

Critical Considerations

What does *habeas corpus* have to do with immigration?

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Earlier this month, Congress passed a bill allocating almost \$70 billion (\$70,000,000,000) to fund immigration enforcement through the end of the Trump presidency in 2029. This action in itself was unusual, as such funding is usually approved on an annual basis. More than half of this sum (\$38 billion) goes to ICE (Immigration and Customs Enforcement) to pay for its massive detention and deportation operations.

ICE is holding tens of thousands of persons in public jails as well as in for-profit prisons, often without formal charges. This situation is raising questions about *habeas corpus*, which the Brennan Center describes as “a legal procedure that allows people who have been detained by the government to challenge their detention in court.” The onus is on the government to justify the detention rather than for the accused to prove why they should not be held.

Literally, *habeas corpus* means “you shall have the body.” Authorities must bring the detained individual before a judge in person and make the case as to why they should be held. It dates back to the *Magna Carta* in 1215 when English barons rose up against the arbitrary power of the king who often imprisoned people without due process.

Habeas corpus was also critically important to the founders who included it in the Constitution. Article I, Section 9 reads: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” It is noteworthy that the framers acknowledge that *habeas corpus* already exists. They are simply borrowing one the cornerstones of English common law, judicial protection against unlawful imprisonment. It is available to both citizens and noncitizens.

As immigrants experience increased repression under the second Trump administration, this over 800-year-old provision is taking on greater significance. When immigrants are denied bond hearings, held after they have been granted voluntary departure status or simply held indefinitely with no movement on their cases, they have a right to challenge their incarceration.