

Seton Hall University

eRepository @ Seton Hall

Law School Student Scholarship

Seton Hall Law

2019

To Be or Not to be Detained: A Discussion on Why Reinstated Removal Orders During Withholding-Only Proceedings Are Not Administratively Final

Mohamed T. Hegazi

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the [Law Commons](#)

Recommended Citation

Hegazi, Mohamed T., "To Be or Not to be Detained: A Discussion on Why Reinstated Removal Orders During Withholding-Only Proceedings Are Not Administratively Final" (2019). *Law School Student Scholarship*. 1022.

https://scholarship.shu.edu/student_scholarship/1022

Mohamed T. Hegazi

COMMENT: To Be or Not to be Detained: A Discussion on Why Reinstated Removal Orders During Withholding-Only Proceedings Are Not Administratively Final

Introduction

Each year, thousands of noncitizens are apprehended for entering the country illegally.¹ Of the noncitizens that are apprehended, many of them are removed from the United States, with over 65,000 removals occurring in 2016 and over 81,000 removals occurring in 2017.² Upon apprehension, a noncitizen is often placed in removal proceedings where an immigration judge decides whether he or she can remain in the country.³ Many noncitizens are also removed from the country immediately upon apprehension without having such proceedings, reflecting Congress's desire to reduce illegal immigration.⁴ Regardless of how a noncitizen is removed, there is no guarantee that he or she will not attempt to re-enter the country at a later time.⁵ Thus,

¹ Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 159 (2016). See also *DHS Releases End of Fiscal Year 2016 Statistics*, DEP'T HOMELAND SEC. (Dec. 30, 2016), <https://www.dhs.gov/news/2016/12/30/dhs-releases-end-year-fiscal-year-2016-statistics> (stating that the Department of Homeland Security ("DHS") apprehended 530,250 individuals in 2016); *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGR. AND CUSTOMS ENF'T 1, 13 (Dec. 13, 2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> (stating that the United States Immigration and Customs Enforcement ("ICE") "conducted 143,470 overall administrative arrests" in 2017).

² *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, *supra* note 1 at 12.

³ Gilman, *supra* note 1 at 159 (stating that "significant number of migrants in detention are awaiting the conclusion of . . . deportation proceedings . . . which will determine" whether they may remain in the country).

⁴ Hillary Gaston Walsh, *Forever Barred: Reinstated Removal Orders and the Right to Seek Asylum*, 66 CATH. U.L. REV. 613, 620–24 (2017) (explaining "expedited removal" of noncitizens under the Immigration and Nationality Act ("INA"), which reflects "Congress's goals of reducing illegal immigration"). Expedited Removal allows federal officers to remove noncitizens "without a hearing before an immigration judge or review by the Board of Immigration Appeals" ("BIA"). Kristen Macleod-Ball et al., *Expedited Removal: What Has Changed Since Executive Order No. 13767*, AM. IMMIGR. COUNCIL 1, 2 (Feb. 20, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory_updated_2-21-17.pdf. While expedited removal was initially limited to "ports of entry" such as airports, it has been expanded to apply to noncitizens apprehended within 100 miles of a border and who fail to prove that, at the time of apprehension, they have been in the country for at least fourteen days. Lara Domínguez et al., *U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis*, YALE L. SCH. 1, 6 (June 20, 2016), https://law.yale.edu/system/files/area/center/schell/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf.

⁵ *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, *supra* note 1 (stating that "[of ICE's arrests for 2017], 92 percent had a criminal conviction a pending criminal charge, were an ICE fugitive or **were processed with a reinstated final order**" (emphasis added)).

special provisions are in place regarding the removal of noncitizens who re-enter the United States after having been previously removed.⁶

When a previously removed noncitizen re-enters the country, and is subsequently apprehended, his or her prior removal order is “reinstated from its original date.”⁷ This order is referred to as a reinstated removal order.⁸ While the effect of the reinstated removal order seems clear – the noncitizen must be removed from the country – noncitizens subject to such orders are not always removed.⁹ This is because a noncitizen may express a reasonable fear of being removed to the country listed in his or her prior removal order.¹⁰ The noncitizen may then choose to apply for withholding of removal or relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (“CAT”), where he or she can avoid being removed to that country through withholding-only proceedings.¹¹

Whenever a noncitizen is apprehended for illegally entering the United States, a decision is made as to whether he or she will be detained until his or her removal proceedings are complete.¹² In some instances, however, noncitizens are subject to mandatory detention, where they are required to be detained during removal proceedings.¹³ For example, a noncitizen must

⁶ See 8 U.S.C. § 1231(a)(5).

⁷ *Id.* Noncitizens who re-enter the country illegally may, in addition to being removed from the United States, face criminal charges for re-entering the country. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 203 (2017). Criminal charges, however, are not as common and tend to occur in those jurisdictions close to the United States’s borders. *Id.*

⁸ See e.g. *Padilla-Ramirez v. Bible*, 862 F.3d 881, 884 (9th Cir. 2017) (referring to the 8 U.S.C. § 1231(a)(5) order as a “reinstated removal order”); *Guerra v. Shanahan*, 831 F.3d 59, 61 (2d Cir. 2016) (same).

⁹ This effect is based on § 1231(a)(5)’s text, which provides that a noncitizen with a reinstated removal order “shall be removed under the prior order at any time after the reentry.” § 1231(a)(5). See *FY 2015 Statistics Yearbook*, U.S. DEP’T JUST. A1, M1, K5 (Apr. 2016), <https://www.justice.gov/eoir/page/file/fysb15/download> (providing statistics on noncitizens avoiding removal pursuing relief through the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (“CAT”) and § 1231(b)(3)).

¹⁰ See *Padilla-Ramirez*, 862 F.3d at 882; *Guerra*, 831 F.3d at 61.

¹¹ See *Padilla-Ramirez*, 862 F.3d at 882; *Guerra*, 831 F.3d at 61.

¹² Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 165 (2016)

¹³ See § 1231(a)(2) (providing that noncitizens, during removal periods, “shall” be detained by the Attorney General).

be detained if he or she previously committed an aggravated felony, multiple crimes involving moral turpitude, or a crime involving a controlled substance.¹⁴ The District Courts, however, have disagreed on whether noncitizens subject to reinstated removal orders must be mandatorily detained during withholding-only proceedings.¹⁵ While some have held that mandatory detention is required, others have held that the noncitizens are at least entitled to bond hearings.¹⁶ Eventually, the issue reached the appellate courts.¹⁷ The Ninth and Second Circuits, however, also disagreed and therefore created a circuit split as to whether noncitizens are subject to mandatory detention during withholding-only proceedings.¹⁸

The current circuit split is due to the Ninth and Second Circuits' disagreement on whether reinstated removal orders are "administratively final" during withholding-only proceedings.¹⁹ The Ninth Circuit concluded that the orders are final because the only decision being made during these proceedings is whether or not the noncitizen will be removed to the country listed on the removal order.²⁰ The court opined that because removing the noncitizen to other countries remains a possibility during these proceedings, the decision to remove him or her from the United States has already been made, thereby supporting its conclusion that the orders are final.²¹ The Second Circuit, on the other hand, opined that a judge during withholding-only proceedings is solely concerned with determining whether a "[noncitizen] is to be removed from the United States."²² Thus, because the Court found that the decision to remove the noncitizen from the

¹⁴ See § 1226(c)(1)(B) (listing the instances where a noncitizen is subject to mandatory detention).

¹⁵ See *Reyes v. Lynch*, 2015 U.S. Dist. LEXIS 114643, *4–5 n. 4–5 (D. Colo. 2015) (listing cases where courts are split).

¹⁶ *Id.*

¹⁷ *Padilla-Ramirez v. Bible*, 862 F.3d 881, 886 (9th Cir. 2017); *Guerra v. Shanahan*, 831 F.3d 59, 64 (2d Cir. 2016).

¹⁸ *Padilla-Ramirez*, 862 F.3d at 886 (noncitizens subject to mandatory detention); *Guerra*, 831 F.3d at 64 (noncitizens entitled to bond hearings).

¹⁹ *Padilla-Ramirez*, 862 F.3d at 886; *Guerra*, 831 F.3d at 64.

²⁰ *Padilla-Ramirez*, 862 F.3d at 886.

²¹ *Id.*

²² *Guerra*, 831 F.3d at 62 (quoting 8 U.S.C. § 1226(a)).

country is not made until the proceedings are complete, the reinstated removal order cannot be a final order.²³

The current split has serious consequences for noncitizens, since a noncitizen's detention status largely depends on which court hears his or her case. Currently, a noncitizen will be detained if his or her withholding-only proceedings occur within the Ninth Circuit, while he or she will at least get a bond hearing if his or her case is brought within the Second Circuit.²⁴ The concern with this, of course, is the injustice that occurs if one of the appellate courts reached the wrong decision. Because immigration proceedings are generally prolonged, it is possible that some noncitizens will spend lengthy periods in detention when, legally, they were not required to do so.²⁵ Thus, the Supreme Court should act to resolve this split and bring uniformity to an issue in law that has caused substantial disagreement among courts.²⁶ In this comment, I argue that the Second Circuit correctly concludes that the orders are not administratively final – thus, the Supreme Court should adopt its reasoning and hold that the noncitizens are not subject to mandatory detention.²⁷ I first argue that from a practical standpoint, a reinstated removal order cannot be final since it can affect the country of removal listed in the reinstated removal order. I then argue that the Second Circuit's reasoning is better aligned with Congress's intent to avoid removing noncitizens to dangerous countries. I last argue that the Supreme Court's decision in

²³ *Id.* at 64.

²⁴ Padilla-Ramirez, 862 F.3d 881, 890 (mandatory detention required); Guerra, 831 F.3d 59, 64 (noncitizen entitled to bond hearing).

²⁵ Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 160 (2016) (describing immigration proceedings in general as "lengthy" due to large dockets).

²⁶ See Padilla-Ramirez, 862 F.3d at 886 (concluding that the order is administratively final); Guerra, 831 F.3d at 64 (concluding that the order is not administratively final); Reyes v. Lynch, 2015 U.S. Dist. LEXIS 114643, *4–5 n. 4–5 (D. Colo. 2015) (listing numerous cases where the courts have split on the issue)

²⁷ Guerra, 831 F.3d at 64.

Zadvydas v. Davis supports the conclusions that the noncitizens should not be mandatorily detained.²⁸

Part I of this comment provides background information on American immigration law and an explanation of reinstated removal orders. Part II analyzes the reasoning of courts that have decided on the administrative finality of reinstated removal orders during withholding-only proceedings. Part III of this comment argues that the Second Circuit correctly concluded that the reinstated removal orders are not administratively final during withholding-only proceedings and how the Supreme Court's decision in *Zadvydas* is consistent with such a holding.

I. Part I: A Description of American Immigration Law

Part I(A): Reinstated Removal Orders

The Immigration and Nationality Act (“INA”) is the centerpiece of American immigration law.²⁹ This is so because the INA governs various aspects of immigration law, including the removal of noncitizens from the United States.³⁰ One of the INA's provisions governing the removal of noncitizens is 8 U.S.C. §1231(a)(5), which is triggered whenever a noncitizen reenters the country after being previously removed.³¹ When the reentering noncitizen is apprehended, his or her prior removal order is “reinstated from its original date.”³²

²⁸ 533 U.S. 678 (2001). *Zadvydas* concerned the detention of noncitizens pursuant to 8 U.S.C. § 1231(a)(6). *Id.* at 682. The issue there was whether, under the statute, detention of “a removable alien indefinitely beyond” a removal period within the statute is permissible. *Id.* (alteration omitted). The Court concluded that indefinite detention is not permissible. *Id.* at 697. The Court, in reaching its decision, focused on the point at which a noncitizen's removal from the country is foreseeable. *Id.* at 699–700 (providing that detention is impermissible when a noncitizen's removal is not reasonably foreseeable). While not speaking directly on the issue discussed in this note, the Court's emphasis on the foreseeability removal provides insight as to how the Court may decide the issue presented here. Specifically, the Court may decide that a noncitizen's detention status during withholding-only proceedings is influenced by whether or not removal from the United States is reasonably foreseeable.

²⁹ See REGINA GERMAIN, *ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* 24 (Am. Immigration Lawyers Ass'n 6th ed. 2010) (explaining how the Immigration and Nationality Act forms the foundation of American Immigration Law).

³⁰ See *Id.* at 23 (noting how American immigration laws offered protection to those fleeing their countries for fear of political persecution during the 19th Century); see e.g. 8 U.S.C. § 1231.

³¹ § 1231(a)(5).

³² *Id.*

Thereafter, the noncitizen is removed from the country.³³ The timeframe for removing a noncitizen pursuant to § 1231(a)(5) is generally short since noncitizens subject to reinstated removal orders are barred from pursuing relief normally available under the INA.³⁴

The process of entering a reinstated removal order against a noncitizen is governed by 8 C.F.R. § 241.8.³⁵ Unlike a noncitizen who illegally enters the United States for the first time, a noncitizen subject to a reinstated removal order is not entitled to a hearing before an immigration judge.³⁶ Instead, a Department of Homeland Security (“DHS”) officer must make certain determinations before the reinstated removal order takes effect and removes a noncitizen.³⁷ Included among these required determinations is a determination on whether the noncitizen fears returning to his or her home country.³⁸ This determination is important because an exception to 8 U.S.C. § 1231(a)(5)’s general ban on relief lies in the noncitizen’s ability to pursue relief under the CAT or withholding of removal pursuant to §1231(b)(3) if he or she professes such a fear.³⁹ The noncitizen would pursue such relief through a withholding-only proceeding.⁴⁰ This avenue of relief exists for noncitizens because the government cannot remove noncitizens to countries where they will be persecuted or tortured.⁴¹

³³ *Id.*

³⁴ *Id.*; Hillary Gaston Walsh, *Forever Barred: Reinstated Removal Orders and the Right to Seek Asylum*, 66 CATH. U.L. REV. 613, 625 (2017). The process of removing noncitizens can even take as little as a few hours. Koh, *supra*, note 7 at 205.

³⁵ See 8 C.F.R. § 241.8; Trina Realmuto, *Practice Advisory: Reinstatement of Removal*, AM. IMMIGR. COUNCIL 1, 9 (Apr. 29, 2013),

https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_29Apr_reinstatement.pdf (providing an overview of the process in which a reinstated removal order is entered against an alien).

³⁶ § 241.8(a).

³⁷ Realmuto, *supra*, note 35 at 9. These determinations include whether the noncitizen is subject to a previous order of removal, what the identity of the alien is, and whether the alien did in fact enter the United States illegally. §§ 241.8(a)(1) – (2).

³⁸ Realmuto, *supra*, note 37 at 9 (citing §§ 208.31; 241.8(e)).

³⁹ Andrade-Garcia v. Lynch, 828 F.3d 829, 831–32 (9th Cir. 2016).

⁴⁰ Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 205 (2017).

⁴¹ Guerra v. Shanahan, 831 F. 3d 59, 61 (2d. Cir. 2016) (first citing 8 U.S.C. § 1231(b)(3); then citing 8 C.F.R. § 1208.16(c)). See also Koh, *supra*, note 40 at 205.

Part I(B): The Law’s Treatment of Noncitizens Fearing Return to Their Home Countries

Throughout history, millions of people have sought to escape dangerous conditions in their home countries with hopes of finding refuge in foreign nations.⁴² The United States, unsurprisingly, has long been a popular destination for refugees, with around three million refugees residing in the country since 1980.⁴³ For the United States, this popularity has at times led to a particular immigration problem – in some instances, a noncitizen enters the country illegally with hopes of finding refuge.⁴⁴ Of course, any noncitizen who enters the country illegally, regardless of whether or not he or she seeks refuge, runs the risk of being removed.⁴⁵ Removing noncitizens, however, has its limits, as the United States is barred from removing any noncitizen to a country where he or she reasonably fears for his or her life.⁴⁶ When a noncitizen faces removal pursuant to § 1231(a)(5), the INA, the CAT, and the United Nations Protocol Relating to the Status of Refugees (“Protocol”) all play a role in his or her removal.⁴⁷

The United States has certain obligations to noncitizens because of its obligations under the CAT, the Protocol and the United Nations Convention Relating to the Status of Refugees (“Convention”).⁴⁸ The Protocol precludes its signatories from removing noncitizens to countries

⁴² Examples include the thousands of refugees who fled persecution in their home countries after World War II, and more recently, the millions of Syrian citizens who fled Syria to escape the dangerous conditions posed by its civil war. See REGINA GERMAIN, *ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* 24 (Am. Immigration Lawyers Ass’n 6th ed. 2010); *The Syrian Refugee Crisis and its Repercussions for the EU*, EUROPEAN U. INST. (Sept. 2016), <http://syrianrefugees.eu>.

⁴³ See Jens Manuel Krogstad and Jynnah Radford, *Key Facts About Refugees to the U.S.*, PEW RES. CTR. (Jan. 30, 2017), <http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/>.

⁴⁴ See e.g. Padilla-Ramirez, 862 F.3d 881, 883 (9th Cir. 2017) (noncitizen fearing persecution and torture in his home country of El Salvador); Guerra 831 F.3d at 61 (noncitizen with a reasonable fear of returning to Guatemala).

⁴⁵ See e.g. *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGR. AND CUSTOMS ENF’T 1, 11–12 (Dec. 13, 2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> (providing statistics on inadmissible noncitizens removed from the United States).

⁴⁶ Germain, *supra*. note 42 at 24; 8 U.S.C. § 1231(b)(3)(A).

⁴⁷ See e.g. Padilla-Ramirez, 862 F.3d 881 and Guerra, 831 F.3d 59 for examples of cases where reinstated removal of aliens were delayed due to the United States’s CAT obligations and 8 U.S.C. § 1231(b)(3)(A).

⁴⁸ Germain, *supra*. note 46 at 8, 24.

where their lives would be placed in danger.⁴⁹ After becoming bound by the Protocol's provisions, the United States passed the Refugee Act in 1980 to better align its immigration laws with its obligations under the Protocol.⁵⁰ The Refugee Act accomplished this goal by incorporating into the INA the Protocol's definition of refugee and the principle of nonrefoulement.⁵¹ Thus, under the INA, a noncitizen who fears that his or her "life or freedom would be threatened in that country because of . . . [his or her] race, religion, nationality, membership in a particular social group, or political opinion" can avoid removal by applying for statutory withholding of removal under § 1231(b)(3)(A).⁵² The United States is also a signatory to the CAT, which prevents the government from removing any noncitizen to any country where he or she will likely be tortured.⁵³ Therefore, noncitizens fearing a return to their home countries

⁴⁹ *Id.* at 24. The United States is also bound by United Nations Convention Relating to the Status of Refugees ("Convention"), because the United Nations Protocol Relating to the Status of Refugees ("Protocol") amended the Convention to broaden the range of individuals who can seek relief, while keeping most of the Convention's provisions intact. *Convention and Protocol Relating to the Status of Refugees*, OFF. UNITED NATIONS COMMISSIONER FOR REFUGEES 1, 2, <http://www.unhcr.org/3b66c2aa10.pdf>. Thus, because of these international law obligations, the United States "shall [not] return or expel . . . a refugee . . . to a territory where he or she fears threats to life or freedom." *Id.* at 3.

⁵⁰ Germain, *supra* note 49 at 24

⁵¹ *Id.* The Immigration and Nationality Act's ("INA") definition of refugee is found in 8 U.S.C. § 1101(a)(42), which defines a refugee as "any person [outside his or her country of nationality] . . . who is unable or unwilling to return to [that country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The INA's nonrefoulement principle is found in 8 U.S.C. § 1231(b)(3)(A), which provides that the "Attorney General may not remove a[noncitizen] to a country if the Attorney General decides that the [noncitizen's] life or freedom would be threatened in that country because of the [his or her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); *see* Germain, *supra* note 50 at 12 (referring to § 1231(b)(3) as the INA's nonrefoulement section).

⁵² § 1231(b)(3)(A).

⁵³ Germain, *supra* note 51 at 8; Pa. State Univ. Dickinson Sch. Of Law's Ctr. For Immigrant's Rights, *Withholding-Only Proceedings*, PENN ST. L. 1, 12, (Aug. 2014) <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Withholding-Only-Toolkit.pdf>. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment ("CAT") is an international human rights treaty formed by the United Nations in 1984. David Weissbrodt and Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 L. & INEQ. 343, 353 (2011). David Weissbrodt and Isabel Hortreiter, *The Principle of Nonrefoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 3 (1999). The CAT became effective law in the United States in 1994. Germain, *supra* note 53 at 8. Under The CAT, "[n]o State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture." *Id.*

are not limited to relief through statutory withholding of removal, but may also apply for relief under the CAT, so long as they fear being tortured in addition to being persecuted.⁵⁴

For a noncitizen to obtain relief under the CAT or statutory withholding of removal, he or she must express a fear of torture or persecution in his or her home country.⁵⁵ Once the noncitizen expresses such a fear, he or she is referred to an asylum officer who determines whether his or her fear is reasonable.⁵⁶ A noncitizen's fear is reasonable if there is a "reasonable possibility" that he or she would be tortured in the country of removal or "persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion."⁵⁷ The INA does not define what acts constitute persecution.⁵⁸ Therefore, the determination of whether a noncitizen's fear of persecution is reasonable is a fact-intensive inquiry contingent upon the exact dangers the noncitizen fears.⁵⁹ Consequently, courts have held that various acts may constitute persecution, including forced abortions, sexual assault, threatening peoples' lives, and ethnic cleansing.⁶⁰ With regards to a noncitizen's fear of torture in a country, a noncitizen must prove that he or she will be tortured by that country's government, or with that government's acquiescence.⁶¹

⁵⁴ See e.g. *Padilla-Ramirez v. Bible*, 862 F.3d 881, 883 (9th Cir. 2017) (noncitizen seeking statutory withholding of removal and relief under the CAT through withholding-only proceedings); *Guerra v. Shanahan*, 831 F.3d 59, 61 (2d Cir. 2016) (same). Relief under the CAT includes deferral of removal under 8 C.F.R. § 1208.17 and withholding of removal under 8 C.F.R. § 1208.16.

⁵⁵ §241.8.; Hillary Gaston Walsh, *Forever Barred: Reinstated Removal Orders and the Right to Seek Asylum*, 66 CATH. U.L. REV. 613, 630 (2017).

⁵⁶ *Guerra v. Shanahan*, 831 F.3d 59, 61 (2d Cir. 2016); Pa. State Univ., *supra* note 53 at 5.

⁵⁷ § 208.31(c).

⁵⁸ Germain, *supra* note 53 at 33.

⁵⁹ *Id.*

⁶⁰ See e.g. *Id.* at 35 (citing *Knezevic v. Ashcroft*, 367 F.3d 1206, 1212 (9th Cir. 2004); then citing *Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003); then citing *Shoaf v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000); then citing *Chang v. INS*, 119 F.3d 1055, 1066 (3d Cir. 1997)).

⁶¹ *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003). § 208.18(a)(1) defines torture as "any act by which severe pain or suffering . . . is intentionally inflicted on a person for such purposes as . . . punishing him or her for an act he or she or a third person has committed . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* (emphasis added). See also Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 11–12 (2014).

If the asylum officer finds that the noncitizen’s expressed fear of removal is reasonable, the noncitizen is placed in withholding-only proceedings before an immigration judge.⁶² To qualify for relief, the noncitizen must establish a “clear probability” of the threats he or she claims to face.⁶³ If the noncitizen successfully meets this burden, the United States cannot remove the noncitizen to the country listed in the prior removal order.⁶⁴ The immigration judge, however, can remove the noncitizen to a third country, even if he or she decides that the noncitizen cannot be removed to the country he or she fears for his or her life in.⁶⁵

While noncitizens subject to removal are protected by the INA and CAT, the likelihood of a noncitizen’s removal is high.⁶⁶ Databases tracking the outcomes of withholding-only cases show that, over the last two decades, “immigration courts have heard 10,105 withholding-only cases,” almost all of which were recently heard.⁶⁷ Final decisions were reached in nearly half these cases, with 25.4% of those cases resulting in the noncitizen obtaining the right to remain in the United States.⁶⁸ Moreover, of these cases, the immigration courts granted a noncitizen’s application for relief through statutory withholding of removal or relief through the CAT in only 1,105 cases.⁶⁹ Thus, while a noncitizen seeking such relief is very likely to be removed from the United States, relief is not entirely uncommon.

⁶² Pa. State Univ. Dickinson Sch. Of Law’s Ctr. For Immigrant’s Rights, *Withholding-Only Proceedings*, PENN ST. L. 1, 9 (Aug. 2014) <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Withholding-Only-Toolkit.pdf>. (citing 8 U.S.C. § 1231(b)(3)(A)).

⁶³ *Tamang v. Holder*, 598 F.3d 1083, 1091 (9th Cir. 2010). The “clear probability” standard has been interpreted by the Supreme Court to mean that the noncitizen must prove it is “more likely than not” that he or she “would be subject to persecution on one of the protected grounds.” *Id.* The “more likely than not” standard also applies when noncitizens seek relief under the CAT. *Id.* at 1095.

⁶⁴ Pa. State Univ., *supra* note 62 at (citing § 1231(b)(3)(A)).

⁶⁵ 8 C.F.R. § 1208.16(f).

⁶⁶ David Hausman, *Fact Sheet: Withholding-Only Cases and Detention*, AM. CIV. LIBERTIES UNION 1, 2 (Apr. 19, 2015), https://www.aclu.org/sites/default/files/field_document/withholding_only_fact_sheet_-_final.pdf.

⁶⁷ *Id.* at 1.

⁶⁸ *Id.* at 1–2.

⁶⁹ *Id.* at 2.

Part I(C): The INA and Detention of Noncitizens

Whenever a noncitizen is apprehended, federal officials must decide whether he or she will be detained during his or her removal proceedings.⁷⁰ The decision, of course, is contingent upon which of the INA’s detention provisions the noncitizen is subject to.⁷¹ The INA contains numerous provisions governing a noncitizen’s detention. For example, if a noncitizen is a suspected terrorist, the INA requires that he or she be subject to mandatory detention pursuant to 8 U.S.C. § 1226a.⁷² § 1226a’s detention provisions, however, would not apply when a noncitizen is being examined for diseases, physical or mental defects, or disabilities, since such a noncitizen is detained pursuant to 8 U.S.C. § 1222(a).⁷³ And neither provision governs the detention of noncitizens convicted of certain crimes, as these noncitizens are subject to detention under 8 U.S.C. § 1226(c).⁷⁴ The split between the Ninth and Second circuits focuses on only two of the INA’s numerous detention provisions – § 1226(a) and § 1231(a).⁷⁵

§ 1231(a) applies when a noncitizen is ordered removed from the United States.⁷⁶ Under § 1231(a), a noncitizen ordered removed from the United States must be removed within a ninety-day period.⁷⁷ This ninety-day period is referred to as the noncitizen’s “removal period.”⁷⁸ During the removal period, the noncitizen must be detained, making § 1231(a) one of the INA’s

⁷⁰ Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 165 (2016).

⁷¹ *Id.* The INA detention provision that governs in a noncitizen’s case is important because the noncitizen may be subject to one of the INA’s mandatory detention provisions. *See id.* (discussing the impact a mandatory detention provision can have on the DHS’s custody determination process). If, based on the noncitizen’s history, he or she qualifies for detention under one of the INA’s mandatory detention provisions, DHS does not have discretion to decide whether he or she will be detained because the provision would require the DHS to detain that noncitizen. *Id.*

⁷² *See* 8 U.S.C. § 1226a.

⁷³ *See* § 1222(a).

⁷⁴ *See* § 1226(c).

⁷⁵ 862 F.3d at 883–84; 831 F.3d at 61.

⁷⁶ *See* § 1231(a) (“Detention, release, and removal of [noncitizens] **ordered removed**”) (emphasis added).

⁷⁷ § 1231(a)(1)(A).

⁷⁸ *See* § 1231(a)(1)(B) (“The **removal period** begins on the latest of the following”) (emphasis added); *see also* Padilla-Ramirez, 862 F.3d at 884 (referring to the ninety-day period as a “removal period”).

mandatory detention provisions.⁷⁹ When the removal period concludes, the government has discretion to continue detaining the noncitizen pursuant to § 1231(a)(6).⁸⁰ § 1226(a), on the other hand, does not require that noncitizens subject to its provisions be mandatorily detained.⁸¹ Instead, § 1226(a) provides the government with discretion in determining whether a noncitizen should be detained.⁸² Thus, the government may elect to release a noncitizen subject to § 1226(a)'s provision on bond.⁸³

For a noncitizen facing detention, being detained pursuant to § 1226(a), as opposed to § 1231(a), is more appealing because of the availability of bond hearings.⁸⁴ If a noncitizen is going to be detained, he or she will be held at a detention facility.⁸⁵ The problem detention poses for noncitizens is that immigration detention facilities tend to have subpar conditions, and at times are compared to criminal detention facilities.⁸⁶ Moreover, immigration proceedings generally tend to be prolonged, and withholding-only proceedings are no exception.⁸⁷ As of January 1st 2015, withholding-only proceedings where an immigration judge made a decision

⁷⁹ § 1231(a)(2) (“During the removal period, the Attorney General shall detain the alien”). See Padilla-Ramirez, 862 F.3d at 884 (stating that 8 U.S.C. § 1231(a)(2) provides for “mandatory detention during . . . [the] ninety-day ‘removal period’”).

⁸⁰ § 1231(a)(6).

⁸¹ Padilla-Ramirez, 862 F.3d at 883.

⁸² § 1226(a) (“a[] [noncitizen] **may** be arrested and detained pending a decision on whether [he or she] is to be removed from the United States”) (emphasis added)

⁸³ § 1226(a)(2)(A).

⁸⁴ Padilla-Ramirez, 862 F.3d at 883.

⁸⁵ U.S. Gov’t Accountability Office, Rep. No. GAO-15-26, Alternatives to Detention 1, 1 n. 1 (2014) (stating that, at the end of 2013, ICE reported that 36,379 noncitizens were detained at detention facilities around the nation).

⁸⁶ Lara Domínguez et al., *U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis*, YALE L. SCH. 1, 3 (June 20, 2016),

https://law.yale.edu/system/files/area/center/schell/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf. (“The majority of these [immigrant detention] facilities have conditions similar to those used in prisons . . . in the United States”); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Detention*, 65 HASTINGS L.J. 363, 367 (2014) (noting how immigrants have been detained in “unduly restrictive, corrections-like conditions, isolated from their families and communities, with inadequate access to law libraries and other services, and often intermingled with criminal inmates”).

⁸⁷ Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 160 (2016); David Hausman, *Fact Sheet: Withholding-Only Cases and Detention*, AM. CIV. LIBERTIES UNION 1, 2 (Apr. 19, 2015), https://www.aclu.org/sites/default/files/field_document/withholding_only_fact_sheet_-_final.pdf.

that no party appealed lasted an average of 114 days.⁸⁸ The average proceeding increased to a total of 301 days where either party appealed to the Board of Immigration Appeals (“BIA”) and increased to 447 days where the BIA remanded to the immigration judge to render a final decision.⁸⁹ Thus, a noncitizen subject to a reinstated removal order faces the prospect of being detained for a long period of time in subpar conditions while his or her proceedings are ongoing. Therefore, it comes as no surprise that noncitizens subject to such proceedings do apply for bond hearings to avoid detention altogether.⁹⁰ The bond hearings, however, will not be available for noncitizens subject to mandatory detention under § 1231(a).⁹¹ For this reason, the Ninth and Second Circuits’ decisions regarding which detention provision applies to noncitizens during withholding-only proceedings has great implications for numerous noncitizens.

II. Part II: The Circuit Split Regarding the Administrative Finality of Reinstated Removal Orders During Withholding-Only Proceedings

Part II(A): The Argument Against Administrative Finality

In 2016, the Second Circuit, in *Guerra v. Shanahan*, became the first appellate court to issue an opinion on whether a noncitizen subject to a reinstated removal order should be mandatorily detained.⁹² In *Guerra*, the petitioner was a Guatemalan citizen who illegally entered the United States in 1998 and was ordered removed later that year.⁹³ He was officially removed from the country in 2009.⁹⁴ Thereafter, Guerra reentered the country illegally and was detained

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See e.g. *Padilla-Ramirez v. Bible*, 862 F.3d 881, 882 (9th Cir. 2017); *Guerra v. Shanahan*, 831 F.3d 59, 61 (2d Cir. 2016); *Guerrero v. Aviles*, 2014 U.S. Dist. LEXIS 154223 (D.N.J. 2014).

⁹¹ See *Padilla-Ramirez*, 862 F.3d at 884 (explaining how bond hearings available under 8 U.S.C. § 1226(a) are not available under 8 U.S.C. § 1231(a), a mandatory detention provision).

⁹² 831 F.3d 59.

⁹³ *Id.* at 60.

⁹⁴ *Id.*

by the Immigration and Customs Enforcement (“ICE) in 2014.⁹⁵ After he was arrested, Guerra’s 1998 order removing him to Guatemala was reinstated pursuant to 8 U.S.C. § 1231(a)(5).⁹⁶

Upon apprehension, Guerra asserted that he feared returning to Guatemala.⁹⁷ An asylum officer concluded that his fear was reasonable, and Guerra was placed in withholding-only proceedings where he applied for statutory withholding of removal pursuant to § 1231(b)(3) and relief under the CAT.⁹⁸ Since Guerra was detained throughout his proceedings, he sought a writ of habeas corpus, arguing that he was detained under § 1226(a).⁹⁹ In response, the government argued that Guerra’s detention was governed by § 1231(a).¹⁰⁰ The court first noted how noncitizens subject to reinstated removal orders generally cannot apply for any relief under the INA.¹⁰¹ The court then pointed to an exception to this rule; namely that the noncitizen may apply for withholding of removal and/or relief under the CAT if he or she has a reasonable fear of persecution or torture in the country listed in his or her removal order.¹⁰²

The Second Circuit began its analysis by comparing §§ 1226(a) and 1231(a), noting how §1226(a) governs when a decision is being made as to whether a noncitizen will be removed from the United States.¹⁰³ The court then stated that §1226(a) gives the government discretion in electing to detain a noncitizen and also allows a noncitizen to request a bond hearing if the government detains him or her.¹⁰⁴ The Second Circuit then discussed § 1231(a) and noted how its provisions apply to aliens subject to final removal orders.¹⁰⁵ Therefore, the Second Circuit

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Guerra, 831 F.3d at 61

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 61–62.

¹⁰² *Id.*

¹⁰³ *Id.* at 62.

¹⁰⁴ Guerra, 831 F.3d at 62. (citing 8 C.F.R. § 1236.1(d)(1)).

¹⁰⁵ *Id.*

opined, § 1231(a)'s provisions can apply only if the reinstated removal order is “administratively final.”¹⁰⁶ Thus, the Second Circuit considered whether a reinstated removal order is administratively final when a noncitizen is subject to withholding-only proceedings.¹⁰⁷

The court first held that, based on § 1226(a)'s text, its provisions apply to noncitizens involved in withholding-only proceedings.¹⁰⁸ The court's reasoning, however, was brief, as it simply concluded that § 1226(a) applies because withholding-only proceedings solely purport to determine whether “the [noncitizen] is to be removed from the United States.”¹⁰⁹ The court did, however, find additional support for its holding through its analysis of the structures of both § 1226(a) and § 1231(a).¹¹⁰ The court also found support for its conclusion by analyzing its precedent.¹¹¹ The court first pointed to its decision in *Kanacevic v. INS*, where it held that denying a noncitizen asylum in asylum-only proceedings “is judicially reviewable” even if no final removal order is issued.¹¹² The court's rationale behind its decision in *Kanacevic* was that denying a noncitizen asylum is “the functional equivalent of a removal order.”¹¹³ Thus, by relying on this decision in the context of withholding-only proceedings, the Second Circuit suggested that denying a noncitizen “withholding in withholding-only proceedings is likewise the ‘functional equivalent’ of a final removal order.”¹¹⁴ The court then pointed to its decision in

¹⁰⁶ *Id.* (citing 8 U.S.C. §§ 1231(a)(1)–(2)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 62.

¹⁰⁹ *Id.* (quoting 8 U.S.C. § 1226(a)).

¹¹⁰ *Guerra*, 831 F.3d at 62–63 (the court concluded that § 1226(a) was primarily concerned with providing the rules governing the detention of aliens “whose removal proceedings are ongoing” while § 1231(a) simply purported to establish a 90-day removal period where the “Attorney General ‘shall remove the alien’”).

¹¹¹ *Id.* at 63.

¹¹² *Id.* (citing 448 F.3d 129, 133–35 (2d Cir. 2006)).

¹¹³ *Kanacevic*, 448 F.3d at 134–35. During the asylum-only proceedings, the noncitizen is waiving his right to pursue other forms of relief. *See Padilla-Ramirez v. Bible*, 862 F.3d 881, 889 (2d Cir. 2006) (explaining how *Kanacevic* was decided in the context of asylum-only proceedings, where the noncitizen “waiv[es] his right to challenge removal except by applying for asylum”). Thus, a denial of asylum in these proceedings will result in the noncitizen's removal from the country. *See Kanacevic*, 448 F.3d at 134–35.

¹¹⁴ *Padilla-Ramirez*, 862 F.3d at 889.

Chupina v. Holder, where it held that a removal order cannot be final if the BIA remands a noncitizen’s case back to an immigration judge to determine his or her withholding-only claims, suggesting that withholding-only proceedings disrupt a removal order’s finality.¹¹⁵

The government sought to distinguish the precedent the Second Circuit relied on in reaching its decision by arguing that finality for purposes of § 1231(a) detention is different from finality for purposes of judicial review.¹¹⁶ The court concluded its analysis by rejecting this argument due to a lack of precedent supporting it and because the argument conflicted with the notion that, for an agency’s action to be administratively final, there must be no future decisions to be made by that agency.¹¹⁷

When ruling in Guerra’s favor, the Second Circuit focused primarily on whether withholding-only proceedings involved a decision to remove an alien from the United States.¹¹⁸ The Second Circuit also opined that a reinstated removal order cannot be final removal order during withholding-only proceedings because the “consummation of the agency’s decision-making process” has not yet occurred.¹¹⁹ The District Court of New Jersey’s decision in *Guerrero v. Aviles* offers further support for the conclusion that reinstated removal orders are not administratively final during withholding-only proceedings.¹²⁰ *Guerrero* involved Nery Flores Guerrero, a Honduran citizen who was removed to Honduras after an immigration judge ordered him removed in 1999.¹²¹ After re-entering the country illegally, Guerrero was detained in 2014,

¹¹⁵ *Id.* (citing 570 F.3d 99, 103 (2d Cir. 2009)).

¹¹⁶ *Id.* at 63.

¹¹⁷ Guerra, 831 F.3d at 63 (quoting U.S. Army Cops of Eng’rs v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016)). In this case, the future decision to be made was whether Guerra would be granted withholding of removal or relief under the CAT.

¹¹⁸ *Id.* at 62.

¹¹⁹ *Id.* at 63 (quoting Hawkes Co., 136 S. Ct. at 1813).

¹²⁰ 2014 U.S. Dist. LEXIS 154223. 25 (D.N.J. 2014) (concluding that detention without a bond hearing during withholding-only proceedings is impermissible).

¹²¹ *Id.* at *3–4.

was later found to have expressed a reasonable fear of returning to Honduras, and was subsequently scheduled for a November 2014 withholding of removal proceeding.¹²² Thus, the District Court, like the Second Circuit, considered whether Guerrero’s reinstated removal order was administratively final.¹²³

The *Guerrero* Court first analyzed the statutory language of 8 U.S.C. § 1101(a)(47)(B), which provides a definition on the finality of removal orders.¹²⁴ The statutory text provides that “removal orders become final upon the earlier of . . . (i) a determination by the [BIA] affirming such order; or (ii) the expiration of the period in which the [noncitizen] is permitted to seek review of such order by the [BIA].”¹²⁵ Based on this definition, the *Guerrero* Court concluded that Guerrero’s reinstated removal order cannot be administratively final.¹²⁶

The court first noted that, once the immigration judge issued his or her decision regarding Guerrero’s withholding-only proceedings, Guerrero had the right to appeal the decision to the BIA.¹²⁷ The court then concluded that, because § 1101(a)(47)(B)(ii) provides that a removal order is final upon “the expiration of the period in which the [noncitizen] is permitted to seek review” of the BIA’s order, the reinstated removal order could not be final since the BIA could still review the immigration judge’s decision.¹²⁸ The court then expressed constitutional

¹²² *Id.* at *4.

¹²³ *Id.* at *5.

¹²⁴ *Id.* at *9. By relying on this definition, the District Court is suggesting that a decision to remove a noncitizen cannot be final if the noncitizen can appeal a removal order to the BIA, since the BIA can overturn such a decision. *Id.* at *12.

¹²⁵ 8 U.S.C. § 1101(a)(47)(B).

¹²⁶ *Guerrero*, 2014 U.S. Dist. LEXIS 154223 at *11–12.

¹²⁷ *Id.* at *12.

¹²⁸ *Id.*

concerns about ruling against *Guerrero* since doing so would prevent him from exercising his right to have the BIA review the immigration judge’s decision.¹²⁹

The government, in *Guerrero*, argued that the order was administratively final because § 1231(a)(5) specifically provides that the noncitizen subject to such an order may not receive “any relief under this chapter.”¹³⁰ The court, however, responded to this argument by pointing to the Supreme Court’s decision in *Fernandez-Vargas v. Gonzales*, which held that withholding-only proceedings are exceptions to the bar to a noncitizen’s ability to seek relief.¹³¹ The government then argued that the reinstated removal order is administratively final since withholding-only proceedings are limited only to deciding whether a noncitizen should be removed to the country listed on the reinstated removal order.¹³² The court also rejected this argument, pointing again to the fact that the order cannot be administratively final when the noncitizen has the right to appeal the immigration judge’s decision to the BIA.¹³³ The court then acknowledged Supreme Court precedent, and precedent from other circuits, supporting its conclusion that the order was not final.¹³⁴

¹²⁹ *Id.* at 12–13 (quoting *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012) (holding that a court’s denial of a petitioner’s right to seek judicial review of a judge’s decision during withholding-only proceedings “raise[s] serious constitutional concerns”).

¹³⁰ *Id.* at *15 (quoting 8 U.S.C. § 1231(a)(5)).

¹³¹ *Id.* at *15–16. (first quoting 548 U.S. 30, 35 n.4 (2006) (citing § 1231(a)(5); then citing 8 C.F.R. § 1231(b)(3)(A); then citing 8 C.F.R. § 241.8(e); then citing 8 C.F.R. § 208.31(e)).

¹³² *Guerrero*, 2014 U.S. Dist. LEXIS 154223 at * 16–17.

¹³³ *Id.* at *17. (first citing § 241.8(e); then citing § 208.31(e); then citing 8 U.S.C. § 1252).

¹³⁴ *Id.* at * 18 –24 (first citing *Immigration & Naturalization Service v. Chadha*, 462 US 919 (1983) (holding that “final orders of deportation” “includes all matters on which the validity of the final order is contingent”); then citing *Foti v. Immigration and Naturalization Service*, 375 US 217 (1963) (holding that “final orders of deportation” include the Attorney General’s suspension of deportation because all determinations made during and incident to the proceeding, which are reviewable by the BIA, are included in an appellate court’s review of an order); then citing *Mebuin v. AG*, 570 Fed. Appx. 161 (3d. Cir. 2014) (holding that subsequent administrative proceedings affect finality, limiting or eliminating the jurisdiction of the reviewing appellate court even where the issue before the II is limited to withholding of removal (citing *Chupina v. Holder*, 570 F.3d99, 103 (2d. Cir. 2009))); then citing *Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012) (“where an alien pursues reasonable fear and withholding of removal proceedings following the reinstatement of a prior removal order, the reinstated removal order doesn’t become final until the withholding proceedings are complete”).

Part II(B): The Argument For Administrative Finality

The cases that have analyzed the issue thus far have offered various reasons as to why the orders are not administratively final, with the two primary reasons being that withholding-only proceedings solely involve decisions concerning a noncitizen's removal from the country and that the INA's definition of finality dictates that the orders are not administratively final.¹³⁵ Despite the courts' reasoning, the Ninth Circuit, in *Padilla-Ramirez v. Bible*, rendered a decision holding otherwise.¹³⁶ In *Padilla-Ramirez*, a previously removed noncitizen was found to have had a reasonable fear of returning to El Salvador after he was detained for reentering the country illegally.¹³⁷ Like the previously mentioned petitioners, Padilla was subject to a reinstated removal order and was challenging his detention after he was granted the opportunity to pursue relief through withholding-only proceedings.¹³⁸

At the outset of its analysis, the court noted that during the withholding-only proceedings, there is no judicial review of the reinstated removal order itself – thus, the status of that original removal order is not subject to change.¹³⁹ The court then analyzed the text of § 1231(a)(5), which, according to the court, “indicate[d], in two ways, that a reinstated removal order is administratively final.”¹⁴⁰ First, the court highlighted the fact that removal orders are final upon their initial execution.¹⁴¹ Thus, when an original removal order is executed, as it was in Padilla's case when he was first removed, that order becomes final.¹⁴² The court reasoned that, if a final

¹³⁵ See *Guerra v. Shanahan*, 831 F.3d 59, 62 (2d. Cir. 2016); *Guerrero*, 2014 U.S. Dist. LEXIS 154223 at *12.

¹³⁶ See 862 F.3d 881 (9th Cir. 2017).

¹³⁷ *Id.* at 883.

¹³⁸ *Id.*

¹³⁹ *Id.* at 884 (first quoting 8 U.S.C. § 1231(a)(1)(B)(ii); then citing *Diouf v. Mukasey*, 542 F.3d 1222, 1230 (9th Cir. 2008)).

¹⁴⁰ *Id.* at 885.

¹⁴¹ *Id.*

¹⁴² *Padilla-Ramirez*, 862 F.3d at 885.

removal order is reinstated, and the status of that order cannot change, as is required by § 1231(a)(5), then the reinstated removal order must also be final.¹⁴³

Additionally, the court noted that § 1231(a)(5) is placed among the INA's provisions regarding mandatory detention of noncitizens, namely, § 1231(a).¹⁴⁴ Thus, the court concluded that Congress must have intended for detention of noncitizens subject to reinstated removal orders to be governed by § 1231(a)'s provisions.¹⁴⁵ The court also concluded that a noncitizen's ability to avoid removal through withholding-only proceedings do not affect its conclusion that the reinstated removal order itself is administratively final.¹⁴⁶

The court then distinguished its prior precedent where it held that the reinstated removal orders were not final during withholding-only proceedings.¹⁴⁷ In *Ortiz-Alfaro v. Holder*, a noncitizen challenged a regulation preventing him from applying for asylum during his withholding-only proceedings.¹⁴⁸ While the *Ortiz-Alfaro* court held that the reinstated removal order was not final during the proceedings, the *Padilla-Ramirez* court noted that *Ortiz-Alfaro* is distinguishable.¹⁴⁹ In *Ayala v. Sessions*, an asylum officer found that a noncitizen did not have a reasonable fear of returning to Guatemala, which an immigration judge affirmed.¹⁵⁰ The immigration judge then denied that noncitizen's motion to reconsider that decision, which was a

¹⁴³ *Id.* at 885.

¹⁴⁴ *Id.* (citing 8 U.S.C. §§ 1231(a)(2)–(3), (6)).

¹⁴⁵ *Id.* (citing 8 U.S.C. §§ 1231(a)(2)–(3), (6)).

¹⁴⁶ *Id.* at 885–86.

¹⁴⁷ *Id.* at 887–88.

¹⁴⁸ 694 F.3d 955, 956 (9th Cir. 2012).

¹⁴⁹ *Padilla-Ramirez*, 862 F.3d at 887. The Court specifically noted that the noncitizen in *Ortiz-Alfaro* challenged the regulation while his withholding-only proceedings were ongoing. *Id.* The Court then acknowledged how, in *Ortiz-Alfaro*, it acknowledged that there were good reasons to hold that the reinstated removal order was final, but it did not do so based “on the canon of constitutional avoidance.” *Id.* Specifically, the Court held that order was not final because holding otherwise would have precluded the noncitizen from “petition[ing] for review of any [immigration judge] decisions [during his withholding-only proceedings] denying him relief or finding that he does not have a reasonable fear.” *Id.* (quoting *Ortiz-Alfaro*, 694 F.3d at 958).

¹⁵⁰ 855 F.3d 1012, 1016 (9th Cir. 2017).

final order unless appealed to the BIA within thirty days.¹⁵¹ The noncitizen filed an appeal within the thirty day timeframe, but the BIA held that it could not consider her appeal because it lacked jurisdiction.¹⁵² The noncitizen then filed a petition for review with the Ninth Circuit.¹⁵³ The *Padilla-Ramirez* court, however, distinguished its decision in *Ayala* on the basis that, like in *Ortiz-Alfaro*, its decision rested on the canon of constitutional avoidance.¹⁵⁴

The Court concluded its analysis by critiquing the Second Circuit’s analysis of this issue in *Guerra v. Shanahan*.¹⁵⁵ The Court first opined that the Second Circuit was incorrect in concluding that 8 U.S.C. § 1226 (a) applies because withholding-only proceedings only involve a decision of what country a noncitizen will be removed to.¹⁵⁶ The Court noted that the decision to remove the noncitizen was already made, and the only decision being made during withholding-only proceedings is what country he or she will be removed to.¹⁵⁷ The court then critiqued the Second Circuit’s reliance on *Kanacevic v. INS*.¹⁵⁸ Specifically, the court noted how asylum-only proceedings and withholding-only proceedings are different, and thus, relying on precedent regarding asylum-only proceedings was inappropriate.¹⁵⁹ The court also critiqued the Second

¹⁵¹ *Id.* at 1017.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Padilla-Ramirez* 862 F.3d at 888. The *Ayala* court needed to determine which order was final for purposes of judicial review – the immigration judge’s denial of the noncitizen’s motion to reconsider or the BIA’s denial of noncitizen’s appeal. *Ayala*, 855 F.3d at 1017. The *Ayala* court concluded that the BIA’s decision was final, noting that removal orders are final only when all administrative proceedings are complete. *Id.* at 1019. The *Padilla-Ramirez* court noted that the decision in *Ayala* is distinguishable because had it held otherwise, the noncitizen, like the noncitizen in *Ortiz-Alfaro*, would have lost her ability to obtain review of the immigration judge’s original decision – i.e., the denial of the noncitizen’s motion to reconsider. *Padilla-Ramirez*, 862 F.3d at 888.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 886 (citing 8 U.S.C. § 1226(a)).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 888.

¹⁵⁹ *Id.* The court noted how in asylum-only proceedings, the denial of asylum is the removal order itself. *Id.* In withholding-only proceedings, however, a denial of withholding is not the equivalent of a removal order because there already is a final removal order, which cannot be affected. *Id.* Thus, the Second Circuit was incorrect in implying that “the denial of withholding in withholding-only proceedings is . . . the ‘functional equivalent’ of a final removal order.”

Circuit’s reliance on *Chupina v. Holder*.¹⁶⁰ The Court noted how *Chupina* “stands . . . for the . . . proposition that a removal order does not become final . . . until all of an alien’s claims for relief made during his original removal proceedings are resolved.”¹⁶¹ The court opined that this proposition does not provide an answer for how a noncitizen’s new claim of relief, i.e. a claim for relief through statutory withholding of removal or CAT, affects a final removal order that has been reinstated and “immunized from reopening or review.”¹⁶² The Court also noted, as was mentioned before, that the differences between finality for purposes of detention and judicial review did not warrant the Second Circuit’s reliance on *Chupina* in reaching its decision.¹⁶³ The court’s last critique was that the Second Circuit inappropriately relied on administrative law principles when it held that the orders cannot be final since agency’s actions are final only when no agency decisions are left to be made.¹⁶⁴ The court stressed that the Second Circuit incorrectly applied this principle because a final decision has already been made that the petitioner was to be removed from the country.¹⁶⁵

Part III: The Supreme Court Should Adopt the Second Circuit’s Reasoning as it is Better Aligned With Congress’s Intent to Protect Noncitizens Escaping Dangerous Conditions

The Ninth Circuit’s decision in *Padilla-Ramirez* created a circuit split between the Ninth and Second Circuits regarding the detention of noncitizens subject to reinstated removal orders during withholding-only proceedings.¹⁶⁶ Due to the split, whether or not a noncitizen subject to a reinstated removal order will be detained during withholding-only proceedings largely depends

¹⁶⁰ *Padilla-Ramirez*, 862 F.3d at 889.

¹⁶¹ *Id.* (quoting *Chupina v. Holder*, 590 F.3d 99, 103 (2d. Cir. 2009))

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 890 (citing *Guerra v. Shanahan*, 831 F.3d 59, 63 (2d. Cir. 2016)).

¹⁶⁵ *Id.*

¹⁶⁶ *See Padilla-Ramirez*, 862 F.3d at 890 (recognizing that this decision resulted in the Ninth Circuit’s splitting from the Second Circuit as to the detention of aliens under these circumstances).

on which jurisdiction he or she is in.¹⁶⁷ In the event that the Supreme Court were to hold that the Ninth Circuit erred in its holding, it would become clear that many noncitizens suffered injustice by being detained when, legally, detention was not required. Thus, to avoid such injustice, the Supreme Court should resolve the current split sooner rather than later, especially when one considers the large number of noncitizens entering the country illegally each year who could potentially become subject to the Ninth Circuit's erroneous holding.¹⁶⁸ In Part III of this comment, I will argue that the Supreme Court should adopt the Second Circuit's reasoning and conclude that detention of aliens subject to reinstated removal orders is mandatory during withholding-only proceedings.

First, it must be noted that the Supreme Court's decision would certainly be a difficult one, as the Ninth Circuit's decision does have support. The crux of the Ninth Circuit's holding is that reinstated removal orders are final during withholding-only proceedings because immigration judges are only deciding which country a noncitizen will be removed to during the proceedings.¹⁶⁹ The Ninth Circuit correctly notes that the primary issue during withholding-only proceedings is whether the United States should remove the noncitizen to the country listed in his or her removal order, as can be seen with his or her burden of proof in the proceedings.¹⁷⁰ Moreover, the possibility that a noncitizen can be removed to a third country if his or her fear in

¹⁶⁷ For examples of cases following *Padilla-Ramirez* due to the court's location within the Ninth Circuit, see *Villalta v. Sessions*, 2017 U.S. Dist. LEXIS 162981 (N.D. Cal. 2017) (following *Padilla-Ramirez*, 862 F.3d 881) and *Baños v. Asher*, 2017 U.S. Dist. LEXIS 145924 (W.D. Wash. 2017) (same). For an example of a case following *Guerra* due to the court's location within the Second Circuit, see *Enoh v. Sessions*, 236 F. Supp. 3d 787 (W.D.N.Y. 2017) (following *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016)).

¹⁶⁸ See Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 159 (2016)

¹⁶⁹ *Padilla-Ramirez*, 862 F.3d at 886.

¹⁷⁰ Regulations make clear that the burden during withholding-only proceedings is upon the applicant to solely establish that he or she fears being removed to the "proposed country of removal." See 8 C.F.R. §§ 1208.16 (b) (describing noncitizen's burden of proof when applying for statutory withholding of removal), 1208.16(c)(2) (describing noncitizen's burden of proof when applying for relief under the CAT).

the proposed country is reasonable lends further support to the fact that withholding-only proceedings are concerned with which country the noncitizen will be removed to and not with whether the noncitizen can remain in the United States.¹⁷¹ The Ninth Circuit's conclusion also has support in § 1231(a)(5)'s text, which provides that the noncitizen's prior removal order is not subject to review.¹⁷² Thus, if the previous order cannot be subsequently changed, the Ninth Circuit's conclusion that it retains its finality is logical.¹⁷³

From a practical standpoint, however, the Ninth Circuit's conclusion that the reinstated removal order remains final during withholding-only proceedings is false. The effect of the prior removal order is that the noncitizen must be removed to the country listed in that order.¹⁷⁴ Thus, for withholding-only proceedings to not disturb the finality of the order, it must be that the proceedings cannot impact the noncitizen's country of removal. Withholding-only proceedings, however, do alter the country of removal, albeit not often.¹⁷⁵ For example, if a noncitizen is granted relief through withholding-only proceedings, he or she may either remain in the United States or be removed to a third country.¹⁷⁶ In either case, the prior removal order's finality was affected because previously designated country of removal is no longer the country where the noncitizen ultimately remains. Thus, the Ninth Circuit's reasoning that the underlying removal order cannot be altered is flawed from a practical standpoint.¹⁷⁷

¹⁷¹ § 1208.16 (f).

¹⁷² See 8 U.S.C. § 1231(a)(5).

¹⁷³ Padilla-Ramirez, 862 F.3d at 885.

¹⁷⁴ See § 1231(a)(5) (providing that a reentering noncitizen "shall be removed under the prior order at any time after the reentry.")

¹⁷⁵ See David Hausman, *Fact Sheet: Withholding-Only Cases and Detention*, AM. CIV. LIBERTIES UNION 1, 2 (Apr. 19, 2015), https://www.aclu.org/sites/default/files/field_document/withholding_only_fact_sheet_-_final.pdf (providing statistics on the outcomes of withholding-only proceedings in the United States and establishing the frequency in which the noncitizen receives relief through the proceedings).

¹⁷⁶ See *Id.* at 1 – 2 (stating that, in "25.4% of the 5,481" withholding-only cases where a decision is reached, "the respondent obtained the right to remain within the United States"); 8 C.F.R. § 1208.16(f) (providing that the noncitizen may be removed to a third country)

¹⁷⁷ Padilla-Ramirez, 862 F.3d at 886.

Despite this flaw in the Ninth Circuit’s reasoning, the Supreme Court should ultimately adopt the Second Circuit’s reasoning in *Guerra* because it is better aligned with Congress’s intent to protect noncitizens escaping dangerous conditions in their home countries. After World War II concluded, the world bore witness to a “plight of refugees” seeking to escape dangerous conditions in their home countries.¹⁷⁸ Countries all over the world sought to address the large numbers of people seeking residence in new nations, which led to the Convention’s adoption in 1951, which the United States assisted in drafting.¹⁷⁹ The Convention was eventually amended by the Protocol, which largely adopted the Convention’s provisions, while at the same time expanding the range of individuals who can seek relief under the treaty.¹⁸⁰ When the United States became bound by the Protocol in 1968 and later amended its immigration laws through the Refugee Act of 1980, the country became barred from removing noncitizens to countries where they fear for their lives.¹⁸¹ The United States became further involved in efforts to assist noncitizens escaping dangerous conditions in their home countries when it became bound by the CAT in 1994.¹⁸²

The United States’s international law obligations, as well as its reforms to its immigration laws, reflect its intent to assist those who enter the United States looking to escape dangerous

¹⁷⁸ See REGINA GERMAIN, *ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* 24 (Am. Immigration Lawyers Ass’n 6th ed. 2010) (explaining how the Immigration and Nationality Act forms the foundation of American Immigration Law).

¹⁷⁹ *Id.*; Lara Domínguez et al., *U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis*, YALE L. SCH. 1, 1–2 (June 20, 2016), https://law.yale.edu/system/files/area/center/schell/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf.

¹⁸⁰ Germain, *supra* note 178 at 24.

¹⁸¹ *Id.* Specifically, the United States became barred from removing refugees, which is defined under 8 U.S.C. § 1101(a)(42) as “any person [outside his or her country of nationality] . . . who is unable or unwilling to return to [that country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion,” to countries where they would be persecuted. See 8 U.S.C. § 1231(b)(3)(A) (providing that the “[a]ttorney General may not remove a[noncitizen] to a country if the Attorney General decides that the [noncitizen’s] life or freedom would be threatened in that country because of the [his or her] race, religion, nationality, membership in a particular social group, or political opinion”).

¹⁸² Germain, *supra* note 178 at 8.

conditions in their countries. Therefore, the Ninth Circuit’s conclusion that noncitizens subject to reinstated removal orders are subject to mandatory detention during withholding-only proceedings runs counter to this intent.¹⁸³ First, as scholars have noted, the United States’s detention facilities have subpar conditions, usually resembling those found in prisons.¹⁸⁴ Moreover, scholars have also noted that detaining noncitizens directly counters the Convention’s requirement that its participating nations do not penalize asylum seekers for entering the country illegally.¹⁸⁵ Thus, the Ninth Circuit’s conclusion that noncitizens are subject to mandatory detention runs counter to Congress’s intent in two aspects. First, subjecting noncitizens who seek refuge to mandatory detention in such facilities, and therefore treating them as prisoners, cannot be squared with Congress’s intent to protect the noncitizens. In fact, subjecting them to mandatory detention for attempting to find refuge closely resembles a penalty for the refugee’s “unauthorized entry” into the United States, which is barred by the Convention.¹⁸⁶ Therefore, the Ninth Circuit’s holding runs counter to Congress’s intent to protect refugees because it results in noncitizens being treated as prisoners for seeking refuge, which in turn penalizes them for seeking refuge in the United States.¹⁸⁷

The Second Circuit’s conclusion is also supported by Supreme Court precedent. In 2001, the Supreme Court decided *Zadvydas v. Davis*, which concerned the prolonged detention of noncitizens past the expiration of 8 U.S.C. § 1231(a)’s removal period.¹⁸⁸ While the decision

¹⁸³ *Padilla-Ramirez v. Bible*, 862 F.3d 881, 886 (9th Cir. 2017).

¹⁸⁴ Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Detention*, 65 HASTINGS L.J. 363, 367 (2014) (commenting on the subpar conditions found in immigration detention facilities across the United States).

¹⁸⁵ Lara Domínguez et al., *U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis*, YALE L. SCH. 1, 11–12, 14 (June 20, 2016), https://law.yale.edu/system/files/area/center/schell/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*; Anello, *supra* note 184 at 367.

¹⁸⁸ 533 U.S. 678 (2001).

was rendered in a different context, the Supreme Court’s reasoning offers insight as to how the Court would likely resolve the circuit split. *Zadvydas* involved the petitions of two noncitizens subject to mandatory detention due to their criminal records.¹⁸⁹ After they were detained and placed in removal proceedings, both noncitizens were ordered removed from the United States.¹⁹⁰ Issues regarding their removal arose, however, when there was a lack of any countries willing to accept either alien.¹⁹¹ The difficulty in locating a country of removal led to their prolonged detention, prompting them to challenge their detention before the Supreme Court.¹⁹² While the INA does allow for criminal noncitizens to be detained beyond the ninety day removal period provided for in 8 U.S.C. § 1231(a), the Court noted that the noncitizens cannot be detained forever.¹⁹³ After considering numerous factors, including the statute’s text, its legislative history and the requirements of similar statutes, the Court ultimately held that the detention of the noncitizens beyond the expiration of this removal period could only be for a period that is “reasonably necessary to bring about [his or her] removal from the United States.”¹⁹⁴ The Court thereafter considered how long a noncitizen’s detention beyond the expiration of the removal period should be, and ultimately determined that six months was a reasonable detention period.¹⁹⁵ In setting this time period, the Court emphasized that the reasonableness of the “post removal period detention” was contingent upon whether the noncitizen’s removal from the United States was “reasonably foreseeable.”¹⁹⁶

¹⁸⁹ *Id.* at 683–85 (citing 8 U.S.C. § 1231(A)(6) (governing detention of aliens who committed prior crimes)).

¹⁹⁰ *Id.* at 684–86.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ 8 U.S.C. §§ 1231(a)(1)(a), (a)(6); *Id.* at 690 (quoting U.S. CONST. amend. V).

¹⁹⁴ *Zadvydas*, 533 U.S. at 682.

¹⁹⁵ *Id.* at 700–01.

¹⁹⁶ *Id.* at 699–701.

In *Zadvydas*, the Court expressed its concern with the possibility that noncitizens subject to mandatory detention could be detained for prolonged periods of time.¹⁹⁷ This concern, of course, is what prompted the Court to conclude that detention is permissible so long as a noncitizen’s removal is reasonably foreseeable.¹⁹⁸ The Court’s emphasis on detention being permissible so long as removal is reasonably foreseeable supports the Second Circuit’s conclusion that mandatory detention is impermissible. First, it must be noted that noncitizens will be removed from the country in a majority of withholding-only proceedings.¹⁹⁹ Therefore, it can be argued that, from the outset, the high likelihood of a noncitizen’s removal makes it reasonably foreseeable that he or she will be removed from the United States. This argument, however, fails to consider the length of time of withholding-only proceedings.²⁰⁰ On average, withholding-only proceedings before an immigration last an average of four months.²⁰¹ The average proceeding, however, skyrockets to ten months when a noncitizen appeals an immigration judge’s decision, and can be as high as fifteen months when the BIA remands a decision back to an immigration judge for further proceedings.²⁰² Moreover, it must be noted that these averages reflect the detention period during the pendency of a noncitizen’s withholding-only case.²⁰³ Since the averages do not reflect “the time [noncitizens] spent in detention pending a reasonable fear determination,” the length of detention is usually much longer.²⁰⁴ Thus, if detention is permissible so long as a noncitizen’s removal is “reasonably foreseeable,” mandatory detention cannot be permissible when withholding-only proceedings

¹⁹⁷ *Id.* at 690.

¹⁹⁸ *Id.* at 689.

¹⁹⁹ See David Hausman, *Fact Sheet: Withholding-Only Cases and Detention*, AM. CIV. LIBERTIES UNION 1, 1–2 (Apr. 19, 2015), https://www.aclu.org/sites/default/files/field_document/withholding_only_fact_sheet_-_final.pdf.

²⁰⁰ *Id.* at 2.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

could very likely extend for very long periods of time.²⁰⁵ The Ninth Circuit’s decision to mandatorily detain noncitizens therefore runs counter to the Supreme Court’s holding in *Zadvydas v. Davis* that detention is permissible so long as the noncitizen’s removal is reasonably foreseeable.²⁰⁶ Therefore, the Supreme Court is more likely to adopt the Second Circuit’s holding if it were to reach this issue on appeal.

Conclusion

The current split between the Ninth and Second Circuit will have many negative implications and will impact numerous noncitizens if the Supreme Court does not act soon to resolve it. Currently, a noncitizen subject to a reinstated removal order will be mandatorily detained if a Ninth Circuit court has jurisdiction over his or her case.²⁰⁷ Therefore, the noncitizen will be subject to detention in subpar conditions for a prolonged period of time while his or her withholding-only proceedings are ongoing.²⁰⁸ This, of course, clearly runs counter to Congress’s intent to protect noncitizens seeking refuge and is also inconsistent with the Supreme Court’s decision in *Zadvydas v. Davis*. Thus, the Supreme Court should quickly act to resolve the circuit split and adopt the Second Circuit’s holding. In doing so, the ultimate goal behind withholding-only proceedings, which is to protect noncitizens fearing a return to their countries, will best be served, and the injustice behind mandatory detention of noncitizens will be avoided.²⁰⁹

²⁰⁵ *Zadvydas v. Davis*, 533 U.S. 678, 699–701 (2001).

²⁰⁶ *Id.*

²⁰⁷ *Padilla-Ramirez v. Bible*, 862 F.3d 881, 886 (9th Cir. 2017).

²⁰⁸ David Hausman, *Fact Sheet: Withholding-Only Cases and Detention*, AM. CIV. LIBERTIES UNION 1, 1–2 (Apr. 19, 2015), https://www.aclu.org/sites/default/files/field_document/withholding_only_fact_sheet_-_final.pdf; Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Detention*, 65 HASTINGS L.J. 363, 367 (2014).

²⁰⁹ *See* 8 U.S.C. § 1231(b)(3)(A) (preventing the United States from removing a noncitizen to a country where his or her “life or freedom would be threatened”); REGINA GERMAIN, *ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* 8 (Am. Immigration Lawyers Ass’n 6th ed. 2010) (explaining how, under the CAT,

“[n]o State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture”).