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Divided Supreme Court Cuts Back Doctrine of Judicial Auer Deference to Agency Interpretations of Its Own Ambiguous Rules

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On June 26, 2019, a divided Supreme Court in *Kisor v. Wilkie* issued one of its most important administrative law decisions in decades. The Supreme Court decided to uphold, but dramatically narrow, the doctrine of judicial deference to agency regulations, known as *Auer* deference, but at the same time unanimously found for petitioner James Kisor in overturning the Federal Circuit's affirmance of the Board of Veteran's Appeals decision to deny part of his claim for Vietnam War disability benefits. We discuss below the majority and minority opinions on *Auer* deference, the narrow unanimous holding of reversal, and the importance of this decision.

Majority Opinion Upholding *Auer* Deference

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, wrote the central ruling, and Chief Justice Roberts filed a concurring opinion. The majority opinion was based on *stare decisis* and upheld the principle that courts in certain instances are to defer to reasonable federal agency interpretations of their own ambiguous regulations. This deference doctrine is based on *Auer v. Robbins*, 519 U.S. 452 (1997) ("*Auer*") (holding agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation") and its predecessor *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410 (1945) ("Seminole Rock"), and is known simply as *Auer* deference. In this blog post, we will refer to this part of the opinion (Section III.A) as the "*Auer* Deference Opinion." While this part of the majority opinion technically upheld *Auer* and *Seminole Rock*, it substantially narrowed it in such a way that Justice Gorsuch, writing for the minority, characterized *Auer* as "maimed and enfeebled—in truth, zombified."

The judicial narrowing of *Auer* deference in *Kisor* comes through a series of gating principles or factors that must be applied before courts are to consider applying deference principles.

- First, courts must determine that the regulation in question is genuinely ambiguous by "exhausting all the 'traditional tools' of construction."
- Second, courts must determine that the interpretation is reasonable.

- Third, courts must evaluate "whether the character and context of the agency interpretation entitles it to controlling weight." The interpretation is entitled to controlling weight if:
    - It is the "authoritative" or "official position" of the agency that "emanate[s]" from "actors . . . understood to make authoritative policy in the relevant context";
    - The agency's interpretation implicates its substantive expertise; and
    - The agency's interpretation reflects "fair and considered judgment," meaning that (1) it is not a position adopted as a "convenient litigating position," and (2) it is not a new interpretation that would result in "unfair surprise" to regulated parties.

Justice Kagan provides the following summary of these gating factors:

"When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase 'when it applies' is important—because it often doesn't. As described above, this Court has cabined *Auer's* scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear."

Chief Justice Roberts cast the deciding vote with the liberal members of the Court upholding *Auer* deference and agreed with the majority's gating principles. He wrote, however, "to suggest that the distance between the majority and Justice Gorsuch is not as great as it may initially appear." Notably, he also made clear his view that the issue decided here is distinct from the form of deference found in *U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 ("Chevron") concerning deference to an agency's interpretation of a statute, and that "the Court's decision today [does not] touch upon" *Chevron* deference.

Dissenting *Auer* Deference Opinions

Justice Gorsuch wrote the lead dissenting opinion to the *Auer* Deference Opinion, joined by Justice Thomas; Justices Kavanaugh and Alito joined for various parts and concurred with the holding to remand, as further discussion below. Justice Gorsuch concluded that *Auer* should be overturned because its deference doctrine results in bias towards the government. *Auer* requires deference to the agency even when the agency's interpretation does not represent the "best and fairest reading." Gorsuch also criticized the majority's reliance on *stare decisis*, which is the judicial principle favoring past precedents. Fundamental to the minority opinion is that *Auer* deference provides "excuses for judges to abdicate their job of interpreting the law."

In support of his opinion, Justice Gorsuch argued that *Auer* deference doctrine is essentially a historical accident and a doctrine of uncertain scope and application and cited one of many law journal articles analyzing *Auer* deference. The minority criticized the Court in the *Auer* Deference Opinion for never squaring *Auer* with the principles of the Administrative Procedures Act (see, e.g. APA §706 which requires reviewing courts to "decide all relevant questions of law" and "set aside agency action . . . found to be . . . not in accordance with law"). In addition, the minority argued that *Auer* is incompatible with the Constitution because it requires courts to share judicial power with the Executive Branch rather than to retain judicial

power as assigned by Article III, § 1 of the Constitution. Finally, Justice Gorsuch strongly criticized (in a section not joined by Justice Alito) the majority for upholding *Auer* based on *stare decisis.* Justice Gorsuch argued that, unlike precedential decisions regarding a single statute or regulation, *stare decisis* here would result in *Auer's* interpretive methodology applying to every future dispute over the meaning of every regulation.

Justice Kavanaugh wrote a brief concurrence, joined in part by Justice Alito, noting that "if a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue," and therefore deference won't be required.

Unanimous Judgment for Reversal

The Court unanimously agreed that the court below should reconsider its decision. Justice Kagan reasoned that the Federal Circuit "jumped the gun" in upholding the Board of Veteran's Appeals' interpretation of the Veteran's Administration ("VA") regulation concerning "relevant" records. Ambiguity did not arise, the Court reasoned, simply because both parties insisted that the plain regulatory language supported their interpretation and neither struck the Federal Circuit as unreasonable. "Rather, the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning." The Federal Circuit also failed to consider whether Congress would intend that the VA's interpretation receive deference. The Court vacated and remanded for further proceedings.

Analysis

For years, conservative legal scholars have looked for ways to cut into what has become known as the "administrative state." High on the list has been efforts to repeal both *Auer* and *Chevron* deference. As we wrote here in 2015 in Developments in Judicial Deference of Administrative Agency Actions, Justices Scalia, Thomas and Alito wrote separate concurrences in Perez v. Mortgage Bankers Association ("Mortgage Banker") seeking to revisit *Seminole Rock* and Justice Scalia's own decision in *Auer*. Petitioner Kisor asked the court to do exactly that in this case.

The importance of *Kisor* can be seen in numerous *amicus* briefs and law review articles cited by both sides. All told, there were almost 40 *amicus* briefs filed, with most on behalf of Petitioner. Authors of the briefs included leading business and conservative legal groups as the Chamber of Commerce, Business Roundtable, Washington Legal Foundation, Center for Constitutional Jurisprudence, Cato Institute, several Republican-led states, and many organizations representing regulated industries, but surprisingly no health care organizations.

Justice Gorsuch bluntly squared the issue in his minority opinion to the *Auer* Deference Opinion: "In disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency's interpretation of its own regulations even where that interpretation doesn't represent the best or fairest reading." In the minority's view, the level of deference hostility goes as far as raising Constitutional Separation of Powers concerns, which was hardly discussed in the *Auer* Deference Opinion majority.

The formal upholding of *Auer* deference in many respects appears to be a pyrrhic victory as the majority has imposed numerous analytical gating principles that now must be applied before

courts grant deference to an agency. With so many of these principles subject to their own future judicial interpretations, the *Kisor* Court may have invited haphazard, inconsistent application. Putting aside the potential for wide-ranging application of "traditional tools" of statutory construction in the determination whether a regulation is "genuinely ambiguous," potentially ripe for varying interpretations is the stated factor of whether "[s]ome interpretive issues may fall more naturally into a judge's bailiwick" than into the area of the agency's expertise.

Another factor given by the Court may wind up bending historic principles is how to decide the legitimacy of an agency's change in position. Long-standing jurisprudence holds that an agency is free to change its official position as long as it reasonably explains its change. But *Kisor* casts a cloud. One of its gating principles is that a regulation may not create "unfair surprise" as when an agency changes its position, for example. In such situations, the Court suggests that deference is not warranted. This part of *Kisor* may lead to disappointment by conservatives, who are now in power and seeking to overturn years of "liberal" rulemaking related to environmental and health and safety laws and who face a judiciary skeptical of applying deference to changing agency interpretations.

Finally, we note that Chief Justice Roberts properly pointed out that *Auer* deference issues are very different than those involved in *Chevron* deference. *Chevron* requires courts to give deference to agency interpretations of charging statutes. As discussed in the majority *Auer* Deference Opinion, in which the Chief Justice joined, it is logical to defer to the authors of the regulation when a matter is subject to an agency's areas of expertise. But that same logic does not necessarily apply to an agency's regulation interpreting a statute. Likely for this reason, Chief Justice Roberts set an important marker that the majority's *Auer* deference decision does not "touch upon" Chevron deference. It appears that he may be inviting a similar challenge to *Chevron*, which has been one of the highest goals of the conservative legal movement in challenging the "administrative state."