



Habeas Petitions for Detained Immigrants: Training for NACDL

Presented by:

Bridget Pranzatelli, Ellie Norton & Sirine Shebaya
National Immigration Project

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Lawyers for the Movement



Current Landscape for Detained Immigrants

- Unprecedented levels of immigration enforcement and detention
 - Fewer people being released on recognizance or bond than ever before
 - Habeas often the only option
- Habeas projects:
 - DC, Maryland, Virginia
 - Louisiana & Gulf Coast
 - Minnesota



Today's Agenda

- Habeas Basics
- Overview of Immigration Detention Statutes
- Habeas Case Study
- Habeas Nuts and Bolts
- Q&A

Habeas Basics

What is habeas?

- 28 U.S.C. § 2241 gives district courts jurisdiction to grant writs of habeas corpus to people who are held in “custody” by the federal government in violation of the Constitution, laws, or treaties of the United States.
- In the immigration context, generally used to challenge unlawful detention (not removal, with limited exceptions).

Common Habeas Claims

- Government is incorrectly claiming noncitizen is subject to mandatory detention statute (*e.g.*, 8 U.S.C. § 1225(b)(2)(A) versus 8 U.S.C. § 1226(a)).
- Noncitizen's re-detention without pre-deprivation process, after government previously released client, violates procedural due process.
- Noncitizen's detention violates substantive due process because there is no legitimate reason for it (*e.g.*, because client has deferred action and cannot be removed).
- Noncitizen's detention has become unconstitutionally prolonged.
- Noncitizen's bond hearing was conducted in an unconstitutional manner.

Habeas Remedies

- **Release**
 - Common for unlawful re-detention claims and substantive due process claims
 - Possible in some jurisdictions for improper mandatory detention
- **Bond hearing before immigration court**
 - Habeas judge might order burden shift
 - Would force government to prove flight risk/danger. Usually, noncitizen has to prove a negative.
 - Habeas judge might require bond hearing to be conducted within certain time, or else release
 - If conducted improperly and bond denied, may come back to habeas court
 - **Immigration court bond hearings are increasingly unfair right now, so whenever possible we encourage arguing for straight release, NOT a bond hearing**
- **Bond hearing before district court**
 - Relatively rare but being sought more frequently

Jurisdictional Bars

Limiting Habeas

- **1252(b)(9)** - cannot challenge legal issues arising from removal proceedings in habeas (only in PFR).
- **1252(a)(5)** - cannot challenge the removal order itself in habeas (only in PFR).
- **1252(g)** - limit on judicial review of “decision[s] or action[s] by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders.” (more cabined than government wishes, about discretion).
- **1252(e)** - cannot challenge being put into expedited removal except on very limited grounds - can challenge 1225 detention inasmuch as you are asserting it’s rightly 1226.

Exhaustion Requirements

- There is no statutory exhaustion requirement for habeas under 28 U.S.C. § 2241.
- BUT courts may require administrative exhaustion for prudential reasons.
 - Exhaustion could mean, *e.g.*, a bond or parole request or a bond appeal.
- When possible, argue exhaustion not required.
 - Courts may waive exhaustion if “administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void.” *Jacobo Ramirez v. Noem*, No. 2:25-CV-02136-RFB-MDC, 2025 WL 3270137, at *5 (D. Nev. Nov. 24, 2025) (finding exhaustion would be futile in 1225/1226 cases).

Immigration Detention Authority Overview



Identifying Legal Claims for Habeas

- The habeas petition's claims about why the client's detention is unlawful will depend on the client's facts and on the statutory detention authority that governs their detention.
- In other words, we need to understand the detention authority in order to craft our legal claims in the habeas petition.

Statutes Authoring Detention

8 USC § 1226(a)

- Default permissive detention “pending a decision on whether the [noncitizen] is to be removed”

Right to an IJ bond hearing

- In 2025, ICE and EOIR changed policies to conclude that only those “admitted” to the U.S. are detained under 1226

8 USC § 1226(c)

- “Mandatory” detention for convictions for certain criminal offenses + Laken Riley Act
- Not EVERY charge or conviction

8 USC § 1225(b)(1) & (2)

- “Mandatory” detention for:
 - (b)(1): Those in expedited removal + after credible fear interview (*Matter of M-S- & Jennings*)
 - (b)(2): Arriving” noncitizens & some returning lawful permanent residents
 - 2025 ICE/EOIR policies: anyone in removal proceedings who hasn’t been “admitted” is detained under (b)(2)

8 USC § 1231(a)

- Noncitizens with final orders of removal, including reinstated removal orders even after passing a reasonable fear interview



Immigration Agencies' Long Standing View: §1225(b)(2)(A) v. §1226

8 U.S.C. § 1225(b)(2)(A)

- Applies to detention of noncitizens “seeking admission” who are placed into removal proceedings.
- For decades, agency largely agreed that § 1225(b)(2)(A) applied to those who enter the United States as an “arriving” noncitizen at a port of entry and are placed into removal proceedings.
 - See 8 C.F.R. § 1003.19(h)(2)(i)(B).

8 U.S.C. § 1226

- Applies to those arrested and detained “on a warrant” issued by DHS “pending a decision on whether the [noncitizen] is to be removed from the United States.”
- For decades, agency agreed that those who enter without inspection and are placed into full removal proceedings are detained under § 1226.
 - Thus, entitled to an IJ bond hearing under § 1226(a) unless § 1226(c) applies..

8 U.S.C. § 1225(b)(2)(A)

8 U.S.C. § 1225(b)(2)(A): “[I]n the case of [a noncitizen] who is an **applicant for admission**, if the examining immigration officer determines that [a noncitizen] seeking admission is not clearly and beyond a doubt entitled to be admitted, the [noncitizen] shall be detained for a proceeding under [INA § 240].”

8 U.S.C. § 1225(a)(1): Noncitizens Treated as Applicants for Admission
“[A noncitizen] present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an **applicant for admission**.”

2025 Agency Policy Changes

- **May 2025:** *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025)
 - Held that people who are apprehended near the border after entering without inspection, released on parole, and then later re-detained, are detained under 8 U.S.C. § 1225(b)(2)(A) and not eligible for bond.
- **July 2025 ICE policy**
 - All noncitizens in removal proceedings who have not been “admitted” to the U.S. (e.g. on a visa) are subject to mandatory detention under 8 U.S.C. § 1225(b).
- **Sept. 2025:** *Matter of Yajure-Hurtado*, 29 I&N Dec. 216 (BIA 2025)
 - Essentially adopted ICE policy: noncitizens who have not been admitted are detained under § 1225(b)(2)(A) and not eligible for an IJ bond hearing.

Litigation on § 1225(b)(2)(A) v. § 1226

- In December 2025, in **nationwide class action** [Maldonado Bautista](#), court ordered that class members are detained under 1226(a) and eligible for IJ bond hearings.
 - Certified class: All noncitizens in the United States without lawful status who (1) have entered or will enter the United States without inspection; (2) were not or will not be apprehended upon arrival; and (3) are not or will not be subject to detention under 8 U.S.C. § 1226(c), § 1225(b)(1), or § 1231 at the time the Department of Homeland Security makes an initial custody determination.
 - BUT: [January 13 EOIR directive](#) to continue following *Yajure-Hurtado*
 - THEN: *Maldonado Bautista* court [vacated Yajure-Hurtado](#) (some, but not all, immigration judges honoring this)
- Plus multiple pending **regional class actions** – [D. Nev.](#), [W.D. Wash.](#), [D. Mass.](#), [D. Colo.](#), [E.D. Va.](#), [N.D. Cal.](#) (re-detentions)
- Hundreds of successful **individual habeas petitions** have resulted in court-ordered bond hearings **or immediate release orders.**



Prevailing Judicial View on § 1225(b)(2)(A) v. § 1226

Merits

- Most judges have concluded that people whom ICE detains while they are residing in the United States are not lawfully detained under 1225(b)(2)(A)
 - Interpret “seeking admission” to be tied to the time of the recent apprehension/detention.
 - This issue is on appeal in various circuit courts right now; watch for updates!
 - CA7 concluded this view was likely correct in *Castanon-Nava*
- BUT bad decision on 2/6 in CA5: [Buenrostro v. Bondi](#)

Remedy for this claim?

Detention Under 8 U.S.C. § 1231(a)

8 U.S.C. § 1231(a): After issuing a final order of removal, DHS has a 90-day “removal period” to remove the noncitizen and is required to detain them during this period. After this, DHS “may” continue detaining many noncitizens (without access to a bond hearing).

***Zadvydas v. Davis*, 533 U.S. 678 (2001):** If no significant likelihood of removal in the reasonably foreseeable future of noncitizen detained under § 1231(a)(6), no longer any lawful purpose for detention (violates substantive due process). Statute must be read to only allow for detention for reasonable period—“presumptively” 180 days.

8 C.F.R. § 241.4 & 8 C.F.R. § 241.13: ICE may release noncitizen after 90-day removal period on Order of Supervision (OSUP) if (1) there is not a significant likelihood of removal in the reasonably foreseeable future (§ 241.13) or removal not practical or not in the public interest (§ 241.4) and (2) the person does not pose a danger to the community.

OSUP Revocation and Third Country Removal

8 C.F.R. § 241.4 & 8 C.F.R. § 241.13: ICE may only re-detain noncitizens released on an OSUP if it determines that there are certain changed circumstances (e.g. violation of condition of release or determination of significant likelihood of removal in reasonably foreseeable future) and if it follows certain procedures (e.g. notice of reasons for revocation and informal interview).

8 U.S.C. § 1231(b)(2)(E)(vii): DHS has the authority to remove noncitizens to a third country where removal to the country designated in the final order is “impracticable, inadvisable, or impossible.”

Developments in 2025:

- March 2025 [DHS memo on third country removals](#)
- July 2025 [ICE memo on third country removals](#)
- [D.V.D. v. D.H.S.](#) class action

§ 1225 v. § 1226

Case Study: Nora



Case Study: Nora

Nora, 27 years old, came to the United States from Mexico as a teenager a decade ago. She entered the United States without inspection. Nora has lived in Reno her whole adult life. She is a single parent to three U.S. citizen children ages 2, 5, and 7. She works in the evenings and on weekends cleaning offices while her sister takes care of her children. Nora has no apparent immigration relief options available to her. Last week, as she was returning to her apartment building after work, ICE agents detained her without a warrant in the parking lot.

Possible Habeas Claims?

- **Statutory claim:** Nora's detention is NOT under § 1225(b)(2)(A)
 - Facts/arguments in support?
- **Procedural due process claim**
- **Fourth Amendment challenge to her arrest**

Can we argue that the proper remedy for EACH of these claims is immediate release, rather than an IJ bond hearing?

What claim(s) would you lead with?

The Plot Thickens

Upon further investigation, you learn that Nora was detained upon her entry as a teenager, processed as an unaccompanied child, and released to a sponsor.

How do these facts impact your habeas claims?

Habeas Nuts and Bolts

- What to include in your petition?
 - Who are the parties?
 - Where to file?
 - How to file & serve?
 - What to file?
 - What happens next?
 - When will client get a decision?
-



Crafting the Petition

- Introduction
- Jurisdiction/Venue
- Legal Framework Section
- Facts Section
- Legal Claims
- Prayer for Relief



Who Are the Parties?

- **Petitioner(s)** = your client, seeking release from immigration detention
- **Respondents** = government defendants
- **“Immediate Custodian Rule”***: name warden of the jail holding petitioner(s)
- Also common to name ICE FOD, ICE Head, DHS Sec’y, AG, etc.
 - **Who is necessary for you to get full relief?**

****SCOTUS has not ruled on whether this rule applies to immigration habeas, but some courts have said it does***



Where to File?

- Venue is proper in the district where the petitioner is detained **at the time of filing**. 28 U.S.C. 2241(a)
- **Pay attention to the proper division within the district:**
 - Some large districts (e.g. in W.D. Tex.) are divided into smaller divisions, each with their own courthouse and judges.
- **Look at local rules and procedures to understand what you need to do!**

How to File & Serve

How to file:

- Look at district court website instructions on using CM/ECF.
- You need to be admitted to that court & registered for CM/ECF, OR have local counsel file it and petition for your admission *pro hac vice*.

How to serve:

- Check for standing order re serving immigration habeas petition or check judge's habeas dockets for recent orders on habeasdockets.org - many judges and courts order clerk to effect service
- If court does not serve, reach out to AUSA to ask if they will accept service on behalf of the government.
- If AUSA refuses to accept service, must request the issuance of a summons and serve each respondent per FRCP 4.

What to File?

- **Petition**
 - Any exhibits in support
 - Civil cover sheet (typically attached to petition)
- **Exhibits**
 - Weigh the pros and cons of client declaration
- **[Motion to Appear Pro Hac Vice (through local counsel, if not admitted)]**
- **[Motion for an Order to Show Cause (“OSC”)]**
 - Recommend including request in petition. See 28 U.S.C. 2243.
- **[Motion for a TRO and/or PI]**
 - Common to obtain faster reaction from court and faster briefing schedule
 - Some courts/judges do not allow TROs seeking release in habeas cases - check habeasdockets.org
 - Can also file TRO to enjoin transfer/removal, not necessary in jurisdictions that automatically enjoin transfer and not allowed in other jurisdictions
- **[Motion to Proceed Under Pseudonym, if necessary]**
- **\$5 filing fee**

What Happens Next

- Depends heavily on jurisdiction, consult local counsel/ check habeasdockets.org
- Not all jurisdictions follow timing in 2243 (which requires return in 3 days unless good cause for extension up to 20)
- In some jurisdictions, case referred to magistrate judge
- In some jurisdictions, gov't files Motion to Dismiss instead of return
 - If gov't files MTD, then you respond & they can reply.
- In some jurisdictions, AUSA assigned can be a resource for negotiation & resolution (although becoming rarer)
- In some jurisdictions, court may order release before reply
- Some judges will hold hearings, often depending on case

When Will Court Decide?

- Depends on jurisdiction, judge, and type of claim
- Note that further briefing still required in some jurisdictions if client released on TRO/PI by court
- Judge may require status reports from government to confirm release/outcome of bond hearing
- Can challenge any attempt by ICE to place ankle monitor unless ordered by court or immigration judge
- Can challenge procedurally unfair bond hearings

Key Resources

- Upcoming National Immigration Project two-day habeas training! (our Spring CLE) - March 31 & April 1
 - **Register [here](#)**
- Searchable [database](#) of habeas cases
- [Spreadsheet](#) of 1226/1225 decisions and lead appeals
- [Practice advisory](#) on *Maldonado Bautista* (updated Feb. 11, 2026)
- [Practice advisory](#) on habeas in Fifth Circuit post-*Buenrostro*
- [Practice advisory](#) on habeas for SIJS/UC youth
- Many helpful sample filings on the [Northwest Immigrant Rights Project litigation page](#)

Habeas Projects

- DC, Maryland, and Virginia
- Louisiana & Gulf Coast
- Minnesota

We can place cases in these regions for full representation, mentorship and local counsel, or just local counsel. But in order to keep placing cases, need as many attorneys willing to take occasional pro bono matters as possible!

Resources offered to attorneys who take cases: office hours, templates, mentorship, local counsel

Interested attorneys can [indicate interest here](#).