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Litigating Habeas Corpus for Immigration Detainees

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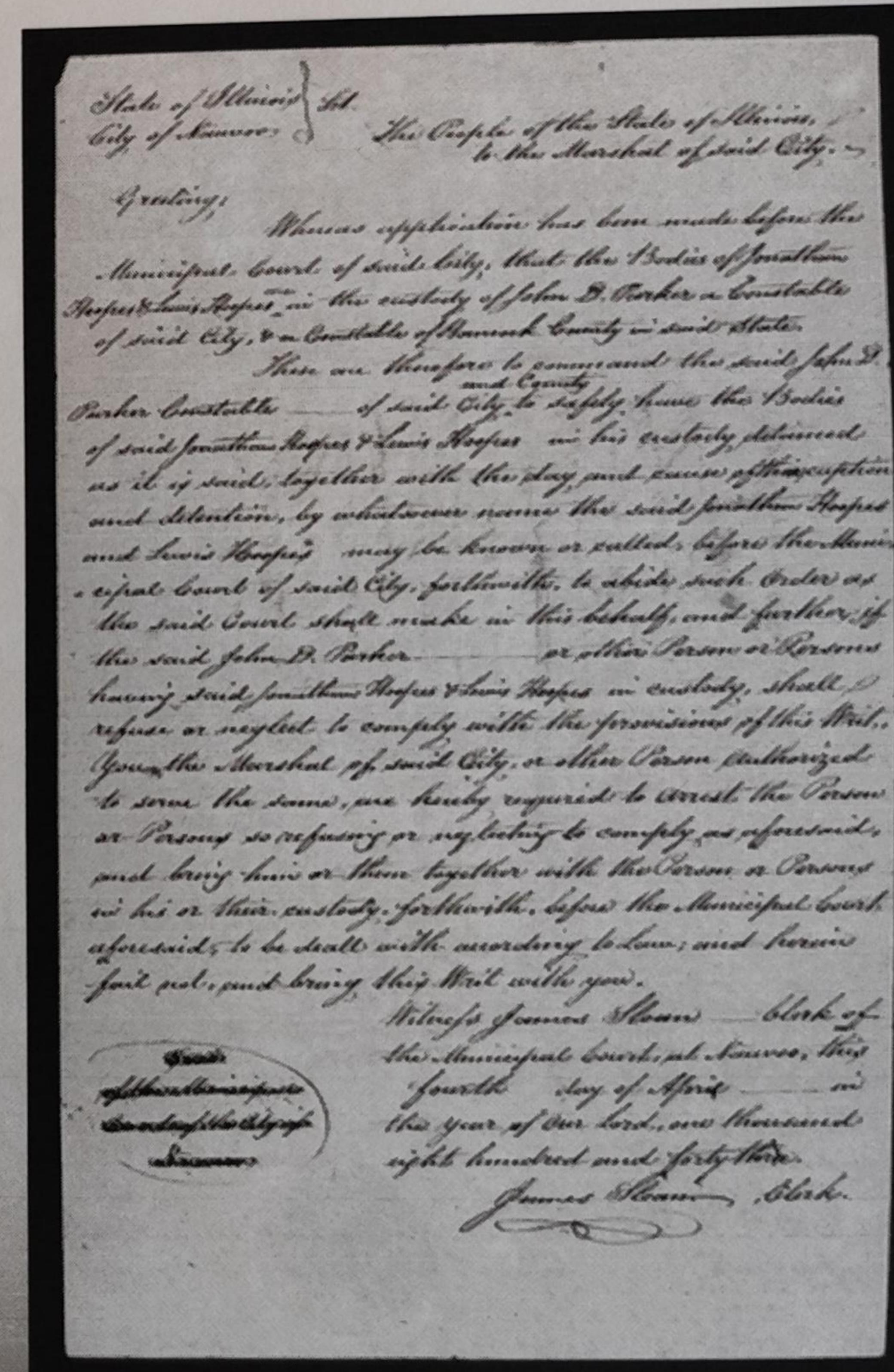
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Prepared for the Vera Institute of Justice's SAFE Network and NYFIUP Members

New York Providers

What is Habeas Corpus?

- A common law writ to challenge illegal custody
- Now codified at 28 U.S.C. § 2241 (for civil detainees)
- Generally used to either:
 - Challenge an individual's continued detention; or
 - Challenge a restraint on an individual's liberty
- Remedy in immigration context: usually a bond hearing but sometimes release or stay



Release Request - and then what?

- Should send release requests to ICE early in case, citing all possible bases for release.
 - *E.g.*, Fraihat, Velasaca, OPLA memos
 - Can combine this with notice to government of potential litigation (cc or fwd to AUSA!). Also helps later in litigation to show exhausted attempts pre-filing
 - Also can help *you* identify good candidates for habeas
- Do you have pending cases you're wondering may be good candidates for habeas? Let's discuss
 - Remember - don't share identifying details

Authority

- 8 USC § 1226(a) (INA 236(a))
 - Applies “pending a decision on whether the alien is to be removed”
 - Eligible for a bond hearing
- 8 USC § 1226(c) (INA 236(c))
 - Applies to noncitizens convicted of certain criminal offenses
 - “Mandatory” detention
- 8 USC § 1225(b) (INA 235(b))
 - Applies to noncitizens seeking admission (“arriving aliens”)
 - Eligible for parole
- 8 USC § 1231(a) (INA 241(a))
 - Applies to noncitizens with administratively final orders of removal
 - Eligible for post-order custody reviews (“POCRs”)

相互矛盾

Governing SCOTUS Decisions

- Zadvydas v. Davis, 533 U.S. 678 (2001)
 - Noncitizens with final removal orders, detained under 8 USC § 1231, cannot be detained indefinitely if they can't be physically deported
- Demore v. Kim, 538 U.S. 510 (2003)
 - Facial challenge to mandatory detention statute, 8 USC § 1226(c), failed. The concept of no-bond detention during removal proceedings is not unconstitutional. Left open as-applied challenges to mandatory detention
- Jennings v. Rodriguez, 138 S. Ct. 830 (2018)
 - Reversed *Rodriguez v. Robbins* (9th Cir.) and abrogated *Lora v. Shanahan* (2d Cir.)
 - 8 USC §§ 1226(c) and 1225(b) unambiguously require mandatory detention for duration of removal proceedings; no 6-month limitation can be read into statute
 - Remands to COA9 to consider whether mandatory detention violates Due Process Clause in first instance (COA9 remanded to district court—case still there)

Hypothetical

(4个月 case)

- You meet a new client who the government says is 236(c) due to a criminal conviction. You think there is an argument that actually, the client should be 236(a). You ask for a Joseph hearing, but lose. Your client has now been detained 4 months and you're about to have a merits hearing, which you're afraid you are likely to lose. But client wants to fight to the end even if detained through rounds of appeals.
- Would you file a habeas case? What claim would you raise? Any complications you foresee?

§ 1225(b) prolonged detentions post-Jennings & Thuraissigiam -

■ Pre-*Thuraissigiam* -

- Some courts found arriving aliens entitled to bond hearings after prolonged detention

← *Padilla v. ICE* - 953 F.3d 1134, 1151 (9th Cir. 2020)

← Enjoined *Matter of M-S-*, finding individuals charged as EWI in expedited removal who passed CFI entitled to bond hearing. (注) 恐惧面谈才**bond hearing**の資格

← But on Jan 11, 2021, SCOTUS granted cert, vacated and remanded to 9th Cir for further consideration in light of *Thuraissigiam*.

← *Abdi v. Duke* (W.D.N.Y.) - prior decision granting bond hearings to 1225(b) subclasses

← Decertified class after *Jennings*

§ 1231(a) prolonged post-Jennings (New Jersey & Pekh)

- Circuits also split on the right to a bond hearing after prolonged post-order detention. CA3 and CA9 require a bond hearing after six months. CA6 has found Jennings precludes construing the statute to require a bond hearing.
- *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F. 3d 208 (3d Cir. 2018):
 - Withholding-only detention is pursuant to 1231(a)/INA241 (post-order detention)
 - 1231(a)/INA241 requires a bond hearing for anyone post-order after six months (constitutional avoidance/statutory analysis)
 - What if G-S- bond is denied?
 - Consider an enforcement action in DNJ. (E.g., Ousman D)
- Pending SCOTUS case *Pham v. Guzman Chavez* - argued Jan 11, 2021
 - may change landscape
 - Gov't appeal of CA4 decision that 236 applies to respondents in WOR proceedings, therefore entitled to a bond hearing if 236(a). CA2 has also held that 236 applies. *Guerra v. Shanahan*, 831 F. 3d 59 (2d Cir. 2016). CA3, CA9, CA6 find 241 applies. *Padilla-Ramirez v. Bible*, 882 F. 3d 826, 830 - 32 (9th Cir. 2017); *Martinez v. Larose*, 968 F. 3d 555, 565 - 66 (6th Cir. 2020).

Zadvydas

- Noncitizens with final removal orders, detained under § 1231(a)/ INA § 241, cannot be detained indefinitely.
- If no removal after 90 days, advocate for release from ICE pursuant to 8 U.S.C. § 1231 (establishing 90-day removal period)
- If no removal after 6 months and ICE refuses to release, can argue that detainee must be released because there is no significant likelihood of removal in the reasonably foreseeable future. Zadvydas v. Davis, 533 U.S. 678 (2001)
- Remedy: release!

Zad bond

§ 1226(a) Burden of Proof

- 2d Circuit: *Velasco Lopez v. Decker*, 978 F.3d 842 (2020)
 - Applies *Matthews* to find due process requires gov't bear burden by clear and convincing evidence, considering Velasco Lopez's 15 month detention
 - Declines to adopt bright line rule
- Class Actions - have put burden on govt
 - *Brito v. Barr*, 415 F. Supp. 3d 258, 269 (D. Mass. 2019) → 1st Cir
 - *Onosamba-Ohindo v. Barr*, No. 1:20-CV-00290 EAW, 2020 WL 5226495 (W.D.N.Y. Sept. 2, 2020) → 2nd Cir
 - *Dubon Miranda v. Barr*, 463 F. Supp. 3d 632 (D. Md. 2020) DMD → 4th Cir
- But see: 3d Cir: *Borbot v. Warden*, 906 F.3d 274 (3d Cir. 2018): suggests ok that burden is on respondent, but doesn't squarely decide. DNJ not sympathetic
- Courts addressing burden have also required IJ to consider: Ability to pay, alternatives to detention, proper weight to crim history
 - *See, e.g.* - *Fernandez Aguirre v. Barr*, 2019 WL 4511933, at *4 (S.D.N.Y. Sept. 18, 2019) (granting release)
- Consider focusing more on APA arguments - particularly if venue issues

CLAIMS TO VWP ENTRANTS

VWP 民主国家入境 → asylum only proceeding
→ 如果有民主国家的 passport 对于 asylum & with hold 很有利 - ; Asylum
需要 overcome firm resettlement bar.

- Visa Waiver Program (“VWP”) Entrants
 - BIA says IJ’s don’t have bond jurisdiction for individuals in asylum-only proceedings under 8 U.S.C. § 1187. See *Matter of A-W-*, 25 I. & N. Dec. 45 (BIA 2009)
 - Argue that detention is governed by 8 U.S.C. § 1226
 - The only language in § 1187 concerning detention provides that § 1187 is not intended to create any right or duty regarding the “removal or release” of detained aliens.
 - *Matter of A-W-* is not entitled to deference under *Chevron*; Congress explicitly provides for detention and release of aliens during their removal proceedings under § 1226.
 - AND, make prolonged detention arguments outlined above



"We would like to request a change of venue to an entirely different legal system."

- What if client is detained by ICE outside your jurisdiction?
- Rumsfeld v. Padilla, 542 U.S. 426 (2004): holds that habeas petitions should be brought against the "immediate custodian" who is usually "the warden of the facility where the prisoner is being held"
- Case law is mixed
 - District courts are split in SDNY: most find Padilla requires suit be brought against warden of jail in DNJ; some judges have held that ICE is true custodian and venue is proper in SDNY.
 - *See, e.g., Rodriguez Sanchez v. Decker*, No. 18-CV-8798 (AJN), 2019 WL 3840977 (S.D.N.Y. Aug. 15, 2019) (finding FOD proper respondent and venue in SDNY)
 - *But see Kholiyavski v. Achim*, 443 F.3d 946 (7th Cir. 2006) (local jail warden is proper respondent, not ICE field office director).

COVID-19-Related Claims

- Conditions of Confinement (substantive due process)
 - *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017) (finding pretrial and civil detainees cannot be detained in punitive conditions of confinement, and it's possible to establish a due process violation by demonstrating that government “knew, or should have known” of excessive risk to health)
Pretrial detainees 未決在獄性の監獄里
- Failure to Provide Adequate Medical Care (Substantive Due Process)
 - *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“prison authorities may not be deliberately indifferent to an inmate’s current health problems” where those authorities “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” such as “exposure of inmates to a serious, communicable disease”); 監獄下能对inmateの健康問題无视
 - *Charles v. Orange*, 925 F.3d 73 (2d Cir. 2019) (“[T]hose in civil detention . . . are also afforded a right to be free from deliberate indifference to their serious medical needs.”).

Other ideas: Access to counsel (PDP); Rehab Act Claims; Using COVID-19 as factor in prolonged detention claims; factor in least restrictive

Hypo

- About 5 months ago, your client lost his BIA appeal and a final order was issued. But he hasn't been deported because travel to his home country is closed due to COVID-19. Your client's main goal is to get out of detention, but if he has any chance of staying in the U.S. he'd like to return to live with his large, supportive family. He has a fairly serious but old assault conviction and a more recent drug possession arrest.

~~即日起有 drug & assault conviction 也要争取 fight out of~~

- Would you file a habeas? Why? Why not?
- What are available claims?
- Alternate remedies?

~~即日起有了 BIA 到 final order~~

Hypo Part 2

- Same facts as before, but this client filed a PFR and stay motion.
 - How does the stay motion change any of his options?
 - § 1231 “does not govern the detention of immigrants whose removal has been stayed pending judicial review.” Hechavarria v. Sessions, 891 F.3d 49, 56 (2d Cir. 2018).
 - Many judges considering the issue post-Hechavarria— concluded that for purposes of § 1231(a)(1)(B)(ii), a stay pursuant to the forbearance agreement (forbearance stay) is equivalent to an individualized order granting a petitioner’s stay motion (individual stay).
 - What if client’s convictions make him 1226(c)? → mandatory detention
 - What if client was 1226(a)? → Pending a decision to bond hearing.
 - What if they were held in New Jersey?
 - See *Jean A. v. Dep’t of Homeland Sec.*, No. CV 19-13951 (SDW), 2019 WL 6318305, at *2 (D.N.J. Nov. 26, 2019) (“this Court treats temporary stays granted by the Third Circuit under its own standing order to cause detention to revert. See, e.g., *Granados v. Green*, No. 15-8917, 2016 WL 1572540, at *4 (D.N.J. Apr. 19, 2016)).

habeas 都是 file 在 Filing
district court 不是在 immigration court

1. File your case in the district court with venue over your petition
 - Direct questions re filing logistics to clerk of that court—they are usually very helpful!
2. Redact and file petition, exhibits, and civil coversheet pursuant to the local rules of your district court
 - Consult court rules re electronic vs. paper filings
 - Be mindful of PDF size and formatting restrictions when filing electronically
3. Consider filing supporting memorandum of law
4. Clerk will assign your case to a judge; when judge is assigned, read judge's individual rules—follow them
5. File paper courtesy copies with judge's chambers if required by individual rules
6. Serve opposing counsel: sometimes U.S. Attorney's Office, sometimes Office of Immigration Litigation (ask if accept electronic service; may require you to mail)

Negotiate briefing schedule or file motion for expedited relief