After Deference: Formal Approaches to Interpretation for the Foreign Affairs Court

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How much deference should courts afford the Executive's interpretations of statutes and treaties in foreign relations law? The question that has long engaged foreign relations scholars has found new salience in recent years as the Supreme Court has been called repeatedly to determine the meaning of statutes and treaties bearing on the President's use of force. Historically, the vast weight of scholarly opinion has accepted with little question the notion that the Court tends to defer to executive views in core matters of foreign relations, particularly where matters of national security were concerned. In statutory interpretation, the Court would bend over backwards to construe broadly legislative delegations of power to the President. All the more so is deference evident in treaty interpretation, where the President's record of prevailing in the Supreme Court is lengthy, and the Court has if anything more compelling formal reasons to accede to the President's interpretive wishes. Counter-narratives existed, to be sure, but they have had seemingly modest effect in puncturing the prevailing wisdom.

On descriptive and normative grounds, the events of the past decade have called the prevailing account into question. In treaty interpretation, the Court has invoked a Marbury based insistence on asserting formal interpretive authority of its own. As the Court put it perhaps most dramatically in the recent opinions construing the Vienna Convention on Consular Relations: "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution." Likewise, in a series of decisions involving national security, the Court has been anything but deferential to the executive's interpretation of the relevant statute or treaty. In Rasul (interpreting the federal habeas statute), Hamdi (interpreting the statutory Authorization for the Use of Military Force and the Geneva Conventions), Hamdan (interpreting the Detainee Treatment Act, the Uniform Code of Military Justice, and the Geneva Conventions), and *Boumediene* (interpreting the Military Commissions Act), the Court swept aside vigorous arguments by the Executive that it refrain from engagement on abstention or political question grounds. More, any doctrinal tradition of interpretive "deference" on the meaning of the laws was scarcely noted by the Court. While descriptive claims that the Court invariably defers to the President in foreign relations law interpretation have always been subject to challenge, the Court's recent behavior has made this account increasingly untenable.

In the wake of such decisions, scholars have turned renewed attention to the task of identifying a doctrine of "deference" in foreign relations law. Cass Sunstein and Eric Posner, among others, have pressed the normative concern that the Court, unduly interested in "saying what the law is" in an area of questionable judicial competence, was no longer taking sufficient account of the executive's superior expertise and political responsiveness in construing statutes and treaties in this realm. Others, while not necessarily lamenting the seemingly less deferential judicial role, focused on the importance of finding some constraining approach that would provide interpretive guidance to the courts. If there is no predictable or sensible way of determining how much attention the Court will pay executive views in construing foreign relations law, rule-of-law interests at a minimum require the development of a new understanding of the judicial relationship to the executive on questions of law interpretation. In an effort to respond to such concerns, Sunstein and Posner joined Curtis Bradley and others in suggesting that courts should defer to the Executive in cases with "substantial foreign relations implications" just as they do under Chevron v. NRDC in the standard administrative law context. But as discussed below, Chevron seems unlikely to solve the problem identified.