



Johnson v. Chavez: Aliens with Reinstated Removal Orders May Be Detained Without Bond Hearings

July 12, 2021

Certain non-U.S. nationals (aliens, as the term is used in the [Immigration and Nationality Act](#)) who unlawfully reenter the United States after being removed are subject to a “[reinstatement of removal process](#),” which generally requires their prompt removal without a hearing. If the alien with a reinstated removal order shows a reasonable fear of persecution or torture in the country of removal, however, he or she may pursue protection from removal in “withholding-only” proceedings. In *Johnson v. Chavez* the Supreme Court recently construed provisions of the Immigration and Nationality Act (INA) as authorizing the detention without bond of aliens with reinstated removal orders pending the outcome of their withholding-only proceedings. The Court reversed a [decision](#) by the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) ruling that aliens placed in withholding-only proceedings are entitled to bond hearings under the discretionary detention provisions of INA § 236(a). The Supreme Court held that aliens with reinstated orders of removal are subject to the more stringent detention provisions of INA § 241(a) because that statute, by its “[plain text](#),” applies to aliens who have been ordered removed.

Legal Background

Detention of Aliens Subject to Removal

As discussed in a [CRS report](#), the immigration detention scheme is multifaceted, and different rules may apply at different stages of the removal process. Under [INA § 236\(a\)](#), the Department of Homeland Security’s (DHS’s) detention of an alien “[pending a decision on whether the alien is to be removed](#)” is generally discretionary, unless the alien is subject to [mandatory detention](#) (e.g., if the alien has been convicted of specified crimes). If detained, the alien may request an immigration judge’s (IJ’s) review of DHS’s custody determination at a [bond hearing](#) and potentially secure release from custody pending the outcome of the removal proceedings.

In contrast, [INA § 241\(a\)](#) governs the detention of an alien who has been “[ordered removed](#).” Under the statute, “[e]xcept as otherwise provided in [§ 241],” the alien must be removed within a 90-day “[removal](#)

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LSB10620

period” that starts when one of three circumstances occur, including when the order becomes “administratively final.” Detention is generally mandatory during the 90-day removal period. INA § 241(a) provides that, if the alien is not removed within that period, the alien must be released on an order of supervision. The statute authorizes the continued detention of some aliens beyond the removal period (e.g., those who are “unlikely to comply with the order of removal” if released). Unlike INA § 236(a), the statute provides for no bond hearings. However, given the “serious constitutional concerns” raised by indefinite detention, the Supreme Court in *Zadvydas v. Davis* construed § 241(a) as having an implicit, temporal limitation of six months post-order of removal if there is no significant likelihood of the alien’s removal in the reasonably foreseeable future.

Reinstatement of Removal

Most removable aliens in the interior of the United States are subject to “formal” removal proceedings and have the right to appear at a hearing before an IJ to contest their removal or pursue any available relief (e.g., asylum). INA § 241(a)(5) sets forth a streamlined “reinstatement of removal” process for those who unlawfully reenter the United States after previously being removed. For those aliens, the statute provides, the prior removal order “is reinstated from its original date and is not subject to being reopened or reviewed.” Additionally, the alien “is not eligible and may not apply for any relief” from removal, and “shall be removed under the prior order at any time after the reentry.” However, an alien who expresses a fear of returning to the designated country of removal is entitled to administrative review of that claim. If the alien shows a “reasonable fear” of persecution or torture, the alien is referred to an IJ for “withholding-only proceedings” to consider the alien’s eligibility for withholding of removal and protection under the Convention Against Torture (CAT) only. Unlike asylum, which provides an alien with a permanent legal foothold in the United States, withholding of removal and CAT protection only bar removal to the country where the alien fears persecution or torture (but not necessarily to an alternative country), and afford no pathway to lawful permanent resident status or citizenship.

Procedural History in *Johnson v. Chavez*

The *Chavez* litigation involved three plaintiffs who had previously been removed from the United States. They unlawfully reentered the country, and their removal orders were reinstated under INA § 241(a)(5). The plaintiffs expressed a fear of returning to their native countries and established a “reasonable fear” of persecution or torture at their screening interviews. The plaintiffs, who were detained, were placed in withholding-only proceedings and denied bond hearings. The plaintiffs challenged their detention in federal district court. They argued that, because they had pending applications for withholding of removal, they were entitled to bond hearings under INA § 236(a), which governs detention “pending a decision on whether the alien is to be removed.” The government argued that the plaintiffs’ detention was governed by § 241(a) instead because they were previously ordered removed. According to the government, plaintiffs were subject to the statute’s mandatory 90-day detention period upon reinstatement of their removal orders, and could potentially remain detained beyond that period without bond. A federal district court ruled that the plaintiffs were detained under INA § 236(a) and ordered the government to provide bond hearings. The Fourth Circuit, in a split decision, affirmed, holding that INA § 236(a) governs the detention of aliens in withholding-only proceedings because they are technically still in proceedings to determine whether they are “to be removed,” and their removal orders are not final.

The Fourth Circuit’s decision furthered a split among the federal circuits on this issue. Like the Fourth Circuit, the Second Circuit had held that INA § 236(a) governs the detention of aliens placed in withholding-only proceedings. Conversely, the Third, Sixth, and Ninth Circuits had held that INA § 241(a) governs the detention of aliens subject to reinstated removal orders, including those placed in

withholding-only proceedings (the [Third](#) and [Ninth](#) Circuits, however, had ruled that aliens detained under § 241(a) have a right to bond hearings after prolonged periods of detention).

The government [petitioned the Supreme Court](#) to review the Fourth Circuit’s decision in *Chavez*, and the Supreme Court [granted](#) that petition.

The Supreme Court’s Decision

In a 6-3 [decision](#), the Supreme Court reversed the Fourth Circuit’s decision. In the majority opinion written by Justice Alito (joined in full by Chief Justice Roberts, Justice Kavanaugh, and Justice Barrett, and joined in part by Justice Thomas and Justice Gorsuch), the Court [held](#) that INA § 241(a) governs the detention of aliens placed in withholding-only proceedings. Relying on the “[statutory text](#),” the Court reasoned that § 241(a) applies because (1) such aliens have [previously been “ordered removed,”](#) and (2) their removal orders [are “administratively final”](#) given that they already had a chance to appeal those orders at the conclusion of their prior removal proceedings.

The Court [rejected](#) the plaintiffs’ claim that, because an IJ could grant them withholding of removal, they are being detained “pending a decision on whether the alien is to be removed” under INA § 236(a). The Court [explained](#) that, in withholding-only proceedings, the question is not whether an alien can be removed from the United States, but whether an alien can be *removed to a particular country*. Withholding of removal, the Court [observed](#), only bars removal to the country designated for removal, but does not prevent removal to an alternative country authorized by statute, such as a country willing to accept the alien. The distinction between whether an alien is to be removed and where an alien is to be sent, the Court [explained](#), is also confirmed by the fact that INA § 241 addresses the execution of a removal order (i.e., how and where an alien is to be removed). In contrast, INA § 236(a) addresses the separate issue of whether the alien is “removable at all” and should be detained pending that determination; that provision, the Court reasoned, would not apply to aliens in the reinstatement process because they were already found removable.

The Court [also rejected](#) the plaintiffs’ argument that a removal order does not become “administratively final,” and thus trigger INA § 241(a)’s post-order of removal detention provisions, until withholding-only proceedings are concluded. The Court [reasoned](#) that regular removal proceedings and withholding-only proceedings “address two distinct questions”—whether an alien can be removed and where the alien can be sent—and thus result in two separate orders. Because the removal order is “separate from and antecedent to a grant of withholding of removal,” the Court [stated](#), the finality of the removal order “does not depend in any way on the outcome of the withholding-only proceedings.”

The Court [further rejected](#) the plaintiffs’ claim that INA § 241(a)(1)(A)’s opening clause, “[e]xcept as otherwise provided in this section,” should be construed as pausing the start of the 90-day “removal period” when an alien initiates withholding-only proceedings. Noting that § 241(a)(1)(A) relates to the *length* of the removal period, not when it begins, the Court [read the opening clause](#) as simply referring to provisions that allow DHS to extend detention beyond 90 days. According to the Court, this clause [does not refer](#) to the withholding-only provision, “which does not mention the length of the removal period and does not stand in the way of removal to a third country.”

The Court [determined](#) that the INA’s statutory structure also indicated that § 241(a) governs detention during withholding-only proceedings. The Court [noted](#) that § 241 itself is titled “Detention and removal of aliens ordered removed,” and that all the provisions relating to reinstatement of removal, withholding of removal, and the countries to which aliens may be removed are found within § 241. More broadly, the Court noted, the INA’s overall structure showed “[the sequential steps of the removal process](#)” from initial inspection to arrest, detention, and removal. Based on how the INA’s sections were ordered, the Court [determined](#), INA § 236(a) applies when an alien is still in formal removal proceedings while § 241(a)

applies later, after an alien is ordered removed. Congress “had obvious reasons to treat these two groups differently,” the Court [opined](#), because aliens who have not been ordered removed are less likely to abscond than those ordered removed, particularly those who reentered unlawfully after removal.

The Court [did not agree with](#) the plaintiffs’ claim that INA § 236(a), rather than § 241(a), governed their detention because their withholding-only proceedings deprived DHS of “full legal authority” to remove them. The Court [noted](#) that the specific triggers [enumerated in § 241\(a\)](#) that must occur before the “removal period” begins do not include completion of withholding-only proceedings. Finally, the Court [determined](#), although § 241(a) contemplates a 90-day removal period, the fact that withholding-only proceedings can take longer than that does not mean that § 241(a)’s detention provisions do not apply at that stage. The Court [explained](#) that, after the removal period ends, § 241(a) authorizes DHS to release aliens on supervision or continue their detention in some circumstances, and DHS could exercise that same authority during withholding-only proceedings.

In sum, the Court [held](#), “the text makes plain” that INA § 241(a), and not § 236(a), governs detention during withholding-only proceedings.

In a [concurring opinion](#), Justice Thomas, joined by Justice Gorsuch, agreed with the majority’s ruling that aliens in withholding-only proceedings are subject to detention under INA § 241(a). Justice Thomas argued, however, that the Court lacked jurisdiction to review plaintiffs’ challenge to their detention in light of an [INA provision](#) generally limiting judicial review of actions to remove an alien except as part of the review of a final order of removal or other specified circumstances.

In a [dissenting opinion](#), Justice Breyer, joined by Justice Sotomayor and Justice Kagan, contended that INA § 236(a) should govern detention during withholding-only proceedings because a removal order is [not “administratively final”](#) at that stage for purposes of triggering the 90-day removal period under § 241(a). Justice Breyer [observed](#) that the majority’s interpretation of “administratively final” as applying only to the finality of the *original* removal order “would lead to a very peculiar statute.” Under that interpretation, Justice Breyer [noted](#), the 90-day removal period contemplated by § 241(a) would have likely expired long before most aliens with reinstated removal orders had unlawfully returned to the United States. Consequently, Justice Breyer [reasoned](#), a removal order—whether reinstated or not—is not “administratively final” until the associated administrative proceedings conclude. Thus, Justice Breyer [argued](#), the plaintiffs had a right to bond hearings during their withholding-only proceedings.

Congressional Considerations

The Supreme Court’s decision in *Chavez* is the latest in [a series of decisions](#) that recognize the government’s broad authority to detain removable aliens. Under *Chavez*, an alien whose removal order is reinstated may be detained without bond hearings pending the outcome of withholding-only proceedings. However, the government’s detention authority is not unfettered. In [prior decisions](#), the Supreme Court has interpreted INA § 241(a) consistently with due process principles to limit detention to a six-month period after a final removal order if there is no significant likelihood of removal in the reasonably foreseeable future. Moreover, [some courts have held](#) that aliens with final removal orders have a right to bond hearings after prolonged periods of detention, even if their continued detention is otherwise permitted by the statute. Nevertheless, given that reinstatement of removal [accounts for many](#) of the removals of aliens in the interior of the United States, *Chavez*’s impact on DHS’s detention authority during that process appears significant.

In the 117th Congress, there have been legislative proposals that would restrict DHS’s ability to detain removable aliens, including those subject to final removal orders. For instance, the New Way Forward Act ([H.R. 536](#)) and the Dignity for Detained Immigrants Act of 2021 ([S. 1186](#), [H.R. 2222](#)) would reduce the 90-day “removal period” to 60 days and allow a detained alien to seek his or her release at a custody

hearing during that period. Both bills would also require an alien's release from custody after the 60-day removal period unless the government shows that continued detention is warranted. The New Way Forward Act would also eliminate the reinstatement of removal process, enabling aliens who unlawfully reenter the United States to contest their removal or apply for any available relief in regular removal proceedings, and potentially secure their release from custody under the discretionary detention provisions of INA § 236(a).

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