

Breyer Rushes To Chevron's Defense Amid Gorsuch Attacks

By **Jimmy Hoover**

Law360 (April 24, 2018, 7:23 PM EDT) -- When U.S. Supreme Court Justice Neil Gorsuch issued his latest broadside to the well-established doctrine of Chevron deference in *SAS v. Iancu* on Tuesday, Justice Stephen Breyer refused to let the affront go uncontested, writing that Chevron should be treated as a "rule of thumb" giving federal agencies leeway to interpret ambiguous laws.



Justice Stephen Breyer's dissent in the 5-4 patent case Tuesday represents the first time a sitting member of the court has responded to Justice Neil Gorsuch's repeated attacks on Chevron, one of the most heavily cited cases in modern U.S. Supreme Court history. (AP)

In *SAS*, Justice Gorsuch's **majority opinion** refused to invoke Chevron deference — which asks courts to defer to an agency's reasonable interpretation of ambiguous laws — as a basis for siding with the U.S. Patent and Trademark Office in a dispute over the inter partes review process established by the America Invents Act.

The USPTO argued it was entitled to Chevron deference over the Patent Trial and Appeal Board's practice of deciding the validity of only certain patent claims challenged by a petitioner. *SAS* Institute said that the AIA required the PTAB to rule on all challenged claims.

After rejecting the Chevron defense, Justice Gorsuch said that "whether Chevron should remain is a question we may leave for another day," a reference to his repeated criticisms of the 1984 ruling in *Chevron USA Inc. v. NRDC* that gave rise to the doctrine. Justice Gorsuch, whose views on Chevron helped land him a job at the Supreme Court, has argued that deferring to members of the executive branch on legal questions raises separation-of-powers issues.

Justice Breyer's dissent in the 5-4 patent case Tuesday represents the first time a sitting member of the court has responded to Justice Gorsuch's repeated attacks on Chevron, one of the most heavily cited cases in modern Supreme Court history. The dissent was joined by Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor and, partially, by Justice Elena Kagan, Breyer's reliable liberal colleagues.

Justice Breyer argued that the PTAB's practice of issuing partial decisions fell safely within Chevron's protection. "Under Chevron, 'where a statute leaves a 'gap' or is 'ambigu[ous],' we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature and purpose of the statute,'" Breyer said, invoking his recent decision in the patent case *Cuozzo Speed Technologies LLC v. Lee*.

Justice Breyer said that courts should not treat Chevron like "a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision."

"Rather," he said, "I understand Chevron as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have."

When confronted with one of these legislative gaps, Justice Breyer said, courts should ask what the "hypothetical reasonable legislator" would have done if "Congress considered the question of delegating gap-filling authority to the agency."

Justice Gorsuch offered a sharp reply to his older colleague in his majority opinion.

"[P]olicy considerations cannot create an ambiguity when the words on the page are clear. Neither may we defer to an agency official's preferences because we imagine some 'hypothetical reasonable legislator' would have favored that approach," Justice Gorsuch said. "Our duty is to give effect to the text that 535 actual legislators (plus one president) enacted into law."

Justice Kagan joined all of Justice Breyer's dissenting opinion except the portion referring to the "hypothetical reasonable legislator."

Tuesday's decision in *SAS Institute v. Iancu* is unlikely to be the last time the justices tangle with the Chevron decision. Indeed, in just one year on the court, Gorsuch has managed to take several shots at what he described while a judge on the Tenth Circuit as the "behemoth."

In a statement in a case involving regulations for digital highway billboards — which also originated in the D.C. Circuit — Justice Gorsuch suggested that courts shouldn't apply Chevron deference to a federal agency's view of an ambiguous contract.

Justice Gorsuch said the questions associated with applying it to contract disputes are "surely worthy of consideration" by the Supreme Court — a view also held by Chief Justice John Roberts Jr. and Justice Samuel Alito, who joined the statement.

More recently, Justice Gorsuch joined a dissent written by Justice Clarence Thomas — another Chevron deference foe — lambasting the Supreme Court for passing up a chance to get rid of the doctrine's judicial cousin, Auer deference, which tells courts to defer to an agency's reasonable interpretation of its own regulations.

Before Justice Breyer's dissent on Tuesday, Justice Gorsuch's criticism of the judicial doctrine prompted a reply from another prominent liberal judicial figure: retired Justice John Paul Stevens, who authored the Chevron opinion.

Justice Stevens, in an interview with Law360 in July 2017, said the suggestion of changing the standard "seems to me to suggest that the doctrine of stare decisis really doesn't have much future anymore." Stare decisis is a legal principle directing judges to adhere to precedent.

Justice Gorsuch's opinion in the *SAS Institute* case was his second of the day on Tuesday. He was also one of two dissenters in the blockbuster patent case *Oil States Energy Services LLC v. Greene's Energy Group LLC*. As with *SAS*, Justice Gorsuch **sided against the USPTO** and argued that the entire inter partes review process established by the AIA violated Article III's promise of independent judges to adjudicate property rights like patents.

"Enforcing Article III isn't about protecting judicial authority for its own sake," Justice Gorsuch said. "It's about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before. And the loss of the right to an independent judge is never a small thing."

--Editing by Pamela Wilkinson and Breda Lund.

