

High Court Limits Ability of Aliens Ordered Removed to Challenge Prolonged Detention

July 20, 2022

Non-U.S. nationals (*aliens*, as the term is [used in the Immigration and Nationality Act](#) [INA]) ordered removed may be detained pending efforts to effectuate their transfer to a foreign country. In its 2001 decision in [Zadvydas v. Davis](#), the Supreme Court held that the indefinite detention of aliens awaiting removal would raise “serious constitutional concerns.” The Court thus construed the [statute](#) authorizing their detention as having an implicit temporal limitation of six months, after which an alien should generally be released absent a significant likelihood of removal in the reasonably foreseeable future. Recently, in [Johnson v. Arteaga-Martinez](#), the Court considered whether the statute should also be construed as requiring bond hearings for detained aliens. In a nearly unanimous opinion, the Court held that the statute does not require bond hearings for aliens ordered removed after six months of detention, or require the government to prove that any continued detention is warranted. In a related case, [Garland v. Gonzalez](#), the Court held that a [separate statute](#) prohibited lower courts from issuing [class-wide injunctions](#) requiring the government to provide bond hearings for detained aliens who have been ordered removed. This Legal Sidebar examines the Court’s rulings in *Arteaga-Martinez* and *Gonzalez*.

Legal Background

As discussed in this [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 during [formal removal proceedings](#) is [discretionary](#), unless the alien is subject to [mandatory detention](#) (e.g., if the alien was convicted of specified crimes). If detained, the alien may request an immigration judge’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 is “[ordered removed](#).” Under the statute, the alien must generally be removed within a 90-day “[removal period](#)” that typically begins when the order becomes “[administratively final](#).” While detention is [generally mandatory](#) during the removal period, in most cases the alien [must be released](#) on an order of supervision if not removed within that period. [INA § 241\(a\)\(6\)](#), however, provides that certain aliens “[may be detained](#)” [beyond the removal period](#) (e.g., those found to be “a risk to the community or unlikely to comply with the order of

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LSB10793

removal”). If they are released, they are subject to “[terms of supervision](#)” described elsewhere in § 241(a). Unlike INA § 236(a), § 241(a) does not mention bond.

In 2001, the Supreme Court in *Zadvydas* determined that the indefinite detention of an alien awaiting removal under INA § 241(a)(6) would raise “[serious constitutional concerns](#).” Noting that the statute provided no “[clear indication](#)” as to whether an alien ordered removed may remain detained indefinitely, the Court applied the [canon of constitutional avoidance](#) and [construed the statute](#) as permitting detention only for “a period reasonably necessary to secure the alien’s removal.” The Court construed § 241(a)(6) as having an [implicit, temporal limitation](#) of six months post-order of removal, after which an alien must generally be released absent a significant likelihood of removal in the reasonably foreseeable future.

While *Zadvydas* generally limited the length of detention under INA § 241(a)(6), the Supreme Court did not consider whether the statute should be interpreted as imposing other procedural requirements, including bond hearings. In *Diouf v. Napolitano*, the U.S. Court of Appeals for the Ninth Circuit held in 2011 that prolonged detention under § 241(a)(6) without adequate procedural safeguards would also raise “serious constitutional concerns.” Citing *Zadvydas*, the court [construed the statute as requiring](#) a bond hearing after six months of detention if the alien’s release or removal is not imminent, and placing the burden on the government to prove that the alien is a flight risk or danger to the community. In 2018, the Third Circuit in *Guerrero-Sanchez v. Warden York County Prison* likewise held that the statute [implicitly requires a bond hearing](#) after six months of detention if release or removal is not imminent, and that the alien has a right to release unless the government proves that further detention is warranted.

In *Jennings v. Rodriguez*, the Supreme Court in 2018 considered the government’s statutory authority to indefinitely detain aliens during formal removal proceedings, including under [INA § 236\(a\)](#), which authorizes (but does not require) the detention of aliens placed in removal proceedings. The *Jennings* Court [rejected](#) a Ninth Circuit decision construing § 236(a) as implicitly requiring bond hearings every six months, where the government has the burden of proving that further detention is warranted. The Ninth Circuit [expressed concern](#) that the statute, if construed to permit the indefinite detention of aliens placed in removal proceedings, would raise “constitutional concerns” under *Zadvydas*. In rejecting that analysis, the *Jennings* Court [explained](#) that the canon of constitutional avoidance applies only when statutory language is susceptible to more than one construction. The Court [distinguished](#) *Zadvydas*, where the canon was applied, because the statute there was ambiguous as to whether open-ended detention pending removal was authorized. In contrast, the *Jennings* Court [explained](#), INA § 236(a) is textually clear in not requiring periodic bond hearings or specifying the government’s burden of proof.

Procedural History

Johnson v. Arteaga-Martinez involved a detained alien from Mexico whose [prior order of removal was reinstated](#) following his unlawful reentry into the United States. He pursued [withholding of removal](#) and [protection under the Convention Against Torture](#) (CAT) during his [reinstatement of removal](#) proceedings based on his fear of returning to Mexico. (The [Supreme Court has held](#) that an alien whose prior removal order is reinstated is subject to detention under INA § 241(a) because that statute applies to those who have been ordered removed.) The alien, who had been detained for four months without a hearing, [petitioned for a writ of habeas corpus](#) challenging his prolonged detention under INA § 241(a)(6). Once the detention period approached six months, a federal district court [ordered a bond hearing](#). Citing *Guerrero-Sanchez*, the Third Circuit [summarily affirmed](#).

Garland v. Gonzalez was a consolidated case involving two Mexican nationals and an El Salvadoran national (“the plaintiffs”) who [were also placed in reinstatement of removal](#) following their illegal reentries. They remained detained while they sought withholding of removal and CAT protection. The plaintiffs [filed lawsuits arguing](#) that, under INA § 241(a)(6), they had a right to bond hearings after six months of detention. The district courts in those cases [entered class-wide injunctive relief](#) barring DHS

from detaining the plaintiffs and similarly detained aliens under § 241(a)(6) for more than 180 days without a bond hearing. Citing *Diouf* as precedent, the Ninth Circuit affirmed the lower court decisions.

The government petitioned for further review in *Arteaga-Martinez* and *Gonzalez*, arguing that INA § 241(a)(6)'s text does not require bond hearings or the government to prove that continued detention is warranted. Citing *Jennings*, the government noted that the Supreme Court rejected similar constructions of other detention provisions as containing implicit bond hearing requirements when the applicable statutes imposed no such requirements. The government distinguished *Zadvydas*, arguing that § 241(a)(6)'s ambiguity about the length of post-removal order detention (rather than whether it requires bond hearings) enabled the Court in that case to apply the canon of constitutional avoidance and construe the statute as containing an implicit time limitation.

The Supreme Court's Decision in *Arteaga-Martinez*

In an 8-1 decision, the Supreme Court reversed the Third Circuit's decision. In the majority opinion written by Justice Sotomayor (joined by Chief Justice Roberts and Justices Thomas, Alito, Kagan, Gorsuch, Kavanaugh, and Barrett), the Court held that "as a matter of textual command," INA § 241(a)(6) does not require bond hearings after six months of detention in which the government must prove that an alien poses a flight risk or danger to the community. The Court recognized that, under *Jennings*, the canon of constitutional avoidance applies only when a statute has "more than one plausible construction." As in *Jennings*, the Court determined there is "no plausible construction" of INA § 241(a)(6)'s text that requires the government to provide bond hearings or to prove that continued detention is justified. The Court observed that the statute states only that certain aliens "may be detained" after the 90-day removal period, but says or indicates nothing about bond hearings or burdens of proof. The Court determined that § 241(a)(6)'s "oblique" reference to "terms of supervision" for those who are released is insufficient to read into the statute any bond hearing requirement.

The Court also rejected the notion that INA § 241(a)(6) should be construed as requiring bond hearings under *Zadvydas*. The Court explained that the bond hearing requirements imposed by the Third Circuit "reach substantially beyond the limitation on detention authority recognized in *Zadvydas*." The Court also noted that *Zadvydas* had "identified ambiguity" in § 241(a)(6) as to whether an alien could be detained indefinitely while awaiting removal. Because there was no textual ambiguity as to whether that statute requires bond hearings, the Court determined that "*Zadvydas* does not require, and *Jennings* does not permit, the Third Circuit's application of the canon of constitutional avoidance."

In a concurring opinion, Justice Thomas, joined in part by Justice Gorsuch, agreed with the majority opinion on the merits, but argued that the Court lacked jurisdiction under 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. (*Jennings* previously held that this provision does not preclude review of detention challenges.) Justice Thomas also urged the Court to reconsider whether the Due Process Clause "applies at all" to aliens subject to removal, and to overrule its decision in *Zadvydas* because, in his view, that case was wrongly decided.

In a separate opinion concurring in part and dissenting in part, Justice Breyer argued that *Zadvydas*, which limited the length of detention under the same statute, INA § 241(a)(6), required construing it as having a bond hearing requirement to avoid the same constitutional problem posed by potentially indefinite detention. Justice Breyer, however, agreed with the majority that § 241(a)(6) was textually clear in not requiring the government to bear the burden of proving that continued detention is necessary.

The Supreme Court's Decision in *Gonzalez*

On the same day of the *Arteaga-Martinez* decision, the Court ruled in *Gonzalez*. Given that the Court had already addressed whether INA § 241(a)(6) requires bond hearings in *Arteaga-Martinez*, the Court did not reach that issue in *Gonzalez*. Instead, the Court addressed a separate “threshold” issue raised in that case: whether INA § 242(f)(1) prohibited the lower courts from entering class-wide injunctions requiring the government to provide bond hearings for aliens detained under INA § 241(a)(6).

In a 6-3 decision, the Supreme Court [reversed](#) the Ninth Circuit's decisions affirming the class-wide injunctions. In the majority opinion written by Justice Alito (joined by Chief Justice Roberts and Justices Thomas, Gorsuch, Kavanaugh, and Barrett), the Court held that the lower courts [exceeded their authority](#) in awarding class-wide injunctive relief. The Court examined INA § 242(f)(1), which provides that no court (other than the Supreme Court) “shall have jurisdiction or authority to enjoin or restrain the operation of” certain INA provisions governing the inspection, apprehension, detention, and removal of aliens, including INA § 241(a)(6), “other than with respect to the application of such provisions to an individual alien” placed in formal removal proceedings. Based on the “ordinary meaning” of “enjoin or restrain the operation of,” the Court [determined](#) the statute “generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions.” The Court rejected the plaintiffs' contention that § 242(f)(1) only precludes injunctions that prohibit the government from doing what federal law authorizes, but not injunctions that prohibit or seek to rectify *unlawful* agency action. Further, the Court [explained](#), although the [statute](#) permits injunctive relief for “a particular alien,” issuing injunctive relief for an “entire class of aliens” does not meet that exception. Thus, the Court [held](#), the lower courts were barred from issuing injunctions requiring bond hearings for an entire class of similarly situated aliens.

In an [opinion](#) concurring in part and dissenting in part, Justice Sotomayor (joined in full by Justice Kagan, and joined in part by Justice Breyer) [interpreted](#) INA § 242(f)(1)'s “enjoin or restrain the operation of” clause more narrowly, arguing that it only bars injunctions that prevent the *lawful* implementation of the specified INA provisions. Justice Sotomayor [argued](#) that § 242(f)(1) does not prohibit lower courts “from commanding compliance with the statutes or enjoining unauthorized action.” Justice Sotomayor further [argued](#) that the exception for injunctive relief on behalf of “an individual alien” permitted the injunctions here in any event because a class action “is a collection of individual claims.” On the merits, however, Justice Sotomayor [concurred](#) with the Court's judgment in light of *Arteaga-Martinez*.

Congressional Considerations

The Supreme Court's *Arteaga-Martinez* decision is the latest in [a series of rulings generally reinforcing](#) DHS's broad detention authority. Although the Court in *Zadvydas* restricted the length of detention of most aliens awaiting removal under INA § 241(a)(6), the Court has declined to read any further limitations or procedural safeguards into the statute. Equally significant, the Court's related decision in *Gonzalez* precludes lower courts from issuing class-wide injunctive relief on behalf of similarly situated aliens who are subject to prolonged detention. More generally, given the *Gonzalez* Court's broad interpretation of INA § 242(f)(1), the Court's decision may reduce the likelihood of nationwide injunctions in the immigration detention and removal context. For example, just a few days after *Gonzalez*, the Supreme Court in *Biden v. Texas* held that a district court violated § 242(f)(1) by issuing a nationwide injunction requiring DHS to implement a policy requiring the return of some arriving migrants to Mexico pending the outcome of their formal removal proceedings.

To the extent there is uncertainty about the extent to which the government may detain aliens awaiting removal, Congress may clarify that authority through legislation. In the 117th Congress, bills have been introduced, including the New Way Forward Act ([H.R. 536](#)) and the Dignity for Detained Immigrants Act

([S. 1186](#), [H.R. 2222](#)), that would limit the period in which aliens may remain detained beyond the removal period to 60 days, and require DHS to prove at a hearing that the alien's continued detention is warranted. Conversely, other bills, such as the Empowering Law Enforcement Act ([S. 1582](#), [H.R. 4796](#)) and Keep Our Communities Safe Act ([S. 4370](#)), would provide that an alien detained beyond the removal period has no right to seek release on bond.

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