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## Enforcing/Protection: The Danger of *Chevron* in Refugee Act Cases

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**Enforcing / Protection:  
The Danger of *Chevron* in Refugee Act Cases**

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[Abstract]

*United States immigration courts that decide asylum cases are situated within the Justice Department—a law enforcement agency deeply invested in enforcing border control—and are subordinate to the Attorney General, the nation’s politically appointed chief law enforcement officer. This institutional subjugation of immigration judges and the Board of Immigration Appeals challenges the system’s integrity and leaves people seeking protection promised by international treaty to the whims of a politically responsive enforcement agency. Courts exacerbate the problem when they give Chevron deference to those Justice Department decisions rather than reviewing them rigorously. Given the prosecutorial nature of the Justice Department, the obligatory and international nature of the legal duty to protect asylum seekers, and the vulnerable population at risk, courts should reconsider the appropriateness of giving deference to the prosecuting agency on asylum decisions and standards. This would be in keeping with developing Chevron jurisprudence, in which the Supreme Court has shown increasing willingness, in Step-Zero-style analysis, to ask whether Congress truly intended for courts to extend deference to a specific agency on a specific statutory question, and with case law declining deference to prosecutors.*

*This article will apply contemporary Chevron doctrine to the question of deference in asylum and withholding of removal cases arising under the Refugee Convention. It will conclude that Congress likely intended for courts not to defer to, but rather to exercise robust review of the Board of Immigration Appeals (BIA) and the Attorney General, to ensure full enforcement of all immigration law—including asylum provisions that protect persecuted individuals.*

I. Introduction

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\* Law School Associate Professor, University of Maryland Francis King Carey School of Law. The author is grateful for the thoughtful support and input of the many people—too many to name but each appreciated—who commented on and improved this article as it developed, including participants in the Immigration Law Scholars and Teachers Workshop, the Clinical Law Review Writers’ Workshop, the Junior Faculty Exchange at the University of North Carolina, and so many of my colleagues at Maryland Carey Law. Shi Yang, Virginia Giannini, Bennett Procter, Stephanie Trader, Katherine Martinez, Paola Vibriesca, Gregory Miles, and Susan McCarty provided excellent research and citation assistance.

Thousands of men, women and children apply for asylum and withholding of removal in United States immigration courts each year, seeking to hold the nation to its obligation under international law to provide protection to those fleeing persecution.<sup>1</sup> The courts where they seek this protection are administrative tribunals located within the Department of Justice under the authority of the Attorney General. This institutional position of subordination to a law enforcement agency—and to its highly placed and politically sensitive executive officer—has long been a challenge to the integrity of the immigration court system. It is particularly troublesome in a political atmosphere in which an administration may have an interest in denying asylum in favor of the highly politicized goal of protecting borders. The appointment of Jeff Sessions, an Attorney General who is openly hostile to asylum applications, highlights the danger this structure can pose to individual protection,<sup>2</sup> but the threat is in fact institutional and not personal to any one Attorney General or specific to any one administration. As an agency with a primary mandate for and deep investment in immigration enforcement, the Justice Department is simply not a neutral institutional home for adjudication of high-stakes asylum applications by vulnerable individuals. The president of the National Association of Immigration Judges describes the problem:

The apparent conflicts of interest have time and time again proven to be actual conflicts of interest between protecting the integrity of the court and the independence of the Immigration Judges from infringement by the perspectives and positions of a law enforcement agency.<sup>3</sup>

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<sup>1</sup> See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]. The U.S. became bound to the terms of the Convention when it signed on to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223 (entered into force Oct. 4, 1967). As of December 2016, the United States Citizenship and Immigration Service (USCIS) had 223,433 pending affirmative asylum applications. *Asylum Office Workload*, USCIS ASYLUM DIVISION (Dec. 2016), [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED\\_2016\\_12AsylumStats.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_2016_12AsylumStats.pdf). The Executive Office for Immigration Review, which administers the Immigration Courts, reported that it received 65,218 asylum applications in FY 16. OFFICE OF PLANNING, ANALYSIS, AND STATISTICS, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK (Mar. 2017), <https://www.justice.gov/eoir/page/file/fysb16/download>.

<sup>2</sup> See *infra* Part II; News Release, Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review Falls Church, VA (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> [hereinafter Sessions Remarks to EOIR].

<sup>3</sup> Letter from A. Ashley Tabaddor, Pres., Nat'l Ass'n of Immigration Judges to Elizabeth Stevens, Fed. Bar Ass'n, Immigration Law Section (Mar. 15, 2018), [https://www.naij-usa.org/images/uploads/publications/NAIJ\\_endorses\\_FBA\\_Article\\_I\\_proposal\\_3-15-18.pdf](https://www.naij-usa.org/images/uploads/publications/NAIJ_endorses_FBA_Article_I_proposal_3-15-18.pdf) (endorsing the FBA's proposed legislation in support of an independent Immigration Court).

This “inherently problematic” conflict of interest is one reason that the NAIJ advocates for Congress to create a new, truly independent immigration court system under its Article I authority,<sup>4</sup> a position supported by the American Bar Association, the Federal Bar Association, and an increasing number of other organizations, jurists, and legislators.<sup>5</sup>

In the absence of such a fundamental restructuring, however, federal courts make quiet decisions every day about whether to apply a presumption of deference, under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>6</sup> to Justice Department decisions on individual applications for asylum and withholding of removal and on the standards for granting those applications. In the context of refugee protection, the *Chevron* question dictates the rigor with which courts review published Board of Immigration Appeals (BIA or Board) and Attorney General decisions interpreting the provisions defining eligibility for protection. This question of deference can mean the difference between lifesaving protection and deportation back to danger.

Consider a potential asylum applicant.<sup>7</sup> “Ruben” became homeless at the age of eleven when he left his abusive and neglectful father’s house, having lost his mother several years earlier. He was taken in by members of a powerful criminal gang that controlled his neighborhood and whose members protected him and provided him food, shelter and a sense of belonging, but who also gradually began demanding that he participate in their activities. He left the gang at age fourteen because his conscience did not allow him to join in the escalating violence the gang leadership demanded of him. Shortly after making this decision of conscience, he fled the country when he was “green-lighted” with a death sentence for having defied gang leaders. At the age of sixteen, he now applies for protection in the United States.

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<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *Strengthening and Reforming America’s Immigration Court System: Hearing Before the Subcomm. on Border Security and Immigration, of the S. Judiciary Comm.* 115th Cong. (Apr. 18, 2018), <https://www.judiciary.senate.gov/download/04-18-18-bass-testimony> (statement of ABA Pres. Hilarie Bass); Letter from Kip T. Bollin, Pres. Fed. Bar Ass’n & Elizabeth Stevens, Chair Immigration Law Section of Fed. Bar Ass’n, to Sen. John Cornyn & Sen. Richard Durbin (Apr. 16, 2018), <http://www.fedbar.org/Image-Library/Government-Relations/Letter-from-FBA-President-Kip-T-Bollin-.aspx> (in support of proposed Immigration Court Act for the Subcommittee Hearing of Apr. 18, 2018); AM. IMMIGRATION LAWYERS ASS’N (AILA) BOARD OF GOVERNORS, RESOLUTION ON IMMIGRATION COURT REFORM (Winter 2018), <https://www.aila.org/File/DownloadEmbeddedFile/74919>. See also Immigration Court Improvement Act of 2018, S. 2693, 115th Cong. (2018) (a bill to safeguard the judicial integrity and independence of immigration judges).

<sup>6</sup> 467 U.S. 837, 844 (1984). In *Chevron*, the Supreme Court held that where Congress has left a policy question ambiguous, courts should generally defer to the decisions of an executive agency charged with administering a statutory scheme. In that case, the Supreme Court held that the EPA’s interpretation of a “stationary source” of pollution was due deference by the courts and, as a reasonable interpretation, was not judicially reviewable.

<sup>7</sup> This hypothetical case is fictional but includes details that are representative of actual cases.

While there is no dispute that Ruben’s life is in danger,<sup>8</sup> an applicant for asylum or withholding has the burden to show that he has been targeted on account of one of the limited number of reasons that give rise to protection under U.S. asylum law (race, religion, nationality, political opinion or membership in a particular social group).<sup>9</sup> This limited list of reasons comes from the 1951 Geneva Convention on the Status of Refugees, on which Congress based U.S. asylum law.<sup>10</sup> Relevant to Ruben, the BIA has issued a series of decisions interpreting and defining the elements of the statutory phrase, “particular social group.” The Board held in 2014 in *Matter of W-G-R-* that an individual targeted for harm for having defected from a criminal gang will not qualify for asylum or withholding because he cannot be considered a member of a “particular social group” as Congress intended that legal definition to be understood.<sup>11</sup>

As it turns out, that the answer to the deference question has serious consequences for Ruben, because it can significantly limit the rigor with which the federal courts will review the Board’s interpretation, with life-and-death consequences. Prior to the *W-G-R-* decision, Ruben’s chances of winning asylum differed significantly depending on whether the circuit court with jurisdiction over his location had decided to give *Chevron* deference to earlier Board interpretations finding that defecting gang members could not qualify for asylum. The four circuit courts that had considered whether former gang members could constitute a “particular social group” had reached two opposite results on the basis of four different lines of reasoning regarding agency deference.<sup>12</sup> In the wake of *W-G-R-*, federal circuit courts of

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<sup>8</sup> See, e.g., Oscar Martinez, *The Gang Informant El Salvador Failed to Protect*, INSIGHT CRIME (Jan. 16, 2015), <https://www.insightcrime.org/news/analysis/the-gang-informant-el-salvador-failed-to-protect/>; Oscar Martinez, *The Death Foretold of an El Salvador Gang Informant*, INSIGHT CRIME (Jan. 19, 2015), <https://www.insightcrime.org/news/analysis/ms13-gang-informant-killed-el-salvador/>.

<sup>9</sup> 8 U.S.C. § 1158(a) (2010); 8 U.S.C. § 1101(a)(43) (2012).

<sup>10</sup> Refugee Convention, *supra* note 1. As discussed, *infra*, Congress incorporated the terms of the 1951 Geneva Convention on the Status of Refugees into the Immigration and Nationality Act (INA) through the Refugee Act of 1980 with the express purpose of bringing the United States into compliance with its obligations under the Convention and the 1967 Protocol. Refugee Act of 1980, 8 U.S.C. §§ 1101–1525 (2012). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987) (finding that Congress intended the Refugee Act to bring the U.S. into compliance with the Refugee Convention).

<sup>11</sup> See 8 U.S.C. § 1158. See also *W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014) (explaining that *W-G-R-* and companion case *M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014), changed the standard the Board of Immigration Appeals (BIA) uses to evaluate particular social groups and concluding that former gang members did not constitute a cognizable particular social group).

<sup>12</sup> Compare *Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013) (deferring under *Chevron* and holding the BIA correctly rejected former gang members as a particular social group), with *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014) (declining to defer to the BIA’s unpublished, nonprecedential decision below and holding that the BIA erred in holding that

appeals are faced with the question of whether or not to defer to the Board's conclusion about former gang members as a possible protected group and, more generally, to the standard the Board established in *W-G-R*- and its companion case for evaluating cognizable particular social groups.<sup>13</sup> Thus, the likelihood that our potential applicant will have a viable claim to protection flows rather directly from the courts' decisions about whether or not to apply *Chevron* deference to the Board's interpretation of the phrase.

The Supreme Court has indicated—but decades ago and without substantive analysis under contemporary *Chevron* jurisprudence—that the BIA should get *Chevron* deference in asylum and withholding cases. Just three years after *Chevron* was decided, in 1987, the Court stated in *dictum* in *INS v. Cardoza-Fonseca*<sup>14</sup> that *Chevron* deference would apply in the interpretation of the Immigration and Nationality Act's (INA's) asylum and withholding provisions, and courts have since then repeated that assertion without much analysis.<sup>15</sup> However, in the three decades since that statement, courts have struggled in a wide variety of cases with how to apply *Chevron*, and the doctrine has evolved considerably.<sup>16</sup> The case law has developed

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former gang membership was not an immutable characteristic of a particular social group), *and*, *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) (finding the BIA “erred as a matter of law” in misconstruing the petitioner’s social group and holding that he was a member of a cognizable particular social group of former gang members), *and* *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (not discussing deference but not deferring to the BIA’s unpublished decision below and recognizing social group of former gang members under Circuit law). All of these circuit court decisions were issued prior to *W-G-R*- and could be susceptible to an argument under *Brand X* that the subsequent agency decision should override the earlier court holdings. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding that a prior court’s construction of a statute that differs from an agency construction is only entitled to *Chevron* deference if the prior court decision holds its construction came from an unambiguous term of the statute).

<sup>13</sup> *See, e.g.*, *S.E.R.L. v. Attorney General United States of America*, 894 F.3d 535, 555 (3rd Cir. 2018) (deferring under *Chevron* to the BIA’s standard for particular social group as established in *W-G-R*- and companion case, *M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014)); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014) (same); *Perez-Rabanales v. Sessions*, 881 F.3d 61, 65 (1st Cir. 2018) (applying standard established in *W-G-R*- and companion case); *Garay Reyes v. Lynch*, 842 F.3d 1125, 1133-37 (9th Cir. 2016) (discussing and concluding that BIA’s standard for particular social group determinations under *W-G-R*- is due *Chevron* deference).

<sup>14</sup> 480 U.S. 421 (1987).

<sup>15</sup> *Id.* at 446; *see infra* Section IV.

<sup>16</sup> *See e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (noting “practical problems of administration”); *see also* Peter M. Shane & Christopher J. Walker, *Foreword: Chevron After Thirty Years: Continued Uncertainty About Scope and Application*, 83 FORDHAM L. REV. 475 (2014) (introducing the proceedings of the 2014 symposium, “*Chevron* at 30: Looking Back and Looking Forward,” including papers by a dozen different scholars with a wide range of views on the justifications, explanations, scope and even validity of the doctrine).

nuance as to whether, when, how and why deference should or should not be applied to the decisions of a particular executive agency in a particular instance. From the same *Cardoza-Fonseca* decision in 1987—which highlighted the limits imposed by the statutory language and expressed intent of Congress—to *King v. Burwell*<sup>17</sup> in 2015 and other recent cases, the Supreme Court has considered various aspects of both the nature of the executive agency and the nature of the question at issue to decide whether it was likely that Congress intended to delegate a question to a particular agency and whether courts should apply *Chevron*'s presumption of deference to the agency interpretation.<sup>18</sup> The doctrine has evolved from a seemingly straightforward directive of deference to the articulation of a preliminary “Step One” analysis of congressional intent as revealed through statutory construction and, later, the addition of several varieties of an even more preliminary “Step Zero” consideration of whether to apply the doctrine at all.<sup>19</sup>

Despite the significance and complexity of this evolving doctrine, however, the Court has never returned to substantively consider whether it is appropriate to grant deference to the Justice Department in the context of the provisions of the Refugee Act. To the contrary, *Cardoza-Fonseca* set the case law trajectory early, before more nuanced questions were being asked about *Chevron*'s reach. In the decades since, courts have applied *Chevron* deference to asylum and withholding law (as they have to immigration law generally) without any particularized analysis of the unique institutional context of the Justice Department as a prosecutor or the origin of refugee protection as a product of international obligations.

This article will do what the courts have never done—it will apply contemporary *Chevron* doctrine to the question of deference to the BIA and the Attorney General in asylum and withholding of removal cases arising under the Refugee Convention. I will consider the appropriateness of deference in light of both the nature of the agency involved and the nature of the interpretive questions raised. I will look at statutory construction principles

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<sup>17</sup> 135 S. Ct. 2480 (2015).

<sup>18</sup> *Id.* at 2489 (holding that an agency's level of involvement and expertise in a complex subject matter and the political and economic significance of the question are relevant to the deference due agency decisions); *see also* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2454 (2014) (“That sort of decision, which involved the Agency's technical expertise and administrative experience, is the kind of decision that Congress typically leaves to the agencies to make”); *City of Arlington v. FCC*, 569 U.S. 290, 209–311 (2013) (Breyer, J., concurring) (explaining the role of agency expertise and the question's “distance from the agency's ordinary statutory duties” in evaluating deference); *id.* at 317 (Roberts, C.J., dissenting) (“But before a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue.”). *See infra* Section III.A.

<sup>19</sup> *See infra* Section III.A. Individual judges and justices have also gone so far as to question the wisdom of the doctrine in any context, including, most recently, a parting suggestion by Justice Kennedy to his colleagues that it may be time to reevaluate *Chevron* as a general matter. *See also* *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

arising from the international law roots of the INA's asylum and withholding provisions, as well as the fact that the Department of Justice is a law enforcement agency to which deference may not be appropriate on questions of protection from enforcement. Finally, I will consider whether the interpretation of international human rights instruments can be considered a "policy" decision for which political accountability is either appropriate or desirable. In the end, I will conclude that contemporary *Chevron* doctrine leads to the conclusion that deference to the Board and to the Attorney General is not appropriate in cases arising under the Refugee Act because of the institutional and legal particularities of decision-making in this area of law.<sup>20</sup>

Following this introduction (Part I), I will describe in Part II the institutional situation of the immigration courts within the Department of Justice and the ways that political influence is felt there. In Part III, I will briefly review the history and theoretical underpinnings of the *Chevron* doctrine. In Part IV, I will review the way that courts have applied *Chevron* to refugee protection cases. In Part V, I will provide a fresh look at the appropriateness of deference to provisions that derive from the Refugee Act. I will first conduct a *Chevron* Step Zero inquiry into the appropriateness of deference under recent *Chevron* case law, focusing on the nature of the Department of Justice as an enforcement agency, the capacity of the Board of Immigration Appeals, and the question of whether treaty-based humanitarian protection obligations can be considered "policy" questions on which political accountability is either appropriate or desirable. I will then move on to a *Chevron* Step One exercise of statutory interpretation in light of the *Charming Betsy* canon for interpreting provisions that implicate international law. Finally, in Part VI, I will conclude that a full understanding of the "lawfulness" of immigration requires courts to exercise robust review of agency decisions in asylum and withholding of removal cases, to enforce the commitments to humanitarian protection in U.S. law.

## II. Protection and Power in a Politically Responsive Department of Justice

The Trump administration has made little effort to hide its antipathy for the asylum and refugee system, seeing it as a loophole that complicates the task of sealing U.S. borders.<sup>21</sup>

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<sup>20</sup> These arguments are not just a variation of immigration exceptionalism, rooted in the idea that immigration should be treated differently than other regulated fields. For a discussion on immigration exceptionalism, see David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (discussing examples of immigration exceptionalism, such as *Tuan Anh Nguyen v. INA*, 533 U.S. 53, 56 (2001), where the court upheld the provision of the INA that treated unmarried mothers and fathers differently for the purpose of conferring citizenship); see also Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183 (2018). To the contrary, they reflect an application of generally applicable developments in *Chevron* jurisprudence to the context of humanitarian protection law under the INA and as implemented by federal immigration agencies.

<sup>21</sup> In this, it has good company with governments around the world, where basic human rights protections for refugees are colliding with strong claims to the executive power of

The President issued an Executive Order within a week of his inauguration banning the entry of all Syrian refugees and temporarily suspending all refugee admissions, among other measures, for the purpose of “protect[ing] the American people from terrorist attacks by foreign nationals admitted to the United States.”<sup>22</sup> Since then, he set the lowest-ever yearly target for refugee admissions in 2018 (45,000), admitted less than half that small number in fiscal year, and then slashed the limit for 2019 to two-thirds of the 2018 target (30,000).<sup>23</sup> On November 9, 2018, the Administration issued a Presidential Proclamation and a Joint Interim Final Rule designed to bar asylum eligibility for anyone who enters the country from the U.S.–Mexican border between ports of entry.<sup>24</sup> With regard to asylum seekers and

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governments to exclude foreigners and secure borders. The United Nations High Commissioner for Refugees estimates that there are 68.5 million people worldwide who have been involuntarily displaced across international borders because of persecution, war or other violence. *Figures at a Glance*, U.N. HIGH COMMISSIONER FOR REFUGEES (June 19, 2018), <http://www.unhcr.org/en-us/figures-at-a-glance.html>. At the same time, proposed policies supporting restrictive immigration were and are a mainstay of Donald Trump’s “America First” campaign, as well as the Brexit campaign for Britain to leave the European Union and unexpectedly strong recent showings of nationalist parties in France, Germany, the Netherlands, Austria, and Italy. See, e.g., Leigh Thomas, *France’s Le Pen Says National Front to be Overhauled after Election Defeat*, REUTERS (May 7, 2017), <https://www.reuters.com/article/us-france-election-lepen/frances-le-pen-says-national-front-to-be-overhauled-after-election-defeat-idUSKBN1830VK>; Melissa Eddy, *Alternative for Germany: Who are They, and What do They Want?*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/world/europe/germany-election-afd.html>; Giovanni Legorano & Marcus Walker, *Italy Shakes Europe’s Establishment as Political Upstarts Form Pact to Govern*, WALL ST. J. (May 13, 2018), <https://www.wsj.com/articles/italys-5-star-league-reach-deal-on-government-program-1526237962>.

<sup>22</sup> Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (“Protecting the Nation from Foreign Terrorist Entry into the United States”).

<sup>23</sup> Letter from sixty-three Members of the House of Representatives to Kirstjen Nielson, Sec’y of Homeland Security & Mike Pompeo, Sec’y of State (July 17, 2018), [https://greateras1.org/wp-content/uploads/2018/07/FINAL\\_Refugee-Admissions-Letter\\_signed.pdf](https://greateras1.org/wp-content/uploads/2018/07/FINAL_Refugee-Admissions-Letter_signed.pdf) (regarding the slow pace of Refugee admissions); Lesley Wroughton, *U.S. to sharply limit refugee flows to 30,000 in 2019*, REUTERS (September 17, 2018), <https://www.reuters.com/article/us-usa-immigration-pompeo/u-s-to-sharply-limit-refugee-flows-to-30000-in-2019-idUSKCN1LX2HS>.

<sup>24</sup> Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States (November 9, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/>; and Interim Final Rule, *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018).

others at the border, the President recently tweeted: “When someone comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”<sup>25</sup>

Attorney General Jeff Sessions, whose restrictionist immigration positions have been one of the hallmarks of his long political career,<sup>26</sup> likewise made it his priority to rein in what he describes as an asylum system “subject to rampant abuse and fraud,” being “gamed” by “dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum providing them with the magic words needed to trigger the credible fear process.”<sup>27</sup> Sessions repeatedly described a “crisis” of “lawlessness” at the border and in the immigration system, even as he cites statistics indicating that 88% of those entering illegally go on to establish a credible fear of persecution in their home countries and the legal right to seek asylum.<sup>28</sup> His Justice Department implemented the administration’s policy of “zero tolerance” criminal prosecution of all those who cross the border illegally, predictably sweeping in that 88% who have come here seeking refuge. He also unilaterally struck down a BIA decision that recognized domestic violence as possible grounds for asylum, with sweeping language designed to preclude virtually all similar future claims, as well as all those arising from persecution by gangs.<sup>29</sup>

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<sup>25</sup> Donald Trump (@realDonaldTrump), TWITTER (June 24, 2018, 10:02 AM), <https://twitter.com/realDonaldTrump/status/1010900865602019329>. The Federal Government has taken the position that tweets from the Twitter account “@realDonaldTrump” are official presidential statements. *See* Innovation Law Lab et al. v. Nielsen, No. 3:18-cv-01098-SI, Opinion and Order Granting Temporary Restraining Order at 12, n. 3 (ECR No. 23) (D. Or. June 25, 2018) (citing James Madison Project v. Department of Justice et al., No. 1:17-cv-00144, Def. Supp. Mem. at 4 (ECF No. 29) (D.D.C. Nov. 13, 2017) (“[T]he government is treating the President’s statements to which plaintiffs point—whether by tweet, speech or interview—as official statements of the President of the United States.”)).

<sup>26</sup> *See, e.g.*, ASIAN AMERICANS ADVANCING JUSTICE, STATEMENT TO THE SENATE JUDICIARY COMMITTEE FOR HEARING ON THE NOMINATION OF JEFF SESSIONS U.S. ATTORNEY GENERAL (Jan. 10, 2017), <https://advancingjustice-aaajc.org/publication/statement-senate-judiciary-committee-hearing-nomination-jeff-sessions-us-attorney>.

<sup>27</sup> Sessions Remarks to EOIR, *supra* note 2.

<sup>28</sup> *See, e.g., id.*; News Release, Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program, Washington, DC (June 11, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal> [hereinafter Sessions Remarks to Legal Training Program].

<sup>29</sup> *See A-B-*, 27 I & N Dec. 316, 320 (A.G. 2018) (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”); *see also id.*, at 320 n.1 (“Accordingly, few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution.”). Much of this language is dictum, but the Attorney General’s intent to restrict asylum eligibility in the courts and at the border is clear.

Indeed, as the head of the Justice Department, the Attorney General has considerable power to influence the immigration court system in a number of strikingly direct ways, from the bureaucratic to the jurisprudential. The Immigration Courts and the BIA are institutionally located *within* the Justice Department, and their judges and Board members are all considered to be “agency attorneys representing the United States government” and serving at the pleasure of the Attorney General.<sup>30</sup> As such, the Attorney General has the power to hire, assign and fire judges and Board members at will. Regulations also give him the authority to certify to himself and directly decide substantive questions of the interpretation of immigration law, bypassing the existing court and appeal system and overturning its decisions.<sup>31</sup> Former BIA Member Lory Rosenberg regards these twin powers as giving the Attorney General “an exclusive level of authority over the course of immigration law and policy.”<sup>32</sup>

Attorney General Sessions used both of these powers aggressively in his twenty-one months in office,<sup>33</sup> with the apparent goals of limiting both procedural rights and substantive legal claims, especially in the asylum arena.<sup>34</sup> In a period of less than six months in early 2018, he certified to himself and decided cases that (1) give ICE attorneys the unilateral power to

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<sup>30</sup> Dana Leigh Marks, *Now Is the Time to Reform the Immigration Courts*, INT’L AFF. F., Winter 2016, at 47, 50, <http://www.ia-forum.org/Files/QNEMHW.pdf>. See, e.g., 8 C.F.R. § 1003.10(a) (“The immigration judges are attorneys whom the Attorney General appoints . . . .”); 8 C.F.R. § 1003.1(a)(1) (identifying Board Members as “the Attorney General’s delegates”).

<sup>31</sup> 8 C.F.R. § 1003.1(h)(1)(i) (“The Board shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him.”) The INA also provides that the “determination and ruling by the Attorney General with respect to all questions of law [relating to immigration] shall be controlling”; 8 U.S.C. 1103(g). Regulations also provide generally that the BIA shall be bound by decisions of the Attorney General. 8 C.F.R. § 1003.1(d)(1)(i).

<sup>32</sup> See Lory Rosenberg, *The Harm That Confirmation of Jeff Sessions as Attorney General Can Do to Immigration Law and Due Process*, LORY D. ROSENBERG ON APPEAL MATTERS (Jan. 10, 2017), <http://blogs.ilw.com/entry.php?9629-The-Harm-That-Confirmation-of-Jeff-Sessions-as-Attorney-General-Can-Do-to-Immigration-Law-and-Due-Process>.

<sup>33</sup> While the Attorneys General under the Obama administration invoked this authority an average of once every two years. See, e.g., Chairez-Castrejon, 26 I. & N. Dec. 796 (A.G. 2016); Silva-Trevino, 26 I. & N. Dec. 550 (A.G. 2015); Dorman, 25 I. & N. Dec. 485 (A.G. 2011); Compean, 25 I. & N. Dec. 1 (A.G. 2009)), Sessions certified four cases to himself in the first three months of 2018.

<sup>34</sup> Asylum, refugee status, and withholding of removal are all forms of humanitarian protection under the INA that are rooted in the 1951 Geneva Convention on the Status of Refugees. Many of their elements are drawn from the Convention and are therefore virtually identical, including the definition of “refugee,” which applies to asylees and is related to the eligibility criteria for withholding of removal. See *infra*, note 211. For simplicity, I sometimes refer to “asylum” or “refugee protection” in this article; in many instances, those statements will also apply to the other forms of humanitarian protection.

keep a case from being administratively closed (to await adjudication of a petition, for example, or for other reasons), (2) struck down a published BIA case that required a full evidentiary hearing on every asylum claim, (3) overturned *Matter of A-R-C-G*,<sup>35</sup> the BIA case that recognized domestic violence as grounds for asylum in some circumstances, (4) drew broad conclusions in that decision purporting to restrict asylum in circumstances where the individual has been persecuted by a non-governmental actor (discussing specifically domestic violence and gang-related claims), and (5) authorized summary pretermission of asylum claims before a hearing.<sup>36</sup> The effect of these decisions is being felt throughout the system, but most acutely at the border, where asylum seekers are being turned away at record rates without so much as the chance to present a full asylum claim.<sup>37</sup>

On the personnel side, the Sessions Justice Department has been accused of using political considerations to shape the political leanings of the immigration bench. Despite a push to increase the number of immigration judges hearing cases, the Department has been accused of blocking or delaying the hiring of individuals provisionally offered immigration judge positions near the end of the Obama administration.<sup>38</sup> At the same time, it has continued the longstanding practice of hiring judges who come overwhelmingly from the ranks of ICE

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<sup>35</sup> A-R-C-G- et al., 26 I. & N. Dec. 388 (B.I.A. 2014).

<sup>36</sup> Castro-Tum, 27 I. & N. Dec. 271, 271 (A.G. 2018) (certified to the Attorney General on Jan. 4, 2018, decided May 17, 2018); E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018) (certified to the Attorney General and decided on March 5, 2018, without giving the parties or *amici* the opportunity to brief any issues); A-B-, 27 I. & N. Dec. 316, 325 (A.G. 2018) (certified to the Attorney General on Mar. 7, 2018, decided June 11, 2018). See also Jeffrey S. Chase, *Are Summary Denials Coming to Immigration Court?*, JEFFREY S. CHASE BLOG (June 24, 2018), <https://www.jeffreyschase.com/blog/2018/6/24/are-summary-denials-coming-to-immigration-court>.

<sup>37</sup> Jeffrey S. Chase, *Attorneys and Credible Fear Review*, JEFFREY S. CHASE BLOG (July 22, 2018), <https://www.jeffreyschase.com/blog/2018/7/22/attorneys-and-credible-fear-review>. See also TRAC REPORTS, Findings of Credible Fear Plummet Amid Widely Disparate Outcomes by Location and Judge, <http://trac.syr.edu/immigration/reports/523/>; USCIS POLICY MEMORANDUM, PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH MATTER OF A-B- (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> and Tal Kopan, *Impact of Sessions' Asylum Move Already Felt at Border*, CNN (July 14, 2018) <https://www.cnn.com/2018/07/14/politics/sessions-asylum-impact-border/index.html>.

<sup>38</sup> See Letter from Representatives Elijah E. Cummings, Lloyd Doggett, Joaquin Castro, and Donald S. Beyer, Jr. to Jeff Sessions, U.S. Att'y Gen. (Apr. 17 2018), <https://cummings.house.gov/sites/cummings.house.gov/files/Dems%20to%20DOJ%20re.%20EOIR%20Politicization.pdf>; Tom Dart, *Jeff Sessions Accused of Political Bias in Hiring Immigration Judges*, THE GUARDIAN (June 16, 2018), <https://www.theguardian.com/us-news/2018/jun/16/jeff-sessions-political-bias-hiring-immigration-judges>.

and DOJ prosecutors.<sup>39</sup> In addition, the Department has tied challenging case completion requirements to performance standards for immigration judges, raising the specter that judges who spend more time hearing evidence and making findings to substantiate all the elements of eligibility for complex cases like asylum will be sanctioned or even fired.<sup>40</sup>

And Sessions was not subtle in reminding judges and Board members that they served at his pleasure and were expected to implement his decisions. In his certified decisions, he explicitly emphasized the “extraordinary and pervasive role” that the Attorney General has over immigration matters as “virtually unique” and the power accorded him as “an unfettered grant of authority” including “broad powers.”<sup>41</sup> On the same day that he issued *Matter of A-B*,<sup>42</sup> the controversial domestic violence decision,<sup>43</sup> Sessions gave a speech to

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<sup>39</sup> For example, of the twenty-three new Immigration Judges sworn in on August 15, 2018, seventeen had served as prosecutors for ICE or the U.S. Attorney’s Office, an additional three had worked for the DOJ or DHS, and only four had any significant professional experience representing individuals in private or nonprofit law practice. IMMIGRATION COURTSIDE, EOIR Announces 23 New Immigration Judge Appointments – Trend Of Appointing Largely From Government Backgrounds Continues! (August 15, 2018), <http://immigrationcourtside.com/2018/08/16/eoir-announces-23-new-immigration-judge-appointments-trend-of-appointing-largely-from-government-backgrounds-continues/>

<sup>40</sup> Tal Kopan, *Justice Department Rolls Out Case Quotas for Immigration Judges*, CNN (Apr. 2, 2018), <https://www.cnn.com/2018/04/02/politics/immigration-judges-quota/index.html> (including a link to the EOIR PERFORMANCE PLAN, ADJUDICATIVE EMPLOYEES, <http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf>). See also Russell Wheeler, *Amid Turmoil on the Border, New DOJ Policy Encourages Immigration Judges to Cut Corners*, BROOKINGS (June 18, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/>. Retired immigration judge Robert Vinikoor points out that the quotas fail to take into account the varying complexity of cases. Robert Vinikoor, *Take it from a Former Judge: Quotas for Immigration Judges are a Bad Idea*, MINSKY, MCCORMICK & HALLAGAN BLOG (Apr. 11, 2018), <https://www.mmhpc.com/2018/04/take-it-from-a-former-judge-quotas-for-immigration-judges-are-a-bad-idea/>. For this reason, the apparently neutral administrative push to speed up cases actually operates against asylum applicants whose cases require more time than legally and factually simpler matters, and it is likely that judges sanctioned for low case completion will be those who handle—and give sufficient attention to—significant numbers of asylum cases.

<sup>41</sup> A-B-, 27 I. & N. Dec. 316, 323–24 (2018).

<sup>42</sup> 27 I. & N. Dec. 316 (2018).

<sup>43</sup> *Id.* at 323-24 (overturning *A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), which recognized domestic violence as potential grounds for asylum). For a perspective on the controversial nature of the decision in the opinion of certain retired immigration judges and BIA Members, see Retired Immigration Judges and Former Members of the Board of Immigration Appeals *Statement in Response to Attorney General’s Decision in Matter of A-B-*,

employees of the immigration court system and pointedly reminded them of the chains of command within the Department: “As the statute states, Immigration Judges conduct designated proceedings ‘subject to such supervision and shall perform such duties as the Attorney General shall prescribe.’”<sup>44</sup> Later in the same speech he reminded them that the Department, in turn, should serve the administration’s goal of ending illegal immigration: “All of us should agree that, by definition, we ought to have zero illegal immigration in this country. Each of us is a part of the Executive Branch, and it is our duty to ‘take care that the laws be faithfully executed.’”<sup>45</sup> The message to judges and Board Members appeared to be the very message that Former Board Chair and Immigration Judge Paul Schmidt says they get consistently from their superiors at the Justice Department: “You exist to implement the power of the Attorney General, you aren’t ‘real’ independent Federal Judges.”<sup>46</sup>

In fact, in 2018, Department administrators removed the judge assigned to a case that was remanded in the wake of an Attorney General decision, when the judge failed to implement the decision in precisely the way and with the speed that Department superiors expected. The judge who was removed from the case and the NAIJ have filed a grievance against the Executive Office for Immigration Review, complaining that the action violated, among other things, the law requiring immigration judges to exercise their independent judgment.<sup>47</sup>

With regard to humanitarian protection specifically, Attorney General Sessions unilaterally set up both a legal framework and strong incentives for immigration judges to summarily deny many asylum claims quickly and without a hearing.<sup>48</sup> Immigration courts around the country are already issuing orders requiring respondents to submit briefs explaining why their cases should not be summarily denied under the new decisions.<sup>49</sup> *Matter of A-B*, the domestic violence decision, is particularly concerning, as the case it overturned, *Matter of A-R-C-G*, had represented the considered result of fifteen years of agency adjudication—at the immigration judge, BIA and Attorney General levels—that ended in a consensus that

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JEFFREY S. CHASE BLOG (June 11, 2018),

<https://www.jeffreyschase.com/blog/2018/6/11/statement-in-response-to-matter-of-a-b->

<sup>44</sup> Sessions Remarks to Legal Training Program, *supra* note 28.

<sup>45</sup> *Id.*

<sup>46</sup> *Former BIA Chairman Paul W. Schmidt on His Career, the Board, and the Purge (Part 1)*, THE ASYLUMIST (Sept. 28, 2016), <http://www.asylumist.com/2016/09/28/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-1/>.

<sup>47</sup> Ani Ucar, *Jeff Sessions Wants To Remove Immigration Judges Who Aren’t Deporting People Fast Enough*, VICE NEWS (August 8, 2018), [https://news.vice.com/en\\_us/article/qvmeyd/jeff-sessions-wants-to-remove-immigration-judges-who-arent-deporting-people-fast-enough](https://news.vice.com/en_us/article/qvmeyd/jeff-sessions-wants-to-remove-immigration-judges-who-arent-deporting-people-fast-enough).

<sup>48</sup> *See* Chase, *supra* note 36.

<sup>49</sup> *See, e.g.*, Notice for All Asylum/Withholding/CAT Applicants, Immigration Judge Elise Manuel, Newark, New Jersey Immigration Court; Notice for All Asylum/Withholding/CAT Applicants, Immigration Judge Shifra Rubin, Newark, New Jersey Immigration Court; Scheduling Order for *A-B* Cases, [Respondent information redacted], June 20, 2018, Arlington, Virginia Immigration Court (on file with the author).

domestic violence claims could and should be recognized within the asylum framework.<sup>50</sup> And the politicized enforcement concerns that animated the decision are evident in its repeated claims to broadly limit precisely the types of Central American claims the administration has struggled to stem at the border<sup>51</sup>—despite the fact that asylum claims must be considered on a case by case basis, on their own facts and legal claims, and the fact that domestic violence cases, of course, are not limited to Central American applicants.<sup>52</sup> The current president of the National Association of Immigration Judges, Judge Ashley Tabaddor, has expressed concern at the Department’s efforts: “A lot of what they are doing raises very serious concerns about the integrity of the system. Judges are supposed to be free from these external pressures.”<sup>53</sup>

As worrisome as Sessions’ actions were, however, he was not the first Attorney General to wield the power of the office to further an administration’s political goals.<sup>54</sup> Under George W. Bush, the Justice Department engaged in both politically biased hiring and changes (and demotions) of existing personnel in a bid to shape the substance of immigration decisions. Subsequent investigations by the Inspector General and the Office of Professional Responsibility found that the Bush administration relied on improper political considerations to hire immigration judges more likely to agree with the administration’s immigration policies.<sup>55</sup> At the same time, Attorney General John Ashcroft conducted what has been

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<sup>50</sup> A-R-C-G-, 26 I. & N. Dec. 388, 391–93 (B.I.A. 2014) (detailing history and noting DHS stipulation on the cognizability of the particular social group).

<sup>51</sup> See A-B-, 27 I. & N. Dec. at 320 (claiming broadly that domestic violence and gang-related claims would generally not qualify for asylum); *id.* at 332 (complaining that A-R-C-G- had been read broadly to encompass claims by “most Central American domestic violence victims”). The treatment of gang-related claims (e.g., 27 I. & N. Dec. at 322-23, 339) was particularly gratuitous, in that the facts of A-B- had no gang connection whatsoever.

<sup>52</sup> See, e.g., *In re: [redacted]* (B.I.A. unpub. June 24, 2016) (recognizing a particular social group under A-R-C-G- for a domestic violence victim from Ghana); *In re: [redacted]* (B.I.A. unpub. Mar. 6, 2016) (remanding the case of a woman from the Dominican Republic for further consideration under A-R-C-G-); *In re: [redacted]* (B.I.A. unpub. Sept. 21, 2017) (considering but denying on factual grounds the claim of a woman from Hungary); *In re: [redacted]* (B.I.A. unpub. Mar. 30, 2018) (recognizing under A-R-C-G- the particular social group of “minor girls sold into marriage/sexual slavery in Cameroon”). These decisions are all on file with the author.

<sup>53</sup> Joel Rose, *Sessions Pushes to Speed Up Immigration Courts, Deportations*, NAT’L PUB. RADIO (Mar. 29, 2018), <https://www.npr.org/2018/03/29/597863489/sessions-want-to-overrule-judges-who-put-deportation-cases-on-hold>.

<sup>54</sup> See generally Catherine Y Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1 (2018) (discussing the history of presidential influence on agency decision making, including political interference in adjudication generally and in the Trump administration).

<sup>55</sup> U.S. DEP’T OF JUSTICE OFFICE OF PROFESSIONAL RESPONSIBILITY AND U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 137 (2008) (“The evidence showed that the most systematic use of

described as a “purge” of more liberal-leaning, Clinton-appointed BIA members whose views were disfavored by the incoming administration.<sup>56</sup> Studies have since shown that the Ashcroft “reforms” resulted in making it considerably more difficult for asylum seekers to prevail on appeal to the BIA.<sup>57</sup> They are also now generally agreed to have seriously damaged both the quality of adjudication in individual cases and the reputation of the agency. Subsequent case law developments at the Board and in the federal courts eventually vindicated many of the legal positions taken by the purged members of the Board on such issues as the recognition of gender-based forms of persecution as grounds for asylum and the categorical analysis used to deport someone for a conviction.<sup>58</sup>

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political or ideological affiliations in screening candidates for career positions occurred in the selection of IJs, who work in the Department’s Executive Office for Immigration Review (EOIR).”).

<sup>56</sup> Peter J. Levinson, *The Façade of Quasi Judicial Independence in Immigration Appellate Adjudications* 15 (2004) (conference paper delivered at the 2004 Annual Meeting of the American Political Science Association), *reprinted in* 9 BENDER’S IMMIGR. BULL. 1154 (Oct. 1, 2004). About a week after Attorney General Ashcroft arrived in office, then-BIA Chairman Paul Schmidt was informed by the director of EOIR that the Department of Justice (DOJ) leadership no longer wanted him as Chair, despite his distinguished record. In part to avoid a fight that might damage the Board, Chairman Schmidt stepped down to the position of Board member. Within two years, Attorney General Ashcroft implemented a “reorganization” that eliminated five Board member positions; not coincidentally, the five members who were cut were the more liberal members, including former Chairman Schmidt, who was reassigned as an immigration judge. Lest there be any doubt as to the motivation for the “reorganization,” former Chairman Schmidt reports that he was told at the time that he was being cut because the DOJ leadership did not like the substance of his decisions:

The reason I was cut is because they did not like my opinions—Ashcroft apparently wanted a cowed, compliant Board where nobody would speak up against Administration policies or legal positions that unfairly hurt migrants or limited their due process.

*Former BIA Chairman Paul W. Schmidt on His Career, the Board and the Purge (Part 2)*, THE ASYLUMIST (Oct. 5, 2016), <http://www.asylumist.com/2016/10/05/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-2/> [hereinafter *Schmidt (Part 2)*].

<sup>57</sup> Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 359, 377 (2007) (documenting the “sudden and lasting decline in the rate of success by asylum applicants” in the wake of the Ashcroft “reforms” (citing DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 19–25 (2003), [http://www.dorsey.com/files/upload/DorseyStudyABA\\_8mgPDF.pdf](http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf))).

<sup>58</sup> *Schmidt (Part 2)*, *supra* note 56. *See, e.g.*, A-R-C-G, 26 I. & N. Dec. 388 (B.I.A. 2014) (finding that married women in Guatemala who are unable to leave their relationship constitute a particular social group); Redacted, 2016 BIA LEXIS (B.I.A. Nov. 1, 2016) (recognizing the proposed particular social group of Salvadoran women unable to leave a domestic relationship as cognizable); R-A-, 24 I. & N. Dec. 629 (A.G. 2008) (granting asylum

Beyond hiring and firing, the immigration courts have long been subject to a range of politically motivated bureaucratic pressures within the Department of Justice. Judge Dana Leigh Marks, former president of the National Association of Immigration Judges (NAIJ), gave the example of the upending of the system's dockets in response to administration enforcement priorities, which began under the Obama administration.<sup>59</sup> That administration first prioritized the cases of Central American women and children asylum seekers following the "surge" of entrants in 2014, in an attempt to deter future illegal entry.<sup>60</sup> But the move served no positive purpose within the court system; to the contrary, it cast the system into considerable chaos.<sup>61</sup>

Attorneys General have also used their power to intervene and overturn BIA case law on a number of important legal questions, including asylum claims based on domestic violence (in this and previous administrations), coercive family planning policies, and female genital mutilation; as well as the bars to eligibility for withholding of removal and the standard for protection under the Convention Against Torture.<sup>62</sup> These decisions have often been responsive to political imperatives within a presidential administration. For example, Attorney General Michael Mukasey notoriously used this power in the waning days of the George W. Bush administration in an attempt to overturn decades of BIA and federal court case law in the *Matter of Silva-Trevino*<sup>63</sup> to broaden the range of convictions that would trigger deportation as "crimes of moral turpitude."<sup>64</sup> After eight years of chaos and inconsistent rulings in the courts (often contingent on whether or not the controlling federal circuit court

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to Guatemalan woman who fled severe domestic abuse); *Descamps v. United States*, 570 U.S. 254 (2013) (affirming proper categorical analysis of convictions); *Mathis v. United States*, 136 S. Ct. 2243 (2016) (affirming proper categorical analysis of convictions); *Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016) ("*Silva-Trevino III*") (confirming categorical analysis of crimes involving moral turpitude analysis).

<sup>59</sup> Marks, *supra* note 30, at 50.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., A-B-, 27 I. & N. Dec. 316 (A.G. 2018) (domestic violence); R-A-, 22 I. & N. Dec. 906 (BIA 1999), *vacated* 22 I. & N. Dec. 906 (A.G. 2001), *remanded* 23 I. & N. Dec. 694 (A.G. 2005); *remanded* 24 I. & N. Dec. 629 (A.G. 2008) (domestic violence). J-S-, 24 I. & N. Dec. 520 (A.G. 2008) (coercive family planning); A-T-, 24 I. & N. 296 (2007), *vacated*, 24 I. & N. Dec. 617 (A.G. 2008), *remanded* to Immigration Judge, 25 I. & N. Dec. 4 (B.I.A. 2009) (female genital mutilation); Y-L-, 23 I. & N. Dec. 270 (A.G. 2002) (drug trafficking offenses as "particularly serious crimes"); J-F-F-, 23 I. & N. Dec. 912 (A.G. 2006) (standard for likelihood of torture upon return).

<sup>63</sup> 24 I. & N. Dec. 687 (A.G. 2008); writ of habeas corpus denied, without prejudice, motion granted by *Silva-Trevino v. Watkins*, 2009 U.S. Dist. LEXIS 8423 (S.D. Tex. Feb. 5, 2009); *vacated* by, petition granted by, *remanded* by *Silva-Trevino v. Holder*, 742 F.3d 197, 2014 U.S. App. LEXIS 1947 (5th Cir. 2014); *vacated* and *remanded* by *Cristobal Silva-Trevino*, 26 I. & N. Dec. 550 (B.I.A. 2015); *Silva-Trevino*, 26 I. & N. Dec. 826 (BIA 2016).

<sup>64</sup> *Id.*

deferred to the Attorney General's decision), the traditional analysis was vindicated and reinstated.<sup>65</sup> But thousands of people were improperly deported during those years, illustrating the very serious human consequences of giving the nation's chief law enforcement officer the power to unilaterally shape the interpretation of immigration law, even if the courts can eventually restore a legally proper interpretation.

A presidential administration thus has considerable power to influence and even direct the Justice Department's interpretation of asylum law through the Attorney General and the Board of Immigration Appeals, for political or other purposes. Successive administrations have indeed taken advantage of that power. With this context, I will turn now to the question of *Chevron* deference in this asylum context, beginning with a discussion of the evolution of the *Chevron* doctrine itself, especially in recent years.

### III. *Chevron*: A Doctrine in Motion

In its 1984 *Chevron* decision, the Supreme Court both acknowledged and further enabled the broad exercise of power by administrative agencies in the modern regulatory state.<sup>66</sup> The case required the Court to consider the appropriateness of the Environmental Protection Agency (EPA)'s implementation of a provision of the Clean Air Act allowing all pollution emitting devices to be grouped into a single category.<sup>67</sup> Faced with this technical policy question and with a lack of indication in the statute of how Congress intended to resolve it, the Court institutionalized, for cases where Congress left ambiguous certain policy details for the implementation of a statute, a flat preference for the decisions of politically accountable executive agencies over reviewing courts.<sup>68</sup>

The Court was concerned with incursions by the judiciary into policy questions about which it had no particular expertise and for which it did not have any political accountability. The

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<sup>65</sup> *Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016) (“*Silva-Trevino III*”, holding that “the categorical and modified categorical approaches provide the proper framework for determining when a conviction is for a crime involving moral turpitude.”).

<sup>66</sup> See, e.g., Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011), cited in Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1149 (2012) (discussing the history of deference to agencies since the controversies of the New Deal in response to “Congress’s increasing tendency to allocate primary responsibility for implementing new statutory schemes away from the courts and into administrative agencies.”); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (“Broad delegation to the Executive is the hallmark of the modern administrative state”). See also Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 146 (2012) (“Put simply, *Chevron* and its ensuing reformulation dramatically altered the executive’s power to create and interpret law”).

<sup>67</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

<sup>68</sup> *Id.* at 843–45.

decision was framed in terms of separation of powers principles and established a hierarchy of government authority for policy questions arising in the implementation of statutory programs: legislative intent trumps executive implementation which in turn is given deference over judicial interpretation. In the words of Michael Herz, “Properly understood and sensibly applied, [*Chevron*] is a salutary recognition that Congress delegates broad authority to agencies and courts must respect those delegations.”<sup>69</sup> *Chevron* was an enormously important decision in the development of the administrative law principles that govern our increasingly administrative state,<sup>70</sup> and a brief review of its history and theoretical bases is helpful to understanding its texture and the nuances with which it has been implemented.

#### A. The Evolution of the *Chevron* Doctrine

While the holding of *Chevron* can be stated relatively simply, its implementation has been anything but straightforward. As administrative agencies have grown in size and power, the Supreme Court and lower courts have struggled for thirty years to discern the proper limits to deference and balance of power between the branches of government in agency decision making. Courts at all levels have wrangled with how and where and to what extent to apply this seemingly straightforward preference for executive policymaking, and scholars have struggled to explain the doctrine’s theoretical underpinnings. Indeed, *Chevron* seems to be “both an untouchable doctrine and yet always under attack.”<sup>71</sup> What appeared at first blush to be a sweeping and categorical preference for executive over judicial authority has gradually been narrowed and qualified over the years, as courts have continued to identify limits to the reach of the doctrine and have become concerned about disproportionate power in executive agencies.

Within three years of his majority decision in *Chevron*, Justice Stevens clarified in *INS v. Cardoza-Fonseca* that if a reviewing court could discern the intent of Congress on a question, there was no need to even consider, much less defer to, the position of the agency: “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given

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<sup>69</sup> Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1879 (2015).

<sup>70</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Blackmun, J., concurring) (recognizing *Chevron* as “an extremely important and frequently cited opinion, not only in this Court but in the Court of Appeals” (citations omitted)). According to Westlaw, the *Chevron* holding has been cited by 15,757 cases, indicating the increased importance of administrative agencies.

<sup>71</sup> Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 2 (2017) (noting that a Westlaw search turned up 80,000 citations for *Chevron*); see also Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 978 n.5 (2008) (observing that the volumes of commentary on *Chevron* testify to its importance as a doctrine, but also to its complexity).

effect.”<sup>72</sup> This became known as *Chevron’s* Step One. In 2001, in *United States v. Mead Corp.*,<sup>73</sup> the Court held that an agency must have been authorized to and must have in fact spoken “with the force of law” in order to trigger *Chevron* deference.<sup>74</sup> This was dubbed a preliminary Step Zero.<sup>75</sup> Step Two is the court’s deferential review of agency action for reasonableness, the standard as originally envisioned in *Chevron*.

In a series of cases in more recent years and with concern for “the growing power of the administrative state,”<sup>76</sup> individual justices and Court majorities have raised other questions about the reach of the doctrine and have increasingly been willing to recognize reasons to decline to defer to executive agencies. The Court has been more and more willing to make a robust initial inquiry (à la Step Zero) into whether Congress likely intended to delegate authority to a particular agency on a specific question at issue. The Court continues to be concerned about and to use *Chevron’s* language of balance of powers between the branches of government, but as administrative agencies have grown in influence and power, the concern has shifted from worry about a judiciary overstepping its bounds to fear of runaway executive agencies in danger of trampling the other two Branches of government. As Chief Justice Roberts expressed it, in dissent in *City of Arlington v. FCC*<sup>77</sup> in 2013: “[The Court’s] duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive.”<sup>78</sup>

By 2014, in *Utility Air Regulatory Group v. EPA*,<sup>79</sup> a fractured Court rejected on substantive grounds an EPA decision that expanded the agency’s own jurisdictional reach, in part because the Court found it unreasonable (under Step Two) to believe that Congress would have intended to delegate “decisions of vast ‘economic and political significance’” to the agency without doing so explicitly.<sup>80</sup> And in 2015, in *King v. Burwell*, the Court sidestepped the *Chevron* framework entirely on grounds that it was unlikely that Congress intended to implicitly delegate a question of such “deep economic and political significance” under the Affordable Care Act to the Internal Revenue Service, given that agency’s lack of expertise in

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<sup>72</sup> 480 U.S. at 448 (quoting *Chevron* at 843 n.9).

<sup>73</sup> 533 U.S. 218 (2001).

<sup>74</sup> *Id.* at 237 (2001) (holding that an agency letter binding only as the specific recipient of the letter was not sufficiently authoritative agency action to warrant *Chevron* treatment).

<sup>75</sup> See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 873 (2001). See also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

<sup>76</sup> *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). Though Justice Roberts was in the dissent in this case, his concerns shifted to the majority by 2015 when the Court dismissed *Chevron* concerns in *King v. Burwell* because of its doubt that Congress intended to delegate important decisions under the Affordable Care Act to the Internal Revenue Service. *King v. Burwell*, 135 S. Ct. 2480, 2488–90 (2015).

<sup>77</sup> 569 U.S. 290 (2013).

<sup>78</sup> *Id.* at 327 (2013) (Roberts, C.J. dissenting).

<sup>79</sup> 134 S. Ct. 2427 (2014).

<sup>80</sup> *Id.* at 2444 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

health insurance policy.<sup>81</sup> In the same year, then-Judge Neil Gorsuch expressed a concern about runaway executive agencies similar to that of a number of his future colleagues on the Court: “When unchecked by independent courts exercising the job of declaring the law’s meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative.”<sup>82</sup> More recently, he expressed concern that *Chevron* represents a “violation of the separation of powers.”<sup>83</sup>

This series of decisions reflects the Court’s growing skepticism of the central notion behind *Chevron* deference—that where Congress does not say otherwise, it necessarily intends to delegate the power to interpret an ambiguous statute to an executive agency rather than to the courts. Indeed, even beyond the justices’ situational willingness to question that premise demonstrated in this line of cases, the Court may soon be on the verge of overturning *Chevron* altogether. In a parting suggestion to his colleagues in the 2018 case of *Pereira v. Sessions*,<sup>84</sup> (an immigration case in which the majority sidestepped *Chevron* by finding the statute to be unambiguous), retiring Justice Anthony Kennedy opined that “it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.”<sup>85</sup> He noted with apparent sympathy the calls in other cases from three of his conservative colleagues to reconsider *Chevron* and pointed out the “troubling” tendency the doctrine encourages for reviewing courts to apply “reflexive deference” and engage in nothing but the most cursory statutory review.<sup>86</sup> He warned that the lackadaisical review of the lower courts in *Pereira* “suggests an abdication of the Judiciary’s proper role in interpreting federal statutes.”<sup>87</sup>

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<sup>81</sup> 135 S. Ct. at 2489 (“This is not a case for the IRS. It is instead our task to determine the correct reading of Section 36B.”).

<sup>82</sup> *United States v. Nichols*, 784 F.3d 666, 671–72 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

<sup>83</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring and citing *Michigan v. EPA*, 135 S. Ct. 2699, 2713–14 (2015) (Thomas, J., concurring); cf. *City of Arlington*, 569 U.S. at 312–14 (Roberts, C.J., dissenting) (the author should include an explanatory parenthetical).

<sup>84</sup> 138 S. Ct. 2105 (2018).

<sup>85</sup> *Id.* at 2121. See Rachel E. Rosenbloom, *A Win for Immigrants and Cloud over Chevron at High Court*, LAW 360 (June 22, 2018), <https://www.law360.com/articles/1056048/a-win-for-immigrants-and-cloud-over-chevron-at-high-court>.

<sup>86</sup> *Pereira v. Sessions* 138 S. Ct. at 2121 (Kennedy, J. concurring) (citing *City of Arlington*, 569 U.S. at 312–16 (Roberts, C.J., dissenting); *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring) (“For if we give the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent, we permit a body other than Congress to perform a function that requires an exercise of the legislative power.”) (internal quotations and citations omitted); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>87</sup> *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018).

Unless and until the Court takes that momentous step, however, courts at all levels will continue to have to wrestle with when and to what degree to apply *Chevron* deference. While the Supreme Court has found any number of ways to evade exercising *Chevron* deference, the doctrine continues to be invoked frequently and to exert enormous power in the lower federal courts.<sup>88</sup> And when those courts defer to BIA and Attorney General decisions in the context of asylum and withholding applications, they do so with literally life-and-death consequences for applicants.

## B. The Theoretical Underpinnings of the Doctrine

In order to assess the appropriateness of deference in the context of humanitarian protection, it is helpful to review the theoretical justifications for the doctrine. As the case law has shifted over the years, scholars have struggled to nail down the theoretical bases for *Chevron* doctrine. In the words of Peter Strauss, administrative law scholars have “leveled a forest” since 1984 exploring and attempting to explain the theoretical underpinnings, the justifications and the limits of the doctrine,<sup>89</sup> and more than thirty years later, the debate continues in the courts and in the academy. While it is beyond the scope of this Article to address this forest of scholarship comprehensively, it is worth taking a moment to identify the main rationales given for the doctrine, because they surface in contemporary questions about its reach.

### 1. Legislative delegation

Prior to *Chevron*, courts recognized and generally deferred to agency interpretations and rules where Congress had explicitly delegated rulemaking authority to an agency.<sup>90</sup> The essential move of the *Chevron* decision was to equate statutory “gaps” or ambiguities with those

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<sup>88</sup> In a recent study of 1561 cases in the federal circuit courts, Kent Barnett and Christopher Walker found that the *Chevron* framework was applied to agency decisions 75% of the time in the courts of appeals. Of those decisions subjected to *Chevron* analysis, the vast majority—70%—made it to Step Two, where fully 94% of agency interpretations were upheld. Barnett & Walker, *supra* note 71, at 31. See Thomas W. Merrill, *Judicial Deference*, 101 YALE L.J. 969, 977 (1992) (observing that *Chevron*’s two-step formulation transforms deference doctrine into “a regime with an on/off switch”). Thus, despite the Supreme Court’s recent tendency to avoid applying *Chevron*, the doctrine continues to be vitally important in the practice of administrative law in the lower courts, where the vast majority of cases are resolved. As Thomas Merrill put it, “for every case in which the [Supreme] Court confronts a *Chevron* question, thousands are decided by the lower courts.” Thomas W. Merrill, *Step Zero after City of Arlington*, 83 FORDHAM L. REV. 753, 783 (2014) [hereinafter Merrill, *Step Zero*].

<sup>89</sup> Strauss, *supra* note 66, at 1144.

<sup>90</sup> See, e.g., *Gray v. Powell*, 314 U.S. 402 (1941) (holding Congress had delegated an administrative function to the agency for an efficient use of agency function and that the “administrative conclusion [will be] left untouched”); *NLRB v. Hearst Publ’ns*, 322 U.S. 111 (1944) (holding that NLRB deserved deference because it exercised its delegated authority to make a determination with reference to its statute reasonably).

explicit legislative delegations of authority and to extend to agency interpretations filling those gaps the deference that had traditionally been given to exercises of explicitly delegated authority.<sup>91</sup> This concept of *implied* legislative delegation to the agency was articulated prominently by the Court in the *Chevron* decision itself and was the principal traditional theoretical justification for *Chevron*'s preference for agency decision-making: If Congress is the primary legislative body, deference should be given to any body to which Congress has delegated that legislative authority, whether explicitly or implicitly.<sup>92</sup> Professor Strauss describes “Chevron space” as a “consequence of delegation”<sup>93</sup> and as:

the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority. The whole idea of “agency” is that the agent has a certain authority, a zone of responsibility legislatively conferred upon it.<sup>94</sup>

Much of the early force of the *Chevron* doctrine rested in the separation of powers argument that deference to the delegated authority of the agency was indirectly deference to the principal law-making function of Congress.

However, this stated basis for the Court's decision has been roundly criticized and debunked as a legal fiction with no basis in legislative reality.<sup>95</sup> Justice Scalia opined early on that gaps

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<sup>91</sup> Merrill & Hickman, *supra* note 75, at 834.

<sup>92</sup> *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also* King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (explaining that *Chevron* deference “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps” but ultimately holding that Congress did not intend such a delegation in that case).

<sup>93</sup> Strauss, *supra* note 66, at 1164.

<sup>94</sup> *Id.* at 1145.

<sup>95</sup> Herz, *supra* note 69, at 1876 (“[I]t is hard to find anyone who does not consider congressional delegation a fiction”) (*citing*, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212–25 (concluding *Chevron* does not rest on actual congressional intent)); Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2009 (2011) (“The framework for judicial review of agency statutory interpretation rests on a legal fiction: Congress intends to delegate interpretive authority to federal agencies whenever it fails to resolve clearly the meaning of statutory language.”); Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 613 (2014) (“[I]n contrast to most of the other interpretive rules, there is widespread agreement about *Chevron*’s source: the Court created the doctrine.”); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 749 (2002) (“*Chevron* deference revolves around the fiction of a congressional delegation . . . .”); Scalia, *supra* note 66, at 517 (noting “any rule [regarding congressional allocation of interpretive authority] represents merely a fictional, presumed intent”); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power*

in statutory frameworks in the vast majority of cases likely did not indicate any congressional intent whatsoever but rather that Congress “didn’t think about the matter at all,”<sup>96</sup> and then Judge Neil Gorsuch dismissed implied legislative delegation in a 2016 concurring opinion as “no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that.”<sup>97</sup> Indeed, Abbe Gluck argues persuasively that the modern trend toward “unorthodox” lawmaking and large, extremely complex and “messy” statutes<sup>98</sup> makes it increasingly likely both that such inadvertent gaps will result and that they will reflect no intention at all on the part of Congress to delegate anything.<sup>99</sup> Even the *Chevron* decision itself recognizes that Congress’s failure to speak on a particular detail might have been “inadvertent.”<sup>100</sup>

As criticism of the fiction of delegation mounted, reliance on it as the justification for *Chevron* deference correspondingly dwindled. But it has not disappeared by any means. Many of the recent cases eschewing deference have done so with the explanation that, for one reason or another, it was unlikely that Congress intended to make such a delegation to a particular agency in the specific context at issue.<sup>101</sup>

## 2. Agency Expertise

Another justification offered for agency deference is that the agency, because of its focus, has expertise in the subject matter at hand. The *Chevron* court, faced with a technical question of the relative merits of different approaches to controlling industrial air pollution, acknowledged that a full understanding of the policy implications of the question “depended

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to Say What the Law Is, 115 YALE L.J. 2580, 2589–91 (2006) (describing proposition that Congress has delegated authority to executive as “fiction.”).

<sup>96</sup> Scalia, *supra* note 66, at 517 (describing implied congressional delegation as “a fictional, presumed intent”). See also Merrill, *Step Zero*, *supra* note 88, at 759 (“Even *Chevron*’s most enthusiastic champions admit that the idea of an ‘implied delegation’ is a fiction.”).

<sup>97</sup> Gutierrez-Brizuela v. Lynch, 834 F3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>98</sup> Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 76, 110 (2015).

<sup>99</sup> *Id.* at 96 (“One way to understand all of this is to view the Court’s sidestepping of *Chevron* [in *King v. Burwell*] as actually a new doctrinal move: namely, that not every ambiguity in an imperfect and complicated statute creates interpretive space for the agency.”).

<sup>100</sup> *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865–66 (1984) (referring to “the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency”).

<sup>101</sup> See, e.g., *King v. Burwell*, 135 S. Ct. at 2488 (explaining that the *Chevron* framework “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps”; however, in some cases, “there may be reason to hesitate before concluding that Congress intended such an implicit delegation.”); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

upon more than ordinary knowledge”<sup>102</sup> and that the justices were “not experts in the field.”<sup>103</sup> In light of its lack of expertise, the Court found it preferable to leave the policy question for the agency to answer. The Court subsequently described “practical agency expertise” as “one of the principal justifications behind Chevron deference.”<sup>104</sup> The Court has waffled nonetheless in how it has described the sort of expertise that should justify deference. Does expertise refer to a technical or scientific expertise in the field of regulation as it did in *Chevron*?<sup>105</sup> To “the way the real world works” in the implementation of the statute?<sup>106</sup> Or to the complicated workings of a statutory scheme?<sup>107</sup> The Court has not resolved this question, and, perhaps correspondingly, it and lower courts have varied in the weight they have given to agency expertise in deference decisions. One study revealed that courts granted the most substantial deference in cases arising in the technically complicated areas of environmental science, energy regulation, intellectual property, pension regulation, and bankruptcy.<sup>108</sup>

It also appears that courts have varied in the levels of deference they have been willing to give different agencies according to their perceptions of the general levels of expertise, capacity and oversight in those agencies. As noted, agency claims of technical or scientific expertise are, understandably, I think, most likely to be given deference.<sup>109</sup> On the other

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<sup>102</sup> *Chevron*, 467 U.S. at 844.

<sup>103</sup> *Id.* at 865.

<sup>104</sup> Paul Chaffin, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA*, 69 N.Y.U. ANN. SURV. AM. L. 503, 525 n.102 (2013) (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990)). Justice Scalia, in turn, stated his position that while agency expertise may be a practical benefit of *Chevron* deference, it was not theoretically sufficient to justify it. Scalia, *supra* note 66, at 514.

<sup>105</sup> See, e.g., *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000) (“In the face of conflicting evidence at the frontiers of science, courts’ deference to expert determinations should be at its greatest.”); *Carstens v. Nuclear Regulatory Comm’n*, 742 F.2d 1546, 1557 (D.C. Cir. 1984) (“[P]etitioners fundamentally misperceive the judiciary’s role in complex regulatory matters. The uncertainty of the science of earthquake prediction only serves to emphasize the limitations of judicial review and the need for greater deference to policymaking entities.”); *Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930 (D.C. Cir. 2006) (upholding an EPA rule that revised nationwide limitations on certain water pollutant discharges and EPA authority to assume industry effluent limitations). For a general discussion of extreme judicial deference to legislative science, see Emily Hammond Meazell, *Scientific Avoidance: Toward More Principled Judicial Review of Legislative Science*, 84 IND. L.J. 239 (2009).

<sup>106</sup> *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651 (1990).

<sup>107</sup> *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 56–57 (2014).

<sup>108</sup> Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 S. CT. REV. 1, 29 (2013) (citing William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1173–74 (2008)).

<sup>109</sup> *Id.*

hand, courts have proven less willing to cede to claims of agency expertise where they perceive problems of bias or dysfunction in an agency.<sup>110</sup> For example, a comparative study of the effects of *Chevron* on administrative law decisions found that while the doctrine generally increased deference to agencies, it seemed to make courts no more willing to defer to decisions by the legacy Immigration and Nationality Service,<sup>111</sup> a difference one commentator attributed to “judicial knowledge of the dysfunctionality of that particular agency.”<sup>112</sup> Likewise, one way to understand the Supreme Court’s rejection of the *Chevron* framework in *King v. Burwell* is as a rejection of the IRS as an expert in the field of health insurance regulation that was the main subject of the Affordable Care Act. The Court responded to but did not dwell on the reality that complex statutory schemes now often implicate different federal agencies to different degrees and may involve them in peripheral ways in fields in which they are not truly expert.

And finally, some commentators have questioned whether being immersed in the day-to-day implementation of a statutory scheme necessarily makes an agency a better decision-maker than a court, regardless of specialized knowledge. Some have argued that agencies can develop “tunnel vision,” causing them to act without sufficient regard for larger normative frameworks such as the Constitution.<sup>113</sup> Others argue that agencies that work regularly with certain interested parties or industries can become “captured” by those special interests and lose their regulatory independence.<sup>114</sup>

Such concerns for agency independence, capacity and expertise have led some Supreme Court justices and some scholars to argue for a completely new regime that would condition levels of judicial deference on “the type of agency, the agency’s track record, the agency’s expertise, the level of presidential and congressional control over the agency, and the timing of the agency’s action.”<sup>115</sup>

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<sup>110</sup> *Id.* (citing Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency’s Success in the Federal Courts of Appeals*, 5 FIU L. REV. 437, 451 (2010)).

<sup>111</sup> Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1043.

<sup>112</sup> Pildes, *supra* note 108, at 29 n.84.

<sup>113</sup> Eskridge & Baer, *supra* note 108, at 1174–75.

<sup>114</sup> Pildes, *supra* note 108, at 21 (discussing the rise of agency capture theory); *see also* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1804 (1975); DANIEL CARPENTER & DAVID A. MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (2013).

<sup>115</sup> *See* Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 980 (2008); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001) (advocating different levels of deference depending on which executive voice speaks and/or whether the agency is executive or independent); *F.C.C. v. Fox TV Stations, Inc.*, 556 U.S. 502, 546–47 (2009) (Breyer, J., dissenting) (calling for increased supervision of executive agencies because of “[the] agency’s comparative freedom from the ballot-box control.”).

3. Policy question for which political accountability is desirable

“Chevron imagines the agency as a policymaker, appropriately responsive to the political views of the President in office at any given time.”<sup>116</sup> The *Chevron* Court described the subject of the contested decision-making at issue in that case as “policy-making” and as “assessing the wisdom of [ ] policy choices and resolving the struggle between competing views of the public interest.”<sup>117</sup> The Court held that this function of formulating “policy” was most properly left to the political branches, which could ultimately be held accountable by their constituents for these normative choices: “[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>118</sup>

If an agency has authority and capacity to engage in policy-making, the next question is what constitutes a question of “policy” on which its action should receive deference. *Chevron*’s first step narrows this inquiry by excluding questions found to require only statutory interpretation because any policy decisions already made by Congress should simply be implemented. From there, the doctrine originally seemed to presume that any remaining ambiguity would be resolved by having the agency weigh the relative merits of substantive policy alternatives and choose among them based on their normative value in light of the public interest. However, over time, it became clear that the line between legal interpretation and substantive policy decisions could be fuzzy. Some of the implementation work of agencies turned out to be more akin to interpreting statutory language than filling in substantive policy gaps. Many courts and commentators began to describe this generally as the “interpretive authority” given to agencies over the statutes they administer and to debate whether such “law-like” interpretive activities were deserving of as much deference as more substantive policy choices.<sup>119</sup> Michael Herz has attempted to clarify the difference, distinguishing between two possible meanings of the word “construction” as applied to a statute: (1) construing (interpreting) statutory language and (2) “constructing” policy, that is, “making a normative, policy-based, prescriptive decision”<sup>120</sup> “in the space Congress left for

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<sup>116</sup> Strauss, *supra* note 66, at 1146–47.

<sup>117</sup> *Chevron*, 467 U.S. at 865–66.

<sup>118</sup> *Id.* at 866.

<sup>119</sup> Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 806 (1997); Herz, *supra* note 69, at 1883; see also *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) (describing the agency interpretive authority as existing only when Congress has conferred authority to the agency).

<sup>120</sup> Herz, *supra* note 69, at 1883 (citing Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 684–708 (2007) (making extended argument that treating agency implementation of statutes as being “statutory interpretation” is both incorrect and harmful)); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under Chevron*, 6 ADMIN. L.J. AM. U. 187, 196–200 (1992) (arguing *Chevron* deference applies to agency policymaking but not agency “interpretation” in sense of determining what it is Congress has done); Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 200 (2007) (“Step two

the agency to work within.”<sup>121</sup> Courts have not always been consistent in distinguishing these types of activity or in deciding whether they are equally worthy of deference, often deferring under *Chevron* to agency interpretation of statutory language that does not appear to implicate traditional notions of policy-making.

In sum, on this somewhat shifting set of theoretical justifications and even with a Supreme Court that may be backing away from the doctrine in whole or in part, *Chevron* continues to hold enormous sway in the lower courts and remains vitally relevant to the analysis of asylum and withholding cases, as the next section explores.

#### IV. *Chevron* Deference to the Justice Department in Asylum and Withholding Cases

As noted, the Supreme Court and lower courts have stated repeatedly but without much analysis that the *Chevron* framework applies to asylum and withholding of removal law (as it does to immigration law generally), but they have never engaged in a robust analysis that takes into account the unique features of Refugee Act provisions, and they have not examined the question in recent years in light of the nuances of contemporary *Chevron* doctrine.

The Court first observed that *Chevron* deference would apply to some aspects of asylum adjudications in the 1987 decision of *Cardoza-Fonseca*.<sup>122</sup> The observation came in *dicta* because the Court decided the case on the “pure question of statutory construction” of the INA provisions for asylum and withholding.<sup>123</sup> The Court distinguished the narrow legal question before it (of whether the asylum and withholding standards were identical) from a hypothetical question about the concrete meaning of the phrase “well-founded fear.” The Court offered the observation that the latter phrase was ambiguous and that courts would need to respect the agency’s adjudicatory interpretations giving it concrete meaning case by case, citing to *Chevron*—a good indication that the Court was assuming that *Chevron* deference

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. . . does not . . . authorize agencies to ‘interpret’ statutes . . . . [I]t recognizes that institutions may choose among competing constructions of a statutory provision that is within the range of meanings that the statutory language can support . . . . An institution can make that choice only by engaging in a policymaking process.” (footnotes omitted).

<sup>121</sup> Herz, *supra* note 69, at 1891 (quoting FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS: PRINCIPLE OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS (William G. Hammond ed., 3d ed. 1880) on the “distinction between interpretation and construction.” *Id.* at 1894. “Interpretation was the narrower task, consisting of ‘the discovery and representation of the true meaning of any signs used to convey ideas.’” *Id.* (quoting LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra*, at 5). “Every text requires interpretation, [..]‘Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.’” *Id.* (quoting LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra*, at 44).

<sup>122</sup> INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>123</sup> *Id.* at 446.

would apply to the agency’s decisions interpreting a well-founded fear (though it did not say so directly).<sup>124</sup> However, the Court’s observation was not essential to its decision and involved no further discussion or analysis of *Chevron*’s applicability in the context of provisions enacted in the Refugee Act—which the Court did acknowledge was enacted with the express congressional intent of bringing U.S. refugee law into compliance with the country’s international obligations under the Geneva Convention on the Status of Refugees and the 1967 Refugee Protocol.<sup>125</sup>

Since that time, the Court has gone on to hold directly that *Chevron* deference is due in asylum and withholding cases, but an examination of these cases reveals a simple reliance on the *dicta* in *Cardoza-Fonseca* and a continuing lack of robust and specific *Chevron* analysis, especially in light of subsequent developments in the jurisprudence. In 1999, the Court held in *INS v. Aguirre-Aguirre* that it was “clear” that principles of *Chevron* deference applied to the statutory scheme of withholding and overturned a circuit court of appeals decision for failing to give deference to a BIA interpretation.<sup>126</sup> The Court relied on the fact that Congress charged the Attorney General in a general way with broad powers to implement and interpret the INA and to determine eligibility for relief in individual cases.<sup>127</sup> The Court also recognized that deference in the immigration context generally was “especially appropriate” because of the political nature and potentially sensitive foreign relations implications of immigration decisions.<sup>128</sup> But the Court relied on *Cardoza-Fonseca* and these general principles without otherwise engaging contemporary *Chevron* case law or discussing the international roots of the Refugee Act provisions or even engaging in a particularly robust Step One analysis. Most notably, though the Court cited to *Cardoza-Fonseca* for the proposition that Congress had passed the Refugee Act with the intention of complying with the 1967 Refugee Protocol, it declined to follow that case’s lead in looking to international understandings of the Protocol to construe the statutory language in a Step One analysis.<sup>129</sup>

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<sup>124</sup> *Id.* at 448.

<sup>125</sup> *Id.* at 436–41 (describing congressional intent to bring the U.S. into compliance with the Protocol and Convention. The United States was not a party to the original 1951 Convention, which specifically addressed and was limited to refugees created in Europe by World War II and its aftermath, but its signing of the 1967 Protocol bound it to the Convention’s terms. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, *entered into force* Oct. 4, 1967.

<sup>126</sup> *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

<sup>127</sup> *Aguirre-Aguirre*, 526 U.S. at 424–25 (citing 8 U.S.C. § 1253(h)(1), § 1253(h)(2), and § 1103(a)(1)).

<sup>128</sup> *Aguirre-Aguirre*, 526 U.S. at 425 (citing *INS v. Abudu*, 485 U.S. 94, 110 (1988) (case involving a motion to reopen deportation proceedings)).

<sup>129</sup> 526 U.S. at 428–29 (dismissing proffered UNHCR guidance on the language as merely a “useful interpretative aid” that the BIA was free to ignore if it so chose and holding that the reviewing court was bound to accept this interpretation as “fair and permissible”).

In 2009, the Court again addressed *Chevron* deference in the asylum and withholding context in the case of *Negusie v. Holder*,<sup>130</sup> citing *Aguirre-Aguirre* for the proposition that “it is well settled that ‘principles of *Chevron* deference are applicable to this statutory scheme.’”<sup>131</sup> But again, the Court did not take a fresh look at the question in light of the development of *Chevron* principles, and it did not look specifically at the propriety of deference to provisions of the Refugee Act. Rather, it relied on rationales for deference in immigration matters generally, which it lifted almost verbatim from *Aguirre-Aguirre*.<sup>132</sup>

And despite this line of case law and other cases counseling deference in immigration generally, the Supreme Court and lower courts have found many ways and reasons over the years to avoid deferring to the BIA and the Attorney General in immigration cases. For example, as noted above, the Supreme Court avoided deference to the BIA in *Cardoza-Fonseca* by recognizing judicial primacy in pure statutory construction, looking to legislative history to divine congressional intent and inaugurating *Chevron*’s Step One.<sup>133</sup> In 2001, the Court again declined to proceed to *Chevron*’s Step Two in two important cases—*Zadvydas v. Davis*,<sup>134</sup> (challenging indefinite immigration detention) and *INS v. St. Cyr*,<sup>135</sup> (challenging the retroactivity of recently imposed bars to relief from deportation).<sup>136</sup> In both cases, the Court disposed of the questions using Step One statutory construction principles. In the 2011 case of *Judulang v. Holder*<sup>137</sup> challenging the agency’s implementation of a waiver of deportation, the Court again rejected the government’s argument for *Chevron* deference, this time on the grounds that the question did not involve the interpretation of any direct statutory language, and the Court instead reviewed the agency’s policy under the Administrative Procedures Act’s “arbitrary and capricious” standard.<sup>138</sup> In 2017, in *Esquivel-Quintana v. Sessions*,<sup>139</sup> a case about the immigration consequences of a conviction, the Court again sidestepped *Chevron* deference by going to some lengths to hold that the INA was “unambiguous” in its

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<sup>130</sup> 555 U.S. 511 (2009).

<sup>131</sup> *Id.* at 516; *Aguirre-Aguirre*, 526 U.S. at 424 (“Because the Court of Appeals confronted questions implicating ‘an agency’s construction of the statute which it administers,’ the court should have applied the principles of deference described in *Chevron*.”).

<sup>132</sup> 555 U.S. at 516–17.

<sup>133</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

<sup>134</sup> 533 U.S. 678 (2001).

<sup>135</sup> 533 U.S. 289 (2001).

<sup>136</sup> *Zadvydas*, 533 U.S. at 699 (2001) (applying the doctrine of constitutional avoidance in Step One and thus failing to find any ambiguity in the statute) *St. Cyr*, 533 U.S. at 321 n.45 (applying statutory interpretation principles of retroactivity in Step One and finding no ambiguity in the statute: “Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.” [internal citations omitted]).

<sup>137</sup> 565 U.S. 42 (2011).

<sup>138</sup> *Id.* at 55 (2011) (case challenging agency’s interpretation of the scope of the old § 212(c) waiver).

<sup>139</sup> 137 S. Ct. 1562 (2017).

(undefined) use of the phrase “sexual abuse of a minor.”<sup>140</sup> And most recently, in *Pereira v. Sessions*, the Court again found a lack of ambiguity that allowed it to avoid *Chevron*, relying on the “plain text, the statutory context, and common sense” to hold that a “Notice to Appear” must include all the statutory elements in order to trigger the “stop-time” rule that limits eligibility for the relief of cancellation of removal.<sup>141</sup>

It is also worth noting that there are broad areas of adjudication under the INA—even very active areas in which the agency could be argued to have developed its expertise on questions within its regulatory authority—on which the BIA is given no deference whatsoever. For example, courts do not defer to the Board on applications of the categorical analysis used to determine whether a conviction will trigger immigration consequences, a complex area of law relevant to removability, inadmissibility and “good moral character” as defined in the INA. Though this is an active area of BIA adjudication and integral to the enforcement of the INA’s grounds of removal and inadmissibility, courts have held and the Board itself acknowledges that it is due no deference in its application of the categorical approach.<sup>142</sup> This is because the approach requires the analysis of the elements of criminal statutes underlying the prior convictions, an area in which the Board has no particular expertise in comparison to reviewing federal courts that regularly apply and interpret criminal statutes.<sup>143</sup>

And finally, many courts have historically resisted deferring to the Board and the Attorney General on immigration decisions, for reasons that appear to range from a lack of confidence in the competence of the Board to concerns about its objectivity as an adjudicator. Studies going back to 1990 have found that courts have been less deferential to BIA decisions than to the decisions of most other agencies.<sup>144</sup> Even earlier, Justice Blackmun, concurring in the decision in *Cardoza-Fonseca* in 1987, was blunt in finding fault

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<sup>140</sup> *Id.* at 1564 (2017).

<sup>141</sup> *Pereira v. Sessions*, 138 S. Ct. 2105, 2114 (2018).

<sup>142</sup> *See* *Silva-Trevino* (“*Silva-Trevino III*”), 26 I. & N. Dec. 826, 833 (B.I.A. 2016) (reaffirming that the application of the categorical approach is not a matter upon which the Board receives deference) (citing *Chairez*, 26 I. & N. Dec. 819, 820 (B.I.A. 2016); *Karimi v. Holder*, 715 F.3d 561, 566 (4th Cir. 2013) (“Although we generally defer to the BIA’s interpretations of the INA, where, as here, the BIA construes statutes and state law over which it has no particular expertise, its interpretations are not entitled to deference.”) (alterations and internal quotation marks omitted); *Alvarez v. Lynch*, 828 F.3d 288, 292 (4th Cir. 2016) (“We thus review the pure legal issue in this case de novo.”) (citing *Espinal-Andrades v. Holder*, 777 F.3d 163, 166 (4th Cir. 2015)); *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 873 (9th Cir. 2008) (reviewing de novo the issue of whether in California forgery is an aggravated felony).

<sup>143</sup> *See, e.g.*, *Omargharib v. Holder*, 775 F.3d 192, 196 (4th Cir. 2014) (quoting *Karimi*, 715 F.3d 561 at 566).

<sup>144</sup> *Pildes*, *supra* note 108, at 29 n.84 (citing *Schuck & Elliott*, *supra* note 111, at 1043 (finding that, in contrast to most agencies whose success rate in judicial review increased significantly in the wake of *Chevron*, the BIA’s actually decreased)).

with the then-INS for failing to adequately develop the asylum standard that had been “entrusted to its care,” finding that the agency had allowed itself to be mired in “years of seemingly purposeful blindness” and had developed a standard that was “strikingly contrary to plain language and legislative history.”<sup>145</sup> More recently, former Judge Richard Posner has been a vocal judicial critic of the BIA. He has regularly drawn attention to the deficiencies of the Board’s process and of the quality of its decisions, as, for example, in a 2005 opinion in which he detailed numerous BIA decisions that had been overturned for “gaping holes” in their reasoning, mistakes, unsupported factual conclusions, procedures that constituted “an affront to [petitioner’s] right to be heard,” hostility and abuse inflicted by immigration judges, and ignoring elementary principles of administrative law and of common sense.<sup>146</sup> In short, Judge Posner noted that the agency had been overturned in a “staggering” percentage of the cases seen in the Seventh Circuit that term and concluded that “the adjudication of these cases at the administrative level ha[d] fallen below the minimum standards of legal justice.”<sup>147</sup> Five different federal circuit courts refused to defer when Attorney General Michael Mukasey attempted to rewrite the method for analyzing whether a conviction should trigger deportation as a “crime involving moral turpitude.”<sup>148</sup> A recent survey of

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<sup>145</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450–52 (1987).

<sup>146</sup> *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (citing *Sosnovskaia v. Gonzales*, 421 F.2d 589, 594 (7th Cir. 2005)).

<sup>147</sup> *Id.* at 830 (7th Cir. 2005) (citing *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2003)). Numerous commentators have also chronicled the dysfunction of the immigration adjudicatory system, which has only worsened since 2005. *See, e.g.*, Shruti Rana, *Chevron Without the Courts? The Supreme Court’s Recent Chevron Jurisprudence Through an Immigration Lens*, 26 *GEO. IMMIGR. L.J.* 313, 319 (2012) (describing the system as “beset with so many severe problems—from overburdened courts and an enormous backlog of cases, to charges of bias, to endemic mistakes, to widely inconsistent decision making”); Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 *WM. & MARY L. REV.* 581, 585, 608–23 (2013) (describing the lack of resources for immigration judges, significant inconsistencies in rates of favorable decisions, political bias among immigration judges and BIA members, and the lack of meaningful review at the agency).

<sup>148</sup> Attorney General Holder, in vacating Mukasey’s decision in 2015, cited “the decisions of five courts of appeals rejecting the framework set out in Attorney General Mukasey’s opinion—which have created disagreement among the circuits and disuniformity in the Board’s application of immigration law—as well as intervening Supreme Court decisions that cast doubt on the continued validity of the opinion . . .” *Cristoval Silva-Trevino*, 26 *I. & N. Dec.* 550, 553 (A.G. 2015). *See* *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 473–74 (3d Cir. 2009) (showing that it does not accord deference to AG’s “realistic probability” requirement); *Fajardo v. U.S. Att’y Gen.*, 659 F.2d 1303, 1310 (11th Cir. 2011) (holding that *Silva-Trevino* is contrary to the unambiguously express intent of congress, thus the court is “not bound by the Attorney General’s view”); *Prudencio v. Holder*, 669 F.3d 472, 475 (4th Cir. 2012) (holding that the procedural framework established in *Silva-Trevino* was not an authorized exercise of the Attorney General’s authority under *Chevron*); *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010) (stating that the court is “bound by [its] circuit’s precedent,” and declined to follow *Silva-Trevino* to the extent it was inconsistent); *Olivas-*

*Chevron* deference in the circuit courts found that immigration decisions continued to be somewhat less likely to receive deference than other types of agency decisions.<sup>149</sup>

In short, the history of judicial deference to case-by-case adjudicatory immigration decisions by the BIA and the Attorney General is not entirely consistent, but leans toward a generous standard that allows the Executive substantial latitude. By the same token, courts have sometimes been willing to subject the agency's decisions to rigorous review, with a variety of justifications. The history of deference in Refugee Act cases, more specifically, has been similar, in that courts have been inconsistent in their application of *Chevron*, applying the doctrine in many cases but not in others.

#### V. Applying Contemporary *Chevron* Doctrine to Refugee Act Provisions

And so, we come with fresh eyes to our question: Should the federal courts employ a presumption of deference under *Chevron* to Justice Department decisions on asylum and withholding of removal? Our analysis is informed not just by the current state of *Chevron* jurisprudence, but also by the treaty roots of the Refugee Act provisions and the nature of the relationship between the Department of Justice, as a prosecutorial immigration agency, and the politically and otherwise vulnerable asylum seeker.

We have seen that contemporary *Chevron* jurisprudence reveals, despite the sweeping language of the original case, that the Supreme Court does not necessarily assume congressional intent to delegate deference-worthy authority to every executive agency on every issue on which the agency has general administrative authority.<sup>150</sup> Since *Cardoza-Fonseca* and with accelerating frequency in recent years, the Court as a whole and individual justices have engaged in preliminary Step Zero and Step One analyses that sidestep the need for deference. The Court has repeatedly expressed separation of powers concerns, finding reasons to eschew deference in the nature of the agency and its relationship to the question at hand<sup>151</sup> and in what deference in a particular situation would mean for the scope of the

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Motta v. Holder, 716 F.3d 1199, 1203 (9th Cir. 2013) (agreeing with other Circuits that the relevant provisions of the INA are not ambiguous and declining *Chevron* deference to the Attorney General's opinion in *Silva-Trevino*).

<sup>149</sup> Barnett & Walker, *supra* note 71, at 50–51.

<sup>150</sup> See *supra*, section III.A. King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (declining to defer to the IRS despite its clear regulatory authority under the ACA). See also Util. Air Regulatory Grp., 134 S. Ct. at 2489; City of Arlington v. FCC, 569 U.S. 290, 309 (2013) (Breyer, J., concurring) (stating that ambiguity alone does not necessarily indicate congressional intent to delegate authority to the executive).

<sup>151</sup> See King, 135 S. Ct. at 2489 (finding it unlikely that Congress intended to delegate deference-worthy authority to the IRS in its administration of the Affordable Care Act because of its lack of expertise in health care policy); City of Arlington, 569 U.S. at 309 (Breyer, J., concurring) (listing “the subject matter of the relevant provision—for instance, its distance from the agency's ordinary statutory duties” among the factors that affect appropriateness of deference).

agency's authority.<sup>152</sup> The Court has framed the question as whether it was likely that Congress intended to delegate unchecked authority to a particular agency on a particular question, though in reality it appears to be engaging in its own analysis of whether deference to executive authority seems appropriate in a given context. The Court's cases appear to reflect a context-specific adaptation of deference doctrine, a "more grounded, realist's stance on the deference issue" that Richard Pildes maintains courts have long taken despite *Chevron's* broad technical claims.<sup>153</sup>

The context of asylum and withholding law has at least two distinctive features that bear on whether it would be reasonable to assume that Congress intended for the Justice Department to receive deference in this area of adjudications: the treaty source of the statutory obligation of *non-refoulement* (along with its definition of refugee and the bars to protection)<sup>154</sup> and the predominantly prosecutorial mission of the agency, which runs directly counter to the obligation to protect. These distinctive characteristics come into play both in a threshold Step Zero analysis and in Step One statutory interpretation.

A. Step Zero: The Threshold Question of Deference to the Justice Department on Humanitarian Protection

The Court's willingness to question the appropriateness of deference because of the relationship between the question at issue and the institutional mandate and capacities of the agency raises a number of important threshold (that is, Step Zero) questions in the immigration context generally and the refugee context specifically. First, is it ever appropriate to defer to an enforcement agency on politically sensitive questions of relief from enforcement, especially when the stakes for individual rights are so high—and, in the refugee context, when protection from enforcement is externally mandated? Second, as a practical matter, does the BIA have interpretive expertise or the institutional resources that would warrant deference to interpretation of provisions that implicate international and foreign sources of law? And finally, can treaty-mandated humanitarian protection of vulnerable populations be considered matters of "policy" for which political accountability is desirable or even permissible?

1. Prosecutor as protector?

The first question of institutional mandate and capacity is fundamental: whether it makes sense as a matter of balance of powers to entrust (without a meaningful check) the protection of vulnerable individuals to a prosecutorial agency that is deeply committed to enforcing the law against those very same individuals? In other words, given the entrenched

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<sup>152</sup> *Util. Air Regulatory Grp.*, 134 S. Ct. at 2439.

<sup>153</sup> Pildes, *supra* note 108, at 29.

<sup>154</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987). For example, *compare* Refugee Convention Art. 33(1) *with* 8 U.S.C. § 1231(b)(3)(A); *compare* Refugee Convention Art. 1(A)(2) *with* 8 U.S.C. § 1101(a)(42); *compare* Refugee Convention Art. 1(f) *and* Art. 33(2) *with* 8 U.S.C. § 1158(b)(2).

institutional commitment of the Justice Department to stopping irregular migration, does it make sense to defer to that same agency on the humanitarian protection of irregular migrants?

a. The Department of Justice as a Politically Sensitive, Prosecutorial Immigration Enforcement Agency

The Department of Justice is one of the principal federal agencies that carries out enforcement of immigration laws as part of its “ordinary statutory duties.”<sup>155</sup> The Attorney General, as head of the Department, is also the nation’s principal law enforcement officer.<sup>156</sup> While the Department is also charged with granting relief from deportation, Attorney General Sessions revealed much about the weight of the law enforcement and deterrence role of the Department in the emphasis he gave them. For example, in a recent speech on immigration to the Criminal Justice Legal Foundation, he said, “We know whose side we’re on: we’re on the side of police and we’re on the side of the American people.”<sup>157</sup> In another speech, at the Executive Office for Immigration Review, he described the Department’s commitment to enforcement:

Let’s be clear: we have a firm goal, and that is to end the lawlessness that now exists in our immigration system. This Department of Justice is committed to using every available resource to meet that goal. We will act strategically with our colleagues at DHS and across the government, and we will not hesitate to redeploy resources and alter policies to meet new challenges as they arise . . . . I have put in place a “zero tolerance” policy for

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<sup>155</sup> See *City of Arlington*, 569 U.S. at 309 (Breyer, J., concurring). Numerous federal agencies perform immigration functions, including, most obviously, enforcement and application adjudication in the Department of Homeland Security, but also, for example, visa processing operations in the Department of State and refugee resettlement and detention of minors in the Department of Health & Human Services. Given the deep investment of the DHS in the expulsion of unauthorized noncitizens and in the deterrence of irregular migration, the argument in this section—against deference to an enforcement agency—could also be made in the context of challenges to DHS decisions restricting a variety of forms of relief from removal, including for example, the decision to terminate a country’s designation under Temporary Protected Status. For purposes of *Chevron* deference in asylum and withholding cases, the decisions of the executive agencies reach the courts through Justice Department decisions, so the DOJ will be our focus here.

<sup>156</sup> Office of the Attorney General, *About the Office*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/ag/about-office>. The DOJ webpage on the Office of the Attorney General explains the history and role of the office of the AG: “The Judiciary Act of 1789 created the Office of the Attorney General which evolved over the years into the head of the Department of Justice and chief law enforcement officer of the Federal Government.”

<sup>157</sup> Attorney General Sessions Delivers Remarks to the Criminal Justice Legal Foundation, Los Angeles, CA (June 26, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-criminal-justice-legal-foundation>.

illegal entry on our Southwest border. If you cross the Southwest border unlawfully, then we will prosecute you. It's that simple.<sup>158</sup>

The immigration prosecution context has traditionally been considered “civil” because removal proceedings are at least nominally not intended to punish,<sup>159</sup> but they undeniably subject individuals to harsh sanctions, including indefinite imprisonment during the pendency of the proceedings,<sup>160</sup> separation from family, and deportation, a sanction that has been rightly recognized as potentially causing one to lose “all that makes life worth living.”<sup>161</sup> The harshness is particularly clear in the context of asylum and withholding applications, where the applicant claims a fear of likely harm or in many cases even death if deported.

Even beyond the severe consequences of deportation, however, the Justice Department has also been actively engaged in *criminally* prosecuting immigration violators for more than the last decade and through three presidential administrations. While Attorney General Sessions was more vocal than other Attorneys General have been about the immigration enforcement role of the Department, that role was not new under his leadership. Long before the Trump administration, prosecutions for the offenses of illegal entry and illegal reentry<sup>162</sup> represented the majority of criminal prosecutions brought nationwide by the Department. In Fiscal Year 2016, under President Obama, the Department prosecuted 64,297 cases of just these two offenses of irregular migration.<sup>163</sup> This number outstripped the Department's total for *all* non-immigration-related criminal prosecutions, including for drugs, weapons, fraud and terrorism cases, which totaled 63,405 for FY16.<sup>164</sup> These high rates of prosecution have been consistent trends in the Department's allocation of its resources for the last decade,<sup>165</sup>

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<sup>158</sup> Sessions Remarks to Legal Training Program, *supra* note 28.

<sup>159</sup> *But see* Maureen A. Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11 (2011). *Also see* César Cuauhtémoc García Hernández, *Immigration Detention as punishment*, 61 UCLA L. REV. 1346 (2014); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011); Peter L. Markovitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

<sup>160</sup> *See generally* *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003).

<sup>161</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *see also* *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (holding that deportation is a drastic measure and at times the equivalent of banishment or exile).

<sup>162</sup> *See* 8 U.S.C. § 1325 and § 1326.

<sup>163</sup> *See* TRAC REPORTS, Table 2, Top Charges Filed, <http://trac.syr.edu/tracreports/crim/446/>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* Fig.1: Criminal Immigration Prosecutions over the last 20 years. *See also* Michael T. Light, Mark Hugo Lopez & Ana Gonzalez-Barrera, *The Rise of Federal Immigration Crimes: Unlawful Reentry Drives Growth* (Pew Research Center, Mar. 18, 2014) (showing that illegal reentry convictions increased twenty-eight-fold from 1992 to 2012, representing 48% of the

demonstrating the Department’s sustained investment in criminal prosecution of immigration violations. Of course, with its “zero tolerance” policy of criminally prosecuting *all* those who cross the border illegally, the Trump Justice Department has made it an even “higher priority.”<sup>166</sup> Attorney General Sessions encouraged U.S. Attorneys to use the full extent of the criminal law to, among other things, “deter[] first-time improper entrants” and directed every district in the country to designate a “Border Security Coordinator” to convene regular meetings with DHS to coordinate immigration enforcement initiatives, training and information sharing. Finally, using a longstanding but previously seldom invoked INA provision, Sessions gave the order for U.S. Attorneys to bypass separate removal proceedings entirely and to directly seek judicial orders of deportation in the U.S. District Courts in “each federal [criminal] case” where practicable.<sup>167</sup>

Sessions is a particularly stark example of an Attorney General for whom shutting down irregular migration was among the highest of law enforcement priorities, even where those coming to the border irregularly are advancing claims to humanitarian protection. The stakes for asylum seekers are heightened by the enormous resources of the enforcement apparatus (which includes both Justice Department and all three immigration sub-agencies of DHS), the extreme volatility of immigration as a political issue, and the particular vulnerability of those applicants—who, by definition, are claiming a threat of persecution and who, as noncitizens, have no access to influence the political process. But as noted earlier, Sessions did not create the prosecutorial role of the Attorney General or of the Justice Department in immigration enforcement, nor the danger that it would be exploited to further an administration’s political agenda at the expense of humanitarian protection. He merely took full advantage of an infrastructure that already gave his office enormous power to influence—and limit—the rights of asylum seekers through the Department’s Executive Office for Immigration Review and the prosecutorial U.S. Attorneys Office, as well as through the Attorney General’s own power to certify and decide cases himself.

b. *Chevron* and the Prosecutor

Asylum seekers’ only administrative safeguards in the face of this enforcement juggernaut are in the hands of the very same agency enforcing the law against them. The Justice Department is responsible for enforcing both the prohibition on irregular migration and the nation’s obligation of *non-refoulement*. While many nations’ asylum systems and even the

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growth in the number of individuals sentenced in federal criminal proceedings over that period).

<sup>166</sup> Attorney General Memorandum for Federal Prosecutors Along the Southwest Border: Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>. *See also* Attorney General Sessions, memo for all federal prosecutors, Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), <https://www.justice.gov/opa/speech/file/956856/download> [hereinafter Renewed Commitment].

<sup>167</sup> Sessions, Renewed Commitment, *supra* note 166.

United States Citizenship and Immigration Service (USCIS) institutionally separate immigration enforcement decision makers from those who make refugee determinations, as a precaution to executive abuse,<sup>168</sup> there is no such separation of asylum adjudicators among immigration judges or at the BIA. All judges and Board Members move back and forth between asylum and all other kinds of removal cases as part of a single institutional entity.

The federal circuit court of appeals, therefore, represent the first access asylum applicants have to a decision-maker who is not part of an immigration enforcement agency.<sup>169</sup> As a result, the rigor with which they can review the agency's decisions is vitally important, as is, by extension, the question of whether they must presumptively defer to those decisions under *Chevron*.

The Supreme Court has in recent years repeatedly reached back to the touchstone of the balance of powers principles underlying *Chevron*, concerned that the *Chevron* doctrine has allowed agencies to usurp both legislative power that should be held by Congress and interpretive power that should be exercised by the courts. The justices' concerns about the abuse of executive power and inordinate claims to executive deference seem very apt in the asylum context. Congress intended to comply fully with the requirements of *non-refoulement* in passing the Refugee Act. The Justice Department, whose "ordinary statutory duties"<sup>170</sup> do not involve the protection but rather the prosecution of irregular migrants, has its own executive—and prosecutorial—imperatives. Given the political importance of strong border control, the Department has every incentive to interpret Refugee Act provisions to maximize its ability to *deny* protection and to remove or repel those who arrive or stay in the country outside normal channels. The Attorney General, as the politically appointed head of the Department, is both very powerful in influencing the interpretation of asylum law *and* demonstrably sensitive to the volatile political consequences of irregular migration. As such, he or she often acts as an instrument of the broader administration and for its political purposes. It is not at all a stretch to imagine that these incentives and pressures could color

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<sup>168</sup> Canada, for example, separates the decision makers in its Refugee Protection Division and its Refugee Appeal Division institutionally from those in the Immigration Division. *Organizational Structure*, IMMIGRATION AND REFUGEE BOARD OF CANADA, <https://irb-cisr.gc.ca/en/organizational-structure/Pages/index.aspx>. The USCIS Asylum Office is in a division separate from other USCIS adjudications and is staffed with a dedicated corps of asylum officers, specially trained to adjudicate asylum applications.

<sup>169</sup> Affirmative asylum applications are decided by Asylum Officers from DHS. 8 C.F.R. § 208.2(a). Applications that are not approved there are referred to the immigration courts for review by an immigration judge who works for the Justice Department. 8 C.F.R. § 208.14(c). Immigration judges also hear "defensive" asylum claims filed initially by people who are already in removal proceedings and claims for withholding of removal. 8 C.F.R. § 208.2(b). Immigration judge decisions are appealable to the Board of Immigration Appeals, also part of the DOJ. 8 C.F.R. § 1003.1(b)(3). Applicants whose asylum cases are denied by the BIA have the right to petition for review at the federal circuit court of appeals. 8 U.S.C. § 1252(a)(1).

<sup>170</sup> *City of Arlington v. FCC*, 569 U.S. 290, 309 (2013) (Breyer, J., concurring).

the Department's statutory interpretations to improperly limit the congressional intent to provide protection. To the contrary, history shows that they have and predictably will continue to do so. Given the distorting influence of the Justice Department's structural investment in its role as an immigration enforcement agency, courts serve as a crucial check on the executive's considerable enforcement power and should rigorously review BIA and Attorney General decisions, to ensure compliance with the congressional intent to comply with *non-refoulement* obligations.

A refusal to defer to the Justice Department in matters of asylum is akin to the principle that there is no deference due to a prosecutor's interpretation of a criminal statute. As Justice Scalia observed in his concurrence in the case of *Crandon v. United States*,<sup>171</sup> prosecutors have an incentive to “err in the direction of inclusion rather than exclusion—assuming, to be on the safe side, that the statute may cover more than is entirely apparent.”<sup>172</sup> For this reason, again in Justice Scalia's words, “we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”<sup>173</sup> To do otherwise would create a “rule of severity” rather than the traditional rule of lenity.<sup>174</sup>

Alina Das, considering deference in the federal *habeas* context in the wake of *City of Arlington*, argues that the separation of powers concerns highlighted by Chief Justice Roberts in his dissent in that case can and should affect a court's consideration of whether Congress likely intended to delegate a question to an executive agency.<sup>175</sup> She poses the two-sided question: (1) Are there reasons to think that Congress intended to delegate its law-making authority and (2) Are there reasons to think it would *not* delegate its authority on the particular question at issue?<sup>176</sup> Das argues that the strong liberty interest at issue in *habeas* and the prominence in the Constitution of the protection of the right to petition for *habeas* relief give rise to a kind of “anti-deference” with which a court should regard the detaining executive agency, because Congress would have been unlikely to cede primary law-making authority on such an important liberty issue to the very executive responsible for the detention.<sup>177</sup> Where an individual who has lost her liberty confronts a government agency's detention power, Das argues for the courts as a robust check on agency power.<sup>178</sup> She concludes that where

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<sup>171</sup> 494 U.S. 152 (1990).

<sup>172</sup> *Id.* at 178 (Scalia, J., concurring)

<sup>173</sup> *Id.* at 177; *Cf.* *Touby v. United States*, 500 U.S. 160, 165–66 (1991) (noting but not deciding whether a higher standard may be required to overcome the non-delegation doctrine that would permit Congress to delegate to an executive agency the power to promulgate regulations creating criminal liability).

<sup>174</sup> Alina Das, *Unbackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 189 (2015).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 150.

<sup>177</sup> *Id.* at 151–58.

<sup>178</sup> *Id.* at 202–05.

individual liberty is at stake in a *habeas* proceeding, it is proper for the courts to exercise robust review of the executive detention decision.<sup>179</sup>

This argument finds echoes in the separation of powers rationale of *Chevron*, and its principles apply equally well to the context of applications for asylum and withholding of removal. There are significant reasons to think that Congress would not—or may not even have the power to—delegate to the enforcement agency unchecked authority to interpret provisions implementing the nation’s obligation of *non-refoulement*.<sup>180</sup> Asylum and withholding applications, like *habeas* petitions, involve a strong, fundamental individual right (to the personal security inherent in humanitarian protection and to relief from persecution), guaranteed by an authoritative external source of law (the Refugee Convention), and at potential risk of abuse by an executive otherwise empowered to compromise the right (through its authority to exclude or deport individuals not authorized to be present in the country). *Non-refoulement*, like the fundamental right to liberty at issue in *habeas*, operates as a direct check on executive power and has profound consequences for individuals and their most basic human rights. All of these factors function as reasons Congress would not want to defer to the executive agency, as “anti-deference” factors.

While it is true that Justice Scalia and the majority dismissed the “fox guarding the henhouse” concern in the civil regulatory context in *City of Arlington*, there are important differences between that situation and the question of deference in *non-refoulement* and humanitarian protection.<sup>181</sup> For one thing, *non-refoulement*, like the liberty interest in the criminal or *habeas* context, is a fundamental interest with serious consequences for personal liberty and even the survival of the individual. For another, there is a structural institutional difference. The Court in *City of Arlington* was considering who should decide the breadth of an agency’s power to regulate third parties. By contrast, with asylum and withholding—as in the criminal or *habeas* context—the question is who should police the agency’s *self*-regulation on a matter of fundamental individual liberty. The need for an external check in that circumstance is amplified.

As a matter of separation of powers, there are thus good reasons to believe that Congress would not have left the fundamental principle of *non-refoulement* in the unchecked hands of the executive enforcement agency. As with the criminal prosecutor, Congress would have expected the courts to exercise robust review of the enforcement agency’s interpretations. Unlike the Department of Justice, the courts are not invested on an institutional level in the mission of punishing, deporting or excluding those not authorized to be in the country or of deterring future unlawful immigration. As such, they are in a better position as a structural matter to defend the principle and the nation’s obligation of *non-refoulement*. In the absence of an express indication otherwise, it is reasonable to conclude that Congress intended them to do so vigorously.

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<sup>179</sup> *Id.* at 205–06.

<sup>180</sup> *Id.* at 173–74.

<sup>181</sup> 569 U.S. 290, 307 (2013).

2. Interpretive Deference in Light of Agency Expertise and Capacity

As we have seen, another possible justification for *Chevron* deference is that the agency has a subject matter expertise that the courts do not. How does a possible claim of expertise by the BIA and the Attorney General affect the *Chevron* calculus?

The EPA expertise to which the Supreme Court gave deference in *Chevron* was in the area of the regulation of industrial air pollution,<sup>182</sup> and involved understanding not just the structure and terms of a statute, but also the technical, scientific details of air quality and industrial outputs. In that substantively technical context, the Supreme Court held that the agency, immersed as it was in those fields of knowledge, was more likely than a court to have the technical know-how to fully understand and make the best decisions about policy matters that had been left ambiguous in the statutory scheme.<sup>183</sup> This expertise rationale supports deference in such areas as environmental, health care, financial and other scientific or technical fields, where implementation policy questions require a kind of “scientific, technical, or other specialized knowledge” akin to that recognized in an expert witness in a trial context.<sup>184</sup> In fact, in a 2008 empirical study of cases reviewing agency decisions, Eskridge and Baer found that the Supreme Court often appeared to act along lines of institutional competence, being more likely to defer to agencies in matters in which the Court concluded it was at an “institutional disadvantage” because of inferior knowledge either related to national security and foreign affairs or to technical or economic regulation.<sup>185</sup> (Notably, although the authors classified immigration agency decisions as relating to foreign affairs, they found the Court *less* likely to defer on immigration.)<sup>186</sup>

The expertise required to interpret the INA, however, does not require familiarity with technical or scientific information, nor with the workings of an industry, nor even, for the most part, with the mechanics of immigration enforcement. And though immigration decisions are sometimes said to implicate delicate matters of foreign relations, the truth of the matter is that it is the very unusual case that affects anyone or anything other than the parties themselves. The vast majority of immigration cases require expertise, not in foreign affairs, but rather in the legal interpretation of a complex statutory and regulatory scheme. This demands expertise in legal analysis and the application of law to facts—precisely the sort of expertise that federal courts have.<sup>187</sup> As Daniel Kanstroom notes, the interpretation of INA provisions is more “law-like” and less “policy-like” than many questions of statutory

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<sup>182</sup> *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 845–46 (1984). The case revolved around the meaning of the phrase “stationary source” in the 1970 Clean Air Act Amendments.

<sup>183</sup> *Id.* at 865.

<sup>184</sup> *See, e.g.*, FED. R. EVID. 702.

<sup>185</sup> Eskridge & Baer, *supra* note 108, at 1083.

<sup>186</sup> *Id.* at 1145.

<sup>187</sup> Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 630–31 (2013) (citing John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 552 (2008)).

implementation and there is both theoretical support and precedent in the Supreme Court's *Chevron* jurisprudence for deferring less broadly to executive interpretation of such terms than to pure policy decisions.<sup>188</sup> Perhaps this comfort with adjudication and the lack of need for any technical expertise is one reason Eskridge and Baer found courts less likely to defer on immigration issues than on other agency decisions.

And in fact, the research and legal analysis required for asylum and withholding adjudications arguably require an even more specialized legal expertise than the average case or even the average immigration case, because they can implicate international and comparative law on the interpretation of the Refugee Convention. As discussed below, and in keeping with the Supreme Court's recent example in *Abbott v. Abbott*,<sup>189</sup> interpretation of Convention-based provisions properly includes reference to international and comparative law sources, either on grounds that the interpretation should fulfill congressional intent to comply with Convention obligations or because such obligations are themselves "the law of the land" as incorporated treaty provisions.<sup>190</sup>

The BIA is an administrative adjudicatory body with experience interpreting the INA, but none in interpreting international instruments or in comparative or international human rights jurisprudence.<sup>191</sup> Nor does it have expertise in the history of humanitarian concerns or the international context in which the Refugee Convention was negotiated and drafted or in which the United States signed on to the 1967 Protocol.<sup>192</sup> The Attorney General, who only infrequently engages in immigration adjudication, has even less familiarity with application of the INA or of international or comparative sources relevant to the Convention.<sup>193</sup>

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<sup>188</sup> See Kanstroom, *supra* note 119, at 806.

<sup>189</sup> 560 U.S. 1 (2010).

<sup>190</sup> See *id.* at 9–10; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449–50 (1987); see also Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 886 (1987) (arguing that "International law is the law of the land"); see also *infra* Section V.B.

<sup>191</sup> See Merrill, *Step Zero*, *supra* note 88, at 786 (stating that "even assuming that agencies have a superior understanding of the statutes. . . it does not follow that they have much, if any, understanding of constitutional law, international law, or federalism").

<sup>192</sup> See Irene Scharf, *Un-Torturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 RUTGERS L. REV. 1, 42 (2013) (arguing for similar reasons against deference to the BIA on interpretation of the Convention Against Torture because the Board lacks international legal or humanitarian expertise).

<sup>193</sup> Former Attorney General Alberto Gonzales has written that contemporary practice has given the DOJ Office of Legal Counsel ("OLC") the role of advisor to the Attorney General for immigration cases certified for his decision. Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 854 (2016), citing 28 C.F.R. § 0.25(f) (2015) (explaining that the duties of the OLC include, "[w]hen requested, advising the Attorney General in connection with his review of decisions of the Board of Immigration Appeals and other organizational units

Furthermore, even if they had the institutional will to do so, the immigration courts and the Board do not have the capacity to develop expertise in the international and comparative law of refugee protection. The immigration court system suffers from serious institutional capacity challenges that compromise its decision making and limit the time and consideration it can give to any single case. While the history of this dysfunction is longstanding,<sup>194</sup> the immigration courts are in more crisis now than ever. Approximately 300 immigration judges nationwide are struggling under the weight of a backlog of nearly 764,000 cases, and the average case takes 717 days to complete.<sup>195</sup> And they do so in the midst of a chronic lack of resources and antiquated systems. The current Justice Department approach to reducing the backlog of cases is to implement policies to pressure judges to speed up adjudications, including the new requirement that immigration judges close out at least 700 cases a year in order to keep a satisfactory job performance rating.<sup>196</sup> This pressure to complete cases quickly will certainly not foster an environment in which research into areas of law seen as extraneous (and politically undesirable) is likely to be encouraged. And despite their enormous caseloads and case completion expectations, immigration judges have less institutional support than Article III federal judges. They often share law clerks rather than having one or more clerks assigned solely to them. There is no electronic filing in immigration courts, so file management is an ongoing challenge. The chronic lack of legal representation also hampers the system, both slowing cases down and worsening the quality of case preparation and, presumably, decision making.<sup>197</sup> And asylum and withholding cases are already among the most complicated cases presented in these courts, often including complex legal questions, factual contexts requiring nuanced understanding of the applicant's personal circumstances and social dynamics in the home country, evidentiary difficulties incident to the applicant's flight from persecution, and applicants and witnesses who often suffer the effects of trauma. This severe and chronic under-resourcing of the system makes it unlikely that the immigration courts will develop

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of the Department"). Like the Attorney General himself, the OLC has no regular involvement and no particular expertise in immigration adjudication.

<sup>194</sup> Immigration Judge Dana Leigh Marks sees the chronic and crisis-level under-resourcing of the immigration courts as a longstanding indication of their being "dramatically overshadowed" by the parts of the agencies charged with enforcement. Marks, *supra* note 30, at 49.

<sup>195</sup> See Immigration Court Backlog Tool,

[http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (Last updated Aug. 2018).

<sup>196</sup> EOIR Performance Plan, *supra* note 40. For a good discussion of why this one-size-fits-all requirement is likely to lead to problematic limitations on due process in many courts, see Wheeler, *supra* note 40.

<sup>197</sup> See, e.g., CTR FOR POPULAR DEMOCRACY, ACCESS TO JUSTICE: ENSURING COUNSEL FOR IMMIGRANTS FACING DEPORTATION IN THE D.C. METROPOLITAN AREA (Mar. 2017), [https://populardemocracy.org/sites/default/files/DC\\_Access\\_to\\_Counsel\\_rev4\\_033117%20%281%29.pdf](https://populardemocracy.org/sites/default/files/DC_Access_to_Counsel_rev4_033117%20%281%29.pdf) (citing studies showing that only 37% of all respondents nationally were represented in removal proceedings and finding only 19% and 29% of detained respondents represented in the Baltimore and Arlington Immigration Courts, respectively).

additional expertise in identifying and understanding international and comparative sources of law.

As noted earlier, courts already recognize a number of areas of statutory interpretation in which the Board and the immigration courts are not given deference because of a lack of expertise, such as questions of the applicability of the crime-based grounds of removal to particular offenses. Just as the Board lacks expertise that would warrant deference in this area of legal interpretation, it has no interpretive advantage over the federal courts in applying Refugee Act provisions rooted in international law and interpreted by an international legal community. This is an exercise of statutory interpretation at which the courts are most expert, and especially where international and comparative law are implicated—as they are in Refugee Act cases—it makes little sense for the federal courts to defer to the BIA or the Attorney General on expertise grounds.

3. Fundamental Human Rights and the Question of “Policy” Subject to Political Accountability

Finally, there is the question of whether interpretation of Refugee Act provisions is truly a question of “policy” of the type for which the *Chevron* Court counseled deference to the executive. Does interpretation of the proper reach of asylum and withholding law implicate “competing views of the public interest”<sup>198</sup> among which immigration agencies are free to choose? And is it a matter on which Congress was likely to find political accountability to be an advantage, or even acceptable?

As discussed earlier, much of the INA represents the results of congressional choices on questions of public policy on which there continue to be competing views of the public good. For example, there are genuine debates about whether it is in the public interest to have more or fewer visas issued each year based on family relationships, about whether higher or lower levels of immigration are good for economic growth and security, and about whether it will enhance or harm the public good to regularize the status of individuals who entered the country illegally.<sup>199</sup> Thus, where the statute leaves a gap regarding implementation details of those legislative policy choices, *Chevron* doctrine would find it preferable for the executive agency to make further policy choices, rather than the courts, on grounds that the political system allows for electoral accountability for those choices.

For example, under the Obama administration, USCIS developed a procedure by regulation to facilitate provisional approval of the waiver needed for spouses of US citizens who had

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<sup>198</sup> *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 866 (1984).

<sup>199</sup> *See, e.g.*, Reforming American Immigration for Strong Economy (RAISE) Act, S. 1720, 115th Cong. (2018), a bill recently proposed in the United States Senate that proposes policy choices that would significantly alter the INA with regard to some of these issues. *Compare* Section 5, allocating permanent resident visas on the basis of a point system that takes into account many factors but does not include close family ties; *with* 8 U.S.C. § 1153(a), allocating permanent resident visas on the basis of family sponsorship.

entered the country illegally to become permanent residents.<sup>200</sup> There was nothing in the statute that required this procedure, but it was an implementation decision that took into account several interacting provisions of the law—the allocation of immigrant visas for spouses of U.S. citizens,<sup>201</sup> a disqualification for those who had entered illegally from obtaining permanent residence without leaving the country,<sup>202</sup> a ban on reentry for someone who has left the country after a period of unlawful presence in the U.S.,<sup>203</sup> and a waiver of that ban.<sup>204</sup> In this case, the executive agency filled a procedural gap left by Congress, acting to implement a policy favoring the unification of the families of U.S. citizens. This was an example of a normative, policy-based, prescriptive decision by an executive agency in a matter on which there were competing visions of the public interest. This was one of a series of immigration related policy choices for which the Obama administration and the Democrats were arguably held accountable in the 2016 election, in which immigration issues featured prominently. Implementation of the Deferred Action for Childhood Arrivals (DACA) program is another.<sup>205</sup>

Contrast these with the provisions of the Refugee Act, which did not implement policies chosen freely by Congress, but rather serve to incorporate the nation’s non-negotiable obligations under the Refugee Convention. Implementing that Act, then, the executive is no more free than Congress was to make decisions to favor or disfavor policies of its own choosing to affect the meaning of those obligations. While there may be aspects of asylum and withholding law that go beyond Convention requirements on which there is room to legislate policy choices, to the extent that INA provisions derive from the Refugee Convention, the executive is obligated to implement them in accordance with the nation’s treaty responsibilities. This is a fundamental difference between the INA’s refugee provisions and many other parts of the statute. The Convention-based provisions do not represent independent policy choices, and it is incumbent on the courts to engage in robust review to ensure that the executive’s interpretations comply with the nation’s international obligations and with the intent of Congress to fulfill those obligations.

Another indication that Refugee Act provisions are not the type of “policy” matters contemplated by the *Chevron* Court is the inappropriateness of political accountability as a value in decision making about the fundamental right to humanitarian protection. The

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<sup>200</sup> 78 Fed. Reg. 536–78 (Jan. 3, 2013); 8 C.F.R. § 212.7(e).

<sup>201</sup> 8 U.S.C. § 1153(a).

<sup>202</sup> 8 U.S.C. § 1255(a) (requiring inspection and admission or parole for eligibility to adjust to permanent resident status).

<sup>203</sup> 8 U.S.C. § 1182(a)(9)(B)(i).

<sup>204</sup> 8 U.S.C. § 1182(a)(9)(v).

<sup>205</sup> See, e.g., Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, Proc. Nat’l Acad. Sci. (Apr. 23, 2018), <http://www.pnas.org/content/early/2018/04/18/1718155115>; and Philip Klinkner, *Yes, Trump’s Hard-Line Immigration Stance Helped Him Win the Election — But It Could Be His Undoing*, L.A. TIMES (Apr. 17, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-klinker-immigration-election-20170417-story.html>.

*Chevron* Court presumed that political accountability would be preferable for the decider of the policy questions it envisioned—to reflect the will of the majority on substantive questions of normative importance.<sup>206</sup> Yet the will of the majority has never been a useful touchstone in the protection of persecuted minorities. To the contrary, in many cases political accountability and pressure are likely to be negative influences and actually impair the quality of protection decisions for vulnerable individuals who may defy majority expectations in some way. Asylum and withholding of removal law are specifically intended to protect individuals with minority political views, those with unpopular religious beliefs or practices, and members of marginalized social groups such as those who defy gender norms, all of whom face serious harm and sometimes even the threat of death because of who they are and what they believe. The protection of these vulnerable outsiders is the last context in which we should want political accountability to influence decision making.

Furthermore, large movements of refugee populations can and do evoke large-scale political opposition that has nothing to do with the legitimacy of their claims as refugees, as evidenced by the backlash against Syrian refugees in both Europe and the United States.<sup>207</sup> Another example is the treatment of mainly Central American asylum seekers who have arrived at the southwest U.S. border in recent years. Successive federal administrations have made a series of decisions designed to discourage these applicants from arriving and from seeking protection, at least in part because of the political ramifications of the administration's being seen as weak on immigration issues and out of control of the border.<sup>208</sup> These decisions had nothing at all to do with the legitimacy of the protection claims these applicants asserted but rather represented efforts by politically accountable leaders to restrict access to protection for political purposes.

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<sup>206</sup> See, e.g., Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 312 (1986) (executive deference allows an agency to pursue “what it perceives to be the will of the people”), cited in Pappas, *supra* note 71, at 979 n.6.

<sup>207</sup> See, e.g., Laura Pitel, Asser Khattab & Erika Solomon, *Syrian Refugees Under Pressure as Neighbours' Goodwill Runs Out*, FINANCIAL TIMES (Mar. 5, 2018), <https://www.ft.com/content/bf696a82-1d47-11e8-956a-43db76e69936>; Ashley Fantz & Ben Brumfield, *More than Half the Nation's Governors Say Syrian Refugees Not Welcome*, CNN (Nov. 19, 2015), <https://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/index.html>.

<sup>208</sup> For a time, the Obama administration explicitly justified its policy of detaining women and children who turned themselves into Customs and Border Protection agents as a means of deterring further asylum seekers from making the journey to the United States. See Order, R.I.L.R. et al. v. Johnson et al., Case No. 1:15-cv-00011-JEB, (D.D.C. Feb. 20, 2015) (“Defendants are hereby ENJOINED from detaining class members for the purpose of deterring future immigration to the United States and from considering deterrence of such immigration as a factor in such custody determinations.”). This policy was applied to the applicants regardless of the merits of their asylum claims and regardless of the fact that 88% of the families passed an interview establishing that they had a credible fear of persecution in their country. Regarding the rate of positive credible fear interviews, see Sessions Remarks to EOIR, *supra* note 2.

The role of the courts in guaranteeing individual humanitarian protection is analogous to their role in the civil rights context, where it has long been recognized that a higher level of protection and scrutiny is appropriate for discrete, insular and vulnerable minorities.<sup>209</sup> Asylum seekers are universally disenfranchised, by definition, as individuals who are outside their countries of citizenship. The Supreme Court has noted that because “noncitizens cannot vote, they are particularly vulnerable to adverse legislation.”<sup>210</sup> It follows that they are—equally by definition—not able to advance their own interests through normal political channels, rendering meaningless for them the justification and any purported advantage factored into *Chevron* doctrine of having those interests decided by the political branches of government. The political vulnerability of individuals seeking humanitarian protection requires both the application of the international Convention establishing their basic individual rights as refugees *and* robust, independent judicial review exercised without fear of political repercussion. These dynamics—together with consideration of the prosecutorial role of the Justice Department and the lack of a meaningful interpretive advantage in the BIA or the Attorney General over the courts—weigh heavily in favor of a Step Zero finding that *Chevron* deference to the politically accountable executive is inappropriate in the refugee context.

B. Step One: Statutory Interpretation, Congressional Intent and *Charming Betsy*

Even if a court were to go beyond these Step Zero considerations and find it appropriate to apply *Chevron* deference to the Justice Department’s interpretation of asylum and withholding provisions, *Chevron*’s Step One analysis calls for rigorous analysis of the statutory provisions before any deference comes into play. Courts are to employ the ordinary tools of statutory construction to determine the intent of Congress on a particular question.

As a general matter, in the asylum and withholding context, the Supreme Court has already held that “one of Congress’ primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.”<sup>211</sup> The Court majority came to this conclusion on the basis of the textual structure of the statute, which included a number of nearly verbatim provisions from the Refugee Convention, and of numerous statements of intent from the legislative history.<sup>212</sup> Following immediately upon its finding of a manifest congressional intent to comply with international law, the Court concluded that it was “thus appropriate to consider what the phrase ‘well-founded fear’ means *with relation to the Protocol*.”<sup>213</sup> This simple

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<sup>209</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>210</sup> *INS v. St. Cyr*, 533 U.S. 289, 315 n.39 (2001) (citing Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1626 (2000)). See generally Paul Chaffin, *Expertise and Immigration Administration: When Does Chevron Apply to BLA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 503 (2013).

<sup>211</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

<sup>212</sup> *Id.* at 437.

<sup>213</sup> *Id.* (emphasis added).

sentence has profound consequences for how we think about what Congress was doing in passing the Refugee Act. To the extent that it was incorporating the obligations of the Protocol into domestic law, Congress was *not* freely exercising its constitutional legislative authority to make policy choices, but was rather importing the substantive provisions already chosen by the drafters of the Refugee Convention and already agreed to by the President who signed the Convention and the Senate which ratified it. This is why it was appropriate for the Court to look to the Protocol for the meaning of the phrase “well-founded fear”, because the Protocol and the Convention—rather than Congress’s policy choices—were the substantive source of the statutory provisions.

This insight, that Congress was implementing already existing, external obligations in the Refugee Act rather than its own policy choices, in turn, has important consequences for how we should think about the provisions for *Chevron* purposes. For Step One purposes, as the majority in *Cardoza-Fonseca* recognized, it supports a statutory interpretation process that looks to international understandings of Convention obligations, to identify what it was that Congress intended to comply with. Reference to international law sources and to the interpretations of sister signatory nations and judicial bodies thus assist a court in applying the “ordinary canon of statutory interpretation” that provisions should be interpreted to carry out the intent of Congress. To the extent that courts can use those international sources to construe the meaning of terms in the statute,<sup>214</sup> they are engaging in simple statutory interpretation under *Chevron* Step One, identifying the expressed intent of Congress, and the question of deference to an agency interpretation does not arise.<sup>215</sup>

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<sup>214</sup> Such sources could include UNHCR guidance, as well as the statutes and court decisions of other signatory nations and international tribunals such as the Inter-American Court of Human Rights and the European Court of Human Rights. See the discussion of *Abbott v. Abbott*, *infra*, for an example of the use such sources by the Supreme Court in interpreting a statute that derives from international treaty obligations.

<sup>215</sup> It should be noted that this reference to international sources has never been noncontroversial. Justice Scalia, though concurring in the opinion in *Cardoza-Fonseca*, disagreed vigorously with the majority on its reliance on extra-statutory sources to determine congressional intent. He took the textualist position that the statute itself conveyed its meaning and that reference to legislative history, purpose, and the underlying Protocol was therefore both unnecessary and unwise. *Cardoza-Fonseca*, 480 U.S. at 452–55. This difference of opinion would persist in *Chevron* jurisprudence down through the years. Justice Scalia would famously maintain his suspicion of extra-textual sources for divining congressional intent—indeed of the ability of any court to know Congress’s intent at all—and insist on reliance on the statutory text alone. Scalia, *supra* note 66, at 517. See Gluck, *supra* note 98, at 82 (“Textualism’s founders were heavily influenced by the legal realists, who argued that collective legislative intent is an impossible notion.”). By the same token, Justice Stevens, writing decades after *Cardoza-Fonseca*, confirmed again his position that even where a statute is silent, it can be appropriate to use other sources to determine congressional intent in *Chevron*’s Step One. *Negusie v. Holder*, 555 U.S. 511, 532 (2009) (Stevens, J., concurring in part, dissenting in part). Nonetheless, the Court as a whole undoubtedly shifted in a textualist direction during Justice Scalia’s tenure. See Gluck, *supra* note 98, at 66 (arguing that

However, general reference to the intent of Congress is not the only “ordinary canon[] of statutory construction” that supports reference to international and comparative authority in interpreting asylum and withholding provisions under *Chevron’s* Step One.<sup>216</sup> The 1804 case of *Murray v. The Schooner Charming Betsy*<sup>217</sup> and its progeny established the principle that statutes should be construed where possible to avoid conflict with international law.<sup>218</sup> This case law is rooted in the Supremacy Clause of the Constitution, which provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .”<sup>219</sup> Relying on this constitutional prioritizing of treaty law, the Supreme Court in *Charming Betsy* held that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .”<sup>220</sup> And while it is true that Congress can choose to enact domestic law that conflicts with international law, it must give a “clear indication” of that intent in order to do so.<sup>221</sup> Absent express language indicating such an intent, statutes should not be interpreted to conflict with international obligations.<sup>222</sup> This principle has become a “classic tenet of statutory interpretation”<sup>223</sup> based on the assumption that Congress takes into account the nation’s treaty obligations and the sovereign interests of other nations when it legislates.<sup>224</sup> Courts thus can, should and do look to international law to interpret a statute that incorporates treaty obligations.<sup>225</sup>

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the entire Supreme Court now accepts a textualist approach to statutory interpretation: “The real divide is over how a Court that unanimously agrees on the priority of text-focused interpretation sees its own role in relation to Congress’s written plans.”). The Court has generally not taken anything more than “guidance” from international sources of law to understand the underlying provisions of the Convention or to interpret the INA’s asylum or withholding of removal provisions. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (holding that the “[t]he U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts”).

<sup>216</sup> *INS v. Cardoza-Fonseca*, 480 U.S. at 449.

<sup>217</sup> 6 U.S. 64 (1804).

<sup>218</sup> *Id.* at 118.

<sup>219</sup> U.S. CONST. art. VI, cl. 2 (emphasis added).

<sup>220</sup> 6 U.S. at 118.

<sup>221</sup> *Federal-Mogul Corp v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

<sup>222</sup> *Id.*

<sup>223</sup> *SNR Roulements v. United States*, 341 F. Supp. 2d 1334, 1341–42 (Ct. Intl. Trade 2004).

<sup>224</sup> *Sale v. Haitian Ctrs. Council* 509 U.S. 155, 178 (1993) (acknowledging that a treaty obligation could provide the “controlling rule of law” over a narrower statutory provision). See also *F. Hoffmann-LaRoche v. Empagran S.A.*, 542 U.S. 155, 164–65 (2004) (assumes legislators take account of the legitimate sovereign interests of other nations, citing, *inter alia*, *Charming Betsy*).

<sup>225</sup> *F. Hoffmann-LaRoche v. Empagran S.A.*, 542 U.S. at 164–65.

The Supreme Court did just that not long ago in *Abbott v. Abbott*,<sup>226</sup> a case involving a U.S. statute that incorporated the Hague Convention on Civil Aspects of International Child Abduction.<sup>227</sup> The Court unabashedly looked to interpretations of the Hague Convention's requirements in order to interpret the U.S. statute. It appealed to ordinary principles of treaty interpretation and considered the text of the Convention, the views of the U.S. State Department on the meaning of the Convention, decisions of sister signatory states, and the purposes of the Convention.<sup>228</sup> Though there was an incorporating statute, the Court spent the first six pages of its legal analysis interpreting the Convention rather than the statute.<sup>229</sup> And while it gave "great weight" to the Department of State's interpretation, it was the Department's interpretation *of the Convention*, not of the statute, that the Court considered.<sup>230</sup> The Court also looked to international consensus on the meaning of certain aspects of the Convention that developed after the Convention was drafted, relying on materials from scholars, international meetings, articles and books.<sup>231</sup> And it interpreted the Convention in light of its stated purpose of preventing the wrongful removal of children across international borders.<sup>232</sup>

In the same way, courts should look to international and comparative law as authoritative sources in interpreting language imported into the INA from the Refugee Convention, as did Justice Stevens in *Cardoza-Fonseca* and analogous to what the Court did in *Abbott*.<sup>233</sup> This would require a recalibration of the way courts and the BIA have treated such sources in much of the Refugee Act jurisprudence, in which they have often been willing to bat down guidance or interpretations from non-U.S. sources as "non-binding" without engaging them

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<sup>226</sup> 560 U.S. 1 (2010).

<sup>227</sup> International Child Abduction Remedies Act (ICARA), currently codified at 22 U.S.C. § 9001 (originally codified at 42 U.S.C. § 11601 (1988)), incorporating the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980.

<sup>228</sup> 560 U.S. at 9–10, 15–20.

<sup>229</sup> *Id.* at 8–13.

<sup>230</sup> *Id.* at 15.

<sup>231</sup> *Id.* at 18–19.

<sup>232</sup> *Id.* at 11.

<sup>233</sup> See Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT'L L. & POL. 391, 417 (2013). Ambiguities remaining in the Convention-based language represent unresolved details passed along from the international instrument itself, and the international community is the proper locus of an ongoing interpretive, adjudicative process to flesh out the meaning of the Convention's provisions. As national and international bodies around the world interpret the Convention's language, they build a body of authority on the proper meaning of the Convention. It is fair to assume that Congress intended that the Refugee Act would ensure compliance with the international obligations of the U.S. under the Convention on an ongoing basis and in conformity with evolving international understandings of the Convention's demands.

substantively.<sup>234</sup> Asylum decisions makers would need to treat as persuasive the guidance of international bodies such as the United Nations High Commissioner for Refugees (UNHCR) and decisions of regional human rights bodies such as the Inter-American Commission and Court of Human Rights and the European Court of Human Rights, as well as the interpretations of those obligations as incorporated into the domestic law of sister signatory states.<sup>235</sup> Finally, just as the Supreme Court did in *Abbott*, adjudicators would have to look to the terms, purpose, and history of the underlying Convention for guidance on interpreting its provisions and, by extension, the INA provisions enacted to incorporate it.<sup>236</sup>

For *Chevron* purposes, this analysis is a Step One enterprise undertaken by a court—ordinary statutory construction in light of congressional intent and employing the *Charming Betsy* canon of statutory interpretation. It is for the court to undertake with no obligation of deference to any agency interpretation. This interpretive context could be contrasted with the interpretation of other undefined or ambiguous terms in the INA, such as “good moral character” or “extreme hardship.”<sup>237</sup> These (non-Convention-based) terms are, in fact, the product of congressional policy decisions in a more ordinary sense, and are more properly the subject of deference to what Kanstroom calls the agency’s “general interpretive discretion.”<sup>238</sup> In contrast, here, where the terms derive from an external instrument with which Congress signaled its intention to comply, ordinary statutory interpretation weighs in favor of giving courts primary responsibility for construing those terms and of having them consult directly with sources related to that external instrument. This is what the Court did in *Cardoza-Fonseca*, where the process of statutory construction resolved an apparent ambiguity in the statute.<sup>239</sup>

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<sup>234</sup> See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999); N-A-I-, 27 I. & N. 72, 80 n.4 (B.I.A. 2017) (“The UNHCR’s opinion is not binding on us or controlling as to our construction of the Act”).

<sup>235</sup> See, e.g., *Abbott*, 560 U.S. at 16–18, citing decisions from the English High Court of Justice, the Supreme Court of Israel, The Supreme Court of Austria, the Constitutional Court of South Africa, the Federal Constitutional Court of Germany, the Canadian Supreme Court and appellate courts in Australia, Scotland and France. Fatma Marouf, in *The Role of Foreign Authorities in U.S. Asylum Adjudication*, demonstrates such a review of international and comparative sources, canvassing sources on the question of what constitutes a “particular social group” under the Refugee Convention. Marouf, *supra* note 233, at 425–45.

<sup>236</sup> See *Abbott*, 560 U.S. at 20. The BIA recently engaged in precisely this type of analysis in its long-awaited *Negusie* decision on the duress exception to the asylum persecutor bar. *Negusie*, 27 I. & N. Dec. 347 (BIA 2018). Unfortunately, Attorney General Sessions stayed that decision and certified it for Attorney General review, which remains pending as of this moment. 27 I&N Dec. 481 (A.G. 2018).

<sup>237</sup> See, e.g., 8 U.S.C. §§ 1101(f), § 1182(h).

<sup>238</sup> Kanstroom, *supra* note 119, at 761.

<sup>239</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (“The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical”).

As noted earlier, the Supreme Court has engaged in similar pre-*Chevron* analysis to discern congressional intent in other (non-Refugee Act) INA provisions. One example is the case of *INS v. St. Cyr* in 2001, where the Court applied statutory construction principles regarding retroactivity and lenity to resolve the question of whether a recent change in the INA should be applied retroactively: “Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.”<sup>240</sup> Because the “normal tools of statutory construction” resolved the question, the Court declined the Justice Department’s invitation to accord *Chevron* deference to the agency’s retroactive application of the new provision.<sup>241</sup>

Another, slightly different way of conceptualizing the dynamics created by statutes incorporating international obligations is proposed by Thomas Merrill, who suggests that courts should consider international law obligations in a *Chevron* “Step Zero” analysis in which courts would exercise independent judgment from an agency.<sup>242</sup> This would be analogous to the way that courts consider preliminary questions of constitutionality or preemption before considering the agency’s views.<sup>243</sup> Such an approach would acknowledge the growing importance of international human rights instruments as an authoritative legal framework in the last 50 years<sup>244</sup> and would accord them interpretive primacy as the “law of the land” analogous to the Constitution under the Supremacy Clause.<sup>245</sup> This pre-*Chevron* consideration would befit the nature of a framework rooted in fundamental and universal human rights, which operates explicitly as a check on sovereign national powers, usually in the form of the nation’s executive power. The human rights framework operates precisely by *not* deferring to a nation’s potentially self-serving interpretations of its own obligations, consistent with a Step Zero *Chevron* analysis, and it would be in keeping with both *Chevron*’s concern for a structural balance of governmental powers and with a Step One *Charming Betsy* analysis.

In sum, at *Chevron*’s Step One, courts are required to make a rigorous effort to interpret a statute before engaging any claim of executive deference. The ordinary canons of statutory interpretation require courts to interpret the INA’s asylum and withholding provisions to implement the intent of Congress (to comply with the external obligations of the Refugee

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<sup>240</sup> *INS v. St. Cyr*, 533 U.S. 289, 320 n.45, 323 (2001) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994), in striking down the BIA’s retroactive application of the elimination of the commonly used Section 212(c) waiver for individuals who had resolved criminal cases with the assumption that the waiver would be available to them).

<sup>241</sup> *Id.* at 320 n.45.

<sup>242</sup> Merrill, *Step Zero*, *supra* note 88, at 785.

<sup>243</sup> *Id.* at 785 n.189.

<sup>244</sup> *See, e.g.*, BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2009).

<sup>245</sup> U.S. CONST. art. VI, cl. 2. *See also* Henkin, *supra* note 190, at 886 (“International law is the law of the land”).

Convention) and to avoid conflict with the Convention under *Charming Betsy*. Courts should engage in this analysis directly and without deference to the BIA or the Attorney General, to determine “what the law is.”<sup>246</sup> And to the extent that international and comparative law sources can clarify the meaning of statutory terms or phrases that derive from the Convention—like “persecution,” “well-founded fear” and “particular social group”—courts should look to and rely on those sources. This *Chevron* Step One (or, arguably, Step Zero) analysis is the province of the courts, which should delve into it without deference to any executive interpretation.<sup>247</sup>

## VI. Conclusion

The last thirty years have seen an evolution of the rhetoric around and the way people think about immigration in the United States. Political candidates and successive administrations alike have transformed the complex dynamics of human migration—the constellation of such push and pull factors as family, opportunity, physical danger, political movements, poverty, economic markets, natural disasters, social dynamics and personal initiative—into a simplistic question of law and order. “What part of ‘illegal’ don’t you understand?” Immigration—specifically immigration enforcement—has become one of the most potent political issues of the day, wielded often by politicians who have no deep experience with the realities of immigration or the communities most affected by it, but who recognize the power the issue has to mobilize political support by defining a clear “us” in opposition to a clear “them.” Anyone in unlawful immigration status is deemed to be irredeemably a “lawbreaker.” The immigration agencies, under intense political pressure and with the justification that they are “restoring law and order”, focus on combating fraud and on detaining, expelling or removing anyone who is out of lawful immigration status. Under the past three administrations, this has even included dedication of considerable Justice Department resources to the actual criminal prosecution of tens of thousands of unauthorized border crossers, culminating in the Trump administration’s “zero tolerance” commitment to criminally prosecute every unauthorized crosser.

With regard to refugee protection specifically, this criminalization of immigration has highlighted longstanding dilemmas inherent in a system that entrusts humanitarian

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<sup>246</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (stating that it is the “duty of the judicial department to say what the law is”); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (holding that *Chevron* gives the Courts the ultimate interpretative authority to “say what the law is”) (Thomas, J., concurring).

<sup>247</sup> This article has focused on reasons that deference to the Justice Department is not appropriate in refugee determination cases as a general matter. In the case of a specific Justice Department decision on some aspect of asylum or withholding law, there may also be challenges to the reasonableness of the decision even under a *Chevron* Step Two analysis. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (declining to defer under *Chevron* Step Two, finding the agency failed to operate within the bounds of reasonable interpretation). Many of the Courts of Appeals that declined to defer to *Matter of Silva-Trevino* did so on grounds that the Attorney General’s interpretation was unreasonable. See *supra* note 148.

protection to the very agencies charged with the hyper-politicized task of enforcing border control. The dilemmas arise because *border entry laws are not the totality of our immigration law*. The INA requires the protection of vulnerable refugees just as much as it prohibits unlawful entry. We need the same kind of rigor in enforcing the treaty-based obligation to protect as we see in enforcing entry restrictions; that obligation is equally part of a “lawful” immigration system. If anything, asylum and withholding provisions are *less* open to executive interpretation as a constitutional matter than other parts of the INA, because they reflect treaty obligations, which are—indisputably when they have been incorporated into a federal statute—the “supreme law of the land.” And yet the executive agencies have few political incentives to rigorously enforce the protection of these vulnerable people, who have no vote and little influence in the political system. To the contrary, agencies and administrations have very powerful incentives to run roughshod over this protection, to reap the benefit of public perceptions of strong border control.

The *Chevron* Court’s fundamental concern was for the proper balance of powers between the branches of government. Since 1984, the Court has recognized that executive deference does not automatically extend to every agency on every type of question. Where there are reasons to doubt that Congress would have intended to give an agency unchecked power over a particular question, the Court has recognized the important judicial role of rigorous review. And on the question of humanitarian protection under the Refugee Act, there are indeed a number of reasons to believe that Congress did not intend to delegate unchecked interpretive power to the immigration enforcement agencies.

First, there is reason to believe that Congress would not have entrusted unchecked authority over the protection of the fundamental human rights of vulnerable and politically powerless migrants to the very enforcement agencies charged with combating irregular migration. The Immigration Court system is located firmly within the Department of Justice, one of the principal immigration enforcement agencies, and it is under the direct institutional control of the Attorney General, the nation’s chief law enforcement officer—and a politically appointed Cabinet member closely tied to the President. The Attorney General has both the power and the political incentives to shortchange asylum seekers in favor of border control. Attorney General Sessions’ recent decision in *Matter of A-B* is a clear attempt to cut off asylum protection—as that has been recognized through the regular adjudicatory process of the Board, no less—for survivors of domestic violence and gang related violence. Sessions articulated a priority of limiting access to the asylum process and tied this priority explicitly to the political mandate he saw President Trump as having received in the election—to shut down irregular migration at the border.

I do not intend with this argument to question the good faith of many of the individual attorneys, judges and Board Members who work within the Immigration Court system day after day. Many fight valiantly to ensure due process and a fair application of the law to the thousands of individuals who appear before them. But it is worth noting that the structure of their agency *contributes* to the difficulty of their performing their jobs well rather than mitigating it. The conflict of interest in asylum cases is not, for the most part, personal—it is fundamental to the institutional structure of a politicized executive agency. This structural

conflict is at the heart of the National Association of Immigration Judges' advocacy for a truly independent immigration court system.

It is also at the crux of why courts should not defer to the Justice Department on matters of asylum and withholding. The agency's principal immigration charge is understood as enforcing restrictions *against* irregular migration, and it is therefore unreasonable as a matter of government structure to believe that Congress would have entrusted unchecked power to that enforcement agency to interpret the terms of asylum eligibility. And while majoritarian political accountability is often considered an advantage on true questions of policy, it is a distinct *disadvantage* in any attempt to protect the fundamental rights of politically vulnerable minorities. These are all reason that it is unlikely that Congress would have assigned unchecked power over such individual protection to the whims of any given executive's politicized decisions on immigration enforcement. As such, courts should decline to exercise *Chevron* deference on asylum and withholding decisions by the Attorney General and the BIA.

Furthermore, Congress clearly, affirmatively intended to protect refugees when it passed the Refugee Act and incorporated the Refugee Convention's obligations into the INA's asylum and withholding of removal provisions. The determination of the content of those obligations, as reflected in statute, is a process of legal interpretation that belongs to the courts under *Marbury v. Madison*, the *Charming Betsy* canon of statutory interpretation, and *Chevron* Step One. It is thus the courts' responsibility under the Constitution to determine what the law of asylum is, that is, how Congress intended to define the word "refugee" when it imported that definition from the Refugee Convention. The essentially "law-like" nature of this interpretive exercise, together with the lack of expertise within the BIA on the interpretation of international and comparative law, supports this preference for the courts to do this interpretation. And the fact that the obligations arise from such an authoritative external source means that they are not negotiable "policy" questions on which the political branches might be free to impose their preferences.

Full enforcement of the law requires full enforcement of provisions that grant protection as well as provisions that restrict border entry. This is the part of "enforcement" that the Department of Justice is not equipped to fully understand. The agency's fundamental commitment to controlling unauthorized immigration does not allow it a neutral, open position on asylum questions. The foundational separation and balance of powers concerns at the heart of *Chevron* require courts to recognize that inherent conflict of interest as a reason Congress is unlikely to have delegated unchecked power on refugee protection to the prosecuting agency. In our constitutional structure, the courts stand as an essential check on the executive power to deport and must provide robust review to fully enforce the congressional mandate to protect refugees. If the courts abdicate this vital function, they will be abdicating their distinctive role in ensuring the full enforcement of *all of our* immigration law—including those provisions that seek to ensure compliance with our international obligations to protect individuals facing the danger of persecution.