NUTS AND BOLTS OF HABEAS CORPUS PETITIONS CHALLENGING IMMIGRATION DETENTION

PRACTICE ADVISORY[1]
July 31, 2021

This practice advisory addresses the nuts and bolts of immigration habeas petitions under the civil habeas statute, 28 U.S.C. § 2241. Although the statute may be stated as a basis for jurisdiction in several types of cases, this advisory focuses on challenges to immigration detention. The advisory focuses on the process for filing such habeas petitions, not the substance of the arguments underlying them.

1) What is a petition for a writ of habeas corpus?

The writ of habeas corpus—which literally means to "produce the body"—is a type of court order, stemming from English common law and long enshrined in the U.S. Constitution and statutes. The right to file a petition for a writ of habeas corpus is intended to, at a minimum, provide "a means to of reviewing the legality of Executive detention." *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

Most relevant to immigration practitioners, 28 U.S.C. § 2241 sets forth the current federal habeas corpus statute.[2] It provides that:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective

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[2] *See also* U.S. Const. art. I, § 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.").

> jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
> . . .
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> . . .
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

Under the statute, individuals who are "in custody" can petition a federal district court for release, the opportunity for a bond hearing before an immigration judge, or to challenge certain conditions of their custody.

2) What are some contexts in which an individual can seek release from immigration detention through a habeas petition?

Courts, including the U.S. Supreme Court, have recognized that individuals subject to immigration detention can utilize habeas corpus petitions to challenge a variety of immigration actions, including:

- Post-removal order detention in violation of the U.S. Constitution or immigration statutes where removal is not reasonably foreseeable.
    - *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005).
    - Note that individuals in withholding-only proceedings following reinstatement orders are subject to post-removal order detention under 8 U.S.C. § 1231 and thus are not statutorily entitled to bond hearings while seeking withholding of removal. *See Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021).[3]
- Pre-removal order mandatory detention in violation of the U.S. Constitution, including whether the individual is properly subject to mandatory detention.
    - BUT: individuals detained pursuant to 8 U.S.C. §§ 1226(c) or 1225(b) do not have a *statutory* right to a bond hearing following prolonged detention. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).
    - BUT: 8 U.S.C. § 1226(c), providing for the brief detention of certain individuals with criminal convictions without bond hearings during removal proceedings, is facially constitutional. *Demore v. Kim*, 538 U.S. 510 (2003).
    - BUT: individuals detained pursuant to 8 U.S.C. § 1226(c) do not have a *statutory* right to a bond hearing regardless of when U.S Immigration and Customs Enforcement (ICE) takes them into custody. *Nielsen v. Preap*, 139 S. Ct. 954

[3] Whether they have a constitutional right to a bond hearing has been decided in some circuits and is an open question in others. That issue is beyond the scope of this advisory.

(2019).[4]

- Pre-removal order non-mandatory detention in violation of the U.S. Constitution or immigration statutes.
    - BUT: individuals detained pursuant to 8 U.S.C. § 1226(a) do not have a *statutory* right to periodic bond hearings every 6 months. *See Jennings*, 138 S. Ct. 830.
- Immigration detention of unaccompanied children in the custody of the Office of Refugee Resettlement in violation of the U.S. Constitution, immigration statutes, or the *Flores* settlement agreement.[5]
- Immigration detention without the opportunity for parole in violation of the immigration statute, regulations, and ICE's parole directive.[6]
- Certain conditions of confinement in violation of the U.S. Constitution.[7]
- Conditions of release in violation of the U.S. Constitution or statutes, including failure to consider ability to pay and/or alternatives to detention.[8]

Individuals can also seek review of various non-detention related immigration claims through habeas petitions. *See, e.g.*, 8 U.S.C. 1252(e)(2) (providing for limited review of certain determinations made in expedited removal proceedings "in habeas corpus proceedings"). However, such claims are beyond the scope of this advisory.[9]

3) Is exhaustion required for a habeas petition?

Exhaustion of administrative remedies may be either statutorily or judicially required. There is no statutory exhaustion requirement in 28 U.S.C § 2241. However, exhaustion may be judicially required. This type of exhaustion is known as prudential exhaustion.

Courts may waive the prudential exhaustion requirement 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." *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (quoting *S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d

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[4] Whether they have a constitutional right to a bond hearing has been decided in some circuits and is an open question in others. That issue is beyond the scope of this advisory.

[5] *See, e.g.*, *D.B. v. Cardall*, 826 F.3d 721, 30-31 (4th Cir. 2016); *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017); *Saravia v. Session*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017); *Maldonado v. Lloyd*, No. 18 Civ. 3089 (JFK), 2018 WL 2089348 (S.D.N.Y. May 4, 2018).

[6] *See, e.g.*, *Abdi v. Duke*, 280 F. Supp. 3d 373, 384-85 (W.D.N.Y. 2017), *vacated in part on other grounds by Abdi v. McAleenan*, 405 F. Supp. 3d 467 (W.D.N.Y. 2019).

[7] *See, e.g.*, *Hope v. Warden York Cty. Prison*, 972 F.3d 310, 323-25 (3d Cir. 2020) (seeking release due to unconstitutional conditions of confinement); *Yanes v. Martin*, 464 F. Supp. 3d 467, 468 n.1 (D.R.I. 2020); *Zepeda Rivas v. Jennings*, 465 F. Supp. 3d 1028, 1035-36 (N.D. Cal. 2020).

[8] *See, e.g.*, *infra* n.14; *see also Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017).

[9] Practitioners pursuing non-detention related habeas claims should be aware of the Supreme Court's decision in *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020). *See also infra* n.15.

685, 688 (9th Cir. 1981).[10]

In detention cases, appeals to the Board of Immigration Appeals (BIA) can take months or years. Thus, requiring habeas petitioners to appeal to the BIA to prudentially exhaust is not efficient, would cause irreparable harm by continuing to deprive a person of their liberty, and/or would be futile where the agency has a precedent decision on the relevant issue. *But see Leonardo v. Crawford*, 646 F.3d 1157, 1160-61 (9th Cir. 2011) (finding that a detainee challenging an IJ's adverse bond determination typically should first appeal to the BIA).[11]

4) Where are habeas petitions filed?

Habeas petitions generally are filed in the district court with jurisdiction over the filer's place of custody. *See Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004) ("The plain language of the habeas statute . . . confirms the general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement."); 28 U.S.C. § 2241(a) (providing for habeas petitions "within [courts'] respective jurisdictions").

Not all habeas petitions follow this rule. In *Padilla*, the Supreme Court stated the district of confinement rule applies to "core habeas petitions challenging present physical confinement." 542 U.S. at 443. The Court expressly declined to decide whether habeas petitions filed by noncitizens "detained pending deportation" are this type of "core challenge[]." *Id*. at 435 & n.8.

In other situations, under prior Supreme Court case law, courts apply "traditional venue considerations." *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 493 (1973). Accordingly, some district courts have followed *Braden*, where the Court considered factors such as convenience to the parties, where "material events took place," and where "records and witnesses pertinent to petitioner's claim are likely to be found," to guide the venue analysis. *Id*. at 493-94. Some of these courts have found venue proper in districts outside the district of confinement.[12] Notably, such decisions generally arise in districts where the court recognizes

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[10] *See also McCarthy v. Madigan*, 503 U.S. 140, 146-49 (1992), *superseded by statute on other grounds as stated in Booth v. Churner*, 532 U.S. 731 (2001) (noting that traditional exceptions include where exhaustion would cause "undue prejudice to subsequent assertion of a court action" or "irreparable harm" to the petitioner, where there is "some doubt as to whether the agency was empowered to grant effective relief," or where it would be futile because "the administrative body is shown to be biased or has otherwise predetermined the issue before it") (internal quotations omitted).

[11] These arguments may be more challenging if the petitioner already filed and is awaiting the adjudication of a BIA appeal.

[12] *See, e.g.*, *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 495-496 (S.D.N.Y 2009) (applying "traditional principles of venue" and the federal venue statute, 28 U.S.C. § 1391(e), in case where U.S. Attorney General is proper respondent); *Carmona v. Aitken*, No. 14-cv-05321-JSC, 2015 WL 1737839 (N.D. Cal. Apr. 10, 2015) (proceeding in district court in location other than district of confinement where U.S. Attorney General and DHS Secretary are proper respondents). *Cf. Chen v. Holder*, No. 6:14-2530, 2015 WL 13236635, at *3 (W.D. La. Nov. 20, 2015) (applying both traditional venue principles and the district of confinement rule and reaching the same result).

that an individual other than the warden can be the proper respondent. *See infra* Question 6.[13]

5) Must an individual be physically detained to file a habeas petition?

No. Although the habeas statute applies to individuals who are "in custody," 28 U.S.C. § 2241(c), individuals need not be physically detained to file a habeas petition. Rather, they may be subject to some other type of restriction on their liberty. *Rumsfeld v. Padilla*, 542 U.S. 426, 437 ("[O]ur understanding of custody has broadened to include restraints short of physical confinement . . . ."); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (finding individuals in custody where there are "other restraints on [their] liberty, restraints not shared by the public generally," including individuals on parole from criminal custody).

For example, courts have found individuals subject to an order of supervision may be in custody for purposes of 28 U.S.C. § 2241 where they challenge the conditions of their release.[14]

Courts also have found individuals subject to final removal orders are "in custody" for purposes of 28 U.S.C. § 2241. *See, e.g.*, *Rosales v. Bureau of Immigration and Customs Enf't*, 426 F.3d 733, 735 (5th Cir. 2005) (agreeing with pre-REAL ID ACT decisions that "a final deportation order subjects [a noncitizen] to a restraint on liberty sufficient to place the [noncitizen] 'in custody'"). However, immigration habeas petitions raising non-detention related claims are beyond the scope of this advisory.[15]

The determination of whether an individual is in custody is made at the time that the habeas petition is filed. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

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[13] In at least one case, a court reasoned that, where a petitioner is in immigration custody in a contract facility, the federal officer with immediate control over the facility (rather than the warden of the contract facility) is the correct respondent and so venue can be determined based on that respondent's location, regardless of where the petitioner is detained. *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1187 (N.D. Cal. 2017), *aff'ed on other grounds* 905 F.3d 1137 (9th Cir. 2018).

[14] *See, e.g.*, *Doe v. Barr*, 479 F. Supp. 3d 20, 26 (S.D.N.Y. 2020); *Devitri v. Cronen*, 290 F. Supp. 3d 86, 90 (D. Mass. 2017); *Xiao Biao Li v. Barr*, 839 F. App'x 589, 591 (2d Cir. 2020); *Alvarez v. Holder*, 454 F. App'x 769, 772-73 (11th Cir. 2011). *But see, e.g.*, *Berrezueta v. Decker*, No. 1:20-cv-10688-MKV, 2021 WL 601649 (S.D.N.Y. Jan. 11, 2021) (finding individual who filed habeas petition while in custody and then was released subject to order of supervision was subject to dismissal as moot absent proof of collateral consequences from prior detention).

[15] In 2020, the Supreme Court found that the 8 U.S.C. § 1252(e)(2), the expedited removal statute limiting habeas review, did not violate the Suspension Clause as applied to an individual seeking review of his lack of opportunity to seek asylum, because the scope of the writ of habeas corpus in 1789 did not encompass the petitioner's claim. *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020). However, the Court did not address the scope of habeas relief available pursuant to 8 U.S.C. § 2241 where the Immigration and Nationality Act does not bar or limit review. *But see* 8 U.S.C. § 1252(a)(2), (4), (5), (b)(9), (e)(2), (g).

6) Who must be named as a respondent in a habeas petition?

As with all cases, it is important to identify the respondent(s) to the habeas petition. In *Rumsfeld v. Padilla*, the Supreme Court addressed the identity of the proper respondent to a § 2241 habeas petition filed by a U.S. citizen challenging his detention as an enemy combatant. 542 U.S. 426 (2004). The Court held that the only proper respondent to a traditional habeas corpus petition involving a "core challenge[]" to "present physical confinement" is the actual or "immediate custodian" of the facility where the individual is detained. *Id*. at 435. In Mr. Padilla's case, the immediate custodian was the commanding officer in charge of the naval brig where he was physically held. *Id*. at 442.

Significantly, however, the Supreme Court expressly left open the question of the identity of the proper respondent(s) to a petition filed by a noncitizen "detained pending deportation." *Id*. at 435 n.8 (recognizing circuit split on "the question whether the Attorney General is a proper respondent to a habeas petition filed by [a noncitizen] detained pending deportation" and stating "[b]ecause the issue is not before us today, we again decline to resolve it").

Since *Padilla*, lower courts that have addressed the identity of the proper respondent to an immigration habeas petition have split. Some courts have found that only the warden of the detention facility where the noncitizen is held is the proper respondent.[16] Other courts recognize national-level policy making officials, such as the U.S. Attorney General, as proper respondents.[17] Still others recognize as the proper respondent the federal official with responsibility over the detention facility or the federal contract governing the detention facility, usually the ICE Field Office Director.[18] In yet other cases, courts reach the merits of habeas claims without addressing the issue where the petitioner named high level federal officials, the ICE Field Office Director, and the warden as respondents.[19]

In order to exercise personal jurisdiction over a habeas petition, a district court need only find that one named respondent is proper.[20] To avoid dismissal based on failing to name the proper respondent, it is advisable to review applicable circuit and district court decisions and consult

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16 *See*, *e.g.*, *Vasquez v. Reno*, 233 F.3d 688, 6993-96 (1st Cir. 2000); *Kholyavskiy v. Achim*, 443 F.3d 946, 949-53 (7th Cir. 2006); *Mi Hui Lu v. Lynch*, No. 1:15-cv-1100-GBL-MSN, 2015 WL 8482748, at *4-5 (E.D. Va. Dec. 7. 2015).

17 *See, e.g*., *Santos v. Smith*, 260 F. Supp. 3d 598, 607-08 (W.D. Va. 2017); *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 723-25 (D. Md. 2016); *Somir v. United States*, 354 F. Supp. 2d 215, 217-18 (E.D.N.Y. 2005).

18 *See, e.g*., *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1183-87 (N.D. Cal. 2017); *Campbell v. Ganter*, 353 F. Supp. 2d 332, 336 (E.D.N.Y. 2004).

19 *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir 2017) (affirming district-wide preliminary injunction in class action case challenging bond practices where plaintiffs named several high-level officials, the Field Office Director for the local ICE office, and the wardens of detention facilities); *Rivera v. Holder*, 307 F.R.D. 539, 544 n.1 (W.D. Wash. 2015).

20 *Dunn v. U.S. Parole Commission*, 818 F.2d 742, 744 (10th Cir. 1987) ("So long as the petitioner names as respondent a person or entity with power to release him, there is no reason to avoid reaching the merits of his petition.") (quoting *Lee v. United States*, 501 F.2d 494, 502-03 (8th Cir. 1974) (Webster, J. concurring)).

with other attorneys who regularly file habeas petitions within that district. If the proper respondent is unclear, it may be prudent to name the warden of the facility where the petitioner is held in addition to any relevant immigration officials or entities (e.g., ICE Field Office Director, DHS Secretary, Attorney General, DHS, EOIR).[21]

7) What should be included in a habeas petition?

As an initial matter, the U.S. Courts' website has a standard form (Form Number AO 242) for a petition for writ of habeas corpus under 28 U.S.C. § 2241.[22] This form is intended for use by pro se habeas petitioners.

In counseled cases, a habeas petition will have many of the same elements of a federal district court complaint. The following is an overview of the basic elements to include:

> ***General Format*** – Federal Rule of Civil Procedure 3 governs the commencement of an action in district court. Most courts have local rules that implement the federal rule and address the format for pleadings that commence an action, including whether pleading paper is required, font size, and caption formatting. In general, in habeas cases, the noncitizen is the petitioner, and the people or entities who are sued are the respondent(s). Habeas petitions, like all complaints, consist of numbered paragraphs.
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> ***Caption*** – The caption should include the name of the document, e.g., Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241. If any of the respondents are people, the caption should note that the respondent(s) are sued "in his/her/their official capacity."
>
> ***Introduction*** – Introductions are optional but can be helpful in giving the court a quick overview of the compelling facts in the case, the basis of the claim(s), and the relief sought.
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> ***Jurisdiction*** – The district court has subject matter jurisdiction under 28 U.S.C. § 2241. To cover all possible bases, it may also provide that the court has under 28 U.S.C. § 1331 (federal question) and, where applicable, Article I § 9, cl. 2 of the U.S. Constitution (Suspension Clause). The section should also state that the court may grant relief pursuant to 28 U.S.C. § 2241, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq*., and the All Writs Act, 28 U.S.C. § 1651. The jurisdictional statement generally also includes a statement that the action arises under the Constitution and the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*.

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[21] In cases involving unaccompanied children detained in the custody of the Office of Refugee Resettlement (ORR), the relevant federal officers and agencies would instead be national-level policy making officials or federal official with responsibility over the detention facility from ORR or the U.S. Department of Health and Human Services. *See, e.g.*, *Saravia*, 280 F. Supp. 3d at 1183-87 (finding ORR federal field specialist, the individual with responsibility over contract facility, the proper respondent); *Santos*, 260 F. Supp. 3d at 607-08 (finding director of ORR director and director of juvenile detention center proper respondents).

[22] The form is available at https://www.uscourts.gov/sites/default/files/AO_242_0.pdf.

Venue – In habeas cases, due to the custody requirement, venue generally is proper in the judicial district where the person is detained at the time of filing. See Question 4 for further discussion of the custody requirement and exceptions.

The petition also could explain why venue is proper under 28 U.S.C. § 1391(e). That statute provides that, in cases where the respondent is a U.S. officer, employee or agency, venue lies in any judicial district where respondent resides, where a substantial part of the relevant events/omissions occurred, or where the petitioner resides if no real property is involved in the action.

Exhaustion of Administrative Remedies – Because statutory exhaustion is not required and prudential exhaustion generally is unwarranted in immigration habeas cases, *see* Question 3, there is usually no reason to include a section in the complaint on exhaustion of administrative remedies.

Parties – The parties section sets forth the name of each petitioner and respondent. With respect to petitioners challenging detention, state the length and place of detention and include an allegation that s/he is under the direct control of the respondent(s). With respect to individual respondents, state that the person is being sued in their official capacity and indicate that the respondent is a legal custodian of the petitioner.

Legal Background/Framework – This section is optional. It may be helpful to lay out the law governing the basis for detention. It can go before or after the statement of facts.

Statement of Facts – Set forth the factual allegations that form the basis of the unlawful conduct challenged in this section.

Claims for Relief – This section generally consists of numbered counts with each count alleging a separate statutory or constitutional violation. Regulatory violations can form part of the basis of a statutory count or a separate independent count.

Prayer for Relief – The prayer for relief lays out the relief sought. It generally requests that the court: (a) assume jurisdiction over the matter; (b) declare that the actions of respondent(s) violate the statute and/or constitutional provision that form the basis for the claims for relief; (c) issue a writ of habeas corpus (e.g., order release, order a bond hearing); (d) award attorneys' fees and costs; and (e) grant any other relief that it deems just and proper.

8) Is there a fee to file a habeas petition and what documents are part of the filing?

Yes, there is a $5.00 filing fee for habeas corpus petitions filed in federal district courts. This amount is set by statute. *See* 28 U.S.C. § 1914(a). A petitioner who is unable to pay the filing fee may seek a waiver of the fee by filing an application to proceed in forma pauperis.[23]

[23] Fee waiver forms are available on the U.S. Courts' website, https://www.uscourts.gov/forms/fee-waiver-application-forms. However, some district courts use customized application forms, which can be found on the specific court's website.

The first document that is filed is the ***petition for a writ of habeas corpus*** discussed above in Question 7. Other documents accompany the filing. Some are mandatory, and the court will require counsel to file them if they are omitted. Others are optional.

All filings require a ***civil cover sheet***.[24] For the most part, the form is self-explanatory, and the second page of the form contains detailed instructions about how to complete it. Notably, for immigration detention habeas petitions, the correct category under Nature of Suit is "Alien Detainee," which located under the "Prisoner Petitions."

Most district courts allow a petitioner to attach ***exhibits*** to the petition as contemplated by Federal Rule of Civil Procedure 10(c) which provides that "an exhibit to a pleading is part of the pleading for all purposes." Attaching exhibits in support of a habeas petition can be helpful as the government will not produce an underlying record. However, some courts do not allow for exhibits in support of a complaint, so it is important to check local rules. If exhibits are permitted, they may include: IJ and/or BIA decisions related to detention; evidence before the IJ or BIA; evidence used by DHS in assessing the petitioner's custody status; a declaration/affidavit by the petitioner or counsel regarding knowledge of various substantive or procedural facts in the case, and a transcript of relevant underlying bond proceedings before the IJ.

A ***memorandum of points and authorities*** (P&A) is not required but may be beneficial. A P&A is like a brief in that it contains a thorough legal analysis in support of the claims stated in the habeas petition. If the habeas petition must be filed quickly, a P&A can be filed afterwards.

A ***motion for temporary restraining order*** (TRO) *or* ***motion for a preliminary injunction*** (PI) is also optional. *See* Federal Rule of Civil Procedure 65. These types of motions are considered extraordinary remedies and require strict compliance with FRCP 65 as well as all relevant local rules. A PI is an injunction that applies pending full adjudication of the merits of the habeas petition. A TRO is an injunction that is temporary in duration, usually 14-days. Among other factors, the moving party must establish that the petitioner will suffer irreparable injury to obtain injunctive relief.[25] Although beyond the scope of this advisory, it is worth noting that a PI motion requires advance notice to opposing counsel (i.e., the local U.S. Attorney's Office) but a TRO motion may be filed without such notice.

Finally, a ***summons*** also must be completed and filed for each respondent to the petition. *See* Federal Rule of Civil Procedure 4(b).[26] Some courts also require preparation of a summons for every person or entity that will be served, including the local U.S. Attorney's Office and the U.S. Attorney General. In a small number of courts, the court will not require a habeas petitioner to file summonses, but instead will issue them on its own.

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[24] The standard civil cover sheet (Form Number JS 44) is available on U.S. Courts' website, https://www.uscourts.gov/forms/civil-forms/civil-cover-sheet. However, some district courts use customized civil cover sheets, which can be found on the specific court's website.

[25] *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008).

[26] Summons forms generally are available on website of each district court. The standard summons form (Form Number AO 440) also is available on the U.S. Courts' website, https://www.uscourts.gov/forms/notice-lawsuit-summons-subpoena/summons-civil-action.

9) How is a habeas petition served?

Federal Rule of Civil Procedure 4(i) sets forth the required manner of service of the complaint and summons in suits against the United States, its agencies, and/or its officers sued in their official capacity.[27] The rule also allows for reasonable time to cure deficiencies in service provided that the U.S. Attorney's Office or the U.S. Attorney General has been served. Fed. R. Civ. P. 4(i)(4). However, always check local rules specific to civil habeas petitions to determine whether there are different instructions regarding service that apply. Importantly, in some courts, the clerk's office will serve the petition and summons in habeas actions.

Note that, regardless of whether counsel or the clerk's office handles service, there may be other documentation the court sends after the habeas petition is filed that counsel must serve. For example, and as discussed below, some judges require that the petitioner serve a copy of their standing orders on opposing counsel.

Attorneys from the local U.S. Attorney's Office or the Office of Immigration Litigation (a division within the Civil Division of the U.S. Department of Justice) generally represent the government in habeas actions. Once counsel enters an appearance, pleadings must be served on counsel "unless service upon the party is ordered by the court," *see* Fed. R. Civ. P. 5(b), and all future pleadings must be filed with a certificate of service, *see* Fed. R. Civ. P. 5(d).

10) What happens after the habeas petition is filed?

Procedural matters

Within hours or days after the petition is filed, the court will issue the summons(es) and assign a district court judge and/or a magistrate judge.

For a magistrate judge to conduct all proceedings and order the entry of a final judgment, all parties must consent. *See generally* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73. Thus, attorneys may need to decide whether to consent to proceed before a magistrate.[28] If either party does not consent, however, the case will proceed before the district court judge. It may be worthwhile to do some background research on the judge assigned to the case and/or connect with local practitioners who have appeared before the judge.[29]

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[27] For further information about service, please see the practice advisory *Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation*, available on NILA's website at https://immigrationlitigation.org/wp-content/uploads/2020/05/Sue-and-Serve-PA.5.29.2020-Update-FINAL-NILA.pdf.

[28] Consent forms generally are available on website of each district court. The standard consent form (Form Number AO 85) also is available on the U.S. Courts' website, https://www.uscourts.gov/sites/default/files/ao085.pdf.

[29] Judges' biographies often are on their court's website. Wikipedia also has information about judges, and the website The Robing Room (www.therobingroom.com) has reviews and ratings.

Most judges have standing orders with specific instructions for litigation and case management. It is critical to carefully read any applicable standing orders and strictly comply with everything in them.

It is important to calculate and calendar all relevant deadlines. Although 28 U.S.C. § 2243 allows for a response to a habeas petition "within three days unless for good cause additional time, not exceeding twenty days," district courts routinely take the position that they are not bound by that reply period, reasoning that they have discretion pursuant to the superseding Rules Governing Section 2254 Cases in the United States District Courts and Rules Governing Section 2255 Cases for the United States District Courts[30] to set a deadline beyond twenty days for habeas petitions under 28 U.S.C. § 2241.[31] In no circumstance, however, should the court set the response time beyond sixty days, which is the amount of time that the government has to file either an answer or a defensive motion in cases against the United States, a federal agency, or a federal officer or employee in an official capacity. *See* Fed. R. Civ. P. 12(a)(3).

Although practices vary by court and judge, counsel may receive court-issued documents specifically related to deadlines for case management reports and conferences, additional briefing, responses, or even oral argument. Most habeas petitions are resolved without discovery. Depending on the facts and nature of the case, the government may file a motion to dismiss the petition for lack of jurisdiction or move for summary judgment.

If counsel handles service, counsel then must inform the district court that the summons and habeas petition were served. Depending on local rules, this is accomplished either by filing an affidavit of service or a return of service, both of which require listing the names, positions, and addresses of the parties served and the method of service.

Practical matters

Once the petition is filed and served, counsel may wish to send a copy via email to the local U.S. Attorney's Office. Subsequently, counsel may wish to contact that office to identify and introduce themselves to the government counsel assigned to the case. Counsel may wish to explain the relief sought through the petition and/or discuss any adjustments to the briefing schedules.

If DHS releases the petitioner from immigration custody after the habeas petition is filed, opposing counsel generally will argue that the case is moot. However, that a petitioner is no longer in custody does not automatically moot a petition if the petitioner was in custody at the

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30 *See* https://www.uscourts.gov/sites/default/files/rules_governing_section_2254_and_2255_cases_in_the_u.s._district_courts_-_dec_1_2019.pdf.

31 *See, e.g., Bleitner v. Welborn,* 15 F.3d 652, 653-54 (7th Cir.1994); *Clutchette v. Rushen,* 770 F.2d 1469, 1473-74 (9th Cir. 1985); *Castillo v. Pratt*, 162 F. Supp. 2d 575, 576-77 (N.D. Tex. 2001); *Romero v. Cole*, No. 1:16-CV-00148, 2016 WL 2893709, at *2 (W.D. La. Apr. 13, 2016); *Y.V.S. v. Wolf*, No. EP-20-CV-00228-DCG, 2020 WL 4926545, at *1 (W.D. Tex. Aug. 21, 2020).

time of filing.[32] Although it is beyond the scope of this advisory, there are some exceptions to mootness, including if the claim is capable of repetition, yet evading review.[33]

11) Can habeas petitioners seek appointed counsel if they cannot afford an attorney?

Although unrepresented individuals are not automatically provided with legal representation if they cannot afford an attorney, they may request representation pursuant to the Criminal Justice Act, which provides that district courts "may" provide representation "for any financially eligible person" including those "seeking relief under [28 U.S.C. § 2241]," "[w]henever the United States magistrate judge or the [district] court determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). Some courts have invoked this statute to appoint counsel for pro se individuals seeking immigration related habeas relief.[34]

12) Are attorneys' fees available for prevailing on a habeas petition?

Under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) & 5 U.S.C. § 504 *et seq*., individuals can recover attorneys' fees and costs for successful federal court litigation against the U.S. government. The EAJA statute applies to "any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action." 28 U.S.C. § 2412(d)(1)(A). Thus, courts have traditionally recognized that EAJA fees are available in the immigration context, including following successful immigration-related habeas petitions.[35]

However, in May 2021, a divided panel of the Fourth Circuit held that a habeas petition seeking release from immigration detention was not a "civil action" and thus was ineligible for fee recovery under EAJA. *Obando-Segura v. Garland*, 999 F.3d 190 (4th Cir. 2021) (petition for rehearing pending as of July 2021). The court, relying upon prior precedent finding habeas petitions related to *criminal* convictions and detention ineligible for EAJA fees, held that *all* habeas petitions are "hybrid" actions that are neither civil nor criminal. *Id.* at 194-95. Therefore, the Court found that they do not fall within the scope of the EAJA statute. *Id*.

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32 *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

33 *See, e.g.*, *Hubbart v. Knapp,* 379 F.3d 773, 777-78 (9th Cir. 2004); *Rosales-Garcia v. Holland*, 322 F.3d 386, 397 (6th Cir. 2003); *Leonard v. Hammond*, 804 F.2d 838, 842-43 (4th Cir. 1986).

34 *See, e.g.*, *Thomas v. Searls*, _ F. Supp. 3d _, 2021 WL 358129, at *3-5 (W.D.N.Y. 2021); *Dela Cruz v. Napolitano*, 764 F. Supp. 2d 1197, 1199 (S.D. Cal. 2011); *Haynes v. Lowe*, No. 3:13-CV-00188, 2013 WL 1856663, at *1 (M.D. Penn. Apr. 5, 2013); *Van Truong v. Holder*, No. 2:10-cv-797 CW, 2012 WL 845399 (D. Utah Mar. 12, 2012); *Fuentes v. Terry*, No. CIV 10-526 WJ/LFG, 2010 WL 11619142 (D.N.M. Aug. 17, 2010).

35 *See, e.g.*, *Nadarajah v. Holder*, 569 F.3d 906 (9th Cir. 2009); *Sotelo-Aquije v. Slattery*, 62 F.3d 54, 58-59 (2d Cir. 1995); *see also Saysana v. Gillen*, 614 F.3d 1 (1st Cir. 2010) (considering EAJA claim but finding government's position substantially justified); *Kiareldeen v. Ashcroft*, 273 F.3d 542 (3d Cir. 2001) (same).

Contrary to that decision, after analyzing the same issue, the Second and Ninth Circuits both have found that immigration habeas petitions *do* constitute civil actions for the purposes of EAJA and thus allow for fee recovery.[36]

[36] *See Vacchio v. Ashcroft*, 404 F.3d 663, 667-72 (2d Cir. 2005) (distinguishing between criminal and immigration habeas petitions); *In re Hill*, 775 F.2d 1037, 1040-41 (9th Cir. 1985) (same).