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Supreme Court Upholds Agency-Deference Standard

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June 26, 2019

Shielding one of the most fundamental tenets of administrative law, the Supreme Court refused Wednesday to overhaul the standard by which courts defer to agency interpretations of their own ambiguous regulations.

Known as *Auer* deference, the core doctrine of administrative law says courts should defer to agencies' interpretations of their own ambiguous regulations so long as the interpretation was not "plainly erroneous or inconsistent."

Drawing its name from a 1997 decision, the deference has been the target of conservatives who say it presents separation-of-powers concerns and gives too much power to administrative agencies.

In a highly fractured opinion this morning, Chief Justice John Roberts sided with the liberal members of the Supreme Court to keep the standard in place.

"*Auer* deference retains an important role in construing agency regulations," Justice Elena Kagan wrote for the plurality. "But even as we uphold it, we reinforce its limits. Auer deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today. The deference doctrine we describe is potent in its place, but cabined in its scope. On remand, the Court of Appeals should decide whether it applies to the agency interpretation at issue."

Kagan cited the doctrine of *stare decisis*, under which the court is reluctant to overturn its past decisions, in upholding the deference. She said James Kisor, the veteran who asked the justices to toss out *Auer*, did not give them a good enough reason for doing so.

"Kisor fails at the first step: None of his arguments provide good reason to doubt *Auer* deference," Kagan wrote. "And even if that were not so, Kisor does not offer the kind of special justification needed to overrule *Auer*, and *Seminole Rock*, and all our many other decisions deferring to reasonable agency constructions of ambiguous rules."

Even with *Auer*, Kagan noted that courts still have a meaningful ability to review agency decisions. Kagan also pushed aside the claim that the deference incentivizes agencies to issue vague regulations, saying there is "no real evidence" that agencies behave in such a way.

Finally, Kagan noted the lower courts have wielded *Auer* deference "thousands of times," and that doing away with it would raise questions about the underlying regulations upheld in those cases.

While sparing the doctrine, Kagan spent nearly eight pages of her opinion discussing its limits, seeking to "restate, and somewhat expand on," the limits of the deference in an effort to "clear up some mixed messages we have sent."

"As we explain in this section, the possibility of deference can arise only if a regulation is genuinely ambiguous," Kagan wrote. "And when we use that term, we mean it — genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation."

Kagan also reiterated that courts should defer only when the regulation is the agency's "official position" and related to its area of expertise.

William Yeatman, a research fellow at the Cato Institute, said the limits Kagan outlined in the opinion are "significant" and follow a "middle road" suggested by the Trump administration in its briefs on the case. The factors Kagan discussed formalize the limits on the doctrine, making it more similar to how its more famous relative, *Chevron* deference, operates, Yeatman said.

"They have made moves in the past, in recent history, the court has, to limit *Auer* deference and this goes much farther in one fell swoop," Yeatman said in an interview.

Particularly key to limiting the deference, Yeatman said, will be Kagan's instruction that before deferring, courts should look to see if an agency has been consistent in its interpretation of the regulation at issue.

Justice Neil Gorsuch, a noted critic of the court's administrative deference doctrines, spent 42 pages excoriating Kagan's holding as keeping alive a "zombified" version of a deference doctrine that runs against the Constitution, the Administrative Procedure Act and good policy judgment.

"The court's failure to be done with *Auer*, and its decision to adorn *Auer* with so many new and ambiguous limitations, all but guarantees we will have to pass this way again," Gorsuch wrote. "When that day comes, I hope this court will find the nerve it lacks today and inter *Auer* at last."

To Gorsuch, the *Auer* doctrine gives judicial power to administrative agencies that sit within the executive branch, an arrangement that violates the separation of powers and makes it hard for people to understand the regulations that govern them.

"Maybe the powerful, well-heeled, popular, and connected can wheedle favorable outcomes from a system like that — but what about everyone else?" Gorsuch wrote. "They are left always a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion and without the chance for a fair hearing before a neutral judge. The rule of law begins to bleed into the rule of men."

He also said the deference upends the relationship between courts and administrative agencies that Congress set up in the APA.

The Trump appointee was hopeful, however, that Kagan's decision turned *Auer* "into a paper tiger," one "so riddled with holes that" courts will not often need to defer to agency interpretations that depart from what they see as the best reading of a regulation.

Kisor, the veteran who invited the court to overturn *Auer*, was represented by Paul Hughes, now with the Washington, D.C., firm McDermott Will & Emery. In a statement Wednesday, Hughes

said the decision will “significantly narrow agency authority,” while also giving his client another chance at litigating his benefits claim.

“This decision delivers a significant victory, not only for our client James Kisor, but also for regulated parties across industries,” Hughes said.

The Justice Department did not immediately return a request for comment on the decision.