PEREIRA V. SESSIONS: A JURISDICTIONAL SURPRISE FOR IMMIGRATION COURTS

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The United States Supreme Court issued a bombshell opinion regarding immigration court procedure on June 21, 2018: *Pereira v. Sessions*.[1] On its face, the case is a boon for certain noncitizens seeking relief from deportation. Yet, as this Essay explains, *Pereira*'s implications are far greater. Although the Court's opinion never mentions jurisdiction, *Pereira* necessarily means that immigration courts lack jurisdiction over virtually every case filed in the last three years, plus an unknown number of earlier-filed cases. This situation arises from the chronic failure of the Department of Homeland Security (DHS) to comply with the law in commencing deportation proceedings. With the clarity afforded by *Pereira*, the result is that these pending removal cases should be dismissed.

In an 8–1 decision, *Pereira* held that when a noncitizen receives a document called a notice to appear, and where that document does not have a time or place listed for the removal proceedings, then it is not a valid notice to appear, and thus it does not "stop time" for purposes of establishing the noncitizen's continuous physical presence in the United States.[2] That clock-stopping question was crucial in *Pereira*, because the petitioner sought cancellation-of-removal relief, which is available only to noncitizens who can establish continuous physical presence in the United States for ten years.[3]

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1. Pereira v. Sessions, 138 S.Ct. 2105 (U.S. June 21, 2018), available at https://www.supremecourt.gov/opinions/17pdf/17-459_1o13.pdf (to be reported at 484 U.S. __).

2. *Id.* at 2109–10.

3. Immigration and Nationality Act § 240A(b)(1)(A); 8 U.S.C. § 1229b(b)(1)(A) (2018).

The Court's opinion, authored by Justice Sonia Sotomayor, held that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a).'"[4] That conclusion followed, in her words, "inescapably and unambiguously" from "[t]he plain text, the statutory context, and common sense."[5]

Pereira has thrown the immigration bench and bar for a loop because what DHS did with Pereira's notice was not unusual—or even merely typical. "[A]lmost 100 percent" of cases filed in the last three years were initiated by notice-to-appear documents that omitted the time and place of the proceeding.[6]

While the Court's opinion explicitly concerns only the stop-time rule, it necessarily undermines the jurisdictional basis for any case in immigration court commenced pursuant to an invalid notice. Here's why: The Executive Office of Immigration Review (EOIR), which encompasses immigration courts, is part of the Department of Justice.[7] As such, Congress has said that the EOIR is "subject to the direction and regulation of the Attorney General,"[8] including regulations promulgated by the Attorney General.[9] Current Attorney-General-issued regulations delimit the jurisdiction of immigration courts, providing that "[j]urisdiction vests . . . when a charging document is filed with the Immigration

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4. *Pereira*, 138 S.Ct. at 2110. Justice Sotomayor repeated this language. *Id*. at 2118 ("A document that fails to include such information is not a 'notice to appear under section 1229(a)'"); *see also id*. at 2116 ("Failing to specify integral information like the time and place of removal proceedings unquestionably would 'deprive [the notice to appear] of its essential character.'") (citations omitted).

5. *Pereira*, 138 S.Ct. at 2110.

6. *Pereira*, 138 S.Ct. at 2111 (citation and internal quotation marks omitted).

7. Prior to 1983, immigration courts were organized under the Immigration and Naturalization Service (INS), the same agency that employed trial attorneys who opposed immigrants' claims in courts. *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 325 (2007). Now, counsel for the government in immigration proceedings are employed by Immigration and Customs Enforcement, a branch of the Department of Homeland Security, an agency distinct from the Department of Justice. *Id*. at 325–26.

8. 6 U.S.C. § 521(a) (2018). Note that the Attorney General is the head of the Department of Justice. 28 U.S.C. § 503 (2018). *See also* About the Office, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, DEP'T OF JUSTICE, https://www.justice.gov/eoir/about-office [https://perma.cc/EVM8-L93Y] ("Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings[.]").

9. 8 U.S.C. § 1103(g)(2) (2018).

Court."[10] Those regulations define a "charging document" as the "written instrument which initiates a proceeding before an Immigration Judge . . . includ[ing] a Notice to Appear."[11] If, as *Pereira* clearly states, a document isn't a notice to appear if it doesn't have a time and place on it,[12] then it cannot be a charging document. And, without a valid charging document, jurisdiction never vests in the immigration court.[13]

In other words, any action by an immigration court absent a valid notice to appear is an *ultra vires* or extra-judicial act, as it exceeds the court's Congressionally-delegated power.[14]

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10. 8 C.F.R. § 1003.14(a) (2018).

11. 8 C.F.R. § 1003.13 (2013); *see also* Martinez-Garcia v. Ashcroft, 366 F.3d 732, 735 (9th Cir. 2004) ("The only charging document available after April 1, 1997, is the Notice to Appear.").

12. Justice Sotomayor calls it a "putative" notice to appear. Pereira v. Sessions, 138 S.Ct. 2105, 2113 (U.S. June 21, 2018). Merriam Webster defines putative as "commonly accepted or supposed; assumed to exist or to have existed." *Putative*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/putative [https://perma.cc/A7ET-YQ36]; *see also* Removal Proceedings, Decision and Orders of Immigration Judge Ana Partida at 3, July 6, 2018 (noting same) (on file with author).

13. The fact that courts have previously found that a notice to appear without a time or place vested immigration courts with jurisdiction is irrelevant because those cases pre-date Justice Sotomayor's determination that such documents are not notice to appears at all. Examples of such irrelevant prior cases are *Guamanrriga v. Holder*, 670 F.3d 404, 409–10 (2d Cir. 2012); *Dababneh v. Gonzalez*,471F.3d 806, 807, 810 (7th Cir. 2006); *Haider v. Gonalzes*, 438 F.3d 902, 909-910 (8th Cir. 2006); *Qumsieh v. Ashcroft*, 134 F. App'x 48, 49-51 (6th Cir. 2005); *Marco v. United States*, No. 1:09-cv-761, 2010 WL 3992113 at *6-7 (S.D. Ohio Oct. 12, 2010). Similarly, pre-*Pereira* cases that discuss the jurisdictional effect of a "defective" notice to appear are irrelevant because, again, a notice to appear without a time and place can no longer be characterized as "defective" but rather is "putative." For an example of such a case, *see Kohli v. Gonzales*, 473 F.3d 1061, 1066–70 (9th Cir. 2007) (rejecting jurisdictional challenge based on defective notice to appear for lack of prejudice). Finally, *Pereira* eviscerates the notion that a putative notice to appear could be cured by a subsequent notice of hearing issued by the immigration court itself. For a pre-*Pereira* case holding a subsequent notice is effective, see *Guamanrriga*, 670 F.3d at 411 ("Service of the April 2000 Notice to Appear and the May 2000 Notice of Hearing, in combination, satisfied the notice requirements[.]"). As Immigration Judge Ana Partida has held: it "clearly cannot be legally correct" that "the EOIR [can] perfect (or vest) jurisdiction upon itself by issuance of a Notice of Hearing, which turns a putative NTA into an actual NTA." Removal Proceedings, Decision and Orders of the Immigration Judge Ana Partida at 3, July 6, 2018 (on file with author).

14. *Cf.* Linda D. Jellum, *Dodging the Taxman: Why the Treasury's Anti-Abuse Regulation is Unconstitutional*, 70 U. MIAMI L. REV. 152, 218 (2015) ("[E]ven if one could find an implicit delegation of either power to the Treasury, the agency's action

Lawyers representing immigrants quickly perceived that *Pereira* has jurisdictional ramifications, and in recent weeks, they have used the case to raise jurisdictional challenges. But those challenges—as well as the government's responses and courts' reactions—are in disarray.

At the heart of the confusion is a failure to characterize the jurisdictional issue as one of personal jurisdiction or subject-matter jurisdiction. The regulatory law itself does not indicate what form of jurisdiction vests with the notice to appear.[15] Briefs filed by private and government counsel, as well as the orders filed by courts, have shied away from taking a position on whether this is an issue of subject-matter jurisdiction or personal jurisdiction.[16] Yet the characterization of the jurisdictional issue cannot be glossed over. The distinction matters greatly: Defects in personal jurisdiction are waived by appearance, while defects in subject-matter jurisdiction persist.

So which is it? The *Pereira* jurisdictional issue must be one of subject-matter jurisdiction. To begin with, a plain reading of the relevant regulation indicates that it references subject-matter jurisdiction.[17] On its face, 8 C.F.R. § 1003.14(a) concerns whether a

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was *ultra vires* because the regulation exceeds the limits of any delegated power."). This analysis indicates that 8 C.F.R. § 1003.13 is truly jurisdictional in nature and not among the type of "claim-processing rules" at issue in cases such as *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 154 (2013) and *United States v. Kwai Fun Wong*, 135 S.Ct. 1625, 1638 (2015). The "subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy" as the Court called it in *Arbaugh v. Y&H Corporation*, 546 U.S. 500, 511 (2006), concerns whether a statutory requirement is an element of a plaintiff's claim for relief or a jurisdictional mandate. Under the *Arbaugh* logic, the notice-to-appear requirement is not in the realm of "claims for relief" ingredients, but is instead about whether immigration courts are acting within their Congressionally-delegated powers.

15. An unpublished opinion from the Board of Immigration Appeals indicates that immigration courts, like Article III federal courts, must have both personal and subject matter jurisdiction. *In re* Elba Isabel Sanchez-Briones, A72 328 292, 2006 WL 2008363, at * 1 (B.I.A. June 2, 2006) ("an Immigration Judge denied the motion on the ground that the Immigration Court no longer had personal or subject matter jurisdiction over the respondent").

16. *Cf.* DAN KESSELBRENNER ET AL., PRACTICE ADVISORY: CHALLENGING THE VALIDITY OF NOTICES TO APPEAR LACKING TIME-AND-PLACE INFORMATION 16 (July 5, 2018), http://nipnlg.org/PDFs/practitioners/practice_advisories/gen/2018_5July_PereiraAdvisory.pdf [https://perma.cc/9G5L-SZUD] ("Whether the purported [notice to appear] creates an issue around personal jurisdiction or subject-matter jurisdiction, the IJ has an overarching obligation to determine deportability before entering any removal order . . . .").

17. Marco v. United States, No. 1:09-cv-761, 2010 WL 3992113 at *6–7 (S.D. Ohio Oct. 12, 2010) (holding same). One might question whether additional words

particular case is properly before an immigration court. Without this propriety, an immigration court lacks authority to render any decisions regarding the issues raised. Any court action taken without this prescribed prerequisite is an extrajudicial act.[18] This is the conceptual domain of subject-matter jurisdiction—what the Supreme Court was speaking of when it stated that courts have a duty to ensure that their jurisdiction "defined and limited by statute, is not exceeded."[19]

Notably, in the 2009 case of *Shogunle v. Holder*, the Fourth Circuit held that an immigration court did not have jurisdiction to hear a case where a notice to appear was not filed with the immigration court before a hearing notwithstanding the fact that the immigrant petitioner showed up to the hearing.[20] Since personal jurisdiction is waived by appearance, *Shogunle* must have understood 8 C.F.R. § 1003.14(a) to speak of subject-matter jurisdiction.

Acknowledging that the notice-to-appear jurisdictional defect involves subject-matter jurisdiction provides clarity on post-*Pereira* jurisdictional arguments. For instance, one immigration court sought to avoid a post-*Pereira* jurisdictional mishap by concluding that the petitioner "waived any challenge to the notice to appear by appearing at his removal hearing," thereby "voluntarily submit[ting] himself to the court's jurisdiction."[21] This reasoning is erroneous because it rests on the assumption that the "jurisdiction" referenced in 8 C.F.R. § 1003.14(a) is a sort of personal jurisdiction and therefore waivable.[22] But it is not a jurisdictional issue with the person before the court. It is, instead, an issue with the legally prescribed capacity of the

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of the regulation inform its interpretation. The full first sentence of 8 C.F.R. § 1003.14(a) is "Jurisdiction vests, *and proceedings before an Immigration Judge commence*, when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. § 1003.14(a) (emphasis added). These additional words confirm that the requirement is one of subject-matter jurisdiction. *See Saqr v. Holder*, 580 F.3d 414, 421 (6th Cir. 2009) (holding that "'commence' is a term of art which defines when jurisdiction vests in an Immigration Court.").

18. Rhode Island vs. Massachusetts, 37 U.S. 657, 714 (1838) ("Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them.").

19. Louisville & Nashville RR Co. v. Mottley, 211 U.S. 149 (1908); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

20. Shogunle v. Holder, 336 F. App'x. 322 (4th Cir. 2009).

21. On file with author.

22. *See* Fed. R. Civ. P. 12(h)(1).

court to act, and thus the subject-matter jurisdiction deficiency is non-waivable.[23]

In California, a federal district court declined to allow a *Pereira*-based jurisdictional challenge for a different reason, holding the only consequence with which *Pereira* was concerned was the stop-time rule.[24] But because *Pereira* controls on the question of what makes a notice to appear valid or invalid, and because the filing of a notice to appear is what confers and delimits the immigration court's subject-matter jurisdiction, courts are without discretion to ignore that lack of jurisdiction.[25]

It is understandable that courts and government lawyers would resist the idea that *Pereira* means what it says. After all, there are over 700,000 pending cases in immigration court today.[26] If immigration courts lack jurisdiction over every removal case that was initiated by a void notice, that requires the dismissal of a large chunk of the court's caseload on the basis of a decision that never mentioned jurisdiction. Yet *Pereira* itself teaches against contriving the law in this area for the sake of convenience, stating that "practical considerations are meritless and do not justify departing from the statute's clear text."[27]

The bottom line is that all cases with invalid notices to appear must be dismissed for lack of subject-matter jurisdiction. This will, of course, be a paperwork headache for government immigration lawyers. But it is a problem of their own making. The government chose not to

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23. *See supra* note 19.

24. Order Granting Motion to Dismiss for Lack of Subject Matter Jurisdiction, Ramat v. Nielsen, No. 3:17-cv-02474-BEN-JLB (S.D. Cal. July 6, 2018), https://www.courtlistener.com/recap/gov.uscourts.casd.555103/gov.uscourts.casd.555103.17.0.pdf [https://perma.cc/EXQ4-2KBS]. Several immigration judges have also held that the effect of Pereira is limited to the stop-time rule. Orders on file with author; *cf.* STRATEGIES AND CONSIDERATIONS IN THE WAKE OF *PEREIRA V. SESSIONS*, AMERICAN IMMIGRATION COUNCIL & CATHOLIC LEGAL IMMIGRATION NETWORK, INC., add. A, at 2 (July 20, 2018), https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Practice-Advisory-Pereira.pdf [https://perma.cc/PL6N-KFE6] (citing email from Deputy Chief Immigration Judge explaining that EOIR and courts "should accept Notices to Appear that do not contain the time and places of the hearing" notwithstanding *Pereira*).

25. Joyce v. United States, 474 F.2d 215, 219 (3d Cir. 1973) ("Where there is no jurisdiction over the subject matter, there is, as well, no discretion to ignore that lack of jurisdiction.").

26. TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/ [https://perma.cc/BND9-RNGG].

27. Pereira v. Sessions, 138 S.Ct. 2105, 2118 (U.S. June 21, 2018).

comply with the clear requirements of the statutory law in bringing removal cases before the immigration courts. That choice should be honored. And whatever removal cases the government wishes to pursue can be re-filed with valid notices to appear.

Going forward, immigration courts should recognize that re-filed cases demand an immigrant-centered approach. Noncitizens should have the chance to re-litigate issues lost in the first litigation—but should be permitted to keep their wins. The government, in contrast, should be bound by its losses. This approach is justified because, as the courts have recognized, the deportation that noncitizens face in removal proceedings "can be the equivalent of banishment or exile."[28] It is because of these high stakes that courts have recognized the need to construe statutes in favor of the noncitizen.[29] This implies that immigration courts should analogously give deference to prior favorable determinations to noncitizens. Such an approach also conforms to notions of basic fairness. Allowing noncitizens to keep their wins and re-litigate their losses protects noncitizens from bearing the burden of the government's choice to wander from the law's requirements. Any other approach would impermissibly render the noncitizen's "right to remain here dependent on circumstances . . . fortuitous and capricious."[30]

Pereira's effect on immigration proceedings will reverberate for years to come. The courts will no doubt feel pressure to avoid the massive inconvenience entailed by the government's longstanding failure to heed to statutorily required procedure. But the fact that immigration courts lack subject-matter jurisdiction over a vast swath of their cases cannot be ignored.

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28. Delgadillo v. Carmichael, 322 U.S. 388, 391 (1947); *see also* Sessions v. Dimaya, 138 S.Ct. 1204, 1213 (2018) ("this Court has reiterated that deportation is 'a particularly severe penalty,' which may be of greater concern to a convicted alien than 'any potential jail sentence.'").

29. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

30. *Delgadillo*, 332 U.S. 388, 391 (1947).