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Justice Department Asks Court to Narrow Auer Deference

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In a just-filed brief, the Trump Administration asks Supreme Court to reduce the degree of deference government agencies receive.

Auer deference (also known as Seminole Rock deference) is one of the more controversial doctrines in adminsitrative law. This doctrine provides that where a federal regulation is ambiguous, the promulgating agency's interpretation of that regulation shoud receive "controlling weight." As articulated by Justice Scalia in Auer v. Robbins, this holds without regard for how or when the agenc articulated its interpretation, provided the reviewing court may be assured that the interpretation offered reflects the agency's official position.

Auer deference may sound like an unobjectionable way to resolve regulatory ambiguity. In practice, however, Auer deference enables agencies to evade a range of administrative law norms designed to ensure notice and accontability, and facilitates agency aggrandizement of their own authority. I review some of the problems with Auer in this brief symposium article, "Auer Evasions."

In recent years, several justices have expressed their discomfort with Auer, including Justice Scalia, who expressed regrets about the decision before his death. Next month, the Supreme Court will hear oral argument in Kisor v. Wilkie, in which the Court will expressly consider whether to overturn Auer. As you might expect, I think it should, for reasons explained in the above-cited article, this SCOTUSBlog essay, and my amicus brief with Michael McConnell, Richard Epstein, the Cato Institute, and Cause of Action.

Yesterday, the Solicitor General filed its brief in the case, defending the federal agency decision at issue in Kisor (the rejection of a veterans' disability benefit claim by the Department of Veterans' Affairs). While the brief defends the VA, it takes the surprising (yet very welcome) steps of acknowledging many of Auer's deficiencies and calling on the Court to narrow Auer deference. The primary reason the brief gives for not overturning Auer completely is stare decisis.

Here is an excerpt from the government's brief's argument summary:

The doctrine of judicial deference to agency interpretations of ambiguous regulations announced in Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), and applied in Auer v. Robbins, 519 U.S. 452 (1997), should be clarified and narrowed.

A. The doctrine raises significant concerns. First, its basis is unclear. It is not well grounded historically; this Court has not articulated a consistent rationale for it; and it is more difficult to

justify on the basis of implicit congressional intent than Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Second, Seminole Rock deference is in tension with the APA's distinction between legislative and interpretive rules. Interpretive rules, unlike legislative rules, do not carry the force and effect of law and are exempt from notice-and-comment procedures. When a reviewing court gives controlling weight to an interpretive rule under Seminole Rock, it arguably treats the interpretive rule as though it were a legislative rule. Seminole Rock deference can also cause practical hardship to regulated parties.

B. In light of these substantial concerns, the Court should impose and reinforce significant limits on Seminole Rock deference. Seminole Rock deference is inappropriate if, after applying all the traditional tools of construction, a reviewing court determines that the agency's interpretation is unreasonable—i.e., not within the range of reasonable readings left open by a genuine ambiguity in the regulation. A more searching application of that inquiry would obviate any occasion for Seminole Rock deference in many cases. And even when that rigorous predicate is met, a reviewing court should defer to the agency's interpretation only if the interpretation was issued with fair notice to regulated parties; is not inconsistent with the agency's prior views; rests on the agency's expertise; and represents the agency's considered view, as distinct from the views of mere field officials or other low-level employees.

As readers might suspect, I think Auer's problems justify its complete reversal, but it is nonetheless welcome to see the federal government acknowledge these problems and show a willingness to narrow a doctrine the inevitably works to the advantage of the government.