Litigating Habeas Corpus for Immigration Detainees

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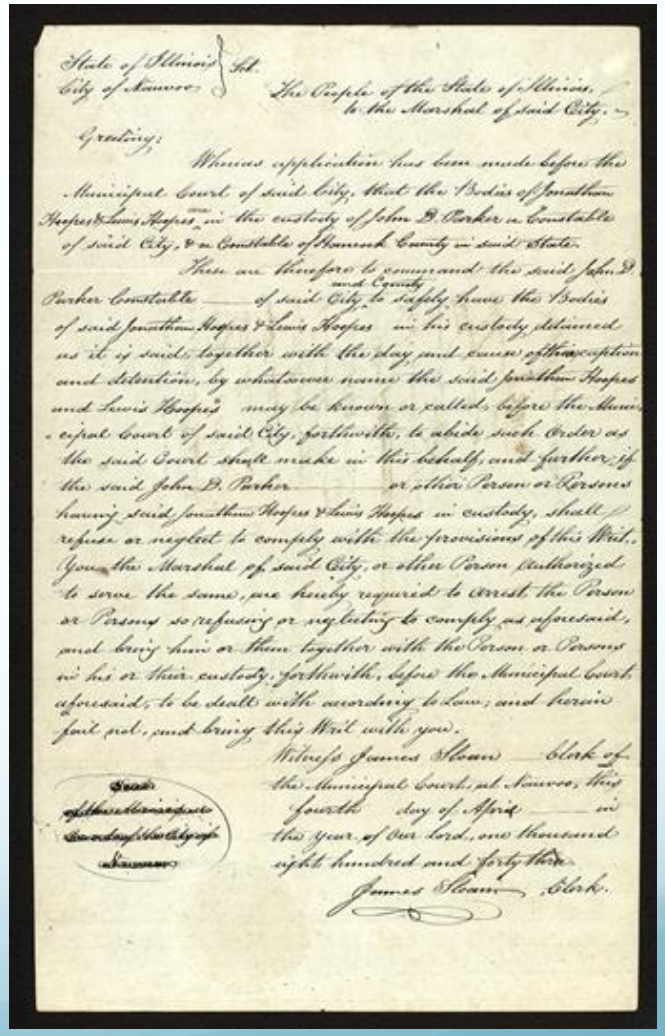
Alexandra Lampert & Zoey Jones
Brooklyn Defender Services

Prepared for the Vera Institute of Justice's SAFE Network and NYIFUP members.

Legal Overview and Potential Claims

What is Habeas Corpus?

- A common law writ to challenge illegal imprisonment
- Now codified at 28 U.S.C. § 2241 (for civil detainees)
- Generally used to either:
  - Challenge an individual's continued detention; or
  - Challenge a restraint on an individual's liberty
- Remedy in immigration context: usually a bond hearing but sometimes release



State of Illinois } ss.
City of Nauvoo }

The People of the State of Illinois,
to the Marshal of said City, —

Greeting:

Whereas application has been made before the Municipal Court of said City, that the Bodies of Jonathan Hoyes & Lewis Hoyes in the custody of John D. Parker a Constable of said City, & a Constable of Hancock County in said State.

These are therefore to command the said John D. Parker Constable and County of said City to safely have the Bodies of said Jonathan Hoyes & Lewis Hoyes in his custody detained as it is said, together with the day and cause of their caption and detention, by whatsoever name the said Jonathan Hoyes and Lewis Hoyes may be known or called, before the Municipal Court of said City, forthwith, to abide such Order as the said Court shall make in this behalf; and further, if the said John D. Parker or other Person or Persons having said Jonathan Hoyes & Lewis Hoyes in custody, shall refuse or neglect to comply with the provisions of this Writ, You the Marshal of said City, or other Person authorized to serve the same, are hereby required to arrest the Person or Persons so refusing or neglecting to comply as aforesaid, and bring him or them together with the Person or Persons in his or their custody, forthwith, before the Municipal Court aforesaid, to be dealt with according to Law; and herein fail not, and bring this Writ with you.

Witness James Sloan Clerk of the Municipal Court, at Nauvoo, this fourth day of April in the year of Our Lord, one thousand eight hundred and forty three.

James Sloan, Clerk.

Statutory Immigration Detention Authority

- 8 USC § 1226(a) (INA 236(a))
  - Applies "pending a decision on whether the alien is to be removed"
  - Eligible for a bond hearing
- 8 USC § 1226(c) (INA 236(c))
  - Applies to noncitizens convicted of certain criminal offenses
  - "Mandatory" detention
- 8 USC § 1225(b) (INA 235(b))
  - Applies to noncitizens seeking admission ("arriving aliens")
  - Eligible for parole
- 8 USC § 1231(a) (INA 241(a))
  - Applies to noncitizens with administratively final orders of removal
  - Eligible for post-order custody reviews ("POCRs")

Governing SCOTUS Decisions

- *Zadvydas v. Davis*, 533 U.S. 678 (2001)
  - Noncitizens with final removal orders, detained under 8 USC § 1231, cannot be detained indefinitely if they can't be physically deported.
- *Demore v. Kim*, 538 U.S. 510 (2003)
  - Facial challenge to mandatory detention statute, 8 USC § 1236(c), failed. The concept of no-bond detention during removal proceedings is not unconstitutional. Left open as-applied challenges to mandatory detention...
- *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)
  - Reversed Rodriguez v. Robbins (9th Cir.) and abrogated Lora v. Shanahan (2d Cir.)
  - 8 USC §§ 1236(c) and 1225(b) unambiguously require mandatory detention for duration of removal proceedings; no 6-month limitation can be read into statute
  - Remands to COA9 to consider whether mandatory detention violates Due Process Clause in first instance (COA9 remanded to district court—case still there)
- *Nielsen v. Preap*, 139 S.Ct. 954 (2019)
  - 8 USC § 1236(c)'s "when released" clause means *any time* after release
  - Leaves open possibility of due process violation based on gap between release from criminal custody and ICE arrest
- *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020)
  - Arriving alien lacked constitutional procedural due process right to judicial review of negative credible-fear determination
  - Implicates habeas petitions for 8 USC § 1225(b) detainees because limits due process rights of arriving aliens

Habeas Claims for Mandatory Detainees: 1226(c) & 1225(b)

- Prolonged civil detention without a bond hearing violates due process
  - Due process requires a bond hearing for prolonged detention
    - BUT, for some clients can argue *any* amount of detention is arbitrary and unreasonable based on their specific circumstances (e.g., no criminal record, very strong relief, serious unmet medical/mental health needs)
- Constitutional "when released" claim for 1226(c) detainees
  - Imposing mandatory detention on the basis of an offense committed many years ago violates due process because it is unfair to draw a conclusion of dangerousness based on stale conduct
  - Can file petition immediately, don't need prolonged period of detention
- DHS alleges wrong detention statute
  - E.g., client was admitted or entered EWI, not paroled; client's convictions don't trigger mandatory detention
  - Need to make these arguments before IJ and BIA as well

1226(c) prolonged detention claims post-*Jennings*

- Statutory decisions remain relevant
  - Courts addressed constitutional principles in applying the canon of constitutional avoidance
  - *See, e.g.*, *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081, 1091-92 (9th Cir. 2011) ("When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. . . . the risk of an erroneous deprivation . . . is substantial.")
- Bright line rule vs. multi factor test
  - Potentially relevant factors
    - Length of detention
    - Strength of immigration case
    - Family/community ties
    - Criminal history; length of incarceration for criminal offenses\
    - Is detention meaningfully different from crim detention (jail).
    - Whether the delay is attributable to the noncitizen

1226(c) prolonged detention claims post-*Jennings*

- Third Circuit
  - *German Santos v. Warden Pike Cty. Corr. Fac.*, 965 F.3d 203, 209 (3d Cir. 2020) (holding that, for petitioner's held under § 1226(c), at a certain point "due process requires the Government to justify continued detention at a bond hearing")

- Other Circuits
  - CA1: *Reid v. Donelan* (19-1900) – argued Dec 2020
  - CA9: *Rodriguez*: remanded to district court
    - "We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so." *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018)
    - Injunction remains in effect for *Rodriguez* class members in CDCA
    - Outside the CDCA: Mixed bag on bright-line rule
  - CA2: issue was fully briefed in *Fremont* but dismissed as moot before argument due to deportation
  - District court decisions are mixed. Mostly multi-factor tests (SDNY – *Sajous*)

Strategy Hypo:

- Multi-factor test vs. Bright Line Rule?
  - Your client is a 30-year-old LPR with severe developmental disorders, who has suffered multiple medical crises while in ICE detention. She is being held in a local jail that has terrible conditions and a history of substandard medical care. You've obtained an opinion from an evaluating doctor that she is not being adequately treated.
  - She is being charged as removable and held pursuant to 236(c) due to a drug conviction from 12 years earlier, when she was 18 and not in treatment for addiction. She received a sentence of probation for that conviction and afterward had been doing well in the community, once her mental and medical health issues were treated. She has three minor children (ages 2, 5, and 8) and was their primary caregiver until her ICE arrest. She has strong defenses to removal and extensive ties to the U.S., with a supportive family.
  - She has been detained by ICE for 14 months. She was pro se for the first year and you were just retained. Most of the delay in her case was due to adjournments asking for counsel, which a sympathetic IJ granted.
  - SHOULD YOU ARGUE THAT SHE'S ENTITLED TO A BOND HEARING UNDER A BRIGHT LINE 6-MONTH RULE, ARGUE AS-APPLIED FACTORS APPLY IN YOUR FAVOR, OR BOTH?

Strategy Hypo:

- Multi-factor test vs. Bright Line Rule?
  - Same facts as before, but your client has been detained by ICE for 2 months.
  - SHOULD YOU WAIT FOR FOUR MORE MONTHS TO FILE, OR FILE NOW AND ARGUE THAT IN THIS PARTICULAR CIRCUMSTANCE, EVEN 2 MONTHS IS TOO LONG TO WAIT FOR NEUTRAL REVIEW OF THE NEED FOR HER DETENTION? ANOTHER APPROACH?

§ 1225(b) prolonged detention claims post-*Jennings & Thuraissigiam*

- Due process rights of "arriving aliens": mixed rulings after *Thuraissigiam*
  - Compare: *Garcia v. Rosen,* No. 6:19-CV-06327 EAW, 2021 WL 118933, at *4 (W.D.N.Y. Jan. 13, 2021) (finding no PDP rights to bond hearing after *Thuraissigiam*); *Hassoun v. Searls*, No. 19-CV-370, 2020 WL 3496302, at *9 n.8 (W.D.N.Y. June 29, 2020) (distinguishing *Thuraissigiam* because the petitioner "is seeking not to be allowed into this country in the first instance, but to be freed from detention within it."), BUT decision vacated due to deportation
  - *Thuraissigiam*, 140 S. Ct. at 2013 n.12 (Sotomayor, J., dissenting) ("Presumably a challenge to the length or conditions of confinement pending a hearing before an immigration judge falls outside of that class of cases. Because respondent only sought promised asylum procedures, today's decision can extend no further than these claims for relief.").
- *Padilla v. ICE*– 953 F.3d 1134, 1151 (9th Cir. 2020)
  - Enjoined *Matter of M-S-*, finding individuals charged as EWI in expedited removal who passed CFI entitled to bond hearing.
  - But on Jan 11, 2021, SCOTUS granted cert, vacated and remanded to 9th Cir for further consideration in light of *Thuraissigiam.*
- *Abdi v. Duke* (W.D.N.Y.) – prior decision granting bond hearings to 1225(b) subclasses
  - Decertified class after *Jennings*

§ 1231(a) prolonged detention claims post-*Jennings*

- *Pham v. Guzman Chavez* – argued at SCOTUS Jan 11, 2021. Gov't appeal of CA4 decision that 236 applies to respondents in WOR proceedings, therefore entitled to a bond hearing if 236(a).
  - CA2 had also held that 236 applies. *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016).
  - CA3, CA9, CA6 find 241 applies. *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208 (3d Cir. 2018); *Padilla-Ramirez v. Bible*, 882 F.3d 826, 830–32 (9th Cir. 2017); *Martinez v. Larose*, 968 F.3d 555, 565–66 (6th Cir. 2020).

- Circuit split on the right to a bond hearing after prolonged detention
  - CA3 and CA9 have construed 241 to require a bond hearing after six months. *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208 (3d Cir. 2018); *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011)
    - *Aleman Gonzalez v. Barr,* 955 F.3d 762, 766 (9th Cir. 2020) (upholding *Diouf* post-*Jennings*) → cert petition pending
  - CA6 has found that *Jennings* precludes construing the statute to require a bond hearing. *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018); *Martinez v. Larose*, 968 F.3d 555, 565–66 (6th Cir. 2020).

Zadvydas Claims

- Noncitizens with final removal orders, detained under INA § 241, cannot be detained indefinitely.
- If no removal after 90 days, advocate for release from ICE pursuant to 8 U.S.C. § 1231(establishing 90-day removal period)
- If no removal after 6 months and ICE refuses to release, can argue that detainee must be released because there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas v. Davis*, 533 U.S. 678 (2001)
- Remedy: release!

Claims for VWP Entrants

- Visa Waiver Program ("VWP") Entrants
  - BIA says IJ's don't have bond jurisdiction for individuals in asylum-only proceedings under 8 U.S.C. § 1187. *See Matter of A-W-*, 25 I. & N. Dec. 45 (BIA 2009)
  - Argue that detention is governed by 8 U.S.C. § 1226
    - The only language in § 1187 concerning detention provides that § 1187 is not intended to create any right or duty regarding the "removal or release" of detained aliens.
    - *Matter of A-W-* is not entitled to deference under *Chevron;* Congress explicitly provides for detention and release of aliens during their removal proceedings under § 1226.
  - AND, make prolonged detention arguments outlined above

Claims for Prior UACs and ORR Age-Outs

- 8 U.S.C. § 1232(c)(2)(B) provides that youth transferred from ORR to DHS must be placed in the least restrictive setting.

- This includes: (1) youth who age-out of ORR custody and are transferred directly to ICE; and (2) arguably, youth who are released by ORR to a sponsor, and later detained by ICE.

- Argue that IJ/ICE must follow § 1232(c)(2)(B)

- May also have claim based on *Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017)
  - Nation-wide class settlement for minors currently or previously in ORR custody who were affected by allegations of gang-affiliation (including denial of USCIS app)

- AND make any applicable arguments from above

§ 1226(a) Burden of Proof

- 2d Circuit: *Velasco Lopez v. Decker,* 978 F.3d 842 (2020)
  - Applies *Matthews* to find due process requires gov't bear burden by clear and convincing evidence, considering Velasco Lopez's 15 month detention
  - Declines to adopt bright line rule

- Class Actions – have put burden on govt
  - *Brito v. Barr*, 415 F. Supp. 3d 258, 269 (D. Mass. 2019)→ 1st Cir
  - Onosamba-Ohindo v. Barr, No. 1:20-CV-00290 EAW, 2020 WL 5226495 (W.D.N.Y. Sept. 2, 2020) → 2nd Cir
  - Dubon Miranda v. Barr, 463 F. Supp. 3d 632 (D. Md. 2020)DMD → 4th Cir

- But see: 3d Cir: *Borbot v. Warden*, 906 F.3d 274 (3d Cir. 2018): suggests ok that burden is on respondent, but doesn't squarely decide. DNJ not sympathetic

- Courts addressing burden have also required IJ to consider: Ability to pay, alternatives to detention, proper weight to crim history
  - *See, e.g. - Fernandez Aguirre v. Barr*, 2019 WL 4511933, at *4 (S.D.N.Y. Sept. 18, 2019) (granting release)

Venue

- What if client is detained by ICE outside your jurisdiction?
- *Rumsfeld v. Padilla*, 542 U.S. 426 (2004): holds that habeas petitions should be brought against the "immediate custodian" who is usually "the warden of the facility where the prisoner is being held"
- Case law is mixed
  - District courts are split in SDNY: most find *Padilla* requires suit be brought against warden of jail in DNJ; some judges have held that ICE is true custodian and venue is proper in SDNY.
  - *See, e.g.*, Rodriguez Sanchez v. Decker, No. 18-CV-8798 (AJN), 2019 WL 3840977 (S.D.N.Y. Aug. 15, 2019) (finding FOD proper respondent and venue in SDNY)
  - *But see Kholyavski v. Achim*, 443 F.3d 946 (7th Cir. 2006) (local jail warden is proper respondent, not ICE field office director).

Strategy hypo: Where to file?

- Your client is detained under 1226(a)/236(a), and although he has a very sympathetic bond case, an IJ denied bond citing your client's one arrest for disorderly conduct that was ultimately dismissed. You think if the burden had been on the government, bond should have been granted. Your client's immigration case is taking place at the Varick Street Imm court in NYC but ICE is detaining him in the Hudson County Jail in NJ.
- Where should you file?

Strategy hypo: Where to file?

- Same as prior facts, but ICE moves your client to Etowah, Alabama, and then continues to hold his removal hearings in NYC using VTC. New York Deportation Officers continue to respond to your requests for release, but sometimes forward you to the New Orleans Field Office for other inquiries about his detention.
- Where should you file?

Jurisdiction-Stripping Provisions

- 8 U.S.C. § 1226(e)
  - "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.
- 8 U.S.C. §§ 1252(a)(2) & 1252(b)(9)
  - No court has jurisdiction to review "any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal" except through appeal of the final order to the circuit
- 8 U.S.C. § 1252(g)
  - "[N]otwithstanding any other provision of law…including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

Jurisdiction arguments takeaways

- Remember habeas cannot challenge the underlying order of removal
- Government will argue that the attorney general has the discretion to make this decision and no court can subject this to review 8 U.S.C. § 1226(e)
  - However AG's decisions have to follow the law -- Frame your arguments as legal questions appropriate for district court, not re-weighing the agency's discretionary decision
  - Respondents contend that 8 U.S.C. § 1226(e) restricts habeas review of the Attorney General's "discretionary judgment" on detention matters. But the Supreme Court has rejected a similar argument before: "Section 1226(e) contains no explicit provision barring habeas review[.]" *Demore*, 538 U.S. at 517.
  - Look up circuit caselaw where habeas petitions were considered
  - Moreover, the Ninth Circuit has made it clear that section 1226(e) "does not limit habeas jurisdiction over constitutional claims or claims of law." *Singh*, 638 F.3d at 1202. This includes "jurisdiction over questions of law, including application of law to undisputed facts[.]" *Id.* (internal citation omitted).

Filing the Petition and Requesting Expedited Relief

Before Filing

- Get admitted to your district court and register for an account with the Case Management/Electronic Case Files ("CM/ECF") system
  - Or obtain local counsel to co-counsel with you
  - Even if you're not admitted to any federal court, you can still register for a Pacer account and view federal court dockets online
- Consider whether filing a habeas petition make sense in your case:
  - Can release be obtained more quickly through litigating bond or relief?
  - Will habeas petition likely be mooted through grant of final relief or imposition of final removal order?
  - If granted bond hearing, will client be granted bond by IJ?
  - Have your habeas claims been exhausted before the agency or can you argue that exhaustion doesn't apply
- Request all relevant evidence from EOIR, such as hearing recordings
- Negotiate for a bond hearing, parole, or release with ICE and the U.S. Attorney's Office (and continue negotiating even if after habeas filing)
- Make sure no factual info in petition could harm merits case
- Obtain your client's permission and discuss privacy concerns
- Consider filing a motion to proceed under pseudonym or for a protective order if case involves sensitive information (e.g., cooperators, sex offenses)

Filing

1. File your case in the district court with venue over your petition
    - Direct questions re filing logistics to clerk of that court—they are usually very helpful!
2. Redact and file petition, exhibits, and civil coversheet pursuant to the local rules of your district court
    - Consult court rules re electronic vs. paper filings
    - Be mindful of PDF size and formatting restrictions when filing electronically
3. Consider filing supporting memorandum of law
4. Clerk will assign your case to a judge; when judge is assigned, read judge's individual rules—follow them
5. File paper courtesy copies with judge's chambers if required by individual rules
6. Serve opposing counsel: sometimes U.S. Attorney's Office, sometimes Office of Immigration Litigation
7. Negotiate briefing schedule or file motion for expedited relief

Tools to use to expedite relief

1. **Order to Show Cause**
   - Expedited Briefing
   - Must notify AUSA before requesting
   - 28 U.S.C. 2243 (return within 3 to 21 days)

2. **Temporary Restraining Order and/or Preliminary Injunction**
   - Expedited Relief
   - Notify AUSA before filing
   - TRO & PI standards are generally:
     - Likely to suffer irreparable harm in absence of preliminary relief
     - Likely to succeed on the merits
     - Balance of equities tips in their favor and Injunction is in the public interest

3. **File motion for interim release to bail**
   - Federal courts have authority to admit habeas petitioners to bail pending adjudication of their petitions
   - *See* Mapp v. Reno, 241 F.3d 221 (2d Cir. 2011):
     - petition for a writ of habeas corpus raises substantial claims; AND
     - Extraordinary circumstances exist that require release in order to make the writ effective.
   - Lucas v. Hadden, 790 F.2d 365 (3d Cir. 1986):
     - Make out a clear case for habeas relief on the law and facts; AND/OR
     - Exceptional circumstances exist warranting special treatment.

Remote Representation Considerations

1. **Declarations from clients will be harder to obtain and have signed**
   - Consider filing declaration from attorney instead describing relevant facts
   - Using electronic signatures/copies of signatures with permission of client
   - Also, habeas petitions generally don't need to be supported by factual exhibits, but motions (including for preliminary or expedited relief) *do* need to be supported by exhibits

2. **Some federal courts currently have special filing procedures in place; check local rules**

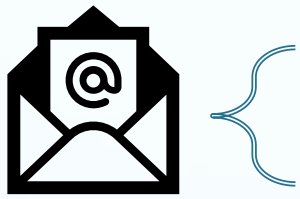
3. **Oral argument may be by video (e.g., Microsoft Teams, Skype, Zoom) or telephonic conference lines**
   - Check local practices/contact court if unsure. Moot if you can using the same format.

4. **Limitations in access to client and delays in immigration proceedings caused by remote rep are relevant to prolonged detention claims and, in some cases, may form independent basis for habeas relief**
   - For example, if you are not being provided with confidential in-person or remote access to your client, you could request such access through habeas petition

Questions? Ideas?

“Help us raze/Raze the prisons/To the ground” – Joan Baez

Individual Case Consultations for SAFE & NYIFUP



- safecitiesconsult@bds.org

- nyifupconsult@bds.org