Despite the lateral inadmissibility of the writ to effectuate Eighth Amendment conditions of confinement claims on the basis of pandemic-related dangers, Habeas Corpus (28 U.S.C.A. §2241) should be construed as to provide recourse for plaintiff inmates who seek community supervision or home confinement during the COVID-19 pandemic and any future viral threat to public health.

In the July 2020 Seventh Circuit case Savage v. Warden of PCl Pekin, a plaintiff inmate was precluded from COVID-justified home confinement on his petition under habeas corpus, as the court held that the writ did not apply because the plaintiff did not challenge the fact or duration of his sentence. A circuit split arises from 1973 Supreme Court decision Preiser v. Rodriguez, where the holding left open the question as to what qualifies as a “condition of confinement.” Historically, the Seventh Circuit has stuck with the standard that habeas corpus can only be brought as to challenge the fact or duration of a sentence. Conversely, the Sixth Circuit has held that habeas corpus is available if the conditions of a sentence are so adverse as to effectively challenge its legality or, effectively, the “fact” of the confinement. Theoretically, a court that finds a plaintiff inmate to be under such material danger is more likely to admit a habeas-based claim. So, does COVID-19 “fit” into this framework?

During the pandemic, not a single plaintiff inmate has effectuated an Eighth Amendment conditions of confinement claim with a petition for a habeas writ. What the CARES Act precludes courts from recognizing is that both the Sixth and Second Circuits recognize petitions for the writ of habeas corpus in effectuating a conditions of confinement claim (see Panel E). Simply, the threats of viral transmissibility in close-quartered prisons should be considered an “extraordinary or exceptional circumstance” regardless of Congressional blockades.

Over 240 federal inmates and four Bureau of Prison (BOP) staff members have died from COVID-19. Of the federal inmates who have been tested for the virus, almost half have recorded a positive test. According to a July 2020 study by Johns Hopkins, incarcerated individuals are 5.5 times more likely to test positive for COVID than the rest of the population. According to epidemiologist Homer Venteres, these statistics are “likely an undercut of infections in settings where crowding makes it easy for the virus to spread, and inadequate health care leaves populations especially vulnerable.”

The US Supreme Court in Rhodes v. Chapman established that “confinement in a prison is a form of punishment subject to scrutiny under the Eighth Amendment.” Wilson v. Seiter furthered that, for conditions of confinement to qualify as “punishment,” claimants must prove the “deliberate indifference” of prison officials, which “requires a finding that the responsible [party] acted in reckless disregard of a risk of which [they were] aware.” In Mar. 2020, Former A.G. Barr explained that the CARES Act vested his office with the authority to compel BOP to expand the cohort of inmates who can be considered for home release. Barr instructed the prison system to prioritize only those inmates who receive the lowest possible score on PATTERN, a “risk assessment” algorithm that has historically deemed white-collar offenders safe for release, while those incarcerated on drug charges face a less favorable outcome. On this standard alone, the DOJ has determined that use of the PATTERN system has a disparately negative impact on communities of color.

Thus far, courts have laterally held that “a prisoner may not invoke the Court’s habeas corpus jurisdiction in an effort to sidestep the limitations and requirements of the CARES Act.” (Price v. Quintana). Simply, courts have been unwilling to invoke habeas jurisdiction in COVID-based conditions of confinement claims so long as no legal challenge to the authority of the CARES Act exists. However, the Second Circuit has been rich with COVID-era case law involving plaintiff inmates’ attempts to petition for bail through habeas corpus §2241. Although primarily dealing with petitions for release on bail, this recent influx of legal controversies on the matter of prisons and viral transmission in the Second Circuit has revealed its consortium with the Sixth Circuit’s habeas-friendly approach (see selected case law below, Panel E).

Recognizing the threats of the COVID-19 virus as part of a larger “extraordinary circumstance” is an effective first step in allowing more avenues for inmate recourses.