

**US Supreme Court****Case:** *Johnson v. Guzman-Chavez*, 594 U.S. \_\_\_\_ (2021)

[Briefed on 7/6/21, so it's the Slip op.]

**Date:** June 29, 2021**Votes:** 6-3**Opinion:** Alito**Dissents:** Breyer (with Kagan & Sotomayor)**Tags:** Immigration, EWI, reentry, reinstatement of removal, withholding of removal, detention, bond,**Question(s) Presented:** Were noncitizens entitled to bond hearings under §1226, because they were in detention pending withholding proceedings after an order of reinstatement of removal?**Holdings:** Reversed. §1231, not §1226, governs the detention of aliens subject to reinstated orders of removal. Therefore, bond is not available to these noncitizens while they wait for withholding-only proceedings. \*8**Rationale:** Reinstated removal orders are administratively final. §1226 governs removal proceedings until a FN's removal order is administratively final; then §1231 governs (and doesn't have provision for bond).**Facts:** [\*7- ] Each respondent had been ordered removed previously, then reentered illegally and was apprehended. Each expressed fear and had a reasonable fear interview with an asylum officer; each was referred to an IJ for withholding-only proceedings. All ultimately detained by DHS and sought release on bond while their withholding-only proceedings were pending.**Procedural History:**

- **District Court (E.D. VA):** *Habeas* petition: summary judgment for respondents
- **Fourth Circuit:** Affirmed

**DHS Argument:**

- Because respondents were detained under §1231, not §1226, they are not entitled to bond hearings.

**Respondents' Argument:**

- §1226 applies to them because they were detained prior to withholding-only proceedings, so they are entitled to bond hearings.

**Appeals to Statute & Precedent:**

- **8 U.S.C. §1226(a) / INA §236A:** Apprehension and detention of noncitizens. DHS may arrest and detain noncitizen pending a decision on whether they are to be removed from the U.S. May generally apply for release on bond or conditional parole.
- **8 U.S.C. §1231(a)(2):** During 90-day removal period, detention is mandatory. (3) If post-removal period and no exceptions apply, noncitizen will be released subject to supervision.
- **8 U.S.C. §1231(a)(5) / INA §241(a)(5):** Reinstatement of prior removal order upon reentry EWI, expedited removal.
- **8 U.S.C. §1231(b)(3)(A):** withholding of removal provision

- **8 U.S.C. §1229a:** removal proceedings
- **8 C.F. R. §§236.1(c)(8), 1236.1(c)(8):** Conditions for bond
- **8 C.F. R. §§236.1(d)(1), 1003.19(a), 1236.1(d)(1):** application for bond hearing (change of conditions)
- **8 C.F. R. §241.13:** *Zadvydas* procedures for post-removal period.
- ***In re Adeniji*, 22 I&N Dec. 1102 (BIA 1999):** Conditions for bond \*2
- ***Zadvydas v. Davis*, 533 U.S. 678, 689 (2001):** Implicit limitation to detention in the statute—noncitizen may be detained only for “a period reasonably necessary to bring about that alien’s removal from the United States.” (I.e., about 6 months, *id.* at 701.) \*4
- ***Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006):** removal orders are explicitly insulated from review upon illegal reentry; discretionary relief from the terms of the reinstated order also generally foreclosed—with the exception of pursuing withholding-only relief. \*5
- ***INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987):** withholding of removal; third country
- ***Guzman Chavez v. Hott*, 940 F.3d 867 (CA4 2019):** [This case] Illegal reentry after removal; reinstatement
- ***INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999):** Distinguishing withholding-only relief and a grant of asylum: Asylum means you get to remain & may apply for AOS in one year; “withholding only bars deporting an alien to a particular country or countries.” \*12
- ***Matter of I-S & C-S*, 24 I&N Dec. 432, 434 (BIA 2008):** withholding-only relief “does not afford [an alien] any permanent right to remain in the United States.” \*12
- ***Nasrallah v. Barr*, 590 U.S. \_\_\_, \_\_\_ (2020) (slip op., at 8):** withholding-only relief means FN may not be removed to designated country unless conditions change, but may be removed to another country.

## Discussion:

- **Circuit Split on the issue:**
  - **4th & 2nd** say that §1226 governs detention while respondents wait for their withholding-only proceedings under a reinstatement order; therefore, they may request bond.
  - **3rd, 6th, 9th** say that §1231 governs, and there is no option for bond.
    - ***Guerrero-Sanchez v. Warden YCP*, 905 F.3d 208 (CA3 2018)**
    - ***Padilla-Ramirez v. Bible*, 882 F.3d 826 (CA9 2017)**
    - ***Martinez v. LaRose*, 968 F.3d 555 (CA6 2020)**
- “The parties agree that §1226 governs the detention of aliens until §1231’s ‘removal period’ begins. As relevant here, the removal period begins when an alien is ‘ordered removed,’ and the removal order becomes ‘administratively final.’ To resolve this case, we therefore must decide two questions: whether respondents were ‘ordered removed’ and whether their reinstated removal orders were ‘administratively final.’ The answer to both questions is yes.” \*9
  - Ordered removed previously after EWI.
  - **Administratively final:**
    - “By using the word ‘administratively,’ Congress focused our attention on the *agency’s* review proceedings, separate and apart from any judicial review proceedings that may occur in a court.” \*9-10 (emphasis original)
    - Removal period begins on the latest of these three events:

- Date order becomes administratively final
    - Date of court's final order if removal order is judicially reviewed and court orders a stay in the meantime
    - Date of alien's release from state/federal confinement
  - "Reading the first two provisions together, it is clear that DHS need not wait for the alien to seek, and a court to complete, judicial review of the removal order before executing it." \*10
    - IOW, once BIA appeal is out of the way/expired, DHS can act to remove the FN—unless a federal court has issued a stay. "Administratively final" means the agency (BIA) has done its review.
  - "For these reasons, §1231's detention provisions are a natural fit for aliens subject to reinstated orders of removal." \*11
- **Why §1231 applies to withholding-only proceedings:**
    - Respondent's argument:
      - "because an IJ / BIA might determine that DHS cannot remove an alien to the specific country designated in the removal order, the question whether the alien is 'to be removed' remains 'pending' and is therefore governed by §1226." \*11
    - Response:
      - Country-specific relief: the FN could be removed somewhere else instead.
        - "If an [IJ] grants an application for withholding of removal, he prohibits DHS from removing the alien *to* that particular country, not *from* the United States." \*11
        - Removal order "remains in full force, and DHS retains the authority to remove the alien to any other country authorized by the statute." \*11
- **When does a removal order become "administratively final"?**
    - Respondent's argument:
      - When an alien initiates withholding-only proceedings, they go back to square one with administrative finality.
      - Dissent: FNs are seeking a modification / change / withholding of prior order of removal, so it's not administratively final.
    - Response:
      - "These related arguments suffer from the same flaw as the one just discussed: They ignore that removal orders and withholding-only proceedings address two distinct questions. As a result, they end in two separate orders, and the finality of the order of removal does not depend in any way on the outcome of the withholding-only proceedings." \*15
      - ***Matter of I-S- & C-S- (BIA 2008)***: IJ should have issued the final order of removal before deciding to withhold it. (Can't withhold it if it doesn't exist.)
        - "In other words, **the order of removal is separate from and antecedent to a grant of withholding of removal.**" \*15

- “Because the validity of removal orders is not affected by the grant of withholding-only relief, an alien’s initiation of withholding-only proceedings does not render non-final an otherwise ‘administratively final’ reinstated order of removal.” \*16
- **When does the “removal period” begin if a FN requests withholding-only relief?**
  - Respondent’s argument:
    - DHS can’t remove the alien and the removal period does not begin if the FN requests withholding-only relief (because this is provided for in the statute at **§1231(a)(1)(A)**, “Except as otherwise provided in this section”)
  - Response:
    - The “Except as otherwise provided” part refers to *how long* the removal period is; there are some alternatives to the 90-day removal period described in **§1226(a)(1)(A)**.
    - IOW “DHS must remove an alien within 90 days *unless* another subsection of **§1231** specifically contemplates that the removal period can exceed 90 days.” \*17
- Note, BTW, the title of **§1231**: “Detention and removal of aliens ordered removed” \*18
  - “Every provision applicable to respondents is located in **§1231**.” \*18
- Also note the sequence of the sections in Part IV of Title 8, which walks through the sequential steps of the removal process. \*19
  - “The order of the sections in Part IV provides helpful context for interpreting the proper application of **§1226** and **§1231**. . . . Section **1226** applies before an alien proceeds through the removal proceedings and obtains a decision; **§1231** applies after. Once an alien has been ordered removed from the United States in a removal proceeding under **§1226a** and that order has been reinstated under **§1231(a)(5)**, ‘the alien cannot go back in time, so to speak, to **§1226**.’ 940 F.3d at 888 (Richardson, J., dissenting). \*19
- “aliens who reentered the country illegally after removal have demonstrated a willingness to violate the terms of a removal order, and they therefore may be less likely to comply with the reinstated order. . . . Congress had obvious reasons to treat these two groups differently.” \*20

#### Concurrence: Thomas w/ Gorsuch

- We like the judgment but we don’t think SCOTUS has jurisdiction here.

#### Dissent: Breyer w/ Kagan & Sotomayor

- “respondents’ circumstances are governed by the more general section that concerns the conditions of detention pending a final determination on removal. See **§1226**. And they are entitled to the bond hearings for which that general section provides.” Dissent at \*2
- Withholding-only proceedings can take a very long time. DHS rarely deports people to other countries if they are granted withholding of removal. Dissent at \*5
- Thinks the “except as otherwise provided” clause has to do with limits on *starting* the removal period, not with alternatives for *extending* it.
- It’s not really administratively final if you’re waiting for a withholding of removal proceeding, because there’s still more to come.

**Commentary:**

- Conditions for bond: not a danger to the community, likely to appear for future proceedings.
- During 90-day removal period, detention is mandatory.
- “The process for applying for withholding of removal depends on whether the alien is subject to the standard removal proceedings or a reinstated order of removal.” \*6
  - “an alien subject to the standard removal process typically applies for withholding during the course of his removal proceedings.” \*6
  - “But because an alien subject to a reinstated order of removal will not have any removal proceedings, the process begins for him only if he expresses a fear to DHS of returning to the country of removal.” \*6
    - Reasonable fear determination by asylum officer
      - Positive: refers to IJ for withholding-only proceedings
      - Negative: may appeal officer’s decision in a Reasonable Fear Review by IJ
  - If withholding of removal is granted, removal may not occur unless the order of withholding is terminated. \*7
  - “But because withholding of removal is a form of ‘country-specific’ relief, . . . nothing prevents DHS ‘from removing [the] alien to a third country other than the country to which removal has been withheld or deferred,’ [8 C.F.R.] §§208.16(f), 1208.16(f).” \*7

**Country-Specific Withholding of Removal Options:**

- Country designated by alien
- Alien’s country of citizenship
- Alien’s previous country of residence
- Alien’s country of birth
- Country from which alien departed for the U.S.
- Any country willing to accept alien