Who Decides?
Overview of *Chevron*, *Brand X* and *Mead* Principles

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A brief overview of principles governing deference to an agency may be useful to practitioners new to this area. In immigration law, the immigration judge and the BIA may resolve almost all issues presented in an immigration case, and DHS and the AG will address many issues in regulation or other policy rulings. The question is whether a federal court reviewing these rulings on appeal has the right to simply substitute its own view as to what is the correct interpretation of the INA, or whether it must to some extent defer to the agency's interpretation.

Chevron. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) *("Chevron")* addresses when a federal court must defer to an agency's interpretation of the statute it administers. There are two steps in the *Chevron* analysis. At Step One the court asks whether, using the regular rules of statutory construction, the "plain language of the statute" will answer the question at issue. If so, the court will interpret the statute without deferring to the agency, and the inquiry ends. However, if the statutory language is ambiguous, or leaves a gap for the agency to fill in, the court will proceed to Step Two.

In Step Two the court asks whether the agency's construction of the statute is reasonable enough to be permissible. If it is, the court will defer to the agency's interpretation, even if the court believes it is not the best possible one.[2] "Permissible" is a low standard, and getting to Step Two of the *Chevron* analysis traditionally has meant that the party opposing the agency is

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[2] See *Chevron*, 467 U.S. at 842-44.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
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> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

about to lose. However, in light of some extreme positions that the Board is taking, for example regarding crimes involving moral turpitude, it is possible that Step Two challenges may become more viable. See, for example, dissent by Judge Berzon in *Marmolejos-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc).

Mead. The *Chevron* test is applied in the first place only if Congress delegated interpretive authority to the agency with respect to the provision in question, and the agency has made an appropriate formal ruling with a "lawmaking pretense." *United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001) *("Mead")*; see also *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Mead* can be referred to as "*Chevron* Step Zero," a test that must be passed before even getting to the two-step *Chevron* analysis. For example, courts have held that they need not defer, and the *Chevron* two-step test does not come into play when:

- The agency did not make a formal rule (e.g. an unpublished BIA case[3]; a published case with a holding that is too vague[4] or is a mere "guideline"[5]). When the agency does not invoke its rulemaking authority sufficiently to merit *Chevron* deference, for example in an unpublished decision, a lower form of deference under *Skidmore, supra,* still may apply, in which deference is accorded commensurate with the merits of the agency opinion.[6]

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[3] See, e.g., *Uppal v. Holder,* 605 F.3d 712, 715 (9th Cir. 2010); *Saavedra-Figueroa v. Holder,* 625 F.3d 621, 627 (9th Cir. 2010).

[4] The Ninth Circuit previously declined to defer to the BIA's definition of a crime involving moral turpitude, on the ground that it was so vague as to not amount to a ruling. See, e.g., *Plasencia-Ayala v. Mukasey,* 516 F.3d 738, 744-45 (9th Cir. 2008) and *Nicanor-Romero,* 523 F.3d 992, 997 (9th Cir. 2008). However, the court *en banc* reversed this position recently, by deferring not the BIA's generic definition but to its application of the definition in cases. See *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*), partially overruling the above cases.

[5] The Ninth Circuit en banc refused to defer to *Matter of Rodriguez-Rodriguez,* 22 I&N Dec. 991 (BIA 1999) as providing a generic definition of the aggravated felony "sexual abuse of a minor," in part because there the BIA only set out a guide, and not an actual definition. See discussion in *Estrada-Espinoza v. Mukasey,* 546 F.3d 1147, 1157-1158 (9th Cir. 2008) (en banc):

> According Chevron deference to Rodriguez-Rodriguez would be inappropriate because the BIA did not construe the statute and provide a uniform definition in the decision. Rather, it developed an advisory guideline for future case-by-case interpretation. The Supreme Court has instructed that "[i]nterpretations such as those in opinion letters--like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law--do not warrant Chevron-style deference." Christensen v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000). Although Rodriguez-Rodriguez has the force of decisional law, its "guide" for ascertaining the meaning of "sexual abuse of a minor" suffers from the same imprecision that internal agency guidelines possess. As the Seventh Circuit has noted, when the BIA "hasn't done anything to particularize the meaning" of a term, "giving Chevron deference to its determination of that meaning has no practical significance." Mei v. Ashcroft, 393 F.3d 737, 739 (7th Cir. 2004).
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> This wisdom is particularly apt when courts are engaged in a Taylor analysis of a prior conviction. The underlying theory of Taylor is that a national definition of the elements of a crime is required so as to permit uniform application of federal law in determining the federal effect of prior convictions. Taylor, 495 U.S. at 590. A Taylor analysis requires a comparison between the prior conviction and the nationally-established generic elements of the offense at issue. Without defined elements, a comparison of the state statute with the federally-defined generic offense is not possible….

[6] See, e.g., discussion in *Marmolejo-Campos v. Holder,* 558 F.3d 903, 909 (9th Cir. 2009) (en banc).

> Nevertheless, Skidmore deference remains "intact and applicable" when an agency with rulemaking power interprets its governing statute without invoking such authority. Mead, 533 U.S. at 237 (discussing

- The agency reversed established prior policy with very inadequate, or no, explanation of why it was doing so,[7] or has answered the question in an erratic manner over time.[8]

- The agency does not administer the provision (e.g., the BIA doesn't administer federal or state criminal statutes,[9] and does not administer certain provisions in the INA, with the obvious examples of judicial review provisions or the immigration-related federal crimes listed there[10], or citizenship statutes[11]).

- The Ninth Circuit found that *Chevron* deference is not merited on the issue of the retroactive application of a statute, either by statutory effective date or under a reliance theory.[12]

> Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944)). Under Skidmore, the measure of deference afforded to the agency varies "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. Recognizing that the BIA's interpretations of the INA are entitled to at least this much respect, we have applied Skidmore when reviewing its unpublished orders. See, e.g., Ortiz-Magana v. Mukasey, 523 F.3d 1042, 1050 (9th Cir. 2008); Estrada-Rodriguez v. Mukasey, 512 F.3d 517, 520 (9th Cir. 2007); Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1113 (9th Cir. 2007); Garcia-Quintero, 455 F.3d at 1014.

[7] See, e.g., language cited i*nfra* from *FCC v. Fox Television Stations*, 120 S.Ct. 1800, 1811 (2009); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 914 (9th Cir. 2009).

[8] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 and n. 30 (U.S. 1987). The Supreme Court has commented on this several times.

> Moreover, when an agency does change its mind, it must provide an adequately reasoned explanation for the change. "Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion," and therefore unworthy of deference. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996) (internal quotation marks and citations omitted); see also Brand X, 545 U.S. at 1000 ("[T]he Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change."); Rust v. Sullivan, 500 U.S. 173, 186-87, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (deferring to the Secretary of Health and Human Services' interpretation, because "the Secretary amply justified his change of interpretation with a 'reasoned analysis'"). To satisfy this requirement, the agency must provide not only a reasoned explanation for its current position, but also a reasoned explanation for why the change was warranted or why the new position is preferable.

Judge Berzon dissent, *Marmolejo-Campos v. Holder*, *supra* at 920.

[9] See, e.g. majority opinion, *Marmolejo-Campos*, *supra* at 907-908. **"**First, the BIA must determine what offense the petitioner has been convicted of committing. This requires the agency to interpret the statute under which the petitioner was convicted and, in certain cases, to examine the record of conviction. ….. It is well established that we give no deference to the BIA's answer to the first question. The BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes and, thus, has no special administrative competence to interpret the petitioner's statute of conviction. As a consequence, we review the BIA's finding regarding the specific act for which the petitioner was convicted de novo. See Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1017 (9th Cir. 2005); Goldeshtein v. INS, 8 F.3d 645, 647 n.4 (9th Cir. 1993)."

[10] See, e.g., alien smuggling, INA § 274, 8 USC 1324; illegal re-entry following removal, INA § 275, 8 USC § 1375.

[11] See *Hughes v. Ashcroft*, 255 F.3d 752, 758 (9th Cir. 2001) (stating that no *Chevron* deference is owed to the agency's interpretation of citizenship provisions because under INA § 242(b)(5) only the federal courts determine nationality claims where there is an order of removal).

[12] See discussion in *Ledezma-Galicia v. Holder,* -- F.3d --, at *6, 2010 WL 5174979 (9th Cir. December 22, 2010), amending opinion at 599 F.3d 1055 (9th Cir. 2010), citing *INS v. St. Cyr,* 533 U.S. 289, 320, n. 45 (2001).

- Emerging arguments: Advocates argue that the BIA is not delegated the authority to interpret the many criminal terms in the aggravated felony definition, because it lacks sole jurisdiction over defining those terms, and is not delegated to define any criminal law terms in the INA because it lacks any special expertise in criminal law compared to federal courts.

Regarding the last two points, advocates argue that the BIA is not owed deference in its definition of terms in the aggravated felony definition at INA § 101(a)(43), 8 USC § 1101(a)(43), because both the BIA and federal courts apply this section, in immigration proceedings and federal criminal cases respectively.[13] There is a presumption against competing definitions of the same term, and furthermore the BIA's lack of exclusive jurisdiction over a provision is a signal that Congress did not delegate authority to the agency. Advocates argue that the BIA does not deserve deference in its generic definition of any criminal term in the INA, because it has no special expertise in defining criminal law terms. For further discussion of these and related points, see the amicus briefs filed in *Estrada-Espinoza v. Gonzales*, and other resources, at www.ilrc.org/criminal.php. The Ninth Circuit has not yet made an *en banc* ruling as to whether it owes deference to the BIA's generic definition of an aggravated felony term, or of any criminal term other than "crime involving moral turpitude."[14] See discussion of *Marmolejo-Campos v. Holder, infra.*

Brand X. In *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (*"Brand X"*) the Supreme Court held that where *Chevron* deference was owed to the agency on an issue, but a federal court published an opinion on the issue before the agency did, the court must defer to the agency's subsequent published interpretation and as needed must reverse its own prior precedent in order to conform to the agency's rule. See, e.g., discussion of *Gonzales v. Department of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007) in *Matter of Ramirez-Vargas*, 24 I&N Dec. 599, 600-601 (BIA 2008).

This means that counsel cannot absolutely count on Ninth Circuit or other federal court immigration precedent, unless the court has stated, or will state, that it does not owe the agency *Chevron* deference on the question at issue. Otherwise, the court someday may have to reverse itself under *Brand X* in order to conform to a new agency precedent decision. Counsel who are trying to determine whether a federal court published decision may be subject to a future *Brand X* challenge by an agency, should check to see what standard the court identified as guiding its holding. For example, if the Ninth Circuit states that the plain language of the statute resolves

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[13] In federal criminal proceedings, a prior conviction of an aggravated felony is a basis for a sentence enhancement for the crime of illegal re-entry. See 8 USC §1326(b)(2) (INA § 276(b)(2)). In addition, several phrases in the aggravated felony list are used in other federal criminal contexts, e.g. burglary, theft. See further discussion in *Defending Immigrants in the Ninth Circuit*, § 2.11 and Chapter 9.

[14] Panels have ruled in both directions. See discussion in *Defending Immigrants in the Ninth Circuit*, § 2.11. Recently a Ninth Circuit panel held that it must defer to the BIA's generic definition of the aggravated felony term "obstruction of justice." *Renteria-Morales v. Mukasey*, 551 F.3d 1076, 1086-87 (9th Cir. 2008), *withdrawing* 532 F.3d 949 (9th Cir. 2008). The Third Circuit criticized this opinion and held that deference to the BIA's definition of a criminal term is not appropriate. *Denis v. AG of the United States*, 633 F.3d 201, __ at n. 2 (3d Cir. 2011).

the issue (so that it may stop at *Chevron* Step One), or that it will not get to the *Chevron* approach because the subject matter is not appropriate, the court's decision is not subject to being reversed someday based upon agency publication of a conflicting rule. (Of course the circuit acting *en banc*, or the Supreme Court, might overrule the federal case someday, either on the substance or on the court's ruling that it did not owe deference to the agency). Conversely, if in the Court's statement describing standards of review of the case, the court acknowledges that *Chevron* deference is owed or, had there been an appropriate agency opinion, would have been owed in the case, the decision is vulnerable to a subsequent agency determination and reversal under *Brand X*. However, the court makes the call as to whether it must defer.

Courts decide whether to defer. Courts do not defer to an administrative agency's view of whether the agency decision is owed deference.[15] The agency cannot force the court to change its position under *Brand X*, unless the court agrees that such deference is due.

[15] See, e.g., *Chevron*, 467 U.S. at 849, n. 9, cited in *Cardoza-Fonseca*, 480 U.S. at 447-48. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Citing cases.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."