AFTER CHEVRON'S DEMISE, SHOULD COURTS BE GIVING DEFERENCE TO THE TRUMP ADMINISTRATION'S FOREIGN POLICY CONSIDERATIONS WHEN DEPORTING A NONCITIZEN?

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The Department of State has revoked the visas of hundreds of students in recent weeks. This disturbing measure comes after the Trump administration has taken numerous actions targeting students involved in pro-Palestine protests for immigration enforcement actions in recent weeks, including the arrest of student activist Mahmoud Khalil, who is a lawful permanent resident, as well as the arrest of a researcher at Tufts University in F-1 status, Rumeysa Ozturk, who has been targeted for deportation for merely writing an op-ed in the student newspaper that was critical of Tufts and Israel.

We have discussed in detail the arrest and detention of Columbia University student activist Mahmoud Khalil. The Notice to Appear (NTA) issued to Khalil invokes INA 237(a)(4)(C)(i), which provides for the deportation of a noncitizen if the Secretary of State has determined that their presence or activities would have adverse policy consequences. Pursuant to 212(a)(3)(C)(iii), the government bears the burden of proving "by clear, unequivocal, and convincing evidence that the Secretary of State has made a facially reasonable and bona fide determination that an alien's presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States" in order to establish that a noncitizen is deportable under this provision. INA 237(a)(4)(C)(i) has also been invoked in many of the notices allegedly rescinding the status of F-1 students in the SEVIS system.

Although the government can charge a noncitizen on other grounds including under INA 237(a)(1)(B) based on the revocation of the underlying nonimmigrant visa in the passport, a lawful permanent resident who has otherwise not been convicted of a crime, supported terrorism or made misrepresentations in their green card process can only be charged under INA 237(a)(4)(C)(i), which is so broad that it can be used against just about any noncitizen whose views may be disfavored by the government and thus have serious adverse foreign policy consequences for the United States. A revised NTA charged Khalil under INA 237(a)(4)(C)(i) and for making material omissions in his green card application under INA 237(a)(1)(A).

A letter from Secretary of State Marco Rubio asserting that Khalil's presence in the United States would have seriously adverse consequences on U.S. foreign policy has not yet been made public or provided to the chairmen of the Judiciary and Foreign Affairs Committees of the House and to the Judiciary and Foreign Relations Committee of the Senate as required by INA 212(a)(3)(C)(iv). Even at the recent hearing in immigration court, the government has not yet provided government has not any evidence to support the charge under INA 237(a)(4)(C)(i). Even if a letter from Secretary Rubio is issued and the immigration court rubber stamps the Secretary's letter, the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo* could mean that it will be afforded less deference if the case is appealed to a court of appeals.

A 1999 Board of Immigration Appeals (BIA) case, *Matter of Ruiz-Massieu*, held that a determination letter from the Secretary of State "conveying the Secretary's determination that an alien's presence in this country would have potentially serious adverse foreign policy consequences for the United States, and stating facially reasonable and bona fide reasons for that determination" is sufficient to meet this high standard. *Ruiz-Massieu*, however, involved a Mexican official who entered the US as a visitor and was apprehended a day after he arrived based on accusations of corruption. The BIA's holding in this case is thus readily distinguishable from that of Khalil, who is a lawful permanent resident and engaged in constitutionally protected speech.

Moreover, *Loper Bright* abolished the longstanding *Chevron* doctrine, which required courts to defer to the government agency's interpretation of an ambiguous statute. Chief Justice John Roberts, writing for the majority, stated that "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA

requires", but clarified that cases decided under the Chevron framework were not automatically overruled. In the absence of *Chevron*, courts tend to apply the lower *Skidmore* standard, which asserts that the level of deference an agency's decision merits depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co*., 323 U. S. 134 (1944).

Given the demise of *Chevron*, a respondent like Khalil will have more room to argue that the BIA's decision in *Ruiz-Massieu* is not only distinguishable from his own case, as the government is not entitled to the same deference that it had under *Chevron*. The BIA's determination in *Ruiz-Massieu* that a determination from the Secretary of State that a noncitizen's presence in the U.S. would have adverse foreign policy consequences is, alone, sufficient to meet the "clear and convincing" standard may not be sufficiently well reasoned even to survive a *Skidmore* analysis. Under *Skidmore*, factors like the thoroughness of the agency's analysis and the validity of its reasoning influence the degree of discretion that is warranted. In her dissent in *Ruiz-Massieu*, Board Member Lory Rosenberg argued that the statutory language of old INA 241(a)(4)(C) is "not clear, and it does not resolve the question…regarding the effect of the letter submitted by the Secretary of State." Rosenberg pointed to the Congressional Record of the 1990 amendment that created this provision as evidence that Congress' intent as the amount of discretion that should be afforded to the Secretary is unclear as it was not "fully debated nor clearly understood in practical terms…" These inconsistencies in the BIA's interpretation could result in deference not being afforded even under a *Skidmore* standard.

In *Moctezuma-Reyes v. Garland*, 124 F.4th 416 (6th Cir. 2024), the Sixth Circuit addressed the question of how much deference should be afforded to the BIA's interpretation of "exceptional and extremely unusual hardship" at INA 240A(b)(1)(D) post-*Chevron*. The court laid out a two part test for determining whether an agency's interpretation should still be given deference after *Loper Bright*. First, the statute in question must contain "broad, flexible standards like 'appropriate' and 'reasonable'", and it must "pair that language with words that expressly empower the agency to exercise judgment". The Sixth Circuit in *Moctezuma -Reyes v. Garland* held that the BIA's interpretation of § INA 240A(b)(1)(D) does not warrant deference because it "contains no such language vesting the BIA with discretion to determine the meaning of

'exceptional and extremely unusual hardship'".

INA 237(a)(4)(C)(ii) contains a freedom of speech and association safe harbor incorporated by reference to the inadmissibility provisions at INA 212(a)(3)(C)(iii) prohibiting deportation "because of the alien's past, current, or expected beliefs, statements or associations, if such beliefs, statements, or associations would be lawful". In order to invoke an exception for the safe harbor protection, the Secretary of State must "personally determine that the alien's presence would compromise a compelling US foreign policy interest." Although the language of this provision is quite broad, and permits the Secretary of State the authority to make a "personal determination", the language of INA § 240A(b)(1)(D) is similarly expansive, yet the Sixth Circuit held that it did not afford the BIA sufficient discretion. Under the *Moctezuma -Reyes v. Garland* test, it is thus possible that the Secretary of State's determination would be afforded less discretion in the post-*Chevron* era.

We have also addressed in the prior blog that there is a strong basis to constitutionally attack INA 237(a)(4)(C)(i) on grounds that it violates a person's First Amendment rights, is void for vagueness and represents an impermissible delegation of legislative power to the executive. We also believe that under *Loper Bright* a court should not rubber stamp a letter without more from the Secretary of State to the immigration court that a noncitizen's presence would compromise a compelling US foreign policy interest.

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