

# Scholarship Comments

## ***Chevron* Deference and Treaty Interpretation**

Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

One need not accept Hobbes's vision of international relations as a perpetual "condition of warre"<sup>1</sup> to recognize that the rule of law does not always govern international affairs. The inevitable tension between foreign policy objectives and rule-of-law values in U.S. foreign affairs law has important implications for treaties, which play dual roles in the American constitutional system: Internationally, treaties represent sensitive political agreements with foreign nations having important implications for U.S. foreign policy. Domestically, treaties enacted pursuant to Article II become "Supreme law" on par with federal legislation.<sup>2</sup> Thus, when interpreting treaties, domestic courts have sought to reconcile these two functions by defending the judicial prerogative to "say what the law is"<sup>3</sup> while simultaneously affording executive treaty interpretations "great weight."<sup>4</sup>

A recent article by Professor Curtis Bradley<sup>5</sup> defends judicial deference to executive treaty interpretation by analogizing this practice to the Supreme Court's two-part test for deference to administrative agency interpretations established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>6</sup> Accepting that some judicial deference in this realm may be both appropriate and desirable, this Comment nevertheless challenges *Chevron*'s adaptability to judicial treaty interpretation in light of prevailing

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1. THOMAS HOBBS, *LEVIATHAN* 90 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

2. U.S. CONST. art. VI, § 1, cl. 2.

3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

4. *United States v. Stuart*, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)).

5. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

6. 467 U.S. 837 (1984).

constitutional and customary international law. In place of Bradley's *Chevron* paradigm, this Comment offers an alternative analogy from administrative law—*Skidmore* deference—as a superior paradigm for conceptualizing judicial deference to executive treaty interpretation.

## I

The *Chevron* doctrine has been described as a judicial effort to accommodate the two major values of the modern administrative state: agency expertise and the rule of law. *Chevron* declares that when Congress delegates administrative authority over a particular statute to an executive agency, courts will defer to the agency's reasonable statutory interpretations if not contrary to Congress's unambiguous intent.<sup>7</sup> In *Chevron Deference and Foreign Affairs*, Professor Bradley asserts that this paradigm also provides a valuable template for accommodating the conflicting values in U.S. treaty jurisprudence. As with agency statutory interpretations, courts only defer to executive treaty interpretations if the treaty's plain language does not resolve the question at issue, if the executive's interpretation is not unreasonable, and if the executive agency is the same charged with administering the treaty.<sup>8</sup> Congress may override executive treaty interpretations by statute just as it may override agency statutory interpretations.<sup>9</sup> Finally, the *Chevron* framework helps to explain why courts have deferred to executive interpretations even when the executive has changed its position.<sup>10</sup>

Normatively, Bradley's *Chevron* paradigm provides an attractive middle ground between the polar extremes of judicial tyranny and judicial abdication in treaty construction. Deference to executive interpretations preserves judicial oversight while simultaneously harnessing the executive's special expertise in international affairs and shifting delicate policy decisions to politically accountable agencies.<sup>11</sup> *Chevron's* flexible design also improves upon previous judicially constructed paradigms, in that it offers a more nuanced account of the interaction between the executive and judiciary in U.S. treaty practice, and gives form to the nebulous and often contradictory standards articulated in past Supreme

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7. *Id.* at 842-43.

8. Bradley, *supra* note 5, at 703-04 (citing *Perkins v. Elg*, 307 U.S. 325, 335-42, 344-49 (1939) (clear statement rule), *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 168 (1999) (reasonableness), and *Sumitomo Shoji Am., Inc.*, 457 U.S. at 184-85 (same agency)).

9. *Id.* at 703. The "last-in-time" rule dictates that, in conflicts between a treaty and a statute, the last instrument to enter force retains legal effect. *Whitney v. Robertson*, 124 U.S. 190, 193-94 (1888).

10. Bradley, *supra* note 5, at 703.

11. *Cf. Chevron U.S.A., Inc.*, 467 U.S. at 865-66 (citing agency expertise and political accountability as justifications for deference).

Court decisions.<sup>12</sup> Perhaps the most appealing feature of Bradley's *Chevron* analogy, however, is its simplicity; rather than erect a complex new theory to account for deference to executive treaty interpretation, Bradley simply invites courts to translate a familiar test to a less familiar field of law.

In July 2002, Bradley's article passed its first significant test in a judicial forum when the Eastern District of Virginia expressly relied upon Bradley's article to decide a critical pretrial matter in the prosecution of John Walker Lindh, an American citizen accused of fighting alongside the Taliban in Afghanistan.<sup>13</sup> Prior to trial, Lindh's attorneys filed several motions to quash the indictment, asserting inter alia that Lindh's status as a Taliban soldier provided a basis for "lawful combatant" immunity under the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).<sup>14</sup> Considering this motion on its merits, the district court invoked *Chevron* and cited Bradley's article for the proposition that "American treaty-makers may be seen as having delegated [treaty interpretation] to the President in light of his constitutional responsibility for the conduct of foreign affairs and overseas military operations."<sup>15</sup> The court accepted the U.S. government's interpretation of the GPW and denied Lindh's request for lawful combatant immunity.<sup>16</sup>

## II

*Chevron* deference provides a useful framework for disciplining U.S. courts' relatively vague standards for deference to executive treaty interpretations. But courts should not apply such deference without first providing an acceptable political theory justification for doing so. As the Supreme Court explained most recently in *United States v. Mead Corp.*, *Chevron* deference does not extend to administrative agencies absent compelling textual evidence that Congress has delegated this interpretive power.<sup>17</sup> Indeed, Bradley acknowledges that congressional delegation of

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12. See generally David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994) (untangling the multifarious canons that masquerade as a coherent methodology in U.S. treaty interpretation).

13. *United States v. Lindh*, 212 F. Supp. 2d 541, 556 n.33 (E.D. Va. 2002).

14. See *id.* at 547 (describing the ten-count indictment); Geneva Convention Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, arts. 87, 99, 6 U.S.T. 3316, 3384, 3392, 75 U.N.T.S. 134, 202, 210 (declaring that combatants "may not be sentenced . . . to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts" and that "[n]o prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed").

15. *Lindh*, 212 F. Supp. 2d at 556.

16. *Id.* at 556-58.

17. 533 U.S. 218, 226-27 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the

administrative authority, “not realism or democratic theory,” forms the “linchpin” of the *Chevron* doctrine.<sup>18</sup> This observation raises conceptual difficulties, however, for those who would translate *Chevron* to the treaty context: Which governmental entity may delegate interpretive authority to executive agencies, and how should courts discern such delegation?

In Bradley’s view, judicial deference to executive treaty interpretations reflects a presumption that “United States treaty makers have delegated interpretive power to the executive branch because of its special expertise in foreign affairs.”<sup>19</sup> Domestic political preferences form the relevant interests, since the interpretation of international agreements by U.S. courts entails delicate questions of domestic governance. This theory of delegation is troubling on several levels.

First, as Professor Michael Van Alstine has observed, and as Bradley himself concedes, U.S. courts have long respected the principle that “the shared expectations of the contracting parties” control in the interpretation of international agreements,<sup>20</sup> just as parties’ collective intent governs the adjudication of private contracts.<sup>21</sup> With respect to treaties, executive agencies are not merely “faithful agents” carrying out congressional policies but also representatives of an interested contracting party with strong incentives to distort international agreements for domestic political gain. True, in some circumstances, treaty partners surely expect municipal agencies to participate as dynamic relational agents in adapting general policy objectives to distinct domestic contexts. In most instances, however, states design treaties with the express purpose of furthering transnational uniformity—a purpose that would be frustrated by the proliferation of varying municipal standards.<sup>22</sup> Judicial decisions that abandon the venerable “intent of the parties” standard for Bradley’s unilateralist *Chevron* approach unnecessarily invite inconsistency between domestic and foreign treaty constructions; draw U.S. treaty law into conflict with international law; and provoke reciprocal, self-serving interpretations by foreign treaty partners. More important, adopting a unilateralist approach to treaty interpretation does not serve domestic interests: American diplomacy

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agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”)

18. Bradley, *supra* note 5, at 670.

19. *Id.* at 702.

20. *Air France v. Saks*, 470 U.S. 392, 399 (1985).

21. Bradley, *supra* note 5, at 705; Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1301 (2002); *see also* *Harris v. United States*, 768 F.2d 1240, 1245 (11th Cir. 1985) (“[W]e must consider the interests and intentions of both parties to the Treaty to secure equality and reciprocity between them.” (internal quotation marks and citation omitted)).

22. A perfect example is the Warsaw Convention, the “cardinal purpose” of which is to “achiev[e] uniformity of rules governing claims arising from international air transportation.” *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (quoting *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991)).

would be severely crippled should the international community perceive that U.S. courts will no longer honor the most fundamental principle in international treaty law, *pacta sunt servanda*.<sup>23</sup>

Second, U.S. treaty-makers clearly cannot “delegate” interpretive power to the executive branch because these institutions lack independent law-generative power absent a treaty partner’s consent. Unlike congressional-executive agreements, which require a bicameral majority, Article II treaties require a supermajority of the Senate alone to enter into force.<sup>24</sup> Yet the Senate, acting unilaterally or in concert with the President, cannot enforce its will through legislation. Only the participation of a foreign treaty partner (i.e., treaties’ contractual aspect) empowers U.S. treaty-makers to generate judicially enforceable agreements. True, Congress retains ultimate control over a treaty’s meaning for domestic purposes, given its residual power to make “unilateral treaty interpretations binding in the United States legal system” through Article I legislation, “even if the interpretation is inconsistent with the overall intent of the parties to the treaty.”<sup>25</sup> But this prospective power to revise or nullify treaties by statute does not bridge the delegation gap for executive agencies, nor does it explain why courts should render *Chevron* deference to executive agencies rather than interpret treaties de novo as they have traditionally done.

Professor David Bederman may be correct that judicial deference to the executive branch is “the single best predictor of interpretive outcomes in American treaty cases,”<sup>26</sup> but U.S. courts have long resisted the notion—in theory, at least—that courts should ever accord *conclusive* deference even to reasonable executive interpretations of ambiguous provisions (as Bradley’s *Chevron* paradigm would require). Instead, courts temper their assertions of deference with the explicit and unequivocal caveat that “courts interpret treaties for themselves.”<sup>27</sup> Thus, even the district court in *Lindh*, which professed to follow Bradley’s *Chevron* analogy, ultimately

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23. See LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 62 (1990) (describing *pacta sunt servanda* as “the most important principle of international law”). Treaties’ contractual character helps explain why few, if any, treaties provide textual support for an implied delegation of interpretive authority to municipal executive agencies. See Van Alstine, *supra* note 21, at 1300 (noting the improbability of such delegation). This is so even if, as the Supreme Court has suggested in *Mead*, delegation may be inferred from the agencies’ functional capacities. See *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

24. U.S. CONST. art. 2, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

25. Bradley, *supra* note 5, at 705.

26. Bederman, *supra* note 12, at 1015.

27. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); see also RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 (1989) (“Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States . . .”).

concluded that the President's interpretation of the GPW should not receive "[c]onclusive deference, which amounts to judicial abstention."<sup>28</sup> The district court instead construed the treaty independently, according the President's interpretation only "substantial or great weight" in its analysis.<sup>29</sup> In sum, U.S. jurisprudence does not support the proposition that deference to executive agencies should *displace* judicial interpretation of ambiguous treaty provisions; executive interpretations merely constitute a relevant "factor" for judicial consideration.<sup>30</sup>

### III

Bradley's article reflects a commonly held—and, in my view, justified—intuition that executive agencies ordinarily merit substantial discretion in supervising U.S. treaty compliance. Nevertheless, *Chevron* deference is not only inappropriate in judicial treaty interpretation, but also unnecessary to preserve those matters properly committed to executive discretion. For centuries, U.S. courts have preserved executive discretion in treaty practice by distinguishing between self-executing treaties (i.e., judicially enforceable) and non-self-executing treaties (i.e., judicially unenforceable without prior implementing legislation).<sup>31</sup> What legal scholars have overlooked, however, is the fact that non-self-executing treaties not only preserve the legislature's managerial role over U.S. treaty compliance, but also circumscribe the executive's interpretive and applicative discretion.

Non-self-executing treaties may be divided into two classes: In the first class are those treaties that the United States cannot perform without enacting federal legislation, indicating that the treaty parties have committed the treaty's administration exclusively to the legislative branch. A second class, however, embraces agreements that the executive branch may implement *sua sponte* without prior congressional enactment. The executive branch's capacity to perform these latter treaties without intervening legislation suggests that these treaties are committed to the political branches jointly. Any subsequent legislation implementing this second category of treaties performs the same function that a congressional override performs of administrative agency decisions generally; Congress may intervene to correct or revise executive interpretations while still

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28. *United States v. Lindh*, 212 F. Supp. 2d 541, 556-57 (E.D. Va. 2002).

29. *Id.* at 557.

30. *O'Connor v. United States*, 479 U.S. 27, 32 (1986).

31. In most cases, courts determine whether a treaty is self-executing by examining its text for evidence that the treaty-makers intended to create a cause of action. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 697 (1995) (identifying four factors by which courts make this determination).

leaving a treaty's day-to-day administration within executive control. The critical point to keep in mind, however, is that none of these non-self-executing treaties give rise to causes of action. Herein lies the great irony for Bradley's thesis: *Chevron* deference applies precisely to those treaties, which do not generate litigation in the first place.<sup>32</sup>

In contrast, the case for *Chevron* deference is far less compelling where self-executing treaties are concerned. Because self-executing treaties require no intervening action by either the executive or legislative branches prior to judicial application, a court's decision to label a particular treaty "self-executing" reflects an implicit judgment that the treaty parties have committed textual ambiguities to judicial resolution. In other words, treaty-makers communicate a preference that treaty provisions be interpreted according to traditional rule-of-law values such as transnational uniformity and predictability (*Marbury* paradigm) rather than variable, context-specific national policies (*Chevron* paradigm). Having divided U.S. treaties into these self-executing/non-self-executing categories, courts should not further hinder treaty-makers' freedom to contract for *Marbury*-style adjudication by shunning this responsibility once it is conferred.

Deference to executive interpretation is all the more problematic in the case of multilateral treaties like the GPW that vest rights in, or place affirmative obligations upon, U.S. citizens. Whatever authority the executive branch may have to construe these treaties liberally for international purposes would seem less justified in domestic adjudication where individual rights hang in the balance. The temptation to abuse judicial deference may be particularly acute, since the executive branch is often an interested party in treaty litigation—whether as prosecutor, plaintiff, or defendant. In *Lindh*, for example, the executive branch certainly had ample motivation—as both prosecutor and politician—to construe the GPW's lawful combatant immunity stingily in order to secure Lindh's conviction. According "great weight" to executive treaty interpretations in such cases raises fundamental fairness concerns similar to those arising from judicial deference to the Attorney General's ex post interpretation of criminal statutes.<sup>33</sup> Courts must tread carefully in this domain, appreciating that judicial deference and due process make uneasy bedfellows.

To the extent that executive treaty interpretations warrant deference at all, courts should employ only *persuasiveness* deference based upon the

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32. Non-self-executing treaties are not entirely without legal force, however, since courts may employ these agreements indirectly as interpretive tools in constitutional, statutory, and common-law adjudication. Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 781 (1988). When courts determine that treaty parties have committed an agreement's administration exclusively to the political branches, *Chevron* deference may be appropriate.

33. See *United States v. Zucca*, 351 U.S. 91, 101 (1956) (Clark, J., dissenting) ("Many cases witness the fact that the Court has often given little or no weight to carefully drawn opinions of the Attorney General on questions of statutory interpretation.").

executive's special expertise in foreign affairs.<sup>34</sup> This standard tracks the Supreme Court's formula in administrative law for statutes that fall within agencies' expertise but are not congressionally committed to their discretion. First articulated in *Skidmore v. Swift & Co.*,<sup>35</sup> this standard dictates that agency interpretations outside the *Chevron* rubric may yet "merit some deference whatever its form, given the [agency's] specialized experience and broader investigations and information . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires."<sup>36</sup> Translating *Skidmore* to the treaty context, the degree of deference due an agency treaty interpretation would turn upon several factors, including the agency's relevant expertise, the cogency of the agency's reasoning, evidence of state and private reliance upon the agency's interpretation, and the interpretation's potential to promote transnational legal order.<sup>37</sup> Applying *Skidmore* deference allows courts to sidestep *Chevron*'s "delegation gap" problem, facilitates the United States's compliance with international law, and preserves the judiciary's constitutional primacy in domestic treaty interpretation.<sup>38</sup>

#### IV

Negotiating the line between "law" and "politics" is never an easy task. High-profile cases like *Lindh* place additional stresses on the adjudicatory process, since their outcomes often portend far-reaching social and political consequences. These politically sensitive cases reveal all the more clearly the necessity for U.S. courts to develop coherent, principled standards for according deference to national policymakers. Given the critical values at stake in domestic treaty interpretation, *Skidmore* deference offers the most coherent, principled framework for reconciling the United States's foreign policy interests with the rule of law.

—Evan Criddle

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34. Professor Van Alstine tenders "calibrated deference"—a sliding scale based upon a treaty's subject matter and its relevance to foreign affairs—as a comparable substitute for Bradley's *Chevron* paradigm. Van Alstine, *supra* note 21, at 1298-303. In contrast, I believe that judicial deference should not turn on a treaty's *subject matter* so much as the agency's *persuasiveness* and the proposed interpretation's potential to promote world public order.

35. 323 U.S. 134, 140 (1944).

36. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (internal quotation marks and citations omitted).

37. *Cf.* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 870 (2001) (describing analogous factors as conventional considerations in *Skidmore* analysis).

38. Although Bradley claims that the Supreme Court's most recent treaty case, *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, supports his thesis, the Court's methodology actually parallels *Skidmore* more closely than *Chevron*. 525 U.S. 155, 171-72 (1999) (testing the government's treaty constructions for persuasiveness only after carefully evaluating the Convention's text, structure, purpose, negotiation history, and the constructions adopted previously by the United States's treaty partners).