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Out of the Shadows: Defining “Known to the Government” in the Immigration Reform and Control Act of 1986

Carl Stine*

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Abstract

This Note argues that these rules contradict the language and purposes of the Act. Part I of this Note examines the rules promulgated by the INS defining “known to the Government.” Part II discusses the only reported case to dispute that definition and analyzes *Chevron U.S.A., INC. v. Natural Resources Defense Council, Inc.*, the governing Supreme Court decision regarding judicial review of a government agency’s interpretation of a statute that it administers. Part III uses the Chevron test to analyze the INS’s rules defining “known to the Government.” This Note concludes that the INS should adopt a broader definition that conforms with the plain meaning of the statutory language and is consistent with the purposes of the legalization provision.

OUT OF THE SHADOWS: DEFINING "KNOWN TO THE GOVERNMENT" IN THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

INTRODUCTION

Under the weight of a growing illegal alien population, the United States Congress amended the Immigration and Nationality Act¹ ("the INA") by passing the Immigration Reform and Control Act of 1986² ("the Act"). The Act provides for, among other things, a one-time amnesty, or legalization,³ of certain illegal aliens.⁴ Specifically, one section of the Act allows for the legalization of authorized nonimmigrants—temporary students, for example⁵—if their visas expired before January 1, 1982, or if they violated the terms of their visas and their illegal status was "*known to the Government as of such date.*"⁶

In the final rules implementing this section of the Act, the Immigration and Naturalization Service ("INS") published its definition of the phrase "known to the Government."⁷ It stated that "Government" means the INS.⁸ Additionally, the rules recognize four restrictive circumstances in which an

1. Ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C.A. §§ 1101-1184, 1185-1353a, 1353d-1525, 1552 (West 1970 & Supp. 1988)).

2. Pub. L. No. 99-603, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3359 (codified at scattered sections of 7, 8, 18, 26, 29, and 42 U.S.C.).

3. Although "amnesty" is the popular term, both sponsors of the Act (Senator Alan K. Simpson and Representative Romano L. Mazzoli) emphasize that the legalization provision is not an "amnesty." A "legalization" mandates specific criteria for the attainment of legal status, while an "amnesty" usually implies that mere application is the only requirement. Miller, "*The Right Thing to Do*": *A History of Simpson-Mazzoli*, in CLAMOR AT THE GATES: THE NEW AMERICAN IMMIGRATION 321 n.8 (N. Glazer ed. 1985).

4. Immigration Reform and Control Act of 1986 sec. 201, § 245A, 8 U.S.C. § 1255a (Supp. IV 1986). The Act also provides for strict penalties against employers who knowingly employ undocumented aliens, *id.* sec. 101(a)(1), § 274A(f), 8 U.S.C. § 1324a(f) (Supp. IV 1986), and a revision of the regulations under which foreign agricultural workers can enter and work in the United States, *id.* secs. 301-305, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) at 3411-34 (codified at scattered sections of 8 and 42 U.S.C.).

5. 8 U.S.C. § 1101(a)(15)(F)(i) (1982); *see also infra* note 19.

6. Immigration Reform and Control Act of 1986 sec. 201, § 245A(a)(2)(B), 8 U.S.C. § 1255a(a)(2)(B) (Supp. IV 1986) (emphasis added).

7. 8 C.F.R. § 245a.1(d) (1988).

8. *See id.*

alien's unlawful status can be "known to the Government."⁹ This Note argues that these rules contradict the language and purposes of the Act. Part I of this Note examines the rules promulgated by the INS defining "known to the Government." Part II discusses the only reported case to dispute that definition¹⁰ and analyzes *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹¹ the governing Supreme Court decision regarding judicial review of a government agency's interpretation of a statute that it administers. Part III uses the *Chevron* test to analyze the INS's rules defining "known to the Government." This Note concludes that the INS should adopt a broader definition that conforms with the plain meaning of the statutory language and is consistent with the purposes of the legalization provision.

I. THE INS'S RULES DEFINING "KNOWN TO THE GOVERNMENT"

Estimates of the number of illegal aliens now living in the United States range from two to twelve million.¹² Congress has recognized that a large number of these people have been in the United States many years and have established strong ties to their communities.¹³ Moreover, they have contributed to the United States in many ways: they have shared their talents, provided their labor, and paid taxes.¹⁴ However, because they live in the United States illegally, they are often afraid to seek help when they become ill or when they are victimized by employers, landlords, or criminals.¹⁵

The legalization provision of the Act was intended to legalize an eligible segment of this group, thus allowing them to

9. See *id.*; *infra* notes 23-28 and accompanying text.

10. *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987).

11. 467 U.S. 837 (1984), *rev'g* *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982).

12. E. HARWOOD, IN *LIBERTY'S SHADOW I* (1986); see also BUREAU OF NAT'L AFFAIRS, INC., *IMMIGRATION REFORM: A PRACTICAL GUIDE* 3 (1987) (the Census Bureau estimates between three and five million). See generally Corwin, *The Numbers Game: Estimates of Illegal Aliens in the United States, 1970-1981*, *LAW & CONTEMP. PROBS.*, Spring 1982, at 223 (discusses the different methods for counting the illegal alien population).

13. H.R. REP. NO. 682, 99th Cong., 1st Sess. pt. 1, at 49 [hereinafter HOUSE REPORT], *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5653.

14. *Id.*

15. *Id.*; E. HARWOOD, *supra* note 12, at 18.

contribute openly to society.¹⁶ In addition, decreasing the number of illegal aliens would free the INS to use its resources more appropriately in the prevention of future illegal immigration to the United States.¹⁷

Section 245A(a)(2)(B) of the INA¹⁸ addresses the situation of aliens who were admitted to the United States as authorized nonimmigrants¹⁹ and whose status subsequently became unlawful before January 1, 1982, either because their visas expired²⁰ or because they violated the terms of their visas.²¹ In its final rules implementing this section of the legalization provision, the INS defined "known to the Government" in this context as "known to the INS" and provided four ways that an alien's unlawful status could be "known."²²

16. HOUSE REPORT, *supra* note 13, pt. 1, at 49, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 5653.

17. *Id.*

18. 8 U.S.C. § 1255a(a)(2)(B) (Supp. IV 1986). Section 245A, as a whole, provides for the adjustment of certain aliens from unlawful status to temporary resident status. There are four general requirements for this adjustment: timely application, continuous unlawful residence since January 1, 1982, continuous physical presence since the enactment of the Act, and admissibility as an immigrant. *Id.* § 1255a. Subsection (a)(2)(B) deals with the unique situation of nonimmigrants within the context of the continuous unlawful residency requirement. *Id.* § 1255a(a)(2)(B).

19. For examples of where authorized nonimmigrants appear, see, e.g., *id.* § 1101(a)(15)(B)(1982) (visitor for business or pleasure); *id.* § 1101(a)(15)(H)(i) (Supp. IV 1986) (temporary worker of distinguished merit and ability); *id.* § 1101(a)(15)(K) (1982) (fiance(e) of United States citizen); *id.* § 1101(a)(15)(L) (Supp. IV 1986) (intra-company transferee); *id.* § 1101(a)(15)(M) (Supp. IV 1986) (vocational student).

20. Immigration and Nationality Act § 245A(a)(2)(B), 8 U.S.C. § 1255a(a)(2)(B) (Supp. IV 1986).

21. *Id.*

22. See 8 C.F.R. § 245a.1(d) (1988). The rules provide as follows:
An alien's unlawful status was "known to the government" only if:

(1) The Service received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government, and such information was stored or otherwise recorded in the official Service alien file, whether or not the Service took follow-up action on the information received. In order to meet the standard of "information constituting a violation of the alien's nonimmigrant status," the alien must have made a clear statement or declaration to the other federal agency, bureau or department that he or she was in violation of nonimmigrant status; or

(2) An affirmative determination was made by the Service prior to January 1, 1982 that the alien was subject to deportation proceedings. Evidence that may be presented by an alien to support an assertion that such a determination was made may include, but is not limited to, official Service documents issued prior to January 1, 1982, i.e., Forms I-94, Arrival-Depar-

First, an alien's unlawful status could be "known to the Government" if any branch of the federal government reported to the INS that the alien had violated the terms of his visa and the INS had a record of this violation in the alien's official INS file.²³ In addition, the alien must have made a clear statement or declaration to the other branch that he was violating his visa.²⁴ The second way an alien's unlawful status could be "known to the Government" is if the INS made an "affirmative determination" that the alien was subject to deportation.²⁵ The third rule promulgated by the INS provides that an alien's illegal status can be "known to the Government" if the INS had advised another agency that the alien had no legal status in the United States or that no record could be found for him.²⁶ The fourth rule is intended "to correct technicalities and provide additional guidance."²⁷ Under this rule, if an alien under a temporary student visa produces documentation showing

ture Records granting a period of time in which to depart the United States without imposition of proceedings; Forms I-210, Voluntary Departure Notice letter; and Forms I-221, Order to Show Cause and Notice of Hearing. Evidence from Service records that may be used to support a finding that such a determination was made may include, but is not limited to, record copies of the aforementioned forms and other documents contained in alien files, i.e., Forms I-213, Record of deportable Alien;

Unexecuted Forms I-205, Warrant of Deportation; Forms I-265, Application for Order to Show Cause and Processing Sheet; Forms I-541, Order of Denial of Application for Extension of Stay granting a period of time in which to depart the United States without imposition of proceedings, or any other Service record reflecting that the alien's nonimmigrant status was considered by the Service to have terminated or the alien was otherwise determined to be subject to deportation proceedings prior to January 1, 1982, whether or not deportation proceedings were instituted; or

(3) A copy of a response by the Service to any other agency which advised that agency that a particular alien had no legal status in the United States or for whom no record could be found.

(4) The applicant produces documentation from a school approved to enroll foreign students under § 214.3 which establishes that the said school forwarded to the Service a report that clearly indicated the applicant had violated his or her nonimmigrant student status prior to January 1, 1982. In order to be eligible under this part, the applicant must not have been reinstated to nonimmigrant student status.

Id. (indentation error in original).

23. *Id.* § 245a.1(d)(1).

24. *Id.*

25. *Id.* § 245a.1(d)(2).

26. *Id.* § 245a.1(d)(3).

27. Adjustment of Status for Certain Aliens, 52 Fed. Reg. 43,843, 43,843 (1987).

that his school sent a report to the INS indicating that the alien had violated his visa, the alien's unlawful status was "known to the Government."²⁸

While the first two rules were under proposal,²⁹ the INS received ninety-one comments in response to their publication in the Federal Register.³⁰ These comments unanimously stated that the proposed definition of "known to the Government" was too restrictive;³¹ nevertheless, the INS remained committed to its interpretation.³² Its rationale for not expanding the meaning of "Government" beyond "the INS" was that administration of the section would then become extremely difficult and that other governmental agencies would be vested with authority specifically reserved for the INS.³³

II. THE FARZAD DECISION AND THE CHEVRON DEFERENCE TEST

As of March 15, 1988, the only litigation concerning the INS's regulations defining "known to the Government" arose in *Farzad v. Chandler*, a recent district court case from the Dallas division of the Northern District of Texas.³⁴ This litigation relied on a Supreme Court case that established the test for whether or not an agency's interpretation of a statute that it administers will receive deference.³⁵

A. The Farzad Decision

In *Farzad*, the petitioner, Masoud Farzad, a native of Iran, entered the United States on September 19, 1976, as an authorized nonimmigrant student.³⁶ Under his visa and subse-

28. 8 C.F.R. § 245a.1(d)(4).

29. See 52 Fed. Reg. 8754, 8754 (1987).

30. Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205, 16,206 (1987).

31. *Id.*

32. *Id.*

33. *Id.* Subsequently, the INS added two other equally restrictive rules that expanded the way an alien's status could be "known." See 52 Fed. Reg. 16,208, 16,208 (1987) (adding third rule); 52 Fed. Reg. 43,845, 43,845 (1987) (adding fourth rule); see also *supra* note 22 (text of final rules).

34. *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987).

35. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

36. 670 F. Supp. at 691. Farzad entered under the authorization of 8 U.S.C.

quent extensions he was authorized to stay in the United States until June 1, 1982.³⁷ Between December 1980 and April 1982, Farzad engaged in unauthorized employment, thereby violating the terms of his visa and making him subject to deportation.³⁸ Although previous to January 1, 1982, the Internal Revenue Service ("IRS") and the Social Security Administration knew of Farzad's employment,³⁹ it is unclear exactly when the INS originally suspected that he was violating his visa. The INS first verified its suspicion in March 1982 by writing to Farzad's employer.⁴⁰ Between that time and January 1987 Farzad engaged in various legal proceedings aimed at preventing deportation.⁴¹

On January 23, 1987, after all appeals had been exhausted, Farzad applied to the INS for a stay of deportation based on the Act's amnesty provision.⁴² A week later, his application was denied, and he was sent a notice to report in ten days for deportation.⁴³ On February 5, Farzad filed a petition with the district court for a writ of habeas corpus,⁴⁴ initiating the action that would culminate with the court's memorandum order of September 22, 1987.⁴⁵

The only substantive issue before the district court was whether Farzad's unlawful status was "known to the Govern-

§ 1101(a)(15)(F) (1982). *Id.* For other examples of nonimmigrant statuses, see *supra* note 19.

37. *Id.*

38. *Id.*

39. *Id.* at 694.

40. *Id.* at 691.

41. *Id.* On August 24, 1984, Farzad's application for political asylum and suspension of deportation was denied; his application for voluntary departure from the United States was granted. *Id.* On January 27, 1986, Farzad's appeal to the Board of Immigration Appeals was dismissed. *Id.* After petitioning the United States Court of Appeals for the Fifth Circuit, the Board of Immigration Appeal's decision was affirmed on October 10, 1986. *Farzad v. INS*, 802 F.2d 123 (5th Cir. 1986). On January 15, 1987, the Court of Appeals denied Farzad's petition for rehearing and suggestion for rehearing *en banc*. *Farzad v. INS*, 808 F.2d 1071 (5th Cir. 1987).

42. 670 F. Supp. at 691.

43. *Id.*

44. *Id.* at 691 n.1. The court's subject matter jurisdiction with regard to habeas corpus was disputed by the Immigration and Naturalization Service ("INS") because Farzad was not in custody. *Id.* The court held that the "INS' order that [Farzad] appear for deportation [was] sufficient to satisfy the 'in custody' requirement for habeas relief." *Id.* The court held that subject matter jurisdiction existed. *Id.*

45. *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987).

ment" as of January 1, 1982.⁴⁶ The INS argued that "the Government" can mean only the Attorney General or the INS⁴⁷ because they have the exclusive responsibility for administering the Act.⁴⁸ The INS also contended that "known" means that the INS "had information in its official file revealing an alien's unlawful status or that it had already made a determination of deportability."⁴⁹ The INS asserted that while another federal agency may have evidence of a nonimmigrant's activity, "it cannot *know* whether such activity amounts to unlawful status unless it consults with the INS."⁵⁰

Farzad argued that "known to the Government" means that before January 1, 1982, one or more departments or agencies of the federal government had information indicating his unlawful status.⁵¹ Farzad reasoned that because the IRS and the Social Security Administration had information in their records that indicated that he had been unlawfully employed before January 1, 1982, he should be eligible for legalization.⁵²

The district court in *Farzad* applied the analysis of the Supreme Court in *Chevron v. Natural Resources Defense Council, Inc.*,⁵³ which governs judicial review of a government agency's interpretation of a statute that it administers. In a short memorandum order, the *Farzad* court held that because Congress freely used the words "INS" and "Attorney General" throughout the Act, it could not have intended that the meaning of "Government" be so narrow as to include only the INS or the Attorney General,⁵⁴ and that it is at least broad enough to include the IRS or the Social Security Administration.⁵⁵ The

46. *Id.* at 692.

47. *Id.* at 693. The final rules say that "the Government" means the INS. See 8 C.F.R. § 245a.1(d) (1988). There is no conflict between the final rules and the INS's argument because the Attorney General is directly responsible for the administration of the INS. 8 U.S.C. § 1103(a) (1982).

48. 670 F. Supp. at 693; see 8 U.S.C. § 1103(a) (1982).

49. 670 F. Supp. at 694.

50. Respondent's Memorandum in Support of Motion to Amend Findings or to Alter or Amend Judgment at 2, *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987) (Civ. A. No. CA 3-87-0256-G) (emphasis in original).

51. 670 F. Supp. at 692-93.

52. *Id.* at 694. For other requirements for eligibility, see *supra* note 18 and accompanying text.

53. 467 U.S. 837 (1984).

54. 670 F. Supp. at 693.

55. *Id.* at 694.

court further held that the INS's interpretation of "known" is not plausible because it "denies coverage to virtually every alien it was intended to reach."⁵⁶

B. *Chevron and its Progeny*

In *Chevron v. Natural Resources Defense Council, Inc.*,⁵⁷ the Supreme Court considered whether the Environmental Protection Agency ("EPA") properly defined two words in the Clean Air Act Amendments of 1977.⁵⁸ In so doing, the Court unanimously enunciated a two-part test for reviewing a federal agency's construction of a statute that it administers. If "the unambiguously expressed intent of Congress" is clear, it must be given effect.⁵⁹ However, if the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation will be given deference if it is based on a permissible construction of the statute.⁶⁰

What is to be considered a permissible construction of a statute will depend on whether the gap, or silence, in the statute was explicit or implicit.⁶¹ An explicit gap occurs when

56. *Id.*

57. 467 U.S. 837.

58. *Id.* at 840. The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, requires certain states to regulate "'new or modified major stationary sources,' of air pollution." *Chevron*, 467 U.S. at 840 (quoting 42 U.S.C. § 7502(b)(6) (1982)). In its regulations implementing this act, the EPA adopted a broad, plant-wide, definition of the term "stationary source." *Id.* (citing 40 C.F.R. § 51.18(j)(1)(i)-(ii) (1983) (re-designated 40 C.F.R. § 51.165(a)(1)(i)-(ii) (1987))). After taking into account the legislative history and the specific statutory language at issue, the *Chevron* Court concluded that Congress did not have specific intent as to the disputed words and that the EPA's definition was reasonable. *Chevron*, 467 U.S. at 863-64.

59. *Chevron*, 467 U.S. at 842-43.

60. *Id.* at 843. The concept of judicial deference to an agency's construction has its detractors. Professor Jaffe wrote:

A judge may say: "There is more than one sensible construction of this statute, but this construction appears to me to be the correct one." If this is what he thinks, he should not defer either to his colleagues or to the agency

.... Such a view comports better with a confident and responsible judiciary.

L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 576 (1965). One author has even suggested that judicial deference is difficult to square with *Marbury v. Madison*, 5 U.S. 87, 1 Cranch 137 (1803). Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 39 (1985). In a 1984 opinion, Justice Blackmun warned that "deference is not to be a device that emasculates the significance of judicial review." *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 142-43 (1984).

61. *Chevron*, 467 U.S. at 843-44.

Congress intentionally leaves an issue in the legislation unresolved and specifically instructs the appropriate agency to promulgate rules that address the issue.⁶² In such a case, the agency's interpretation will be given deference unless it is "arbitrary, capricious, or manifestly contrary to the statute."⁶³ In contrast, Congress creates an implicit gap when it leaves no specific instructions in the legislation.⁶⁴ Where there is an implicit gap, the agency's interpretation must be reasonable.⁶⁵ An interpretation will be considered reasonable "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."⁶⁶

Since the *Chevron* decision, this analysis has been used numerous times to review regulations and interpretations of statutes promulgated by, among others, the Federal Reserve Board,⁶⁷ the Secretary of Agriculture,⁶⁸ the Federal Drug Administration,⁶⁹ the Merit Systems Protection Board,⁷⁰ the Sec-

62. See, e.g., Immigration and Nationality Act § 245A(g)(1), 8 U.S.C. § 1255a(g)(1) (Supp. IV 1986) ("The Attorney General . . . shall prescribe . . . (A) regulations establishing a definition of the term 'resided continuously', as used in this section"); 42 U.S.C.A. § 1396a(a)(17) (West Supp. 1988) (providing that the Secretary of Health and Human Services shall determine standards of eligibility for a state medical assistance plan).

63. *Chevron*, 467 U.S. at 844; see, e.g., *Atkins v. Rivera*, 477 U.S. 154, 162 (1986) (invoking the "arbitrary, capricious, or contrary to the statute" standard in a *Chevron* analysis of the Secretary of Health and Human Service's interpretation of an "explicit" statute); *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 510 (D.C. Cir. 1986) ("arbitrary, capricious, or contrary to the statute" standard used in reviewing an FCC interpretation of 47 U.S.C. § 312(a)(7) (1982), which allows agency discretion in revocation of a television station's license for failing to allow reasonable access to federal political candidates).

64. *Chevron*, 467 U.S. at 844.

65. *Id.*

66. *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)); accord *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) ("reasonable, in light of the language, policies, and legislative history of the Act").

67. See *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986). The Court used the *Chevron* analysis, see *id.* at 368, and held that the Federal Reserve Board incorrectly defined "banks." *Id.* at 374.

68. See *Biggs v. Lyng*, 823 F.2d 15, 18-20 (2d Cir. 1987). The *Chevron* analysis was used to review the Secretary of Agriculture's definition of "loan" under 7 U.S.C.A. § 2014(d)(4) (West Supp. 1987) (7 U.S.C. § 2014(d)(4) (Supp. IV 1986)) as applied to New York's Home Relief program. *Id.*

69. See *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986). The Court used a *Chevron* analysis to review the Federal Drug Administration's interpretation of a clause in the Federal Food, Drug and Cosmetic Act. *Id.* at 980.

70. See *Cornelius v. Nutt*, 472 U.S. 648 (1985). Deference was given to the Merit

retary of Health and Human Services,⁷¹ and the Environmental Protection Agency.⁷² The decisions of these courts demonstrate "the continuing and unchanged vitality" of the *Chevron* test.⁷³

III. *APPLYING CHEVRON TO "KNOWN TO THE GOVERNMENT"*

Under a *Chevron* analysis, the plain meaning and context of the phrase "known to the Government" unambiguously reveal that Congress intended a broader interpretation than was supplied by the INS.⁷⁴ This clear intent should be given effect. However, even if a court finds the congressional intent ambiguous, the INS's interpretation is unreasonable because it is inconsistent with the purposes behind the legalization provision of the Act.⁷⁵

A. *Congressional Intent*

Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived.

*John Marshall*⁷⁶

When applying the *Chevron* two-part analysis⁷⁷ to the INS's definition of "known to the Government," a court must first determine whether there is an "unambiguously expressed intent of Congress."⁷⁸ If there is that clear intent, it must be

Systems Protection Board's interpretation of "harmful error" in the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(c)(2)(A) (1982).

71. See *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524 (1984). Citing *Chevron*, the Court deferred to the Secretary of Health and Human Service's interpretation of a phrase from the Medicaid Act. *Id.* at 530-31 n.16.

72. See *American Mining Congress v. United States EPA*, 824 F.2d 1177 (D.C. Cir. 1987). The court held EPA's definition of "discarded" to be inconsistent with Congressional intent. *Id.* at 1193.

73. *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413, 426 (1987) (Scalia, J., concurring) ("our decision demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron*").

74. *Farzad v. Chandler*, 670 F. Supp. 690, 694 (N.D. Tex. 1987).

75. *Id.*

76. *United States v. Fisher*, 6 U.S. 214, 230, 2 Cranch 358, 386 (1805) (Marshall, C.J.)

77. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

78. *Id.*

given effect.⁷⁹ The *Chevron* Court further refined this requirement by mandating that "traditional tools of statutory construction" be employed to determine that intent.⁸⁰

The first consideration in every case involving statutory construction is the words themselves;⁸¹ and the presumption is that the ordinary use of those words is the meaning to be attributed to them.⁸² Section 245A(a)(2)(B) of the INA states that the alien's unlawful status must have been "known to the Government."⁸³ It does not say "known to the INS" or "known to the Attorney General" or any other subdivision of the federal government.⁸⁴ The word "Government" is not ordinarily used to mean only the INS.⁸⁵ Furthermore, "to know" is variously defined as "to perceive,"⁸⁶ "to be aware of,"⁸⁷ or "to possess information."⁸⁸ The ordinary usage of these terms should thus simply mean that to qualify under section 245A(a)(2)(B), prior to January 1, 1982, the federal government must have possessed some information documenting⁸⁹

79. *Id.*

80. *Id.* at 843 n.9.

81. *Kelly v. Robinson*, 107 S. Ct. 353, 358 (1986).

82. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2585 (1987) (Powell, J., concurring); *Summit Valley Indus. v. Local 112, United Bhd. of Carpenters*, 456 U.S. 717, 722 (1982).

83. *See* 8 U.S.C. § 1255a(a)(2)(B) (Supp. IV 1986) (emphasis added); *see also supra* notes 18-21 and accompanying text (discussing § 245A).

84. *See* Immigration and Nationality Act § 245A(a)(2)(B), 8 U.S.C. § 1255a(a)(2)(B) (Supp. IV 1986); *see also infra* text accompanying notes 97-98 (discussing relation of agencies to the federal government).

85. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 529 (1987) (defines "Government" (with a capital "G") as "the executive branch of the U.S. federal government").

The use of a dictionary to show the ordinary meaning or common usage of a word is well established. *See, e.g., Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2027 (1987) (citing various dictionaries to help define "race"); *Lukhard v. Reed*, 107 S. Ct. 1807, 1811-12 (1987) ("income"); *United States v. James*, 106 S. Ct. 3116, 3121 n.6 (1986) ("damages"); *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 n.6 (1985) ("policy"); *United States v. Rodgers*, 466 U.S. 475, 479 (1984) ("jurisdiction").

86. RANDOM HOUSE DICTIONARY 489 (1980). *See generally supra* note 85 (giving examples of recent Supreme Court cases that use dictionary definitions to establish common usage).

87. *Id.*

88. BLACK'S LAW DICTIONARY 784 (5th ed. 1979). *See generally supra* note 85 (giving examples of recent Supreme Court cases that use dictionary definitions to establish common usage).

89. *See infra* text accompanying notes 114-15.

the alien's illegal status.⁹⁰

There is also a presumption that the same word or phrase has the same meaning throughout a statute.⁹¹ The word "Government" or "government" appears twenty-two times within the Act. Twelve times it appears with a capital "G": six of those times it is directly modified by the word "Federal" (*i.e.*, "Federal Government"),⁹² three times it appears with the word "agencies" (*i.e.*, "Government agencies" or "agencies of Government"), one time it surfaces as "United States Government,"⁹³ and the other two times, it appears in the disputed form—"known to the Government."⁹⁴ When "government" (lower case "g") appears in the Act, it is referring to "state or local government" or generally to the federal government, state or local governments, or their agencies.⁹⁵ It would seem that when Congress specifically used a capital "G," its intent was to include the whole federal government.⁹⁶ Furthermore,

90. See *infra* text accompanying notes 132-38.

91. See *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941); *Barnson v. United States*, 816 F.2d 549, 554 (10th Cir. 1987); *Doctors Hosp. Inc. v. Bowen*, 811 F.2d 1448, 1452 (11th Cir. 1987); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, in 4 SUTHERLAND STATUTORY CONSTRUCTION 133, 138 (C. Sands ed. 1975).

92. Pub. L. No. 99-603, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3359, at 3373 (twice), 3404, 3405, 3406, 3432.

93. *Id.* at 3364, 3401, 3411.

94. *Id.* at 3395, 3443. The second occurrence of the disputed phrase appears in Title V of the Act, which deals with the cost of incarcerating illegal aliens:

(b) **ILLEGAL ALIENS CONVICTED OF A FELONY.**—An illegal alien referred to in subsection (a) is an alien who is any alien convicted of a felony who is in the United States unlawfully and—

(1) whose most recent entry into the United States was without inspection, or

(2) whose most recent admission to the United States was as a non-immigrant and—

(A) whose period of authorized stay as a nonimmigrant expired, or

(B) whose unlawful status was *known to the Government*, before the date of the commission of the crime for which the alien is convicted.

Immigration Reform and Control Act of 1986 § 501(b), 8 U.S.C. § 1365(b) (Supp. IV 1986) (emphasis added). There are no regulations or case law construing this portion of the Act, but because the context is so similar to § 245A(a)(2)(B) of the Immigration and Naturalization Act, 8 U.S.C. § 1255a(a)(2)(B) (Supp. IV 1986), it illustrates that use of this general language was intentional.

95. Pub. L. No. 99-603, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3359, at 3374 (twice), 3410, 3411, 3419, 3424 (twice), 3440, 3441, 3442.

96. In its final rules, the INS inexplicably changed "known to the Government"

to substitute "INS" for "Government" in any of these contexts deprives the language of its meaning by creating, for example, "United States INS" or "INS agencies."

The INS, under the supervision of the Attorney General, is an agency under the terms of the Administrative Procedure Act ("APA").⁹⁷ The APA defines an agency as an "authority of the Government of the United States,"⁹⁸ and therefore a subset of the federal government. By defining "known to the Government" as "known to the INS," the INS is, in effect, substituting a small subset for the set itself.⁹⁹

In the Act, Congress chose to be more specific than "Government" many times: the Act employs the words "the Attorney General" 154 times and speaks of "the Immigration and Naturalization Service," "the Service," or "the INS" forty-nine times.¹⁰⁰ Throughout the Act, when Congress wanted to give responsibilities to other agencies, departments, or individuals, it specifically did so. For example, the Act expressly re-

(capital "G") to read "known to the government" (lower case "g"), thus altering the meaning of the phrase. See 8 C.F.R. § 245a.1(d) (1988).

97. *Koden v. United States Dep't of Justice*, 564 F.2d 228, 232 (7th Cir. 1977); *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 933 (D.C. Cir. 1971).

98. 5 U.S.C. §§ 551(1), 701(b)(1) (1982).

99. American Immigration Lawyers Association, Position Paper: "known to the Government" Issue, III-4 (undated) [hereinafter *AILA*], included in Supplement to Petitioner's Reply to Respondent's Response to Order to Show Cause, Etc., Dated February 13, 1987, *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987) (Civ. A. No. CA 3-87-0256-G) (available at the *Fordham International Law Journal* office); B. Bates, Comments of Proposed Regulations for the Legalization Program 3 (undated memorandum prepared on behalf of the North Texas Immigration Coalition) [hereinafter *NTIC*], included in Petitioner's Third Supplement to Petition at M1, M3, *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987) (Civ. A. No. CA 3-87-0256-G) (available at the *Fordham International Law Journal* office) (Mr. Bates was counsel for Petitioner in *Farzad*); Memorandum from Jackie Burger to Lucas Guttentag, National Litigation Coordinator for the American Civil Liberties Union Immigration and Aliens Rights Task Force at 7 (Jan. 11, 1988) [hereinafter *ACLU*] (available at the *Fordham International Law Journal* office) (regarding "known to the Government").

The ACLU and the AILA were two of the organizations that filed an *amici* brief in *Farzad* in support of petitioner. The ACLU's interest in the case was in its commitment to the equal and fair application of the laws and the Constitution to all persons, including illegal aliens. Brief of Amici Curiae in Support of Petitioner at 1, *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987) (Civ. A. No. CA 3-87-0256-G) (available at the *Fordham International Law Journal* office). The AILA's members practice and teach immigration law and therefore are directly affected by any new developments regarding the legalization provision. *Id.*

100. See Pub. L. No. 99-603, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3359 *passim*.

fers to, among others, the Comptroller General,¹⁰¹ the Equal Employment Opportunity Commission,¹⁰² the Department of Labor,¹⁰³ the Federal Maritime Commission,¹⁰⁴ the Department of State,¹⁰⁵ the Secretary of Health and Human Services,¹⁰⁶ the Secretary of Agriculture,¹⁰⁷ and the Director of the Bureau of Census.¹⁰⁸

By analyzing the statutory construction, it is clear that the Congressional intent behind the use of the phrase "known to the Government" is unambiguously broader than the INS's narrow interpretation.¹⁰⁹ Under a *Chevron* analysis, that determination would be "the end of the matter."¹¹⁰ But, assuming a court found the intent to be ambiguous, *Chevron* requires that a second question be asked: Is the INS's interpretation "based on a permissible construction of the statute"?¹¹¹

B. *A Permissible Construction?*

Because Congress did not give specific instructions as to the meaning of "known to the Government," the INS's definition will be considered reasonable—and therefore will be given judicial deference—unless the statute or its legislative history reveals that Congress would not have sanctioned this definition.

1. The Purpose Behind the "known to the Government" Requirement

If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.

*Karl Llewellyn*¹¹²

101. *Id.* at 3379.

102. *Id.*

103. *Id.* at 3381.

104. *Id.* at 3383.

105. *Id.*

106. *Id.* at 3406.

107. *Id.* at 3422.

108. *Id.* at 3430.

109. Although "known to the Government" is a broad, general phrase, "[b]road, general language [in a statute] is not necessarily ambiguous when congressional objectives require broad terms." *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980).

110. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

111. *Id.* at 843.

Although Congress did not articulate a purpose behind the "known to the Government" requirement,¹¹³ it was generally concerned throughout the Act with the possibility of fraudulent documentation.¹¹⁴ A reading of section 245A(a)(2)(B) of the INA within the context of the entire legalization provision supports the assumption that the purpose behind this clause is to require governmental objectivity with respect to a nonimmigrant's documentation, thus ensuring a high level of reliability and minimizing the possibility of fraud.¹¹⁵

The INS contends that "known to the Government" means "known to the INS"¹¹⁶ because only the INS is responsible for the administration and enforcement of the Act.¹¹⁷ But if the purpose of the phrase is to ensure reliable documentation that the nonimmigrant was in an unlawful status as of January 1, 1982, then evidence of the unlawful status in the possession of *any* federal agency or department would ensure that reliability. In addition, when Congress has required that a specific agency or individual have knowledge of some fact, it has explicitly articulated that requirement.¹¹⁸

The INS further contends that because it is the agency responsible for the administration of the Act, it is the only agency capable of making a determination whether or not the nonimmigrant's status is unlawful.¹¹⁹ But the Act does not re-

112. *Llewelyn*, *supra* note 91, at 135.

113. *But cf.* The Select Commission on Immigration and Refugee Policy, Report 76 (U.S. Immigration Policy and the National Interest, Joint Committee hearings, Print No. 8, 1981). In its section on Eligibility for Legalization, the Select Committee specifically mentioned nonimmigrants in violation of their visas: "For visa abusers . . . the period of continuous residency should begin *at the time of visa abuse.*" *Id.* (emphasis added).

114. *See, e.g.*, 8 U.S.C. § 1160(b)(3) (Supp. IV 1986) (proof of eligibility for special agricultural workers); 18 U.S.C. § 1546 (Supp. IV 1986) ("Fraud and misuse of visas, permits, and other documents"); *see also* HOUSE REPORT, *supra* note 13, pt. 1, at 73, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 5677 (the definition of "continuous residence" should "ensure the integrity of the documentation process while minimizing the incidence of fraud").

115. *ACLU*, *supra* note 99, at 14.

116. 8 C.F.R. § 245a.1(d).

117. Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205, 16,206 (1987).

118. *ACLU*, *supra* note 99, at 13 (*citing* 28 U.S.C. § 2416(c) (1982)) (in actions brought by the United States, the statute of limitations is tolled for periods where material facts are not known "by an official of the United States charged with the responsibility to act in the circumstances").

119. 52 Fed. Reg. at 16,206.

quire that a *determination* of the nonimmigrant's illegal status have been made before January 1, 1982; it merely requires that his status was "known to the Government" as of that date.¹²⁰ Thus, because the INS is responsible for the administration and enforcement of the Act,¹²¹ it will *ultimately* be charged with determining whether or not the alien's status was illegal. This determination can easily be made by examining relevant documentation from *any* federal governmental agency or department.¹²²

2. The Purpose of the Legalization Program

In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy.

Roger B. Taney¹²³

The *Chevron* Court, by reviewing the legislative history of the act at issue,¹²⁴ followed the ancient axiom that "statutes should be interpreted so that the manifested purpose or object can be accomplished."¹²⁵

The legislative history of the Act provides two clearly stated purposes behind the legalization provision: first, to provide the INS with a "clean slate"¹²⁶ by legalizing eligible aliens and thus allowing INS resources to be used more appropriately for the prevention of future illegal immigration,¹²⁷ and

120. Petitioner's Brief in Support of Petition for Writ of Habeas Corpus and Motion for Temporary Restraining Order at 11, *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987) (Civ. A. No. CA 3-87-0256-G) (available at the *Fordham International Law Journal* office); *ACLU*, *supra* note 99, at 13; *NTIC*, *supra* note 99, at 4.

121. See 8 U.S.C. § 1103(a) (1982). Under the direction of the Attorney General, the INS administers and enforces all laws relating to immigration and naturalization of aliens, except as otherwise provided. *Id.*

122. *AILA*, *supra* note 99, at III-1.

123. *United States v. Heirs of Boisdoré*, 49 U.S. 116, 125, 8 How. 113, 122 (1850), *quoted in Kelly v. Robinson*, 107 S. Ct. 353, 358 (1986).

124. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984).

125. 2A N. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 58.06 (Sands 4th ed. 1984) (citing Heydon's case, 76 Eng. Rep. 637, 638 (Ex. 1584)).

126. 132 CONG. REC. S16,911 (daily ed. Oct. 17, 1986) (statement of Sen. Hawkins).

127. *Id.*; see also *supra* text accompanying notes 16-17. See generally Smith, *Introduction*, *LAW & CONTEMP. PROBS.*, Spring 1982, at 3, 7 (in the introduction to an issue devoted to U.S. immigration policy, Attorney General William French Smith discusses the policy reasons behind proposed amnesty legislation).

second, to end the exploitation by criminals, employers, or landlords of "a class of individuals who now must hide in the shadows."¹²⁸ To accomplish these purposes, Congress intended a "liberal and generous" implementation of the legalization provision of the Act.¹²⁹ The legalization provision is clearly remedial in nature¹³⁰ and thus, when Congress uses broad language—such as "known to the Government"—that language should be interpreted generously, in favor of those whom the statute was designed to benefit.¹³¹

Those applying for eligibility under the "known to the Government" requirement are members of a subcategory of all illegal aliens applying for legalization.¹³² Each individual legalized under this section is one individual fewer who must "hide in the shadows,"¹³³ and one individual fewer whom the INS has to worry about deporting. Furthermore, under a more generous interpretation, processing the applications of these individuals should be as easy as processing those of any applicant for legalization.¹³⁴

C. *A More Reasonable Interpretation*

The present INS interpretation of "known to the Government" contradicts the plain meaning and ordinary usage of the words themselves,¹³⁵ is inconsistent with the documentation purpose underlying the phrase,¹³⁶ and is contrary to the purposes behind the entire legalization provision.¹³⁷

128. Statement by President Ronald Reagan upon Signing S.1200, 22 WEEKLY COMP. PRES. DOC. 1534 (Nov. 10, 1986); see also *supra* text accompanying notes 15-16 (discussing purposes of the Act). See generally *Smith, supra* note 127.

129. HOUSE REPORT, *supra* note 13, pt. 1, at 72, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 5676.

130. *Farzad v. Chandler*, 670 F. Supp. 690, 694 (N.D. Tex. 1987); *Bailey v. Brooks*, No. C886-1914 R, Order Granting Writ of Habeas Corpus at 7 (W.D. Wash. Dec. 15, 1986) (available at *Fordham International Law Journal* office).

131. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 428 (1st Cir. 1985); *Wirtz v. Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir. 1967).

132. Immigration Reform and Control Act of 1986 sec. 201, § 245A, 8 U.S.C. § 1255a (Supp. IV 1986).

133. Statement by President Ronald Reagan upon Signing S.1200, 22 WEEKLY COMP. PRES. DOC. 1534 (Nov. 10, 1986).

134. *AILA, supra* note 99, at III-1.

135. See *supra* notes 81-108 and accompanying text.

136. See *supra* text accompanying notes 113-22.

137. See *supra* text accompanying notes 126-34.

A definition that is both reasonable and consistent with the plain language of the Act has been suggested by the American Immigration Lawyers Association: a nonimmigrant would be "presumptively eligible for legalization" if the alien was in violation of the terms of his visa before January 1, 1982; and, on or before January 1, 1982, "through the normal operations of the Federal Government, some Federal agency or officer was on notice of the actions that violated visa status."¹³⁸

This interpretation would conform with the plain meaning of "known to the Government"¹³⁹ by broadly defining "Government" as any federal agency or officer, and "known" as to be on notice.¹⁴⁰ Congressional concerns regarding reliable documentation¹⁴¹ would be allayed because federal documents would still be required for proof that the nonimmigrant was in violation of his visa before January 1, 1982.¹⁴²

This broader definition would allow more individuals to qualify for legalization and thus would help to accomplish the purposes behind the legalization provision.¹⁴³ This definition would free the INS to concentrate on present and future violations;¹⁴⁴ it would also free more individuals from exploitation and allow them to contribute openly to society.¹⁴⁵

CONCLUSION

The INS's interpretation of "known to the Government" is inconsistent with the plain, unambiguous, meaning of the words. Furthermore, it is an impermissible construction because the legislative history of the Act shows it to be unreasonable within the context of the clear purposes behind the legalization provision. To conform more faithfully with the clear statutory language and the remedial purposes behind the le-

138. *AILA*, *supra* note 99, at III-1.

139. *See supra* notes 81-90 and accompanying text.

140. *AILA*, *supra* note 99, at III-1.

141. *See supra* text accompanying note 114.

142. *AILA*, *supra* note 99, at III-1.

143. *See supra* text accompanying notes 120-28.

144. *See supra* text accompanying notes 120-21.

145. HOUSE REPORT, *supra* note 13, pt. 1, at 49, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 5653.

galization provision, the INS should adopt a broader definition.

*Carl Stine**

[As this Note was going to press, Judge Stanley Sporkin of the United States District Court for the District of Columbia issued a memorandum opinion and order holding that the INS's regulations regarding "known to the Government" are contrary to the law.** In his lengthy opinion, Judge Sporkin, following the *Chevron* methodology, held that both the plain meaning of the statutory language and the legislative history of the Act reveal a clear congressional intent that is contrary to the INS's narrow interpretation. In granting the plaintiff's motion for declaratory judgment, Judge Sporkin interpreted the word "Government," in this context, to mean the United States government and not merely the INS. Additionally, he enjoined the further application of the regulations and ordered the INS to take specific remedial actions.***]

* J.D. candidate, 1989, Fordham University

** *Ayuda, Inc. v. Meese*, No. 88-0625, slip op. at 39, 1988 U.S. Dist. LEXIS 2729, at 54 (D.D.C. Mar. 30, 1988) (memorandum opinion and order).

*** *Id.*