

# FCLS Habeas Series Webinar 5: Creative Uses of Habeas

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# Slides and Recordings

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

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# Habeas Jurisdiction

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18 U.S.C. § 2241 but guaranteed by Suspension Clause of the U.S. Constitution

“[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, § 9, cl. 2.

Habeas statutes “granted to the courts broad remedial powers to secure the historic office of the writ.” *Boumediene v. Bush*, 553 U.S. 723, 776–77.

# Questions

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How do bars to "judicial review" relate to habeas jurisdiction in U.S. district court?

What is the scope of habeas review?

# *St Cyr* and The Real ID Act

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*INS v. St. Cyr*, 533 U.S. 289 (2001)

Congressional reaction to *INS v. St. Cyr*

Channeled review back to Courts of Appeals

“Savings Clause” making reviewable all constitutional claims and questions of law

# When does habeas remain available?

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Detention cases

Other challenges that are not challenges to final orders

- e.g., events after removal order

Generally, where petition for review is unavailable or inadequate

Caution against using habeas as “interlocutory appeal”



# *Example: Stays of Removal Through Habeas*

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Regular administrative Motion to Reopen stay process through IJ and BIA is inadequate

People caught off guard and unable to file from abroad

The Supreme Court has recognized that the motion to reopen process is a critical, statutorily-based procedural safeguard. *See Kucana v. Holder*, 558 U.S. 233, 242 (2010)

# Habeas Stay Cases

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*Hamama v. Adducci*, 261 F. Supp. 3d 820 (E.D. Mich. July 24, 2017)  
(*Hamama II*) (Iraqis)

*Devitri v. Cronen*, No. CV 17-11842-PBS, 2017 WL 5707528 (D. Mass. Nov. 27, 2017) (Indonesian Christians)

*Chhoeun v. Marin*, No. CV 17-01898 (S.D. Cal. 2017) (Cambodians)

***Ibrahim v. Asst Field Office Director*, No. 17-cv-24574 (S.D. Fla. Dec. 18, 2017) (Somalis on failed deportation flight)**

# Facts of *Ibrahim* Case

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92 Somali women and men

Shackled on plane for 48 hours during deportation attempt

Forced in seated position, including while grounded in Senegal for a day

Abused, deprived of bathroom and some medication

Flight aborted and landed in Miami

Everyone detained

ICE had planned to immediately put on second plane



# Claims

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*Procedural due process*: must have access to meaningful motion to reopen procedure (i.e., a stay until case decided)

*Statutory claims under withholding and CAT*: statute provides for reopening based on changed country conditions, must be meaningful access

# 8 U.S.C. § 1252(a)(5) Bar

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“a petition for review ... shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter ...”

“in every provision that limits or eliminates judicial review or jurisdiction to review, the terms ‘judicial review’ and ‘jurisdiction to review’ include habeas corpus review pursuant to section 2241 of title 28”

# Arguments

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Only applies to review of final orders

Read statutory language to avoid Suspension Clause problem

In any event, Suspension Clause requires habeas review where there is no adequate judicial review through petition for review process

# 8 U.S.C. § 1252(g) Bar

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Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), ***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.



# Arguments

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Statutory language applies only to discretionary decisions (directed at challenges to prosecutorial discretion)

Here, CAT and withholding are *mandatory* forms of relief

In any event, Suspension Clause requires habeas review where there is no adequate judicial review through petition for review process

# Rulings in *Hamama, Dvetri, Ibrahim*

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Found habeas repealed by statutory language but that Suspension Clause guaranteed jurisdiction. *But see Chhoeun v. Marin*, No. CV 17-01898 (S.D. Cal. 2017) (reading statute to avoid constitutional issue)

Rejected Gov's argument that habeas limited to detention challenges

Rejected Gov's contention that filing a motion to reopen from outside the country is adequate alternative to habeas

# *Ibrahim*

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“This Court agrees [with the government] that the statutory text is unambiguous” and repeals habeas jurisdiction.

But 8 U.S.C. § 1252(g) “violates the Suspension Clause as applied if it deprives Petitioners of a meaningful opportunity to exercise their statutory right to file motions to reopen their immigration cases in a manner that comports with the onerous statutory and regulatory requirements”

# Inadequacy of procedures

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Changed circumstances arose suddenly (flight, escalation of violence)

Claims based in part on allegations of government misconduct

Cannot effectively file Motion to Reopen from Somalia because of danger

Also no access to immigration files

“Unique” circumstances of the case

# Cautionary Notes

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Litigate in collaboration with ACLU, others

Have a plan for representing the individuals in MTRs, esp if detained

Opt outs will likely have deportation delayed

All district court case law so far is positive, but circuit law may not be (e.g., *Hamama* case in 6<sup>th</sup> Cir)

Carefully frame element of surprise and uniqueness of class

Collateral issues: getting A files, conditions of detention

# Habeas case study

SAN FRANCISCO, CA

SEPTEMBER 22, 2016

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# Overview of case

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Long time LPR

Detained for around 450 days because of four misdo theft offenses over a 20 year period.

Case was pending at Ninth Circuit

# Surprise!!!!

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YOUR CLIENT IS BEING TRANSFERRED TO  
LA SALLE DETENTION FACILITY IN  
JENA, LOUISIANA!!!!



# Seriously?



# Overview of response

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Received call from Client's brother (6:45 a.m., )

Called Deportation Officer

Drafted letter to Field Office Director

Initiated drafting of habeas

- Summons
- Complaint and Notice of Motion (TRO/Preliminary Inj.)
- Memorandum of Points and Authorities
- Proposed Order
- Proof of Service
- Civil Cover Sheet
- Fee Waiver

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# Interference in attorney/client relationship

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One exception has warranted judicial interference with the Attorney General's discretion to detain and transfer aliens for detention purposes, that is **when transfer interferes with the existence of an established, on-going attorney-client relationship**. *Committee of Cent. American Refugees v. Immigration & Naturalization Service*, 682 F. Supp. 1055, 1064-1065 (N.D. Cal. 1988)

# If no attorney/client relationship, harder to win

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Transfers of detainees out-of-state did not deprive non-citizens of access to counsel because there was **no proof of interference with any established attorney-client relationship**. *Committee of Cent. American Refugees v. Immigration & Naturalization Service*, 795 F.2d 1434, 1439 (9th Cir. Cal. 1986)

# Denial of Access to Counsel

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Denial of access to counsel to a non-citizen immigrant detainee violates due process. *See Lyon v. United States Immigration & Customs Enforcement*, 2016 WL 1070650 (N.D. Cal. Mar. 18, 2016).

- high cost rates and fees, technical barriers to making calls, inability to make free phone calls to lawyers, and limits of hours of telephone access—  
inhibited access to counsel
- but **not tantamount to denial of access to counsel**

# Denial of Access to Counsel

Transfer of non-citizen detainees to remote locations can severely cripple their ability to obtain and be represented by counsel. *See Armentero v. INS*, 340 F.3d 1058, 1069, (9th Cir. Cal. 2003)

- (“For example, if the California attorney of [a non-citizen] formerly domiciled in California but now detained in rural Oakdale, Louisiana is only permitted to litigate her client’s petition in the District Court for the Western District of Louisiana, the cost of travel and other expenses could prove fatal to the feasibility of the representation.”) (citing Rachel E. Rosenbloom, *Is the Attorney General the Custodian of an INS Detainee?*, 27 N.Y.U. Rev. L. & Soc. Change 543, 549-550)

# Denial of Access to Counsel

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*Mendez v. INS*, 563 F.2d 956, 959 (9th Cir. 1977) (INS' failure to notify non-citizen's previously-retained counsel prior to deporting alien violated alien's statutory right to counsel).

Cesar Cuauhtemoc Garcia Hernandez, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates their Right to Counsel*, 21 Berkeley La Raza L.J. 17, 40-45 (2011) (transfers out of jurisdiction functionally undermine the non-citizen detainee's access to counsel)



# Denial of Access to Counsel

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**Argue transfer of venue is denial of counsel:**

- **Establish on-going attorney/client relationship**
- **Establish that transfer denies counsel:**
  - **Distance (thousands of miles away) inhibits communication**
    - **time it takes to communicate,**
    - **Impossibility of conducting in/person meeting**
    - **particular characteristics of client making in person meeting crucial**

# ICE transfer policies (Policy 11022.1)

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Section 5.2.1, a Field Office Director (FOD) should refrain from transferring a non-citizen detainee if there is:

- a) immediate family within the Area of Responsibility (AOR);
  - b) an attorney of record within the AOR;
  - c) pending or on-going removal proceedings, where notification of such proceedings has been given, within the AOR; or,
  - d) the non-citizen detainee has been granted bond or scheduled for a bond proceeding.”
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- The policy provides authority for the FOD to transfer a detainee to relieve prison overcrowding, but must make efforts to assess whether the detainee falls under any of the categories listed in section 5.2.1. *Id.* at section 5.2.3(g)

# ICE transfer policies (Policy 11022.1)

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A Field Office Director (FOD) has authority to transfer a detainee to relieve prison overcrowding, but must make efforts to assess whether the detainee falls under any of the categories listed in section 5.2.1. *Id.* at section 5.2.3(g)

# What happened to client?

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“It always seems impossible until  
it's done.”

—Nelson Mandela

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# Questions? Ideas?

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