



Vol. 1, No. 1

July, 2019

Welcome to *ChevronWatch*, NCLA's monthly publication that summarizes significant judicial deference cases. NCLA is committed to keeping tabs on the problems that judicial deference causes the federal courts. We are particularly concerned that deference doctrines like *Chevron* compromise judicial independence, require judges to violate their oaths, and deny due process rights to litigants. After all, how can a party in a lawsuit against the government get a fair trial if the judge defers to the government's interpretation of the law?

This newsletter is a group effort. If we missed a case or you know of an upcoming case you would like for us to feature, please let us know! Better yet, share with a friend or a judge who would like to receive future publications of *ChevronWatch* and have them sign up [here](#)

DEFERENCE SCHMEFERENCE

The cases summarized here either refrain from deferring, apply a deference doctrine against an agency, or else feature a concurrence or dissent that is hostile to (or otherwise sows doubts about) judicial deference.

[Smith v. Berryhill \(S. Ct. 2019\)](#)

This is a Social Security Administration case, with an important aside for *Chevron* enthusiasts (or anti-enthusiasts?). Per Justice Sotomayor: "The scope of judicial review, meanwhile, is hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency." Indeed, "Congress did not delegate to the SSA the power to determine 'the scope of the judicial power vested by' § 405(g) or to determine conclusively when its dictates are satisfied." In other words, agencies will not get deference on their determination of the scope of judicial review.

[Weyerhaeuser v. U.S. Fish and Wildlife Service \(S. Ct. 2018\)](#)

Weyerhaeuser appealed a F&WS decision to designate its 1,544-acre site in Louisiana as critical habitat under the Endangered Species Act for the dusky gopher frog even though the species does not live there and could not in the site's present state. Per C.J. Roberts, a "critical habitat" must first be a "habitat." If that adjectival analysis seems obvious, the F&WS would beg to differ. It sought both *Chevron* and *Baltimore Gas* deference for the agency's expert views of the ESA, which had won at CA5 below. SCOTUS reversed 8-0 with nary a mention of either form of deference.

[Guedes v. ATF \(D.C. Cir. 2019\)](#), **dissent** by J. Henderson

CADC upheld ATF's bump stock rule (see next section). J. Henderson **dissented** on multiple grounds including: (1) properly construed, the rule squarely conflicts with the statute; (2) the rule of lenity compels courts to interpret any ambiguity against criminal liability; (3) the majority makes too much of the infamous *Babbitt* footnote to say that *Chevron* deference still applies when a statute has both civil and criminal applications; and (4) the court should not apply *Chevron* when the government disclaims reliance on it; nor did the rule itself depend on *Chevron*. NCLA's amicus brief in support of Guedes made many of these points.

[Procopio v. Wilkie \(Fed. Cir. 2019\) \(en banc\)](#), **concurrency** by J. O'Malley

A former U.S. sailor suffering from diabetes and prostate cancer sought relief from the Board of Veterans' Appeals because he claimed his illnesses were connected to his service as a Naval officer in the "Republic of Vietnam." One problem: what counts as the "Republic of Vietnam"—the territorial land, or the land *and the sea around it*? CAFC concluded that Congress spoke unambiguously when it chose to use Vietnam's formal name in its legislation, therefore implying that territorial sea counts. Judge O'Malley concurred: the pro-veteran statutory canon should have ended the debate before the court even reached a *Chevron* analysis. Honestly, she's not completely convinced that the *Chevron* doctrine is constitutional. NCLA: Can we start the Judge O'Malley fan club?

[Simpson v. U.S. Att'y General \(3d Cir. 2019\)](#)

The Bureau of Alcohol, Tobacco, Firearms & Explosives revoked a firearms dealer's federal firearms license (FFL) after ATF found that he had willfully violated the Gun Control Act of 1968 more than 400 times. ATF conducted an administrative hearing and affirmed the revocation of the FFL. The dealer appealed to the Eastern District of Pennsylvania, which granted ATF's motion for summary judgment. On appeal, CA3 noted that, generally, ATF's interpretation of federal explosive law is afforded *Chevron* deference. However, the Gun Control Act of 1968 requires that courts review ATF licensing revocations *de novo*. Under this standard, and not *Chevron*, CA3 affirmed the district court's finding that the dealer willfully violated the GCA because he was informed of his obligations under it.

[Texas v. Alabama-Coushatta Tribe of Texas \(5th Cir. 2019\)](#)

The Alabama-Coushatta Tribe brought an action to void a federal court judgment from 1994 that interpreted relevant federal statutes to prohibit the tribe from conducting gambling operations in violation of Texas law. The Tribe argued that a 2015 opinion letter which permitted the Tribe to conduct certain kinds of gaming was entitled to deference under Brand X and should be read today as a *Chevron* "step-two" decision that left the door open for a reading favorable to the Tribe. CA5 disagreed, saying that the Tribe's "reasoning disregards the fact that ... *Chevron* step one ... requires the reviewing court to apply 'traditional tools of statutory interpretation'—like canons and legislative history—to determine whether Congress has spoken to the precise issue." Lone Star State, or Lone Non-Deference State? You tell us.

[Forrest Gen. Hosp. v. Azar \(5th Cir. 2019\)](#)

Several hospitals sued HHS for miscalculating the amount of federal money to which hospitals were entitled for serving large numbers of indigent patients. The dispute concerned HHS's interpretation of a statute, which HHS argued required *Chevron* and *Auer* deference. In a colorful opinion by Judge Willett (citing Tolkien's *Fellowship of the Ring*), CA5 refused to apply either form of deference. It held that "[u]nder bedrock separation-of-powers principles, Article III courts ... must not ... outsource their constitutionally assigned interpretive duty to Article II agencies when the Article I Congress has spoken clearly." CA5 was even more skeptical of *Auer*: "*Auer* has lost its luster over the years, weathering unsparing criticism from commentators and jurists, including *Auer*'s author, the late Justice Scalia, who ... brand[ed] it one of the Court's 'worst decisions ever.'"

[Southwestern Electric Power Co. v. EPA \(5th Cir. 2019\)](#)

A group of environmental companies challenged EPA regulations which say the “Best Available Technology,” or “BAT,” for leachate clean-up is “impoundments”—a method which the environmental companies claim is as antiquated as CD players, Sony Watchman pocket TVs, and the Commodore 64 home computer. CA5 employed a Chevron framework and said EPA doesn’t even make it past the first step. EPA’s interpretation of the statute conflates two important concepts (BAT and Best Practicable Technology), and its interpretation is not reasonable. Hey—Diet Coke is also a product of 1982, so it wasn’t all bad, okay CA5?

[Valent v. Comm’r of Soc. Sec. \(6th Cir. 2019\)](#), dissent by J. Kethledge

Valent was fined \$125,000 by the Social Security Administration for failing to disclose employment while receiving disability benefits. Despite Valent’s argument that SSA misinterpreted the relevant statutes, CA6 found the statutory text ambiguous and deferred to SSA under *Chevron*. Judge Kethledge wrote a powerful **dissent**, expressing constitutional concerns about *Chevron* deference in general: “Article III court[s] should not defer to an executive agency’s pronouncement of ‘what the law is’ unless the court has exhaustively demonstrated ... that every judicial tool has failed ... Instead, the federal courts have become habituated to defer to the interpretive view of executive agencies ...—as if our duty were to facilitate violations of the separation of powers rather than prevent them.”

[Arangure v. Whitaker \(6th Cir. 2018\)](#)

Judge Thapar’s opinion is a masterclass on the interrelation of canons of construction with *Chevron* deference. Does the common-law presumption canon count as a “traditional tool of statutory interpretation” required by *Chevron* analysis? CA6 says yes. After Arangure’s first removal proceeding was terminated, DHS initiated a second removal proceeding under a different statutory subsection. Arangure argued claim preclusion barred the second proceeding which threw everyone for a loop because, well, the INA doesn’t specify whether res judicata governs removal proceedings. DHS dangled *Chevron*, but CA6 declined to take the bait: “[U]nder *Chevron*, ambiguity means courts get to outsource their ‘emphatic’ duty by deferring to an agency’s interpretation. But even *Chevron* itself reminds courts that they must do their job before applying deference.” “When courts find ambiguity where none exists, they are abdicating their judicial duty.” Applying the common-law presumption canon first resolves any ambiguity, so claim preclusion does govern removal proceedings. Remand to determine the finality of the first proceeding.

[Lopez v. Barr \(9th Cir. 2019\)](#)

DHS filed a Notice to Appear and commenced removal proceedings against Lopez. Relying on SCOTUS’s ruling in *Pereira v. Sessions*, Lopez argued the Notice to Appear did not contain the Court’s requirements of setting a time and date for the proceeding and, thus, he qualified for cancellation of removal. Should CA9 defer to BIA’s interpretation of *Pereira* that a subsequent Notice of Hearing cures the defects in the previously issued Notice to Appear? CA9: No, the court must follow the plain language of the statute and *Chevron* does not permit courts to defer to an agency’s reading of Supreme Court precedent. But see J. Callahan’s dissent, reading *Pereira* to allow DHS to cure a deficient notice.

[Maralex Res., Inc. v. Barnhardt \(10th Cir. 2019\)](#)

A Colorado family and the Southern Ute Indian Tribe agreed to develop a parcel of land together under a “communitization agreement.” Soon, a Bureau of Land Management official ordered them to provide him with keys to locked gates on the property so that he could inspect the new oil wells. He cited a federal statute allowing BLM to inspect lease sites on “Federal or Indian lands” at any time without notice. While CA10 found that the “communitization agreement” had created a lease site, it also found that the statute did not address lease sites on “private lands,” and BLM was not due *Chevron* deference on the issue. Silence ≠ ambiguity under *Chevron*.

DEFERENCE PREFERENCE

The cases summarized here apply a deference doctrine in an agency's favor. They have been selected because they apply or extend the doctrine in some unusual, problematic, or precedent-setting way.

Rather than summarize the Supreme Court's *Kisor v. Wilkie* decision here, let us point you to a recent take on the case by NCLA's general counsel, who co-authored NCLA's amicus brief in the case. The article explains why Justice Kagan's cabining of *Auer* deference and Justice Gorsuch's constitutional objections to *Auer* deference are quite dissimilar approaches: [Chief Justice Roberts Is Dead Wrong About *Auer* Deference](#), ([Forbes.com](#)).

[Guedes v. ATF \(D.C. Cir. 2019\)](#)

Have bump stocks always been "machineguns" as defined in the National Firearms Act? CADC says 'yes' over a concurrence/dissent. It held that ATF's redefinition of the word "machinegun" deserved *Chevron* deference despite (1) previous administrations indicating a lack of authority to ban bump stocks; (2) ATF's different longstanding interpretation of "machinegun"; (3) the rule of lenity; and (4) the government's attempt to waive *Chevron*. Prior CADC precedent appeared to permit the government to waive reliance on *Chevron* deference, which makes this holding all the more perplexing.

[BMW of North America LLC. v. United States, \(Fed. Cir. 2019\)](#)

You know that feeling when you forget to pay a bill and then get the late fine notice a week later? That was BMW, who got slapped with an extra heavy antidumping rate after it failed to answer a Commerce Department questionnaire it received for petitioning DOC to review its antidumping rate. BMW argued honest mistake from management changes; DOC argued *Chevron*. Surprise, surprise: *Chevron* won. DOC gets to interpret how to construe its rate process; BMW regrets asking to change the rate in the first place. Sigh. All's fair in love and imports.

[Perez v. Cissna \(4th Cir. 2019\)](#)

A North Carolina juvenile court granted Perez's brother emergency temporary custody of Perez—an unlawful immigrant—because Perez could not go home to his parents due to abuse and neglect. Using this emergency order as the predicate (as required by law), Perez then applied for special immigrant juvenile (SIJ) status. Can U.S. Citizenship and Immigration Services grant an applicant SIJ status if the predicate custody order was temporary and not permanent? USCIS says no. CA4? Defer to USCIS's interpretation that the statute requires the predicate custody order be permanent *even though* such an interpretation was not developed through formal rulemaking.

[Baldwin v. United States \(9th Cir. 2019\)](#)

The Baldwins mailed their amended tax return to the IRS four months before the deadline—but the document apparently didn't arrive. Did the Baldwins "timely file" their return, thereby allowing them to seek relief in federal district court from the IRS's denial of their refund claim? CA9 had a nearly 30-year-old precedent that would have allowed the Baldwins to show they "timely filed" their claim under the common law mailbox rule. But today, under the haunting shadow of *Chevron* and its progeny *Brand X*, CA9 eschews its own precedent and defers to the IRS's interpretation that the mailbox rule no longer applies—even though IRS issued the rule advancing that new interpretation after the Baldwins filed their return. Justice Gorsuch call your office! NB: The Baldwins are now NCLA clients. Stay tuned.

[Merck & Co. v. HHS \(D.D.C. July 8, 2019\)](#)

To drive down drug prices, HHS invoked its ability under the Social Security Act to "promulgate rules necessary for the administration of its department," to create the "Wholesale Acquisition Cost Disclosure Rule." It requires drug mfrs. to disclose the list price of a 30-day supply of drugs on their tv ads. HHS's briefs did not seek *Chevron* deference. Pharma. cos. sued, arguing to apply *Chevron* and *limit* HHS's regulatory authority. CADC agreed: *Chevron* applies, the WAC Rule is "in search of a statutory home," and federal agencies may not venture into brand-new regulatory territory absent explicit Congressional authorization. "Were courts to *presume* a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron*, *Mead*, and quite likely the Constitution as well."

[Pennsylvania v. Trump, \(E.D. Pa. Jan. 14, 2019\)](#)

Pennsylvania and New Jersey sued President Trump to enjoin enforcement of two Interim Final Rules (IFRs) promulgated by Treasury and DOL. After the Court found that the Women's Health Amendment rules violated the APA and issued a stay, and while the Defendant's appeal was pending, the agencies promulgated two "non-substantive" rules which Pennsylvania and New Jersey again challenged. Judge Beetlestone found that the Final Rules failed at *Chevron* step one. Deviating from her previous approach to the IFRs, Judge Beetlestone issued a nationwide preliminary injunction in order to prevent female citizens who work for out-of-state employers from losing their contraceptive coverage under the Final Rules' exemptions.

DEFERENCE REFERENCE

This third category is for run-of-the-mill cases. Although our focus is on *Chevron*, we will also include cases involving *Seminole Rock/Auer* deference, *Brand X* deference, *City of Arlington* deference, *Stinson* deference, *Baltimore Gas* deference, and other kinds of deference that violate constitutional norms.

[Office of Comptroller afforded deference to define the word "interest" in the National Bank Act.](#)

[Unambiguous statute comports with DHS regulation at Chevron step one.](#)

[CA3 upholds NLRB's interpretation of NLRA after Chevron analysis.](#)

[Informal guidance is not afforded Chevron deference.](#)

[No deference should be afforded to BIA's interpretation of state and federal criminal laws.](#)

[INA provision listing "crimes of child abuse" as removable offense is ambiguous; BIA interpretation reasonable to include conviction of endangering child welfare under NY law.](#)

[No deference to Coast Guard Officer's testimony just because ... he is a Coast Guard.](#)

[De novo standard enough to deny petition; Chevron not reached.](#)

[Deference afforded to BIA's finding that wire fraud is a "crime involving moral turpitude."](#)

[SIH Partners liable for back income because IRS's regulations are reasonable interpretations under Chevron.](#)

[Asylum seeker using fake name subject to removal for violation of valid rule under Chevron.](#)

[Asylum seeker not eligible because not part of "a particular social group" as required by Chevron-ed regulation.](#)

[CA6 refused to defer to BIA interpretation of "moral turpitude"; reviews statute de novo.](#)

[Classification of negligent homicide by AG upheld as reasonable under Chevron.](#)

[AG could not interpret "Notice to Appear" any differently than was explicitly defined in statute.](#)

[EEOC interpretation of obesity-as-disability requires underlying physiological condition.](#)

[Being paroled does not constitute being "admitted in any status" under Chevron and Brand X.](#)

Participation in illicit drug trafficking involves “moral turpitude” sufficient for removal.

BIA’s definition of a “single scheme of criminal misconduct” is not afforded deference.

DOL’s interpretation of “extraordinary circumstances” in Black Lung Benefits Act afforded deference.

Chevron avoided in removal case by examining nexus between persecution and social group.

Chemical companies and certain exports may keep makeup of products confidential.

Broad interpretation of “interests of justice” serves underlying PTO policy.

DOC’s interpretation of “less than adequate remuneration” far exceeds reasonable standard under *Chevron* step two.

Patent term adjustment statute unambiguous: “fails to,” not “does nothing.”

Chevron is independently sufficient basis for ruling for HHS on statutory interpretation of DHA payments.

