IMMIGRATION LAW AFTER *LOPER BRIGHT*: THE MEANING OF 8 U.S.C. § 1103(A)(1)

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Well before the Supreme Court's decision in Loper Bright, *the Solicitor General laid the groundwork for treating the outcome of the case as irrelevant for immigration law. In recent cases, the Solicitor General has argued that 8 U.S.C. § 1103(a)(1) provides a freestanding basis for deference by the judiciary due to a phrase that the Attorney General's views are "controlling." This Essay shows that the Solicitor General's argument is deeply flawed. Building on textual critiques, this Essay shows that for one hundred years Congress has considered how to manage multiple executive departments administering immigration laws. From 1924 until 1952, Congress did not preclude intrabranch disagreements, and in at least one case such disagreements were presented to the Supreme Court. In 1952, Congress acted to have the executive speak with one voice and placed that power with the Attorney General in § 1103(a)(1). Until recently, the Solicitor General recognized that § 1103(a)(1) was nothing more than a method for resolving intrabranch conflicts. The Solicitor General's new effort to turn § 1103(a)(1) into a separate basis for judicial deference to agency views has no basis in the text or history of the provision. The Solicitor General's argument should be abandoned before it leads to a new wave of circuit conflicts about deference in immigration cases in the wake of the Supreme Court's decision this Term overturning* Chevron.

INTRODUCTION 282
I. THE SOLICITOR GENERAL'S ARGUMENTS ABOUT 8 U.S.C. § 1103(A)(1) 284
II. TEXTUAL CRITIQUES OF THE SOLICITOR GENERAL'S CURRENT POSITION ON § 1103(A)(1) 287
III. MINING THE HISTORY OF § 1103(A)(1) 291
CONCLUSION 296

INTRODUCTION

Even before the Supreme Court's decision in *Loper Bright*,[1] the Solicitor General of the United States began laying the foundation for a new

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[1] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron*). *Loper Bright* was consolidated with Relentless, Inc. v. Dep't of Com., 62 F.4th 621 (1st Cir. 2023), *cert. granted in part*, 144 S. Ct. 325 (2023) (No. 22-1219), and the Court issued a single opinion in the two cases.

kind of immigration exceptionalism[2] in which judicial deference is not dependent on general rules for review of agency action, such as *Chevron*.[3] The Solicitor General thereby sought to deprive immigrants facing deportation of the benefit of arguments available to other litigants challenging the government's interpretation of statutes. The Solicitor General's approach was to argue that Congress specifically delegated all questions of legal interpretation to the Attorney General. Under this new immigration exceptionalism, courts would continue to defer to the Attorney General on legal questions despite the Court's rejection of broad deference in other contexts.

The Solicitor General's approach is evident in recent immigration cases, where the Solicitor General has relied not only on *Chevron*, but also on 8 U.S.C. § 1103(a)(1) to claim deference to the legal opinions of the Attorney General.[4] § 1103(a)(1) states:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.[5]

In briefing prior to the *Loper Bright* decision, the Solicitor General made clear that, in its view, § 1103(a)(1) meant that *Loper Bright* would have no implications for immigration cases. The Solicitor General argued that language in § 1103(a)(1), which says the views of the Attorney General on questions of law are "controlling," provides a separate statutory basis for deference to the views expressed by the Attorney General.[6]

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[2] *See generally* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (providing framework for thinking about immigration exceptionalism in constitutional law).

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

[4] *See, e.g.*, Brief for the Attorney General at 52, Pugin v. Garland, 599 U.S. 600 (2023) (No. 22-23), 2023 WL 2142779, at *26 (arguing that § 1103(a)(1) provides for deference to the Attorney General); Reply Brief for the Attorney General at 28, Pugin v. Garland, 599 U.S. 600 (2023) (No. 22-23), 2023 WL 2872998, at *14 (arguing that § 1103(a)(1) allows the Attorney General to speak with "the force of law").

[5] 8 U.S.C. § 1103(a)(1).

[6] Brief for the Respondent in Opposition at 13 n.3, Diaz-Rodriguez v. Garland, 55 F.4th 697 (9th Cir. 2022) (No. 13-73719), *petition for cert. filed*, No. 22-863 (U.S. Mar. 8, 2023), *cert. granted, vacated, and remanded*, 2024 WL 3259656 (July 2, 2024), https://www.justice.gov/sites/default/files/briefs/2023/07/07/22-863_diaz-rodriguez_v._garland_final.pdf [https://perma.cc/A95P-YGMU] (arguing that § 1103(a)(1) provides an express delegation of authority to the Attorney General); Brief for the Respondent in Opposition at 25, Debique v. Garland, 58 F.4th 676 (2d Cir. 2023) (No. 21-6208), *petition for cert.*

The Solicitor General's position is deeply flawed. While others have parsed the text and structure of § 1103(a)(1) to make arguments in favor of ordinary judicial review principles,[7] this Essay looks at the history of § 1103(a)(1) to show that it was always about resolving intrabranch disagreements within the Executive Branch. That history dates back one hundred years to 1924, a time when the Secretary of Labor and the Secretary of State disagreed about provisions of the Immigration Act of 1924, which they both were charged with administering.[8] Over the next three decades, as domestic immigration authority moved from the Department of Labor to the Attorney General, Congress grappled directly with how to allocate authority within the Executive Branch. It was not until 1952 that Congress expressly chose the Attorney General over other cabinet officers to speak for the executive.[9] Fifty-one years later, when Congress created the Department of Homeland Security and allocated most domestic immigration responsibilities to that department, it once again faced the question of how to allocate legal interpretive authority within the executive and once again chose the Attorney General over other members of the cabinet.[10] Nothing in this history suggested that the Attorney General would receive special deference from the judicial branch of government.

This Essay argues that there is no basis for the Solicitor General's interpretation of § 1103(a)(1) as a freestanding basis for deference to agency views. Part I begins by presenting the argument that the Solicitor General has made in recent cases about § 1103(a)(1) and shows that it is a reversal from the Solicitor General's earlier statements. Part II proceeds to outline a response from one federal court of appeals judge on the textual and structural limitations of the Solicitor General's argument. Part III then proceeds to present the history of statutes assigning responsibility among Executive Branch actors. The Essay concludes by urging the Solicitor General to abandon this meritless (and recent) argument about § 1103(a)(1) before it leads to further confusion in the courts.

I

filed, No. 23-189 (U.S. Aug. 25, 2023), *cert. denied*, 2024 WL 3259698 (July 2, 2024), https://www.justice.gov/d9/2024-04/23-189_debique_opp_-_final.pdf [https://perma.cc/SC6A-KTM2] (same and noting that the Court appeared to be holding four petitions for *Relentless*). *See also infra* Part I (discussing the Solicitor General's changing positions on § 1103(a)(1)).

[7] *See infra* Part II.

[8] Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952). *See infra* Part III (discussing allocation of authority within the Executive Branch).

[9] *See infra* Part III (describing how prior to 1952, no one executive department had final say over interpretations of immigration law).

[10] *See infra* Part III (describing how in 2003 Congress maintained the structure of the 1952 decision, which provided the Attorney General with final say within the Executive Branch).

THE SOLICITOR GENERAL'S ARGUMENTS ABOUT 8 U.S.C. § 1103(A)(1)

As Chief Justice Roberts observed during the *Relentless* argument, which presented the identical issue as *Loper Bright*, *Chevron* deference has played no role in Supreme Court decisions for quite some time.[11] *Chevron* issues, however, continue to dominate circuit court opinions[12] and continue to be briefed before the Court.[13] Beginning in 1991, the Solicitor General turned to § 1103(a)(1) to bolster its claim for *Chevron* deference in immigration cases.[14] That effort bore fruit in Supreme Court cases that cite § 1103(a)(1) alongside *Chevron* to support deference to the Attorney General.[15] More recently, the Solicitor General has sought to transform § 1103(a)(1) from an argument that supports *Chevron* deference to one that provides a separate basis for deference to agency views.

The Solicitor General's most extensive statement of its current § 1103(a)(1) argument came in a pair of cases in the 2022 Term, *Pugin v. Garland* and *Garland v. Cordero-Garcia*.[16] These cases raised a question of statutory interpretation about the breadth of the aggravated felony category in immigration law.[17] In its opening brief, the Solicitor General argued for deference to the Attorney General, citing past precedent that applied *Chevron* deference and citing to § 1103(a)(1).[18] In response, Cordero-

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[11] *See* Transcript of Oral Argument at 81, Relentless v. Dep't of Com., No. 22-1219 (2024), 2024 WL 250638 (noting that the Court has not relied on *Chevron* for 14 or 16 years).

[12] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 50 (2017) (showing the circuits applying *Chevron* in 72.3% of immigration cases with the government prevailing in 76.8% of those cases); Nancy Morawetz, *Representing Noncitizens in the Context of Legal Instability and Adverse Detention Precedent*, 92 FORDHAM L. REV. 873, 887–89 (2023) (discussing reliance on *Chevron* in the circuit courts in immigration cases).

[13] The Solicitor General regularly relies on deference arguments in immigration cases. *See, e.g.*, Reply Brief for the Attorney General at 27, Campos-Chaves v. Garland, No. 22-674 (2023); Reply Brief for the Petitioners at 19, Nielsen v. Preap, 129 S. Ct. 954 (2019) (No. 16-1363).

[14] *See* Brief for the Petitioners at 33, INS v. Nat'l Ctr. for Immigrants' Rts., 502 U.S. 183 (1991) (No. 90-1090), 1991 WL 521620, at *15 (arguing that § 1103(a)(1) is an explicit delegation of authority to the Attorney General to fill any gap in the statute).

[15] *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 516–17 (2009); INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999).

[16] 599 U.S. 600 (2023) (consolidated under *Pugin v. Garland*).

[17] *See id.* at 602 (interpreting 8 U.S.C. § 1101(a)(43)(S), an offense relating to obstruction of justice). It is not unusual for the Court to hear a case about the aggravated felony definition because that definition has cascading consequences for a noncitizen including deportability, 8 U.S.C. § 1227(a)(2)(A)(iii), mandatory detention, 8 U.S.C. § 1226(c), and bars to relief, 8 U.S.C. § 1229b(a)(3). *See, e,g.*, Esquivel-Quintana v. Sessions, 581 U.S. 385, 398 (2017) (scope of one phrase in 8 U.S.C. § 1101(a)(43)(A)); Luna Torres v. Lynch, 578 U.S. 452, 455 (2016) (scope of 8 U.S.C. § 1101(a)(43)(E)); Moncrieffe v. Holder, 569 U.S. 184, 184 (2013) (scope of 8 U.S.C. § 1101(a)(43)(B)); Kawashima v. Holder, 565 U.S. 478, 480 (2012) (scope of 8 U.S.C. § 1101(a)(43)(M)(ii)); Nijhawan v. Holder, 557 U.S. 29, 32 (2009) (scope of 8 U.S.C. § 1101(a)(43)(M)(i)); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185 (2007) (scope of 8 U.S.C. § 1101(a)(43)(G)); Leocal v. Ashcroft, 543 U.S. 1 (2004) (scope of 8 U.S.C. § 1101(a)(43)(F)).

[18] Brief for the Attorney General at 52, Pugin v. Garland, 599 U.S. 600 (2023) (No. 22-23), 2023 WL 2142779, at *26.

Garcia's counsel argued that § 1103(a)(1) merely allocates authority "among various cabinet officers and Executive Branch officials" and therefore did not change the principles of statutory interpretation that should apply.[19] The Solicitor General responded by doubling down on its claim. It wrote:

> Cordero-Garcia contends that Section 1103 "simply allocates interpretive authority among Executive Branch officials." But Section 1103 does more than that: It also demonstrates Congress's intent that the Attorney General will "be able to speak with the force of law when he addresses ambiguity in the statute or fills a space in the enacted law."[20]

In *Pugin*, the Solicitor General further argued that its view of § 1103(a)(1) means that the Attorney General's views should prevail even if traditional rules of statutory construction might suggest a different resolution. Referring to the longstanding canon that resolves statutory ambiguities in favor of the noncitizen,[21] the Solicitor General argued that "[i]f courts were required to resolve any and all ambiguities in the [Immigration Nationality Act (INA)] in noncitizens' favor, that would usurp the Attorney General's interpretive authority."[22] The Solicitor General thereby made clear that it viewed § 1103(a)(1) as a substantive provision that affects interbranch resolution of statutory ambiguities and the tools of statutory construction available to the judiciary, rather than simply an intrabranch provision about which executive department should speak for the executive.[23]

While the *Loper Bright* case was pending before the Court, the Solicitor General made clear that it viewed its § 1103(a)(1) arguments as independent of the broader *Chevron* issues the Court was considering. In one case, where counsel for the immigrant suggested that the case should be held for the outcome of *Loper Bright*, the Solicitor General objected, writing that the

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[19] Brief for Respondent at 45, Garland v. Cordero-Garcia, 599 U.S. 600 (2023) (No. 22-331), 2023 WL 2601614, at *21.

[20] Reply Brief for the Attorney General at 28, Pugin v. Garland, 599 U.S. 600 (2023) (No. 22-23), 2023 WL 2872998, at *14 (first quoting Brief for Respondent, *supra* note 19, at 45; then quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001)).

[21] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 320 (2001) (referencing "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987))); INS v. Errico, 385 U.S. 214, 225 (1966) (same); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (same).

[22] Reply Brief for the Attorney General at 29, Pugin v. Garland, 599 U.S. 600 (2023) (No. 22-23), 2023 WL 2872998, at *15.

[23] The Solicitor General's briefs have also claimed special deference for the Attorney General's decisions due to the relationship between immigration and foreign relations. *See, e.g.*, Brief for the Respondent at 47–48, Niz-Chavez v. Barr, 593 U.S. 155 (2021) (No. 19-863) (arguing the political sensitivity of immigration warrants added deference). As discussed below, this claim for deference is weakened by Congress's decision to have the Attorney General rather than the Secretary of State speak for the Executive Branch on legal issues. *See infra* notes 74–83 and accompanying text.

immigration law contains an "*express* delegation of authority" to the Attorney General.[24] Similar arguments have been made by the Office of Immigration Litigation before the courts of appeals.[25]

Notably, the Solicitor General's position is relatively new. Before *Chevron*, the Solicitor General's office characterized § 1103(a)(1) as making the Attorney General's rulings on issues of law "controlling within the Executive Branch."[26] The Solicitor General repeated this view after *Chevron*,[27] but gradually moved to citing § 1103(a)(1) as a reason why the Solicitor General should get deference under *Chevron*.[28] It is only recently, as *Chevron* deference was in jeopardy, that the Solicitor General seized on its latest view: that § 1103(a)(1) provides a freestanding basis for judicial deference.

II
TEXTUAL CRITIQUES OF THE SOLICITOR GENERAL'S CURRENT POSITION ON § 1103(A)(1)

As the Department of Justice has advanced its view that § 1103(a)(1) is an independent basis for deference, Judge Newsom, of the Court of Appeals for the Eleventh Circuit, has examined the text and implications of this

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[24] *See* Brief for the Respondent in Opposition at 13 n.3, Diaz-Rodriguez v. Garland, 55 F.4th 697 (9th Cir. 2022) (No. 13-73719), *petition for cert. filed*, No. 22-863 (U.S. Mar. 10, 2023), *cert. granted, vacated, and remanded*, 2024 WL 3259656 (July 2, 2024), https://www.justice.gov/sites/default/files/briefs/2023/07/07/22-863_diaz-rodriguez_v._garland_final.pdf [https://perma.cc/S7PF-RFH8] (arguing that § 1103(a)(1) provides an express delegation of authority to the Attorney General).

[25] *See* Respondent's Opposition to Petitioner's Petition for Rehearing or Rehearing En Banc at 9, Edwards v. U.S. Att'y Gen., 56 F.4th 951 (11th Cir. 2022) (No. 19-15077) (on file with author) (advancing the same argument for deference made in *Diaz-Rodriguez*). It is difficult to assess how often the Office of Immigration is making this argument in the circuit courts because the government's briefs in immigration cases are not accessible through court databases due to existing privacy rules. *See* FED. R. APP. P. 25(a)(5).

[26] Brief for the United States at 27, Fedorenko v. United States, 597 U.S. 946 (1979) (No. 79-5602), 1980 WL 339958, at *14.

[27] *See* Brief for the United States at 22 n.22, Kungys v. United States, 485 U.S. 759 (1988) (No. 86-228), 1987 WL 880265, at *26 n.22 (describing the Attorney General as "charged with the administration of the immigration laws and whose rulings on questions of law are controlling within the Executive Branch under 8 U.S.C. 1103(a)").

[28] *See, e.g.*, Brief for the Petitioners at 33, INS v. Nat'l Ctr. for Immigrants' Rts., 502 U.S. 193 (1991) (No. 90-1090), 1991 WL 521620, at *15 ("The Attorney General's interpretation of 8 U.S.C. 1252(a)(1) is owed considerable deference and should be upheld if it represents a 'permissible' construction of the statute. . . . The deference due the Attorney General's interpretation of 8 U.S.C. 1252(a)(1) is reinforced by 8 U.S.C. 1103(a)." (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984))); Brief for the Petitioner at 19, INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (No. 97-1754), 1998 WL 858535, at *12 ("As this Court has long recognized, 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.' . . . [T]he INA specifically provides that . . . the 'determination and ruling by the Attorney General with respect to all questions of law shall be controlling.'" (first quoting *Chevron*, 467 U.S. at 844; and then quoting 8 U.S.C. § 1103(a))).

position and found it unpersuasive. In 2023 and 2024, Judge Newsom sat on two panels that grappled with § 1103(a)(1), and ultimately decided that they did not need to settle on a meaning for the provision. The first case, *Ruiz v. Attorney General*,[29] concerned a legal question—whether a form of relief from removal that requires a showing of extreme cruelty can be met through evidence of psychological cruelty.[30] The panel ultimately concluded that there was no definitive agency position and therefore did not apply deference principles.[31] Judge Newsom, however, took the opportunity to write a concurrence about the "curious case" of § 1103(a)(1), which he noted the Supreme Court has cited in support of the "ho hum" proposition that principles of *Chevron* deference apply in immigration cases.[32] First, Judge Newsom explained that it made little sense to see § 1103(a)(1) as a source of deference.[33] If an agency's reading of a statute is "controlling," he opined, then courts would be bound by agency views, not merely providing deference.[34] He proceeded to explore two readings of § 1103(a)(1)—one as establishing a division of power within the executive and the other as claiming agency power vis-à-vis the judiciary. Looking to the text of § 1103(a)(1), he showed that it opens by charging the Department of Homeland Security (DHS) with various tasks and then makes clear that its role is limited by roles allocated to other executive departments—including the President, the Secretary of State, and other officials.[35] The language providing the Attorney General with a "controlling" say comes at the end of the provision's recognition that many departments administer the immigration laws.[36] Judge Newsom proceeds to show how other subsections of § 1103(a)(1) confirm that the "entire section's thrust is allocating functions within the Executive Branch."[37] Judge Newsom also compared the current language of § 1103(a)(1) to the version before the creation of the DHS and concluded that these most recent modifications merely accounted for the creation of the DHS in 2003.[38] After reviewing these statutory

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29 73 F.4th 852 (11th Cir. 2023).

30 The noncitizen sought relief from removal under 8 U.S.C. § 1229b(b)(2)(A)(i), which requires a showing that the applicant for relief "has been battered or subjected to extreme cruelty" by a spouse or parent. *Id.* at 853.

31 The panel concluded that the agency opinion was not eligible for *Chevron* deference because it was issued by a single member of the Board of Immigration Appeals. *Id.* at 857–58.

32 *Id.* at 860 (Newsom, J., concurring).

33 *Id.* at 860–62.

34 *See id.* at 861.

35 *See id.* at 862.

36 *Id.*

37 Ruiz v. U.S. Att'y Gen., 73 F.4th 852, 863 (11th Cir. 2023).

38 *Cf. id.* ("To reflect that the head of the newly created Department would assume principal responsibility for administering the country's immigration laws, Congress replaced the words (and office) 'Attorney General' with the words (and office) 'Secretary of Homeland Security' in both the title and the prefatory clause . . . .").

interpretation sources, Judge Newsom observed that a contrary reading—in which the provision treats Attorney General interpretations on questions of law to be controlling as to the judicial branch—would raise serious constitutional issues about the structure of the three branches.[39] He concluded that the Supreme Court's citations to § 1103(a)(1) as support for deference were "something of a mystery" since the best understanding of § 1103(a)(1) is that it has "nothing to do with the weight or deference that reviewing courts should give to the Attorney General's legal determinations."[40]

While the *Ruiz* case was pending, a different panel of the Eleventh Circuit, also including Judge Newsom, considered deference arguments with respect to the definition of the term "sentence" in the immigration laws. In *Edwards v. Attorney General*, the question was whether the term "sentence"[41] includes state court changes to a criminal sentence.[42] Attorney General Barr had reversed prior agency precedent and decided that sentence revisions should be subject to a line of agency caselaw developed to determine when to respect state court changes to convictions, which immigration law defines separately.[43] Edwards argued that the court should reject the Attorney General's new interpretation as contrary to the statute.[44] The panel concluded that the statutory term was ambiguous and deferred to

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[39] *Id.* at 864–65. Judge Newsom reasoned that, if the Attorney General's views are "controlling" with respect to the judiciary, the provision would strip the judiciary of the basic Article III power to declare "what the law is." *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). He further reasoned that such a reading would transgress the limits placed on Article II tribunals. *Id.* at 865. He concluded by noting nondelegation issues with a broad reading of § 1103. *Id.* ("As matters stand, even ordinary *Chevron* deference is on thin non-delegation ice." (citing Gundy v. United States, 588 U.S. 128, 149–79 (2019) (Gorsuch, J., dissenting))).

[40] *See id.* Several commentators have similarly concluded that the text of § 1103(a)(1) shows that the controlling language is about intrabranch disputes. *See* Richard Frankel, *Deporting* Chevron*: Why the Attorney General's Immigration Decisions Should Not Receive* Chevron *Deference*, 54 U.C. DAVIS L. REV. 547, 580 n.176 (2020) (arguing that the provision could be read as a constraint on the Department of Homeland Security (DHS) or as allocating authority among agencies); Brian Green and Stephen Yale-Loehr, *Is Chevron Dead? Thoughts After Oral Argument in Relentless, Inc. and Loper Bright Enterprises*, AM. IMMIGR. LAWS. ASS'N: BLOG (Jan. 25, 2024), http://thinkimmigration.org/blog/2024/01/25/is-chevron-dead-thoughts-after-oral-arguments-in-relentless-inc-and-loper-bright-enterprises [https://perma.cc/A6AR-9SVJ] (arguing that the "provided however" language shows that the provision is about which department has ultimate interpretive authority and not whether the Executive Branch has special authority vis-à-vis the courts).

[41] 8 U.S.C. § 1101(a)(48)(B) (defining the term "sentence" for immigration purposes).

[42] Edwards v. U.S. Att'y Gen., 56 F.4th 951, 963 (11th Cir. 2022), *vacated and replaced*, 97 F.4th 725 (11th Cir. 2024).

[43] *In re* Thomas & Thompson, 27 I. & N. Dec. 674 (A.G. 2019) (adopting test from *In re* Pickering, 23 I. & N. Dec. 621 (B.I.A. 2003), which addresses 8 U.S.C. § 1101(a)(48)(A), for statutory provision on sentences in 8 U.S.C. § 1101(a)(48)(B)).

[44] *See Edwards*, 56 F.4th at 961.

the Attorney General's interpretation under *Chevron*.[45] In doing so, the panel cited to § 1103(a)(1) as support for applying *Chevron* deference in the immigration context.[46] Edwards sought rehearing, challenging the applicability of *Chevron* and arguing that any new rule about modified sentences should not apply retroactively to his case.[47] The Office of Immigration Litigation responded, including virtually identical language to a recent Solicitor General brief on how § 1103(a)(1) is a statutory delegation to the Attorney General on issues of law.[48] Edwards's attorney later filed a letter with the panel noting that the Supreme Court had granted certiorari in *Loper Bright* and urged that *Edwards* be held pending resolution of the future of *Chevron* deference.[49]

The *Edwards* panel did not hold its decision on the rehearing petition, as the petitioner requested, relying instead on conventional *Chevron* analysis,[50] but it did speak to the uncertainty about the meaning of § 1103(a)(1). In a subsection titled "The Attorney General's Authority" the court stressed that a prior circuit decision on retroactivity bound the panel and required application of the Attorney General's decision to cases where the facts predated the decision.[51] The panel proceeded, however, to note the lack of clarity about the meaning of § 1103(a)(1). The opinion states that § 1103(a)(1) "seems to give the Attorney General the final say on questions of immigration law" but goes on to note that "interpreting 8 U.S.C. § 1103(a)(1) as giving the Attorney General final authority on the law may be a misinterpretation of the statute."[52] It then cited to Judge Newsom's *Ruiz* concurrence for the proposition that the better reading of § 1103(a)(1) "may be" that it empowers the Attorney General to bind other members of the Executive Branch.[53]

With *Loper Bright* decided, courts no longer have the option to rely on *Chevron* and avoid how best to read § 1103(a)(1). Instead, they have to consider head on whether § 1103(a)(1) provides its own freestanding basis

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45 *Id.* at 960.

46 *Id.*

47 *See* Petition for Rehearing and Rehearing En Banc at 7–8, Edwards v. U.S. Att'y Gen., 56 F.4th 951 (11th Cir. 2022) (No. 19-15077) (on file with author). Edwards also argued that because the term "sentence" has criminal consequences it is not subject to *Chevron* deference. *Id.* at 17.

48 *Compare* Brief for the Respondent in Opposition at 13 n.3, Diaz-Rodriguez v. Garland, 55 F.4th 697 (9th Cir. 2022) (No. 22-863), *petition for cert. filed*, No. 22-863 (U.S. Mar. 8, 2023), *with* Respondent's Opposition to Petitioner's Petition for Rehearing or Rehearing En Banc at 9 n.4, Edwards v. U.S. Att'y Gen., 56 F.4th 951 (11th Cir. 2022) (No. 19-15077) (deleting emphasis on the word "controlling" and adding a citation to the brief in *Diaz*).

49 Letter from John Kuhn Bleimaier to David J. Smith, Clerk of the Ct., U.S. Ct. of Appeals for the Eleventh Cir. (Aug. 7, 2023) (on file with author).

50 *See* Edwards v. U.S. Att'y Gen., 97 F.4th 725, 734 (11th Cir. 2024).

51 *Id.* at 736 (citing Yu v. U.S. Att'y Gen., 568 F.3d 1328 (11th Cir. 2009)).

52 *Id.* at 738–39.

53 *Id.* at 739.

for deference to agency views. Judge Newsom's concurrence shows that the better reading of § 1103(a)(1) is that it concerns the division of power within the Executive Branch. Not only is this position the one the Solicitor General originally advanced,[54] but, as shown in the next section, it also reflects a century-long struggle over the role of different agencies in immigration law.

III
MINING THE HISTORY OF § 1103(A)(1)

A longer view of history leaves no doubt that § 1103(a)(1), and its predecessor provisions, sought to resolve a century-long question of who speaks for the Executive Branch on issues of immigration law. This history makes clear that § 1103(a)(1), inserted in 1952, represented a shift from prior law and was addressed to intrabranch conflict, not the role of the Judicial Branch vis-à-vis the Executive Branch. While earlier laws permitted disagreements within the Executive Branch, § 1103(a)(1) required other executive departments to bow to the views of the Attorney General.

The question of how to handle intrabranch disagreements dates back to the early twentieth century when the United States implemented a system of visas that were administered, in the first instance, by the Department of State and consular officers around the globe.[55] As a result, the domestic enforcement apparatus, at that time administered by the Department of Labor, was no longer the only agency applying provisions about who was admissible to the United States.

In the lead-up to the Immigration Act of 1924,[56] the Secretary of State, Charles Evans Hughes, wrote to the congressional committees on many aspects of the proposed bills, including the predecessor provision to § 1103(a)(1).[57] With respect to the allocation of authority to prescribe rules

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54 *See supra* Part I.

55 *See* SHARON D. MASANZ, CONG. RSCH. SERV., 70-108 O, HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE: A REPORT FOR THE USE OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 37 (1980) (discussing the inauguration of consular examinations of intending immigrants and its effect in diminishing the work of the domestic immigration authority).

56 Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952).

57 Secretary Hughes wrote to the committee presenting objections to proposed language that would require the State Department to follow rules promulgated by other departments. *See* Letter from Charles Evans Hughes, Sec'y of State, to Representative Johnson (Feb. 8, 1924), *reprinted in* H.R. REP. NO. 68-350, pt. 2, at 29 (1924) [https://perma.cc/4SHN-NWEY]. Secretary Hughes stated that he considered it "important that consular officers shall continue to be under the direction and control of the Department of State." *Id.* at 29. He further objected to any provisions that would dilute the authority of the Secretary of State, such as a provision under which the Commissioner General of Immigration would "authorize the Consular Officer to issue an immigration certificate," *id.* at 29–30, and a provision that would have the Commissioner General issue rules binding on the State Department, *id.* at 31. For a description of Secretary Hughes's objection to discriminatory

governing consular officers, Secretary Hughes urged that the new law provide for the Secretary to act on the recommendation of another department, rather than being bound by another department's rules.[58] That approach made it into the final law, which stated:

> The Commissioner General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this Act; but all such rules and regulations, insofar as they relate to the administration of this Act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor.[59]

In the wake of the 1924 Act, the Departments of Labor and State disagreed about how to interpret its substantive provisions. Just one year into the implementation of the law, the Supreme Court considered the breadth of new bars to admission based on "ineligibility for citizenship" which expressly targeted Asian immigrants.[60] The specific question in *Cheung Sum Shee v. Nagle*[61] was whether the wife and children of a person classified as a Chinese merchant under prior treaties were eligible to enter under a provision that protected rights under existing treaties, notwithstanding the bar on admitting anyone ineligible for citizenship.[62] The Secretary of Labor had refused to admit the wife and children on the ground that they were ineligible for citizenship, irrespective of the mercantile status and treaty rights of the husband and father. Before the Supreme Court, the Solicitor General began by saying "it must be frankly explained that there is a difference of opinion between the two departments of the Government which are directly concerned with the administration of the Act."[63] The Solicitor General

provisions that harmed foreign relations, see MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 48–50 (2004).

58 Letter from Charles Evans Hughes, Sec'y of State, to Representative Johnson, *supra* note 57.

59 Immigration Act of 1924 § 24, 43 Stat. at 166 (1924) (repealed 1952).

60 *Id.* § 13(c), at 162 ("No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant [under subsections of section 4] . . . or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subsection (d) . . . ."). This provision directly targeted Asian immigrants in the wake of Supreme Court decisions applying citizenship laws that required the applicant to be "white" or of "African descent." *See* H.R. REP. NO. 68-350, at 6 (1924) [https://perma.cc/4SHN-NWEY] (referencing Supreme Court decisions denying citizenship to persons from Asia under then existing statutory requirements for citizenship); Ozawa v. United States, 260 U.S. 178, 198 (1922) (denying citizenship to Japanese national as not "white"); United States v. Thind, 261 U.S. 204, 214–25 (1922) (denying citizenship to person from India and concluding that "free white persons" is a term of art that expresses congressional "opposition to Asiatic immigration generally").

61 268 U.S. 336, 337–38 (1925).

62 Immigration Act of 1924 § 3, 43 Stat. at 154–55 (repealed 1952) (defining "immigrant" as "any alien departing from any place outside the United States destined for the United States, except . . . (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation").

63 Brief on Behalf of the Appellee at 6, Cheung Sum Shee v. Nagle, 268 U.S. 336 (1925) (No. 769) [https://perma.cc/LKK5-XVFK].

proceeded to say that given the importance of the case, it would ensure that the Court could see the conflicting views of the departments so the Court could "compar[e] them."[64] After briefing the views of the Secretary of Labor, he made clear that the Secretary of State disagreed and suggested that the Court "should also consider the careful and well-reasoned opinion of the Solicitor for the Department of State" before deciding the case.[65] The Solicitor General proceeded to append a lengthy memorandum from the Department of State on how the statute could be read to conform with treaty obligations and thereby allow for admission of the wife and children of a previously admitted Chinese merchant.[66] There was plainly no one department within the executive whose views were controlling within that branch.

The political branches next considered the division of executive roles in 1940. In June 1940, Congress approved a Presidential Reorganization plan that moved the Commissioner of Immigration from the Department of Labor to the Department of Justice.[67] That same month, the Alien Registration Act of 1940[68] placed the Commissioner of Immigration under the authority of the Attorney General.[69] The 1940 Act also created new responsibilities for the Postmaster General, as part of the new system for registration of noncitizens.[70] Following the pattern from 1924, the Act expressly addressed the division of responsibilities among the Attorney General, the Postmaster General, and the Secretary of State.[71] The statute adopted the format from 1924, in which the Commissioner of Immigration could make recommendations, but the relevant regulations would be promulgated by the relevant department.[72]

It was not until 1952 that Congress took on the question whether one department should speak with a controlling voice for the Executive Branch.

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64 *Id.* at 6–7.

65 *Id.* at 12.

66 *Id.* at 13–42.

67 MASANZ, *supra* note 55, at 47.

68 Alien Registration Act of 1940, ch. 439, 54 Stat. 670, 670–76 (1940) (repealed 1952).

69 *Id.* § 20 (providing for warrants for deportable offenses issued under the authority of the Attorney General); *id.* § 23 (providing for warrants for exclusion under the authority of the Attorney General).

70 *Id.* § 33(b).

71 *Id.* § 37(a).

72 *Id.* § 37 (providing that "[t]he Commissioner, with the approval of the Attorney General, is authorized and empowered to make and prescribe, and . . . change and amend, such rules and regulations not in conflict with this Act as he may deem necessary and proper in aid of the administration and enforcement of this title" but adding that other agencies had ultimate power to decide on regulations: "[E]xcept that all such rules and regulations, insofar as they relate to the performance of functions by consular officers or officers or employees in the Postal Service, shall be prescribed by the Secretary of State and the Postmaster General, respectively, upon recommendation of the Attorney General.").

The initial draft of the Immigration Act of 1952 would have returned more authority to the Secretary of State.[73] Commenting on this bill, the General Counsel of the Immigration and Naturalization Service (INS) noted the history of the provision in the 1924 Act, including the letter from Secretary Charles Evans Hughes, and recommended that the division of authority remain the same as before.[74] The final bill, however, transformed the provision into one in which the views of the Attorney General on legal questions were paramount. As explained in both the House and Senate Reports, the change was designed to provide an authoritative voice within the Executive Branch on questions of law. As the Senate Report stated:

> Within their respective spheres of jurisdiction with respect to the administration and enforcement of the provisions of the bill, both the Attorney General and the Secretary of State are vested with authority to issue such regulations as may be necessary for performing their functions under the provisions of the bill. However, rulings of the Attorney General, as the chief law-enforcement officer of the Nation, with respect to all questions of law shall be controlling.[75]

The report went on to make clear that the Attorney General's voice would control on issues such as inadmissibility rules and would "be binding on the Secretary of State."[76] No more would the Secretary of State be free to disagree with the domestic agency enforcing immigration law, as it had before the Supreme Court in 1925. The 1952 report makes clear that Congress chose the term "controlling" in the context of anticipated disagreements within the Executive Branch and sought to provide a definitive rule for which department would speak for the executive.[77]

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[73] As introduced, the bill stated that the Attorney General is "authorized and empowered to make and prescribe such regulations not in conflict with this Act as he may deem necessary and proper in aid of the administration and enforcement of this Act," but the Secretary of State prescribes "all regulations, insofar as they relate to the powers, duties, and functions of diplomatic and consular officers." The bill further clarified: "Provided, That the Secretary of State and the Attorney General may jointly make such rules and regulations as may be necessary to carry into effect the provisions of chapters 1 and 3 of title III and such provisions of title I as relate to those chapters." S. 716, 82d Cong. § 404 (1951) [https://perma.cc/D34B-JT33].

[74] *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcomms. of the Comm. on the Judiciary Cong. of the United States on S. 716, H.R. 2379, and H.R. 2816*, 82d Cong. 282 (1951) [https://perma.cc/TJU8-FXX7] (Statement of L. Paul Winings, General Counsel, Immigration and Naturalization Service at the Department of Justice).

[75] S. REP. NO. 1137, at 7 (1952). *See also* H.R. REP. NO. 1365, at 35 (1952).

[76] *Id.*

[77] The choice of the Attorney General over the Secretary of State made clear that expertise in issues of foreign relations, rather than law enforcement, would not control Executive Branch interpretations of immigration law. As a result, there is no longer a foundation for the assumption that Executive Branch interpretations reflect judgments sensitive to foreign relations, as the Supreme Court stated in Negusie v. Holder, 555 U.S. 511, 517 (2009) (discussing special importance of *Chevron* deference in immigration cases due to foreign relations implications).

Notably, the 1952 Act was enacted through a congressional override of President Truman's veto, making it a particularly odd context to conclude that Congress sought to increase deference to the Executive Branch.[78]

The only relevant change in the law since 1952 has been the addition of a new executive department, the Department of Homeland Security, which has assumed most of the previous responsibilities of the Attorney General.[79] The Homeland Security Act of 2002,[80] placed immigration policy and enforcement responsibilities in the Department of Homeland Security.[81] The Attorney General retained the far more limited role of overseeing the Executive Office of Immigration Review (EOIR), which adjudicates removal cases, including the power to issue legal rulings on referral from EOIR.[82] As part of this broad reorganization, Congress carried forward the language of the 1952 Act that the Attorney General's legal determinations would be "controlling," thereby maintaining the priority for the views of the Attorney General on legal questions within the Executive Branch.[83]

Altogether, a century of history shows that Congress at one point

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Indeed, the case cited in *Negusie* for this proposition, INS v. Abudu, 485 U.S. 94, 110 (1988), cites back to Hampton v. Mow Sun Wong, 426 U.S. 88, 101–02 (1976), which in turn cites back to cases that predate the choice of the Attorney General over the Secretary of State as the decider in cases involving the interpretation of immigration law. Truax v. Raich, 239 U.S. 33, 42 (1915); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).

[78] *See* Harry S. Truman, *Veto of Bill To Revise the Laws Relating to Immigration, Naturalization, and Nationality*, TRUMAN LIBR. (June 25, 1952), https://www.trumanlibrary.gov/library/public-papers/182/veto-bill-revise-laws-relating-immigration-naturalization-and-nationality [https://perma.cc/RXY8-EQTU]; Act of June 27, 1952, Pub. L. No. 82-414 (following override).

[79] Congress created the Department of Homeland Security (DHS) in 2002. Homeland Security Act of 2002, Pub. L. No. 107-296, § 111, 116 Stat. 2135 (codified at 6 U.S.C. § 111). That statute transferred the roles of the Immigration and Naturalization Service (INS) to various subdivisions of the DHS. *See* 6 U.S.C. § 271 (establishing the Bureau of Citizenship and Immigration Services); 6 U.S.C. § 291 (abolishing INS); 6 U.S.C. § 251 (transferring immigration enforcement to the Under Secretary for Border and Transportation Security).

[80] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[81] *See* 8 U.S.C. § 1103(a)(1). *See generally* David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, MIGRATION POL'Y INST. INSIGHT, Apr. 2003, at 14–19 (noting the reduction in role for the Attorney General and arguing that more authority be transferred to the Department of Homeland Security).

[82] *See* 8 U.S.C. § 1103(g) (providing that the Attorney General shall have the powers "as were exercised by the Executive Office of Immigration Review, or by the Attorney General with respect to the Executive Office of Immigration Review"). Oddly, the statute links the Attorney General's powers to those existing "on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002." *Id.* That bill never became law. *See S.2444 - Immigration, Reform, Accountability, and Security Enhancement Act of 2002*, CONGRESS, https://www.congress.gov/bill/107th-congress/senate-bill/2444/all-actions [https://perma.cc/Q7CP-XMZC] (tracking the status of the bill after it was introduced).

[83] *See* Homeland Security Enhancement Act of 2003, §§ 103, 108, 110, 8 U.S.C. § 1103(a)(1) (amending § 1103(a)(1) to specify the respective roles of the Attorney General and the Secretary of Homeland Security, while retaining the language that the views of the Attorney General on questions of law would be controlling).

allowed for the executive departments to disagree on the interpretation of immigration law, but in 1952 made clear that, in the face of disagreements, the views of the Attorney General would prevail over those of other departments. Beginning in 1924, immigration law approached the delicate balance between Executive Branch departments by allowing the department charged with immigration law domestically to make recommendations for regulations to the State Department, which undertook the task of screening immigrants abroad. Intrabranch disagreements were possible under this model, as was made clear in the government's brief in *Cheung Sum Shee v. Nagle* when the Solicitor General presented the differing views of two departments to the Supreme Court. It was not until 1952 that Congress chose to select one Executive Branch official to resolve intrabranch disagreements. § 1103(a)(1) today is simply a descendent of that 1952 choice. It recognizes that many parts of the Executive Branch have roles to play with immigration law, but that the Attorney General's views take precedence over others on questions of law. This history makes clear that § 1103(a)(1) is about intrabranch conflicts and has nothing to say about the role of the Executive Branch vis-á-vis the Judicial Branch.

CONCLUSION

The Solicitor General has made clear that it views § 1103(a)(1) as a freestanding basis for deference to agency views. Looking at the text, structure, and history of § 1103(a)(1), there is no basis for this argument. Instead, § 1103(a)(1) tells the executive which agency's views control in administering immigration laws, and it tells the courts who speaks for the government. This allocation of authority is relevant for judicial review, but only in the sense of telling courts which agency's views it should examine when it is interpreting statutes, for example, when deciding whether the views are persuasive.[84] It does not tell courts to defer to those agency views, let alone treat them as controlling.

Nonetheless, due to the sheer number of immigration cases in the circuit courts, it is virtually inevitable that some court will accept the government's newfound basis for deference, leading to years of unnecessary litigation.

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[84] *See, e.g.*, U.S. v. Mead Corp., 533 U.S. 218, 235 (2001) (noting that in the absence of *Chevron*, an agency decision may be considered based on its "power to persuade" (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))). In the absence of a provision like § 1103(a)(1), it would be unclear whether even any deference provisions would apply. *See, e.g.*, Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1797 (2015) (noting that the Supreme Court has not settled how *Chevron* applies when multiple agencies administer a statute); Thomas W. Merrill & Kristen E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 893–96 (2001) (discussing complexities of multiple agencies implementing a statute and suggesting that *Chevron* could apply in some but not all situations).

Immigration cases make up a steady docket of cases in the federal courts.[85] These cases involve disputes about the meaning and application of statutory terms with high stakes, including who is deportable and who can apply for relief from removal. The decision in *Loper Bright* promises to ensure that courts will decide these issues based on how best to interpret the relevant statutes. Meanwhile, the government's arguments about § 1103(a)(1) threaten to insert a diversionary secondary issue about whether immigration law remains a sphere for deference even when *Chevron* stops being applied elsewhere to resolve questions of law. Rather than continue to advance this baseless theory, the Solicitor General should remove it from its briefs and defend agency interpretations of the immigration laws on their merits.

[85] In 2023, there were 5,748 administrative agency appeals resolved in the courts of appeals. *See Table B-5, U.S. Courts of Appeals Statistical Table for the Federal Judiciary (June 30, 2023)*, U.S. COURTS (June 30, 2023), https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2023/06/30 [https://perma.cc/R7FG-6ND5]. Seventy-nine percent of these cases involve immigration. *Federal Judicial Caseload Statistics 2023*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 [https://perma.cc/W27E-LVXH]. This large number of cases leads to conflicts in the circuits and a steady stream of cases before the Supreme Court. *See, e.g.*, Pugin v. Garland, 599 U.S. 600 (2023); Campos-Chavez v. Garland, 54 F.4th 314 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2687 (June 30, 2023). *See generally* Nancy Morawetz, *The Perils of Supreme Court Intervention in Previously Technical Immigration Cases*, 64 ARIZ. L. REV. 767, 796–98 (2022) (discussing the dynamics leading to extensive litigation of immigration issues).