

Habeas

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Procedural Issues

- Review the Federal Rules of Civil Procedure, the Local, District Court Rules, and Individual Judges' Standing Orders prior to filing
- Jurisdiction - Conditions or lawfulness of detention: 28 U.S.C. 2241
- Venue: 28 U.S.C. 1391
- What: ongoing custody or restraint on liberty

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Jurisdictional Issues

- Neither 8 U.S.C. 1252(b)(9) or 8 U.S.C. 1226(e) deprives federal court of jurisdiction to review scope of government's detention authority. *Jennings v. Rodriguez* 583 U.S., 200 L.Ed. 2d 122, 138 (2018)
- No jurisdiction in habeas on discretionary determinations, only questions of law. *Demore v. Kim*, 538 U.S. 510, 538 (2003)

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Who Do You Name as Defendants?

- Sue the Custodian: ICE-ERO Field Office Director (FOD) and/or immediate warden or supervisor of facility. Attorney General as head of EOIR. May be appropriate to sue DHS Secretary
- Explain to the court that ICE detainees are frequently transferred, so FOD is the appropriate custodian. Circuit law specific

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Immediate Custodian

- First Circuit: superintendent of the detention facility. *Vasquez v. Reno*, 233 F. 3d 688 (1st Cir. 2000).
- Sixth Circuit: ICE field office director for the district where the detention facility is located. *Roman v. Ashcroft*, 340 F. 3d 314, 2003 FED App. 0283P (6th Cir. 2003).
- Seventh Circuit: detention facility warden. *Kholyvskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006).

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Filing the Writ

- Civil Cover Sheet
- Petition
- Memorandum of Points and Authorities (optional) -- check for page limits on briefing
- Actual physical service (certified mail) of petition and memorandum on opposing, as well as electronic filing; after initial filing, everything is filed and received electronically

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Filing the Writ (cont.)

- Summons & return of summons: who prepares the summons? Court specific.

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Next Steps

- Curing any defects in filing
- Typically assigned to a magistrate. Can object to magistrate
- DOJ/US Attorney's Office/AUSA will enter appearance on behalf of Govt to file a response
- Court/magistrate may schedule a conference and/or oral argument. Conference reports

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Pre and Post Final Order Detention

- 8 USC § 1226(c), INA 236(c):
 - Inadmissible under 8 USC § 1182(a)(2), INA § 212(a)(2)
 - CIMT (not petty offense or juvenile offense)
 - Offense relating to a controlled substance
 - Multiple convictions with five years cumulative ordered imprisonment
 - Prostitution, commercial vice
 - Controlled substance trafficking
 - Severe violations of religious freedom
 - Trafficking in persons, money laundering

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Pre and Post Final Order Detention (cont.)

- Deportable under 8 USC §§ 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D), INA §§ 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D):
 - Two or more CIMTs
 - Aggravated felony
 - Relating to a controlled substance (except 30 grams of marijuana)
 - Firearms and explosive devices
 - Miscellaneous -- espionage, national security, export violations for dual use equipment

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Pre and Post Final Order Detention (cont.)

- 8 USC § 1226(c):
 - Deportable under 8 USC § 1227(a)(2)(A)(i), INA § 237(a)(2)(A)(i): CIMT for which a maximum term of imprisonment is one year, act committed within five years of admission, and has been sentenced to one year or more imprisonment.
 - Inadmissible under 8 USC § 1182(a)(3)(B) INA § 212(a)(3)(B): Security and terrorist activities

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Pre and Post Final Order Detention (cont.)

- Deportable under 8 USC § 1227(a)(4)(B), INA § 237(a)(4)(B):
 - Security, terrorist activities
 - Nazis
 - Genocide, torture, extrajudicial killings
 - Recruitment/use of child soldiers
 - Foreign policy concerns

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Pre and Post Final Order Detention (cont.)

- 8 USC § 1231(a): Post Final Order
 - (1)(A): Except as otherwise provided in this section, when an alien is ordered removed, the AG shall remove the alien from the U.S. within a period of 90 days, "removal period."
 - (2): During the removal period, the AG shall detain the alien.

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Timing

- General rule is that Federal Defendant gets 60 days to file a response after being served
- 28 U.S.C. 2243 sets default timeline
 - Local district court practice varies: notice of motion and motion for emergency hearing

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Stays of Removal

- Pending PFR
- Rules 18 and 27 of Federal Rules of Civil Procedure
- Likely to succeed on the merits
- Petitioner will suffer irreparable harm
- Potential harm to opposing party if granted
- Public interest in the granting of the TRO

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Stopping ICE Action

- Temporary Restraining Orders
 - stop re-detention
 - prevent transfers out of jurisdiction
 - may be requested as a separate motion from the complaint or included in the complaint

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Substantive Issues

- Burden of Proof and Merits of Bond Motion
- Challenging the amount of bond
- Prolonged detention
- "When released"

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Burden of Proof

- Placing burden on non-citizen violates due process
 - *Jennings v. Rodriguez*
- Placing burden on non-citizen is arbitrary and capricious
 - *Matter of Adeniji*, 22 I&N Dec. 1102, (BIA 1999)
 - 8 U.S.C. 1226(a), *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976), and 8 C.F.R. 236(c)(8).

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Amount of Bond

- Ability to pay: *Hernandez v. Sessions*, 872 F. 3d 976 (E.D. CA 2017)

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Prolonged Detention: Pre Final Order

- Fifth Amendment Due Process Clause Challenge
- *Demore v. Kim* 538 U.S. 510 (2003):
 - Supreme Court held that detention during the “limited period necessary” to complete deportation proceedings is not unconstitutional.
 - Court relied on faulty statistics, provided by EOIR; Court believed average detention case to be 45 days to five months.

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Anticipate Government Arguments

- 8 U.S.C. 1226(c) - pre final order cases:
 - Mandatory Detention INA 236(c) applies
 - Exhaustion to BIA needed
 - No Review of Discretionary Decisions
 - Statute Does Not Permit Release

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Post Final Order

- A statute permitting indefinite detention would raise serious due process concerns. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)
- Six Month Rule with initial 90 day review

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Anticipate Government Arguments

- 8 U.S.C. 1231(a) - post order detention
- Detention is not yet prolonged
- Noncitizen has failed to cooperate
- Noncitizen is "particularly dangerous"

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Jennings v. Rodriguez

- Class action lawsuit, filed in the Central District of California
- Raised both constitutional and statutory challenges
- INA s. 235, 236(a), and 236(c)
- The Ninth Circuit held that prolonged detention without a hearing raised serious due process concerns. The court also concluded that none of the detention provisions at issue authorized such detention.
- Applying the canon of constitutional avoidance, the court construed the INA to require an automatic bond hearing before the immigration judge at six months of detention, where the government bears the burden of justifying continued detention.
- *Rodriguez v. Robbins*, 804 F. 3d 1060, 1074-77 (9th Cir. 2015).

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Jennings v. Rodriguez, 583 US _ (2018)

- In 5-3 decision (Justice Kagan was recused), the Supreme Court reversed the Ninth Circuit and remanded for further proceedings:
 - Held: Plain language of the INA authorized detention without hearings until the conclusion of removal proceedings
 - Remanded for the Ninth Circuit to decide whether Fifth Amendment due process requires a hearing for prolonged detention

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When Released

- Noncitizen was not taken into ICE custody, "when released" from relevant criminal custody
- ICE may subject a noncitizen to mandatory detention from criminal custody - i.e., even if ICE does not take custody immediately after the individual is released. *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001)

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When Released (cont.)

- Circuit Courts are split on the issue:
 - 3rd, 4th and 10th follow the Board's *Rojas* decision
 - 1st and 9th do not follow *Rojas*:
 - *Preap v Johnson*, 831 F.3d 1193 (9th Cir. 2016)
 - *Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015)
 - SCOTUS granted cert: *Nielsen v. Preap*, 138 S. Ct. 1279 (2018). Oral argument: 10/10/2018

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Happy Litigating!



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Questions? Comments?

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