

TYPICAL LEGAL AND PROCEDURAL ISSUES IN HABEAS LITIGATION

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Presented by: AILA Federal Court Litigation Section

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 - 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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- **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
- **www.immigrationjustice.us**



Slides and Recordings

- Available on aila.org, along with registration links for webinars 3, 4, and 5:

<http://www.aila.org/publications/videos/fearless-lawyering-videos/five-part-webinar-series-on-habeas-corpus>

- More Fearless Lawyering resources:

<http://www.aila.org/about/immigration-justice-campaign/learn-more-about-fearless-lawyers>

Temporary Restraining Orders

- FRCP 65(b): provides for court order enjoining a party without notice to that party. Order expires in 14 days or less.
- TROs are rare in the habeas context where the issue is only detention. TRO provide the petitioner with complete relief. Courts are reluctant to grant complete relief.

Preliminary Injunctions

- FRCP 65(a):
 - An extraordinary and drastic remedy
 - Notice to adverse party is required
 - Hearing is not expressly required but the Rule contemplates a hearing
 - Can be in effect for more than 14 days
 - A preliminary injunction is immediately appealable

Preliminary Injunctions

- Standard for issuance of a preliminary injunction:
 - Likelihood of success on the merits
 - The petitioner is likely to suffer irreparable harm
 - The balance of equities tips in favor of the petitioner
 - An injunction is in the public interest
- Application of the standard varies by circuit
 - 9th circuit employs a “sliding scale” test where strength of one element can offset weaker showing of another
 - 5th circuit precedent instructs movants to establish clearly each element

Preliminary Injunctions

- Contexts in which courts have granted PIs in the habeas context:
 - Transfer of noncitizen
 - Removal of noncitizen
 - Denial of a hearing
 - Application of unlawful rule
 - Denial of work permit or proof of lawful status

Jurisdictional and Exhaustion Questions

- Several jurisdictional or exhaustion objections that Government may raise in response to habeas petition.
- Consider which ones might apply to your case and review relevant case law in your circuit.

Exhaustion

- Exhaust your claims in the immigration court and BIA.
 - *See Leonardo v. Crawford*, 646 F.3d 1157 (9th Cir. 2011) (claim that noncitizen was denied due process in bond hearing must be appealed to BIA first).

Exceptions to Exhaustion

- Futility. *See, e.g., Gonzalez v. O'Connell*, 355 F.3d 1010, 1018-19 (7th Cir. 2004)
- *See Hernandez v. Sessions*, 872 F.3d 976, 988-89 (9th Cir. 2017) (Exhaustion excused bc pure legal question, won't encourage bypass, etc.)
- *Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011) On habeas review under § 2241, exhaustion is a prudential rather than jurisdictional requirement.

Claims to preserve before IJ & BIA

- Objections to evidence?
- Excessive bond?
- Witnesses permitted to testify?
- IJ/BIA consider ALL relevant evidence?
- Procedural deficiencies?
- Punitive detention?
- Correct legal standard/burden?
- Hearing individualized?

Jurisdiction – Section 1226(e)

- 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.
- BUT! Does not apply to “statutory framework” governing detention. *See Demore v. Kim*, 538 U.S. 510 (2003).
 - Does not apply to constitutional claims or questions of law. *Leonardo*, 646 F.3d at 1160.

Jurisdiction – Section 1226(e)

- What kinds of claims are not barred by Section 1226(e)?
 - Claims that petitioner’s prolonged detention violates the Due Process Clause. See *Jennings v. Rodriguez*.
 - Claims that petitioner is not properly subject to mandatory detention.
 - Claim that Government failed to consider ability to pay in making bond determinations. See *Hernandez*.
 - Claim that the procedures of a bond hearing violated due process. See *Singh, Leonardo*.
 - Claims re the standard and burden of proof. See *Casas and Singh*.
 - Claims re admissibility of evidence. See *Singh*.
 - Claims that petitioner is a US citizen. *Flores Torres v. Mukasey*, 548 F. 3d 708 (9th Cir. 2008)
 - Legal standard for determining dangerousness.
 - Whether judge used the correct legal standard in the bond hearing.
 - Challenge to out of state transfer/access to counsel as violative of DP.
- What kinds of claims have courts found barred by Section 1226(e)?
 - A challenge to an “excessively high bond amount” that does not raise legal or constitutional issues. See *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008).

Jurisdiction – Section 1252(a)(2)(B)(ii)

- 8 U.S.C. 1252(a)(2)(B)(ii)
 - U.S.C. no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security
- BUT! Does not apply to claims addressing extent of Government's statutory authority. *See Zadvydas*, 533 U.S. at 688.
- Legal and constitutional claims remain reviewable. *See Hernandez*, 872 F.3d at 988.

Jurisdiction – Section 1252(a)(2)(B)(ii)

- What kinds of claims are not barred by Section 1252(a)(2)(B)(ii)?
 - Indefinite detention claims. See *Zadvydas*.
 - Constitutionality and legality of procedures used in parole proceedings. See *Sierra v. INS*, 258 F.3d 1213, 1217 (10th Cir. 2001).
- What kinds of claims have courts found barred by Section 1252(a)(2)(B)(ii)?
 - Challenge to “discretionary decision to deny . . . Bond.” *Mwangi v. Terry*, 465 Fed. Appx. 784 (10th Cir. 2012).

Jurisdiction – Section 1252(b)(9)

- 8 U.S.C. 1252(b)(9)
 - Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section.
- **BUT! Does not apply to claims challenging the lawfulness of immigration detention.**
 - *See Jennings*, 2018 WL 1054878, at *7-8 (op. of Alito, J.); *id.* at *44 (Breyer, J., dissenting).
 - Does not apply to US citizens challenging legality of detention. *See Flores Torres*.

Jurisdiction – Section 1252(b)(9)

- What kinds of claims are not barred by Section 1252(b)(9)?
 - Claims that challenge the lawfulness of a petitioner's detention generally should not be subject to b9 at all. *See, e.g., Jennings v. Rodriguez.*
- What kinds of claims have courts found barred by Section 1252(b)(9)?
 - *Aguilar v. ICE*, 510 F.3d 1 (1st Cir. 2007) (claim that petitioners were being transferred to faraway locations in violation of their right to counsel in removal proceedings)
 - *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) (claim that children in removal proceedings are entitled to appointed counsel is barred by b9).

Jurisdiction – General tips

- Framing claim is very important to determining whether a jurisdictional bar applies
- In general, courts are more likely to have jurisdiction over legal claims than factual or discretionary challenges
 - E.g., a claim that an IJ applied the wrong legal standard in determining dangerousness may be a legal claim.
- Each of these jurisdictional bars could apply to your claim – should analyze each one separately
- Remember to look at the law in your own circuit
- Reach out if you have questions!

Factual Disputes

- Record of delay
 - Obtaining discovery
- Govt's efforts to effectuate removal
 - Obtaining discovery
- Demonstrating impossibility of removal
- Demonstrating bad faith or detention that is unreasonable or unjustified
- Facts underlying US citizenship claim

Mootness

- If client is released from custody pending the petition, AUSA will argue that the habeas petition is Moot. Your case may fall into the mootness exception if you can show that the claim is capable of repetition, yet evading review. See *Hubbart v. Knapp*, 379 F.3d 773 (9th Cir. 2004).
- Conditions of release important factor.
- If client received what he requested (ie a bond hearing) but was denied release by IJ, check to make sure IJ complied with DP standards and full and fair hearing was received.

Appeals

- Decisions by Magistrate Judges
 - Objections to Report and Recommendation
 - Appeals filed with District Court w/i 60 days but file ASAP to get faster resolution.
 - File with Motion to Expedite (if granted can be decided within 4-9 months by circuit court)
 - If granted, circuit court has been known to order briefing within 7 days so be prepared! (be careful what you wish for)

Appeals

- Appeals to Circuit Court
 - Record Excerpts (distinct from PFR process not prepared by government if you are the appellant)
 - If government the Appellant—agree to an ER in advance or check the govt ER carefully because they may not have put in favorable evidence.
 - Order transcripts ASAP so you are prepared to write your brief with proper cites (if no hearings, no transcripts).
 - Framing legal issues
 - OB/Oral argument

Questions?



THE END

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