



When Does a Reinstated Removal Order Become Final: Federal Circuit Courts Are Split

April 5, 2024

On February 27, 2024, the U.S. Court of Appeals for the Seventh Circuit [held](#) that a removal order that has been reinstated following an [alien's](#) unlawful reentry into the United States is not final for purposes of judicial review until after the conclusion of proceedings that determine whether the alien would likely be persecuted or tortured if removed. This decision is the latest by a court of appeals to address the issue of when a reinstated removal order becomes final. Recent Supreme Court decisions have led federal appellate courts to reconsider whether they have jurisdiction over petitions seeking review of a reinstated order if the petition is filed more than 30 days after the original removal order was reinstated. This Legal Sidebar provides an overview of [reinstatement of removal](#), discusses recent Supreme Court cases, and summarizes the current circuit split as to when the reinstated removal order becomes final. Lastly, this Sidebar identifies several considerations for Congress.

Reinstatement of Removal

When an [alien](#) has been ordered removed under a final removal order, leaves the United States, and reenters unlawfully, he is subject to having the prior removal order reinstated. Under [8 U.S.C. § 1231\(a\)\(5\)](#), the alien's prior removal order "is reinstated from its original date and is not subject to being reopened or reviewed." Courts have held that they retain limited jurisdiction under [8 U.S.C. § 1252\(a\)\(2\)\(D\)](#) to review certain constitutional claims or questions of law raised in a petition for review seeking review of a decision to issue a reinstatement order.

In addition to being subject to removal, the alien is not eligible to apply for any relief, and "[shall be removed](#) under the prior order at any time after the reentry." Typically, under this streamlined process, the alien does not appear before an immigration judge, cannot apply for relief from removal, and can be removed at any point after reentry. Under [regulations](#), an immigration officer may reinstate a prior removal order only after (1) determining that the alien has a prior removal order; (2) confirming the alien's identity and that the alien was previously removed or left the United States voluntarily under the removal order; and (3) establishing that the alien reentered the United States unlawfully. However, there are a few regulatory exceptions.

Congressional Research Service

<https://crsreports.congress.gov>

LSB11140

Regulations implementing U.S. obligations under the United Nations Convention Relating to the Status of Refugees and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) restrict the United States' ability to remove persons to certain countries when there is a threat of persecution or torture. An alien subject to a reinstated order and who [expresses a fear of return](#) to the country of removal is placed in reasonable fear proceedings, and the matter is [referred](#) to an asylum officer who makes a preliminary determination whether the alien has a [reasonable fear](#) of persecution or torture if returned to the country of removal. If the asylum officer determines that the alien has not established a reasonable fear (a negative reasonable fear determination) the alien may [request](#) a review of the asylum officer's decision by an immigration judge. If the immigration judge agrees with the asylum officer, the alien's prior removal order is reinstated and the alien [cannot appeal this decision](#) to the Board of Immigration Appeals (BIA). The alien [may only petition for review](#) of the reinstatement decision with the appropriate court of appeals.

If the asylum officer determines that the [alien has a reasonable fear](#) of persecution or torture in the country of removal or the [immigration judge disagrees](#) with the asylum officer's decision, the alien is placed in "withholding-only" proceedings before an immigration judge. During these proceedings, an alien may pursue withholding of removal and/or protection from removal under CAT. If the immigration judge grants relief, the alien will not be returned to the country of removal. If the immigration judge denies the alien's application, the alien [can appeal the decision](#) to the BIA.

If the alien seeks further review following a denial by the BIA—or a reinstatement decision after an asylum officer and immigration judge determined no reasonable fear of persecution or torture—under 8 U.S.C. § 1252(a)(1), (b)(1), an alien may file a petition for review with a court of appeals. The [statute provides](#) that such petitions "must be filed not later than 30 days after the date of the final order of removal." Until recently, [all U.S. Courts of Appeals held](#) that a reinstated removal order did not become final, for purposes of the 30-day deadline, until withholding-only proceedings were complete, which in most cases was after the BIA affirmed the immigration judge's decision.

Recent Supreme Court Cases

There are recent Supreme Court cases that have been instrumental in some appellate courts changing their position that judicial review of a petition for review, filed within 30 days of the completion of withholding-only proceedings but more than 30 days from when the prior order was reinstated, is precluded under 8 U.S.C. § 1252(a)(1) and (b)(1). Those cases are *Nasrallah v. Barr*, *Johnson v. Guzman Chavez*, and, to a lesser extent, *Santos-Zacaria v. Garland*.

Nasrallah v. Barr

In *Nasrallah v. Barr*, the Supreme Court considered whether 8 U.S.C. § 1252(a)(2)(C) precluded judicial review of an alien's petition for review raising factual challenges to the denial of CAT protection. [Section 1252\(a\)\(2\)\(C\)](#) states that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense [covered in certain sections] of [Title 8]."

The Supreme Court held that a court of appeals can review the petitioner's factual challenges to the CAT order under this section. The Supreme Court [reasoned](#) that an order denying protection under the CAT is not a "final order of removal" because it neither concludes that the alien is a deportable alien nor orders his removal. In the Court's view, a grant of a CAT order means only that a petitioner cannot be removed to a designated country until those country's conditions change or he can be removed to another country. The Court explained that a CAT order [does not affect](#) the validity of a final order of removal and does not merge into the final order of removal. Therefore, the Court concluded that Section 1252(a)(2)(C) does not

preclude judicial review of a petitioner’s factual challenge to a CAT order and may be reviewed together with final orders of removal in a court of appeals.

Johnson v. Guzman Chavez

In *Johnson v. Guzman Chavez*, the Supreme Court addressed whether detained aliens with reinstated removal orders are entitled to bond hearings under the discretionary detention provision of 8 U.S.C. § 1226(a) (pending the outcome of their withholding-only proceedings), or whether they are subject to the mandatory detention requirement of 8 U.S.C. § 1231(a), which applies to aliens ordered removed.

The Supreme Court [held](#) that Section 1231 governs the detention of aliens placed in withholding-only proceedings and that they have no right to a bond hearing pending the outcome of those proceedings because they have been “ordered removed.” The Court [reasoned](#) that in withholding-only proceedings, a removal order remains in full force and that the purpose of those proceedings is only to determine whether an alien should be removed to a specific country, not whether an alien should be removed from the United States. The Court [reiterated](#) that removal orders and withholding-only proceedings address two different questions and the finality and validity of a reinstated removal order is not affected by an immigration judge’s grant of withholding of removal. For a more detailed discussion of this case see this [CRS Legal Sidebar](#).

Santos-Zacaria v. Garland

In *Santos-Zacaria v. Garland*, the Supreme Court addressed (1) whether 8 U.S.C. § 1252(d)(1), which states that “[a] court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right,” is jurisdictional; and (2) whether the statute requires a petitioner to file a motion to reconsider with the BIA before filing a petition for review with the court of appeals. The Supreme Court held that Section 1252(d)(1) is [not jurisdictional](#) because it contains an exhaustion requirement and its language differs from clear jurisdictional language elsewhere in related statutes. According to the Court, exhaustion is typically non-jurisdictional and “promotes efficiency, including by encouraging parties to resolve their disputes without litigation.” The Court explained that a rule is jurisdictional “only if Congress clearly states that it is.” The Court also held that Section 1252(d)(1) [does not require](#) seeking reconsideration with the BIA before judicial review in a court of appeals because if a remedy is discretionary, it is not available “as of right” and aliens have no right to reconsideration from the BIA.

The Circuit Split

Since 2022, seven courts of appeals have re-examined when a reinstated removal order becomes final for purposes of judicial review. Some courts have held that reinstated removal orders are final once they are reinstated, while other courts have determined that they do not become final until after the completion of withholding-only proceedings. This determination dictates under what conditions an alien can seek further review in federal courts.

Reinstated Removal Orders Are Final As Soon As They Are Reinstated

The [Second](#), [Third](#) (in a nonprecedential opinion), and [Fourth](#) Circuits have held that the 30-day clock to seek judicial review as mandated under 8 U.S.C. 1252(b)(1) begins to run when a prior removal order is reinstated, even if the alien is subsequently placed in withholding-only proceedings. Relying on *Nasrallah* and *Guzman Chavez*, the Second and Fourth Circuits held Section 1252(b)(1) is jurisdictional and that a reinstated removal order—because it is not subject to further agency review—becomes final when an

alien does not contest it or when the immigration officer rejects the alien's challenges to the prior removal order being reinstated. The courts also reiterated that withholding-only proceedings do not impact the validity of a removal order and decide only where—and not whether—an alien may be removed. The reinstated removal order, the courts explained, remains in full force no matter what happens in the withholding-only proceedings.

Relatedly, the Second Circuit [cast doubt](#) on its precedent holding that a reinstated removal order is a final removal order for purposes of judicial review. The court observed that a removal order [becomes final](#) only when the BIA has affirmed the order or when the period has expired for an order to be appealed to the BIA. The court remarked that a reinstated removal order, under this definition, can never become final because it cannot be appealed to the BIA. The Second Circuit seemed to [suggest](#) that only an initial removal order is considered final and not the reinstated removal order or the immigration judge's decision at the conclusion of withholding-only proceedings. It is the only court of appeals to have cast doubt on whether a reinstated removal order is a final removal order.

On the other hand, existing Fourth Circuit precedent has determined that finality under Section 1231 [is the same as](#) finality under Section 1252 and neither *Nasrallah* nor *Guzman Chavez* disturbed this ruling. According to the Fourth Circuit, its precedent, along with the Supreme Court's clarification in *Guzman Chavez* that a reinstated removal order's finality in the detention context is not dependent on withholding-only proceedings, [means that](#) a reinstated removal order's finality for judicial review is also not dependent on withholding-only proceedings.

Reinstated Removal Orders Are Final After Withholding-Only Proceedings

Conversely, the [Fifth](#), [Sixth](#), [Seventh](#), [Ninth](#), and [Tenth](#) Circuits have held that reinstated removal orders become final only after withholding-only proceedings have concluded and that therefore, the 30-day clock for judicial review begins to run after this process. These courts agreed that *Nasrallah* and *Guzman Chavez* addressed very narrow issues and did not overrule or undermine their circuit's precedent. As the Sixth Circuit [pointed out](#), "an order about withholding of removal functions as a reviewable final order because such relief could foreclose an avenue of deportation if granted." These courts distinguished *Guzman Chavez* because that case was decided in the context of mandatory detention. In the courts' view, the definition of finality, for purposes of mandatory detention, is not the same as finality for judicial review. The courts pointed out how the Supreme Court [explicitly clarified](#) that its holding "express[ed] no view on whether the lower courts are correct in their interpretation of [Section] 1252, which uses different language than [Section] 1231 and relates to judicial review of removal orders rather than detention." Further, under Ninth Circuit [precedent](#), finality for purposes of detention and finality for purposes of judicial review are two separate questions.

The Sixth, Seventh, and Tenth Circuits also held that the filing deadline in Section 1252(b)(1) is still jurisdictional despite the Supreme Court's opinion in *Santos-Zacaria*. The Seventh Circuit pointed out that until the Supreme Court clearly says otherwise, it will continue to rely on the Supreme Court's decision in *Stone v. INS*, which explained that Section 1252(b)(1)'s predecessor statute was jurisdictional. In contrast, the Fifth and Ninth Circuits held that the filing deadline in Section 1252(b)(1) is no longer jurisdictional after the Supreme Court's opinion in *Santos-Zacaria*. The Ninth Circuit [explained](#) that Section 1252(b)(1) and Section 1252(d)(1) are within the same statute, and the Supreme Court deemed Section 1252(d)(1) non-jurisdictional because it lacked jurisdictional language and "Congress spoke in plain jurisdictional terms elsewhere in [Section] 1252." Therefore, the reasoning in *Stone v. INS* "is now 'clearly irreconcilable' with the Supreme Court's intervening reasoning in *Santos-Zacaria*" because Section 1252(b)(1) also lacks jurisdictional language.

The Fifth Circuit mentioned that if judicial review did not attach until the end of withholding-only proceedings, it would have “[disastrous consequences](#) on the immigration and judicial systems” because aliens would file petitions for review prematurely, creating a backlog, and the courts would need to create a separate system to track all these petitions. The Ninth Circuit argued that the system would be [unfair](#) to pro se aliens who “would be forced to navigate a confusing system set up to require appeals of decisions not yet made and pay a hefty filing fee that they likely cannot afford.”

The Seventh Circuit focused on the meaning of finality within the relevant immigration statutes because neither *Nasrallah* nor *Guzman Chavez* defined or clarified it for purposes of judicial review. The court noted that, under the [plain meaning](#) of the word defined in the *Oxford English Dictionary* and *Black’s Law Dictionary*, “final” means, among other things, “leaving nothing to be looked for or expected” and “conclusive; definitive.” Using these definitions, the Seventh Circuit stated that a reinstated removal order requires further agency action when an alien is in withholding-only proceedings and even though that alien is removable, he cannot be removed until the proceedings are complete. According to the court, “[o]nly when withholding proceedings are complete have ‘the rights, obligations, and legal consequences of the reinstated removal order’ been fully established.” The Seventh Circuit [also found](#) that the plain meaning of these statutes addressing finality is in line with “the principle of statutory construction that presumes congressional intent in favor of judicial review.” Similar to the Fifth and Ninth Circuits’ reasoning, the Seventh Circuit mentioned that requiring aliens to file [premature petitions](#) seeking judicial review while withholding-only proceedings are still pending would contravene the purpose of the [zipper clause](#) in Section 1252, which is meant to streamline judicial review by consolidating all challenges into one petition.

Considerations for Congress

As a result of this circuit split, aliens are receiving different treatment in terms of access to judicial review depending on where venue lies for their individual case. In those circuits that have adopted the approach that the 30-day rule is triggered after the prior order has been reinstated, regardless of whether there are pending withholding-only proceedings, aliens in withholding-only proceedings may not be able to pursue judicial review of that decision following the conclusion of those proceedings. [According to](#) the Ninth Circuit, this “could raise serious constitutional concerns as the Suspension Clause unquestionably requires some judicial intervention in deportation cases.”

This circuit split has also demonstrated how different courts of appeals have defined finality for purposes of judicial review. If Congress chose to provide an explicit definition of a term in a statute, such as the term “final removal order” in the reinstatement of removal context, courts would likely hold that this definition controls. Although Congress provides a general definition for a final removal order in [8 U.S.C. § 1101\(a\)\(47\)](#), there has been litigation regarding when that definition applies and under what circumstances. As explained above, one common question courts of appeals have grappled with is whether finality under Section 1231, which applies in the detention context, is the same as finality under Section 1252, which applies to judicial review.

To provide some clarification, Congress could determine that reinstated orders are not final removal orders until withholding-only proceedings are complete. On the other hand, Congress could determine that reinstated removal orders are final once agency review of the order is complete, independent of whether there are also withholding-only proceedings, and therefore subject to the 30-day filing deadline under [8 U.S.C. § 1252\(b\)\(1\)](#).

Congress can also clarify whether Section 1252(b)(1) is a jurisdictional or a mandatory claims-processing rule. If the statute is not jurisdictional, it can be waived or forfeited, instead of conditioning whether a court of appeals has the authority to hear a case before it. There is a circuit split on this issue as well, with the Fifth and Ninth Circuits claiming Section 1252(b)(1) is no longer jurisdictional and the rest of the courts of appeals—that addressed the issue—claiming it is still jurisdictional notwithstanding the Supreme Court’s holding in *Santos-Zacaria*.

Author Information

Alejandra Aramayo
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS’s institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.