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Legal Sidebar

Supreme Court Rules That Lawful Permanent Residents May Be Treated as "Inadmissible" Under Cancellation of Removal Statute

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A non-U.S. national (alien) admitted into the United States as a lawful permanent resident (LPR) enjoys certain benefits that other classes of aliens do not. For instance, an LPR may remain in the United States permanently, work in the United States without restrictions, and qualify for federal public benefits. Unlike U.S. citizens, however, LPRs may be subject to removal if they commit certain immigration violations, including specified criminal offenses. Even so, an LPR placed in formal removal proceedings may apply for a discretionary form of relief known as cancellation of removal. The LPR must satisfy certain criteria to be eligible. Among other things, the LPR could not have committed certain enumerated crimes within the first seven years of admission into the United States. In *Barton v. Barr*, the Supreme Court held that the commission of certain crimes set forth in § 212 of the Immigration and Nationality Act (INA), a provision generally applicable to aliens who have not been admitted into the United States, could render an LPR ineligible for cancellation of removal if committed within seven years of the LPR's admission. The Court's 5-4 decision, in which the Justices split on how to interpret provisions of the INA properly, could significantly limit the ability of some LPRs with criminal records to qualify for cancellation of removal. This Legal Sidebar examines the decision.

Statutory Framework: Inadmissibility and Deportability

The INA sets forth a framework for the removal of aliens who either lack authorization to enter or remain in the United States, or who have engaged in specified conduct (e.g., certain types of criminal activity). The INA sets different grounds for removal for aliens who have been lawfully admitted into the United States and those who have not (i.e., those seeking initial admission into the country and unlawful entrants). Aliens who were lawfully admitted—including LPRs—can be removed from the United States if they fall under specified grounds of *deportability* listed in INA § 237(a). Aliens who have not been admitted into the United States—whether first arriving or having entered the country without being lawfully admitted—can be denied admission and removed if they fall under specified grounds of *inadmissibility* listed in INA § 212(a). Both the grounds of deportability and inadmissibility include the commission of certain enumerated criminal offenses. Though they overlap (e.g., both grounds of

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inadmissibility and deportability include controlled substance violations), the criminal grounds are not identical. Some criminal offenses that trigger inadmissibility are not included as grounds of deportability, and vice versa. Additionally, while some criminal grounds of inadmissibility only require an alien's admission of a crime, most criminal grounds of deportability require a conviction. Thus, the criminal grounds of inadmissibility are generally broader than the criminal grounds of deportability.

Cancellation of Removal

Most aliens apprehended within the interior of the United States—whether charged with being inadmissible or deportable—are placed into "formal" removal proceedings before an immigration judge (IJ). Aliens placed in formal removal proceedings may apply for any available relief from removal. An LPR subject to removal may apply for discretionary relief known as cancellation of removal under INA § 240A(a), (a separate form of cancellation of removal is available to non-LPRs who meet more stringent statutory requirements). To qualify for cancellation of removal, the LPR must establish that he or she

1. had LPR status for at least five years;
2. continuously resided in the United States for at least seven years after being admitted into the United States in any status; and
3. was not convicted of an aggravated felony (which is defined in the INA to include many criminal offenses such as rape, burglary, and drug trafficking).

Under what is commonly known as the "stop-time rule," any period of continuous residence in the United States for purposes of cancellation of removal ends when the alien commits a criminal offense "referred to" in INA § 212(a)(2)'s grounds of inadmissibility that "renders" the alien "inadmissible" to the United States under § 212(a)(2), or "removable" from the United States under the grounds of deportability listed in § 237(a)(2) or 237(a)(4).

The Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying immigration laws, has held that the commission of a criminal offense covered by INA § 212(a)(2) cuts off continuous residence under the stop-time rule regardless of whether the alien is actually charged as being inadmissible or deportable based on that offense. The U.S. Courts of Appeals for the Second, Third, and Fifth Circuits have adopted a similar construction of the statute, holding that an LPR who commits a § 212(a)(2) offense is "inadmissible" under the stop-time rule even though the LPR—who has already been admitted—is not being denied admission into the United States. But the Ninth Circuit has held that an LPR cannot be "inadmissible" under the stop-time rule because inadmissibility applies only in the context of seeking admission, and an LPR is not subject to the grounds of inadmissibility.

Procedural Background in *Barton v. Barr*

Andre Barton was first admitted to the United States as a tourist in May 1989, and adjusted his status to LPR in 1992. In January 1996—less than seven years after first being admitted— Barton was arrested for aggravated assault, property damage, and firearm possession. Barton was convicted of these offenses in July 1996. Then, in 2008, he was convicted of drug possession. During his formal removal proceedings, Barton was charged and found deportable under INA § 237(a)(2) based on his drug and firearm convictions, and applied for cancellation of removal. The IJ denied the application, ruling that Barton's 1996 aggravated assault offense cut off his initial seven-year period of residence under the stop-time rule because (1) it was "referred to" in INA § 212(a)(2) as a "crime involving moral turpitude," and (2) it rendered Barton "inadmissible" under that provision (Barton's aggravated assault offense did not render him "deportable" under § 237(a)(2), and his other 1996 crimes were not "referred to" in § 212(a)(2) for purposes of the stop-time rule). The BIA dismissed Barton's appeal. Before the Eleventh Circuit, Barton argued that his aggravated assault offense did not render him "inadmissible" because he was not seeking

admission to the United States. The Eleventh Circuit disagreed, holding that "inadmissibility" is a *status* that a person can acquire (e.g., upon commission of a crime) even if that person has already been admitted into the United States.

An admitted alien's acquisition of "inadmissible" status, the Eleventh Circuit continued, "might not immediately produce real-world admission-related consequences." An already-admitted alien would remain subject to the grounds of deportability under INA § 237(a) so long as he remained in the United States. But acquisition of "inadmissible" status could have consequences if the alien departed the United States and then sought re-entry. And, in the case of LPRs like Barton, it could trigger the stop-time rule, preventing them from seeking cancellation of removal if they committed an offense within seven years of their admission into the United States rendering them "inadmissible."

The Supreme Court's Decision

Barton petitioned for Supreme Court review, arguing that his aggravated assault offense did not "render" him "inadmissible" under the stop-time rule because he was not seeking admission to the United States, and was not subject to the grounds of inadmissibility. In a 5-4 decision, the Supreme Court held that the commission of a disqualifying criminal offense within the seven-year continuous residence period bars an LPR from cancellation of removal regardless of whether the LPR was actually charged as being inadmissible or deportable based on that offense.

In the majority opinion authored by Justice Kavanaugh (joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Alito), the Court observed that the cancellation of removal statute "functions like a traditional recidivist sentencing statute" that looks beyond the offense that triggers removal to an alien's *entire* criminal record. The Court noted that this statutory framework enables adjudicating IJs to determine whether an otherwise removable LPR should be allowed to remain in the United States. The Court determined that, under this framework, Barton was ineligible for cancellation of removal because (1) he committed within seven years of admission an offense "referred to" in INA § 212(a)(2); and (2) the offense rendered him "inadmissible" upon his conviction.

The Court rejected Barton's claim that he must have been charged and subject to removal based on the disqualifying offense ("offense of removal") for the stop-time rule to apply. The Court noted that, for LPRs, a criminal offense ordinarily serves as a ground for removal if it falls within INA § 237(a)(2), which applies to those who were admitted; while INA § 212(a)(2) covers those who were not admitted. The Court reasoned that, if the stop-time rule precludes cancellation of removal only when the disqualifying crime is an offense of *removal*, the statute would likely refer to offenses listed in either § 212(a)(2) *or* 237(a)(2). With no reference to § 237(a)(2) offenses, the Court concluded that the statute did not merely look to whether an offense of removal was committed. Instead, the statute employed § 212(a)(2) "as a shorthand cross-reference for a [broad] category of offenses that will preclude cancellation of removal if committed during the initial seven years of residence."

The Court also rejected Barton's claim that his aggravated assault offense did not make him "inadmissible" under the stop-time rule because he was not seeking admission to the United States. The Court determined that the requirement that the INA § 212(a)(2) offense "renders the alien inadmissible" does not mean the alien must be *actually* adjudicated as inadmissible and denied admission for the stop-time rule to apply. Instead, the Court reasoned, the statute uses the term "inadmissible" as a "status" resulting from the commission of a crime that triggers immigration consequences regardless of whether the alien has already been lawfully admitted or subject to removal based on the offense. The Court noted, moreover, that Congress has used the concept of "inadmissibility" as a status in other contexts, such as barring a lawfully admitted alien from adjustment of status if the alien has committed a crime that makes him "inadmissible" under § 212(a)(2).

Additionally, as discussed, commission of an INA § 212(a)(2) offense ends continuous residence if it "renders the alien inadmissible to the United States under [INA § 212(a)(2)] *or* removable from the United States under [INA § 237(a)(2) or 237(a)(4)]." The Court recognized that if an LPR is rendered "inadmissible" based on the commission of a § 212(a)(2) offense (regardless of whether that offense also renders the alien deportable under § 237(a)(2) or 237(a)(4)), then there is no reason for the stop-time rule to include the phrase "or removable from the United States under [§ 237(a)(2) or 237(a)(4)]." Nevertheless, the Court noted that "redundancies are common in statutory drafting," and determined that redundancy in one part of a statute "is not license to rewrite or eviscerate another portion of the statute contrary to its text."

In a dissenting opinion, Justice Sotomayor (joined by Justices Breyer, Kagan, and Ginsburg) argued that Barton's aggravated assault offense did not make him "inadmissible" under the stop-time rule because he was already admitted into the United States. Citing the INA's "two-track structure" that distinguishes between admitted aliens and non-admitted aliens, Justice Sotomayor declared that an alien "can be deemed inadmissible or deportable, but not both." Noting that the stop-time rule "carries that distinction forward," Justice Sotomayor argued that an alien is "rendered inadmissible" by a § 212(a)(2) offense only if the alien is seeking admission. Justice Sotomayor determined that, if an admitted alien could be deemed "inadmissible" based on a § 212(a)(2) offense, then the stop-time rule's language regarding deportability under § 237(a)(2) or 237(a)(4) would be meaningless. The proper way to construe the stop-time rule, Justice Sotomayor argued, was to understand it to apply to an admitted alien who committed a type of offense covered by INA § 212(a)(2) that makes the alien *deportable* under § 237(a)(2) or 237(a)(4).

Considerations for Congress

The Supreme Court's decision may be consequential for LPRs applying for cancellation of removal, typically the only form of relief available to long-term residents in removal proceedings. Under the Court's reading of the statute, an LPR is barred from cancellation of removal under the stop-time rule if the alien has committed *any* INA § 212(a)(2) offense within seven years of that alien's admission. Based on the Court's decision, it is irrelevant whether the alien had been admitted to the United States or whether the disqualifying crime would sustain a charge of deportability under INA § 237(a)(2) or 237 (a)(4). This is significant because the criminal offenses that render an alien inadmissible under § 212(a)(2) do not necessarily correspond with § 237(a)(2)'s or (a)(4)'s grounds of deportability. Consequently, given the Supreme Court's decision, an LPR may be statutorily barred from relief based on crimes that could never have resulted in the alien's deportation.

However, as the Court majority noted, Congress can "amend the law at any time." Thus, Congress may clarify the circumstances in which an LPR seeking cancellation of removal is barred from relief under the stop-time rule. For instance, Congress could limit the stop-time rule by indicating that the disqualifying offense cuts off continuous residence only if the alien is *capable of being charged* with inadmissibility or deportability based on that offense; or, going further, by indicating that the alien must be *actually charged* with inadmissibility or deportability based on the offense (i.e., that the offense literally serves as a basis for removal). Conversely, as Justice Sotomayor suggested in her dissent, Congress could make the stop-time rule more restrictive, and preclude eligibility for cancellation of removal so long as the alien commits a § 212(a)(2) offense that theoretically "*could render*" the alien inadmissible or deportable. In short, the *Barton* decision turned on an issue of statutory interpretation; Congress can amend the INA in any number of ways to clarify how its provisions should apply to long-term residents of the United States who are potentially subject to removal.

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