Impact of the Supreme Court's elimination of Chevron deference on PTAB practice

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AUGUST 19, 2024

"*Chevron* deference," a term dominating discussions of legal current events, refers to a doctrine in which judicial deference is given to administrative action particularly within the realm of an agency's expertise. It was coined after a landmark case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984). In the two-step analysis, a court first asks whether a statute is ambiguous, and if it is, whether the agency has engaged in authorized rulemaking based on a reasonable interpretation of the statute.

The U.S. Supreme Court's recent ruling in *Loper Bright Enterprises v. Raimondo* ended that 40-year-old precedent. Judges reviewing administrative regulations and actions will no longer defer to the expertise of agencies on how to best interpret ambiguous language in the statutes that govern their responsibilities.

The fear surrounding this ruling is that interested judges now have an easy path through which to expand their role into policymaking: interpreting arguably ambiguous statutes to their liking rather than deferring to an agency's expertise.

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Justice Elena Kagan wrote in her dissent, "In one fell swoop, the majority today gives itself exclusive power over every open issue — no matter how expertise-driven or policy-laden — involving the meaning of regulatory law." *Loper Bright*, 144 S. Ct. 2244, 2295 (June 28, 2024) (Kagan, J., dissenting). The dissent continued, "the majority turns itself into the country's administrative czar." *Id.*

The implications of *Chevron* deference are clear in areas like environmental protection and health care. For example, career scientists at the Environmental Protection Agency (i.e., scientists who are long-term employees not political appointees) were traditionally given deference in interpreting "safe" amounts of mercury in the soil surrounding elementary schools.

Likewise, courts deferred to clinicians and medical doctors at the Food and Drug Administration and Centers for Disease Control and Prevention in their decisions to approve, for example, a vaccine and recommend a vaccine schedule. Without that deference, some fear that judges might overturn official agency actions based on political agendas that conflict with scientific principles and data.

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The implications of *Chevron* deference in the area of patent law are far less straightforward, despite the Patent Office having a large number of implementing regulations in the Manual of Patent Examining Procedure and being uniquely situated at the forefront of scientific and technical advancement.

There are three main reasons why the elimination of *Chevron* deference is likely to have less impact on Patent Trial and Appeal Board (PTAB) practice compared with other areas of administrative law.

First, unlike other areas of administrative law, all appeals from decisions of the Patent Trial and Appeal Board go to the U.S. Court of Appeals for the Federal Circuit — a specialized court that has expertise in patent law and judges (and judicial clerks) with experience or education in science and technology. *See* 35 U.S.C. § 141(c). Accordingly, the stated fear of lay judges deciding specialized technical issues without regard to agency expertise does not necessarily apply to PTAB decisions with the same force.

A prime example is *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356 (Fed. Cir. 2016). In *Harmonic*, the Court applied Chevron deference to the Patent Office's interpretation of 35 U.S.C. § 316, which governs the institution of *inter partes* proceedings to review challenged patents.

The Federal Circuit found that the Patent Office possessed the authority to promulgate 37 C.F.R. § 42.108, which provides for the Board's decision to institute or deny all grounds presented in a petition for *inter partes* review. The Court agreed with the Patent Office's justification that the regulation's "convergence of issues for review streamlines the proceeding and aids" in the Patent Office's efficient operation based on its familiarity with the nature of PTAB trials. *Id.* at 1368.

Second, *Chevron* deference has previously played little role in PTAB jurisprudence throughout the history of the Board and the Federal Circuit. In the vast majority of cases, both the PTAB and the Federal Circuit have rejected arguments by parties that a statute is ambiguous — the first step of a *Chevron* analysis.

Examples from the Federal Circuit include *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321 (Fed. Cir. 2020) (finding 35 U.S.C. § 315(c) clear and unambiguous and affirming PTAB interpretation under *Chevron* step one); *Uniloc 2017 LLC v. Hulu, LLC*, 966 F.3d 1295 (Fed. Cir. 2020) (same for 35 U.S.C. § 311(b)); *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336 (Fed. Cir. 2018) (same); and *Power Integrations, Inc. v. Semiconductor Components Indus., LLC*, 926 F.3d 1306, 1318 (Fed. Cir. 2019) (refusing to give *Chevron* deference to "an agency regulation that merely parrots the statutory language").

Where the agency and reviewing court find that the statute is clear and unambiguous, there is nothing to which the court must defer.

Likewise examples of the Patent Office finding no need to invoke *Chevron* include *Gopro, Inc. v. 360heros, Inc.*, No. IPR2018-01754 (P.T.A.B. Aug. 23, 2019) (finding 35 U.S.C. § 315(b) plain and unambiguous); *Canfield Sci., Inc. v. Melanoscan, LLC*, No. IPR2017-02125 (P.T.A.B. Mar. 30, 2018) (finding the definition of "counterclaim" in 35 U.S.C. § 315(a)(3) unambiguous); *Joseph E. Louis Junior Party (Sauer Inc.) v. Sirius Xm Radio Inc. v. Fraunhofer-Gesellschaft zur Forderung der Angewandten Forschung E.V.*, No. IPR2018-00690 (P.T.A.B. July 23, 2020) (finding the prior art date of an international application is unambiguously the 371(c) date); *Comcast Cable Commc'ns, LLC v. Rovi Guides, Inc.*, No. IPR2019-01434 (P.T.A.B. Feb. 12, 2020) (finding 35 U.S.C. § 325(d) is unambiguous); *SolarEdge Techs. Ltd. v. SMA Solar Tech. AG*, No. IPR2020-00021 (P.T.A.B. Oct. 25, 2022) (finding 35 U.S.C. § 311(b) unambiguous).

Even where the Federal Circuit has nominally applied *Chevron* deference in an appeal from a PTAB post-grant proceeding, it has done so reluctantly and without broad consensus. In *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290 (Fed. Cir. 2017), for example, a fractured *en banc* panel addressed the PTO's allocation of burden regarding patentability of amended claims, interpreting 35 U.S.C. § 316(d) and § 316(e).

Five judges found the statute unambiguous, placing the burden of persuasion to prove unpatentability onto the petitioner, including for amended claims, without reaching *Chevron* step two. Six judges found the statute ambiguous, provided a step-two analysis, and arrived at the same outcome regarding the allocation of burden.

Third, the Supreme Court has already found that the America Invents Act gives the Patent Office certain rulemaking authority that Congress has not expressly granted to other agencies. The most notable application of *Chevron* deference to PTAB rulemaking involved the claim construction standard applicable in agency proceedings, addressed by the Supreme Court in *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261 (2016).

Cuozzo involved the interpretation of multiple different statutory provisions, with *Chevron* deference applied to the Board's interpretation of 35 U.S.C. § 316 in promulgating 37 C.F.R. § 42.100(b) (which, at the time, required using the "broadest reasonable construction" of challenged claims). Section 316 is silent on the claim-construction standard, and the Federal Circuit deferred to the agency's rule.

The Supreme Court unanimously agreed. The Court went on to confirm that "the statute allows the Patent Office to issue rules 'governing *inter partes* review,' § 316(a)(4), and the broadest reasonable construction regulation is a rule that governs inter partes review." *Id.* at 277. The Court even rejected the long-unresolved argument that the Patent Office's rulemaking authority is "limited to *procedural* rules." *Id.*

Even Justice Clarence Thomas, who had previously indicated his desire to overturn *Chevron* in *Michigan v. EPA*, 576 U.S. 743 (2015), noted in his concurrence in *Cuozzo* that "[t]he Court avoids [his] constitutional concerns today because the provision of the America Invents Act at issue contains an express and clear conferral of authority to the Patent Office to promulgate rules governing its own proceedings." *Id.* at 286 (Thomas, J., concurring).

The implication is, therefore, that even after *Chevron* deference was eliminated in *Loper Bright*, the Patent Office may still enjoy some deference ("*Cuozzo* deference" perhaps?) that other administrative agencies may not.

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This article was first published on Reuters Legal News and Westlaw Today on August 19, 2024.