US Supreme Court

Case: *Barton v. Barr*, No. 18-725 (US 2020) **Date:** April 23, 2020
Votes: 5-4 in favor of A.G.
Opinion: Kavanaugh (with Alito, Roberts, Thomas, Gorsuch)
Dissent: Sotomayor (with RBG, Breyer, Kagan)

Tags: Immigration, cancellation of removal, inadmissibility, stop-time rule, LPR, removability, CIMT

Question(s) Presented: Must the crime that triggers the stop-time rule be the/a crime that renders an LPR ineligible for cancellation of removal?

Holdings: 11th Circuit decision affirmed.
The crime that triggers the stop-time rule doesn't need to be the/a crime that renders the LPR ineligible for cancellation of removal.

Rationale: The majority reads 8 U.S.C. § 1229b as having the same parameters for noncitizens seeking *admission* as for LPRs hoping to avoid *removal*. Any indication that there's two tracks for these groups of people is, in the majority's view, merely rhetorical redundancy. The statute functions like a recidivist rule, in that the judge may examine prior criminal history in order to decide admissibility.

Facts: Jamaican citizen entered U.S. with mother at age 10 (1989), adjusted status to LPR through stepfather. Convicted of aggravated assault at age 17 (6.5 years after becoming LPR), then firearms & drug possession in early 2000s. Issued NTA in 2016 because of latter two convictions.

Legal History, Prior Appeals & Trial Court Input:

- **2016 IJ:** Stop-time rule was triggered by aggravated assault, which occurred during his first 7 years as LPR. Therefore he is ineligible for cancellation of removal.
- **2017BIA:** Affirmed.
- **2018 11th Circuit:** Affirmed.
- **SCOTUS:** Granted cert because there's a split with 9th Circuit on the QP. Argued 11/4/19.

Attorneys' Arguments:

- **Government:** Per 8 U.S.C. § 1229b, there is no difference in treatment for purposes of the stop-time rule between noncitizens who were *not* admitted and LPRs who *were* admitted. In either case, the dispositive conviction is one of those listed at 8 U.S.C. § 1182(a)(2), which renders *either of these individuals* "inadmissible" by triggering the stop-time rule. Barton's aggravated assault was on the § 1182 list and occurred during his first 7 years as an LPR, thus triggering the stop-time rule.
    - **Barton:** In 8 U.S.C. § 1229b, Congress envisioned separate tracks for noncitizens who were not admitted and LPRs. For the first group, a conviction among those listed at 8 U.S.C. § 1182(a)(2) is sufficient to trigger the stop-time rule and render the noncitizen *inadmissible*. The disjunctive in the statute means that there is a different threshold for LPRS: what triggers the stop-time rule

is a conviction listed at 8 U.S.C. § 1227(a)(2), which would render the LPR *removable.* Barton's aggravated assault was not on the § 1227 list and therefore did not trigger the stop-time rule. Thus he is still eligible for discretionary cancellation of removal.

Appeals to Statute & Precedent:

- **8 U.S.C. § 1229b:** Describes what needs to happen to be eligible for discretionary cancellation of removal for an LPR: (1) LPR for 5 years, (2) continuous residence in U.S. for 7 years, (3) no aggravated felony.
- **8 U.S.C. § 1182(a)(2):** Lists convictions that would render a noncitizen inadmissible.
- **8 U.S.C. § 1227(a)(2):** Lists convictions that would render an LPR removable.
- ***In re Jurado-Delgado*, 24 I&N Dec. 29, 31 (BIA 2006):** An offense that triggers the stop-time rule and halts cancellation of removal doesn't have to be one that led to the removal order in the first place. (Agreement with 2nd, 3d, & 5th; 9th disagrees.)
- ***Heredia v. Sessions*, 865 F.3d 60, 68 (CA2 2017):** An offense that triggers the stop-time rule and halts cancellation of removal doesn't have to be one that led to the removal order in the first place.
- ***Ardon v. Attorney General*, 449 Fed. Appx. 116, 118 (CA3 2011):** An offense that triggers the stop-time rule and halts cancellation of removal doesn't have to be one that led to the removal order in the first place.
- ***Calix v. Lynch*, 784 F.3d 1000, 1011 (CA5 2015):** An offense that triggers the stop-time rule and halts cancellation of removal doesn't have to be one that led to the removal order in the first place.
- ***Nguyen v. Sessions*, 901 F.3d 1093, 1097 (CA9 2018):** LPR's offense listed in § 1182(a)(2) only matters for stop-time rule if it was one of the offenses of removal.

Discussion:

- "If a lawful permanent resident has ever been convicted of an aggravated felony, or has committed an offense listed in § 1182(a)(2) during the initial seven years of residence, that criminal record will preclude cancellation of removal. In that way, the statute operates like traditional criminal recidivist laws, which ordinarily authorize or impose greater sanctions on offenders who have committed prior crimes." *Barton v. Barr*, No. 18-725, *2 (US 2020).

- "Barton's 1996 aggravated assault offenses were not the offenses that triggered his removal. But according to the BIA, and contrary to Barton's argument, the offense that precludes cancellation of removal need not be one of the offenses of removal." *Barton v. Barr*, No. 18-725, *2 (US 2020).

- Re. "recidivist" approach: "It is entirely ordinary to look beyond the offense of conviction at criminal sentencing, and it is likewise entirely ordinary to look beyond the offense of removal at the cancellation-of-removal stage in immigration cases." *Barton v. Barr*, No. 18-725, *8 (US 2020).

- "The offenses listed in § 1182(a)(2) help determine whether a noncitizen should be admitted to the United States." *Barton v. Barr*, No. 18-725, *8 (US 2020).

- "Barton committed those offenses [of aggravated assault] during his initial seven years of residence. He was later convicted of the offense in a Georgia court and thereby rendered 'inadmissible.'" *Barton v.*

Barr, No. 18-725, *8 (US 2020). [Note that Sotomayor says this is an absurd statement: as an LPR, Barton was already ADMITTED. Therefore he cannot later be rendered "inadmissible"—meaning that this line of the statute does not refer to LPRs.]

- In fact Kavanaugh seems to make Sotomayor's argument below:
  "In removal proceedings, a lawful permanent resident (such as Barton) may be found 'deportable' based on deportability offenses listed in § 1227(a)(2). A noncitizen who has not previously been admitted may be found 'inadmissible' based on inadmissibility offenses listed in § 1182(a)(2)." *Barton v. Barr*, No. 18-725, *11 (US 2020) [Note that he is distinguishing here between who is "deportable" and who is "inadmissible"—two statuses which he will later conflate under the status of "inadmissibility."]

- "As Barton puts it (and the dissent echoes the point), how can a lawfully admitted noncitizen be found inadmissible when he has already been lawfully admitted?
  - "As a matter of common parlance alone, that argument would of course carry some force. But the argument fails because it disregards the statutory text, which employs the term 'inadmissibility' as a status that can result from, for example, a noncitizen's (including a lawfully admitted noncitizen's) commission of certain offenses listed in § 1182(a)(2)." *Barton v. Barr*, No. 18-725, *13 (US 2020) [But he's already read the statute to distinguish these two groups of people and the status they can have—see above at 11. See opinion at 13-14 for other forays into the INA that try to make LPRs "inadmissible."]
  - "Barton tries to say that some of those other statutes involve a noncitizen who, although already admitted to the United States, is nonetheless seeking 'constructive admission.' . . . But that ginned-up label does not avoid the problem." *Barton v. Barr*, No. 18-725, *15 (US 2020).
- Totally makes sense that the extra phrases in § 1229b are "surplusage." Sometimes Congress did that. "…redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication." *Barton v. Barr*, No. 18-725, *16 (US 2020).

Concurrence/Dissent: Sotomayor

- Adamant that there are TWO SEPARATE TRACKS in the statute, one for non-admitted noncitizens (who may be rendered "inadmissible" if their cancellation of removal is precluded) and one for admitted LPRS (who may be rendered "removable" if their cancellation is precluded).
- "The offense must also render a noncitizen either 'inadmissible' or 'deportable.' In applying these important limitations, the rule directly references the two-track nature of the [INA], a statute that has long distinguished between noncitizens seeking admission and those already admitted." *Barton v. Barr*, No. 18-725, Dissent at 1 (US 2020).
- "The majority errs by conflating these two terms." *Barton v. Barr*, No. 18-725, Dissent at 1 (US 2020).
- "Neither the express language of the statute nor any interpretative canons support this paradox; Barton cannot and should not be considered inadmissible for purposes of the stop-time rule because he has already been admitted to the country. Thus, for the stop-time rule to render Barton ineligible for relief from removal, the Government must show that he committed an offense that made him deportable. Because the Government cannot meet that burden, Barton should prevail." *Barton v. Barr*, No. 18-725, Dissent at 1-2 (US 2020).

- "The distinction between 'inadmissible' and 'deportable' matters. Indeed, both are terms of art, so it is critical to understand their histories and their attached meaning over time." *Barton v. Barr*, No. 18-725, Dissent at 2-3 (US 2020). [Section on lexical history follows.]
- "With few exceptions, the grounds for inadmissibility are broader than those for deportability." *Barton v. Barr*, No. 18-725, Dissent at 3 (US 2020).
- "These separate categories and procedures—treating deportable noncitizens more generously than inadmissible noncitizens, and treating one group of deportable noncitizens (LPRs) the most generously of all—stem from one animating principle. All noncitizens in this country are entitled to certain rights and protections, but the protections afforded to previously admitted noncitizens and LPRs are particularly strong." *Barton v. Barr*, No. 18-725, Dissent at 5 (US 2020).
- "The stop-time rule carries that distinction forward. The rule specifies how a period of continuous residence ends for noncitizens who are seeking admission and thus are inadmissible, as well as noncitizens who are already admitted and thus deportable. By using separate terms and grounds for two groups of people, the stop-time rule thus reflects the two-track dichotomy for inadmissibly or deportable noncitizens that pervades the INA." *Barton v. Barr*, No. 18-725, Dissent at 5 (US 2020).
- "…Barton's second argument—which the Court fails to grapple with meaningfully—is surely correct: At the very least, an offense cannot 'rende[r]' someone inadmissible unless the Government can legally charge that noncitizen with a ground of inadmissibility." *Barton v. Barr*, No. 18-725, Dissent at 7 (US 2020).
- "Because the stop-time rule uses the terms 'removable' (i.e., deportable) and 'inadmissible' in the disjunctive, the Court must analyze the rule against the INA's historic two-track backdrop." *Barton v. Barr*, No. 18-725, Dissent at 8 (US 2020).
- "The Court reaches a different result only by contorting the statutory language and by breezily waving away applicable canons of construction." *Barton v. Barr*, No. 18-725, Dissent at 12 (US 2020).
- "At bottom, the Court's interpretation is at odds with the express words of the statute, with the statute's overall structure,and with pertinent canons of statutory construction. It is also at odds with common sense." *Barton v. Barr*, No. 18-725, Dissent at 15 (US 2020).

Commentary:

- Sotomayor is the only one who writes up the facts of Barton's criminal history and rehabilitation: and it's very glowy!
- Kavanaugh only deals with the first of Barton's questions on appeal, regarding whether the offense that triggers the stop-time rule needs to be one of the ones that led to removal in the first place.
    - Sotomayor addresses the second and more fundamental question of whether 8 U.S.C. § 1229b is **redundant** (all noncitizens are "inadmissible" if convicted of an offense listed at 8 U.S.C. § 1182(a)(2)) or **disjunctive** (there are separate tracks for noncitizens who have never been admitted and LPRs, and therefore the list at 8 U.S.C. § 1182(a)(2) is irrelevant to Barton's case).

Text of Statute:

- **8 U.S.C. § 1229b(d)(1)(B):** "…any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the united states under section 1182(a)(2) of this title or removable form the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest."