SETTING THE "PERSECUTOR BAR" FOR POLITICAL ASYLUM AFTER *NEGUSIE*

Negusie v. Holder, 129 S. Ct. 1159 (2009)

David A. Karp[*]

After night fell in the port city of Massawra, Eritrea, Daniel Girmai Negusie slipped out of the military prison where he had been held for four years.[1] During the day, he hid at a friend's house; at night, he swam out to container ships anchored off the coast of the Red Sea.[2] On his fifth night, Negusie, twenty-eight years old, slipped into a luggage container with an air hole aboard a tanker, the *Atlantic Forest*.[3] He said later that he did not know where the ship was headed.[4]

When the *Atlantic Forest* arrived a month later on December 14, 2004, in Morehead City, North Carolina, crew members found Negusie and two other stowaways inside the containers.[5] Negusie had the equivalent of $10.60 in Eritrean money on him.[6]

Negusie told immigration officials that if sent back to Eritrea, he would be killed for deserting[7] and for converting to Christianity.[8] He applied for political asylum[9] and withholding of removal[10] from the United States based on a "well-founded fear of persecution."[11] But an immigration judge denied his application,[12] and the Board of

---

* J.D. 2009, University of Florida Levin College of Law. B.A. 1995, Yale University. This Comment is dedicated to Professor Dennis Calfee, whose generosity knows no bounds. Also thanks to Professor Lea Johnston for her close reading of this Comment and to the editors of the *Florida Law Review* for their friendship and diligent work on this Comment.

1. Initial Brief of Appellant-Petitioner at 15, Negusie v. Holder, 129 S. Ct. 1159 (2009) (No. 07-499).

2. *Id.*

3. *Id.*; *see also* CIA, The World Factbook, Eritrea, Map, https://www.cia.gov/library/publications/the-world-factbook/geos/er.html (last visited June 26, 2009).

4. Government Exhibit No. 1, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, Negusse v. Gonzales , 2007 WL 708615 (W.D. La. Mar. 1, 2007) (No. 06-1382).

5. Initial Brief of Appellant-Petitioner, s*upra* note 1, at 15; Record of Sworn Statement, *supra* note 4, at 2; *see also Gonzales*, 2007 WL 708615, at *1.

6. Record of Sworn Statement, *supra* note 4, at 2; *see also* CoinMill.com-The Currency Converter, Eritrean Nakfa and United States Dollars, http://coinmill.com/ERN_USD.html#ERN=160 (last visited June 26, 2009).

7. Record of Sworn Statement, *supra* note 4, at 3.

8. Initial Brief of Appellant-Petitioner, *supra* note 1, at 14. Record of Sworn Statement, *supra* note 4, at 3.

9. *See* 8 U.S.C.A. § 1158(b)(1)(A) (West 2008); *see also* 8 U.S.C.A. § 1101(a)(42)(A) (West 2009).

10. *See* 8 U.S.C.A. § 1231(b)(3)(A) (West 2006).

11. *See* 8 U.S.C.A. § 1101(a)(42)(A). An applicant must show that he is unable or unwilling to return to his country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." *Id.*; *see also* 8 U.S.C. 1158(b)(1).

12. Government Exhibit No. 7, Oral Decision of the Immigration Judge, Negusse v.

Immigration Appeals (BIA)[13] and the U.S. Court of Appeals for the Fifth Circuit affirmed.[14]

While the immigration judge found that Negusie had been conscripted into the army and then abused in prison in Eritrea,[15] the judge also determined that Negusie had been forced to work as a prison guard, a position in which he helped punish others.[16] Thus, federal law treated Negusie both as a victim and as a perpetrator.[17] Although he had been forced—at gunpoint—to act as an accomplice to persecution,[18] federal law imposed a black-and-white bar on granting political asylum to anyone who helped persecute others.[19] The law did not allow immigration officials to consider the moral culpability of the persecutor, or to evaluate whether the persecutor was coerced.[20] As the Fifth Circuit explained, "The question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions."[21]

With help from a group of Yale law students,[22] Negusie appealed to

---

Gonzales, 2007 WL 708615 (W.D. La. Mar. 1, 2007) (No. 06-1382). Many of the court documents spell Daniel Girmai Negusie's name different ways, and INS officials originally processed him as Daniel Nugsa-Ghirmay. *See* Government Exhibit No. 3 at 2, Record of Deportable/Inadmissible Alien, Negusse v. Gonzales, 2007 WL 708615 (W.D. La. Mar. 1, 2007) (No. 06-1382). Negusie—who may have limited knowledge of English—spelled his own name incorrectly in the Petition for Writ of Habeas Corpus he filed while imprisoned at the Tensas Paris Detention Center in Waterproof, Louisiana. Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 at 1, Negusse v. Gonzales, 2007 WL 708615 (W.D. La. Mar. 1, 2007) (No. 06-1382). Despite this confusion, all the cited cases refer to the same person.

13. Government Exhibit No. 9, Decision of the Board of Immigration Appeals, *In re* Daniel Girmai Negusie at 3, Negusse v. Gonzales, 2007 WL 708615 (W.D. La. Mar. 1, 2007) (No. 06-1382).

14. Negusie v. Gonzales, 231 F. App'x. 325, 326 (5th Cir. 2007).

15. Oral Decision of the Immigration Judge, *supra* note 12, at 7, 11–12. While the judge had doubts about Negusie's testimony, the judge found Negusie's testimony "largely credible" and accepted that the testimony reflected what actually happened. *Id.* at 7, 12.

16. *Id.* at 9–11.

17. Because the immigration judge found that Negusie participated in persecution of a protected class under 8 U.S.C.A. § 1101(a)(42)(A) (West 2009), he denied him political asylum and withholding of removal. Oral Decision of the Immigration Judge, *supra* note 12, at 9–10. However, the judge found that Negusie would likely be tortured if returned to Eritrea. *Id.* at 13. Therefore, the judge deferred removal under the Convention Against Torture. *Id.* at 14. Deferral, unlike withholding or political asylum, does not entitle Negusie to remain permanently in the United States. *See* Initial Brief of Appellant-Petitioner, *supra* note 1, at 16 & n.5. Negusie may be detained at any time by the Department of Homeland Security and may be deported to a country where he is not likely to be tortured. *See id.*

18. Initial Brief of Appellant-Petitioner, *supra* note 1, at 15.

19. 8 U.S.C. § 1158(b)(1)(A) (West 2008); 8 U.S.C.A. § 1101(a)(42)(B) (West 2009). The statute states: "The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C.A. § 1101(a)(42)(A).

20. Negusie v. Gonzales, 231 F. App'x. 325, 326 (5th Cir. 2007).

21. *Id.* (citing Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003)).

22. Press Release, Yale Law School, Supreme Court Clinic Wins Victory No. 2 in *Negusie v. Holder* (Mar. 4, 2009), *available at* http://www.law.yale.edu/news/9252.htm.

the United States Supreme Court.[23] In March, the Court reversed.[24] In an 8-to-1 decision,[25] the Court held that federal law did not require officials evaluating Negusie's political asylum application to ignore whether he had been coerced into persecuting others.[26] But rather than decide the full meaning of the federal law, the Court sent Negusie's case back to the Board of Immigration Appeals.[27] It instructed the BIA, an executive arm of the Justice Department whose members are appointed by and serve the Attorney General,[28] to first interpret the ambiguity in the law.[29]

By remanding the case back to the executive branch, the Court displayed the type of "judicial modesty" that Chief Justice John G. Roberts, Jr. has touted as a hallmark of judicial restraint.[30] The Court's limited decision allowed the Court to speak with near unanimity and eliminated any appearance that the Court was crafting immigration policy from the bench. The decision also placed the complicated public policy choice at the heart of Negusie's case before the politically-accountable executive branch. It allowed Attorney General Eric Holder to craft immigration policy that balances international relations, humanitarian concerns, and America's intolerance of persecution.

Yet, as Justice John Paul Stevens argued in a separate opinion,[31] the Court did not abdicate its responsibility to "say what the law is."[32] The Court reserved the right under the *Chevron* doctrine[33] to review the

---

23. *Id.*

24. *Id.*

25. 129 S. Ct. 1159, 1161 (2009). Justice Anthony Kennedy wrote the Court's opinion, which was joined by Chief Justice John G. Roberts Jr., Justice David Souter, Justice Samuel Alito and Justice Ruth Bader Ginsburg. *Id.* at 1162. Justice Clarence Thomas dissented, *id.* at 1176 (Thomas, J., dissenting), Justice John Paul Stevens and Justice Stephen Breyer concurred in part and dissented in part, *id.* at 1170 (Stevens, J. and Powell, J., concurring in part and dissenting in part), and Justice Antonin Scalia and Justice Samuel Alito filed a separate concurring opinion, *id.* at 1168 (Scalia, J. and Alito, J., concurring).

26. *Id.* at 1162 (majority opinion).

27. *Id.*

28. *See* 8 C.F.R. § 1003.1(a)(1) (2009); U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, BD. OF IMMIGRATION APPEALS PRAC. MANUAL 1, § 1.1(a), *available at* http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm (last visited June 26, 2009); U.S. Dep't of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, http://www.usdoj.gov/eoir/biainfo.htm (last visited June 26, 2009).

29. *Negusie*, 129 S. Ct. at 1167–68.

30. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.). For another discussion of judicial modesty, see William H. Pryor Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007 (2008).

31. *Negusie*, 129 S. Ct. at 1170 (Stevens, J., concurring in part and dissenting in part).

32. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

33. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

BIA's interpretation to ensure that it complied with Congress' intent.[34] Thus, *Negusie* stands as an example of the Roberts Court's pragmatism and shows the wisdom of deferring to the political branches in close calls of statutory interpretation.[35]

The complexity of Negusie's case, which presented questions of foreign affairs, international law, and Congress' plenary immigration power, illustrates why courts so often ask the political branches to settle these types of policy issues. Negusie was born in the Horn of Africa, a region beset by malnutrition, human rights abuses, and war. Almost two-thirds of Ethiopia's population is illiterate,[36] and an estimated 980,000 people live with AIDS.[37] According to Amnesty International, human rights violations are rampant amid this poverty.[38] The Eritrean government banned minority religions in 2002, arrested hundreds of believers, and held them without trial.[39] The government regularly jails—and sometimes tortures—political opponents, and forces children into military service.[40] If children try to escape conscription, they may be killed or their family members may be tortured.[41]

Negusie was eighteen years old when soldiers surrounded a movie theater in Eritrea and forced him into labor.[42] He worked for a month in a salt mine before being pressed into military service.[43] He served as a

---

34. *Negusie*, 129 S. Ct. at 1168.

35. This Comment does not consider whether, as a general matter, the Roberts Court has displayed judicial modesty in the body of its work. For a discussion of that broader topic, see Roger Pilon, *Foreword: The Roberts Court Emerges: Restrained or Active?* to ROGER PILON & MARK MOLLER, CATO: SUPREME COURT REVIEW: 2006–2007, at vii (2007); Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251 (2008); David J. Garrow, Response, *The Three Rs: Rosen, Roberts, and Restraint*, 47 WASHBURN L.J. 13 (2007); Douglas W. Kmiec, *Overview of the Term: The Rule of Law & Roberts's Revolution of Restraint*, 34 PEPP. L. REV. 495 (2007); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law,* 82 TUL. L. REV. 1533 (2008); Mark Tushnet, *The First (and Last?) Term of the Roberts Court*, 42 TULSA L. REV. 495 (2007).

36. Country Profile: Ethiopia, BBC NEWS, Apr. 15, 2009, http://news.bbc.co.uk/2/hi/africa/country_profiles/1072164.stm (last visited June 26, 2009).

37. CIA, The World Factbook, Ethiopia, https://www.cia.gov/library/publications/the-world-factbook/geos/et.html (last visited June 26, 2009).

38. AMNESTY INT'L, ERITREA–AMNESTY INTERNATIONAL REPORT 2008, at 1 (2008), *available at* http://www.amnesty.org/en/region/Eritrea/report-2008.

39. *Id.*; *see also* AMNESTY INT'L, ERITREA: RELIGIOUS PERSECUTION 15–17 (2005), *available at* http://www.amnesty.org/en/library/asset/AFR64/013/2005/en/62b61e58-d499-11dd-8a23-d58a49c0d652/afr640132005en.pdf. In 2002, Eritrea officially recognized the Orthodox, Catholic, and Lutheran churches, as well as Islam. About half of the country is Orthodox Christian, and about 48% is Islamic. Profile: Eritrea, U.S. Department of State, April 2009, http://www.state.gov/r/pa/ei/bgn/2854.htm (last visited June 26, 2009).

40. AMNESTY INT'L, ERITREA: RELIGIOUS PERSECUTION, *supra* note 39, at 16.

41. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR 2006, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: AFRICA: ERITREA (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78733.htm.

42. Initial Brief of Appellant-Petitioner, *supra* note 1, at 13.

43. *Id.* at 14.

gunner on a boat patrolling the Red Sea, but said he never fired on anyone during his tour.[44] When the war between Eritrea and Ethiopia erupted again, Negusie refused to fight.[45] Negusie's captors placed him in solitary confinement for six months, and then forced him into hard labor for a year and a half.[46] When Negusie converted to Protestant Christianity in prison, he said he was punished for two weeks.[47] For talking to fellow Christians in the prison, guards beat him and forced him to roll on the ground in the hot sun.[48]

In 2001, nearly seven years after he was first taken, Negusie's captors told him to serve as a prison guard.[49] If he refused, they would kill him.[50] By accepting the post, Negusie arguably moved in the eyes of American law from victim to accomplice. As a guard, he carried a gun.[51] He was posted at the prison's gate to prevent prisoners from leaving.[52] He also kept prisoners from showering and getting fresh air.[53] Negusie saw at least one person die after being left for two hours in intense heat without water.[54] He stood by and did nothing.[55]

Although a guard, Negusie was also a prisoner.[56] Negusie carried a gun, but he was not allowed to leave the prison.[57] When he disobeyed orders, Negusie was punished.[58] Negusie also tried to help prisoners when he could. At night, he let inmates take showers in secret.[59] He smuggled food, water, and cigarettes to prisoners from time to time.[60]

Despite Negusie's aid to prisoners and his own prisoner status, the Fifth Circuit held that even Negusie's limited participation in persecution prevented him from receiving political asylum in the United States.[61] Under federal law, it did not matter that Negusie may have been forced into persecuting others. In reaching this conclusion, the

---

44. *Id.*

45. *Id.* Negusie, who was born in the Ethiopian capital of Addis Ababa and whose mother is Ethiopian, refused to fight against Ethiopia because he said he considered Ethiopians his "brothers." *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 14–15.

50. *Id.*

51. Negusie v. Holder, 129 S. Ct. 1159, 1162 (2009).

52. *Id.*

53. *Negusie*, 129 S. Ct. at 1162–63.

54. *Id.* at 1163.

55. Oral Decision of the Immigration Judge, *supra* note 12, at 6; *see also Negusie*, 129 S. Ct. at 1163.

56. Initial Brief of Appellant-Petitioner, *supra* note 1, at 15.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Negusie v. Gonzales, 231 F. App'x 325, 326 (5th Cir. 2007).

Fifth Circuit relied first on its own interpretation in *Bah v. Ashcroft*[62] that "the syntax of the statute suggests that the alien's personal motivation is not relevant."[63] The court reasoned that if Congress had wanted to make the alien's motivation an issue, it could have drafted the law to reflect this goal.[64]

The Fifth Circuit, similar to other circuits that have interpreted the persecutor bar,[65] also based its decision on the Supreme Court's holding in *Fedorenko v. United States*.[66] In *Fedorenko*, the Court found no mens rea requirement in the Displaced Persons Act's (DPA) persecutor bar.[67] Because the Court found no intent requirement in the DPA, other circuits reasoned that the persecutor bar for political asylum claims likewise did not require intent.[68]

Fedorenko involved a Nazi guard who had worked at the infamous Treblinka concentration camp and applied after the war for U.S. citizenship under the DPA.[69] Congress passed the DPA in 1948 to allow European refugees to emigrate to the United States, but excluded any person who "'assisted the enemy in persecuting civil[ians]' or . . . 'voluntarily assisted the enemy forces . . . in their operations. . . .'"[70] Fedorenko lied on his visa application,[71] and when

62. 341 F.3d 348 (5th Cir. 2003).

63. Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003). *Bah* reflects the type of horrific cases that U.S. Immigration & Custom Enforcement evaluates. Amadu Bah lived in Koidu, Sierra Leone, when the Revolutionary United Front (RUF) captured his family, incinerated his father, raped and killed his sister, and then threatened to kill Bah if he refused to join the RUF. *Id.* at 349. As an RUF member, Bah was ordered to shoot female prisoners and used a machete to chop off the hands, legs, and heads of civilians. *Id.* at 350. When he refused, soldiers poured palm oil on his back and placed him on his back to burn him. *Id.* He escaped by stealing the British passport of a tourist in Sierra Leone's capital, and used it to fly through the United Kingdom to Houston, Texas, where he applied for political asylum. *Id* at 349–50.

64. *Id.*

65. Several circuit courts of appeals split on whether the persecutor bar permitted the government to consider an applicant's intent. The Fifth and Second Circuits held that the law did not allow the government to consider intent. *See id.* at 351; Xie v. Immigration & Naturalization Serv., 434 F.3d 136, 142–43 (2d Cir. 2006). The Eighth Circuit disagreed. Hernandez v. Reno, 258 F.3d 806, 814–15 (8th Cir. 2001). The First and Ninth Circuits, while not directly addressing the issue, suggested that the persecutor bar contemplated a person's moral culpability. Castañeda-Castillo v. Gonzales, 488 F.3d 17, 22 (1st Cir. 2007); Vukmirovic v. Ashcroft, 362 F.3d 1247, 1251–53 (9th Cir. 2004).

66. *See* Negusie v. Gonzales, 231 F. App'x 325, 326 (5th Cir. 2007) (citing Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981)).

67. *Fedorenko*, 449 U.S. at 512.

68. *See Xie*, 434 F.3d at 141 ("[I]nasmuch as the INA and the DPA were enacted for similar purposes—to enable refugees to find sanctuary in the United States in the wake of World War II—we find it unlikely that the phrase 'assisted in persecution' implicitly includes a voluntariness requirement in one statute but not the other."). Note that the persecutor bar in the 1980 Refugee Act amended the Immigration and Nationality Act (INA) discussed in *Xie*. *See Negusie*, 129 S. Ct. at 1162.

69. *Fedorenko*, 449 U.S. at 494–98.

70. *Id.* at 495 (citation omitted).

the government discovered his true identity, Fedorenko argued that the Nazis had forced him to serve as a concentration camp guard.[72] Because Congress had included the word "voluntary" in one part of the DPA, the *Fedorenko* Court reasoned that the absence of the word "voluntary" in another subpart of the DPA meant that Congress wanted to exclude all persons who persecuted others—whether they were coerced to do so or not.[73] "'We are not at liberty to imply a condition which is opposed to the explicit term of the statute,'" the Court wrote.[74] "'To [so] hold . . . is not to construe the Act but to amend it.'"[75]

In *Negusie*, the Court wrote that the Fifth Circuit, four other circuit courts, and the BIA made a mistake by relying on *Fedorenko*.[76] *Fedorenko* interpreted the World War II-era DPA, passed in 1948 to deal with "the Holocaust and its horror."[77] The Refugee Act of 1980, which governed Negusie's political asylum claims, came from a different era. Congress passed the Refugee Act to implement immigration policy broadly,[78] particularly after the Indochina "boat people" refugee crisis and the resettlement of thousands of Soviet Jews at the end of the Cold War.[79]

Moreover, the Refugee Act did not contain the same textual structure so critical to the interpretation of the DPA in *Fedorenko*. In the DPA, Congress included "voluntary" in one part of the statute, but not in another subpart.[80] This absence arguably demonstrated Congress' intent. By contrast, Congress did not use "voluntary" in any subpart of the 1980 Refugee Act, "so its omission cannot carry the same significance," Justice Kennedy wrote for the Court.[81] These two

---

71. *Id.* at 496, 509.

72. *Id.* at 500–01.

73. *Id.* at 512–14 ("The plain language of the Act mandates precisely the literal interpretation that the District Court rejected: an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa.").

74. *Id.* at 513 (quoting Detroit Trust Co. v. Barlum S.S. Co., 293 U.S. 21, 38 (1934)).

75. *Id.*

76. Negusie v. Holder, 129 S. Ct. 1159, 1164 (2009).

77. *Id.* at 1165–66.

78. *Id.*

79. *See* Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 145–46 (1981).

80. The government pointed out, however, that the INA contains other provisions that mention voluntariness. For example, the law does not bar a person who was an "involuntary" member of a totalitarian party from admission to the United States. Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 7, Negusie v. Holder, 129 S. Ct. 1159 (2009) (No. 07-499) (citing 8 U.S.C.A. § 1182(a)(3)(D)(ii) (West 2009); 8 U.S.C. § 1424(d) (2006)). Negusie's attorneys countered that the provisions cited by the government do not deal with persecution or asylum, and were passed in 1952, twenty-eight years before Congress inserted the 1980 persecutor bar. Initial Brief of Appellant-Petitioner, *supra* note 1, at 45 & n.13. Thus, the existence of voluntariness in an earlier, different part of the statute does not show anything about Congress' intent in 1980. *Id.* at 45 n.13.

81. *Negusie*, 129 S. Ct. at 1165.

differences show why "*Fedorenko*, which addressed a different statute enacted for a different purpose, does not control the BIA's interpretation of this persecutor bar" in *Negusie*.[82]

By casting aside the importance of *Fedorenko*, the Court in *Negusie* decided that the persecutor bar did not *prohibit* the government from considering an applicant's culpability in persecuting others.[83] But Negusie wanted the Court to take its decision one step further—and declare that the statute *required* the government to consider culpability.[84] Instead,[85] the Court asked the executive branch to interpret the law first.[86]

In doing so, the Court argued that the interpretation of the law rested primarily in the agency's, rather than the Court's, hands.[87] Under the *Chevron* doctrine, courts engage in a two-step analysis of the law. First, courts ask whether Congress created a gap that it intended agencies to fill. Second, courts ask if the agency's interpretation of the gap is reasonable. If so, courts will defer to an agency's interpretation.[88] The Court gives particular deference to immigration officials, who "'exercise especially sensitive political functions that implicate questions of foreign relations.'"[89]

On one hand, the Court's choice to remand the case to the BIA—a board appointed by the Attorney General to act as his agent—raises profound questions about our system of separation of powers.[90] If the

---

82. *Id.* at 1166.

83. *Id.*

84. Initial Brief of Appellant-Petitioner, *supra* note 1, at 32.

85. Justice Antonin Scalia made it clear that the BIA could interpret the statute in the exact same way it had in Negusie's case if it offered an independent, reasoned explanation based on agency expertise and policy judgment for its interpretation. *Negusie*, 129 S. Ct. at 1170 (Scalia, J., concurring). Scalia wrote:

> [I] do not endorse any particular rule. It is to agency officials, not to the Members of this Court, that Congress has given discretion to choose among permissible interpretations of the statute. They deserve to be told clearly whether we are serious about allowing them to exercise that discretion, or are rather firing a warning shot across the bow.

Id.

86. *Id.* at 1168.

87. *Id.* (citing Immigration & Naturalization Serv. v. Orlando Ventura, 537 U.S. 12, 16–17 (2002)).

88. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984). For a discussion of the *Chevron* doctrine in the immigration context, see Jeffrey A. Bekiares, Note, *In Country, On Parole, Out of Luck—Regulating Away Alien Eligibility for Adjustment of Status Contrary to Congressional Intent and Sound Immigration Policy*, 58 FLA. L. REV. 713, 721–24 (2006).

89. *Negusie*, 129 S. Ct. at 1163–64 (quoting Immigration & Naturalization Serv. v. Abudu, 485 U.S. 94, 100 (1988); *see also* Bekiares, *supra* note 88, at 721.

90. *Negusie* also highlights the important role oral argument plays in the Court's decision-

Constitution in Article III gives courts the power to interpret the law, courts arguably should not pass this power to the administrative state, with its entrenched bureaucracy and capture by special interest.[91] The Constitution gives the federal judiciary independence and life-tenure[92] precisely so that judges can interpret the law without political interference.

In dissent, Justice John Paul Stevens, the author of the *Chevron* doctrine,[93] sharply criticized the Court's transfer of power to the executive branch.[94] He wrote that the Court had distorted the balance struck in *Chevron*[95]—*Chevron* only instructed courts to defer to the executive branch when agencies implement policy pursuant to Congressional authorization. *Chevron* did not give agencies the power to replace the federal courts. "Courts are expert at statutory construction, while agencies are expert at statutory implementation," Stevens wrote.[96] "That the distinction can be subtle does not lessen its importance."[97]

While Justice Stevens' distinction appears sound in the abstract, the broad language of the persecutor bar folds interpretation and implementation into one step. To give the word "persecute" a moral dimension, a court must define what type of conduct transforms the persecuted into a persecutor. Any test the court might create could

---

making process. Justice Anthony Kennedy, author of the Court's opinion, forecast his thinking by asking Negusie's attorney the first question of the argument about *Chevron* deference. Transcript of Oral Argument at 4, Negusie v. Holder, 129 S. Ct. 1159 (2009) (No. 07-499). In his opinion, Justice Kennedy then seized on the concession in oral argument by Negusie's attorney that the BIA could construe a duress defense broadly or narrowly. *Negusie*, 129 S. Ct. at 1164. For a discussion of the role of oral argument in decision-making, see Stephen A. Higginson, *Constitutional Advocacy Explains Constitutional Outcomes*, 60 FLA. L. REV. 857, 858 (2008), and David A. Karp, Note, *Why Justice Thomas Should Speak at Oral Argument*, 61 FLA. L. REV. 611 (2009).

91. For a discussion of these questions, see Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 550–51 (1985); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 307–08 (1988); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17 (1989); Cass R. Sunstein, *Deregulation and the Courts*, 5 J. POL'Y ANALYSIS & MGMT. 517, 517 (1986).

92. U.S. CONST. art. III, § 1.

93. *Chevron*, 467 U.S. at 842–43.

94. *Negusie*, 129 S. Ct. at 1171 (Stevens, J., concurring in part, dissenting in part). Of course, the BIA, to which the Attorney General delegates authority, had already interpreted the statute. But the Court found the BIA's interpretation invalid because the BIA mechanically—and incorrectly—relied on *Fedorenko* as dictating its interpretation. *Id.* "An agency's assertion that it is compelled to adopt a particular interpretation by the statutory text or by judicial precedents is not reasoned decisionmaking." Initial Brief of Appellant-Petitioner, *supra* note 1, at 47 (citing FCC v. RCA Commc'ns, Inc., 346 U.S. 86, 96 (1953); SEC v. Chenery Corp., 318 U.S. 80, 89–90 (1943)).

95. *Negusie*, 129 S. Ct. at 1171.

96. *Id.*

97. *Id.*

hardly capture the range of moral judgments officials must make in evaluating a political asylum claim. This line drawing between willing behavior and forced cruelty becomes especially trying when captors force their victims to switch sides and torture others.

Consider the agonizing cases coming before immigration courts in the executive branch. One case weighed the political asylum claim of a child soldier from Uganda, forced into military training at the age of fifteen.[98] Rebel soldiers "forced [the boy] to kill his friend, to watch the murder of his parents, and to view the mutilation of innocent civilians."[99] In Ethiopia, a thirteen-year-old boy was given a choice: serve as a soldier on the Ethiopian front or face abuse in prison, where jailers hung the boy upside down, burnt him, beat him on the soles of his feet, and deprived him of food and water.[100] Scores of asylum applications come from countries such as Burma, Columbia, El Salvador, Guatemala, Iraq, Peru, Somalia, and the Sudan, where militia groups are known to force children into military service. [101]

In ordinary cases, courts look to agencies to first interpret ambiguous statutes based on agency expertise. "The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides."[102] The agency's expertise becomes especially useful in cases such as Negusie's, where an agency gains insight from evaluating hundreds of asylum claims from around the world. With this experience, the agency can better balance foreign policy, humanitarian concerns, and this nation's unwillingness to provide refuge to persecutors.

By sending the case back to the Justice Department, the Court retained its role under *Chevron* to review the executive branch's interpretation and implementation of the persecutor bar. Yet the Court also strengthened its legitimacy by showing restraint in this case.[103] The Court's role as an independent and unelected branch becomes most valuable when the Court reviews laws that protect a politically powerless minority. But the Court's place in the constitutional order

98. Lukwago v. Ashcroft, 329 F.3d 157, 164–65, 168–170 (3d Cir. 2003).

99. *Id.* at 170.

100. Brief of Human Rights First et al. as Amici Curiae Supporting Petitioner, Negusie v. Holder, at 11–15, 129 S. Ct. 1159 (2009) (No. 07-499).

101. Initial Brief of Appellant-Petitioner at 9–11, Negusie v. Holder, 129 S. Ct. 1159 (2009) (No. 07-499).

102. Immigration & Naturalization Serv. v. Orlando Ventura, 537 U.S. 12, 17 (2002).

103. For an article illustrating the courts' failure to clearly interpret another provision of immigration law, see Natalie Liem, Note, *Mean What You Say, Say What You Mean: Defining the Aggravated Felony Deportation Grounds to Target More Than Aggravated Felons*, 59 FLA. L. REV. 1071, 1084–87 (2007).

does not carry the same force in certain areas, such as immigration and foreign policy, where the politically accountable branches have more expertise and flexibility to implement the people's will. The Court wisely placed Negusie's case in the hands the Justice Department, which should now devise a humane policy to deal with this daunting moral dilemma.