

# No End in Sight:

## Prolonged and Punitive Detention of Immigrants in Louisiana



# Acknowledgments

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# 1. Introduction



Louisiana has long held the title as the incarceration capital of the United States, and by extension, the world. In recent years, advances in criminal justice reform have decreased the number of individuals held in criminal custody. However, in the wake of these bipartisan criminal justice reforms, the state saw a massive expansion of immigrant detention. Quickly and quietly, newly emptied jail beds in rural Louisiana began to be filled with detained immigrants, after the federal immigration enforcement agency—Immigration and Customs Enforcement (ICE)—contracted with local officials, as well as with for-profit prison companies who often oversee prison operations. By the summer of 2019, Louisiana was detaining more immigrants than any state, other than Texas, in a patchwork of twelve facilities spread across hundreds of miles—an increase of 9 facilities and 7,000 jail beds in less than six months. This brought the total detention capacity of the state to 9,000 beds. The new facilities are spread out across the state in rural towns, hours away from larger cities where advocates, community groups and legal service providers are located. Because of the remote locations, it is nearly impossible for the vast majority of detained immigrants to secure counsel or receive visits from family and friends. The expansion of the past few years continued a trend that had begun in 1986, when the largest immigrant detention center in the county opened Louisiana at the beginning of the mass immigrant detention trajectory.

The right to liberty is fundamental. It is enshrined in the Constitution and it applies to all persons in the United States, regardless of race, national origin, or status. The writ of habeas corpus is a longstanding means of last resort to challenge arbitrary executive power to confine or detain. Immigrants who have been living and working all over the U.S. may be shipped to Louisiana after being taken into custody, further alienating them from their families and communities. Because of blanket denials of parole requests for release compounded by the difficulty of winning release through bond, the writ of habeas corpus serves a vital purpose for the thousands of detained immigrants in Louisiana. It is their last recourse, and often their only hope, to regain their liberty. Louisiana’s detention facilities all fall under the jurisdiction of the New Orleans ICE Field Office. This field office has denied parole to 98% of detained immigrants seeking release, many of whom could have or should have been released under the law, including under ICE’s own internal policies. Thus, habeas corpus is a last resort for immigrants to seek release from prolonged, indefinite, and punitive detention. This report will examine the 499 habeas petitions filed by immigrants seeking release from their detention in Louisiana between January 1, 2010 and July 31, 2020. Because all of the long-term detention centers are located in the Central, Northern, and Western parts of the state, all of these cases are typically filed in a single federal district court: the Western District of Louisiana.

The writ of habeas corpus holds promise as means to ensure ICE does not indefinitely or punitively detain immigrants. However, the process of seeking release through habeas corpus is complex, time consuming, and currently inaccessible for many detained immigrants, the majority of whom must navigate the system without legal representation and without access to an interpreter. In reporting on habeas cases for the last ten years in the Western District of Louisiana, the authors hope to shed light on the stories of detained immigrants who seek release through habeas, and encourage reforms to improve fairness and efficiency, working towards eliminating mass prolonged and punitive detention.

## 2. Methodology

● Currently open facilities    ● Facilities that were open during the study period but are not currently holding immigration detainees    Other facilities (various) = 32, 6%



1. BOSSIER PARISH MEDIUM SECURITY FACILITY: 0 CASES
2. RICHWOOD CORRECTIONAL CENTER: 3 CASES (LESS THAN 1%)
3. JACKSON PARISH CORRECTIONAL CENTER: 3 CASES (LESS THAN 1%)
4. WINN CORRECTIONAL CENTER: 3 CASES (LESS THAN 1%)
5. LASALLE CORRECTIONAL CENTER (OLLA): 30 CASES (6%).
6. LASALLE ICE PROCESSING CENTER (JENA): 174 CASES (35%)
7. CATAHOULA CORRECTIONAL CENTER: 7 CASES (1%)
8. TENSAS PARISH DETENTION CENTER: 49 CASES (10%)
9. RIVER CORRECTIONAL CENTER: 1 CASE: (LESS THAN 1%)
10. ALEXANDRIA STAGING FACILITY: 3 CASES: (LESS THAN 1%)
11. OAKDALE FEDERAL DETENTION CENTER: 94 CASES (19%)
12. PINE PRAIRIE ICE PROCESSING CENTER: 54 CASES (11%)
13. ALLEN PARISH PUBLIC SAFETY COMPLEX: 2 CASES (LESS THAN 1%)
14. SOUTH LOUISIANA ICE PROCESSING CENTER: 44 CASES (9%)



This report examines the 499 immigrant habeas cases filed between January 1, 2010 to July 31, 2020 within the Western District of Louisiana. With the assistance of court staff, the authors obtained these case dockets through the Public Access to Court Electronic Records (PACER) system.<sup>1</sup>

To analyze the cases, the authors developed a survey instrument using the Qualtrics platform, to identify petitioner demographics, legal representation status, procedural matters, case adjudication timelines, and case outcomes. The authors developed this survey, consisting of 183 questions, after discussions with regional practitioners and national detention experts, as well as in consultation with Professor Mirya Holman, a political scientist and empiricist of Tulane University. During the 2020-2021 academic year, authors, along with a small research team, “coded” all 499 cases using the survey instrument, with at least every eighth case reviewed for errors. Each law student who coded cases was trained on coding protocols, completed a test survey, and received feedback on their coding.

Authors, along with Prof. Holman, analyzed the resulting 499 surveys, constituting all of the coded habeas cases. The authors also developed a research plan to interview formerly detained noncitizens, which was approved by Tulane University’s Institutional Review Board on April 2, 2021. Interviews are ongoing. This report is the culmination of a year of project design, research, and analysis to illuminate trends in immigrant habeas petitions in Louisiana.

<sup>1</sup> While dockets and opinions are accessible to any PACER user, the public generally cannot view other docket filings in immigrant habeas corpus cases. Parties to the case can access them anywhere. Non-parties can view other docket filings in these cases in a public access terminal in the courthouse. Because the courthouse was closed during the COVID-19 pandemic, court staff permitted electronic access through PACER to cases within the Clinic’s study period.

D.A. is an asylum seeker from Cameroon who was detained in Jena, Louisiana for a year and half at the LaSalle ICE Processing Center. In early 2021, he was finally released to his family in Maryland.

Photo courtesy of Southern Poverty Law Center.

## 3. Profiles of Immigrants Filing Habeas Petitions







In our study, immigrant habeas filings remained mostly stagnant for the nine-year period leading up to 2020, aside from a brief spike stemming from mass filings by Haitians in 2011, in the wake of the devastation from the 2010 earthquake. After this largely stagnant period, immigrant habeas petitions have risen precipitously in 2020. Of the 499 petitions in the ten-year study period, 65 (13%) were filed in the first half of 2020 alone. Notably in the 499 cases, the vast majority are unique petitioners, with just 29 individuals who filed two or three habeas cases over the ten-year study period. In more than three-fourths of cases (382), detained immigrants had been ordered removed and were arguing for release under *Zadvydas* because they could not be deported.

The steep rise in immigrant habeas petition filings in 2020 has come at a time when immigrant detention centers have been ravaged by COVID-19 outbreaks. These increased challenges to prolonged and punitive detention happened at a time of unprecedented travel restrictions related to the pandemic, when deportations to many countries became impossible and many detained immigrants languished for longer periods of time. A key 2020 court case, *Dada v. Witte*, brought to light the dangers of the pandemic to immigrants in congregate settings.<sup>4</sup>

## CASE STUDY

*Dada v Witte*



In this case, sixteen medically vulnerable immigrants held in six different detention centers in Louisiana claimed their detention had become unconstitutionally punitive. They argued they were in danger of serious illness or death because of their high risk of contracting the COVID-19 virus, particularly in light of ICE's history of failing to address overcrowding, unsafe and unsanitary facilities, and failure to provide adequate medical care. The court ordered the release of 14 petitioners finding that petitioners would likely succeed in their argument that their Fifth Amendment due process rights were violated by the punitive conditions in detention.

## Most Detained Immigrants are Detained for Over a Year Before Even Filing a Habeas Petition.

Detained immigrants have been in detention for months or even years before filing for habeas. The *Zadvydas* Court found detention beyond six months after the conclusion of immigration court proceedings to raise constitutional concerns, and the federal courts continue to grapple with possible constitutional limits to detention during proceedings.<sup>5</sup> In our study, immigrants had been detained for nearly one year and one month, on average, at the time they filed their habeas petitions. In the longest instance, a petitioner was detained for six and a half years before they filed for habeas relief. After filing, many detainees often wait many more months, and at times, even years longer, before their cases are resolved. Nineteen detained immigrants filing for habeas were detained more than 1,000 days, and four of them had filed two habeas petitions.



On average, detained immigrants already are detained for nearly **one year and one month** when they file a habeas petition.

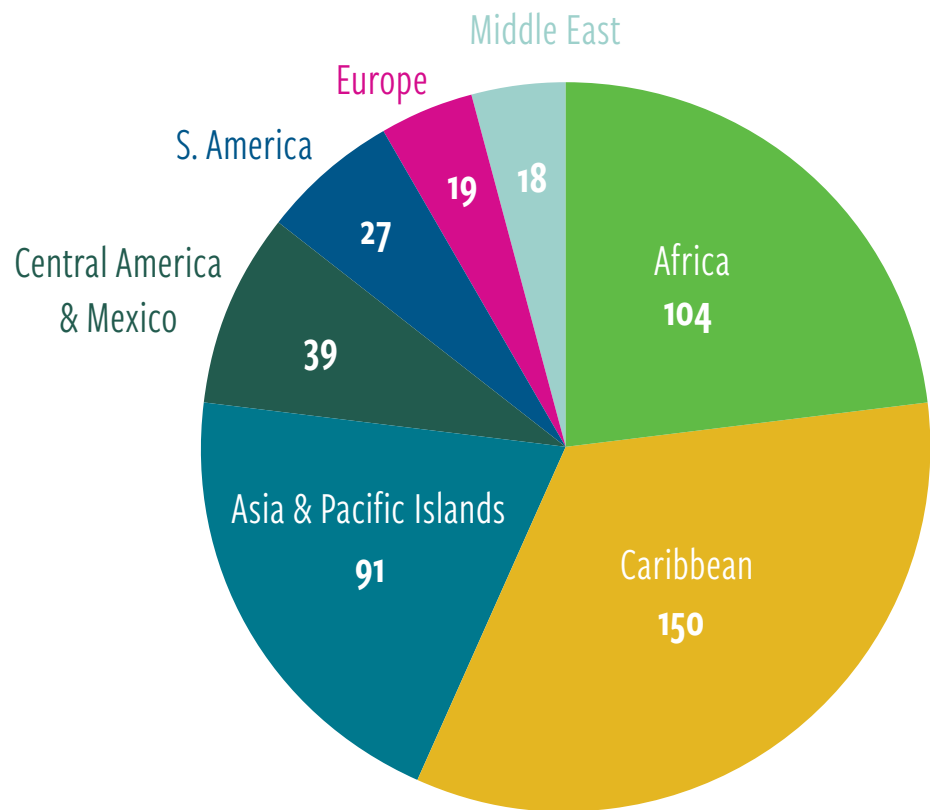
<sup>4</sup> *Dada v. Witte*, 1:20-CV-00458, 2020 WL 2614616 (W.D. La. May 22, 2020).

<sup>5</sup> See *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (remanding prolonged detention case for consideration of constitutional issues).

# Detained Immigrants Filing Habeas Petitions Are Largely Black Immigrants, and Almost All Male.

The majority of detained immigrants, 57% (254 of 448), who filed habeas petitions were Black immigrants. According to the Black Alliance for Just Immigration (BAJI), Black immigrants include those immigrants whose country of origin is in Africa or the Caribbean.<sup>6</sup> Here, more than a third of detained immigrants filling for habeas had Caribbean countries of origin (in 150 out of 448 cases). More than one fifth of habeas petitioners had African countries of origin (in 104 out of 448 cases). Black immigrants are disproportionately represented among immigrants seeking release through habeas, as Black immigrants make up only 4.8% of detained immigrants.<sup>7</sup>

Black immigrants are also disproportionately likely to be facing deportation because of a criminal conviction.<sup>8</sup> One common consequence of deportation stemming from criminal convictions is that those immigrants may be held in mandatory detention, with no right to a bond hearing, which could lead to prolonged detention.



**COUNTRY OF ORIGIN FOR DETAINED IMMIGRANTS FILING HABEAS PETITIONS BY REGION<sup>9</sup>**

<sup>6</sup> Julian Morgan-Trostle, Kexin Zheng and Carl Lipscombe, “The State of Black Immigrants,” at 8, Black Alliance for Just Immigration & NYU School of Law Immigrant Rights Clinic (2020), available at <http://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf>.

<sup>7</sup> *Id.* at 26.

<sup>8</sup> *Id.* (finding that “nearly one out of every five people detained while facing deportation on criminal grounds before the EOIR is Black.”).

<sup>9</sup> We relied on BAJI’s definition of Black immigrants, as well as their definitions of African countries and Caribbean countries. We also referenced World Atlas for categorizing other countries, and TeachMidEast to categorize Middle Eastern countries, <https://teachmideast.org/articles/what-is-the-middle-east>.



Women make up a smaller portion of detained immigrants nationally, as 79% percent of detained immigrants are men.<sup>10</sup> Detained immigrants in our ten-year study were almost entirely male. Ninety-six percent, or 375 petitions (out of 391 cases with gender pronouns), were filed by men, with only 10 petitions filed by women. Notably, in the 10-year study period, there were very few Louisiana detention centers that held women. All 10 cases stemmed from LaSalle ICE Processing Center in Jena, Louisiana, the detention center that historically has held women, with one petitioner who filed two cases. While this facility has long detained men and women, it has allotted significantly fewer beds to detained women.

## Forty Percent of Petitioners Previously Held Lawful Status, Many as Long-term Lawful Permanent Residents.



Almost **1 out of 4** habeas petitioners were previously lawful permanent residents.  
**Almost half** of habeas petitioners previously held some form of lawful status.

Detained immigrants filing for habeas often have significant ties to the United States, having lived an average of sixteen years in the U.S. before they filed their habeas petition (out of 314 cases with entry dates). Forty percent of habeas petitioners (in 198 out of 499 cases) held some form of immigration status prior to filing their habeas petition, most commonly as lawful permanent residents. A lawful permanent resident is an immigrant who can live permanently within the United States, commonly referred to as holding a green card.<sup>11</sup> Lawful permanent residents have passed rigorous background checks and often have been interviewed by immigration officials. Yet, lawful permanent residents can still be deported for reasons that range from failing to update their address to being convicted of certain crimes. Almost one fourth of habeas petitioners had been lawful permanent residents (in 115 cases). Many habeas petitioners had been seeking other immigration relief as well. More than one out of five petitioners (in 109 cases), had been seeking human rights protections based on fleeing torture or other serious harm in their country of origin, including asylum, withholding of removal, and protection under the Convention against Torture.<sup>12</sup>

# 16 Years

On average, detained immigrants lived in the U.S. for sixteen years before they filed their habeas petition.

<sup>10</sup> Emily Ryo & Ian Peacock, “The Landscape of Immigration Detention in the United States,” at 8, American Immigration Council (Dec. 2018), available at [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_landscape\\_of\\_immigration\\_detention\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf).

<sup>11</sup> 8 U.S.C. § 1101(a)(20) (defining lawful permanent residence); Dep’t of Homeland Sec., Lawful Permanent Resident, <https://www.dhs.gov/immigration-statistics/lawful-permanent-residents>.

<sup>12</sup> Human rights protections here refer to asylum, withholding of removal and protection under the Convention Against Torture.

## 4. Outcomes of Immigrant Habeas Petitions

Custody.

Your Honor, My two last results show that my Immune System is very low. The Doctors in JENA advised that my CD4 count should be at least 300 or above, but looking at my LAB Records, I find it lower than 260. So I am very much exposed to the COVID-19. Some detainees were tested positive and taken to the hospital, they were later brought back and they are still in the same Dormitory with us and the coronavirus can still spread because as at date, we are not practicing social distancing.

Your Honor, I have (5) five of my sisters and my mother living in the U.S.A and they can take good care of me.

I do plead with your Honor to Temporarily release my custody to my family.

# In more than 1 out of 5 cases, ICE released the detained immigrant before the Court could make a final decision. Only five petitioners won a court order for their release.

Nearly all habeas petitions filed by detained immigrants ask the Court to order immigration authorities to release them into the community, often after months or years of detention, because continued detention is unlawful. But in most cases, the Court never had the chance to rule on the legality of detention. In 22% of cases (112 cases), ICE released the detained immigrant to their community during the case, before the Court made a formal ruling on whether continued detention is unlawful. These were voluntary administrative releases—the result of decisions by ICE officials—that were not ordered by the Court.



Almost **1 out of 4** habeas petitioners were previously lawful permanent residents.  
Almost **half** of habeas petitioners previously held some form of lawful status.

These voluntary administrative releases are “shadow wins” where the immigrant is released without court vindication, but they show up in the formal court record as losses, or court dismissals. After ICE releases a habeas petitioner from custody, the Court dismisses the habeas petition, because the case lacks a live dispute, with no further legal remedy that the Court can order since the petitioner has already achieved release. The Court will also dismiss the habeas petition if ICE deports the detained immigrant, as happened in 26% of cases (128 out of 499).

Although detained immigrants were released from detention during the habeas case in more than one-fifth of cases, hardly any petitioners won an order from the Court finding their detention was unlawful and requiring ICE to release them. In fact, the Court only ordered release in five cases. This represents 1% of cases, which is an abysmal success rate if looking only at court-ordered releases.

Of these rare successful cases, three were from 2020. During the height of the COVID-19 pandemic, as part of the *Dada* case, the Court ordered release of 14 medically vulnerable immigrants held in detention facilities with active COVID-19 outbreaks, finding the risks to their health outweighed the government’s interest in continued detention.<sup>13</sup> And the facts of the other two 2020 cases are nearly identical: in both the Court ordered release of Venezuelan immigrants who could not be deported because of a total breakdown in diplomatic relations as well as a COVID-related ban on international flights into the country.<sup>14</sup> The final two successful cases date from 2011 and 2014, also by immigrants who won release because they could not be deported.

<sup>13</sup> *Dada v. Witte*, No. 20-cv-458, 2020 WL 2614616 (W.D. La. May 22, 2020) *adopting* in part, rejecting in part Report & Recommendation, 2020 WL5510706 (W.D. La. April 30, 2020).

<sup>14</sup> *Gomez Barco v. Witte*, No. 20-cv-497, 2020 WL 7393786 (W.D. La. Dec. 16, 2020) *adopting* Report & Recommendation, 2020 WL 7393924 (W.D. La. Nov. 19, 2020); *Castro Balza v. Barr*, No. 20-cv-866, 2020 WL 6064881 (W.D. La. Oct. 14, 2020) *adopting* Report & Recommendation, 2020 WL 6143643 (W.D. La. Sept. 17, 2020).



## CASE STUDY



In February 2011, a Haitian immigrant held at Tensas Parish Detention Center filed a habeas petition because the Haitian Consulate was denying all travel documents in the aftermath of the 2010 earthquake. The immigrant had entered the United States in 2000 as a lawful permanent resident but was ordered deported in April of 2010. The judge quickly set an evidentiary hearing and appointed an attorney to represent the immigrant. The hearing was held about a month later, after which the Court ordered ICE to release him because he could not be deported due to illegible identity documents. The immigrant had been detained for nearly a year. The Court later vacated its own order because ICE released the immigrant after the Court had recommended release.<sup>15</sup>

In five additional cases, an interim ruling recommended release but there was no reached a final order, either because the Court disagreed with the recommendation or ICE released the immigrant before the Court could make a final ruling.

In one unique case, a Cuban asylum seeker who was not eligible for a bond hearing filed a habeas petition after being continuously detained for nearly 11 months. After holding a hearing, the Court denied immediate release from detention but ordered ICE and the Department of Justice to hold a bond hearing within 21 days. At that hearing, the detained immigrant should receive an individualized determination by a neutral factfinder as to whether he needed to continue being detained.<sup>16</sup> Whether he was released is unclear, as immigration court proceedings including bond hearings are not part of the habeas docket.



In **only 5 cases**, detained immigrants won court-ordered release from detention through habeas.

The more common outcome in these cases, so-called shadow wins, where ICE releases the detained immigrant to their community during the habeas case, are a mixed blessing. On one hand, the detained immigrant is released and may reunite with family and friends or seek medical care and recuperation. It is a positive step for ICE to release an immigrant who may be unconstitutionally detained. On the other hand, these releases sometimes come months or even years into the case, after further prolonged detention and after repeated ICE refusal to release. The releases deny immigrants who have been detained up to several years the vindication of their legal rights. Furthermore, because the releases end the legal case challenging detention, ICE may be using these releases to avoid negative court decisions that make formal rulings regarding prolonged, indefinite and punitive detention. Final court decisions that weigh the evidence and determine whether detention is lawful or not are important to clarify the legal limits of

<sup>15</sup> *Alexis v. Smith*, No. 11-cv-309, 2011 WL 13386020 (W.D. La. Sept. 15, 2011); *Alexis v. Smith*, No. 11-cv-309, 2011 WL 3954945 (W.D. La. Sept. 6, 2011) *adopting* Report & Recommendation, 2011 WL 3924247 (W.D. La. Aug. 3, 2011).

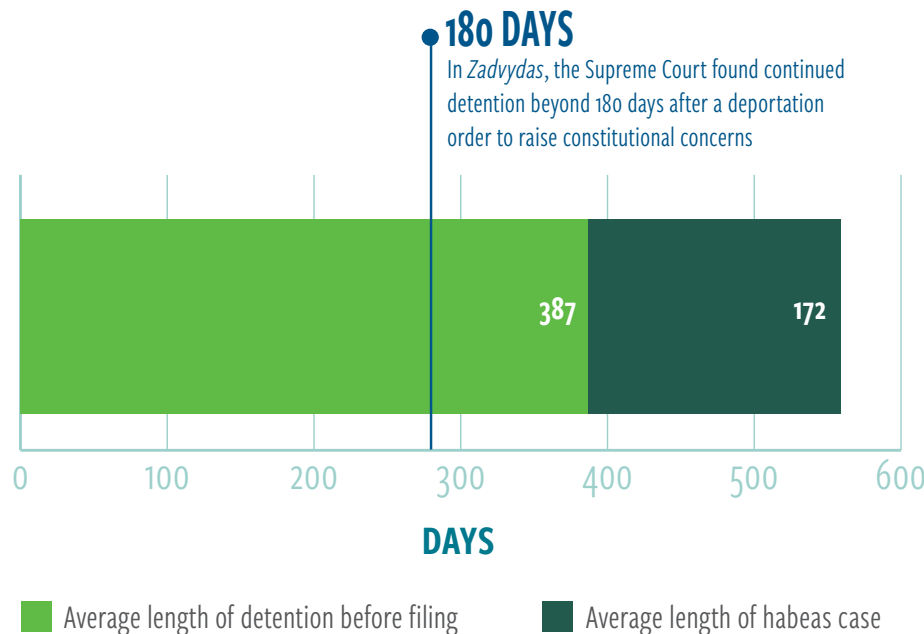
<sup>16</sup> *Fortuny Diaz v. Barr*, No. 20-cv-425 (W.D. La. Sept. 14, 2020).

immigration detention. The very few final court decisions mean that neither side—neither detained immigrants and their advocates, nor ICE and their attorneys—can predict what facts or evidence might convince the Court that detention has become unlawful. Attorneys for immigrants unfamiliar with the phenomenon of shadow wins might conclude from legal research that habeas petitions almost never succeed and decline representation to a detained immigrant in need, even though representation does improve likelihood of release. These shadow wins also usually prevent attorneys for the detained immigrant from receiving litigation fees, further disincentivizing the representation of indigent clients.<sup>17</sup>

## Habeas petitions are taking months or even years for adjudication. This further prolongs potentially unconstitutional detention.

Time is often at the core of habeas petitions because they challenge unlawful detention, which has become punitive due to prolonged or indefinite in nature. As the Supreme Court has recognized, the writ of habeas corpus must be a “prompt and efficacious remedy” against unlawful detention, based on the “root principle ... that in a civilized society ... if imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.”<sup>18</sup> The habeas statute therefore requires a habeas court to “forthwith award the writ” in appropriate cases and “summarily hear and determine the facts, and dispose of the matter as law and justice require.”<sup>19</sup>

Yet, unfortunately, many habeas cases become protracted. On average among closed cases (467 cases), habeas petitions take about six months (172 days) from the date the case is filed to the date the case is terminated. But this average belies both many exceedingly short cases—typically dismissed for procedural errors—and many exceedingly long cases. The standard deviation for case length is four months (119 days), meaning that 34% of cases take between 53 days to 172 days and another 34% of cases take between 172 days and 291 days. Twenty-two cases were pending for more than a year.



<sup>17</sup> The Equal Access to Justice Act permits recovery of attorneys’ fees and costs in successful federal court litigation against the government, but the Supreme Court has held that a petitioner must be a prevailing party who achieves a “material alteration of the legal relationship of the parties” and a “judicial imprimatur on the change” to receive fees. *Buckhannon Bd. Care & Home Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604–05 (2001).

<sup>18</sup> *Fay v. Noia*, 372 U.S. 391, 401–02 (1963), overruled on other grounds by *Wainwright v. Sykes*, 433 U.S. 72 (1977).

<sup>19</sup> 28 U.S.C. § 2243.

<sup>20</sup> *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

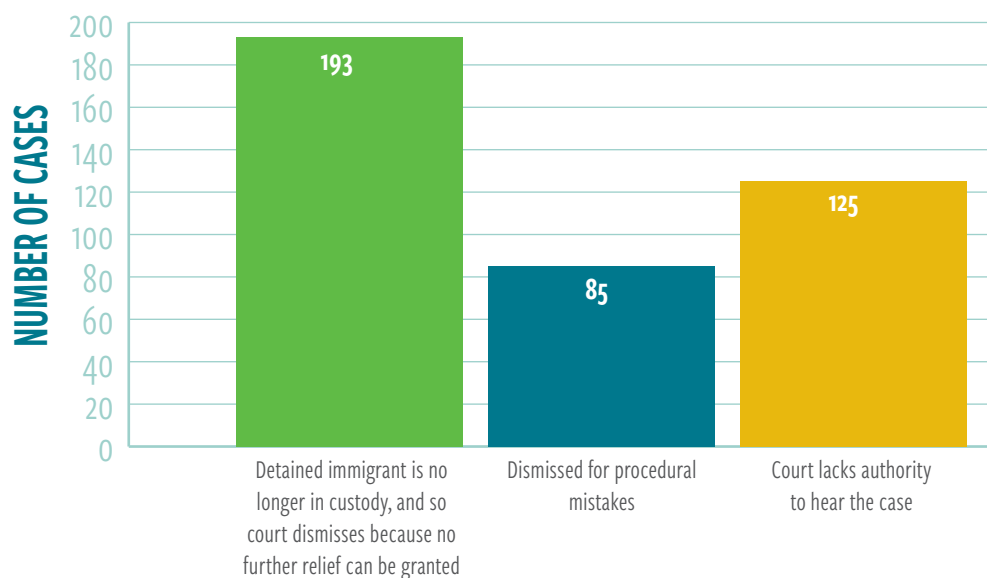
### AVERAGE LENGTH OF DETENTION FOR HABEAS PETITIONERS

Most detained immigrants in their habeas cases argue that their continued detention has become unreasonably prolonged and therefore unlawful. In the average case, the detained immigrant has already been held in detention for nearly one year and one month (387 days) when they file their petition. This means that for the average case, the detained immigrant is detained for over one year and six months (559 days) in total by the time that their habeas case is resolved. By comparison, the Supreme Court ruled that six months of detention after a removal order raises constitutional concerns.<sup>20</sup>

In meritorious cases, every additional day that the case is pending with no ruling is contributing to unconstitutionally prolonged detention.

## Most cases are dismissed without any judicial evaluation of the legality of detention.

Among closed cases (467 cases), the majority were dismissed for procedural or jurisdictional reasons, meaning that the Court did not weigh the evidence and did not rule on whether detention is unlawful. Sometimes dismissals were based on multiple reasons. For more than 40% (193 cases), the case was dismissed because the detained immigrant was no longer in custody, either because of a shadow win release or deportation. For more than 18% (85 cases), the case was dismissed for failure to comply with court instructions, such as filling out certain forms, paying the filing fee, and updating the address. For about 27% (125 cases), the case was dismissed for lack of jurisdiction, meaning that the Court lacks the legal authority to decide the case. These dismissals end the case without a judicial evaluation and ruling of the legality of detention—the core purpose of habeas corpus.



### REASONS FOR CASE DISMISSALS OF HABEAS PETITIONS



## 5. Early Procedural Barriers

THE HONORABLE  
JUDGE: JOSEPH H. L.  
PEREZ - MONTES  
UNITED STATES DISTRICT COURT  
OF LOUISIANA WESTERN DISTRICT.

YOUR HONOR,  
A DECLARATION IN SUPPORT OF MY CASE  
IN YOUR COURT.

On April 20, 2020 a Federal court approved a class action in a law suit called *Frajhat v. ICE* on behalf of people being detained in ICE custody with medical conditions that put them at high risk of harm from coronavirus/COVID-19. I am 54<sup>+</sup> years now getting to 55 years in a few months. I was also diagnosed with HIV while in detention at PINE PRAIRIE detention center since April 2017 and since then I have been



In **44% of cases**, ICE never entered the case and never had to provide a legal reason for the immigrant’s continued detention.

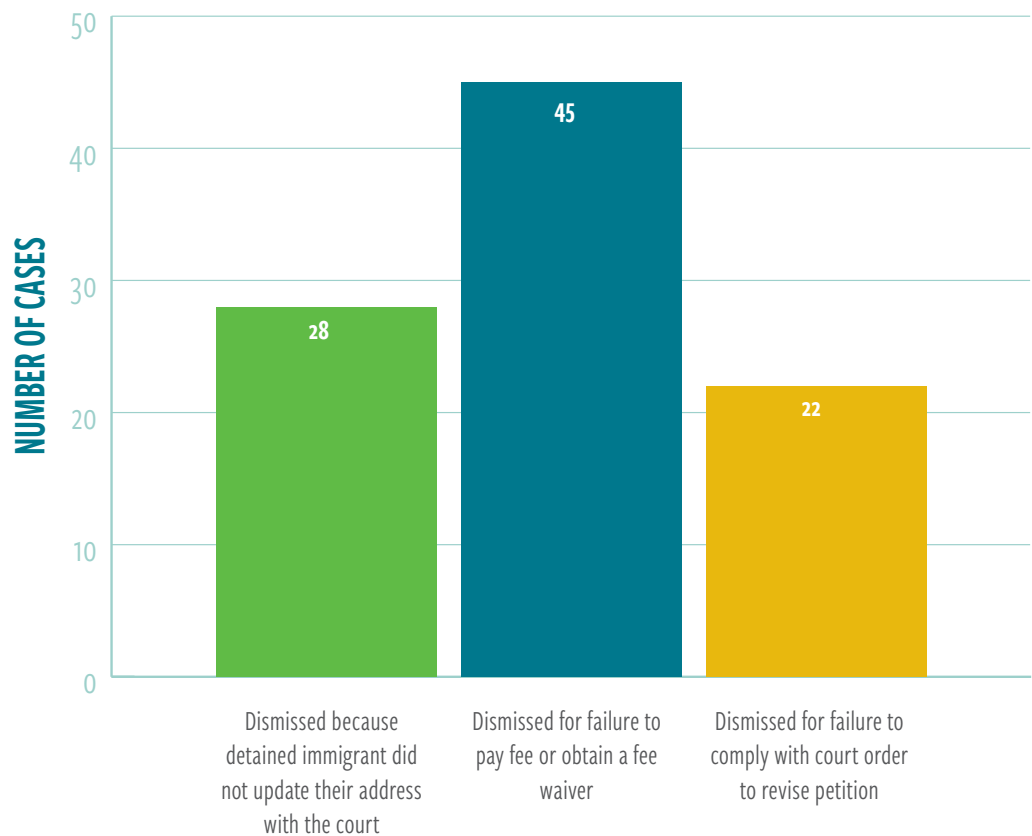


**20% of closed cases** were dismissed for procedural errors.

Immigrants in detention face a maze of complicated procedural obstacles in challenging their detention in federal court through the writ of habeas corpus. In order to start their case, detained immigrants must pay a \$5.00 filing fee or request a fee waiver file, and they also must file their petitions on specific court-issued forms. Moreover, they are required to keep their address updated with the Court throughout the duration of their case, even if their address changes for reasons out of their control, as when ICE transfers them to another detention center. Detained immigrants often face this maze without the assistance of counsel, and they must do so from detention with scant access to legal tools and inadequate resources to properly file their petition.

If a detained immigrant fails to file their petition properly, they risk further prolonged detention without answers from ICE for the basis of their detention, or even the dismissal of their claims. In 44% (218) of all cases, ICE never appeared at all in the case, and without appearing, they were never required to justify why a detained immigrant was being detained.

Critically, the Court dismissed 20% (85 cases) of resolved habeas cases solely because of procedural errors, including failing to pay the \$5 filing fee, failing to update an address, or failing to comply with an order to revise the petition. The Court did not dismiss these cases because they lacked merit or viable claims, and the Court never ruled on the legality of the detained immigrant’s detention. Rather, the Court dismissed these cases simply for a procedural error. The Court dismissed 10% (45 cases) of resolved cases because the detained immigrant failed to pay \$5.00 to file their petition. The Court dismissed 6% (28 cases) of resolved cases because the detained immigrant had failed to update their address with the court. Finally, the Court dismissed about 5% (22 cases) of resolved cases because the detained immigrant failed to amend their petition. Some cases were dismissed for multiple procedural errors.



**BREAKDOWN OF CASES DISMISSED FOR PROCEDURAL MISTAKES**

*Some cases were dismissed for multiple procedural errors*

# In Over Forty Percent of Cases, the Detained Immigrant Did Not Pay the Fee Initially. The Court Denied One-Third of Fee Waivers Requested.

Any person in custody seeking to challenge their custody in federal court through the writ of habeas corpus must pay a \$5 filing fee when they file their petition.<sup>21</sup> If the individual is unable to pay the fee, they may ask the court to proceed *in forma pauperis*, which acts as a special fee waiver or deferral of the \$5 filing fee.<sup>22</sup> The Court requires detained immigrants seeking waiver of the filing fee to make their request on a court-issued form, submit a certified copy of their detainee money accounts, and attach an affidavit describing their financial situation.

In 42% (211 cases), the detained immigrant did not pay the initial \$5 fee when filing the petition, and over half of those who did not pay also did not include a written request for fee waiver. Moreover, among those detained immigrants who asked for a waiver of fees because they could not afford the \$5, the Court denied one-third of requests (26 denials out of 75 fee waivers filed). In total, the Court granted the fee waiver in 49 cases. The Court dismissed 45 cases at least in part because the detained immigrant failed to pay the \$5 filing fee.

**1 out of 3**  
Fee waivers were denied

## CASE STUDY



The Court dismissed a petition of a former lawful permanent resident whose sole source of income was disability, which he started receiving after an AIDS diagnosis. The detained immigrant requested a fee waiver because his disability payments were cancelled after he was arrested and detained, leaving him with no source of income. The Court denied his request without giving any reason and ordered him to pay \$5 within 30 days. The Court never received the \$5 and subsequently dismissed his case.<sup>23</sup>



**45 cases were dismissed for failure to pay \$5**

<sup>21</sup> The \$5 filing fee for habeas corpus is written into federal statute. 28 U.S.C. § 1914(a).

<sup>22</sup> 28 U.S.C. § 1915.

<sup>23</sup> Case documents on file with authors.



# In Over Sixty Percent of Cases, Court Mail Was Returned Undelivered. The Court Dismissed Twenty-Eight Habeas Petitions for Failure to Update Address.

Even though ICE maintains custody of detained immigrants and controls all movement, detained immigrants bear the responsibility to update their address with the Court to keep their habeas petition alive. Local court rule requires unrepresented people to update addresses during the case and permits the Court to dismiss the case entirely if mail is returned as undelivered and the address is not updated within 30 days.<sup>24</sup>

In fact, in over 60% of cases (300), mail was returned undelivered to the Court from the detention center, presumably because the detained immigrant was no longer at the detention facility. Critically, in the majority of cases with returned mail (187 cases), the undelivered mail from the Court to the detained immigrant contained a legal deadline in the case. In some cases with undelivered mail, the court record showed why the detained immigrant was no longer at the facility, including transfers to other facilities, deportations, or releases into the community. ICE can transfer detained immigrants from facility to facility with no warning and for no clear reason, which public health specialists have warned contributes to the spread of the COVID-19 virus.<sup>25</sup> Out of all cases examined in this study, seventy detained immigrants were transferred to other detention centers while their habeas petition was still pending.

In some cases, the detained immigrant suddenly disappears from the court record with no explanation. In those cases, the court record simply ends with repeated instances of returned mail and dismissal for failure to update the address. The Court dismissed 28 cases because the detained immigrant did not update their address.

## The Court Dismissed Twenty-Four Habeas Petitions Because the Detained Immigrant Did Not Use the Court-Mandated Form or Failed to Revise Their Petition.

Detained immigrants who do not have the help of a lawyer must also file their petition on a specific court-issued habeas petition form according to local rules of the Court.<sup>26</sup> The form is only in English, and it spans nine pages long.<sup>27</sup> The form requires the detained immigrant to explain the history of their immigration proceedings, any past appeals or administrative remedies, and it requires them to explain their legal arguments along with the supporting facts underlying their claims. Nearly all detained immigrants were required to explain the legal arguments and supporting facts for their petition without the assistance of counsel, and they all did so from detention with limited access to legal tools to adequately research and present their claims.

<sup>24</sup> “Each attorney and pro se litigant have a continuing obligation to promptly notify the court in writing of any address change.” United States District Court for the Western District of Louisiana, Local Civil Rule 11.1, *available at* [https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/localrules\\_WDLA.2021Feb11.pdf](https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/localrules_WDLA.2021Feb11.pdf). “The failure of an attorney or pro se litigant to promptly notify the court in writing of an address change may be considered cause for dismissal for failure to prosecute when a notice is returned to the court for the reason of an incorrect address and no correction is made to the address for a period of 30 days.” Local Civil Rule 41.3.

<sup>25</sup> Mica Rosenberg, Kristina Cooke, Reade Levinson, “U.S. Immigration Officials Spread Coronavirus with Detainee Transfers,” Reuters (July 17, 2020), *available at* <https://www.reuters.com/article/us-health-coronavirus-immigration-detent/u-s-immigration-officials-spread-coronavirus-with-detainee-transfers-idUSKCN24I1G0>.

<sup>26</sup> “Every original Petition filed by a prisoner who is proceeding pro se . . . seeking a writ of habeas corpus under 28 U.S.C. § 2241 or 28 U.S.C. § 2254 or § 2255 shall be typed or legibly written on forms supplied by the court and signed by the prisoner.” United States District Court for the Western District of Louisiana, Local Civil Rule 3.2, *available at* <https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/localrules.WDLA.2021Feb11.pdf>.

<sup>27</sup> Petition for Writ of Habeas Corpus Under 28 U.S.C.A. § 2241 (AO 242), Administrative Office of the U.S. Courts (Sept. 1, 2017), *available at* <https://www.uscourts.gov/forms/civil-forms/petition-writ-habeas-corpus-under-28-usc-ss-2241>.

If a detained immigrant fails to submit their petition on the proper form, the Court will allow petitioners to amend their petitions within a specific time frame. However, if the petition is not properly amended within the required timeframe, the petition may be dismissed. The Court dismissed 22 cases for failing to comply with an order to fill out the required form or revise the petition.

## When Cases Are Dismissed for Procedural Errors, the Detained Immigrant Remains Locked in Detention Without Any Answer for Why They are Being Detained.

When detained immigrants do not pay the \$5.00 filing fee or request to proceed *in forma pauperis*, or when they do not file their petitions on the required forms, the Court will generally dismiss the case. The Court does not notify ICE that a person in their custody has filed a habeas petition and may be detained unlawfully. The Court will generally issue a summons to notify the U.S. Attorney's office that a lawsuit has been filed against ICE only after the detained immigrant properly files a writ of habeas corpus—with the filing fee or fee waiver, on the correct form, and making clear legal arguments challenging their detention.<sup>28</sup> Once the U.S. Attorney's office is given such notice, they are required to justify to the Court why the detained immigrant is being held. However, if the Court deems the initial filing defective for procedural issues, the Court does not notify the U.S. Attorney's Office until the detained immigrant fixes those defects. Therefore, even when the detained immigrant can correct any errors in the petition, those procedural mistakes prolong the amount of time the detained immigrant remains in detention without answers for the legal basis of their detention.

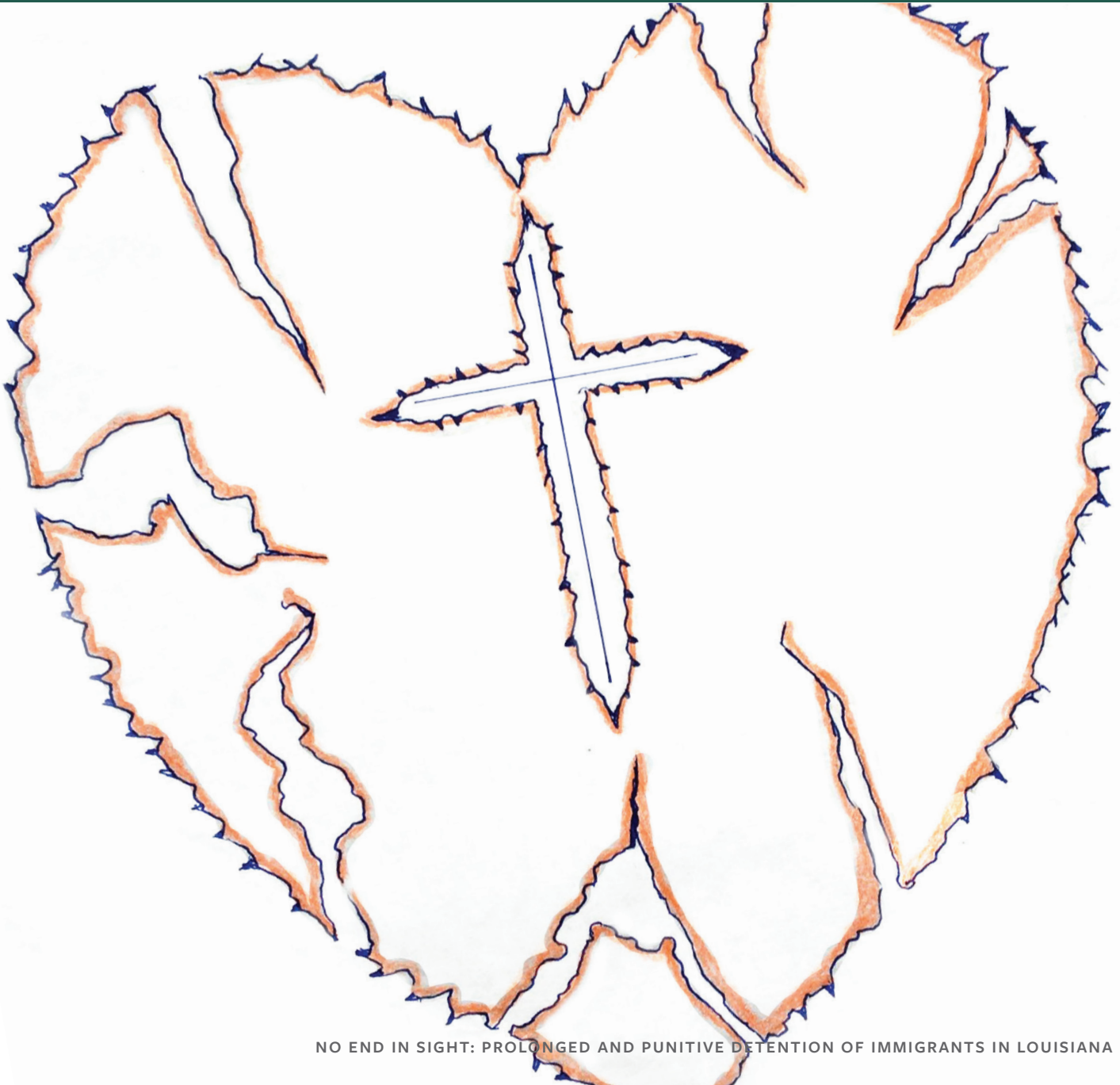
The Court issued a summons requiring a legal justification for detention in less than 60% (286) of cases. In fact, in 44% (218) of the reviewed cases, the U.S. Attorney's office (representing ICE) never appeared at all, and without appearing, ICE was never required to justify why the immigrant was being detained.

<sup>28</sup> "The writ, or order to show cause shall be directed to the person having custody of the person detained. ... The person to whom the writ or order is directed shall make a return certifying the true cause of detention." 28 U.S.C.A. § 2243.

Artwork created by Bernardino, a Honduran immigrant detained in Louisiana, given to his attorney who helped him seek release. Bernardino was detained for months in Jena, Louisiana at Lasalle ICE Processing Center and was denied release on bond.

Photo courtesy of Southern Poverty Law Center

## 6. Barriers to Fact-Finding and Decisionmaking





Even after someone from the U.S. Attorney’s office representing ICE enters the case, cases can languish for months or years before the Court issues a final decision. The first step of this delay is the deadline for ICE to respond to the petition. The Court has roughly tripled the time allotted to the U.S. Attorney’s office to file a response to the petition over the study period, significantly prolonging cases. The U.S. Attorney’s office further contributes to delay by sometimes requesting even more time to respond to the petition, meaning that the detained immigrant remains confined without receiving a meaningful justification for their continued detention. The Court overwhelmingly grants those requests for extensions.

## Lengthy Response Periods and Deadline Extensions Delay Adjudication of Cases, While the Petitioner Remains in Potentially Unconstitutional Confinement.

Once a detained immigrant has filed a petition that complies with court procedure, the Court must order ICE to respond with legal justification for continued detention—in the habeas statute, this is referred to as a “return certifying the true cause of detention.”<sup>29</sup> The habeas statute instructs this response must be filed “within three days, unless for good cause additional time, not exceeding twenty days, is allowed.”<sup>30</sup> This deadline is much shorter than the default rule in civil lawsuits, in which the federal government is generally allowed 60 days to respond.<sup>31</sup> In remarking generally on federal habeas petitions, the Supreme Court has recognized that the habeas statute provides “a swift, flexible, and summary determination” of claims of unlawful detention.<sup>32</sup>

Over time, the Court has allowed ICE more extended deadlines to reply. For the first two years of the study period, 2010 to 2011, the Court imposed deadlines for ICE response that largely tracked the habeas statute provision, which sets the maximum deadline at 20 days with very few exceptions. For the 122 cases filed in 2010 and 2011 where the Court ordered ICE to respond, the Court set the ICE response deadline at 20 or 21 days from receiving notice of the lawsuit with few exceptions. In only four of these 122 cases, the Court allowed a slightly longer deadline of 30 days.

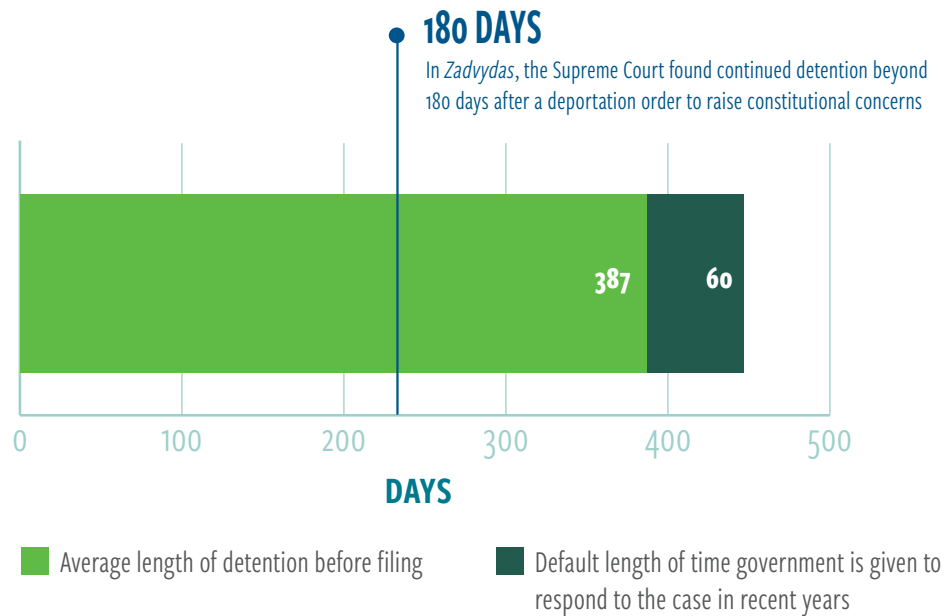
That practice slowly changed in the years that followed. From 2012 to 2014, while the Court continued to order response deadlines of 20 or 21 days in some cases, it allowed ICE to take a full 60 days to respond in other cases. This is roughly triple the shorter deadlines that had been the norm. By comparison, 60 days, or roughly two months, represents one-third of the length of detention after which the Supreme Court considered continued detention possibly unconstitutional in *Zadvydas v. Davis* for those with concluded immigration proceedings. The detained immigrant has on average already been detained for nearly a year and one month (387 days) at the time they file their petition, and they remain in confinement for the duration of the response period.

<sup>29</sup> 28 U.S.C. § 2243.

<sup>30</sup> 28 U.S.C. § 2243.

<sup>31</sup> Fed. R. Civ. P. 12(a)(2) & (3).

<sup>32</sup> *Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973).



### LENGTH OF DETENTION WITH DEFAULT LENGTH OF TIME FOR ICE RESPONSE

<sup>33</sup> This is the Court's interpretation of rules promulgated by the Supreme Court for habeas petitions challenging those convicted of state crimes and held in state custody. Those rules require only that a district orders a response "within a fixed time." Rule 4, Rules Governing Section 2254 Cases in the United States District Courts (last amended Feb. 1, 2010), available at <https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf>. "The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a)." Rule 1(b). The Court further interprets the habeas statute with strict deadlines, 28 U.S.C.A. § 2243, as "subordinate" to the Court's discretionary authority because of the Rules Enabling Act. In that Act, passed in 1934, Congress delegated the "power to prescribe general rules of practice and procedure" in the district courts to the Supreme Court so long as such rules do not "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072.

<sup>34</sup> See, e.g., *Asmar v. Warden LaSalle Detention Facility*, No. 16-cv-860 (W.D. La. filed June 17, 2016) ("The [60 day] deadlines ... are both standard in this Division and expedited.").

<sup>35</sup> Local court rule permits the court to impose sanctions for failing to consult with the other party without a good faith reason. United States District Court for the Western District of Louisiana, Local Civil Rule 7.4, available at <https://www.lawd.uscourts.gov/sites/lawd/files/UP-LOADS/localrules.WDLA.2021Feb11.pdf>.

By 2015, the longer 60 day period for ICE response was the new norm. In the 94 cases filed between 2015 to the end of the study period in 2020 where the Court ordered ICE to respond, the Court set the ICE response deadline at 60 days from receiving notice of the lawsuit in 80% of cases (75 cases).

No relevant law or rule pertaining to the response time for habeas corpus changed during this period. Rather, the Court began to newly interpret Supreme Court rules from 1976 that govern other types of habeas cases to grant district courts discretion to set longer deadlines in these cases.<sup>33</sup> The Court then newly exercised that discretion to give ICE a full 60 days to respond in most cases. The Court has rejected requests from attorneys for detained immigrants to enforce the strict deadlines from the habeas statute of 3 days for a response, or up to 20 days for good cause.<sup>34</sup> However, the Court has expedited some cases, even in recent years, with deadlines for ICE response as short as 10 days.

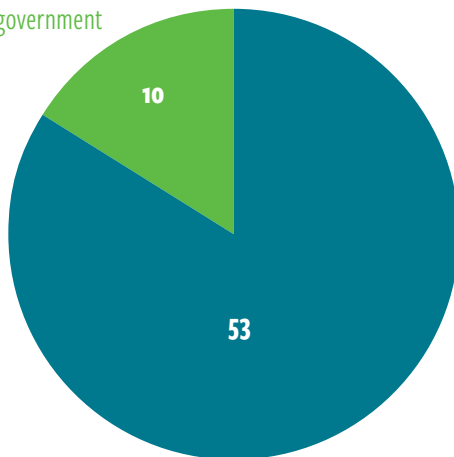
Unfortunately, no matter the initial deadline, the case can be delayed further through extension requests from the U.S. Attorney's office representing ICE. These requests are overwhelmingly granted by the Court. In 57 cases the U.S. Attorney's office requested at least one extension, and in 10 of those cases, the U.S. Attorney sought a second extension of the deadline. The Court granted 97% of these requests (65 out of 67 requests) from the U.S. Attorney's office. No requests were denied, but two requests for extension were not ruled on. Notably, in almost half of the cases where the U.S. Attorney's office sought an extension (27 of 57 cases), the Court had already permitted a full 60 days for the filing of the response and the government attorney still sought additional time.

Extensions were made easier for the U.S. Attorney's office as the Court appeared not to always apply a local rule requiring consultation with the other party. The U.S. Attorney's office generally did not consult with the detained immigrant unless they had an attorney, writing that doing so was impractical.<sup>35</sup>

## “When I filed habeas corpus, I presented all evidence that would support my claim, but the judge neglected my case for over a year. I didn’t get an answer.”

– A.S., formerly detained immigrant who was released during his habeas corpus case after being detained for 3 years and 6 months, a shadow win with no formal court vindication.

Number of second extensions requests sought by government



Number of first extensions requests sought by government



The Court never denied an extension request from the U.S. attorney’s office.

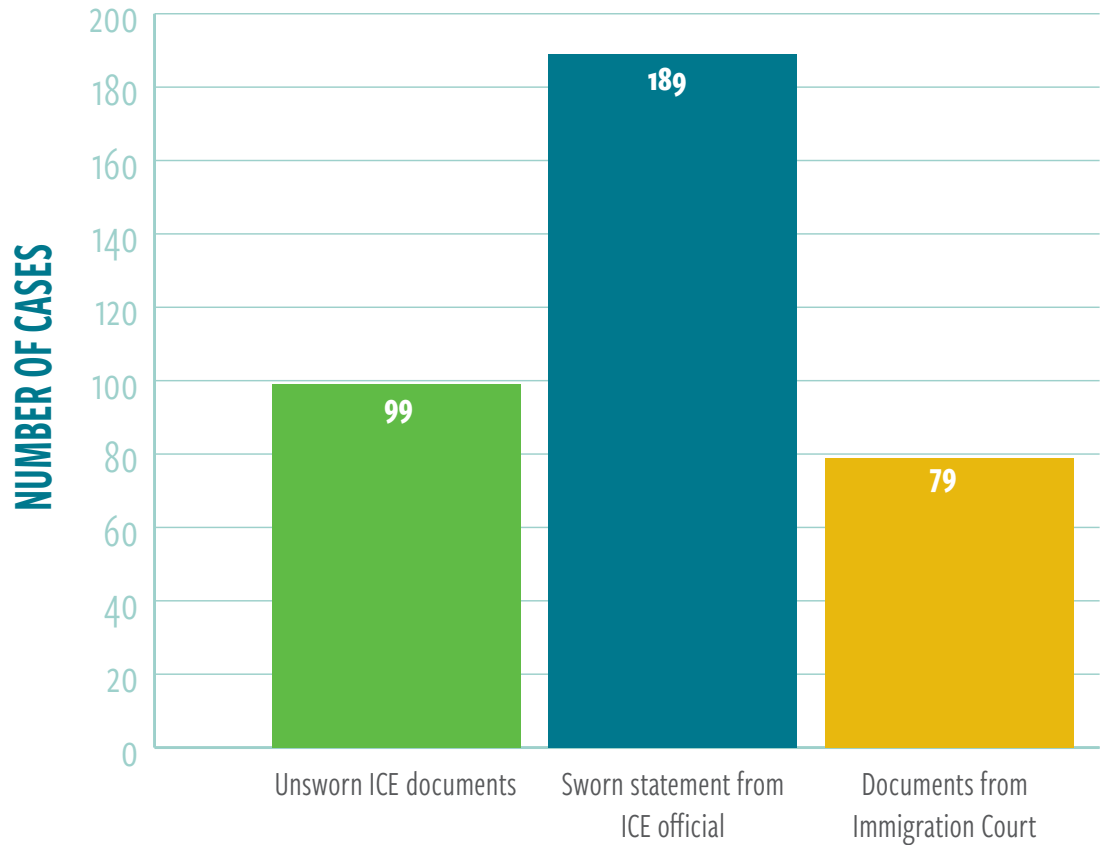
### EXTENSION REQUESTS FROM U.S. ATTORNEY’S OFFICE

## In Most Cases, the U.S. Attorney’s Office Submitted an ICE Official’s Sworn Statement to Justify Continued Detention.

The response from the U.S. Attorney’s office on behalf of ICE should include legal justification for the continued detention. In cases where the detained immigrant seeks release because they cannot be deported, under *Zadvydas*, the court typically orders the response to provide supporting evidence that shows whether there is a significant likelihood of removal in the reasonably foreseeable future, including all documents relevant to the efforts made by the immigration officials to obtain travel documents.

The U.S. Attorney’s office introduced facts in the vast majority of cases where they submitted a response (205 cases with new facts out of 264 cases with a response). The most common evidence offered in support of new facts was a sworn statement from an ICE official, submitted 92% of the time (189 out of 205 cases). These sworn statements were almost always hearsay, meaning that the person signing the statement did not have personal knowledge of the events but rather was repeating information from another source. Typically, the ICE official repeated information from an ICE computer database and the immigration file. In 2019, a district court in California ruled that several ICE databases “often contain incomplete data,” “significant errors,” and information that “is largely

erroneous.”<sup>36</sup> That court held that the databases were not sufficiently reliable to support findings of probable cause that someone was in the country unlawfully, though an appellate court has reversed that order and asked the district court to more specifically analyze ten additional databases that were not discussed in the original order.<sup>37</sup>



### ICE DOCUMENTS SUBMITTED ATTEMPTING TO JUSTIFY CONTINUED DETENTION

*Some cases included multiple documents*

Many statements contained essentially no information on the key factual question: whether ICE will be able to deport the immigrant in the reasonably foreseeable future. For example, in a five-sentence ICE statement from a 2011 case, the agent only provides the date of last contact with the immigrant’s consulate and the statement that “ICE continues to maintain frequent contact... and will continue its efforts to remove Mr. Weston to that country.”<sup>38</sup> Five months after that lackluster submission, the Court finally ordered an evidentiary hearing in the case and appointed counsel.<sup>39</sup> ICE released Mr. Weston a week and a half later, ending the case with a shadow win.

In other cases, the ICE official gave predictions for anticipated deportation, some of which were conclusory and later proven inaccurate. In a 2019 case, two different ICE officials predicted likely deportation in the near future.<sup>40</sup> One official wrote on November 7, 2019 that “removal is now imminent.”<sup>41</sup> Several months later, when the imminent deportation had still not happened and the immigrant remained detained, a different ICE official simply repeated the legal standard stating that “I believe there is a significant likelihood of removal in the reasonably foreseeable future” on May

<sup>36</sup> *Gonzalez v. ICE*, 416 F. Supp. 3d 995, 1008, 1011 (C.D. Cal. 2019), *reversed and vacated by* 975 F.3d 788 (9th Cir. 2020).

<sup>37</sup> 975 F.3d 788, 820–22 (9th Cir. 2020).

<sup>38</sup> *Weston v. Napolitano*, No. 11-cv-567 (W.D. La. May 26, 2011).

<sup>39</sup> *Id.*

<sup>40</sup> *Dos Santos Carlos v. Barr*, No. 19-cv-878 (W.D. La. filed April 7, 2011).

<sup>41</sup> *Id.*



26, 2020.<sup>42</sup> Both conclusory predictions proved false, and the immigrant remained detained until he was released by ICE on Feb. 12, 2021 in another shadow win.<sup>43</sup> At the time of release, he had been detained for years, much of that while his habeas case languished.

Unsworn ICE documents are the other evidence the U.S. Attorney's office typically introduced, appearing in almost half of the cases (99 out of 205 cases). In roughly two out of five cases where the U.S. Attorney's office offered evidence, they submitted documents from immigration court (79 out of 205 cases). In a number of cases, the U.S. Attorney's office submitted a few types of evidence.

In some cases, the U.S. Attorney's office included more probative evidence of imminent deportation, such as valid travel documents to show they were issued, the date of a scheduled deportation flight, or records from consulate communications to show there was no obstacle to repatriation. In other cases, where deportation was not possible, the U.S. Attorney's office offered evidence that the detained immigrant had been released to the community, ending the case.

## Evidentiary Hearings Can Assist in Fact-finding, and Sometimes Precipitates the Release of the Detained Immigrant, But These Hearings Are Rare.

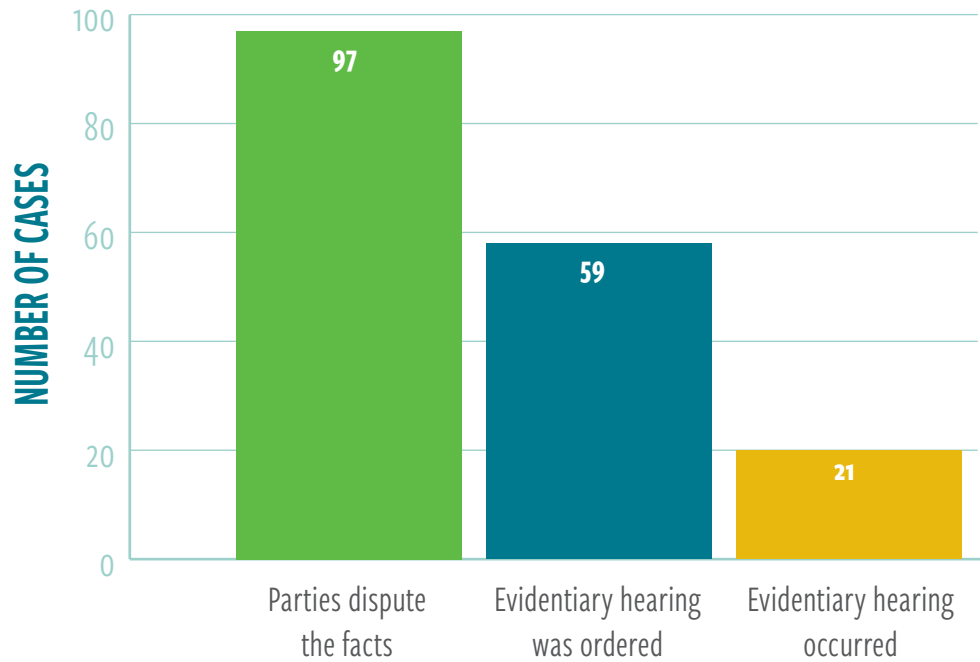
After submission of evidence from both the detained immigrant and the U.S. Attorney's office, the Court must determine the facts of the case and rule on whether detention is illegal. If the two sides present contradictory evidence, such as the detained immigrant swearing that no travel document has been issued while ICE evidence states otherwise, then these disputed facts should be resolved through an evidentiary hearing to test the evidence through cross-examination. The habeas statute provides that the detained person should be brought to any evidentiary hearing held to resolve disputed facts and should be permitted to testify.<sup>44</sup>

Of the 205 cases where the U.S. Attorney's office offered evidence, almost half presented factual disputes between the parties (97 cases). The Court ordered evidentiary hearings in 58 cases in the study. More evidentiary hearings were ordered in the first years of the study, after which they became less common. Over half of the evidentiary hearings were ordered in the first two years of the study period, 2010 and 2011. Among those 58 scheduled evidentiary hearings, only 20 hearings were actually held.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 28 U.S.C. § 2243.



## DISPUTED FACTS AND THE USE OF EVIDENTIARY HEARINGS TO RESOLVE CASES

Sometimes a court order scheduling an evidentiary hearing appears to precipitate ICE administrative release of the detained immigrant in a shadow win that ends the litigation without a formal ruling on the legality of the detention. For example, one detained immigrant filed his habeas petition on Oct. 1, 2018.<sup>45</sup> After months of back and forth between the parties, including a stay in the case for several weeks because of the 2019 government shutdown, the Court issued an order on June 11, 2019 setting an evidentiary hearing for early July and appointing counsel for the detained immigrant.<sup>46</sup> He was then released a few weeks later and the case was dismissed before a hearing could be held.<sup>47</sup> In other cases, the evidentiary hearing did not occur because ICE deported the detained immigrant before the hearing.

Evidentiary hearings seem to be effective in determining disputed facts and resolving cases—determining if the detained immigrant’s confinement is unlawful—but they were often ordered months into the litigation. In the case just discussed from 2018, the Court ordered the evidentiary hearing after the case had been pending for more than 9 months and more than 2 months after the last brief filed by a party. The habeas statute provides that, after a response is filed, “a day shall be set for a hearing, not more than five days after the return unless for good cause additional time is allowed.”<sup>48</sup> On the other hand, the Court moved quickly to schedule hearings for several 2020 cases brought during the COVID-19 pandemic.

<sup>45</sup> *Jensen v. Sessions*, No. 18-cv-1293(W.D. La. filed Oct. 1, 2018).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 28 U.S.C. § 2243.

## 7. Access to Counsel Challenges

hire the service of the lawyer.

Your honor, I wish to bring to your notice that, when I arrived to the United States three years ago, I had credible fear interview with an asylum officer, who found me credible and granted me parole. I know that, by law, I was supposed to be released from detention so that I file my asylum case in liberty. However, ICE attempted to release me on parole at that time; they asked me to submit supporting documents from my sponsor, which I did. They assured me of my release but I was disappointed a few days later, when they verbally notified me that I was going to remain in detention while filing my case. No reason was given to me for this change of decision.

Your honor, please, I kindly request that, you use your high office to intervene on this issue because I am confused and desperate, for I do not believe it is acceptable that an immigrant who fled his country to seek protection in United States could be detained for three years and threaten to be deported even though found with credible fear.

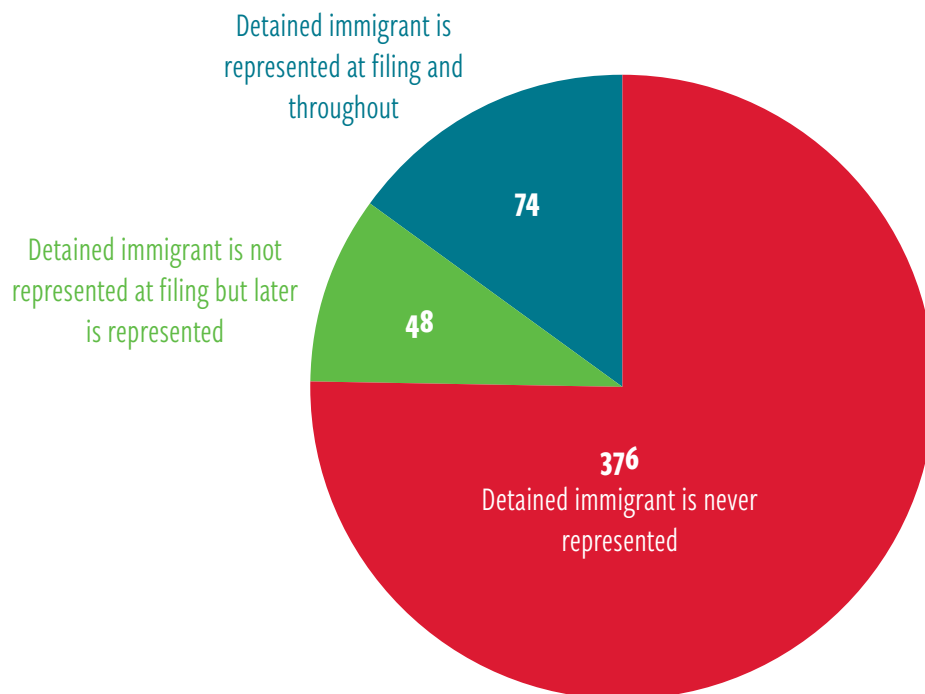
Your honor, I thank you for your kind attention and I greatly hope on your kind consideration in my matter. I am available and ready to submit any additional information when necessary.

# The Vast Majority of Detained Immigrants Filing Habeas Did So Without an Attorney.



85% of detained immigrants filed their habeas petitions without the help of a lawyer.

Detained immigrants do not have the right to appointed counsel in habeas proceedings, and the vast majority proceed on their own, without a lawyer's help. Notably, Louisiana detention centers are located far from major metropolitan areas where federal litigators and immigration lawyers are concentrated. In the ten-year study period, there were only six attorneys who represented petitioners in three or more cases at the time of filing. Aside from the scarcity of attorneys with habeas expertise, another challenge for access to counsel is the detained immigrant's financial ability. As a result of access to counsel challenges, 85% of detained immigrants who filed habeas petitions did so without an attorney (424 cases), with only 10% of detained immigrants later obtaining representation (48 cases). This means that the vast majority of detained immigrants must proceed with their habeas claim without ever having access to a lawyer.



## LEGAL REPRESENTATION FOR DETAINED IMMIGRANTS FILING HABEAS

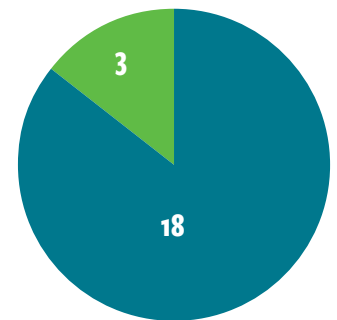


# Very Few Petitioners Requested Court Appointed Counsel and Having a Lawyer Can Change the Outcome of a Case.

An attorney may make the difference between release and further prolonged detention, and can improve efficacy in judicial proceedings for the court and all parties involved. This is because a lawyer can be essential to draw out the legal claim and follow complex procedural rules. Lawyers representing petitioners can be helpful for all parties, including the court, to improve communication. In fact, mail sent to detention centers was commonly returned, which can happen if a detainee is transferred.

Like other federal district courts, the Western District of Louisiana has authority to appoint counsel in habeas corpus actions based on financial need.<sup>49</sup> However, it is extremely rare for pro se defendants to make formal requests asking for counsel, and even more rare for the court to grant the request. Only 5%, or 23 detained immigrants, asked the court to appoint counsel, and only a handful had their requests granted. Yet, in all 21 cases where the court ordered an evidentiary hearing, the court ensured petitioners were represented. Specifically, the court appointed counsel at the evidentiary hearing stage in 18 cases where the petitioner had been unrepresented, and in the remaining three cases, the detained immigrants were already represented. Through these actions, the Court appears to recognize how critical appointment of counsel is at the evidentiary hearing stage of a case.

## LEGAL REPRESENTATION IN EVIDENTIARY HEARINGS



**18 people** were appointed counsel by the court for the hearing, **3 people** were already represented by a lawyer when the hearing was ordered.

### CASE STUDY



A detained immigrant originally from China filed a habeas petition in December of 2016 after being held for seven and a half months. Along with his petition, he asked the Court to appoint counsel after a nonprofit organization in California was unable to take his case. Immigration documents that later were introduced show that the immigrant had suffered cognitive impairment from childhood meningitis, and an immigration judge ruled he was unable to meaningfully participate in immigration proceedings. The detained immigrant asked for an attorney in his habeas case because he understood limited English and was being detained in Louisiana with only \$150 total in a savings account and no income. The judge denied the request, reasoning that the circumstances of his case were not particularly complex. Months later, when the immigrant had been detained for nearly a year, the judge scheduled an evidentiary hearing in the case and appointed counsel. ICE failed to present evidence that he could be deported. One day after the lawyer appointed by the court entered the case, the detained immigrant was released from detention. He had been held for one year and one day in total and had been living in the United States since 1989.



More than **1 out of 4** detained immigrants represented by lawyers at filing were released from detention.

<sup>49</sup> See 8 U.S.C. § 3006A(a)(2)(B).

Lawyers can play a particularly vital role in helping bring out key facts and moving cases to conclusion. Litigation tools, such as motions to expedite, for evidentiary hearings, for oral arguments, and for preliminary injunctions, can speed up case adjudication and even change case outcomes. The vast majority of detained immigrants who used these litigation tools were represented by counsel at the time of their motions. Detained immigrants who are representing themselves are unlikely to even know about, yet alone utilize, these litigation tools. Notably, some detained immigrants may have developed substantial knowledge of habeas procedure, possibly through their own research or with the assistance of a “jail house lawyer” or writ writer—fellow detainees who have studied legal resources and offer guidance based on experience. However, it is not possible to determine from court filings the extent that this happens.

Having a lawyer can change the outcome of a case. More than 1 out of 4 detained immigrants represented by lawyers at filing were released from detention (32 released out of 122 represented). Meanwhile, only 9% of detained immigrants who were unrepresented at the time of filing were released from detention (32 out of 362 cases). In the six cases where detained immigrants won court ordered relief,<sup>50</sup> all had attorneys. Access to counsel makes a critical difference in the outcome of a habeas petition and can be the factor that tips the balance in favor of the petitioner’s release from detention.

**“I still have nightmares of my time in detention. But you have to always keep your head up, be brave, take care of yourself. You have to know that there is no outside support, and you have to be curious and proactive and try to learn about your case. When you try to seek legal support most of the time the lawyers that you try to reach won’t take your case because they don’t have time, also you don’t speak English, and you don’t know the immigration laws.”**

- A.S., formerly detained immigrant released during his habeas case.

<sup>50</sup> In five cases, the court ordered release and in the sixth case, the court ordered a bond hearing.

## 8. Recommendations

TONY R. MOORE, CLERK  
WESTERN DISTRICT OF LOUISIANA  
ALEXANDRIA, LOUISIANA

05/13/2020

YOUR HONOR,

CASE NO: [REDACTED]

This is just to inform you that, due to the current situation of the COVID-19 Pandemic, Detainees cannot be in the same Facility for a long time. So I just want to plead with your Honor that for any correspondence to be sent to me, kindly send it to my Family and the Address is:-

The following recommendations stem from the findings of this study and suggest improvements to reduce potentially prolonged, indefinite and punitive detention, provide legal representation and legal resources regarding these claims to detained immigrants, and reduce the large number of dismissals for purely procedural mistakes. The first three sections focus on recommendations for mostly local actors, including the Court, ICE, U.S. Attorney's office, and attorneys for detained immigrants. The final recommendations, to end no-bond immigration detention and close detention facilities, are directed at Congress and ICE headquarters in D.C.

## To Speed Case Adjudication and Reduce Potentially Unconstitutional Prolonged Detention of Immigrants During Their Habeas Cases:

- **The Court** should consider shorter deadlines for ICE, represented by U.S. Attorneys, to respond to habeas petitions. Given that the legality of prolonged detention is at issue in these cases and that long deadlines risk furthering an unjustified deprivation of liberty, all deadlines should be set to the stricter deadlines in the habeas statute. **The Court** should require ICE to file a substantive response no more than 20 days from the service of the summons.<sup>51</sup>
- **The U.S. Attorney's office** should only seek extensions in rare and exceptional instances, such as government-wide shutdown. **The U.S. Attorney's office** should not seek extensions, and therefore protract the litigation, to obtain travel documents. Instead, the absence of timely travel documents should result in release of a detained immigrant enduring unreasonably prolonged detention. **The Court** should be reluctant to grant extensions of deadlines, particularly in pro se cases.
- **The Court** should consider resolving claims expeditiously based on evidence submitted by each party after the petition, response, and any rebuttal. Where ICE and the U.S. Attorney's office fail to present specific, detailed evidence that deportation is likely soon—such as testimony based on personal knowledge of cooperation by the receiving country, proof of issuance of travel documents, and firm flight dates with no other obstacles—and the petitioner has shown that deportation is unlikely, **the Court** should order release in accordance with *Zadvydas v. Davis*. If the evidence offered by ICE and the U.S. Attorney's office is merely conclusory, and therefore inadequate to justify continued prolonged detention, then the appropriate remedy is release.
- In cases where there are genuine issues of material facts, **the Court** should act quickly to use all available tools for fact-finding under the habeas statute.<sup>52</sup> This could include ordering evidentiary hearings where the petitioner is brought to court and ICE testimony is tested through cross-examination.<sup>53</sup> **The Court** should grant reasonable requests for discovery from the petitioner, including the production of all documents on which ICE and the U.S. attorney's office rely to show that deportation is likely soon. **Attorneys for petitioners** should use interrogatories and other discovery tools, as well as cross-examination in court, to test evidence offered by the U.S. Attorney's office.<sup>54</sup> For any proceedings where a limited English proficient petitioner is brought to court, **the Court** should provide simultaneous interpretation by a court interpreter at no expense to the detained immigrant, consistent with federal policy.<sup>55</sup>
- **The Court** should consider issuing orders quickly in these cases because of the stakes for detained immigrants deprived of their liberty and because of the benefit of providing written, reasoned opinions that could guide parties in future litigation.

<sup>51</sup> The statute authorizing habeas petitions for those detained by the federal government provides that the response "shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed." 28 U.S.C. § 2243.

<sup>52</sup> The habeas statute provides that "evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit." 28 U.S.C. § 2246.

<sup>53</sup> The habeas statute states "[w]hen the writ or order is returned a day shall be set for hearing." 28 U.S.C. § 2243. The statute further provides that: "Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." 28 U.S.C. § 2243.

<sup>54</sup> The detained person may testify at any hearing to contest facts. 28 U.S.C. § 2243. The habeas statute further authorizes, at a minimum, written interrogatories to test an opposing party's affidavit. 28 U.S.C. § 2246.

<sup>55</sup> Guide to Judiciary Policy, Vol. 5: Court Interpreting § 230, Administrative Office of the U.S. Courts (Oct. 10, 2017) available at [https://www.uscourts.gov/sites/default/files/guide\\_vol05.pdf](https://www.uscourts.gov/sites/default/files/guide_vol05.pdf) (providing for interpretation at no cost to petitioner in habeas proceedings).



## To Increase Access to Counsel, Legal Information, and Legal Representation in These Cases:

- **The Court** should appoint counsel for unrepresented petitioners with regularity. The Criminal Justice Act permits the Court to appoint counsel in habeas cases where “the interests of justice so require” representation and the petitioner cannot afford counsel.<sup>56</sup> **The Court** should consider motions for appointment of counsel in the context of the many barriers that unrepresented detained immigrants face, including language, limited legal resources, and limited contact with family and advocates. **The Court** should consider the length of detention in appointing counsel because prolonged detention itself raises constitutional concerns and requires complex legal analysis. **The Court** should appoint counsel in the early stages of litigation to investigate and develop any potentially viable claims.
- **The Court** should award attorneys’ fees and costs to successful detained immigrants who win release under the Equal Access to Justice Act.<sup>57</sup> This act allows fees and costs to be awarded if the detained immigrant prevails in the litigation, typically through a judicial order of relief, the government was not substantially justified in its position, and an award would not be unjust. Attorneys’ fees and costs could serve to encourage more practitioners to develop the expertise needed to represent detained immigrants with habeas claims.
- **Attorneys for detained immigrants** in the small community of practitioners with expertise in immigration law and habeas corpus litigation should provide accessible trainings to increase the number of attorneys with these skills. Additionally, practitioners with immigrant habeas expertise should release a practice advisory and other training materials. Further, **the local bar** should consider including immigrant habeas cases in pro bono programs, with the advice and technical assistance of existing practitioners.
- All detained immigrants should have access to legal information about habeas corpus. **Department of Justice’s Legal Orientation Program (LOP)** should include habeas corpus information, and funding should be expanded so that every detention center receives an LOP presentation at least monthly. **Any detention center holding immigrants** should contain a legal library with habeas corpus forms, relevant cases and other legal resources, and a guide to self-representation in multiple languages.

## To Reduce Procedural Barriers For Unrepresented Detained Immigrants and Improve Adjudication:

- **ICE** should limit transfers between facilities, particularly when a detained immigrant is actively litigating a habeas petition. **The U.S. Attorney’s office** should notify the federal court of change of address when its client, ICE, transfers a detained immigrant litigating a habeas petition. **The Court** should consider ordering the U.S. Attorney’s office to notify the Court of any transfer of unrepresented petitioners while the habeas petition is under consideration.

<sup>56</sup> 18 U.S.C. § 3006A(a)(2)(B) (Criminal Justice Act).

<sup>57</sup> 28 U.S.C. § 2412 (Equal Access to Justice Act).

- **The Administrative Office** of the U.S. Courts should produce a separate form for habeas petitions filed by immigrants not represented by attorneys. That form should eliminate sections that are not relevant to detained immigrants and should add sections to ask if those filing want to seek appointment of counsel. Form instructions should include more specific directions on seeking waiver of the filing fee (*in forma pauperis*) and directions on seeking appointment of counsel, such as including the relevant legal factors, so detained immigrants know what information they should provide.
- The form for unrepresented immigrants to file a habeas petition and the related form for waiver of the filing fee (*in forma pauperis*) should be available in multiple languages in every detention center. In accordance with the ICE Language Access Plan, which provides for “translation of crucial documents,” **ICE’s Office of Diversity and Civil Rights** should ensure these documents are available in each detention center in Spanish, Haitian Creole, Hindi, Mandarin Chinese, Urdu, and French, and additional languages depending on the population of detained immigrants in each facility.<sup>58</sup>
- **The Court** should consider motions for waiver of fees (*in forma pauperis*) in light of the many barriers that unrepresented detained immigrants face, including prolonged detention with almost no opportunity to earn income.
- **ICE** should publicly report the number of people detained longer than 6 months at each detention center. In each ICE custody review (such as a post-order custody review for those ordered deported), **ICE** should give any detained immigrant who is denied release the form for a habeas corpus petition and a notice from legal service providers to seek further information.

## System-Wide Reform:

- **Congress** should pass the Dignity for Detained Immigrants Act, which would require probable cause for detention of immigrants and permit every detained immigrant to seek a custody review before an immigration judge.<sup>59</sup> The Act would also ban private immigration detention centers and shrink the population of detained immigrants.
- **ICE** should close detention centers, especially those that are remote and not accessible to attorneys, advocates, and detainees’ families.

Some of these recommendations will be easier to implement, while others require more work. Collectively, these changes will go a long way to alleviate human suffering and promote transparent, efficient, reasoned adjudications in these cases. Ultimately, efforts by the Court, practitioners, U.S. Attorney’s Office, ICE, and even Congress could substantially reduce prolonged, indefinite and punitive detention in Louisiana, providing a blueprint for the rest of the country.

<sup>58</sup> Language Access Plan, Immigration & Customs Enforcement (June 14, 2015), available at <https://www.ice.gov/sites/default/files/documents/Document/2015/LanguageAccessPlan.pdf>.

<sup>59</sup> Dignity for Detained Immigrants Act of 2021, S. 1186 & H.R. 2222, available at [https://www.booker.senate.gov/imo/media/doc/senator\\_booker\\_reintroduces\\_the\\_dignity\\_for\\_detained\\_immigrants\\_act\\_to\\_transform\\_the\\_immigration\\_detention\\_system\\_and\\_end\\_inhumane\\_conditions\\_at\\_facilities1.pdf](https://www.booker.senate.gov/imo/media/doc/senator_booker_reintroduces_the_dignity_for_detained_immigrants_act_to_transform_the_immigration_detention_system_and_end_inhumane_conditions_at_facilities1.pdf).

The Tulane Immigrant Rights Law Clinic seeks to address the rapidly growing crisis in access to justice for detainees in the region by building a pipeline of immigrant defenders and public-service minded government attorneys, developing pro bono capacity in the private bar, and changing the culture of institutional players in the region through strategic litigation, advocacy and reporting.

#### **Tulane Immigrant Rights Law Clinic**

[bit.ly/tulane-immigrants-rights](https://bit.ly/tulane-immigrants-rights)

#### **No End in Sight: Prolonged and Punitive Detention of Immigrants in Louisiana**

[bit.ly/no-end-report](https://bit.ly/no-end-report)