



# TAMU Law Answers Webinar Series



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# HABEAS CORPUS ACTIONS CHALLENGING IMMIGRATION DETENTION

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# HABEAS CORPUS – ORIGINS

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- Common law origin
- Suspension Clause, U.S. Const., Art. I, Sec. 9, Cl. 2: “The 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.”
- *INS v. St.Cyr*, 533 U.S. 289, 301 (2001) – Historically, the writ has “served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”



# HABEAS CORPUS – EVOLUTION

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- Federal habeas statutes:
  - 28 U.S.C. §§ 2241 - 2255
- *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody”).

# TYPES OF FEDERAL HABEAS ACTIONS

Common types of federal habeas proceedings:

- Challenge to state court conviction - 28 USC § 2254
- Challenge to federal court conviction - 28 USC § 2255
- **Challenge to lawfulness of detention or conditions of detention - 28 USC § 2241**
  - Military detention
  - **Federal immigration detention**



# FEDERAL HABEAS: IMMIGRATION DETENTION

## REQUIREMENTS under 28 USC § 2241:

- In custody under color of authority of U.S. or committed for trial before court thereof; or
- In custody for act/ omission under federal law, or order of U.S. judge; or
- **In custody in violation of the Constitution, laws or treaties of the U.S.; or**
- Citizen of foreign state and domiciled therein is in custody for act/ omission under foreign law, based on law of nations; or
- It is necessary to bring detained person into court to testify or for trial.



# CHALLENGES TO IMMIGRATION DETENTION



Detention is not authorized by law



Detention is unduly prolonged and lacks sufficient procedural safeguards



Detention is indefinite



Conditions of detention expose petitioner to substantial risk of serious harm that cannot be remedied without release.

## TYPICAL CAUSES OF ACTION

### Violations of Fifth Amendment Due Process:

- Arbitrary – no substantive basis; does not serve the stated purpose; lacks procedural safeguards
- Prolonged – disproportionate in time period to stated purpose; lacks procedural safeguards
- Indefinite – substantive due process

### Violations of the Immigration and Nationality Act

# PRE-FILING CONSIDERATIONS

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Admission to federal district court (regular or *pro hac vice*)

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Goals and likelihood of success

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Use of administrative remedies

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Costs and timeline

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Client and family expectations

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Availability of attorney fees (EAJA)

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Confidentiality issues

# HABEAS CORPUS PROCEDURE

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**STATUTORY PROCEDURE under 28 U.S.C. 2241 –**

**PETITION, RETURN, TRAVERSE, EVIDENCE, AND HEARING**

## **PETITION**

- Petition must be in writing, signed and verified by petitioner or someone on his/ her behalf.
- Petition must allege the facts relating to the detention, name the custodian, and name the authority under which petitioner is held, if known.

# HABEAS CORPUS PROCEDURE

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## **PETITION:**

**JURISDICTION** - 28 U.S.C. § 2241. You can also cite: 28 U.S.C. § 1651 (All Writs Act), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (Mandamus Act), and U.S. Const., Art. I., § 9, Cl. 2 (Suspension Clause).

**VENUE** – 28 U.S.C. § 1391. Typically, the district of petitioner's detention.

# HABEAS CORPUS PROCEDURE

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## **PETITION:**

**PROPER RESPONDENTS** – Always sue the warden/ ICE official in charge of detention center. Can also include: ICE Field Office Director, Director of ICE, Secretary of DHS, and Attorney General. The court may dismiss non-warden respondents.

**EXHAUSTION OF ADMINISTRATIVE REMEDIES** – Assert: not required by statute, futile, and irreparable harm if required. But to satisfy “prudential exhaustion” requirements, use available administrative remedies and mention them in the petition.

# HABEAS CORPUS PROCEDURE

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## **PETITION:**

**CAUSES OF ACTION** – Typically: 1) Immigration and Nationality Act; 2) Due Process Clause, 5th Amendment. In rare cases: 3) Non-Detention Act, 18 U.S.C. 4001.

**RELIEF REQUESTED** –Typically: assume jurisdiction; require Respondents to timely answer and Petitioner to reply; set a hearing; issue the writ of habeas corpus (**IMMEDIATE RELEASE FROM CUSTODY**); issue declaratory relief; grant reasonable attorney fees and costs; and further relief as the Court deems just and proper.

# HABEAS CORPUS PROCEDURE

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## **MAKING A FULL FACTUAL RECORD**

- You can attach exhibits to the petition, and supplement later if needed. The Federal Rules of Evidence apply.
- Discovery and depositions are very rare.

## **ENSURING TIMELY CONSIDERATION OF THE PETITION**

- Motion for order to show cause: 3-20 days instead of 60 days for Respondents' response.
- Court may decide on papers without a hearing.

# HABEAS CORPUS PROCEDURE

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## PETITION

- To start the case: Petition, exhibits, civil cover sheet, and motion for order to show cause. Brief is optional.
- Filing fee is typically \$5. You don't need to file motion for *in forma pauperis*.

## SUMMONS AND SERVICE

## RETURN, TRAVERSE, EVIDENCE, HEARING, AND MOTIONS

## MAGISTRATE JUDGE R&R, OBJECTIONS AND DECISION

## DUE PROCESS CLAIMS: UNAUTHORIZED DETENTION

Immigration detention is civil detention that is typically based on concerns of flight risk and/or danger.

Due Process limitations on civil detention:

- Cannot be punitive
- Cannot be arbitrary; must be based on a legitimate government interest.
- Cannot be indefinite
- If prolonged, must be supported by a special justification and adequate procedural safeguards.

# CLAIMS UNDER THE INA



Possible violation of INA 236(a), 8  
U.S.C. 1226



Possible violation of INA 235, 8  
U.S.C. 1225



Possible violation of INA 241, 8  
U.S.C. 1231

## DUE PROCESS CLAIMS: CONDITIONS OF CONFINEMENT

Deprivation of minimum civilized measures of life's necessities (food, shelter, clothing, safety), including a substantial risk of serious harm that society will not tolerate.

Deliberate indifference to that risk of harm by defendants, typically shown by knowledge of the risk and conscious or reckless disregard.

*Farmer v. Brennan*, 511 U.S. 825 (1994).

DUE PROCESS  
CLAIMS:  
INADEQUATE  
MEDICAL CARE

Serious medical need (typically, illness or injury)

Injury to plaintiff as a result of defendants' acts or omissions

Deliberate indifference to that risk of harm by defendants, typically shown by knowledge of the risk and conscious or reckless disregard.

# Habeas: Fifth Circuit Legal Background

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*Poree v. Collins*, 866 F.3d 235, 243 (5th Cir. 2017): “Typically, habeas is used to challenge the fact or duration of confinement, and [civil rights statutes] to challenge conditions of confinement. . . . Poree challenges the fact of his confinement . . . for which habeas relief may be sought.”

*Coleman v. Dretke*, 409 F.3d 665 (5th Cir. 2005): Fifth Circuit and SCOTUS have never held that certain claims *must* be brought under civil rights statutes rather than habeas

*Carson v. Johnson*, 112 F.3d 818 (5th Cir. 1997): Habeas was inappropriate vehicle where release was still within the parole board’s discretion, *not* the inevitable result of litigation

# ICE COVID Claims

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Habeas is appropriate where release is the requisite remedy because there is no way for the detention center to keep the individual safe.

Factors to consider:

- Has COVID-19 entered the facility? How widespread is COVID-19 within the facility?
- Is it possible for those detained to follow CDC guidance in the facility?
  - - Helpful evidence
- Is the individual particularly medically vulnerable?