, Mississippi, Texas), (6th: Kentucky, Michigan, Ohio, Tennessee), (7th: Illinois, Indiana, Wisconsin), (8th: Arkansas, Iowa, Missouri, Minnesota, Nebraska, North Dakota, South Dakota), (9th: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington), (10th: Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming), (11th: Alabama, Florida, Georgia).

[164] See *Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008) (finding that the second misdemeanor offense cannot be treated as an aggravated felony when the first conviction was not at issue in the prosecution of the second offense).

[165] See *United States v. Cepeda-Rios*, 530 F.3d 333, 335 (5th Cir. 2008) (finding, after the U.S. Supreme Court decision in *Lopez v.*

Gonzales, 549 U.S. 47 (2006), that two or more state misdemeanor drug possession convictions qualify as aggravated felonies, and therefore bar non-citizens from applying for cancellation of removal under INA 240A, 8 U.S.C. 1229b).

[166] Human Rights Watch interview with Jeffrey J. (pseudonym), South Texas Detention Complex, Pearsall, Texas, April 25, 2008.

[167]*Alsol v. Mukasey*, 548 F.3d 207, 219 (2d Cir.2008) (deciding that a second simple possession misdemeanor conviction does not constitute an aggravated felony for immigration law purposes).

[168] Human Rights Watch telephone interview with Jeffrey J., Jamaica, October 10, 2008.

[169] Human Rights Watch interview with Rafael S. (pseudonym), South Texas Detention Complex, Pearsall, Texas, April 25, 2008.

[170]*United States v. Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002).

[171]*United States v. Cepeda-Rios*, 530 F.3d 333, 335 (5th Cir. 2008).

[172]*Mortera-Cruz v. Gonzales*, 409 F.3d 246, 256 (5th Cir. 2005).

[173]*Acosta v. Gonzales*, 439 F.3d 550, 556 (9th Cir. 2006); *Padilla-Caldera v. Gonzales*, 426 F.3d 1294, 1296 (10th Cir. 2005).

[174]*Renteria-Gonzalez v. INS*, 322 F.3d 804, 814 (5th Cir. 2002) (finding that a vacated conviction, federal or state, remains valid for purposes of the immigration laws). Other Circuits disagreesee, for example, *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1129 (10th Cir. 2005) (noting that convictions which have been vacated on the merits cannot serve as basis for aliens removal); *Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006) (stating that aggravated felony conviction that had been vacated could not serve as basis for removal); *Sandoval v. I.N.S.*, 240 F.3d 577, 583 (7th Cir. 2001) (non-citizen convicted in state court of possession of more than 30 grams of marijuana was not subject to deportation due to conviction, where conviction was vacated on post-conviction motion and sentence modified consistently with first time conviction for possession of less than 30 grams.).

[175] The 1967 Protocol Relating to the Status of Refugees, to which the United States is a party, binds parties to abide by the provisions of the Refugee Convention, including the requirement that no state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Convention relating to the Status of Refugees (Refugee Convention), 189 U.N.T.S. 150, entered into force April 22, 1954, art. 33.

[176] Human Rights First, In Libertys Shadow, http://www.humanrightsfirst.org/about_us/events/Chasing_Freedom/asylum_report.htm, p. 33.

[177] Ramji-Nogales, Schoenholtz, and Schrag, Refugee Roulette, *Stanford Law Review*, p. 376.

[178]*Abay v. Gonzales*, 368 F.3d 634, 643 (6th Cir. 2004) (recognizing that parent may be granted asylum based on fear of the torture of her daughter through female genital mutilation).

[179]*Olowo v. Ashcroft*, 368 F.3d 692, 701 (7th Cir. 2004) (denying asylum based on the fact that the mother herself did not fear future genital mutilation).

[180]*Abebe v. Ashcroft*, 379 F.3d 755, 759 (9th Cir. 2004) (first appeared to follow Seventh Circuit in *Olowo,* holding that risk that daughter would face genital mutilation did not establish a well-founded fear of persecution, until a majority of the court voted to rehear the case *en banc* and remanded case to Board of Immigration Appeals to reconsider the decision).

[181]*Mwembie v. Gonzales,* 443 F.3d 405, 415 (5th Cir. 2006) (finding that the imprisonment and repeated rapes of Ms. Mwembie in the Democratic Republic of the Congo (DRC) were suffered not because of her incarceration due to her political opinion or membership in a particular social group, but rather because she was incarcerated as a part of a legitimateinvestigationinto the assassination of the DRCs head of state).

[182]*Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (recognizing that rape constitutes persecution and torture).

[183] Immigration and Nationality Act, Section 208(a)(2)(D), 8 U.S.C. Section 1158(a)(2)(D)(2000).

[184]*Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Diallo v. Gonzales*, 447 F.3d 1274, 1281 (10th Cir. 2006); *Sukwanputra v. Gonzales*, 434 F.3d 627, 634 (3d Cir. 2006).

[185]*Ramadan v. Gonzales*, 479 F.3d 646, 655 (9th Cir. 2007).

[186] See cases cited in footnote 184.

[187] Human Rights Watch telephone interview with Rebecca Schreve, January 29, 2009.

[188] Human Rights Watch telephone interview with Eleni Wolfe, January 29, 2009.

[189] Human Rights Watch telephone interview with Anne Wideman, licensed clinical psychologist, Maryland, January 29, 2009.

[190] Detainees and their attorneys reported paying between 75 cents and 3 dollars per minute for phone calls from detention centers in Texas, Arizona, and New Mexico. Human Rights Watch interview with Jianyu C. (pseudonym), South Texas Detention Complex, April 25, 2008; Human Rights Watch telephone interview with JJ Rosenbaum, January 27, 2009.

[191] Human Rights Watch interview with Jianyu C., April 25, 2008.

[192] Human Rights Watch telephone interview with Zubair A., February 11, 2009.

[193] Letter to J. Bauer, aide to Governor Jeb Bush of Florida, from [name redacted], May 7, 2004, forwarded to ICE by Mayra Sutton, caseworker for Governor Bush on August 26, 2004 (provided to Human Rights Watch by ICE in response to our FOIA request regarding detainee transfers) (letter on file with Human Rights Watch).

[194] Human Rights Watch telephone interview with Holly Cooper, January 27, 2009.

[195] Human Rights Watch telephone interview with Anne Wideman, January 29, 2009.

[196] Ibid. The woman described in this case study ultimately was granted relief from deportation and allowed to remain in the United States.

[197] Human Rights Watch telephone interview with Rebecca Sharpless, November 8, 2007.

[198] Human Rights Watch telephone interview with Holly Cooper, January 27, 2009.

[199] Human Rights Watch telephone interview with Georgina V. (pseudonym), Brooklyn, New York, January 23, 2008.

[200] Human Rights Watch telephone interview with Margarita Silva, January 29, 2009.

[201] Human Rights Watch telephone interview with attorney Muhammad Yunus, Jackson Heights, New York, January 29, 2009.

[202] Ibid. (letter read to Human Rights Watch researcher by Mr. Yunus).

[203] Letter from Immigration and Naturalization Service to family member, date redacted (You have requested INS transfer your cousin to a facility closer to his family. Unfortunately, due to budgetary restrictions and lack of detention space, INS is unable to grant your request.) (letter on file with Human Rights Watch); letter from US Department of Justice, Executive Office for Immigration Review to detainee, August 21, 2006 (Sir, the Dallas Immigration Court does not have any control that has to do with transfers.) (letter on file with Human Rights Watch); letter from Immigration and Naturalization Service to detainee, date redacted (You have requested that the Immigration and Naturalization Service (INS) exercise its discretion and allow you to transfer to another INS facility The INS has no plans to transfer you to a different facility at this time.) (letter on file with Human Rights Watch); letter from Immigration and Naturalization Service [sic: INS ceased to exist in 2003, yet this letter appears on INS letterhead and is dated 2008] to detainee, September 29, 2008 (INS cannot transfer you to a different facility) (letter on file with Human Rights Watch).

[204] United Nations High Commissioner for Refugees (UNHCR), Refugee Children: Guidelines on Protection and Care, Geneva: 1994, p. 37. (Detention [of child asylum seekers] must only be used as a last resort and must always have a proper justification. For example, when identity documents have been destroyed or forged, a State might choose to detain an asylum seeker while identity is being established, but detention must be for the shortest period of time possible (CRC art. 37(b))).

[205] Human Rights Watch, Detained and Deprived of Rights: Children in the Custody of the US Immigration and Naturalization Service, vol. 10, issue 4, December 1998, http://www.hrw.org/en/reports/1998/12/01/detained-and-deprived-rights, pp. 4-5 (recommending to the INS that it develop alternatives to detention that include local social service agencies and foster families in the area in which the child was originally detained and that shelter-care facilities should be in major ports of entry to the Unites States, where culturally appropriate community resources and legal services are available. When possible, children should be placed in shelter-care facilities in the area in which they were originally apprehended or in which they have friends or relatives.)

[206] Human Rights Watch interview with expert working with unaccompanied children detained by ICE and ORR, January 29, 2009 (anonymity requested for job security reasons).

[207] Administration for Children and Families, US Department of Health and Human Services, fiscal year 2007 statistics.

[208] As of fiscal year 2007, there were 43 facilities across the United States capable of accommodating unaccompanied children. These facilities were located in Arizona (4), California (8), Oregon (1), Washington (3), Illinois (2), Indiana (2), Texas (17), New York (1), Virginia (1), and Florida (3). Administration for Children and Families, US Department of Health and Human Services, fiscal year 2007 statistics.

[209] Human Rights Watch interview with expert working with unaccompanied children detained by ICE and ORR, January 29, 2009 (anonymity requested for job security reasons).

[210]*Zhen v. INS*, 11 Fed. Appx. 801, 802 (9th Cir. 2001) (unpublished decision) (stating that As a teenager, Zhen had an altercation with agents of Chinas Birth Planning Department, who then told his parents that Zhen would be sterilized at age twenty. Zhens parents, fearful for his safety, put him on a boat to Guam, where Zhens uncle resided.).

[211] Ibid.

[212] Human Rights Watch interview with expert working with unaccompanied children detained by ICE and ORR, January 29, 2009 (anonymity requested for job security reasons).

[213] Special Immigrant Juvenile Status is codified at 8 U.S.C. Section 1101(a)(27)(J).

[214] Human Rights Watch interview with Emily M. (pseudonym), immigration attorney, Florence, Arizona, April 29, 2008.

[215] Human Rights Watch interview with expert working with unaccompanied children detained by ICE and ORR, January 29, 2009 (anonymity requested for job security reasons).

Transfers of Detained Immigrants Interfere with Lawyer Access and Right to Challenge Deportation