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NCLA Asks Court to Not Abandon Its Duty of Independent Judgment in BIA Case Under *Chevron* Deference

Brackeen v. Bernhardt et al.

Washington, DC (January 7, 2019) – The New Civil Liberties Alliance filed an [amicus brief](#) today with the Fifth Circuit U.S. Court of Appeals in support of plaintiffs-appellees in the case of *Brackeen v. Bernhardt*. NCLA is urging the full Fifth Circuit to call out the constitutional defects inherent in the *Chevron* judicial deference doctrine. Specifically, NCLA points out that judges violate Article III of the Constitution and their judicial oaths when they give *Chevron* deference instead of providing their independent judgment. Furthermore, judges violate the Due Process Clause when they favor a government litigant’s interpretation of the law over the interpretation of the other party in the case. In other words, Chad Brackeen and the other plaintiffs-appellees are denied a fair trial if the judge hearing their case employs *Chevron* deference in favor of the government.

In this case, Congress gave the federal agency (the Bureau of Indian Affairs) a 180-day window to issue regulations, but that was 36 years ago. Now the BIA thinks it can make law as it pleases, when it pleases. NCLA calls on the *en banc* Fifth Circuit to resist the siren song of *Chevron*.

NCLA released the following statements:

“Under the *Chevron* deference doctrine, three judges of the Fifth Circuit concluded that BIA’s decision to issue lame-duck regulations in 2016 some four decades too late was “reasonable.” That conclusion, which is hard to reconcile with logic or grammar, was possible only because of *Chevron*—a doctrine that requires judges to abandon their duty of independent judgment and acquiesce in the decisions of executive-branch agencies. We urge the full Fifth Circuit, which is rehearing the case *en banc*, to silence the panel’s out-of-tune paean to *Chevron*.” —**Adi Dynar, NCLA Litigation Counsel**

“This case presents a perfect opportunity for the Fifth Circuit to repudiate *Chevron* deference, a doctrine so ill-advised and violative of due process that it has been construed by courts and agencies to permit the Bureau of Indian Affairs (BIA) latitude to write itself its own permission slip to issue regulations four decades after Congress’s grant of such authority lapsed. By repudiating *Chevron*, the Court will uphold its integrity as an independent and unbiased third branch of government ensuring that Americans enjoy due process of law.” —**Peggy Little, NCLA Senior Litigation Counsel**

ABOUT NCLA

NCLA is a nonprofit civil rights organization founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other *pro bono* advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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