

Decoding Deportation: Scopal Ambiguity in the Supreme Court

Handout for Semantics Group special session 01/08/2024

Lucas Champollion (amicus brief coauthored with Brandon Waldon, Masoud Jasbi, Willow Parks, and Cleo Condoravdi)

Docket with all briefs and other documents: <http://tinyurl.com/22-674-docket>

Our amicus brief: <http://tinyurl.com/linguists-brief>

The statute in question (8 U.S.C. 1229a): <http://tinyurl.com/8usc1229a>

Blog post: <http://tinyurl.com/amicus-brief-post>

Estimated schedule of the oral argument:

10am: Court business
 10:05am: Government argument -- freeform questioning
 10:30am: Government argument continues -- seriatim questioning
 10:50am: Noncitizens' argument -- freeform questioning
 11:20am: Noncitizens' argument continues -- seriatim questioning
 11:45am: Government's rebuttal
 11:50am: End

Summary of the case:

- When a noncitizen does not attend a removal (deportation) hearing, a removal order is entered against him. One of the only paths to rescinding that order is through 8 U.S.C. § 1229a(b)(5)(C)(ii) (**B5C2**), which allows rescission if the noncitizen can show that he “did not receive notice in accordance with paragraph (1) or (2)”.
- For nearly 20 years, the Government consistently failed to provide “notice in accordance with paragraph (1)” to noncitizens, because the notices it sent omitted the date and time of the removal proceedings. Because of a previous court decision (*Niz-Chavez v. Garland*, 6-3, authored by Justice Gorsuch, which incidentally focused on the meaning of the word “a”), everyone agrees that the noncitizens—and many other noncitizens—did not receive “notice in accordance with paragraph (1).”
- The noncitizens are making two arguments in the present case:
 - The noncitizens did not receive “notice in accordance with paragraph (2),” either, because a paragraph (2) notice, that informs the noncitizen of a “change” in the time

or place of proceedings, depends on the paragraph (1) notice having provided a date and time of the hearing in the first place.

- The phrase “did not receive notice in accordance with paragraph (1) or (2)” is ambiguous. The better reading is that a noncitizen who shows he “did not receive notice in accordance with paragraph (1)” is eligible for rescission, even if he received “notice in accordance with paragraph (2).”

- Rescinding a removal order under **B5A** does not necessarily mean that a noncitizen can remain in the United States. It simply means that he gets another hearing—one at which he can attempt to prove his case against being deported. Noncitizens who are not supposed to be in the US will still be deported even if they are able to rescind their removal order.

What the law says:

Under 8 U.S.C. 1229(a)(1), “written notice” shall be given to aliens (noncitizens) who are being placed in removal (deportation) proceedings. This “**paragraph (1) notice**”, also called “Notice to Appear” (NTA), must specify certain information including the “time and place at which the removal proceedings will be held”.

Under 8 U.S.C. 1229(a)(2), “in the case of any change or postponement in the time and place of such proceedings”, “a written notice” shall be given. This “**paragraph (2) notice**”, also called “Notice of Change” or “Notice of Hearing” (NOH), must specify, among others, “the new time or place of the proceedings”.

Under 8 U.S.C. 1229a(b)(5)(A) (**B5A**), a noncitizen may be ordered removed in absentia (i.e. without a hearing) when he “does not attend a [removal] proceeding ... after written notice required under paragraph (1) or (2) ... has been provided ... if the Service establishes ... that the written notice was so provided”.

Under 8 U.S.C. 1229a(b)(5)(C)(ii) (**B5C2**), even if an order of removal may be entered, it “may be rescinded ... if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title”.

Question presented (i.e. what the court has been asked to rule on):

“If the government serves an initial notice document that does not include the “time and place” of proceedings, followed by an additional document containing that information, has the government provided notice “required under” and “in accordance with paragraph (1) or (2) of section 1229(a)” such that an immigration court must enter a removal order in absentia and deny a noncitizen’s request to rescind that order?”

So the question is: does failure to receive a “paragraph (1) notice” precludes Document 2 from counting as a paragraph (2) notice; and if it counts, may the order of removal still be rescinded?

Summary of our amicus brief:

The rescission condition is linguistically ambiguous, and can be interpreted as either a "neither-nor" or an "either-or" scenario. The first part of the brief establishes ambiguity:

1. **Linguistic Ambiguity:** Linguistic analysis shows that negative disjunctions (e.g. "he did not receive notice A or notice B" as in Section **B5C2**) are inherently ambiguous.
2. **Common Usage:** Empirical evidence from linguistic corpora suggests that in everyday language, the "either not A or not B" interpretation is common.
3. **Legal Precedent:** There are instances in American law where negative disjunction has been interpreted as "either not A or not B."
4. **Logic Does Not Help:** The ambiguity inherent cannot be resolved by any law of logic.

The second part discusses how context and linguistic analysis can resolve the ambiguity:

1. **Contextual Clarification:** Context helps resolve the ambiguity in the rescission condition, and QUD theory shows how people use context to understand scopally ambiguous sentences.
2. **Lawmaker Intent:** In legal contexts, the intent of the lawmakers disambiguates conditions like the one in question.
3. **Government Interpretation:** The government's interpretation of the rescission condition does not align with either of the possible literal semantic interpretations.

Other questions that might come up in the case:

- Does setting a time that was previously listed only as "TBD" count as a "change" in time?
- Does the time count as a "new" time?
- Does the word "the"
- Should courts consider lawmaker intent when they interpret statutory texts ("purposivism") or only the actual words in their ordinary meaning ("textualism")?

Supreme Court justices with textualist leanings (my take):

- Samuel Alito
- Amy Coney Barrett
- Neil Gorsuch
- Brett Kavanaugh
- Clarence Thomas

Supreme Court justices with purposivist leanings (my take):

- Ketanji Brown Jackson
- Elena Kagan
- John Roberts?

- Sonia Sotomayor