The Habeas Petition, And Other Options for Immigrants, in the Federal Courts[1]

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Introduction

The petition for a writ of habeas corpus is an important tool in the arsenal of immigration attorneys who seek to fully represent their clients. Going to federal court in an attempt to obtain habeas relief may be the only remaining remedy after all other administrative options have been exhausted. Traditionally, habeas has been used to challenge prolonged detention post-final order of removal, prolonged detention pre-final order, and to challenge unlawful detention, but increasingly it is used to challenge such related issues as unlawful deportations in violation of the statute or regulatory provisions, and/or violations by CBP, USCIS or other agency actions during the expedited removal process under 8 U.S.C. § 1225(b). There is a case now pending in the Supreme Court, *Thuraissigiam v. DHS*, 917 F.3d 1097 (9th Cir. 2019), *cert. granted, DHS v. Thuraissigiam* Case No. 19-161 (Oct. 18, 2019) (oral argument held, March 2, 2020), on whether courts have jurisdiction under the Suspension Clause in habeas proceedings seeking judicial review over claims of those in expedited removal.[2]

[1] This article will be presented by the co-authors at the State Bar of Texas federal litigation conference to be held virtually in early April and it will appear in the State Bar's publication, Federal Litigation in Immigration, Ch 7.

[2] In federal court cases involving those in expedited removal, the government will argue for dismissal by citing to the jurisdiction-stripping provisions found in 8 U.S.C. 1252(e). The issue of what issues can be brought in federal court for those in expedited removal is a developing issue and will be determined when the Supreme Court rules in June, 2020. *See DHS v. Thuraissigiam, supra; see also* Garza, Vanessa, *Unheard and Deported: The Unconstitutional Denial of Habeas Corpus in Expedited Removal,* Vol 56, Issue 4, Houston L.R. (2019), at https://houstonlawreview.org/article/7954-unheard-and-deported-the-unconstitutional-denial-of-habeas-corpus-in-expedited-removal.

Importantly, during the habeas proceedings before a federal judge, the petitioner can challenge not just the client's detention but the underlying reasons giving rise to his being detained in the first place. Several "jurisdiction-stripping" provisions will be used as a possible way for the government to try to keep the petitioner out of court and, depending on the facts and procedural posture, may be overcome.[3] This may implicate legal issues, such as whether he has been properly deemed an "arriving alien" or "aggravated felon," and other issues potentially affecting the removal process. Under the Real ID Act of 2005, there is no jurisdiction to challenge a final order of removal itself in the habeas proceeding, *see* 8 U.S.C. § 1252(a), but there are still a number of legal and procedural issues which may reviewed by the federal judge.

Nuts and Bolts

The habeas petition commences with the filing and service of a petition detailing*, inter alia*, its jurisdictional basis under 28 U.S.C . § 2241, venue, parties, exhaustion of administrative remedies, factual and procedural history, causes of action, and prayer(s) for relief. Importantly, practitioners should seek attorney's fees under the EAJA statute, and should do so explicitly in the habeas petition. EAJA fees are subject to the requirements in the statute, of showing among other things that the government's position was not "substantially justified" and that the movant for the fees was the "prevailing party." *See* 5 U.S.C. § 504; 28 U.S.C. § 2412.

[3] See, e.g., 8 U.S.C. § § 1252(a)(5), (e)(2), (f), (g), among others, in section 1252 which limit the power, in certain cases, to hear claims made by petitioners in federal court.

There are other important considerations that experienced practitioners use in their efforts to educate the court and the government about the habeas statute. These may include potentially the filing of a Motion for Order to Show Cause Hearing, a Motion for Temporary Restraining Order and/or Preliminary Injunction, as well as accompanying memoranda of law. The habeas statute, 28 USC § 2241, et seq., has a number of procedural steps which are intended by Congress to ensure an expedited review by the federal courts, including a speedy response time from the government. *See* 28 USC § 2243 (providing inter alia that the writ or order to show cause "shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed" and that the court shall hold a hearing on the writ or order to show cause "not more than five days after the return unless for good cause additional time is allowed."). Importantly, some courts are unaware of the expedited nature of the habeas process, and it is best practice to contact the court clerk and seek to have a pretrial conference with opposing counsel as soon as possible so that the Court and clerk are aware of Congress' intention to allow for speedy processing.

Federal law requires that the habeas petition be verified and the lawyer can do that. 28 U.S.C. § 2243. While there is an argument that the immediate custodian need not be named in an immigration habeas, *see Rumsfeld v. Padilla,* 542 U.S. 426, 438 (2004) (suggesting that the immediate custodian rule may not apply when something other than physical confinement is challenged), the safer course is *always* to name the warden of the facility where the noncitizen is detained. Further, any order issued by the federal court will run against the person having power over the noncitizen so it is best to

name the warden or other individual having immediate custodial authority over the noncitizen.

Unlike petitions for review or lawsuits under the Administrative Procedures Act (APA), 5 U.S.C. § 702 *et. seq.*, federal law does not require the Department of Homeland Security or the named respondents in the habeas to file an administrative record. Discovery is also limited and thus, advocates should submit all records the district court should consider in reviewing the habeas petition. Because some of the records (or the petition itself) may include sensitive or confidential information, it may be necessary to redact the petition or documents, or seek to seal the pleadings and supporting documents.

Advocates should confirm with the clerk of the district court that it, and not petitioner, is responsible for serving the respondents in the petition. Pursuant to the Federal Rules of Civil Procedure, the petitioner must serve copies of the Complaint and Summons on the U.S. Attorney's Office for the district where the lawsuit is brought. F.R.C.P. 4(i). Since it is likely that the U.S. Attorney's Office represent all of the respondents, this is another good reason to be sure to serve a copy of all pleadings on the U.S. Attorney in the particular district, and be aware of which AUSAs commonly handle such cases in your jurisdiction.

Bars to Judicial Review Under 8 U.S.C. § 1252 and How to Deal With Them

There are at least three significant bars that advocates may face after filing a habeas petition. First, if the habeas attempts to challenge the actual "removal order" itself, then

§ 1252(a)(5) bars *habeas* review of the removal order. 8 U.S.C. § 1252(a)(5) ("Notwithstanding any other provision of law (statutory or nonstatutory), *including section 2241 of title 28*, *or any other habeas corpus provision*, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal…). However, as noted above, in some circumstances, the Suspension Clause, U.S. Const. art. 1, § 9, cl. 2, may require court review of a final order of removal. *Thuraissigiam v. United States Dep't of Homeland Sec.*, 917 F.3d 1097 (9th Cir. 2019) (notwithstanding jurisdiction stripping statute, Suspension Clause required review of expedited removal order). This is especially true when the procedures do not permit development of a factual record and the habeas proceeding is the only adequate remedy.

Second, the bar to judicial review of discretionary decisions eliminates challenges to many agency actions except those limited to legal or constitutional questions. Section 1252(a)(B) of title 8 of the United States Code prohibits federal courts from reviewing any decisions relating to the granting of relief under §§ 1182(h), 1182(i), 1229b, 1229c, or 1255, or any other decision or action specified in Subchapter II of the Immigration and Nationality Act, 8 U.S.C. §§ 11151-1382, that is within the discretionary authority of the Secretary of Homeland Security. By its terms, the statute only limits those decisions specified in § 1252(a)(2)(B)(i) and (ii) and not actions made discretionary under the regulations. *Kucana v. Holder*, 558 U.S. 233 (2010). Still, advocates must continually strive to define the challenged decisions in a way that avoids application of § 1252(a)(2)(B).

In addition, 8 U.S.C. § 1252(f)(1) may be used by the government. Under this provision, "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of provisions of part IV of this subchapter . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). The Supreme Court stated that although 1252(f) restricts classwide injunctions, this restriction does not apply to individual cases. *Reno v. American-Arab Anti-Discrimination Comm*., 525 U.S. 471, 481–82 (1999); see also Nielsen v. Preap, 139 U.S. 954, 963 (2019) (refusing to reach the question of injunctive relief). Likewise, 8 U.S.C. § 1252(f)(2) does not prohibit this Court's jurisdiction. This provision was interpreted in *Nken v. Holder,* 556 U.S. 418 (2009), where the Supreme Court held that "traditional stay factors" govern the requests for stay pending judicial review. *Id*. at 426.

Section 1252(g) bars legal challenges, including habeas petitions, to any decision or action to commence proceedings, adjudicate cases or execute removal orders. The Supreme Court has interpreted this jurisdictional bar narrowly to apply to the three enumerated categories. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999) (limiting reach of provision to "three discrete actions"). Circuit courts have held, however, that the enumerated list includes additional discretionary decisions made in furtherance of one of the "three discrete actions." *See, e.g., Moussa v. Jenifer*, 389 F.3d 550, 554 (6th Cir. 2004) ("[A] denial of a stay of deportation is a component of the decision to execute a deportation order."); *Mapoy v. Carroll*, 185 F.3d 224, 228 (4th

Cir. 1999) (noting that challenge to denial of stay "clearly arose" from decision to execute removal order and was not within court's jurisdiction). Advocates must therefore avoid raising challenges to legal issues that relate to these three enumerated categories and craft their habeas challenges in a way that can challenge the underlying unconstitutional actions of respondent governmental actors.

Exhaustion of Administrative Remedies

The government will invariably attempt to argue for dismissal of the habeas petition on an alleged "failure to exhaust" administrative remedies. However, it is important to respond to such motions for dismissal by showing whatever evidence exists, if available, of exhaustion and *also* by arguing that exhaustion does not apply when a petition challenges agency action collateral to removal proceedings. *See Aguilar v. Lewis*, 50 F.Supp.2d 539, 541 (E.D. Va. 1999) (No federal statute imposes an exhaustion requirement concerning bond); *Rowe v. INS*, 45 F. Supp. 2d 144, 145-46 (D. Mass. 1999) (and cases cited therein); *Pastor-Camarena v. Smith*, 977 F. Supp. 1415, 1417 (W.D. Wash. 1997) (and cases cited therein); *Montero v. Cobb*, 937 F. Supp. 88, 90-91 (D. Mass. 1976); *Alikhani v. Fasano*, 70 F.Supp.2d 1124, 1129-30 (S.D. Cal. 1999). In addition, exhaustion is not required "where . . . an agency's exercise of authority is clearly at odds with the specific language of the statute." *McClendon v. Jackson Television Inc.,* 603 F.2d 1174, 1177 (5th Cir. 1979). Moreover, exhaustion is also not required where a review procedure exists but it is not mandated by statute or agency regulations. *Darby v. Cisneros*, 113 S.Ct. 2539 (1993) (Where regulation provided that ALJ's determination shall be final unless the Secretary of HUD, in his discretion, decides to review the decision after request

of a party, such regulation does not provide for mandatory review and plaintiff could file suit without making request to Secretary); *Noriega Lopez v. Ashcroft,* 335 F.3d 874, 880-82 (9th Cir. 2003) (Failure to file a motion to reconsider BIA decision is neither statutorily required under INA §242(d)(1) nor prudentially required); *Chang v. U.S*., 327 F.3d 911, 922- 24 (9th Cir. 2003) (Where investor was not required to seek a removal proceeding to review denied petition and where IJ in removal could not address APA, estoppel and constitutional claims and where statutes now limit the scope of removal proceedings, plaintiffs did not have to exhaust removal proceeding).

Finally, exhaustion of administrative remedies (such as an appeal to the Board of Immigration Appeals) is not required where it would be futile. *See Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1976) (A constitutional challenge to administrative action does not require exhaustion.); *Jean v. Nelson*, 727 F.2d 957, 981 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846, 105 S.Ct. 2992 (1985) (allowing exception to exhaustion requirement where remaining administrative remedies could not cure alleged defect in agency procedures); *Ramirez Osorio v. INS*, 745 F.2d 937, 939 (5th Cir. 1984) (holding that "exhaustion is not required when administrative remedies are inadequate"); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033-36 (5th Cir. 1982) (same).

Other Causes of Action, including Mandamus, Which May Be Used in addition to the Habeas Petition

Habeas corpus and mandamus are extraordinary writs that are viewed as appropriate in emergency situations. There are other emergency writs—for example, the

writ of prohibition, preliminary and permanent injunctions, quo warranto, or an emergency mental health writ of detention—and they all are granted sparingly. As "extraordinary remedies, they are reserved for really extraordinary causes."[4] But keeping these truths in mind, these writs are often the only remedy to which individuals facing urgent threats to their fundamental rights can turn.

Extraordinary Writs under Attack in the Immigration Context

In recent years there has been an effort to curtail migrants' access to extraordinary writs. The retroactive Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)[5] removed recourse to extraordinary writs in relation to the revocation of non-immigrant and immigrant visas considered under INA §221(i), except in removal proceedings if the revocation was the only grounds upon which the removal was based under INA §237(a)(1)(B). It also eliminated access to extraordinary writs and funneled appeals to the courts of appeals leapfrogging the district courts and their ability to do fact-finding for removal orders under INA §242(a)(5)[6] and when a CAT-claim[7] has been rejected.[8] The REAL ID Act of 2005[9] additionally eliminated extraordinary writs in a variety of situations.[10]

[4] *Ex parte Fahey*, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 (June 23, 1947).
[5] PL 108-458, title V; 118 Stat. 3638, 3732–42 (Dec. 17, 2004); HR Conf. Rep. 108-796.
[6] 8 USC §1252(a)(2)(D).
[7] Claim for protection under the Convention against Torture, 1465 U.N.T.S. 85 (1984).
[8] 8 USC §1252(a)(4).
[9] Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, 2005, PL 109-13, 119 Stat. 231, 302–23 (May 11, 2005); HR Cong. Rep. 109-72 at 167–75, 2005 U.S.C.C.A.N. 240, 292–99; 151 Cong. Rec. H536-51 (Feb. 10, 2005), H2813, 2386–77 (May 3, 2005); 151 Cong. Rec. S 4838 (May 10, 2005).
[10] *See*, *for example*, 8 USC §1252(a)(5) (removal orders), 8 USC §1252(b)(7) (orders in criminal proceedings), 8 USC §1252(e) (inadmissibility), 8 USC §1252(f) (in actions for injunctions), and 8 USC §1252(g) ("the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter").

The Immigration and Nationality Act as amended to 2011, in Title II, Part V, Sec. 242, deals with the "Judicial review of orders of removal." This section is codified in § 1252 of Title 8 of the United States Code. This provision begins by stating that henceforth appeals from the administrative decision to remove a migrant may only be appealed to the court of appeals, thereby leap-frogging over the district court.[11] The provision of law then goes on to remove the jurisdiction of the district courts to consider extraordinary writs in relation to any migrant challenging a broad variety of actions related to expedited removal proceedings,[12] any migrant subject to a discretionary decision of the Attorney General or Secretary of Homeland Security or any of their subordinates,[13] or removal orders direct against migrants for a variety of crimes both serious and not so serious.[14] While review of "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals" are preserved,[15] no review of the administrative decision that involves additional fact finding is allowed. The administrative procedures that precede the judicial review by a court of appeals do not have to abide by rules of evidence, procedure, or even decorum. As a consequence, the record they create may be irreparably damaged even if it does eventually come before a court of appeals.

Furthermore, the right to an extraordinary writ in decisions concerning removals on medical grounds[16] and under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[17] That any decision taken under

[11] 8 U.S.C. §1252(a)(1).
[12] INA 242(a)(2)(A), 8 U.S.C. §1252(a)(2)(A).
[13] INA §242(a)(2)(B), 8 U.S.C. §1252(a)(2)(B).
[14] INA §242(a)(2)(C), 8 U.S.C §1252(a)(2)(C).
[15] INA §242(a)(2)(D), 8 U.S.C §1252(a)(2)(D).
[16] INA §242(a)(3), 8 U.S.C §1252(a)(3) applying INA §240(c)(1)(B), 8 U.S.C §1229a(c)(1)(B).
[17] 1465 U.N.T.S. 85 (1984). INA §242(a)(4), 8 U.S.C §1252(a)(4).

the 8 U.S.C. 1252 is not subject to an extraordinary writ is stated by noting that judicial review through a petition for review to the court of appeals is the "sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter."[18] The only exception are challenges alleging the migrant is not an alien, was not ordered removed, or when the alien can prove that that they have been admitted for permanent residence, as a refugee, or have been granted asylum and the grant is still in effect.[19] In addition challenges may be brought to the United States District Court for the District of Columbia to challenge the "validity of the system"—the constitutionality of part of the law or a regulation or the inconsistency of "regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General."[20]

Despite these attacks on extraordinary writs brought by migrants, the Supreme Court has preserved extraordinary writs when the there is no equivalent procedure or when a decision that is based on an obligation that is not discretionary is being challenged. The basis for preserving this space for extraordinary writs appears to be that a migrant, like any every other person in the United States, is entitled to "a meaningful opportunity to demonstrate…" that his ill-treatment is due to "the erroneous application or interpretation of the relevant law."[21] In this limited space, extraordinary writs remain important for protecting the fundamental rights of migrants.

Habeas corpus

[18] INA §242(a)(5), 8 U.S.C §1252(a)(5).
[19] INA §242(e), 8 U.S.C §1252(e).
[20] INA §242(e)(3)(A), 8 U.S.C §1252(e)(3)(A).
[21] *See Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001).

To preserve the opportunity for the extraordinary writ of habeas corpus, the Supreme Court of the United States developed an 'as applied test' to determine the reach of the Suspension Clause of the U.S. Constitution.[22] This 'as applied' test depends on "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[23]

It is often thought that traditionally the writ of habeas corpus was aimed at securing the release of a wrongly held prisoner.[24] However, in its origin the writ was not limited to release from detention, but instead to whatever equitable relief a court would order.[25] It was used to discharge a juror who had been jailed for contempt of court after supporting the acquittal of a defendant,[26] to free a woman placed in a private asylum by her husband,[27] to release a 18-year-old boy from military service,[28] and to release foreigners from military service.[29]

Although there must be a relationship to a detention, more than the merely unlawfulness of the detention may be challenged even if there is still unsettled law concerning the issue challenged. There is, for example, a circuit split on whether a habeas writ may be granted for inadequate health care. The Second Circuit has held it can,[30] the

[22] U.S. Constitution, Art. 1, Sec. 9, cl. 2.
[23] *Boumediene*, *supra,* note 21, at 766.
[24] *See INS v. St. Cyr*, 533 U.S. 289, 301 (2001).
[25] Halliday, D., *Habeas Corpus: from England to Empire* 39 and 87 (2010)
[26] *Bushell's Case*, 124 Eng. Rep. 1006, 1016 (C.P. 1670).
[27] *R. v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761).
[28] *U.S. v. Anderson*, Case No. 14,449, 1 Brunner, Col. Cas. 202;1 1 Cooke, 143 (C.D. Tenn. 1812).
[29] *See* Costello, K., "Habeas Corpus and Military and Naval Impressment 1756-1816," 29 *J. Legal Hist.* 215, 239, n. 145 (2008).
[30] *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008).

Seventh has denied such a habeas petition.[31] Consequently, a challenge to deny of health care as a condition of detention would be viable. A challenge to other forms of degrading or harmful treatment may also be viable.

There is also Fifth Circuit law indicating that you might make your Fifth amendment due process case based on multiple procedural errors, thus smaller errors, which take alone might not constitute a due process violation, might take together be used to indicate one deserving of a writ of habeas corpus to protect a detained individual.[32] For example, a detained individual may be able to petitioner for a writ of habeas corpus to enjoin future action, but must also attack a contemporary detention. In dismissing the appeal of a prisoner who tried to enjoin his future prosecution for offenses he committed while on parole, the Fifth Circuit made the point that a § 2241 habeas action cannot be used to attack a future prosecution, but appeared not to foreclose the possibility that if a contemporary detention is attacked a petitioner might also seek to enjoin a future action through a writ of habeas.[33]

Finally, these are just some examples, lawyers should use their ingenuity in using the writ of habeas corpus as an emergency writ to protect their clients. It might be an appropriate remedy to attack a failure to transfer a detained child to appropriate custody because Immigration and Customs Enforcement don't believe the detained migrant is a minor or because they don't want to follow the decision of an Immigration Court making this determination. In such a situation the specific remedy might not be release from detention but transfer to more appropriate detention facilities. It might be an appropriate

[31] *Robinson v. Sherrod*, 631 F.3d 839 (7th Cir. 2011), rehearing denied.
[32] *Jones v. Cain*, 601 F.Supp.2d 769 (E.D. LA. February 10, 2009) (multiple errors can violate a petitioner's right to due process).
[33] *See Stringer v. Williams*, 161 F.3d 259, 263 (5th Cir. 1998).

writ to rejoin separated families, an inhuman practice which is still happening today, and force the government to reunite children, although not to necessarily release them from detention.[34] It might be sued to challenge the conditions of immigration detention abroad when the U.S. government has played a significant role in controlling or causing that detention.[35] And it might be an appropriate writ to reverse a decision that *de facto* continues a migrant's detention because the Immigration Judge failed to follow established federal law. The point is that we need to think outside the box and to be creative in how we protect migrants, especially those most vulnerable for which the extraordinary writ of habeas corpus might be appropriate.

Mandamus

Mandamus is a "judicial command requiring the performance of a specified duty which has not been performed."[36] A petitioner allege a duty that is "clear and certain and the duty of the officer [must be] ministerial and so plainly prescribed as to be free from doubt."[37] Finding a clear obligation is a *conditio sine qua non* of a petition for a writ of mandamus. Where the government has some discretion to do the act or to reframe from the act in question, it will likely be able to defeat a petition for a writ of mandamus. However, having noted the necessity of pleading a clear obligation and although constrained by the similar concerns about appropriateness as habeas corpus—including

[34] *See* Complaint in *Ms L v. I.C.E.*, se 3:18-cv-00428-DMS-MDD, Doc. 1, filed February 26, 2018.
[35] *See*, *for example*, *Munaf v. Geren*, 553 U.S. 674 (2007).
[36] Editors, "Mandamus in Administrative Actions: Current Approaches," 1973(1) *Duke Law Journal* 207 (1973) accessed at www.jstor.org/stable/1371805 (on 28 Feb. 2020). *Also see Parveen v. McAleenan*, 410 F. Supp. 3d 809, 815 (S.D. Tex. 2019) *quoting Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004).
[37] *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992). *Also see Richardson v. U.S.*, 465 F.2d 844 (3rd Cir. 1972) (explaining that an act is ministerial or falls under the purview of the mandamus statute only its performance is positively commanded and so plainly prescribed as to be free from doubt).

that the writ is being sought as a last resort,[38] the writ of mandamus is even more expansive in its preview than the writ of habeas corpus. It may be used to "compel an officer or employee of the U.S. or any agency thereof to perform a duty owed to the plaintiff."[39] And it is "especially appropriate … where the issues implicated have "importance beyond the immediate case….[internal citations omitted]."[40]

A district court has jurisdiction under the mandamus statute.[41] And the duty may arise under the U.S. Constitution, a statute, an administrative regulation,[42] or, arguably under international law.

Petitions for a writ of mandamus have been used to compel a decision on an adjustment of status for a refugee that had been pending for seven years;[43] to require adjudication Special Immigrant Visas that were being held in 'administrative processing';[44] to compel Issuing EB-1 visas under INA §203(e)(1);[45] and to compel a consular official to issue a visa.[46] These examples of challenging visa processes have drawn a careful line between challenging consular discretion to decide issue a visa and the regulated manner in which that discretion may be exercised.[47] There are other examples of petitions for writs of mandamus that although not directly on immigration

[38] *In re Estelle*, 516 F.2d 480, 483 (5th Cir. 1975).
[39] 28 U.S.C. § 1361.
[40] *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019).
[41] 28 U.S.C. § 1361. A district court may also have jurisdiction under the federal question statute. 28 U.S.C. § 1331.
[42] *See*, *for example*, *Pacemaker Monitor Corp. v. United States Government*, 440 F.Supp. 473, 480 (S.D.Ga.1977), *Andujar v. Weinberger*, 69 F.R.D. 690, 693–94 (S.D.N.Y.1976); *Ryan v. Shea*, 525 F.2d 268 (10th Cir.1975); and *McMahon v. Califano*, 476 F.Supp. 978, 982 (D.Mass.1979).
[43] *See Singh v. Still*, 470 F.Supp.2d 1064 (N.D. Cal. 2007).
[44] *See Iraqis Nine Iraqi Allies Under Serious Threat v. Kerry*, 168 F.Supp.3d 268 (D.D.C. 2016).
[45] *See Meina Xie v. Kerry*, 780 F.3d 405 (D.C. Cir. 2015).
[46] *See Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997).
[47] *See Mulligan v. Schultz*, 848 F.2d 655 (1988) (finding jurisdiction over the Secretary of State's placing of temporal restrictions on the processing of visa applications).

issues might be relevant, for example, to challenge a gag order[48] or to remove an individual from an undesirable designation.[49]

Common concerns

Some common concerns about extraordinary writs relate to the persons to whom they may be directed. The writs of habeas corpus and mandamus, for example, issue against or are directed only to government authorities. Generally, you cannot direct an extraordinary writ to a private actor, but what about private actors who are pretenders to public authority, who use contractual or delegated inferences to claims the immunity of public actors. Can such people be subject to extraordinary writs? Should they be? Take, for example, the private company that operates an immigration detention center in Pennsylvania and when sued for negligent mistreatment of a detainee says it is entitled to the same immunity as Immigration and Customs Enforcement, part of the Department of Homeland Security. Can such a claim be made?

In addition, there are still ongoing challenges to efforts to suspend access to extraordinary writs. These challenges often focus on the preservation of habeas corpus using the Suspension Clause of the Constitution. On 2 March 2020, the American Civil Liberties Union argued to the Supreme Court in *Thuraissigiam v. Barr* that the lack of due process of expedited removal procedures constitutes an inadequate replacement of habeas corpus and therefore violates the prohibition of the Suspension Clause of the U.S. Constitution.[50] While expedited removal might be the most far-reaching infringement on a migrant's human rights, even procedures that allow judicial review before the Court of

[48] *See In re Murphy-Brown, LLC,* 907 F.3d 788 (4th Cir. 2018).
[49] *See In Re: People's Mojahedin Organization of Iran*, 680 F.3d 832 (D.C. Cir. 2012).
[50] Art. 1, Sec. 9, cl. 2. Prohibiting the suspension of the privilege of habeas corpus except when the public safety iis threatened by rebellion or invasion.

Appeals would appear problematic. This is the case because although the courts of appeals are a sufficient judicial instances, as appellate courts, they lack the authority to establish an evidentiary record as a district court would be able to do in dealing with a petition, for example, for habeas corpus. Does this deficiency, in a matter where the administrative record has been established on faulty grounds or insufficiently, mean that such a procedure is a *de facto* suspension of habeas corpus? Perhaps *Thuriassigiam* will provide us at least a partial answer, but it is unlikely to be the end of the issue.

Habeas and the Covid-19 Pandemic

In response to the Covid-19 pandemic, the federal courts have changed operations to limit the spread of the disease.[51] Also, there have been other significant changes to the operations of USCIS and EOIR, in recent days.[52] Even despite these changes, it seems that detained court dockets may go forward, as scheduled, and apparently (as of this writing) will not be postponed.[53] The habeas petitioner should consider some of the following issues when going forward in federal court proceedings given the Covid-19 pandemic.

First, be aware that the factor under *Zadvydas v. Davis*, 533 U.S. 678 (2001), in determining whether or not removal would be "reasonably foreseeable" in the future may be affected by the Covid-19 virus in that some countries may not be willing to take back

[51] *See* Gershman and Tau, "Coronavirus Disrupts U.S. Court System," Wall St. J. (Mar. 17, 2020), at https://www.wsj.com/articles/coronavirus-disrupts-u-s-court-system-11584445222

[52] *See* announcement from EOIR at https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic. *See also* announcement from USCIS at https://www.uscis.gov/about-us/uscis-response-coronavirus-disease-2019-covid-19.

[53] *Id., supra*, note 51, EOIR announcement.

their nationals. An examination of the current stance of individual countries should be done to determine this factor. Given the inability of some nations to repatriate given the pandemic, this consideration may play a central role in a habeas claim based on prolonged detention under *Zadvydas.*

Second, the Covid-19 virus has the potential to impact detainees in serious and significant ways given their close proximity and nature of the spread of the disease. If your client has a claim for prolonged or unlawful detention this factor will be important for the consideration of whether or not the detention remains "reasonable" and whether such detention has been converted from civil confinement to one that is ***punitive***. *See Zadvydas*, 533 U.S. at 690 ("The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). This factor also may be impacted in cases where the client has a particular susceptibility to the disease or any underlying pre-existing conditions, which many of our clients do.

Third, there is a concern that the Trump administration will close the border or otherwise make the situation for MPP clients worse by preventing them from entering the U.S. for their currently scheduled immigration court hearings. The administration has announced that it is considering closing or partially closing the borders due to the public health emergency or otherwise limiting entry along the border. Pursuant to 8 USC § 1185, the President has broad powers to control entry into the U.S., as well as under 8 USC § 1182(f), as we saw in the Travel Ban case. In addition, 42 USC § 265 is entitled, "Suspension of entries and imports from designated places to prevent spread of

communicable diseases," and provides that whenever the Surgeon General "determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States," the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons . . . ." *Id.*[54]

Given these authorities and the imminent danger that under these provisions persons will be prevented from re-entering the country for their hearings, litigants should request in specific cases that federal courts act to prevent individual MPP clients from being returned to Mexico and that they be released here in the United States to await their immigration court hearings. While these types of MPP habeas cases may be difficult to bring given the lack of counsel and access to counsel, as well as the limited time that the respondents are here in the United States, coordinated effort should be made to make this argument and work to bring these habeas claims on behalf of these vulnerable clients at or near the border.

Concluding Thoughts

The co-authors of this Article have been successful when bringing habeas actions for their clients, immigrants who are detained, for example in obtaining the release of a client from ICE detention, in obtaining an order from the District Judge mandating that the immigration court provide a merits hearing on cancellation of removal, in the issuance of a stay of removal order from the district court, and in an award of EAJA fees where the

[54] *See* esp. the CDC website, for "Specific laws and regulations governing control of communicable diseases," at https://www.cdc.gov/quarantine/specificlawsregulations.html

government was not substantially justified in their position. One of the co-authors shortly will be filing a habeas petition for a client who was wrongfully deported in an attempt to force the government to parole back into the United States. As these examples illustrate, the habeas petition, and the associated strategies along with it, can be very useful. Habeas is an important tool and one that should be utilized more often to protect the rights of immigrant clients.[55]

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[55] For future reading and important further guidance on federal court practice, *see* Robert Pauw, Litigating Immigration Cases in Federal Court, 4th Ed. (AILA 2017); *see also* AILA's Immigration Litigation Toolbox, 6th Ed. (Released: 6/30/2019); Ira J. Kurzban, Immigration Law Sourcebook, 16th Ed. (AILA 2018-2019).