US Supreme Court

Case: Pereira v. Sessions [585 U.S. ___] **Date:** June 21, 2018 **Votes:** 8-1

Opinion: Sotomayor **Concurrence:** J. Kennedy **Dissent(s):** J. Alito

Tags: Immigration, non-immigrant visa, DHS, BIA, INA, *Chevron*, removal, time & place, continuous physical presence, stop-time rule, nonpermanent residents, discretionary relief

Question(s) Presented: Does a notice to appear for a removal hearing that does NOT specify the place and time of the hearing effectively trigger the stop-time rule?

Holdings: No. The notice of removal must have place and time of hearing if it's going to trigger the stop-time rule for continuous physical presence. (BIA & 1st Circuit reversed)

Rationale:

- "The answer is as obvious as it seems: No. A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1129(a)' and therefore does not trigger the stop-time rule. The plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion." (2)

Facts: Pereira entered US on non-imm visa, overstayed 6 years. Issued notice to appear but did not specify date or time. 7 years later, arrested for driving without headlights on & detained by DHS. Sought relief from removal proceedings because he could claim continuous physical presence for at least 10 years, but BIA and then 1st Circuit denied his claim.

History, Prior Appeals & Trial Court Input:

- **June 2000**: non-immigrant visa issued, to expire Dec 2000
- **May 2006:** DUI; DHS served Pereira with notice of removal, no date & time specified
  - Date & time sent to wrong address
- **2007:** Judge ordered him removed in absentia, but he stayed
- **March 2013**: arrested for motor vehicle violation; detained by DHS
  - Filed motion to reopen removal proceedings, sought relief under 8 USC §1229b(b)(1)
- **2013:** BIA held notice to appear (w/o date & time specified) interrupted period of continuous physical presence
- **2017:** 1st Circuit Court of Appeals upheld BIA (*Chevron* deference)

Attorneys' Arguments:

- David Zimmer for petitioner: The statute even says that the "notice to appear" must include time and place information.

- For Gov't:
    - The statute isn't worded like a definition, therefore we're not bound to what it says about what "notice to appear" ought to include.
        - S: nope, it's got "quintessential definitional language"
    - Even if it's a definition, it just defines what a *complete* notice to appear would have.
        - S: nope, that stuff is part of the definition of the thing itself.
    - Congress' use of the word 'under' in the stop-time rule renders the statute ambiguous. (They think it means "authorized by" §1229(a), not "according to" that section and all it contains.)
        - S: Look it up in Black's.
        - S: "Far from generating any 'degree of ambiguity,' . . . the word 'under' provides the glue that bonds the stop-time rule to the substantive time-and-place requirements mandated by" the statute.

Appeals to Statute & Precedent:

- **Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)**
    - **8 USC §1229b(b)(1):** at the AG's discretion, removal proceedings can be cancelled and status adjusted for an alien who is deportable if alien has been physically present in the US for a continuous period of at least 10 years before the application date.
    - **8 USC §1229b(b)(1):** period of continuous presence is deemed to end when alien is served a notice to appear.
    - **8 USC §1229(a)(1)(G)(i):** Describes notice to appear and that it must contain time & place of hearing
    - **8 USC §1229a(b)(5)(A):** removal in absentia if alien fails to appear
    - **8 USC §1229a(b)(5)(C)(ii):** removal in absentia may be rescinded if alien demonstrates failure of service
    - ***Matter of Camarillo* [25 I&N Dec. 644 (2011)]:** BIA addressed whether failure to appear notices trigger stop-time rule even when they don't specify time and date of removal proceedings; concluded that they do because there are no "substantive requirements" of what information those notices must contain.
    - **467 U.S.:** "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." (842f.; IRT *Chevron* deference)
    - ***Taniguchi v. Kan Pacific Saipan, Ltd.,* [566 U.S. 560 (2012)]:** "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." (571; 11)

Relevant History:

- **1997**: AG's regulation—"notice to appear" need only provide time, place, & date of initial removal hearing.
- **Recent years:** Gov't admits that nearly 100% of notices to appear omit the time & date (stating "TBD)

- Actually, all of the rest of the info required by the statute appears on the form because it's standard information; the time and date are the only changeable things.

Dicta:

- "The Court leaves for another day whether a putative notice to appear that omits any of the other categories of information enumerated in **8 USC §1229(a)(1)** triggers the stop-time rule." (8n5)
- "If the three words 'notice to appear' mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens 'notice' of the information, *i.e*., the 'time' and 'place,' that would enable them 'to appear' at the removal hearing in the first place." (12)
- "At bottom, the Government's self-serving position that a notice to appear must specify charging information, but not the time-and-place information, reveals the arbitrariness inherent in its atextual approach to the stop-time rule." (13n7)
- "Straining to inject ambiguity into the statute, the Government and the dissent advance several overlapping arguments. None is persuasive." (13)
- "In the dissent's view, a defective notice to appear is still a 'notice to appear' even if it is incomplete—much like a three-wheeled Chevy is still a car." (14)
- "…the statute makes clear that Congress fully intended to attach substantive significance to the requirement that noncitizens be given notice of at least the time and place of their removal proceedings." (18)
- "Unable to find sure footing in the statutory text, the Government and the dissent pivot away from the plain language and raise a number of practical concerns." (18)
- "In a last ditch effort to salvage its atextual interpretation, the Government invokes the alleged purpose and legislative history of the stop-time rule." (18)

Concurrence: J. Kennedy

- "This separate writing is to note my concern with the way in which the Court's opinion in ***Chevron U.S.A. Inc. v. natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)**, has come to be understood and applied." (20+1)
- "In according *Chevron* deference to the BIA's interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned . . . and whether the BIA's interpretation was reasonable." (+2)
- "This analysis suggests an abdication of the Judiciary's proper role in interpreting federal statutes."
- "The type of reflexive deference exhibited in some of these cases is troubling." (esp. so when the agency is interpreting the scope of its own authority!)

Dissent: J. Alito

- Parallels the gymnastics that the Gov't applied to avoid noticing that the statute spells out what's required in the notice to appear.
- Well dissected by the Court's opinion.
- "…the Court's decision implicates the status of an important, frequently invoked, once celebrated, and now increasingly maligned precedent, namely, *Chevron*…" (23+1)
- "I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*." (23+1)
- "Pereira, on one side, and the Government and the BIA, on the other, have a quasi-metaphysical disagreement about the meaning of the concept of a notice to appear." (23+3)
- He thinks that the document just has that name, but that the name and the statute don't have any bearing on the information the document by definition should contain. (IOW, it's still called "notice to appear" even though it fails to tell you where and when you have to do that.)
- All you need for *Chevron* is a *permissible* interpretation, not necessarily *the best* one.
- The poor Gov't might have to guess at a date and then change it.