A Measure of Deference: Justice Stevens from *Chevron* to *Hamdan*

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First, I'd like to say thank you to Ken Manaster and Diane Amann. I am delighted to be included in this symposium honoring Justice Stevens, whom I so greatly admire. And I am especially fortunate to be part of this distinguished panel today.

Before I launch into my talk, since this came up just before we came out to speak, I'll make what might be a slight public service announcement. For those who follow the post-9/11 national security cases and the Supreme Court, you might know that the Court has had before it the case of the last remaining U.S.-held "enemy combatant," Ali Saleh al-Marri.[1] The case had been granted by the Supreme Court while the Bush Administration was still in office, with al-Marri challenging the legality of his detention under the Authorization for the Use of Military Force passed by Congress in the wake of 9/11. The Obama Administration, I think just last week, filed papers asking the court to dismiss the case as moot. The Administration filing did not take the position that it would never again assert the power to detain anyone under the Authorization for the Use of Military Force. It did, however, say: we have now indicted or we are about to indict al-Marri with federal criminal charges, and have him transferred to civilian custody. He will be prosecuted criminally, and therefore, there is no further need to decide the enemy combatant question. Moments ago, the Supreme Court issued an order granting the Obama Administration's motion. The judgment in the Fourth Circuit, which had ruled in favor of the Bush Administration's power to detain al-Marri, will be vacated.

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[1] al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

We can talk about the significance of this ruling if it comes up in our question and answer session. I don't want to spend too much time on it at the moment, other than to say this (perhaps by an effort to segue into the remarks I plan to make): the post-9/11 era may well end up producing more significant decisions on the constitutional authority of the Executive and the role of the courts in time of national security crisis than arguably any other period in history. There were, of course, a series of cases out of World War II, and that may be the closest to this period in terms of the volume of national security decisions coming out of the Court. But this Court, and Justice Stevens himself in some critical ways, has rewritten the casebooks on these critical questions about executive power and the role of the courts. This case is another example, even if only in the Court's decision not to decide the particular question presented.

The question I want to ask about Justice Stevens's jurisprudence today is in some ways a bridge between Kathryn's remarks and what I expect Gene's will be. And that is, in the more traditional national security context, does Justice Stevens believe that the Court should defer to the views of the Executive, and if so, to what extent? In particular, should the Court defer to the views of the Executive in interpreting statutes that have some resonance in foreign affairs or national security?

My talk had been tentatively entitled "From *Chevron* to *Hamdan*," a reference to Justice Stevens's two great, but remarkably different, opinions bearing on this question. His greatest decision on the question of deference in the administrative law realm, *Chevron*,[2] is most often read as announcing a remarkably deferential view to the views of the Executive on questions of the interpretation of federal law. His decision in *Hamdan*,[3] invalidating the military commissions created at Guantanamo Bay, not only cast aside the *Curtiss-Wright*[4] notion of near-total deference in matters of foreign affairs, it ignored *Chevron* as well, demonstrating instead really no deference at all. How do you square these outcomes by the same Justice?

The question is not mine alone. Since 9/11, a growing number of scholars have responded to what were broadly viewed as sweeping claims of executive authority by the Bush Administration, with the argument that we should look toward *Chevron* as a means of cabining overly broad claims of executive deference. That is to say, instead of just granting the President essentially carte blanche to exercise his

[2] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[3] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[4] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

judgment on the meaning of federal statutes bearing on national security, as cases like *Curtiss-Wright* might suggest, we should at least engage *Chevron*'s famous, and more constrained, two-prong inquiry. Recall, *Chevron* says that if a statute delegating administrative authority to an executive agency is ambiguous, then courts should defer to the agency interpretation, so long as it's reasonable. Curtis Bradley, Jack Goldsmith, Cass Sunstein, and Eric Posner, among others, have thus all suggested that importing *Chevron* into the national security context can helpfully inform the judicial interpretation of securities statutes and treaties. As Professor Bradley has argued: "The *Chevron* doctrine is grounded in both functional and formal considerations. Functionally, it pushes interpretive law-making to government entities that have more expertise and democratic accountability than courts. And by allowing for changes in interpretation, seeks to promote flexibility in regulatory governments." The argument here is not that anything goes, that whatever the executive agencies say is fine, but rather that because the Executive has greater expertise than the court, because it has more claim to democratic accountability, the courts should defer on questions of law interpretation as long as the Executive's interpretation is reasonable.

The issue comes up centrally in two of the post-9/11 cases that I want to talk about: *Hamdi v. Rumsfeld*,[5] which involved the interpretation of the Authorization for the Use of Military Force (AUMF) passed by Congress, and *Hamdan v. Rumsfeld*,[6] which involved, in part at least, the interpretation of the Uniform Code of Military Justice (UCMJ), the set of statutes passed by Congress post-World War II, which generally governs the administration of military justice for the armed forces. As it became clear in these cases, one of the key judicial thinkers who has not been on board with the "let's apply *Chevron* to the national security context" argument is the author of *Chevron* himself. Indeed, in reviewing the Executive's interpretation of the AUMF and the UCMJ, Justice Stevens was the opposite of deferential. Let me just recall briefly by way of background what happened in those cases before I talk about why it is he would balk at expanding the reach of his own opinion in *Chevron*.

In *Hamdi*, which came down in 2004, the question was whether the AUMF authorized the President to detain, in military custody, a U.S. citizen, Yaser Hamdi, who was picked up in Afghanistan in 2001 after

[5] 542 U.S. 507 (2004).

[6] *Hamdan*, 548 U.S. 557.

the U.S. invasion. The AUMF says this: "The President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." A *Chevron*-like reading might go as follows. The AUMF delegates to the President the power to determine what force is "necessary and appropriate" to use in fighting Al Qaeda. The President contends that "all necessary and appropriate force" includes military detention at a minimum. There can be no question this construction is reasonable. After all, if the AUMF authorizes the use of lethal force, as it surely did in Afghanistan, why would this not include the lesser force of detaining people picked up on the battlefield?

Yet as ready as this rationale might seem, there is little indication that *Hamdi* embraced it. While the *Hamdi* plurality ultimately agreed with the view that the AUMF authorized the detention, neither the plurality, nor the Executive relied on *Chevron* or anything like it in reaching their conclusion. Nor did the Court rely on *Curtiss-Wright*'s broader claim of deference to the President in matters of national security. Instead, the *Hamdi* plurality very much relied on the Court's own reading of the law of war, including the Geneva Conventions, and how those laws informed their reading of the AUMF.

Justice Stevens in *Hamdi* signs on to the dissent written by Justice Scalia, taking the position that the Court doesn't go far enough in constraining the Executive's authority here. That is, Justice Stevens and Justice Scalia argue, the only way that the detention of a U.S. citizen could be authorized under a statute like this is if the statute intended to suspend the writ of habeas corpus. And the AUMF is no suspension law. The Executive had said: we can not only detain these people, we have the authority to detain them with little or no process or review about whether or not their detention is factually justified or justified as a matter of law. Stevens and Scalia say: no — there is the writ of habeas corpus. Unless Congress suspends it, U.S. citizen detainees are entitled to petition for the writ. As far as the dissent is concerned, there simply is no way of deferring to the Executive in this circumstance.

In *Hamdan*, the question of deference is somewhat more squarely raised. There, among the many challenges presented to the Court of the legality of military commissions, was the question whether and to what extent the Uniform Code of Military Justice authorizes the President to set procedures for military commissions. In particular, did

the Bush military commission violate the UCMJ rule, among others, that courts martial (the traditional mechanism for military trials), on the one hand, and military commissions, on the other hand, have procedures that are — in so far as "practicable" in the language of the statute — uniform? One could imagine having different procedures for regular courts martial (which are very close to civilian criminal trials these days) and some less protective set of procedures in military commissions. But the statute precludes this, insofar as uniformity is "practicable." The President argued that uniformity was not practicable here. The very broad contention was that part of the force necessary to prosecute a war is the force necessary to try people for war crimes, and that in order to be successful in such prosecutions, protections such as the right to confront evidence against you may become impossible to meet.

The Court rejects the Executive's argument. Even though the statutory language seems to give the President rather broad flexibility to determine what procedures are "practicable," and when uniformity is required, and even though the Court assumes that such a determination is entitled to "a measure of deference," the Court finds nothing in the record to support the Executive's impracticability claim. And indeed the record is sparse. Justice Thomas's dissent points only to public statements made by various Defense Department officials suggesting, without elaboration or evidence, that different rules may be necessary to protect classified information in military commissions. There were various specific arguments available about why different procedures were necessary or UCMJ procedures were impracticable — the administration just didn't advance them in this case. The Court thus finds (of its own authority, no deference involved) no reason why military commissions can't proceed under essentially the same rules, procedures, protections that UCMJ courts martial or regular criminal trials follow.

So, what happened in *Hamdan*? And how can it be squared with *Chevron*, where it is assumed that the executive authority has greater expertise than the courts on questions of, say, military justice, as well as a greater claim to political accountability than the court? Why is it that Justice Stevens wouldn't just defer, or at least defer even a little bit, to the Executive's assertion of authority there? And before I answer that question I should just emphasize, not only was there not *Chevron* deference in this case, there was no consideration of a higher level of deference the Court has at times seemed to recognize in foreign affairs — the *Curtiss-Wright* view that the President is the sole organ of foreign affairs, and particularly in traditional questions of national security affairs, the Court should be even more deferential

than what *Chevron* would require. Justice Stevens was well aware that an even broader degree of deference was available. He even once cited the *Curtiss-Wright* opinion in one of his decisions back in 1993, the *Haitian Centers Council* case,[7] holding that neither a statute, nor an applicable treaty provided relief for Haitian refugees (who were captured on the high seas by the United States) from being sent back to Haiti without asylum process. The decision was based in part on the grounds that executive authority in the area of foreign affairs (captures on the high seas and so forth) at least gives added weight to the canon against extraterritorial application of statutes. That is, to protect the Haitians, the statute would have to be read to apply extraterritorially. But the Executive's own authority in this realm at least gives the Court pause before ignoring the canon against extraterritorial application.

I'm going to suggest that there are three reasons why Justice Stevens doesn't pursue *Chevron* — or any kind of — deference in these cases. The first is just a doctrinal argument that under *Chevron* doctrine as it stands, deference is inappropriate. Since *Chevron*, there have been a series of cases, *Mead*[8] and *Christensen*[9] among others, suggesting that there's a *Chevron* step zero — an initial question about whether the authority Congress was delegating to the Executive was the authority to make rules with the force of law or just to interpret and carry out the statute as the Executive sees fit. Thus, for example, in determining whether the Executive's construction of the AUMF was entitled to *Chevron* deference in *Hamdi*, the Court might have reasoned that while Congress was authorizing the President to use military force, Congress didn't mean for that action to carry the force of law. Rather, Congress just imagined executive actions under the statute would be an example of the kind of conduct that was authorized. While it might be difficult to accept this rationale in *Hamdan*, where the language of the UCMJ really does seem to authorize the President to create procedures for the carrying out of these military commissions, the AUMF at issue in *Hamdi* wasn't authorizing the President to go out and actually make laws about the meanings of these statutes. So that's one possibility.

A second possibility was that *Chevron* deference never meant as much to Justice Stevens as it meant to the administrative law bar and to folks like Justice Scalia. Ever since *Chevron* was handed down there's been a battle between its author, Justice Stevens, and Justice Scalia about the decision's significance. Justice Scalia has claimed it rendered a huge change in the way in which courts relate to law

[7] Sale v. Haitian Ctr. Council, Inc., 509 U.S. 155, 188 (1993).

[8] United States v. Mead Corp., 533 U.S. 218 (2001).

[9] Christensen v. Harris County, 529 U.S. 576 (2000).

interpretations of the executive branch and executive agencies. Justice Stevens and others have argued that *Chevron* wasn't intended to do anything dramatic at all. And if you talk to the clerk who worked on the *Chevron* opinion, there really does seem to be a sense that the opinion was intended only to describe what the Justice thought the law was at the time — not to change the face of administrative law for the following thirty years.

And indeed, one can even see in the years immediately following *Chevron*, language from Justice Stevens in related administrative law and immigration law cases, trying to roll back the implications of *Chevron* and reassert the view that the courts remain the final authority in the interpretation of law. So in a famous case, *INS v. Cardoza-Fonseca*[10] (in '87), Justice Stevens writes, "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court employing traditional rules of statutory construction ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." In this light, it should not be surprising that in many of the post-*Chevron* cases, Justice Stevens ends up coming out on *Chevron*'s step one. That is, the statute is clear or, in Justice Stevens's view, clear enough that we don't need to get to the secondary question of whether or not the agency's interpretation was reasonable. So that's another possibility — that *Chevron* simply doesn't do as much work as some of its advocates and some of its proponents seeking deference to the Executive would like to think it does.

But I think maybe most significant in these cases is that Justice Stevens, and the rest of the Court, behaves as though they believe that there is nothing so special about the field of foreign affairs law that absolves the Executive of all need to be put to proof. Pre-*Chevron* administrative law took more of a totality of the circumstances approach than *Chevron* does to thinking about how much deference any executive interpretation is due. *Skidmore* for instance had held that the Executive agency's view was entitled to deference — but only in so far as it has the power to persuade.[11] While one might imagine that the Executive's view would carry some rather significant power to persuade in the foreign relations context, if you look at a case like *Hamdan*, none of the factors the Court looked to in *Skidmore*, and that Justice Stevens in his administrative law decisions has looked to

[10] 480 U.S. 421 (1987).

[11] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

consistently even after *Chevron*, ended up cutting in the Executive's favor. *Skidmore*, recall, considered things like: how thorough was the process, how evident was it that the agency considered the details and applied its expertise to coming up with an answer to the interpretive question, how valid was its reasoning, how consistent was this interpretation with its other pronouncements, and so forth. And if you look at, for example, the thoroughness of the process issue in the creation of the military commissions, as became clear through the record of the case and, more importantly, some of the amicus briefs filed and declarations filed in the *Hamdan* case, the Executive Branch seemed effectively to cut the military experts out of the process. JAG lawyers — the military lawyers who were expert in how one might conduct a military commission trial, or how one might need to conduct a military commission trial — weren't part of the executive decisionmaking about how to design the military commissions. Similarly, as I mentioned, Clarence Thomas relied not on some sort of record of the Executive or the military saying: well, this classified information prevents us from following standard procedure — it just asserted the authority. And that mere assertion of authority without a clear indication of process, without a clear reliance on actual expertise, without a contextual factual record simply wasn't enough to persuade Justice Stevens that this view was entitled to any deference at any level, nor did it carry even much power to persuade. And I think for that reason, and others, his approach in *Hamdan* is not only consistent with *Chevron*, but consistent with the theme we've been talking about through much of the day. That is, the belief and reliance on expertise, or at least the possibility of some contextual answer to the legal question presented. I think this interest was very much at work in the Justice's decisionmaking in *Hamdan* and in his decision not to defer to the Executive on questions of military trials for terrorist suspects.