

# **PRO SE GUIDE TO CHALLENGING YOUR DETENTION THROUGH HABEAS CORPUS**

\*\*\*\*\*



## ***What is “habeas corpus”?***

“Habeas corpus” is a Latin term meaning “may you have the body.” In practice, it is a legal petition filed to challenge the government’s unlawful detention of a person. There are many different types of habeas corpus but in this guide we will only be discussing habeas corpus petitions that are filed in U.S. District Court to challenge your detention by Immigration and Customs Enforcement (ICE) under 28 U.S.C. § 2241. We will be simply

calling these “habeas petitions” in this guide.

## ***What does a habeas petition do?***

In the immigration context, a habeas petition can do one of two things: (1) ask the district court to consider whether ICE has the legal right to detain you at all; or (2) ask the district court to consider whether ICE has the legal right to detain you under certain conditions, such as without a chance to ask for a bond. It is important to know that a habeas petition only challenges ICE’s power to **detain** you. It does NOT challenge whether or not ICE can deport you.

## ***Can I file a habeas petition to challenge my criminal conviction?***

Yes, there are certain types of habeas corpus that you can use to try to overturn a conviction in either state or federal criminal court. However, these are not discussed in this guide. You should try to consult with a criminal defense attorney to learn more about this kind of habeas corpus.

## ***Can I file a habeas petition to challenge my order of deportation?***

No, a habeas petition can *only* challenge your detention by ICE. In order to challenge an order of deportation from the Board of Immigration Appeals, you must file a petition for review with the Ninth Circuit Court of Appeals.

## ***Where do I file my habeas petition?***

If you are detained in Eloy, Arizona or Florence, Arizona, a habeas petition should be filed in the U.S. District Court of Arizona in Phoenix.

U.S. District Court – District of Arizona  
Sandra Day O'Connor U.S. Courthouse  
401 W. Washington Street, Suite 130, SPC 1  
Phoenix, AZ 85003-2118  
Telephone: 602-322-7200

### ***How much does it cost to file a habeas petition?***

The filing fee for a habeas petition is \$5. If you do not have \$5, you can file your petition with an application to proceed “in forma pauperis,” which is like a fee waiver. In order to proceed “in forma pauperis,” you will have to have an official from your detention center certify how much money is in your account.



### ***How long does a habeas petition take?***

Because the courts have many cases to decide, a petition for habeas corpus can take a long time. It is not unusual for a habeas petition to take a minimum of 6 months, and in most cases you will not receive a final decision for at least 10 months. Therefore, you should not expect that filing a habeas corpus petition will get you immediately released



### ***In what situations could I file a habeas petition?***

Here are the most common situations to file a habeas petition:

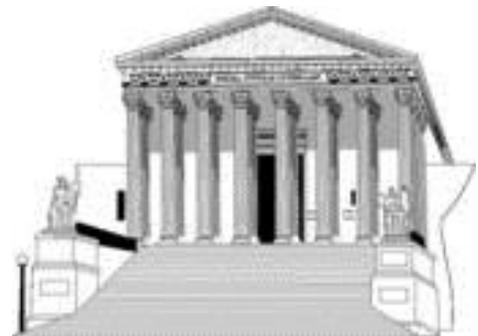
#### **→ Unlawful detention:**

This is when you believe that ICE does not have the authority to detain you *at all*. Most unlawful detention habeas petitions are filed in cases where the person has a non-frivolous claim to U.S. citizenship, or where ICE mistakenly says the person is undocumented but s/he actually has a green card and no deportable criminal convictions. Unlawful detention habeas petitions are rare.

#### **→ Indefinite detention (“Zadvydas habeas”):**

This is when you have been ordered removed but ICE cannot physically deport you back to your country, usually because your country will not issue a travel document for you or the U.S. does not have diplomatic relations with your country.

In the case *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), the Supreme Court considered whether a person could be detained indefinitely while ICE



was trying to deport him. The Supreme Court held that after six months had passed, a person should be released if s/he “provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.”

To file a Zadvydas habeas petition, you must wait **6 months** from the date of your “final order of removal.” A final order of removal is when the Immigration Judge ordered you deported and you did not reserve the right to appeal, or when the Board of Immigration Appeals dismissed your appeal and you did not file a petition for review to the Ninth Circuit and request a stay of removal. You *cannot* file a Zadvydas habeas before 6 months have passed from the date of your final order of removal.

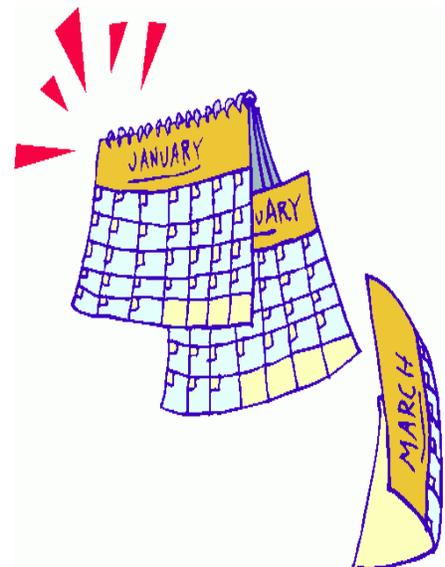


You also *must* cooperate with the ICE to try to get a travel document from your country. This may mean writing a letter to your embassy or the embassies of other countries or applying for a passport. You should also try to gather and submit with your habeas petition any evidence showing that your country will not accept you back, such as letters from your embassy denying you a travel document or proof that your country does not generally accept people who are removed from the U.S. If you do not have any proof, ICE may try to say that you have not shown that there is “no significant likelihood of removal in the reasonably foreseeable future.”

➔ **Prolonged detention (“Casas-Castrillon” or “Diouf” habeas):**

You may file a prolonged detention habeas petition when you have not been eligible to apply for a bond for a long period of time, usually because you have certain criminal convictions or you were arrested while entering the U.S.

In the case *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008), the Ninth Circuit considered whether a person could ask for a bond while he was appealing his case to the Ninth Circuit and had been granted a stay of removal. The Ninth Circuit held that, even if the person was not previously eligible for a bond because of his criminal history, his prolonged detention meant that he was eligible to have a bond hearing before an Immigration Judge unless ICE “establishes that he is a flight risk or will be a danger to the community.” In *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), the Ninth Circuit also held that a person who had filed a motion to reopen and appealed it to the Ninth Circuit could ask for a bond hearing after 6 months.



The law on prolonged detention habeas petitions is fairly new and is changing all the time. But some courts are beginning to use cases such as *Casas-Castrillon* and *Diouf* to say that a person should not be detained for longer than 6 months without being able to apply for a bond. ICE does not usually agree with this argument and will argue against it. But, if you have been detained for longer than 6 months and told that you cannot ask for a bond, you can try to file a prolonged detention habeas petition using *Casas-Castrillon* and *Diouf*.

Even if you win a prolonged detention habeas petition, this does not mean that you will automatically be released. It only means that you are given a hearing to ask an Immigration Judge for a bond. The judge can still deny you a bond if ICE proves that you are dangerous or that you will not show up for your next immigration appointment.

### ***What form do I use to file a habeas petition?***

To file a habeas petition, you should use the form provided by your local district court if they have one (the Florence Project can provide a copy of the Arizona form upon request). On the form you should explain what type of habeas petition you are filing and cite the case law that supports it (for example: "I am filing a habeas under *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) because I received a final order of removal over 6 months ago and am still detained.")



Answer the questions in the form and give the court: (1) the date that you were detained; (2) the dates that the Immigration Judge and the Board of Immigration Appeals ordered you removed (if any); (3) proof showing that the Immigration Judge or ICE have denied you bond or denied your request for release.

Send **two copies** of this form to the Arizona district court in Phoenix, along with your \$5 or request for a fee waiver. You should also include a Certificate of Service showing that you have sent a copy to the ICE and the U.S. Attorney's office at Two Renaissance Square, 40 N. Central Avenue, Suite 1200, Phoenix, AZ 85004-4408.

### ***What happens after I file my habeas petition?***

Once you send your habeas petition to the district court, the judge will consider whether there is enough proof to go forward with your petition. If the judge believes there is enough proof, s/he will issue an **Order to Show Cause** to the ICE. An Order to Show Cause requires ICE to show why it has the legal right to detain you and/or why you are not eligible for a bond. An Order to Show Cause is usually issued 1-3 months after you file your habeas.

If the court issues an Order to Show Cause, ICE will have 20 days to submit its legal argument, or **Response**. Once the ICE submits its Response, you have 20 days from the date

of the Response to submit a **Reply** arguing why ICE' reasons for detaining you, or detaining you without a bond, are not valid.



After you submit your Reply, a lower judge called a Magistrate will issue a **Report and Recommendation** in several months on whether your habeas petition should be granted. This Report and Recommendation is not a final decision on your habeas petition. It is only the Magistrate's opinion on whether there are sufficient legal grounds to grant your petition.

You will then have **14 days** to submit any **Objections to the Report and Recommendation**. If the Report and Recommendation says that your habeas should be denied, your Objections can explain why this conclusion is wrong. The ICE can also submit any Objections within 14 days. You can write a Reply to the ICE' Objections if you want but it is not required.

After the Objections and Replies are submitted, the District Court judge will either adopt or reject the Report and Recommendations. This is the final decision on your habeas petition. If the District Court denies your habeas petition, you have the right to appeal this decision to the Ninth Circuit.

### ***What do I get if I win my habeas petition?***

If you have filed an unlawful detention habeas or a Zadvydas habeas, the court will likely order ICE to release you. If you have filed an unlawful detention habeas, the court will likely order ICE to provide you a bond hearing in front of the Immigration Judge. If you have a bond hearing, ICE has the burden to show that you are a danger or a flight risk. The Immigration Judge must make a recording of this decision. If you do not agree with the judge's decision on your bond, you can appeal this decision to the Board of Immigration Appeals.



\*\*\*\*\*

*Challenging Your Detention Through Habeas Corpus* was prepared and updated by the staff of the Florence Immigrant & Refugee Rights Project and was written for immigrant detainees in Arizona who are representing themselves pro se in their removal proceedings. This guide is not intended to provide legal advice or serve as a substitute for legal counsel. The Florence Project is a nonprofit legal services organization and does not charge for its services to immigrant detainees in Arizona. This guide is copyright protected but can be shared and distributed widely to assist indigent immigrants around the country. All of our guides are available to download on our website: [www.firrp.org](http://www.firrp.org). We kindly ask that you give credit to the Florence Project if you are adapting the information in this guide into your own publication.