

# Chapter 11

## The Limitation Argument, Part 2: Minimizing the Transfer Method

### ABSTRACT

*Chapter 11's focus is also on the anti-transfer crowd's (ATC's) transfer-limitation-mission, this time addressing the claim that judicial transfer (JT) is only the permissible method. To establish this position, the ATC falsely floats the idea that JT is a constitutional requirement. Chapter 11 establishes that since there is no constitutional right to prosecution in JC, there is no constitutional right to JT prior to prosecution in CC. Some ATC members strongly object to the amenability-to-treatment considerations inherent in JT, however, this is due to the nebulous and ambiguous criteria employed and the potential discriminatory outcomes invited. Although all ATC folks prefer JT to PT, then, only some are willing to embrace traditional JT. Stripping amenability from JT, nevertheless, leaves judges with the solitary chore of gauging offenses, which prosecutors can do well and better. The bottom line is that the ATC demands JT because they know certainly that judges are less inclined than prosecutors to transfer.*

### INTRODUCTION

Although ATC folks disagree on how to construct the narrowest scope of possible transfer targets, there is unanimity that the only permissible method is JT. The explanation is that judges are less likely to transfer than are prosecutors. The one divide is how JT should operate.

### **Judicial Transfer (JT) Means There Is a Less Likely Prospect Of Transfer's Occurring**

Fearing prosecutors will transfer vast numbers of juveniles to CC, the ATC has gone to great lengths to portray prosecutorial transfer (PT) as illegitimate or evil (see Deitch, Barstow, Lukens, & Reyna, 2009; Feld, 1995, 2000, p. 125; Zimring, 1991). The ATC is upset that appellate courts have continuously up-

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held the validity of PT. These rulings have held it does not amount to an unconstitutional grant of power to these officials by the legislature (see Frost & Bonnie, 2000, pp. 183-4). These courts have ruled that there is no constitutional right to be prosecuted in JC, and that charging power rightfully belongs to the executive branch of government, not to the judicial branch. The ATC resents these appellate decisions as one observer claimed:

*This interpretation created a **perverse** incentive for state legislatures to **rewrite** judicial waiver laws altogether by instituting more statutory exclusion and prosecutorial discretion laws (Arya, 2010, p. 145, footnote omitted, emphases added).*

There is nothing perverse about PT, although the ATC disdain is perhaps understandable since prosecutors are indeed more likely to transfer. A good deal of the expansion of PT in the mid- to late-1990s was due to both a sharp rise in violent juvenile crime and an unwillingness of JC judges to transfer many of those offenders to CC (see McCarthy, 1994; Sanborn, 1996b).

Prosecutors are the chief law enforcers of the community. They are the victim's and society's representatives. Typically, prosecutors' transfer authorization needs only a qualified offense, and possibly a certain age and record. On the other hand, judges are less inclined to see wrongdoing only, and their only client is justice. Judges also usually have to rely upon a PO's assessment (and possibly treatment providers' analyses), and have more criteria to consider and satisfy before being authorized to transfer juvenile offenders. That judges transfer fewer offenders is easy to understand, then, as is the ATC's endorsement of this transfer method.

## **JT Is Allegedly a Constitutional Right**

Many of the ATC insist that their JT-only policy has constitutional roots, likely coupled with a claim there is a constitutional right to treatment (Comment, 1973; Flicker, 1981; Hirase, 1992; Kimbrell, 2015; Linares & Bunton, 2010; Manning, 2020; Mlyniec, 1976; Park, 2007; Vitiello, 1976). Some ATC members have gone as far as to declare that only a jury is authorized to transfer a juvenile offender to CC (Carroll, 2009; Kimbrell, 2015; Vannella, 2006).

The first U.S. Supreme Court case dealing with juvenile justice (JJ) was *Kent v. U.S.* in 1966. A juvenile offender from Washington, D.C., was transferred to CC without a hearing and the assistance of counsel. The Court ruled the transfer violated the statute that required a "full investigation" before transfer. Kent's appellate counsel challenged the transfer on statutory grounds. The Court ultimately heard the appeal because it is the highest appellate court in D.C. The decision was statutory-based, but ATC types have held on to an illusory take on the holding as being constitutional in nature. In *Kent*, the Supreme Court declared the statute required four rights be granted to youths facing transfer in the jurisdiction: counsel, a hearing, counsel's being granted access to the JC's records regarding the youth, and a requirement that the judge write supporting reasons for the transfer, should that be the decision.

The Supreme Court effectively proved *Kent* was not constitutional, nevertheless, when several years later, in *U.S. v Bland* (1972), the Court denied *certiorari* to a D.C. Circuit Court case that had upheld an offense exclusion (OE) statute that was passed reputedly as retaliation against the *Kent* decision. Supposedly, Congress did not agree with the Supreme Court that the transfer statute it had written was intended to require the rights the Court had granted. In response, Congress authorized prosecutors to transfer via an OE provision that eliminated all that the *Kent* holding had demanded, including a hearing

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