

# Extending Chevron Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President

Oren Eisner

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

## Recommended Citation

Oren Eisner, *Extending Chevron Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 Cornell L. Rev. 411 (2001)  
Available at: <http://scholarship.law.cornell.edu/clr/vol86/iss2/4>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## NOTE

### EXTENDING *CHEVRON* DEFERENCE TO PRESIDENTIAL INTERPRETATIONS OF AMBIGUITIES IN FOREIGN AFFAIRS AND NATIONAL SECURITY STATUTES DELEGATING LAWMAKING POWER TO THE PRESIDENT

*Oren Eisner*†

INTRODUCTION .....	412
I. THE FOREIGN SOVEREIGN IMMUNITIES ACT AMENDMENT AUTHORIZING EXECUTION OF BLOCKED PROPERTY AND THE PRESIDENTIAL INTERPRETATION OF THE AMBIGUITY IN ITS WAIVER PROVISION .....	415
A. Background to the Foreign Sovereign Immunities Act Amendments .....	415
B. Section 117 of Public Law 105-277 and the Presidential Waiver Provision .....	417
C. <i>Alejandro v. Republic of Cuba</i> .....	420
II. THE <i>CHEVRON</i> DOCTRINE .....	422
III. ANALYSIS OF THE RATIONALES OF <i>CHEVRON</i> AND THEIR APPLICATION TO THE PRESIDENT'S INTERPRETATION OF THE WAIVER PROVISION OF SECTION 117 .....	426
A. Delegation .....	428
B. Democratic Accountability .....	432
C. Expertise .....	434
CONCLUSION .....	435

*This Note argues that courts should extend Chevron deference to presidential interpretations of ambiguities in foreign affairs and national security statutes delegating lawmaking to the President. By examining one such instance—the amendment to the Foreign Sovereign Immunities Act authorizing execution of blocked assets of terrorist states and President Clinton's interpretation of this amendment's ambiguous waiver provision—this Note shows that the rationales of Chevron—delegation, democratic accountability, and expertise—would all be served by deferring to the President's interpretation.*

*The ambiguity of the waiver provision suggests that Congress could not resolve the issue of the waiver's scope. In light of Chevron, this suggests that Congress left the resolution of the issue to the body it best saw fit to do so—the President. Furthermore, extending Chevron's presumption of im-*

---

† B.A., Yale University 1996; candidate for J.D., Cornell Law School, 2001.

*PLICIT delegation to ambiguities within statutes to be implemented by the President would be superior to the case-by-case interpretation of ambiguities presently offered by courts. Congress will be aware of and enjoy the benefits associated with the presumption of implied delegation to the President, as it does with the presumption of implied delegation to the agencies.*

*Next, because the President is more democratically accountable than the courts, and indeed, even more than the agencies, the second rationale of Chevron, that of democratic accountability, would also be further served by extending judicial deference to presidential interpretations of ambiguities in foreign affairs and national security statutes.*

*Finally, the third rationale of Chevron, that of expertise, would be served by extending Chevron deference to presidential interpretations of ambiguities in foreign affairs and national security statutes because these statutes fall into the President's area of expertise.*

*Therefore, courts would further the rationales of the Chevron doctrine by extending Chevron deference to presidential interpretations of statutes involving national security and foreign affairs.*

#### INTRODUCTION

In the landmark<sup>1</sup> case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>2</sup> the Supreme Court formulated a two-step test to govern the deference a reviewing court should extend to an agency's interpretation of an ambiguous statute Congress has entrusted the agency to administer.<sup>3</sup> Under the *Chevron* doctrine, if the reviewing court, "employing traditional tools of statutory construction,"<sup>4</sup> determines that Congress has spoken directly on a precise issue, then the court "must give effect to the unambiguously expressed intent of Congress."<sup>5</sup> If after examining the text and legislative history of the statute, the reviewing court determines that a statute is silent or ambiguous regarding a particular issue, the court must defer to any reasonable interpretation made by the implementing agency.<sup>6</sup>

This Note proposes to expand the scope of the *Chevron* doctrine beyond deference to agency interpretations—and extend judicial deference to presidential interpretations of ambiguities in statutes in the

---

<sup>1</sup> *Chevron* is generally perceived as a watershed decision that "was intended to be a sea change in the way courts reviewed agency decisions." Erika Jones et al., *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency*, 4 ADMIN. L.J. AM. U. 113, 139 (1990); see Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 187 (1992) ("The Supreme Court's decision in *Chevron* . . . has become perhaps the central case of modern administrative law."). For a more thorough discussion regarding the impact of *Chevron*, see *infra* Part II.

<sup>2</sup> 467 U.S. 837 (1984).

<sup>3</sup> *Id.* at 842-43.

<sup>4</sup> *Id.* at 843 n.9.

<sup>5</sup> *Id.* at 843.

<sup>6</sup> *Id.* at 843-44.

realm of foreign affairs and national security that delegate lawmaking power to the President.<sup>7</sup> This Note will show that the rationales underlying the Supreme Court's decision in *Chevron* to mandate judicial deference to agency interpretations of ambiguous statutes apply to delegations of lawmaking power to the President, and it therefore suggests extending judicial deference to presidential interpretations of such ambiguities in foreign affairs and national security statutes. This Note analyzes one such presidential interpretation of an ambiguity in a foreign affairs and national security statute that delegated a lawmaking power to the President and demonstrates that the rationales of *Chevron* are served by extending judicial deference to this presidential interpretation.

In *Alejandro v. Republic of Cuba*<sup>8</sup> (*Alejandro II*), the United States District Court for the Southern District of Florida determined that a recent amendment to the Foreign Sovereign Immunities Act (FSIA),<sup>9</sup> authorizes the attachment of blocked property of foreign terrorist states, or their agencies or instrumentalities, in actions to enforce judgments for claims brought as a result of terrorist activities by such states.<sup>10</sup> The court ruled that *Alejandro* was entitled to blocked Cuban assets held by various U.S. corporations, and it ordered that these assets be garnished in aid of execution of a judgment against Cuba in *Alejandro's* favor.<sup>11</sup> In reaching this decision, the court rejected President Clinton's interpretation of a waiver provision contained in this amendment to the FSIA,<sup>12</sup> which gives the President of the United

---

<sup>7</sup> For an explanation and examples of the types of statutes to which this applies—foreign affairs or national security statutes delegating lawmaking power to the President—see *infra* note 94. This Note does not attempt to determine the proper scope of the delegation of lawmaking power to the President, nor does this Note implicate the nondelegation doctrine. It argues for extension of *Chevron* deference to presidential interpretation of ambiguities in foreign affairs or national security statutes that delegate some lawmaking power to the President, but it does not address how much lawmaking power Congress can constitutionally afford the President. That determination is not critical to the analysis of this Note. The Supreme Court has not invalidated a federal statute based on the nondelegation doctrine since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). See *Mistretta v. United States*, 488 U.S. 361, 373-74 (1989) (rejecting a nondelegation challenge to the Federal Sentencing Guidelines).

<sup>8</sup> 42 F. Supp. 2d 1317 (S.D. Fla.), *vacated by Alejandro v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277 (11th Cir. 1999); see also *infra* Part I.C (discussing *Alejandro II*).

<sup>9</sup> 28 U.S.C. § 1610(f)(1)(A) (Supp. IV 1998).

<sup>10</sup> *Alejandro II*, 42 F. Supp. 2d at 1323-24.

<sup>11</sup> *Id.* at 1343. The blocked assets were actually those of Empresa de Telecomunicaciones de Cuba, S.A. (ETECSA), a Cuban telecommunications corporation, that the court found to be "an 'agency or instrumentality of a foreign state'" under the FSIA. *Id.* at 1336. ETECSA's assets were blocked and held by various U.S. corporations, including AT&T and MCI. *Id.* at 1343. *Alejandro* had previously won an extrajudicial killing action against Cuba in *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

<sup>12</sup> Pub. L. No. 105-277, div. A, title I, sec. 101(h), § 117(a), 112 Stat. 2631, 2631-491 (1998) (codified as amended at 28 U.S.C. § 1610(f)(1)(A), (1)(B), (2)(A), (2)(B) (Supp. IV 1998)).

States authority to waive the provision allowing such attachment.<sup>13</sup> The court found that both the language<sup>14</sup> and legislative history<sup>15</sup> of this amendment to the FSIA were ambiguous in regard to the scope of the President's waiver authority. Relying on post-legislative statements of several representatives,<sup>16</sup> the court gave its own interpretation to the statute limiting the scope of the waiver.<sup>17</sup>

The *Alejandro II* court then rejected a number of challenges to its interpretation,<sup>18</sup> including the argument that it should defer to the executive's interpretation of an ambiguous statute based on the *Chevron* doctrine.<sup>19</sup> The court correctly pointed out that the *Chevron* doctrine dictates that courts defer to an agency's reasonable interpretation of ambiguous statutes which Congress has mandated that the agency administer,<sup>20</sup> and thus it does not apply to President Clinton's interpretation of the scope of the waiver provision of the FSIA section authorizing attachment of blocked property.<sup>21</sup>

This Note demonstrates that the same rationales that gave rise to the *Chevron* doctrine of judicial deference to agency interpretations of ambiguities in statutes that the agency is authorized to administer apply equally to judicial deference to the President's interpretation of the ambiguous waiver provision in the FSIA amendment. These rationales—delegation,<sup>22</sup> democratic accountability,<sup>23</sup> and expertise<sup>24</sup>—would all be served if the *Alejandro II* court had deferred to President Clinton's interpretation of this ambiguity in a statute dealing with foreign affairs and national security that delegates lawmaking powers to the President. This in turn suggests, and thus this Note argues, that the rationales of *Chevron* would be similarly served by expanding the

<sup>13</sup> *Alejandro II*, 42 F. Supp. 2d at 1327.

<sup>14</sup> *Id.* at 1328-29.

<sup>15</sup> *Id.* at 1329.

<sup>16</sup> *Id.* at 1330-31.

<sup>17</sup> *Id.* at 1331.

<sup>18</sup> *See id.* at 1332 (finding that its interpretation does not raise constitutional issues); *id.* at 1333 (refusing to address the issue of whether its interpretation could potentially violate U.S. treaty obligations); *id.* at 1333-34 (rejecting the argument that it must construe the President's waiver authority broadly because of the broad presidential authority in areas of foreign policy).

<sup>19</sup> *Id.* at 1334.

<sup>20</sup> *Id.*; *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *id.* at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court . . . ." (internal quotation marks omitted)).

<sup>21</sup> *See infra* notes 66-69 and accompanying text.

<sup>22</sup> *See infra* Part III.A.

<sup>23</sup> *See infra* Part III.B.

<sup>24</sup> *See infra* Part III.C.

scope of *Chevron* to judicial deference to presidential interpretations of ambiguities in foreign affairs or national security statutes delegating lawmaking power to the President. Part I gives the background of the ambiguous amendment to the Foreign Sovereign Immunities Act, President Clinton's interpretation of it, and the court's treatment of the amendment in *Alejandro II*. Part II discusses *Chevron* and its pronouncement regarding judicial deference to agency interpretations of ambiguous statutes. Part II also discusses *Chevron*'s progeny and its impact on the separation of powers and institutional roles of the different players in the administrative state. Part III examines the rationales behind *Chevron* and ties them to the instant case of the FSIA amendment and *Alejandro II*. This Part argues that the same rationales invoked by the *Chevron* Court for judicial deference to agency interpretations of ambiguous statutes, apply equally to President Clinton's interpretation of the ambiguous waiver provision of the FSIA amendment. Thus the *Chevron* rationales support the normative proposal of general judicial deference to presidential interpretations of ambiguities in foreign affairs and national security statutes delegating lawmaking power to the President.

## I

### THE FOREIGN SOVEREIGN IMMUNITIES ACT AMENDMENT AUTHORIZING EXECUTION OF BLOCKED PROPERTY AND THE PRESIDENTIAL INTERPRETATION OF THE AMBIGUITY IN ITS WAIVER PROVISION

#### A. Background to the Foreign Sovereign Immunities Act Amendments

Alisa Michelle Flatow, an American citizen studying in Israel, was murdered on April 9, 1995 in the Gaza Strip when a suicide bomber of the Palestinian terrorist group, the Islamic Jihad, drove a van loaded with explosives into the bus she was riding.<sup>25</sup> The Palestinian Islamic Jihad is a Palestinian terrorist group supported and funded entirely by the Islamic Republic of Iran.<sup>26</sup> The Foreign Sovereign Immunities Act<sup>27</sup> of 1976, which affords immunity to foreign sovereigns, shielded Iran and other states that either committed or supported terrorist acts against United States citizens from civil liability for these

---

<sup>25</sup> Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7-9 (D.D.C. 1998); 144 CONG. REC. H7267-H7268 (daily ed. Aug. 5, 1998) (statement of Rep. Saxton).

<sup>26</sup> Flatow, 999 F. Supp. at 8; 144 CONG. REC. H7267 (daily ed. Aug. 5, 1998) (statement of Rep. Saxton).

<sup>27</sup> 28 U.S.C. §§ 1602-1611 (1994 & Supp. IV 1998).

actions.<sup>28</sup> In April 1996, prompted by the Flatow murder,<sup>29</sup> Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 that, among other things, amended the FSIA to lift the immunity of foreign states for certain sovereign terrorist acts.<sup>30</sup> The amendment gave federal courts jurisdiction over foreign states designated by the Department of State as "countries supporting international terrorism"<sup>31</sup> for acts of terrorism committed or materially supported by that state, resulting in the death or injury of a United States citizen.<sup>32</sup> Five months later, Congress enacted another amendment to the FSIA, Civil Liability for Acts of State Sponsored Terrorism, as part of the 1997 Omnibus Consolidated Appropriations Act.<sup>33</sup> Commonly known as the "Flatow Amendment,"<sup>34</sup> this provision, enacted for the benefit of the Flatows,<sup>35</sup> expressly provides for punitive damages in actions brought under the state-sponsored terrorism exception to foreign immunity.<sup>36</sup> The amendment also created a separate cause of action against officials, agents, or employees of a foreign state that had lost its jurisdictional immunity for an act of terrorism enumerated in 28 U.S.C. § 1605(a)(7).<sup>37</sup>

<sup>28</sup> See *id.* § 1604; see also *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 247 (2d Cir. 1996) (holding that the FSIA shielded Libya from liability for the bombing of Pan Am Flight 103); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 169 (D.C. Cir. 1994) (concluding that the FSIA shielded Iran from liability for the kidnapping and torturing of U.S. citizens in Lebanon by an Islamic terrorist group supported and funded by Iran).

<sup>29</sup> See 144 CONG. REC. H5710 (daily ed. July 16, 1998) (statement of Rep. Saxton) (stating that the statute was changed "to give the Flatow family the ability to sue"); 144 CONG. REC. E1345 (daily ed. July 17, 1998) (statement of Rep. Schumer) (stating that Congress amended the Anti-Terrorism Act in 1996 "precisely to help families like the Flatows").

<sup>30</sup> Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Title II, § 221(a), 110 Stat. 1241 (1996) (codified as amended at 28 U.S.C. § 1605(a)(7) (Supp. IV 1998)).

<sup>31</sup> "Countries supporting international terrorism" are designated by section 6(j) of the Export Administration Act of 1979 or section 620A of the Foreign Assistance Act of 1961. 50 U.S.C. § 2405(j) (1994). The foreign states designated sponsors of terrorism pursuant to this are: Iran, Cuba, Syria, Iraq, Libya, Sudan, and North Korea. 22 C.F.R. § 126.1(d) (2000).

<sup>32</sup> 28 U.S.C. § 1605(a)(7) (Supp. IV 1998). The enumerated terrorist acts that give rise to jurisdiction under this statute are: "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources" for such an act by an official of that state acting within his or her official scope. *Id.*

<sup>33</sup> Pub. L. No. 104-208, div. A, title I, sec. 101(c), § 589, 110 Stat. 3009-172 (1996) (noted at 28 U.S.C. § 1605 (Supp. IV 1998)).

<sup>34</sup> *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12 (D.D.C. 1998).

<sup>35</sup> See 144 CONG. REC. H1095 (daily ed. Mar. 11, 1998) (statement of Rep. Saxton).

<sup>36</sup> 28 U.S.C. § 1605(a)(7) (Supp. IV 1998); see also *Flatow*, 999 F. Supp. at 12 ("[T]he amendment to 28 U.S.C. § 1605(a)(7) expressly provided, *inter alia*, that punitive damages were available in actions brought under the state sponsored terrorism exception to immunity.").

<sup>37</sup> Previously, this statute gave rise to jurisdiction, not a cause of action. § 589; *Alejandro v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1321-22 (S.D. Fla.), *vacated by Alejandro v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277 (11th Cir. 1999).

As a result of these amendments to the FSIA, in *Flatow v. Islamic Republic of Iran*,<sup>38</sup> a federal district court found that it had jurisdiction over the foreign sovereign state,<sup>39</sup> and after Flatow obtained a default judgment against Iran,<sup>40</sup> the court awarded a judgment exceeding \$247 million.<sup>41</sup>

#### B. Section 117 of Public Law 105-277 and the Presidential Waiver Provision

Congress enacted the next amendment to the FSIA in 1998 as section 117 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act in 1999<sup>42</sup> to allow the Flatows to execute the judgment in their favor against blocked Iranian property located in the United States.<sup>43</sup> President Clinton signed the appropriations act on October 21, 1998 and the amendment to the FSIA became section 117 of Public Law 105-277.<sup>44</sup> Section 117(a) of Public Law 105-

<sup>38</sup> 999 F. Supp. 1 (D.D.C. 1998).

<sup>39</sup> *Id.* at 34 ("This Court possess [sic] subject matter jurisdiction over this action and personal jurisdiction over Defendants."); *see also id.* at 12-14 (discussing the amendment to the FSIA and how it gives the court jurisdiction over foreign sovereigns).

<sup>40</sup> Iran, of course, did not show up to court to contest the action. *Id.* at 6. Under 28 U.S.C. § 1608 of the FSIA, however, plaintiffs in an action against a foreign sovereign who defaults must establish "his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e) (1994); *see also Flatow*, 999 F. Supp. at 6 (discussing the required standard for default judgment against foreign sovereigns).

<sup>41</sup> *See Flatow*, 999 F. Supp. at 5. The amendment to the FSIA providing courts jurisdiction over a state designated as a "state sponsor of terrorism," 28 U.S.C. § 1605(a)(7), granted courts jurisdiction over foreign sovereigns in two other cases. In *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997), the families of the Brothers to the Rescue pilots who were murdered by the Cuban airforce received a judgment of over \$187 million for compensatory and punitive damages after the court found that it had jurisdiction over Cuba pursuant to the FSIA amendment. *Id.* at 1247-48. In *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998), *aff'd* 162 F.3d 748 (2d Cir. 1998), *cert. denied*, 525 U.S. 1003 (1999), representatives and survivors of the victims of the terrorist bombing of Pan Am Flight 103, whose earlier action against Libya was dismissed for lack of jurisdiction over the foreign sovereign in *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996), survived a motion to dismiss for lack of jurisdiction by Libya as the court found that 28 U.S.C. § 1605(a)(7) gave the court jurisdiction over the terrorist state. *Rein*, 995 F. Supp. at 329-30.

<sup>42</sup> Pub. L. No. 105-277, div. A., title I, sec. 101(h), § 117(a), 112 Stat. 2681, 2681-491 (1998) (codified as amended at 28 U.S.C. §§ 1610(f)(1)(A), (1)(B), (2)(A), (2)(B) (Supp. IV 1998)).

<sup>43</sup> 144 CONG. REC. H7419 (daily ed. Aug. 7, 1998); 144 CONG. REC. H7267 (daily ed. Aug. 5, 1998); 144 CONG. REC. H5710 (daily ed. July 16, 1998).

<sup>44</sup> Section 117 of Public Law 105-277 provides:

(a) EXCEPTION TO IMMUNITY FROM ATTACHMENT OR EXECUTION. Section 1610 of title 28, United States Code, is amended by adding at the end the following new subsection:

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the

277 authorizes execution against blocked property of foreign states, or their agencies or instrumentalities, for the enforcement of judgments for 28 U.S.C. § 1605(a)(7) actions brought as a result of terrorist activities by such states.<sup>45</sup> Without this amendment, successful § 1605(a)(7) plaintiffs would not be able to collect their judgments because the State Department invariably blocks the assets of foreign states designated as sponsors of terrorism in the United States.<sup>46</sup> In-

---

Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or [sic] such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

2(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of the State shall fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

- (i) may provide such information to the court under seal; and
- (ii) shall provide the information in a manner sufficient to allow the court to direct the United States Marshal's office to promptly and effectively execute against that property.

(b) CONFORMING AMENDMENT.—Section 1606 of title 28, United States Code, is amended by inserting after “punitive damages” the following: “, except any action under section 1605(a)(7) or 1610(f).”

(c) EFFECTIVE DATE. The amendments made by subsections (a) and (b) shall apply to any claim for which a foreign state is not immune under section 1605(a)(7) of title 28, United States Code, arising before, on, or after the date of enactment of this Act.

(d) WAIVER. The President may waive the requirements of this section in the interest of national security.

§ 117, 112 Stat. at 2681-491.

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

<sup>46</sup> See *Alejandro v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1324 n.7 (S.D. Fla.) (noting that, according to one State Department official, “[b]locking [sic] assets represents one of the primary tools at the disposal of the United States to combat terrorism and other conduct that threatens the security of the United States and its citizens, and to seek to modify such conduct” (citations omitted)), vacated by *Alejandro v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277 (11th Cir. 1999); see also 144 CONG. REC. E2314 (daily ed. Nov. 12, 1998) (statement of Rep. Forbes) (“This provision was made necessary because of the Administration’s repeated efforts in Federal Court to block terrorism victims from attaching assets of terrorist states to help satisfy judgments they had received by such courts.”); Signing Statement, Pub. L. No. 105-277, 1998 U.S.C.C.A.N. 576, 581 (President Clinton discussing the importance of his power to block assets of terrorist states and how “[a]bsent [the President’s] authority to waive section 117’s attachment provision, it would

deed, when the Flatows attempted to attach three properties in Washington, D.C. owned by the Iranian government to satisfy their \$247 million judgment, the State Department intervened and blocked the properties.<sup>47</sup> Congress specifically intended the amendment authorizing execution against blocked properties to deal with this problem.<sup>48</sup> Section 117 of Public Law 105-277 went even further and imposed an affirmative duty upon the Secretary of the Treasury and Secretary of State to assist such plaintiffs in their execution.<sup>49</sup> Section 117 included a waiver provision that authorized the President to “waive the requirements of this section in the interest of national security.”<sup>50</sup> When President Clinton signed Public Law 105-277 he exercised the waiver provision of section 117 “in the interest of national security.”<sup>51</sup>

---

also effectively eliminate use of blocked assets of terrorist states in the national security interests of the United States, including denying an important source of leverage”).

<sup>47</sup> 144 CONG. REC. H5710 (daily ed. July 16, 1998) (statement of Rep. Saxton) (discussing how when the Flatows attempted to attach property owned by the Iranian government, “along came our own State Department and our own Treasury and said to the judge, stop. You cannot perfect this judgment in the form of liens against those properties because there is another statute that gives us the ability to stop you and we will.”); *see also* 144 CONG. REC. H7267 (daily ed. Aug. 5, 1998) (statement of Rep. Saxton) (discussing how the State Department and Justice Department objected to the attachment of Iranian properties by the Flatows). The administration’s antagonism to the amendment authorizing execution of blocked property of terrorist states remained evident in *Alejandre II*, where the government sided with the defendant Cuba to argue against the amendment and prevent the plaintiff from attaching blocked Cuban assets. *See Alejandre II*, 42 F. Supp. 2d at I327.

<sup>48</sup> *See* 144 CONG. REC. H7267 (daily ed. Aug. 5, 1998) (statement of Rep. Saxton) (discussing why the amendment is needed so that the State Department will not be able to prevent victims of terrorism from executing judgments in their favor); *see also* 144 CONG. REC. H7419 (daily ed. Aug. 7, 1998) (statement of Rep. Saxton) (arguing that the amendment is necessary because “there has to be a price to pay” for terrorism, but that “our government was protecting the rights of the State of Iran rather than the rights of the Flatow family”). Ironically, the Flatows failed in their first attempt to make use of this new law. In *Flatow v. Islamic Republic of Iran*, 67 F. Supp. 2d 535 (D. Md. 1999), *aff’d*, *Flatow v. Alavi Found.*, No. 99-2409, WL 1012956 (4th Cir. July 24, 2000), the court held that the assets the Flatows were attempting to garnish did not belong to an instrumentality of the Iranian Government under the FSIA and were therefore immune from execution. *Id.* at 543. This provision was codified as 28 U.S.C. § 1610(f)(1)(A).

<sup>49</sup> § 117(a), 112 Stat. at 2681-491.

<sup>50</sup> *Id.* § 117(a), 112 Stat. at 2681-491.

<sup>51</sup> Signing Statement, Pub. L. No. 105-277, *reprinted in* 1998 U.S.C.C.A.N. 576, 581

I am concerned about section 117 of the Treasury/General Government appropriations section of the Act, which amends the Foreign Sovereign Immunities Act. If this section were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to “receive Ambassadors and other public Ministers.” Moreover, if applied to foreign diplomatic or consular property, section 117 would place the United States in breach of its international treaty obligations. It would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations. Absent my authority to waive section 117’s attachment provision, it would also effectively eliminate use of blocked assets of terrorist states in the national security interests of the United States, including denying an important

By exercising this waiver, President Clinton intended to waive the entirety of section 117 of Public Law 105-277, that is, the entire amendment to 28 U.S.C. § 1610: both the section imposing the affirmative duty on the secretaries under § 1610(f)(2) as well as the authorization to execute against blocked property under § 1610(f)(1)(A).<sup>52</sup> Even before enacting the amendment to the FSIA authorizing attachment of blocked properties, Congress was aware of the Administration's opposition to it.<sup>53</sup> Indeed, Congress passed the amendment in the first place because the Administration was preventing successful plaintiffs from attaching property owned by governments of terrorist countries.<sup>54</sup> The President's exercise of the waiver provision of section 117 when signing Public Law 105-277 into law, therefore, came as no surprise.

### C. *Alejandro v. Republic of Cuba*

Plaintiffs first used 28 U.S.C. § 1610(f)(1)(A) to execute a judgment against a foreign state in *Alejandro II*,<sup>55</sup> notwithstanding the presidential waiver. On February 24, 1996, the Cuban Air Force shot down planes of the Miami-based humanitarian organization Brothers to the Rescue over international water without warning or provocation, killing four workers including Armando Alejandro.<sup>56</sup> In *Alejan-*

---

source of leverage. . . . To the extent possible, I shall construe section 117 in a manner consistent with my constitutional authority and with U.S. international legal obligations, and for the above reasons, I have exercised the waiver authority in the national security interest of the United States.

*Id.*

<sup>52</sup> *Id.*; see also Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998) ("I hereby waive the requirements of section 117 [amending section 1610(f)(1)(A)] in the interest of national security.")

<sup>53</sup> 144 CONG. REC. H5711 (daily ed. July 16, 1998) (statement of Rep. Obey). Representative Obey noted:

in a letter from the administration, the letter indicates that this amendment would substantially undermine the President's ability to use such assets as leverage when economic sanctions are being used to modify the behavior of a foreign state or in negotiations with that state. It said, for instance, that if private claims were allowed to execute judgments ahead of these assets, the President would be deprived of their use as leverage to gain concessions from the North Koreans in the negotiating process, because in their judgment this amendment does not just apply to Iran. It applies to all kinds of other countries, including Cuba.

The administration also points out that the Supreme Court has recognized the importance of the administration retaining this authority . . . 'Such blocking orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency.'

*Id.*

<sup>54</sup> See *supra* notes 46-47 and accompanying text.

<sup>55</sup> *Alejandro v. Republic of Cuba*, 42 F. Supp. 2d 1317 (S.D. Fla.), *vacated by Alejandro v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277 (11th Cir. 1999).

<sup>56</sup> *Id.* at 1320.

*dre v. Republic of Cuba (Alejandre I)* the district court awarded Alejandre's representative compensatory and punitive damages totaling over \$187 million in a 28 U.S.C. § 1605(a)(7) action.<sup>57</sup> In *Alejandre II*, the district court of the Southern District of Florida garnished blocked Cuban assets held by American corporations pursuant to 28 U.S.C. § 1610(f)(1)(A) to execute the judgment Alejandre had been awarded.<sup>58</sup> In *Alejandre v. Republic of Cuba (Alejandre II)*, the United States government ironically sided with defendant Cuba, arguing that the court should interpret the presidential waiver of section 117 to include the entire amendment and thus prevent attachment of blocked Cuban assets.<sup>59</sup> Nonetheless, the court held that the presidential waiver under section 117 applied only to 28 U.S.C. § 1610(f)(2), the affirmative duty of the secretaries, and that the waiver could not and did not apply § 1610(f)(1)(A).<sup>60</sup> Concluding that both the language and legislative history of section 117 were ambiguous in this regard,<sup>61</sup> the court relied on post-enactment statements of several representatives to limit the scope of the presidential waiver.<sup>62</sup> The court limited the scope of the waiver while expressly recognizing that this action was contrary to President Clinton's interpretation of the waiver and intention in executing the waiver.<sup>63</sup> The

---

<sup>57</sup> *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

<sup>58</sup> See *Alejandre II*, 42 F. Supp. 2d at 1343. The assets were actually owned by ETECSA, a Cuban corporation that the district court found to be an "agency or instrumentality of a foreign state" and therefore within 28 U.S.C. § 1610(f)(1)(A). *Id.* at 1336. *Alejandre II* was vacated on appeal when the Eleventh Circuit found that ETECSA was not an agency or instrumentality of Cuba and therefore not within 28 U.S.C. § 1610(f)(1)(A). *Alejandre v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277, 1286-88 (11th Cir. 1999).

<sup>59</sup> *Alejandre II*, 42 F. Supp. 2d at 1327-34. As discussed above, see *supra* notes 53-54 and accompanying text, the administration strongly opposed the amendment authorizing execution of blocked property of terrorist states, thus explaining the curiosity of finding the United States and Cuba on the same side of the lawsuit.

<sup>60</sup> *Alejandre II*, 42 F. Supp. 2d at 1326-34.

<sup>61</sup> *Id.* at 1328-32 (discussing that while several members of Congress believed that the waiver provision applied only to the affirmative duty of Secretaries, other members of Congress believed that it would allow the President to waive the entirety of section 117, both the new subsection § 1610(f)(1) and § 1610(f)(2)).

<sup>62</sup> *Id.* at 1330-31; see also 144 CONG. REC. E2314 (daily ed. Nov. 12, 1998) (statement of Forbes). Representative Forbes noted that:

The intent of this waiver was to allow the President, only in limited circumstances, to waive the requirement that the Secretary of State and Secretary of the Treasury, under subsection (f)(2)(A), cooperate with victims in locating terrorist assets. It was never intended to allow the President to waive subsection (f)(1)(A), the change in the law which allows victims to attach such assets they are able to find on their own. Unfortunately . . . the President issued a blanket waiver, in which he invoked a national security waiver over [both subsections]. . . . It should be clear that the waiver provision of Section 117 only applies to Subsection (f)(2)(A).

*Id.*

<sup>63</sup> *Alejandre II*, 42 F. Supp. 2d at 1331 ("The Court concludes that, contrary to the President's intention in executing the waiver, Congress did not intend to give the Presi-

court also rejected constitutional challenges to section 117 and refused to address whether section 117 could potentially violate U.S. treaty obligations.<sup>64</sup> The *Alejandro II* court next rejected the argument that the waiver provision of section 117 should be construed broadly based on precedent affording the President broad discretion in foreign affairs.<sup>65</sup> Finally, the court rejected the argument that it should defer to the President's interpretation of section 117 based on the *Chevron* doctrine.<sup>66</sup> In making the *Chevron* argument, the government reasoned that because administrative agencies are entitled to deference in their application of regulatory legislation, the President should similarly enjoy such deference in its application of statutory grants of executive authority.<sup>67</sup> The court curtly dismissed the *Chevron* argument: "Only a tortured reading of [*Chevron*] . . . would have it stand for the position" that the court should defer to the President's interpretation regarding the scope of the waiver.<sup>68</sup>

The *Alejandro II* court correctly pointed out that *Chevron* deals "with an administrative agency's construction of an ambiguous statute that Congress has mandated that it administer"<sup>69</sup> and does not mandate that courts defer to a presidential interpretation of statutory ambiguity. The *Alejandro* court was thus correct in its refusal to apply *Chevron*. This Note, however, will now examine the rationales behind the *Chevron* doctrine and illustrate that these same rationales justifying judicial deference to an agency's interpretation of statutory ambiguity apply equally, if not more powerfully, to President Clinton's interpretation of section 117 of Public Law 105-277. This suggests that the courts should extend the scope of *Chevron* to include judicial deference to presidential interpretations of ambiguities in foreign affairs and national security statutes that delegate lawmaking power to the President.

## II

### THE *CHEVRON* DOCTRINE

In *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>70</sup> environmental groups challenged the Environmental Protection Agency's interpretation of the term "stationary source" in the Clean Air Act to include all polluting activities within an entire industrial

---

dent the broad authority to waive the new subsection (f) (1) when it gave him the power to waive "the requirements of this section."').

<sup>64</sup> *Id.* at 1332-33.

<sup>65</sup> *Id.* at 1333-34.

<sup>66</sup> *Id.* at 1334.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 467 U.S. 837 (1984).

facility (known as the “bubble concept”).<sup>71</sup> This interpretation allowed polluting firms to comply with the Clean Air Act by obtaining a single permit for a whole facility (a “bubble”), rather than by obtaining individual permits for each polluting smokestack in the facility.<sup>72</sup> The Clean Air Act did not contain a definition of the term “stationary source,” and the D.C. Circuit rejected the EPA’s “bubble” definition as inconsistent with the purposes of the Act and therefore invalid.<sup>73</sup> Reversing the D.C. Circuit on appeal, the Supreme Court articulated a two-step test to determine the deference a reviewing court should give to an agency interpretation of an ambiguous statute that the agency is to administer.<sup>74</sup> In step one, the court inquires “whether Congress has directly spoken to the precise question at issue.”<sup>75</sup> “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>76</sup> When determining whether Congress has spoken directly to the precise question at issue, the court employs the traditional tools of statutory construction, looking to both language and legislative history of the statute.<sup>77</sup> If the court determines that Congress has not spoken directly to the precise issue, it proceeds to part two of the test. In this step “the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.”<sup>78</sup> Instead, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>79</sup> Thus, under the *Chevron* test, in the face of statutory ambiguity, courts should accept reasonable agency interpretations.<sup>80</sup> This pronouncement made *Chevron* a landmark case<sup>81</sup> and a watershed in administrative law and separation

---

71 *Id.* at 840.

72 *Id.*

73 *Id.* at 841.

74 *Id.* at 842-44.

75 *Id.* at 843.

76 *Id.* at 842-43.

77 *See id.* at 843 n.9, 859-62.

78 *Id.* at 843 (footnote omitted).

79 *Id.*

80 Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 460 (1989); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969 (1992); Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990).

81 *See* Scalia, *supra* note 80, at 512 (“*Chevron* has proven a highly important decision—perhaps the most important in the field of administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC*.”); Hon. Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986) (“*Chevron* has quickly become a decision of great importance, one of a small number of cases that every judge bears in mind when reviewing agency decisions.”); *see also* PETER L. STRAUSS ET AL., GELLHORN & BYSE’S ADMINISTRATIVE

of powers jurisprudence because it redefined judicial deference to the executive. *Chevron's* rule of judicial deference to the agency interpretation of ambiguities in statutes they administer "implicates the basic problems concerning the institutional roles of the different players in the administrative state."<sup>82</sup> Indeed, *Chevron* is often regarded as a "counter-*Marbury*,"<sup>83</sup> as it seems facially contrary to the fundamental principle of *Marbury v. Madison*<sup>84</sup> that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>85</sup> Ever since *Marbury*, "determin[ing] 'what the law is' in the context of an actual controversy that turns on a question of statutory meaning is the quintessential judicial function."<sup>86</sup>

After *Chevron*, much of this quintessential judicial function belongs to the executive agency.<sup>87</sup> *Rust v. Sullivan*<sup>88</sup> further strengthened *Chevron* and its impact on the relationship between Congress, the judiciary, and the executive. In *Rust*, the Supreme Court extended *Chevron* deference to agency reinterpretations of their own previous constructions of statutes. Although stated as a judicial concession of what will survive judicial review, this judicial acceptance of an agency's freedom to change its own policies has strengthened the

---

LAW 621 (9th ed. 1995) (showing that *Chevron* has been cited more often in circuit courts than the other landmark administrative law cases); *id.* at 620 ("In every case involving statutory interpretation, think *Chevron*" (quoting Hon. Patricia M. Wald, Remarks at the Fourth Annual Appellate Advocacy Program (Oct. 28, 1994))); Sunstein, *supra* note 80, at 2075 ("[*Chevron*] has established itself as one of the very few defining cases in the last twenty years of American public law.").

<sup>82</sup> Herz, *supra* note 1, at 187; *see also* Farina, *supra* note 80, at 456 (arguing that "*Chevron* invoked the principles of separation of powers and legitimacy" and thus "appeals to our deepest constitutional unease about allocating power in the administrative state").

<sup>83</sup> Merrill, *supra* note 80, at 969.

<sup>84</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>85</sup> *Id.* at 177; *see* Merrill, *supra* note 80, at 969-70 (arguing that *Chevron* makes "administrative actors the primary interpreters of federal statutes" and that this has "enormous implications for the overall balance of power among the three branches of government"); Scalia, *supra* note 80, at 513 (stating that *Chevron* seems incompatible with *Marbury*); *see also* Starr, *supra* note 81, at 283 (arguing that the Executive Branch "is displacing the judiciary in its traditional and jealously guarded law-declaring function").

<sup>86</sup> Farina, *supra* note 80, at 452.

<sup>87</sup> Criticizing as extreme this shift in judicial role brought about by *Chevron* and its progeny, Professor Farina observed that "[i]n the world according to *Chevron*, the judiciary's role in interpreting regulatory statutes amounts to little more than serving as a mouthpiece for legislative directives that are unequivocal and directly on point." *Id.* at 462-63.

<sup>88</sup> 500 U.S. 173 (1991). In 1985, the Reagan-Bush appointed Department of Health and Human Services reconstructed Title X of the Public Health Service Act, which authorizes distribution of federal funds to family planning clinics that "offer a broad range of acceptable and effective family planning methods and services" so as to "not consider abortion an appropriate method of family planning." *Id.* at 178, 180. This was a dramatic reconstruction of the agency's own previous interpretation of appropriate family planning which did include abortion counseling. The Supreme Court accepted this new interpretation under *Chevron*. *Id.* at 187.

relative power of the executive vis-à-vis Congress. A change in an agency interpretation, brought about most likely by a change in the administration, can now survive judicial review as long as it is reasonable, and however unwelcome to Congress, can only be overcome by legislation.<sup>89</sup> Thus, to override the agency's interpretation, Congress must either secure the President's agreement to this change, or muster the necessary votes to override a presidential veto.

*Chevron* alters the balance of the separation of powers by strengthening the executive's power at the expense of the judiciary's power to determine what the law is and at the expense of Congress's power to make law. Critics of *Chevron* are unhappy about this power shift, yet following *Chevron*, decisions of the Supreme Court<sup>90</sup> and the lower federal courts<sup>91</sup> evidence *Chevron's* continuing message of deference to the executive agency and the shift in the roles of the players in the

---

<sup>89</sup> See STRAUSS ET AL., *supra* note 81, at 630.

<sup>90</sup> See, e.g., *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) (deferring to the Comptroller of the Currency's definition of "interest" under the National Banking Act of 1864); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994) (deferring to the Health and Human Service Secretary's Medicare distribution policy under the Social Security Act); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991) (deferring to the Secretary of Labor's interpretation of the statute authorizing black lung benefits); *Rust v. Sullivan*, 500 U.S. 173 (1991) (deferring to the Health and Human Service Secretary's interpretation of family planning appropriations statute); *Martin v. Occupational Safety Health Review Comm'n*, 499 U.S. 144 (1991) (remanding for determination of whether the Secretary of Labor's promulgation of coke oven emissions standards was a reasonable interpretation of the Occupational Safety and Health Act); *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990) (finding deference unnecessary where Congress did not delegate to the Secretary of Labor the authority to administer the Agricultural Workers Protection Act); *Sullivan v. Everhart*, 494 U.S. 83 (1990) (deferring to the Health and Human Service Secretary's allocation formula for distributing benefits under the Social Security Act); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987) (deferring to the Comptroller of the Currency's decision that a bank's offering of discount brokerage services did not violate the National Bank Act); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974 (1986) (deferring to the FDA's exemption of corn shipment from aflatoxin action level); *Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 468 U.S. 137 (1984) (finding no ambiguity in the Glass-Steagall Act's definition of "security").

<sup>91</sup> See, e.g., *Am. Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (*per curiam*), *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (refusing to defer the EPA's promulgation of air quality standards under the Clean Air Act where the agency failed to articulate an intelligible principle); *Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437 (7th Cir. 1994) (withholding *Chevron* deference from Federal Railway Administration's interpretation of the Hours of Service Act where the FRA had not been granted rulemaking authority by Congress); *Envl. Def. Fund v. EPA*, 898 F.2d 183 (D.C. Cir. 1990) (withholding *Chevron* deference from EPA's promulgation of air quality standards where interpretation did not adequately consider the statute's requirements); *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408 (7th Cir. 1987) (deferring to the Health and Human Service Secretary's decisions to deny home nursing care company exemption from Medicare reimbursement limits); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613 (D.C. Cir. 1987) (withholding *Chevron* deference from Secretary of Labor's delayed application of field sanitation standards that was not a reasonable interpretation of the Occupational Safety and Health Act); *Cmty. Nutrition Inst. v. Young*, 757 F.2d 354 (D.C. Cir. 1985) (withholding *Chevron* deference from FDA's promulgation of aflatoxin

administrative state. In the recent cases of *FDA v. Brown & Williamson Tobacco Corp.*<sup>92</sup> and *INS v. Aguirre-Aguirre*,<sup>93</sup> the Supreme Court continued to extend *Chevron* deference to agency interpretations of statutory ambiguities.

This Note argues that courts should now extend *Chevron* deference to presidential interpretations of ambiguities in foreign affairs and national security statutes that afford the President lawmaking power.<sup>94</sup> The next section of this Note examines the rationales of *Chevron* and illustrates how they equally apply to the presidential interpretation of the waiver provision in the FSIA amendment to section 117 of Public Law 105-277, and thus how they apply to presidential interpretations of ambiguities in foreign affairs and national security statutes generally delegating lawmaking power to the President.

### III

#### ANALYSIS OF THE RATIONALES OF *CHEVRON* AND THEIR APPLICATION TO THE PRESIDENT'S INTERPRETATION OF THE WAIVER PROVISION OF SECTION 117

The three rationales behind *Chevron* and the role it affords to the judiciary regarding deference to the executive branch are delega-

---

action levels where doing so conflicted with the clear intent of the Food, Drug, & Cosmetic Act).

<sup>92</sup> 120 S. Ct. 1291, 1297, 1300 (2000) (noting that "agencies are generally entitled to deference in the interpretation of statutes that they administer" and that "a reviewing court must respect the agency's construction of the statute so long as it is permissible").

<sup>93</sup> 526 U.S. 415, 424 (1999) (stating that the lower court should have applied the principles of deference described in *Chevron*: whether "the statute [was] silent or ambiguous with respect to the specific issue" before it, and if so, "whether the agency's answer [was] based on a permissible construction of the statute.").

<sup>94</sup> The Supreme Court has held that the President has independent lawmaking powers relating to foreign affairs. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981) (stating that the President has power to enter into some sole executive agreements); *Pfizer, Inc., v. India*, 434 U.S. 308, 319-20 (1978); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938) (explaining that the President has exclusive authority to recognize a foreign state or government); *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 82-83 (2d Cir. 1997) (noting that the President has power to determine which foreign governments have access to United States courts). See generally LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 31-62 (1996) (discussing presidential lawmaking power relating to foreign affairs); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 661 (2000) (same); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 47-56 (1992) (same). Of course, the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7)(A), whereby Congress delegated to the President the power to determine which nations are "state sponsors of terrorism" and are therefore not extended sovereign immunity, is itself a lawmaking power. *Id.* All of these are examples of presidential lawmaking—foreign affairs or national security statutes in which Congress has delegated to the President the power to make law. It is to presidential interpretations of ambiguities in these types of statutes that this Note argues that courts should award *Chevron* deference.

tion,<sup>95</sup> democratic accountability,<sup>96</sup> and expertise.<sup>97</sup> Though *Chevron* deals with judicial deference to interpretations by administrative agencies rather than by the President, these agencies are a part of the executive<sup>98</sup>—indeed subordinate to the President—and the rationales dictating deference to them also suggest deference to their leader.<sup>99</sup> This Note will now examine the rationales behind *Chevron* and show how they equally apply to judicial deference to President Clinton's

---

<sup>95</sup> Farina, *supra* note 80, at 466; Merrill, *supra* note 80, at 969; Scalia, *supra* note 80, at 516; Sunstein, *supra* note 80, at 2084; *see also infra* Part III.A (analyzing the delegation rationale).

<sup>96</sup> Farina, *supra* note 80, at 466-67; Merrill, *supra* note 80, at 978; Scalia, *supra* note 80, at 515; Sunstein, *supra* note 80, at 2086-87; *see also infra* Part III.B (analyzing the democratic accountability rationale).

<sup>97</sup> Scalia, *supra* note 80, at 514; Starr, *supra* note 81, at 309; Sunstein, *supra* note 80, at 2087-88; *see also infra* Part III.C (analyzing the expertise rationale). In addition to the above three rationales that are used by the *Chevron* Court, it is worth mentioning another justification, not offered by the Court, that of uniformity. *See* Herz, *supra* note 1, at 195 n.48 ("Because federal agencies have a nationwide jurisdiction and federal courts of appeals do not, greater judicial deference will lend uniformity to federal law."); *see also* Scalia, *supra* note 80, at 517 ("One of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever. . ."). The uniformity justification for *Chevron* deference would also apply to this Note's suggestion of expanding judicial deference to interpretations made by the President. This Note will not further elaborate on it because it is merely a post hoc rationalization.

<sup>98</sup> In *Chevron*, the Court discussed agencies and the executive interchangeably, suggesting that the rationales behind deference to an agency's interpretation apply to deference given to any executive interpretation. As Justice Stevens noted in *Chevron*, the Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844. Indeed, the democratic accountability rationale of *Chevron* applies with even greater force to deference to a presidential interpretation than to deference to an interpretation by an agency subordinate to the President, which is twice removed from the electorate. *See infra* Part III.B. In *Chevron*, the Court acknowledges that:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*Chevron*, 467 U.S. at 865. This democratic accountability rationale of *Chevron*, would be served even further were it the President rather than an agency interpreting an ambiguity. As Professor Merrill states: "An agency, . . . while 'not directly accountable to the people,' is subject to the general oversight and supervision of the President, who is accountable." Merrill, *supra* note 80, at 978 (quoting *Chevron*, 467 U.S. at 865-66); *see also infra* Part III.B (discussing democratic accountability).

<sup>99</sup> The President is already heavily involved in the process of agency rulemaking. For example, in the 1992 presidential campaign, one of the issues was the potential rescinding of the Department of Health's regulation withholding federal funds from family planning or medical services that included counseling about abortions. *See* Peter L. Strauss, *Presidential Rulemaking*, 72 *CHI.-KENT L. REV.* 965, 967 (1997) ("[T]he President's willingness to take political responsibility, even for generally popular rulemaking initiatives, reflects our growing awareness and acceptance that rulemaking is not simply a technocratic process performed in neutrality by objective experts; rulemaking has a distinctly political cast, and that may make the President's actions seem even comforting.").

interpretation of the waiver provision of section 117 of Public Law 105-277—an ambiguity<sup>100</sup> within a foreign affairs and national security<sup>101</sup> statute delegating lawmaking power to the President.<sup>102</sup> This in turn suggests giving judicial deference to presidential interpretations of ambiguities in foreign affairs and national security statutes that delegate lawmaking power to the President. It is important to note that the statute at issue must delegate lawmaking power to the President. This is required for purposes of symmetry: *Chevron* only extends deference to agency interpretations of ambiguous statutes that Congress has delegated to the agency to administer.<sup>103</sup> *Chevron* thus supposes some lawmaking power on the part of the interpreting agency. The suggestion to extend judicial deference to presidential interpretations of ambiguities in foreign affairs and national security statutes applies only to those that delegate lawmaking power to the President.

### A. Delegation

The first rationale behind the *Chevron* doctrine is that when a statute is ambiguous or silent regarding a particular issue, Congress has implicitly delegated to the agency the task of interpreting the ambigu-

---

<sup>100</sup> Clearly, the waiver provision of section 117 of Public Law 105-277 is ambiguous. See *supra* note 62 and accompanying text; *infra* notes 101-02 and accompanying text.

<sup>101</sup> The ambiguity is within the statute in the realms of both foreign affairs and national security: the amendment is to the Foreign Sovereign Immunities Act which is self-evidently a foreign affairs statute. See 28 U.S.C. § 1601-1610 (1994). The waiver provision of section 117 of the amendment states that “The President may waive the requirements of this section in the interest of *national security*.” Pub. L. No. 105-277, div. A., title I, sec. 101(h), § 117(d), 112 Stat. 2681, 2681-491 (noted at U.S.C. § 1610 (Supp. IV 1998)) (emphasis added).

<sup>102</sup> Section 117 delegates to the President the affirmative power to waive the requirements of the section in the interest of national security. § 117, 112 Stat. at 2681-491. This is clearly and expressly a lawmaking power. Indeed, the President interpreted the ambiguity while he was effecting this lawmaking power—that is, while he was exercising the waiver provision. Furthermore, it is the President who decides which nations are designated as a “state sponsor of terrorism” and thus the nations to which section (f)(1)(A) of the amendment, the section authorizing execution of blocked property of terrorist states, even applies. See *supra* note 41 and accompanying text; 28 U.S.C. § 1610(f)(1)(A) (Supp. IV 1998). The fact that the President chooses the countries to which the amendment applies is also a lawmaking power—he decides to whom the law applies. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). *Curtiss-Wright* is a classic case of delegation of lawmaking powers to the President, when Congress delegated to the President the power to decide which countries would be subject to an arms embargo. This was deemed a delegation, albeit a constitutional one, of legislative powers to the President, *id.* at 320-22, and is analogous to the power delegated to the President in *Alejandro II*—the power to decide which countries are affected by the amendment authorizing execution of blocked properties. See also *Kent v. Dulles*, 357 U.S. 116 (1958) (delegating to the President power to decide who may obtain passports); *J. W. Hampton, Jr., Co. v. United States*, 276 U.S. 394 (1928) (delegating to the President the power to decide which products of which countries should be subject to tariffs and the schedule of custom duties to be levied on them).

<sup>103</sup> See *Chevron*, 467 U.S. at 844.

ity and determining the issue.<sup>104</sup> Under *Chevron*, ambiguity in a statute, where the court cannot discern the congressional intent, creates an irrebuttable presumption that Congress meant to leave the resolution of the ambiguity to the agency.<sup>105</sup> Deference under *Chevron* is necessary "to avoid judicial usurpation of functions Congress wished to entrust to the agency."<sup>106</sup> This deference is thus justified in terms of congressional intent,<sup>107</sup> and statutory ambiguity indicates congressional intent to delegate resolution of an unsettled issue to the agency.

Though critics of the delegation rationale of *Chevron* point out that the presumption of implicit delegation by Congress in the face of statutory ambiguity or silence regarding a particular issue is somewhat divorced from reality,<sup>108</sup> both the courts<sup>109</sup> and academ-

<sup>104</sup> "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit." *Id.* at 843-44. The Court continued: "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator." *Id.*

<sup>105</sup> See *id.* at 843-44, 865-66; Farina, *supra* note 80, at 469-70 ("[T]his presumption—that ambiguity equals legislative intent to empower the agency—is irrebuttable."); Merrill, *supra* note 80, at 969 ("The [*Chevron*] Court justified this new general rule of deference by positing that Congress has implicitly delegated interpretive authority to all agencies charged with enforcing federal law."); Scalia, *supra* note 80, at 516 (noting that "in the case of ambiguity, agency discretion is meant").

<sup>106</sup> Farina, *supra* note 80, at 466.

<sup>107</sup> See, e.g., Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990) ("The threshold issue for the court is always one of congressional intent: did Congress intend the agency's interpretation to bind the courts?"); Herz, *supra* note 1, at 195 ("Under this now common view of the theoretical underpinning of judicial deference, the need for and extent of deference is a function of congressional intent." (footnote omitted)); Sunstein, *supra* note 80, at 2084 ("[T]he [*Chevron*] Court quite rightly implied that any principle of deference is a product of Congress's explicit or implicit instructions on that question. . . . Courts must defer to agency interpretations if and when Congress has told them to do so.").

<sup>108</sup> See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 198 (1998) ("[I]mplicit delegation theory lacks any solid basis in actual congressional intent."); Farina, *supra* note 80, at 470 ("*Chevron* offers no evidence to support its conclusion that silence or unclarity in a regulatory statute typically represents Congress's deliberate delegation of meaning-elaboration power to the agency."); Herz, *supra* note 1, at 195-96 (arguing that "*Chevron*'s presumption is particularly counterfactual in equating ambiguity with delegation" because "[t]he notion that Congress has delegated interpretive authority to the agency is likely to be wholly fictional in any case where the delegation is not express"); *id.* at 195 ("The rivalry between the legislative and executive branches, compounded by the now longstanding phenomenon of powers separated not only by the Constitution but by political party, should raise doubts that Congress actually wants to hand over power to the agencies."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 445 (1989) ("An ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two.").

<sup>109</sup> See, e.g., *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996) (acknowledging a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost,

ia<sup>110</sup> have recognized the validity of *Chevron's* implicit delegation. Implicit delegation, even if it is a legal fiction as asserted by its critics, is "unquestionably better" than case-by-case evaluation.<sup>111</sup> The advantage of this presumption of implicit delegation is that

Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known. The legislative process becomes less of a sporting event when those supporting and opposing a particular disposition do not have to gamble upon whether, if they say nothing about it in the statute, the ultimate answer will be provided by the courts . . . rather [than] by the [agency].<sup>112</sup>

---

by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows"); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) ("When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited."); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) ("If the legislation either calls for the agency's decision or contains no disposition of the subject, then the agency has been deputized to make a rule, and its decision should be respected.").

<sup>110</sup> See, e.g., *Farina*, *supra* note 80, at 469 ("If Congress has not itself *unambiguously* resolved the *precise* substantive issue, then [under *Chevron* we presume] that it either 'explicitly' or 'implicitly' delegated to the agency the interpretive task."); Merrill, *supra* note 80, at 969 ("The [*Chevron*] Court justified this new general rule of deference by positing that Congress has implicitly delegated interpretive authority to all agencies charged with enforcing federal law."); Scalia, *supra* note 80, at 516 ("*Chevron* . . . replaced th[e] statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.").

<sup>111</sup> Scalia, *supra* note 80, at 517. As Justice Scalia pointed out:

If the *Chevron* rule is not a 100% accurate estimation of modern congressional intent, the prior case-by-case evaluation was not so either—and was becoming less and less so, as the sheer volume of modern dockets made it less and less possible for the Supreme Court to police diverse application of an ineffable rule. And to tell the truth, the quest for the "genuine" legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all.

*Id.* Congress did not actually think about the ambiguity of the waiver provision of section 117 of Public Law 105-277. See *supra* Part I.B. This, however, does not conflict with *Chevron's* presumption of implicit delegation—it fits exactly into it. Under the *Chevron* rationale, if Congress considered an issue but left it ambiguous in the statute, *Chevron* assumes that it must have delegated its resolution to the agency. See *supra* notes 104-10 and accompanying text. Nor does this detract from Justice Scalia's argument, because regardless of whether Congress purposefully left an issue unresolved or merely did not think about it, *Chevron's* presumption of implicit delegation is superior to judicial, case-by-case determination. Scalia, *supra* note 80, at 517.

<sup>112</sup> Scalia, *supra* note 80, at 517; cf. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 493 (1996) (arguing for *Chevron's* application to federal criminal statutes, stating, "Congress enjoys the institutional economics of incomplete spectl-

Whether or not a fiction when the *Chevron* Court made the decision, after *Chevron* Congress knows that in a statute that an agency is to administer, that agency will resolve any ambiguity regarding a specific issue or silence regarding a specific issue in the statute. The ambiguity regarding the scope of the waiver provision in section 117 of Public Law 105-277 can similarly be viewed as an implicit delegation by Congress to the executive to define the scope of the waiver provision. The provision “[t]he President may waive the requirements of this section in the interest of national security”<sup>113</sup> is clearly ambiguous regarding whether the President may waive the provision allowing attachment or only the affirmative duties of the secretaries. Congress, however, was aware of this ambiguity. Indeed, members of Congress had shared different views regarding the scope of the waiver: some believed the scope was narrow, others that it was broad.<sup>114</sup>

The fact that Congress was aware of this specific issue, yet left it unresolved, suggests that it either could not resolve the issue on its own or believed that it would be best if the executive was left to resolve it. Certainly, both the fact that the President is heavily involved in the administration of this section<sup>115</sup> and that he is to make his decision in “the interest of national security”<sup>116</sup> suggest that Congress believed the President would be best at interpreting the proper scope of the waiver provision.

Viewed in this way Congress’s decision to leave unresolved an issue of which it was aware fits neatly within the delegation rationale of *Chevron*. Congress delegated the resolution of the ambiguity to the executive body best fit to resolve it—not to an agency of the executive in this case but to the chief executive—the President. The delegation rationale of *Chevron* therefore calls for judicial deference to the President’s interpretation of the waiver provision of section 117, as its ambiguity suggests a delegation by Congress to the President to “fill in the blank.” Similarly, the same delegation rationale suggests that courts should defer to presidential interpretations of ambiguities in statutes that Congress has delegated to the President to administer.

---

fication regardless of whether it’s the judiciary or the Justice Department that finishes the task”).

<sup>113</sup> Pub. L. No. 105-227, div. A., title I, sec. 101(h), § 117(d), 112 Stat. 2681, 2631-491 (1998) (noted at 28 U.S.C. § 1610 (Supp. IV 1998)).

<sup>114</sup> See *supra* notes 61-63 and accompanying text.

<sup>115</sup> The President designates any “state sponsor of terrorism” to which the amendment applies. 22 U.S.C. § 2371(a) (1994); 28 U.S.C. §§ 1605(a)(7)(A), 1610(f)(1)(A) (Supp. IV 1998); 50 U.S.C. app. § 2405(j)(1)(A) (1994). In addition, Secretaries assist in the execution of judgment against that state. 28 U.S.C. § 1610(f)(2). Finally the President decides whether or not to “waive the requirements of this section.” § 117, 112 Stat. at 2631-491.

<sup>116</sup> § 117, 112 Stat. at 2631-491.

## B. Democratic Accountability

The second rationale of *Chevron* is that because agencies are more democratically accountable to the electorate than judges, agencies are better suited to resolve delegated issues left open by Congress.<sup>117</sup> When an executive agency is to implement a statute, "the resolution of [ambiguities left within it by Congress] necessarily involves policy judgment. Under our democratic system, policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive."<sup>118</sup> The executive is politically accountable while courts are not—it is therefore more democratic for the courts to defer to an interpretation of the executive than to resolve an ambiguity on their own.<sup>119</sup> Thus, *Chevron* shifts interpretive power from the courts to the executive:<sup>120</sup>

[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."<sup>121</sup>

The judiciary, according to *Chevron*, "is an inappropriate body to make the kinds of policy choices that are unavoidable in construing contemporary regulatory statutes."<sup>122</sup> The justification for deference voices fundamental concerns about legitimacy and "echoes the Lockean view

<sup>117</sup> Duffy, *supra* note 108, at 191 ("[T]he [*Chevron*] Court ultimately supported its deference principle with two intertwined policy reasons—agency expertise and democratic accountability."); Merrill, *supra* note 80, at 978 (stating that *Chevron* "broke new ground by invoking democratic theory as a basis for requiring deference to executive interpretations").

<sup>118</sup> Scalia, *supra* note 80, at 515.

<sup>119</sup> See Merrill, *supra* note 80, at 978 (arguing that democratic accountability supplied the justification for switching the default rule from independent judgment by the courts to deference to the executive); see also Atchison, *Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 445 (7th Cir. 1994) (Easterbrook, J., concurring) (discussing the proper role of the judiciary), *aff'd sub nom. Bhd. Locomotive Eng'rs v. Atchison, Topeka and Santa Fe Ry. Co.*, 516 U.S. 152 (1996). Judge Easterbrook noted:

When the statute tells the executive branch to achieve a goal, the choices made in pursuit of that objective are political in nature. The President rather than a judge decides how to execute the laws, and a court therefore must respect the discretionary choices a coordinate branch of government has made in the course of implementation.

*Id.*

<sup>120</sup> Starr, *supra* note 81, at 312.

<sup>121</sup> *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (citations omitted).

<sup>122</sup> Farina, *supra* note 80, at 467.

that the exercise of power in a democratic government can be defined only through accountability to its source, the electorate."<sup>123</sup>

The President is clearly more democratically accountable than the courts or the executive agencies. First, at least in their first term, Presidents are certainly very accountable to the voters because they seek re-election—a source of accountability not shared with either the courts or the agencies. Even second term Presidents remain accountable assuming that they prefer their party to retain control of the executive. Second, the very fact that Presidents are elected and not appointed, as judges and agency administrators are, already creates democratic accountability because the elected President and the President's views and policies presumably reflect the preferences of the voters. Appointed courts, on the other hand, are accountable to no one, and at best, reflect only the preferences of the President, and are twice removed from the voters. Similarly, the agencies are only accountable to the President and are also twice removed from the voter. *Chevron's* rationale of democratic accountability therefore applies even more strongly to the President than it does to agencies, because the principle of democratic accountability applies even more strongly to the President than it does to the agencies.

Indeed, even according to the *Chevron* Court itself, deference to the President's interpretation of an ambiguity rather than to an agency's interpretation would better serve the democratic rationale:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the [executive].<sup>124</sup>

The democratic accountability rationale of *Chevron* thus applies with more force to suggest that courts should award deference to President Clinton's interpretation of the ambiguous waiver provision of section 117 of Public Law 105-277 as he is more accountable than the courts to the United States electorate.<sup>125</sup> This same rationale also suggests that courts should therefore defer to presidential interpretations of ambiguities in statutes that Congress has delegated to the President to

---

<sup>123</sup> *Id.*; see also Scalia, *supra* note 80, at 517 (arguing that one of *Chevron's* greatest advantages from the standpoint of governmental theory is that it permits "appropriate political participation").

<sup>124</sup> *Chevron*, 467 U.S. at 865-66.

<sup>125</sup> For example, Professor Merrill argues that "[d]emocratic theory supplied the justification [for *Chevron*]: agency decisionmaking is always more democratic than judicial decisionmaking because all agencies are accountable (to some degree) to the President, and the President is elected by the people." Merrill, *supra* note 80, at 978-79. By extending *Chevron* deference to the President, however, we cut out the "middle-man," serving democracy even further.

administer because the President is more democratically accountable than the agencies.

### C. Expertise

The third rationale behind *Chevron* is that the courts, which are not necessarily experts in the field of law the ambiguous statute is addressing, should defer to the executive, which is such an expert and has an "intense familiarity" with the history and purposes of the legislation and a "practical knowledge of what will best effectuate those purposes."<sup>126</sup> "[S]ometimes interpretation is not simply a matter of uncovering legislative will, but also involves extratextual considerations of various kinds, including judgments about how a statute is best or most sensibly implemented,"<sup>127</sup> and, as the *Chevron* Court stated bluntly, "[j]udges are not experts in the field."<sup>128</sup>

An agency obviously enjoys a more thorough understanding than the generalist judiciary of how a statute's various provisions or its legislative history interrelate . . . [and] inevitably enjoys an edge in understanding technical concepts and terminology contained in the statute. . . . These advantages of agency expertise are all the more evident during an era of burgeoning judicial caseloads, when judges must move rapidly from one area of the law to another. . . .

. . . Agency administrators, who have extensive experience . . . are much better placed than generalist judges to make the policy decisions. . . .<sup>129</sup>

Under *Chevron*, therefore, reviewing courts defer to the executive because the executive agency will make more correct decisions regarding the particular issue.<sup>130</sup>

The *Chevron* rationale of deferring to the executive because of its expertise applies equally to the case of President Clinton's interpretation of the waiver provision of section 117. The President is the expert in foreign affairs and national security, which are both among the core powers of the executive.<sup>131</sup> Indeed, in the realm of national se-

<sup>126</sup> Scalia, *supra* note 80, at 514; see also Bradley, *supra* note 94, at 662 (noting that courts defer to the executive branch's views "based upon its status as an able and knowledgeable representative of United States interests"); Duffy, *supra* note 108, at 191 ("[T]he [*Chevron*] Court ultimately supported its deference principle with two intertwined policy reasons—and democratic accountability.").

<sup>127</sup> Sunstein, *supra* note 80, at 2088.

<sup>128</sup> *Chevron*, 467 U.S. at 865.

<sup>129</sup> Starr, *supra* note 81, at 309-10.

<sup>130</sup> Scalia, *supra* note 81, at 514 ("[Agencies] are more likely than the courts to reach the correct result.").

<sup>131</sup> Starr, *supra* note 81, at 299; see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) (stating that "we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); *Abourezk v. Reagan*, 785 F.2d

curity and foreign affairs, courts already recognize the broad scope of the President's authority,<sup>132</sup> and Congress grants the executive broad discretion.<sup>133</sup> Thus it is the President who knows best what the interests of national security discussed in the waiver provision are. The President also knows best what effect the authorization to attach blocked property and the inability to successfully block the foreign assets of terrorist states will have on the bargaining power and security interests of the United States.<sup>134</sup>

Clearly, deferring to the President's interpretation of the ambiguous waiver provision of section 117 of Public Law 105-277 would serve the rationales of *Chevron*. Furthermore, the expertise rationale suggests extending *Chevron* deference generally to presidential interpretations of ambiguities in foreign affairs and national security statutes delegating lawmaking power to the President.

### CONCLUSION

In *Chevron*, the Supreme Court pronounced that courts should defer to interpretations of ambiguous statutes by the agencies Congress has designated to administer them. This Note has proposed to expand the *Chevron* doctrine and extend judicial deference to presidential interpretations of ambiguities in foreign affairs and national security statutes delegating to the President a lawmaking power. By examining one such instance—the amendment to the Foreign Sovereign Immunities Act authorizing execution of blocked assets of terrorist states, and President Clinton's interpretation of this amendment's ambiguous waiver provision—this Note has shown that deferring to the President's interpretation would serve the three rationales of *Chevron*.

---

1043, 1063 (D.C. Cir. 1986) (Bork, J., dissenting) ("This principle of deference applies with special force where the subject of that analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs. Such authority is fundamentally executive in nature."), *aff'd*, 484 U.S. 1 (1987).

<sup>132</sup> See, e.g., *Curtiss-Wright*, 299 U.S. at 320 (discussing the deference and discretion enjoyed by the President as the "sole organ" of federal government in field of international relations); *Alejandro v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1334 (S.D. Fla.) (agreeing with the government that the executive enjoys broad discretion in foreign affairs), *vacated by Alejandro v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277 (11th Cir. 1999).

<sup>133</sup> See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958) (recognizing as permissible Congress's delegation to the executive of the lawmaking power to decide who may obtain passports); *Chicago & S. AirLines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) ("Congress may of course delegate very large grants of its power over foreign commerce to the President."); *Curtiss-Wright*, 299 U.S. at 320-22 (recognizing as permissible Congress's delegation to the President of the power to decide which countries would be subject to an arms embargo.); *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (recognizing as permissible Congress's delegation to the President of the lawmaking power to decide which products of which countries should be subject to tariffs and the schedule of custom duties to be levied on them).

<sup>134</sup> See *supra* notes 46-48 and accompanying text.

First, the ambiguity of the waiver provision suggests that Congress could not resolve the issue of the waiver's scope.<sup>135</sup> In light of *Chevron*, this suggests that Congress left the resolution of the issue to the body it best saw fit to do so—the President. Furthermore, extending the *Chevron* doctrine to include implicit delegation to the President to resolve ambiguities in statutes that the President is to implement would be superior to the current case-by-case interpretation of ambiguities as the *Alejandro II* court's interpretation of the waiver provision evidences. Congress would thereby enjoy the benefits already associated with the presumption of implied delegation to the agencies.<sup>136</sup>

Second, since the President is more democratically accountable than the courts and, indeed, even more than the agencies, extending judicial deference to President Clinton's interpretation of the waiver provision would further serve the second rationale of *Chevron*, that of democratic accountability.

Finally, deferring to the President's interpretation of the ambiguous waiver provision would serve the expertise rationale of *Chevron*. This waiver, to be exercised in the interests of national security, is clearly within the President's area of expertise.

The rationales behind *Chevron*—delegation, democratic accountability, and expertise—therefore provide a compelling argument to award judicial deference to President Clinton's interpretation of the ambiguous waiver provision. This in turn suggests extending judicial deference to interpretations by the President of ambiguities in national security or foreign affairs statutes that delegate lawmaking power to the President.

---

<sup>135</sup> See *supra* notes 113-16 and accompanying text.

<sup>136</sup> See *supra* note 112 and accompanying text.