Judicial Deference in Immigration Cases

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Introduction

This practice advisory examines the impact of judicial deference in immigration litigation. In particular, the practice advisory discusses the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, [*467 U.S. 837 (1984)*.], and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, [*545 U.S. 967 (2005)*.]. It offers practitioners guidance on how to address questions of administrative deference in litigation and notes new trends in the cases.

Justice John Paul Stevens, the author of *Chevron*, "explained recently that "[i]n the 25 years since *Chevron* was decided, [the Supreme Court] has continued to recognize that courts and agencies play complementary roles in the project of statutory interpretation." [*For a fuller discussion see Stephen Manning, Lory Rosenberg, Mary Kenney, "A Brand X Primer," Immigration & Nationality Law Handbook (AILA 2009-2010 Ed.).*]. The *Chevron* doctrine, as conceived of by the Supreme Court and implemented by the lower courts, clarifies how courts and agencies work together to achieve the goals articulated by Congress in legislation. As Justice Stevens is emphatic about pointing out: judicial deference to agencies' views on statutes they administer was not born in *Chevron* and the role of the judiciary to say what the law is did not die with *Chevron* either.

Administrative Deference and The *Chevron* Doctrine

Administrative deference is a judicial doctrine that has been in existence, in one form or another, since at least 1944. Federal courts are often confronted with interpreting and applying statutes that are primarily intended to be implemented by executive administrative agencies. Unlike federal criminal law wherein the federal courts are primarily responsible for implementation, several statutes vest responsibility for implementing the statute's program in the hands of an executive administrative agency. For example, the Immigration and Nationality Act (INA) provides that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of [the statute]" and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." [*See INA § 103(a)(1)*.].

Prior to 1984, the Supreme Court recognized that the "power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." [*Morton v. Ruiz, 415 U.S. 199, 231 (1974)*.]. The governing Supreme Court case was *Skidmore v. Swift*

& Co., which held that an agency's interpretation of its statute was not accorded deference as a matter of right. [*Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).*]. Rather, a federal court would "respect" the agency interpretation to the extent that the agency's reasoning had the power to persuade the court. [*Id.*].

In 1984, the Supreme Court decided *Chevron*. *Chevron* famously provides a two-step structure for judicial review of agency decision making while preserving the legitimate authority of an agency and, ultimately, Congress. At *Chevron* step one, a court determines whether Congress' intent is expressed in the statute's plain language, and if it is, that intent must be given effect. [*Chevron*, *467 U.S. at 843-44.*]. However, when Congress has "explicitly left a gap for the agency to fill," a court must proceed to step two, where the inquiry is whether Congress was silent or used language that is ambiguous. If so, the agency's interpretation is given controlling weight unless it is unreasonable. [*Chevron, 467 U.S. at 843-44.*]. This seemingly pristine *Chevron* doctrine, while simple in statement, can be difficult in application.

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Under the INA, the power to administer the statute is generally delegated to the Attorney General and Secretary of Homeland Security. [*There are other cabinet level administrators whom particular sections of the INA entrust for administration, such as the Secretary of State or the Secretary of Labor.*]. The Attorney General, by regulation, is the ultimate interpreter of the law and has delegated his power to do so in the day to day administration to the BIA. In *INS v. Aguirre-Aguirre*, the Supreme Court recognized the BIA's role and explained that its law-making decisions can earn *Chevron*-style deference. [*INS v. Aguirre-Aguirre*, *526 U.S. 425, 424 (1999).*].

The reason why the rather academic question of deference to the BIA's interpretations of ambiguous immigration statutes matters a great deal in litigating claims is twofold: first, the BIA has been a hostile forum in which to litigate and, second, the BIA's jettison of cases during the Affirmance without Opinion (AWOP) landslide caused a great deal of havoc at the circuit courts causing the circuits to lurch, with frequent mistakes, along searching for some manner of disposing of cases without any firm guidance from the BIA. (Presently, the BIA does not routinely utilize the AWOP procedure though it remains authorized to do so by regulation. The circuit courts are still recovering from the AWOP landslide that dropped so many cases in their laps without any guidance from the BIA on important questions of law.)

Although it has not always been so, it is plain that the BIA has become a hostile forum for noncitizens. In recent years, the BIA has proffered interpretations of the INA that are unreasonable, supported with disingenuous reasoning, and are often mean-spirited and thus not in keeping with Supreme Court guidance that deportation can frequently deprive a person of all "that makes life worth living." [*Bridges v. Wixon, 326 U.S. 135, 147 (1945).*]. Examples of such decisions include the 212(c) cases, *Matter of Blake* and *Matter of Brevia*; the mandatory detention cases, *Matter of Rojas*, *Matter of West*, and *Matter of Adenji*; and the cancellation of removal cases, *Matter of Cortez-Canales* and *Matter of Almanza*. [*Matter of Blake, 23 I&N Dec. 722 (BIA 2005); Matter of Brevia, 23 I&N Dec. 766 (BIA 2005); Matter of Rojas, 23 I&N Dec. 117 (BIA 2001); Matter of West, 22 I&N Dec. 1405 (BIA 2000); Matter of Adenji, 22 I&N Dec. 1102 (BIA 1999); Matter of Cortez-Canales, 25 I&N Dec. 301 (2010); Matter of Almanza, 24 I&N Dec. 771 (BIA 2009).*]. In each of these examples, the BIA adopted the interpretation of the statute advocated by DHS that was undeniably harsh. As the Supreme Court explained, the BIA's decision in the 212(c) cases was arbitrary and capricious. Several federal courts have rejected the BIA's reasoning in the mandatory detention cases for pushing a strained interpretation of

the statute. While no federal court of appeal has yet passed on the the cancellation of removal cases, they suffer from the same flaws.

If the Supreme Court's rules are applied fairly and consistently (which not all Courts of Appeals do), there is almost a mechanistic approach to determining when a the *Chevron* doctrine is implicated. In order to earn *Chevron* deference for its decisions (and thus permit the Department of Justice's Office of Immigration Litigation to defend an agency decision based on administrative deference), the BIA's decisions must satisfy both format and content criteria.

The Format of the BIA Decision May Trigger *Chevron*

Only published BIA decisions curry *Chevron* deference. [*Marmolejo-Campos, 558 F.3d at 909; Pierre v. Holder, 588 F.3d 767, 772 (2d Cir. 2009); Garcia-Padron v. Holder, 558 F.3d 196, 199 (2d Cir. 2009)*.]. An unpublished decision relying on a published opinion for dispositive effect will also trigger *Chevron* as to the contents of the published decision. *Id.* at 911. Immigration Judge decisions are not *Chevron* eligible. [*Miranda-Alvarado v. Gonzales, 449 F.3d 915, 921 (9th Cir. 2006); accord Lin v. U.S. D.O.J., 416 F.3d 184, 1902 (2d Cir. 2005)*.]. Single-member BIA decisions, like the unpublished BIA decisions, are not *Chevron* eligible. [*Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012-14 (9th Cir. 2006)*.]. Nor is a BIA decision entitled even to *Skidmore* deference where "neither the IJ's nor BIA's decision contains any analysis with persuasive power." [*Mendis v. Filip, 554 F.3d 335, 338 & n.3 (2d Cir. 2009)*.].

The Content of the BIA Decision May Trigger *Chevron*

Even if the BIA decision is published, its content must satisfy at least two rules before *Chevron* is implicated. First, only BIA decisions that interpret the Immigration and Nationality Act or other statutes expressly delegated to it for administration are *Chevron* eligible. [*Marmolejo-Campos, 558 F.3d at 907*.]. For example, BIA decisions interpreting criminal law are not reviewed under *Chevron*. [*Id.; Leocal v. Ashcroft, 543 U.S. 1 (2004) (finding BIA interpretation of a criminal statute not entitled to deference); Pierre, 588 F.3d at 772 (court reviews constitutional claims or questions of law, including whether a specific conviction qualifies as an aggravated felony, de novo); Oouch v. Holder, 633 F.3d 119, 121 (2d Cir. 2011) (same); Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 279 (4th Cir. 2004) (court reviews de novo questions of law reached by the BIA)*.].

Second, the BIA decision must actually invoke *Chevron* by identifying an ambiguity or policy gap that its interpretation is meant to fill before *Chevron* is implicated. In other words, to "invoke" *Chevron* the BIA must state that it is (1) interpreting an ambiguous statute, (2) filling statutory gaps, or (3) giving concrete meaning to ambiguous terms through case-by-case adjudication. If the BIA is simply applying unambiguous statutory language then *Chevron* (and thus the concept of judicial deference to the BIA's opinion) is inapposite to the analysis. [*Negusie v. Holder, 555 U.S. 511, 521 (2008); Delgado v. Holder, 648 F.3d 1095, 1103 n.12 (9th Cir. 2011) (en banc)*.].

When the BIA finds that a statute is clear, a reviewing court is precluded from deferring and, instead, must interpret the statutory language *de novo*. This principle that – as to content – an administrative agency must actually use its expertise to fill statutory gaps or particularize ambiguous statutory terms before *Chevron* will apply appears to be well-accepted in administrative law outside the immigration context. [*Peter Pan Bus Lines Inc. v. Federal Motor Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006) (collecting cases) ("Chevron step 2 deference is reserved for those instances when an agency recognizes that the Congress's*

intent is not plain from the statute's face."); Arizona v. Thompson, 281 F.3d 248, 253-54 (D.C. Cir. 2002) ("Deference to an agency's statutory interpretation 'is only appropriate when the agency has exercised its own judgment,' not when it believes that interpretation is compelled by Congress.").].

In *Negusie v. Holder*, the Supreme Court applied this second principle to immigration litigation. [*555 U.S. 511, 521 (2008).*]. The dispute in *Negusie* centered on whether coercion or duress is relevant in determining whether a noncitizen assisted or otherwise participated in the persecution of others such that he or she would be ineligible for asylum. The BIA in denying the application had concluded that its case law did not recognize coercion or duress as a defense to the persecutor bar. The government defended this decision on the basis of *Chevron* – the BIA was entitled to deference in interpreting the Immigration and Nationality Act. The problem in that defense, as Justice Kennedy pointed out, is that the BIA had not actually "interpreted" anything. The BIA, erroneously, had concluded that its rulings were compelled by a Supreme Court decision interpreting a different statute. Accordingly, *Chevron* was inapplicable because the BIA had not used its *Chevron* delegated power to make law. The Supreme Court explained that "[o]ur reading of these decisions confirms that the BIA has not exercised its interpretive authority, but, instead, has determined that *Fedorenko* controls . . . Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." [*Negusie, 555 U.S. at 522 (internal citations omitted).*].

Confusion at the Courts of Appeals

The second principle, that only BIA decisions that invoke *Chevron* get *Chevron* deference, is a matter of confusion among the courts of appeals. The circuit courts have failed to recognize this principle when applied to BIA decisions. For example in *Garfias-Rodriguez v. Holder*, the Ninth Circuit recently cited *Chevron* and deferred to the BIA's decision in *Matter of Briones*, yet in *Matter of Briones* the BIA merely conducted a plain language analysis of the statute and did not, in fact, invoke its interpretive powers. [*Garfias-Rodriguez v. Holder, 649 F.3d 942 (9 th Cir. 2011); Matter of Briones, 24 I&N Dec. 355 (BIA 2007).*].

This may be changing -- slowly. In the recent en banc opinion in *Delgado v Holder* at the Ninth Circuit, Judge Fisher, writing for the majority, credits the principle and explains at footnote 12 that, true, the BIA would *not* have been entitled to deference had it only reached a plain language interpretations. Judge Fisher stated that the BIA, in fact, had found the statute to be ambiguous and thus adopted a *Chevron* gap-filling interpretation. [*Delgado v. Holder, 648 F.3d 1095, 1103 n.12 (9th Cir. 2011) (en banc).*]. In cases where the BIA believes a statute is plain, but it is in fact ambiguous, the court will remand for an agency interpretation under *Chevron*.

The Strategic Importance of Requiring BIA Decisions To Invoke *Chevron*

There are several key strategic advantages if practicioners continue to argue the second principle to the courts of appeals. The first strategic advantage to arguing that the BIA must invoke *Chevron* to get *Chevron* deference is that as more courts of appeals adhere to the Supreme Court's teaching on *Chevron* and consistently apply the content and format criteria, we will have approached the high-water mark of *Chevron*. Certainly, *Chevron* will retain its importance in defining the relationship between the federal courts and administrative agencies, but courts may no longer reflexively invoke it to clear their dockets and instead will need to do the actual job of judges: judge. For example, a number of circuit courts have rejected the Attorney General's novel framework in *Matter of Silva-Trevino,* [*24 I&N Dec. 687 (A.G. 2008)*],

for determining whether a particular criminal conviction is for a crime involving moral turpitude. [*See, e.g., Prudencio v. Holder, 2012 U.S. App. LEXIS 1693 (Jan. 30, 2012); Sanchez Fajardo v. U.S. Att'y Gen., 2011 U.S. App. LEXIS 20685 (11th Cir. Oct. 12, 2011); Jean-Louis v. Att'y Gen., 582 F.3d 462 (3d Cir. 2009)*.]. In those cases, the courts have rejected the government's argument that the statutory language in the INA -- "convicted of a crime involving moral turpitude" -- is ambiguous and that the agency's interpretation merits *Chevron* deference. Instead, the courts have found the language of the statue to be plain and have accorded no deference to the agency's decision.

A second strategic advantage to insisting that *Chevron* applies only when the BIA identifies and interprets a statutory gap or ambiguity is that this position will cast doubt on every circuit court decision that deferred to a plain language BIA analysis. This could permit circuit court panels to distinguish prior negative precedent or be cause for seeking en banc consideration of a claim to bring the circuit's jurisprudence in line with Supreme Court holdings.

Additionally, by requiring that the BIA invoke *Chevron* first before *Chevron* applies supports the proposition that highly contested BIA decisions such as *Matter of Briones*, *Matter of Lemus-Losa*, and *Matter of Rodarte*, will *not* be entitled to *Chevron* deference because the BIA did not use its *Chevron* delegated powers. Finally, a consistent insistence on this *Chevron* principle ought to cause OIL attorneys to rethink their axiomatic and indiscriminate invocation of *Chevron* in defense of poorly reasoned BIA decisions when the BIA decision itself did not rely on *Chevron*. In short, if the second principle is not lost in the briefing, it ought to bring additional restraints on administrative decision-making and bring additional rationality to judicial review of immigration decisions.