Article

Gorsuch's Appointment Could Affect the Deference Given to the USPTO Under *Chevron* and *Auer*

By Nick Guinn

On April 7, 2017, the United States Senate confirmed Judge Neil Gorsuch to the Supreme Court. Gorsuch is known for his positions on administrative law and, more specifically, his opposition to the *Chevron* doctrine. As practitioners before the USPTO, our reliance on regulatory interpretation could be impacted.

What is the *Chevron* Doctrine?

The *Chevron* doctrine requires courts to, under certain conditions, defer to a federal agency's reasonable interpretation of a statute it is charged with administering. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The similar *Auer* doctrine applies when agencies interpret their own regulations. *Auer v. Robbins*, 519 U.S. 452 (1997). (Given their similarity, I refer to both doctrines collectively as "the *Chevron* doctrine.")

Chevron U.S.A. considered an EPA decision to allow states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble." The EPA decision was based on the EPA's construction of "stationary source" as used in the Clean Air Act. The Court held the EPA's definition of the term "source" was a permissible construction of the statute.

The Court also set forth a test for determining whether to grant deference to a government agency's interpretation of a statute that it administers. First, the agency must give effect to the unambiguously expressed intent of Congress. But if Congress has not directly addressed the precise question at issue, a court does not simply impose its own construction on the statute. Rather, the court should defer to the agency's construction unless it is unreasonable. *Chevron U.S.A.*, 467 U.S. at 842–43.

The *Chevron* doctrine has also been considered in the trademark context. In *Humanoids Group v. Rogan*, 375 F.3d 301 (4th Cir. 2004), the court upheld a USPTO interpretation of a regulation defining minimum requirements for granting a filing date to a trademark application. In *Eastman Kodak Co. v. Bell & Howell Document Mgt. Prods. Co.*, 994 F.2d 1569, 1571–72 (Fed. Cir. 1993), the court upheld the TTAB's implied creation of a presumption that favors applicants for a numerical marks intended for use as more than model designators.

Gorsuch on *Chevron*

Judge Gorsuch is skeptical of the administrative deference afforded under *Chevron*. In *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), for example, he authored a concurring opinion highly critical of *Chevron*:

> There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.
>
> * * *
>
> [R]ather than completing the task expressly assigned to us, rather than "interpret[ing] . . . statutory provisions," declaring what the law is, and overturning inconsistent agency action, *Chevron* step two tells us we must allow an executive agency to resolve the meaning of any ambiguous statutory provision. In this way, *Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty. Of course, some role remains for judges even under *Chevron*. At *Chevron* step one, judges decide whether the statute is "ambiguous," and at step two they decide whether the agency's view is "reasonable." But where in all this does a court interpret the law and say what it is? When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct.
>
> * * *
>
> *Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive). Add to this the fact that today many administrative agencies "wield[ ] vast power" and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report), and you have a pretty potent mix.

Why Should We Care?

The *Chevron* doctrine implicates trademark and patent matters because the USPTO is an administrative agency that, under *Chevron*, may interpret ambiguous statutory and regulatory language. Moreover, IP clients might be impacted by other agencies' similar statutory and regulatory interpretations (e.g., Secretary of the Treasury regulating the importation of gray-market goods).

It seems likely Justice Gorsuch will not endorse further application of *Chevron*. If the Court reconsiders *Chevron*, Justice Gorsuch would likely rely on *Chevron* being a procedural rule rather than a substantive one:

> Of course, we often retain even mistaken judicial decisions because reliance interests have arisen around them. But *Chevron* is a procedural rule, and procedural rules generally receive little precedential consideration when experience proves them problematic in their administration. No doubt this is because parties form reliance interests primarily around substantive rules of law that allocate property and define the limits of permitted behavior, while procedural rules merely govern how courts will go about their own business when deciding disputes many years later that parties often cannot foresee when arranging their affairs.

Gutierrez-Brizuela, 834 F.3d at 1157–58 (internal citation omitted).

Conclusion

IP practitioners routinely confront statutory and regulatory language—such as the Lanham Act and the Code of Federal Regulations. For any ambiguity in relevant statutes, the *Chevron* doctrine requires courts to defer to the USTPO for its interpretation of any ambiguous statutory or regulatory language. But if the Court has occasion to reconsider *Chevron*, one would expect Justice Gorsuch to spearhead the cause for negating the deference now given to administrative agencies in construing ambiguous statutory language.

Nick Guinn *is a registered patent attorney with Gunn, Lee & Cave, P.C. in San Antonio. He specializes in all aspects of intellectual property, with an emphasis on litigation, primarily patent, trademark and copyright infringement actions.*

This article expresses the view of the author and not necessarily that of the State Bar of Texas IP Law Section.