

NUTS AND BOLTS OF FILING A PETITION FOR WRIT OF HABEAS CORPUS IN FEDERAL COURT

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Presented by: AILA Federal Court Litigation Section

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- Resources include:
 - sample briefs
 - Seminars
 - quarterly calls on hot topics in federal court litigation
 - Fearless Litigation monthly podcast highlighting cutting-edge litigation strategies
- <http://www.aila.org/membership/communities/sections/federal-court>

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- **Mobilizing** lawyers to defend immigrants
- **Teaching** cutting-edge strategies to protect rights and **challenge** deportation machinery
- **Amplifying** individual representation through advocacy and litigation
- **Building a movement** of lawyers committed to immigration reform
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Petition for Writ of Habeas Corpus

- What type of habeas?
- What are you challenging?
- What are you not challenging?
- Who are you challenging?
- Where are you challenging?
- Why are you challenging?
- What relief are you seeking?

What Type of Habeas?

- Federal habeas statutes are in 28 USC §§ 2241 – 2255.
- Three types of habeas (generally):
 - **28 USC § 2241: Conditions or lawfulness of detention**
 - 28 USC § 2254: Challenging state conviction
 - 28 USC § 2255: Challenging federal conviction

What Are You Challenging?

- You are challenging ongoing custody or restraint on liberty (unreasonable OSUP).
- You are challenging the executive's authority to continue to detain the alien under 28 USC §2241: "The writ of habeas corpus shall not extend to a prisoner unless— . . .
(3) He is *in custody* in violation of the Constitution or laws or treaties of the United States"

What Are You NOT Challenging?

- You are not challenging:
 - The validity of the underlying conviction (if any), see 28 USC § 2254, 28 USC § 2255;
 - The validity of the underlying removal order or process (if any), see 8 USC § 1252;
 - The denial or delay of a benefits petition, the denial or delay of citizenship/naturalization application, or denied entry (if any), see 5 USC § 706 (APA), 8 USC § 1421(c) (natz denial), 8 USC § 1447(b) (natz delay), 8 USC § 1503 (N600 or passport denial), *Merlan v. Holder*, 667 F.3d 538 (5th Cir. 2011) (denial of entry is not custody).

Why Are You Challenging?

- Unauthorized Detention
- Prolonged Detention
- Refusal to provide bond hearing (another way of saying unauthorized or prolonged)
- Improper Denial of Bond after hearing (usually after BIA review)
- Certain other illegal aspects of detention

Pre-Filing Considerations

- Likelihood of success & Exhaustion
- What success looks like
- Cost
- Timeline
- Client expectations
- Non-confidentiality
- EAJA

Where to File

- General Venue Statute:
- Venue is proper in the Judicial District where the defendant resides or in the Judicial District in which a substantial part of the events or omissions giving rise to the claim occurred.

See 28 U.S.C. 1391.

Venue for ICE Detainee

- Judicial district where individual is being detained (where Warden is located); or
- Judicial district where the action being challenged took place (e.g. the ICE officer or FOD).

If a noncitizen gets moved during suit, the original court retains jurisdiction over the noncitizen, regardless of where they get moved.

Find the Rules, Read the Rules, Know the Rules!

- Federal Rules of Civil Procedure
- Local Rules for the District Court
- Individual Judge's Standing Orders
- Other notices on Court's website?
- Habeas Rules?

Are *You* Admitted for Practice?

- You must be admitted to practice **in the specific U.S. District Court where you are filing** the Habeas Petition. Requires:
 - Complete Petition for Bar Membership
 - Filing Fee for Attorney Admission
 - Good Standing With State Bar
- Pro Hac Vice?

Registering for CM/ECF

REGISTER FOR PACER



- Register for a PACER Account at:
www.pacer.gov
- Must set up Billing on PACER.

REGISTER FOR CM/ECF



Case Management

CM / ECF

Electronic Case Files

Getting registered on CM/ECF can take up to 24 hours. Do NOT leave this for the day you intend to file your Habeas!

Tips on Electronic Filing

- All Documents must be turned into PDF.
- Make sure you have the software you need! (Adobe Acrobat, etc.)

Court Help Desk

- If you get stuck with electronic filing....

Who To Name As Defendants

- Custodian of your client, usually ICE, which includes (in their official capacities):
 - Field Office Director (FOD)
 - Assistant Secretary of DHS for ICE
 - Department of Homeland Security Secretary Kelly
 - The Warden of the County Jail or facility where the client is detained
 - Attorney General Jefferson B. Sessions III, (especially if Immigration Court hearing is needed)

What To File

- Civil Cover Sheet
- Verified Petition
- Memorandum of Points & Authorities (optional)
- Exhibits in Support of Petition
- Note: Request OSC be issued in 3 days (to avoid need for TRO or emergency motion)

Attaching Evidence/Exhibits

- Government Does Not Produce Transcript of Underlying Proceedings.
- Exhibit List will be in the form of an authentication declaration by the attorney
- Provide sufficient evidence to document the essential claims
- Follow redaction rules (FRCP and Local Rules)
- Keep in mind record is publically available

SERVICE

- Try to contact the local U.S. Attorney's office before filing
- Courtesy email copy of filing if you are in contact with ASUA
- After filing habeas, the Court will issue an Order to Show Cause (and/or summons)
- Serve physical copy of filing, with OSC, on defendants.
- Note: If DHS or DOJ is defendant, then serve U.S. Attorney's office, which is authorized to receive service for the federal defendants
- If you name the local warden, you might have to hire a local process server for service
- File Return of Summons with Court

OKAY, I GOT IT FILED. NOW WHAT?

Government attorney will be assigned either from DC or locally; consider reaching out to discuss case; if urgent matter, be ready to act quickly to appear in court

My Filing Was Rejected!



But Act Quickly!

- Make sure that you have immediate access to phone and email for *at least* 24-48 hours after filing.
- Court Clerk often provides instructions for how to cure a defective filing.

Communicating with the U.S. Attorney

- When you file a Federal Habeas Action, the federal Defendant or Respondent is represented by an Attorney from the U.S. Attorney's office. (aka: "AUSA")
- An AUSA may call you in order to:
 - Gain Clarification On Remedies You Are Seeking
 - Explore Possible Solutions Or Compromises
 - Narrow Issues
 - Help With Immigration law

Sometimes when you talk to DHS Attorneys, it's like:



But with U.S. Attorneys, it *can be* a little more like...



Step by Step Recap (Part 1)

- Step 1: Is Habeas the right solution for the problem?
 - Is the client detained by ICE?
 - Is the client improperly being denied a bond hearing?
 - Depending on reason: Is an appeal to the BIA needed?
 - Has the client been given a bond hearing but improperly denied bond?
 - Exhaustion: Is an appeal to the BIA on the merits needed?

Step by Step (Part 2)

- Identify the courts and parties
 - Who are the defendants? Any strategic decisions?
 - Which court? Any strategic decisions?
- Am I ready?
 - Discussion with client regarding costs, timing, publicity
 - Preparation in your office to litigate: software, court admissions, personnel, travel

Step by Step (Part 3)

- Research your legal arguments
 - Circuit Courts (precedent or unpublished)
 - District Court decisions in your district or other districts
 - Consider your judges
- Prepare your evidence
- Contact Opposed Counsel (if appropriate)
- Once your documents are final: E-filing!

After Filing: Then What Happens?

- You E-file your petition.
- It will often be referred to the magistrate judge.
- The magistrate judge will review and issue an order to show cause.
- USAO and DOJ attorneys will make appearances and file Return.
- You file your traverse.
- Argument.
- Report and Recommendation.
- Objections
- Decision

Timing

- General rule is that Federal Defendant gets 60 days to file a response after being served.
- 28 U.S.C. 2243 sets default timeline:
- Return within 3 days unless good cause up to 20 days; and
- Hearing on case within 5 days of return unless good cause shown

Other Possible Timelines

- Request an OSC in short time period (e.g. three days), to avoid delay from court
- Alternatively, if TRO or PI requested, work out reasonable briefing schedule with the AUSA
- In some cases, Court may request cross-motions for summary judgment if pure legal issues
- Check Judge's calendar for hearing days

Hypo #1

Pre-Order or Post-Order?

- **Merlin was just ordered removed by an immigration judge. The judge denied his application for asylum, withholding of removal, and relief under the Convention Against Torture. He plans on filing an appeal to the Board of Immigration Appeals.**

Is Merlin in pre-order or post-order detention?

Answer

- **Merlin is in pre-order detention**
- **Because there is no *final* order**

Hypo #2

- **Lydia overstayed a tourist visa five years ago. She is arrested for driving without a license and turned over to immigration authorities. She is in immigration detention. She has no other criminal record.**
- **ICE refuses to set bond. Can you file habeas to get her out?**

Answer

- Lydia is eligible for a bond hearing before the Immigration Judge
- You must exhaust that remedy first
- Cannot file Habeas immediately

Hypo #3

- **Miriam (Lydia's sister) overstayed a tourist visa five years ago. She is arrested for driving without a license and turned over to immigration authorities. She is in immigration detention. Miriam has a prior conviction for drug possession that makes her deportable.**
- **ICE refuses to set a bond, and indicates she is not eligible for bond before the Immigration Court.**
- **Can you file habeas?**

Answer

- Miriam is probably eligible for hearing before the Immigration Judge to determine bond eligibility
- If Immigration Judge finds she is not eligible to request bond, consider whether appeal to the BIA is necessary
- If BIA appeal futile or would result in unjust prolonged detention, habeas in federal court may be possible

Anticipate Government Arguments

- Pre-Final Order Cases:
 - Mandatory Detention INA § 236(c) Applies
 - Exhaustion to BIA Needed
 - No Review of Discretionary Decisions
 - Statute Does Not Permit Release
- Post Order Cases:
 - Post-order detention is not yet prolonged
 - Noncitizen has failed to cooperate
 - Noncitizen is “particularly dangerous”

Discovery

- Discovery: 28 USC §2246

“If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.”

Consider Relief You are Seeking

- Legal:
 - Bond hearing?
 - Order of Supervised Release? (*Zadvydas/Clark*)
 - Immediate release?
- Practical:
 - Quicker BIA decision?
 - Action on the underlying case?
 - Better terms of OSUP?
 - Quick removal?

CONGRATS! YOUR CLIENT GOT OUT. IS IT OVER?

Hint: Hope for the best but prepare for the worst

Post-Release Issues

- Ask: Did client receive all relief sought in Habeas Petition?
 - Release
 - Order for New Bond Hearing
 - Declaratory Relief
 - EAJA fees (if no waiver)
 - Other?

Challenging AUSA Motion to Dismiss Habeas as Moot

- Exceptions to Mootness
 - Capable of Repetition Yet Evading Review
 - Voluntary Cessation

What Does Success Look Like?

- Educating the Court
- Order Finding Unlawful Government Conduct
- Transport of Client from Immigration Custody to Criminal Custody to Resolve Criminal Case
- Bond hearing set before Immigration Court
- Release of Detained Client

Hypo #4

- Robert is charged in criminal case, but is able to post bail before entering a plea. Instead of being released, however, he is transferred to ICE custody.
- ICE denies bond, and Robert is given a bond hearing before the Immigration Judge.
- The IJ wants to review the police report, and expects Robert to answer questions about the contents
- Robert invokes his Fifth Amendment right not to incriminate himself and refuses to answer
- The IJ denies bond.
- ICE is not transferring Robert back to criminal custody to resolve the pending charges

Answer

- Challenge the IJ's denial of bond without providing Robert a chance to return to criminal court to resolve the criminal charges
- Filing Habeas Can Bring a Recalcitrant ICE to the Table
- Request Transfer to Criminal Custody if Appropriate

Hypo #5

- Abel has no criminal record, but he was previously removed
- ICE again arrests him and moves to reinstate his prior removal order
- Abel passes his reasonable fear interview, and is placed in withholding-only proceedings before the IJ
- Due to IJ's calendar, Abel spends more than six months in ICE custody, and his case remains pending on calendar
- Habeas?

Answer

- First, file motion for bond hearing with Immigration Judge, based on prolonged (six month) detention
 - E.g. following Rodriguez in Ninth Circuit
- If IJ denies, file Habeas
- Is exhaustion to BIA needed first?

Equal Access to Justice Act (EAJA)

- Ask the Judge to Make the Government Pay for Your Work
- Need Order from the Court in your client's favor
- Government position not substantially justified
- Contemporaneous Time Records
- Standard Rates or Enhanced Rates
- Clear assignment of fees (agreement with client)
- Sometimes a stipulated settlement on the case involves a waiver of fees (ultimately client's choice to make)



We Need To Start Challenging ICE & EOIR In Federal Court

- Don't have to be an expert
- Civil detention should not be the exception, not the rule
- If it feels unfair, it probably is
- Help the Article III Judge understand how the immigration system deprives your client of their rights
- Tell ICE: Hey! B.S.!

THE END

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