



AMERICAN IMMIGRATION COUNCIL

## INTRODUCTION TO HABEAS CORPUS<sup>1</sup>

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### Introduction

This practice advisory is an introduction to the law of habeas corpus in the immigration context. This advisory is intended for lawyers and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. The cases included here are cited as examples only and do not represent an exhaustive search of the case law in all federal circuits.

The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless government action.<sup>2</sup> Historically, "[habeas corpus] has served as a means of reviewing the legality of Executive detention."<sup>3</sup> The right to habeas corpus is rooted in the U.S. Constitution's Suspension Clause.<sup>4</sup> There also is a federal habeas corpus statute, 28 U.S.C. § 2241, which states, in pertinent part:

- (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 jurisdictions . . .
- (c) The writ of habeas corpus shall not extend to a prisoner unless --

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<sup>2</sup> *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969); *Boumediene v. Bush*, 128 S.Ct. 2229, 2244, 2008 WL 2369628, at \*12 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom").

<sup>3</sup> *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

<sup>4</sup> U.S. Const. art. I, § 9, cl. 2 states: "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."

- (1) He is in custody under or by color of the authority of the United States . . .
- (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

Since its inclusion in the Judiciary Act of 1789, 28 U.S.C. § 2241 has given 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. Under this statute, federal courts have considered both constitutional claims and claims of statutory interpretation.

### **When Can Habeas Corpus Be Used in the Immigration Context?**

In the immigration context, often a petitioner filing a habeas corpus action seeks initial review of an administrative decision where no judicial proceeding has occurred and no other review may be available. Prior to the REAL ID Act of 2005, immigration habeas corpus petitions generally fell into two categories: challenges to the legality of a removal order and challenges to detention.

The REAL ID Act of 2005<sup>5</sup> purports to eliminate habeas corpus jurisdiction over final orders of removal, deportation, and exclusion and consolidate such review in the court of appeals.<sup>6</sup> This change became effective immediately on the Act's enactment date, May 11, 2005.<sup>7</sup> At the time of this writing, few courts of appeals have addressed the scope of the purported bar to habeas review over final orders of removal.<sup>8</sup> It remains unclear

<sup>5</sup> Pub. L. 109-13, 119 Stat. 231 (2005).

<sup>6</sup> Real ID Act § 106, adding new subsection (a)(5) to 8 U.S.C. §1252 (“Notwithstanding any other provision of law (statutory or non-statutory), including [habeas, mandamus, and all Writs Act] . . . a petition for review filed with an appropriate court of appeals...shall be the sole and exclusive means for juridical review of an order of removal entered or issued under any provision of this Act...). At the same time that the Real ID Act limited habeas jurisdiction in certain immigration cases, it also expanded the jurisdiction of a court of appeals over constitutional claims and questions of law in a petition for review of a final order of removal. See 8 U.S.C. § 1252(a)(2)(D) (added by Real ID Act § 106). See also the Legal Action Center’s practice advisory titled “Judicial Review Provisions of the REAL ID Act” (June 7, 2005), at <http://www.legalactioncenter.org/sites/default/files/realid6705.pdf>.

<sup>7</sup> REAL ID Act § 106(b), 8 U.S.C. §1252 note (2005).

<sup>8</sup> See, e.g., *Enwonwu v. Gonzales*, 438 F.3d. 22 (1st Cir. 2006) (declining to address whether REAL ID’s repeal of habeas corpus violated the Suspension Clause because case presented only legal issues, which court has jurisdiction to review pursuant to INA § 242(a)(2)(D)); *Puri v. Gonzales*, 464 F.3d 1038, 1041-42 (9th Cir. 2006) (same); *Alexandre v. U.S. Attorney General*, 452 F.3d 1204, 1205-06 (11th Cir. 2006) (on the facts presented, court found a petition for review under 8 U.S.C. § 1252(a)(2)(D) to be an adequate and effective substitute for habeas review); *Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007) (same). See also, *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 n. 3 (9th Cir. 2005) (“we make no comment on what should be done in the more

whether habeas review may be available in the rare circumstance where there is a compelling reason that court of appeals review is inadequate.

The REAL ID Act, however, did not impact the ongoing availability of habeas corpus to challenge the length or conditions of immigration detention.<sup>9</sup>

Over the past several years, the Supreme Court has upheld the availability of § 2241 habeas corpus in cases challenging detention. The post-IIRIRA Supreme Court decisions involving such challenges are:

*Zadvydas v. Davis*, 533 U.S. 678 (2001) – The Court held that habeas corpus may be used to bring statutory and constitutional challenges to post-removal order detention. This case addressed whether the government could detain a removable person indefinitely beyond the removal period.

*Demore v. Kim*, 538 U.S. 510 (2003) – The Court held that habeas corpus may be used to bring a constitutional challenge to pre-removal order detention. The Court considered the constitutionality of the mandatory detention provision, INA § 236(c).

*Clark v. Martinez*, 543 U.S. 371 (2005) – The Court held that its decision in *Zadvydas v. Davis* also applied to government detention of persons found to be inadmissible.

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unusual case where the pending habeas petition requires further factual development. In such a case, construing a pending habeas petition as a petition for review might bar this court from remanding the petition for further fact-finding.”).

<sup>9</sup> Several courts have so held. See, e.g., *Kellici v. Gonzales*, 472 F.3d 416, 419-20 (6th Cir. 2006) (finding that when petitioner challenges only his detention in a habeas petition, rather than his removal, the case cannot be transferred to the court of appeals); *Bonhometre v. Gonzales*, 414 F.3d 442, 446 n.4 (3d Cir. 2005) (“An alien challenging the legality of his *detention* still may petition for habeas corpus [post-REAL ID].”) (emphasis in the original); *Hernandez v. Gonzales*, 424 F.3d 42 (1st Cir. 2005) (transferring case back to district court for habeas review where only issue was detention); *Channer v. DHS*, 406 F. Supp. 2d 204 (D. Conn. 2005) (finding habeas review over detention). *Accord Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (jurisdiction-stripping provision of REAL ID Act applies only to habeas corpus petitions that challenge a final order and is inapplicable where petitioner granted CAT relief in removal proceeding because there is no final order of removal); *Ali v. Gonzales*, 421 F.3d 795, 797 n.1 (9th Cir. 2005) (in habeas corpus action seeking an injunction preventing removal to Somalia, “[t]he Real ID Act of 2005, . . . , does not apply to this case because petitioners do not challenge or seek review of any removal order”). See also Joint Explanatory Statement of the Committee of Conference, H.R. Cong. Rep. No 109-72 at 175, 151 Cong. Rec. H2836, 2873 (2005) (“[REAL ID Act] section 106 will not preclude habeas review over challenges to detention that are independent of challenges to removal orders.”)

## Must the Petitioner Be Physically Detained to File a Habeas Corpus Petition?

No. A common misconception is that only persons, who are physically detained, that is, in jail or prison, may file habeas corpus petitions. Although § 2241 says that habeas corpus is available only when a person is “in custody,” courts have interpreted the statute to not require actual physical restraint; rather other restrictions on liberty can satisfy the custody requirement.<sup>10</sup> For example, a person who challenges the conditions of release under an order of supervision may be found to satisfy the “in custody” requirement.

Prior to the REAL ID Act, individuals subject to a final order of removal were considered “in custody” for purposes of the habeas corpus statute.<sup>11</sup> This concept of custody has remained the law in post-REAL ID habeas corpus cases.<sup>12</sup>

The “in custody” determination is made at the time the habeas corpus petition is filed.<sup>13</sup> If the petitioner is in custody then, the federal court may pass on the merits of the petition even though the individual is free from custody before the petition is acted upon,<sup>14</sup> provided the petitioner may still suffer collateral consequences.<sup>15</sup>

## What Are the Procedures for Filing a Habeas Corpus Petition?

Habeas corpus petitions are most often filed in district court.<sup>15</sup> The filing fee is \$5 unless the petitioner first obtains permission from the court to file in forma pauperis. The Federal Rules of Civil Procedure are applicable to these proceedings, but the local rules also will apply as well as any special local procedures for habeas corpus.

<sup>10</sup> *Rumsfeld v. Padilla*, 542 U.S. 426, 437 (2004) (“[O]ur understanding of custody has broadened to include restraints short of physical confinement”).

<sup>11</sup> See, e.g., *Simmonds v. INS*, 326 F.3d 351, 354 (2d Cir. 2003); *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1291 (10th Cir. 2001); *Mustata v. U.S. Dep’t of Justice*, 179 F.3d 1017, 1021 n. 4 (6th Cir. 1999); *Nakaranurack v. United States*, 68 F.3d 290, 293 (9th Cir. 1995).

<sup>12</sup> See, e.g., *Rosales v. ICE*, 426 F.3d 733, 734-36 (5th Cir. 2005).

<sup>13</sup> *Zalawadia v. Ashcroft*, 371 F.3d 292, 297 (5th Cir. 2004) (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968) (“The Supreme Court has made it clear that the “in custody” determination is made at the time the habeas petition is filed.”))

<sup>14</sup> *Perez v. Greiner*, 296 F.3d 123, 125 (2d Cir. 2002) (“The Supreme Court has held that a habeas petition challenging a criminal conviction is not necessarily mooted when the petitioner is released from prison, as collateral consequences of that conviction may still impinge on the petitioner post-release, and therefore a case or controversy may continue to exist.”); *Handa v. Clark*, 401 F.3d 1129, 1132 (9th Cir. 2005) (same).

<sup>15</sup> 28 U.S.C.A. §2241(a) states: “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.” The Supreme Court interprets this statute to require only that the court issuing the writ have jurisdiction over the prisoner’s custodian. *Braden v. 30<sup>th</sup> Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

District court decisions in habeas corpus proceedings are appealed to the appropriate court of appeals; the Federal Rules of Appellate Procedure (and the circuit court's local rules) govern appeals of habeas corpus decisions.

Jurisdiction over habeas corpus petitions exists where the petitioner's custodian can be reached by service of process from the court in which the petition has been brought.<sup>16</sup>

The habeas corpus statute requires a petitioner to allege "the name of the person who has actual custody over the petitioner."<sup>17</sup> While a full discussion of naming the proper custodian in the habeas petition is beyond the scope of this introductory practice advisory, the following is a summary of the issue. Prior to 2004, a conflict in case law developed over who constituted the proper "custodian" to be named in habeas immigration cases: some courts held that it was the "immediate custodian" with day-to-day control over the petitioner's custody; other courts held that it was the person with authority to release the petitioner from custody.

~~Actual P~~ "immediate custodian"

In 2004, in a non-immigration case, the Supreme Court held that in a habeas case presenting a "core challenge" to the physical confinement of the petitioner, the actual or immediate custodian of the facility where the petitioner is confined is the only proper defendant in a habeas action.<sup>18</sup> The Court specifically left open the question whether a different rule might apply to immigration-related habeas cases.<sup>19</sup>

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Padilla

Since *Padilla*, the REAL ID Act has limited when habeas corpus may be used in immigration cases. At least one court held in 2006 that a challenge to post-final order detention was a "core" habeas challenge, subject to the immediate custodian rule under *Padilla*.<sup>20</sup>

### What if the Client Cannot Afford Representation?

Individuals who are unable to afford representation in their habeas corpus proceedings may ask the court to appoint paid counsel under the Criminal Justice Act, 18 U.S.C. § 3006A. Many courts routinely appoint immigration counsel in immigration-related habeas cases.<sup>21</sup>

<sup>16</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>17</sup> 28 U.S.C. § 2242 (2008).

<sup>18</sup> *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); see also the Legal Action Center's practice advisory "Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation" (May 13, 2010), at

[http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_040706.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_040706.pdf).

<sup>19</sup> *Padilla*, 542 U.S. at 436 n.8.

<sup>20</sup> *Kholayavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006).

<sup>21</sup> For information about the Criminal Justice Act see the Legal Action Center's practice advisory on "Requesting Attorney's Fees Under the Equal Access to Justice Act" (Dec. 15, 2008), at

[http://www.legalactioncenter.org/sites/default/files/EAJA\\_Fees\\_04\\_07\\_06.pdf](http://www.legalactioncenter.org/sites/default/files/EAJA_Fees_04_07_06.pdf).