

Q&A: Habeas as the Last Line of Defense for Detained Immigrants

Q. How about litigation to determine that persons the US government is seeking to deport who are indigent should be entitled to appointed counsel?

A. There are many advocates working to establish a universal representation program to represent indigent folks in removal proceedings. Unfortunately, noncitizens have a right to an attorney in immigration proceedings only if they are able to pay for one themselves. But advocates continue to push for more support.

Q. Recently, I got a 30-year-old criminal conviction set aside and the underlying charge dismissed with prejudice. This was the client's only criminal conviction, and it was the basis for a 1996 deportation order. A motion to set aside that deportation order is pending at the BIA, but I understand that takes years to get a decision. In the meantime, next week the client has to report for check-in with ICE. What are the chances he will be detained based on this old deportation order, the basis of which no longer exists? Is it possible to file a pre-emptive habeas so that he doesn't get arrested next week?

A. We have seen a lot of re-detentions in recent months, and will briefly talk about claims that could be made in this context later in the presentation. It is possible to file a pre-emptive case, although likely more challenging in certain jurisdictions. Here is an example of a case in DNM where the judge issued a PI enjoining re-detention at an upcoming check-in: *Intriago-Sedgwick v. Noem*, No. 1:25-CV-01065-MIS-LF, 2025 WL 3688155 (D.N.M. Dec. 19, 2025).

Q. How can habeas be used to challenge unlawful deportation?

A. Generally speaking, once a person has been removed from the United States, federal courts will no longer have habeas jurisdiction. We have challenged unlawful removals of clients who were deported while their habeas was already pending in a U.S. district court. The challenge in those cases depended on the reason that the removal was unlawful (e.g., whether a violation of their immigration protection, a TRO, etc.).

Q. With the rise in immigration detention of US citizens, is Habeas the best avenue for release?

A. It often is, yes — seeking release from an immigration court is often simply not possible (which we'll discuss more soon).

Q. Sorry to trouble you with a question about constitutional law, but could you please help clarify the distinction between procedural due process and substantive due process in the context of immigration detention? I still find them confusing, as they seem very similar when I read about them. How can we clearly distinguish between the two?

A. We will try to clarify this again later, but the way I always think about it is that substantive due process is about there being a lawful purpose for detention. If there's no lawful purpose, detention is just punitive. The only two lawful purposes for immigration detention are to prevent flight risk and danger to the community. So, if a client has previously been found not to be a flight risk or a danger, e.g., or they have something like deferred action and cannot be deported, there is arguably no lawful purpose for their detention. Procedural due process is more that, even if the government claims there's a lawful purpose for detention (that person is a flight risk or danger) there should still be some process to test that claim — like a bond hearing.

Q. What is the legal basis to request flipping of the burden?

A. It's usually based on a [*Mathews v. Eldridge*, 424 U.S. 319 \(1976\)](#) procedural due process analysis, finding that the risk of erroneous deprivation of liberty interest is too high if burden is on noncitizens, since many do not have access to counsel or access to information to prove a negative (that they are not a flight risk or danger). Also relevant is the fact that the government already subjected them to unlawful detention, so arguably it should be the government's burden to prove detention is justified.

Q. We represent a detainee in a (Redacted Court). We filed a habeas petition in early December including a request for a TRO and immediate release but the judge still has not ruled on our petition. Any suggestions on how we can get the judge to issue a ruling?

A. This is extremely tough and an issue across the southeast. If you have already done a TRO and release motion, the only other things that come to mind are motion for expedited consideration or a 28(j) notice of supplemental authority.

Q. Is there a standing order in El Paso district stating that bonds are required or that Respondent should file directly with district court to get order on bond?

A. You still need to file directly with the district court, although depending on the judge you could get a swift order providing for a burden-shifted bond hearing.

Q. As state-practicing PDs, we often don't know more than a client's status, which often they barely know. How can we find what statute our clients are detained under? The administrative warrants we see are so devoid of actual information.

A. This is something that the practitioner would need to determine via the facts (type of admission and other analysis Ellie went through), and then via arguments about how to read these statutes. Outside of the Fifth Circuit, the arguments would be exactly what Ellie is describing. In the Fifth Circuit, the court in [*Buenrostro-Mendez v. Bondi*](#) expanded the scope of §1225.

Q. What about someone who was lawfully admitted, then later got a criminal conviction that makes the person deportable, but then got the conviction voided and the charge dismissed, so there is no longer any criminal conviction?

A. If the person was lawfully admitted then they should be eligible for an immigration court bond hearing without having to file habeas (unless there is a procedural issue with the bond hearing or the government argues the person is actually mandatorily detained under §1226(c)/Laken Riley Act, in which case habeas might be necessary to challenge this).

Q. Are there any remedies (expedited removal proceedings, demands for immediate removal, voluntary departure etc.) for detained persons willing to waive their rights to stay or contest their removal?

A. Yes, depending on the circumstances/context, noncitizens can either ask for voluntary departure from an immigration court or DHS or can agree to a removal order.

Q. Exactly what does "inspection" consist of, with regard to determining whether someone entered "with inspection" or "without inspection"?

A. Inspection really just means some encounter with an immigration officer, usually CBP at the border. Entering without inspection means the person crossed the border surreptitiously (so hasn't had any prior immigration contact).

Q. Name of case regarding "due process prolongs unlawful detention"?

A. *Romero v. Ladwig*, No. CV 25-1106-JWD-EWD, 2026 WL 321437, at *8 (M.D. La. Feb. 6, 2026) (ordering release where the government did not follow regulations when revoking an order of supervision).

Q. I was appointed by a USDC under the Criminal Justice Act to represent a detained non-citizen who filed a pro se habeas petition. So at least one judge thinks she has the authority to appoint counsel.

A. That is great. I would love for more judges to do that.

Q. What kinds of records exist regarding whether an individual had an encounter with CBP at the border, and how does one access those records?

A. In theory you can file a FOIA request, but this often takes a long time. If you file a habeas petition upon information and belief after discussing with the client, if there are existing records often the government will file them in the habeas case. There is also the ability to seek limited discovery in habeas if necessary.

Q. Is it really required to list the name of the ICE field office director / Warden? If so, is there a place online where people can find the name of the ICE field office director?

A. Yes, the immediate custodian rule requires naming the warden. (SCOTUS has not ruled on whether this rule applies to immigration habeas, but some courts have said it does.) It is generally good practice to name the FOD as well. If you do not know who the warden is, you can just name “Warden, X Detention Center.”

Q. Please comment on the approach of filing a Motion for TRO along with a habeas petition.

A. Depends on the court. Really, habeas petitions should move quickly on their own per 28 U.S.C. §2243. But in many jurisdictions, more is needed to get the case moving. One could file a motion for an order to show cause, motion for TRO/PI, or motion for release pending adjudication. You can find what different judges respond best to by reviewing dockets on habeasdockets.org.

Q. Are both a warrant AND a flight risk assessment required? So if they have a warrant but don't assess flight risk there's a claim?

A. Basically, an officer needs to either have (1) both “reason to believe” the person is violating immigration law AND a flight risk determination or (2) a warrant. This is in 8 U.S.C. §1357(a)(2).

Q. How do you determine venue when ICE is preventing anyone from knowing WHERE the detained person(s) are being held?

A. Yes, that is tough. We use the [ICE detainee locator](#) if we have the person's A-number. If not, we make our best guess, which forces the government to tell the court where the person is.

Q. Is there any recent pushback on exhaustion after the order vacating Yajure Hurtado?

A. Currently we have not seen this, I believe because the government does not want to concede that the vacatur is actually valid.

Q. Is there a strategy regarding whether to load the petition with legal arguments or file a memo in support and a motion for TRO etc. to nudge the court to make a decision?

A. We frame the issues extensively in the petition itself. But yes, someone could also use the TRO memo (or the motion for release, if applicable) as an opportunity to further apply and explain arguments.

Q. Do you have a sample of a pre-emptive petition that can be filed before the person reports for a scheduled check-in that you can share?

A. I have not filed until someone is in custody. However, after release, we have filed pre-emptive TROs enjoining the government from re-detaining them at their next check-in. See, e.g., Kilmar's case for an example of that.

Q. Are volunteer attorneys permitted to represent clients completely remotely to enable us to practice in other jurisdictions pro hac vice without physical presence?

A. Yes. In most cases, status conferences and similar proceedings are held telephonically to accommodate pro hac vice appearances.

Q. How much success are you seeing with discovery requests versus FOIA requests for records, especially where briefing deadlines are soon after appointment?

A. In our experience, FOIA responses are so slow that they almost uniformly require litigation to obtain production. Discovery is limited in habeas, but if you need a specific document, it would likely be much faster than FOIA.

Q. If someone is filing pro se should they include their own declaration (since no verification statement)?

A. I have never seen pro se petitioners add a declaration, and have seen some great pro se petitions granted recently. The verification statement is usually signed by the attorney saying they got the information directly from the petitioner. Where the petitioner signs the petition themselves, that generally serves the same purpose.

Q. Do these involve handling the matters in open court/oral arguments? Researching and drafting a petition is far different than having the experience necessary to make these arguments in open court.

A. It depends on the jurisdiction. Many courts disfavor oral argument and decide cases on the papers. However, oral arguments do occur sometimes.

Q. Is there a good resource for tracking the appeals in the Yajure-Hurtado-type cases?

A. Yes, there is a tracker of §1225/§1226 cases (which I believe includes the appeals) referenced on the last slide of the presentation. The slides will be shared.

Q. I am not sure if I understood correctly, do we file the request for bond first with an immigration judge and get denied and then file the habeas?

A. If your client entered unlawfully, this arguably shouldn't be required since immigration courts are generally still saying they cannot grant bond in these cases. You can therefore argue to the habeas court that requesting a bond hearing would be futile.

Q. Is there any requirement to meet and confer with the government prior to filing a habeas petition?

A. That depends on the local rules of the district court. Often even if you reach out to the U.S. Attorney's Office in advance, they will not confer until service has been effected.

Q. If you are filing without a bond request, how does that change the structure of the habeas?

A. Either way, it generally does not materially change how the habeas petition itself is structured.