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Legal Sidebar

Has Judicial Deference to Agency Regulatory Interpretations Reached Its Final *Auer*?

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On Wednesday, March 27, the Supreme Court is scheduled to hear arguments in *Kisor v. Wilkie*, in which the Court is asked to overturn one of the most significant and contentious doctrines in administrative law. That doctrine, first espoused by the Court nearly seventy-five years ago in *Bowles v. Seminole Rock & Sand Co.*, and later reaffirmed in *Auer v. Robbins*, generally instructs courts to defer to agencies' reasonable constructions of ambiguous regulatory language. The Court's decision to uphold, narrow, or end application of the *Auer* doctrine not only may have direct ramifications for agencies' approach to decision making, but also may signal whether the Court will reconsider an even more consequential administrative law doctrine—the *Chevron* doctrine—in the near future. This Sidebar provides a general overview of the *Auer* doctrine and the Supreme Court's consideration of *Kisor*, including the potential consequences of the Supreme Court's decision in that case.

The *Auer* Doctrine

The Supreme Court has established several doctrines by which courts may afford some level of deference to agency legal interpretations of the statutes they administer and regulations they promulgate. The most well-known deference regime—known as the *Chevron* doctrine—generally requires courts to defer to an agency's reasonable interpretation of an ambiguous statute it administers. The *Auer* doctrine, alternatively, applies when a court is reviewing an agency's interpretation of its own ambiguous *regulation*. In that event, *Auer* instructs courts to defer to the agency's interpretation "unless it is plainly erroneous or inconsistent with the regulation." While agency interpretations are generally afforded *Chevron* deference only if they are contained in a statement that has the force of law, such as a regulation promulgated following notice-and-comment proceedings, agency interpretations afforded *Auer* deference may be rendered in a broader range of documents, such as internal agency memoranda and legal briefs.

The Supreme Court has articulated several exceptions to *Auer*. For example, deference is unavailable when the regulation being interpreted "does little more than restate the terms of the statute" that the

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agency administers, or when the regulation is not in fact ambiguous. In *Christopher v. SmithKline Beecham Corp.*, the Supreme Court discussed other situations in which *Auer* deference is potentially unavailable. In that decision, the Court refused to accord *Auer* deference to the Secretary of Labor's interpretation of regulations promulgated under the Fair Labor Standards Act. After reiterating the foundational rule that deference is unavailable in the case of an interpretation that is "plainly erroneous or inconsistent with the regulation," the Court further explained that deference is inappropriate if "the agency's interpretation 'does not reflect [its] fair and considered judgment on the matter in question.'" Fair and considered judgment may be absent where the interpretation at issue is contrary to an earlier construction, or if the interpretation merely seems to represent a "'convenient litigating position'" or an after-the-fact defense of a prior agency decision.

Justifications and Criticism of *Auer*

While commentators have observed that the Supreme Court did not provide a clear rationale for the *Auer* doctrine when it was first announced in 1945, "several justifications have been proposed since." For example, the Court has supported according deference to an agency's regulatory interpretation where the regulation being interpreted is part of a complex administrative program requiring the application of program-specific expertise to administer. The Court has also explained that deference to an agency's regulatory interpretation is appropriate because an agency's authority to engage in such interpretive activities stems from Congress's delegation of lawmaking authority to the agency, and because the agency that issues a regulation is in the best position to uncover the intent underlying the regulation.

In recent years, many scholars and even some past and current Justices of the Supreme Court have raised several significant criticisms of *Auer*. Perhaps notably, Justice Scalia, who authored the Court's opinion in *Auer*, later became one of the doctrine's most passionate critics, claiming in a 2011 concurring opinion that he had "become increasingly doubtful of its validity." The doctrine has been criticized, for example, as violating constitutional principles. Some commentators have argued that granting an agency the power to both issue a binding rule and authoritatively interpret it "violate[s] a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands."

Many observers are also troubled by what they perceive as the poor incentives *Auer* promotes for agency rule drafters. *Auer*, some argue, "erects a powerful incentive for agencies to issue vague regulations" during the notice-and-comment process, "with the thought of creating the operative regulatory substance later through informal interpretations" such as so-called "interpretive rules" that generally need not undergo such formal procedures. For this reason, Justice Scalia argued that *Auer* "frustrates the notice and predictability purposes of rulemaking."

Another primary argument—also embraced by Justice Scalia—asserts that *Auer* violates the text of the Administrative Procedure Act (APA). In addition to generally imposing notice-and-comment requirements on agency rulemaking proceedings, the APA also prescribes the standards by which federal courts are to review agency actions—including regulations—that are subject to legal challenge. Section 706 of the APA provides that "the reviewing court shall . . . determine the meaning or applicability of the terms of an agency action." Opponents of *Auer* contend that this provision "contemplates that courts, not agencies, will authoritatively resolve ambiguities in . . . regulations."

Kisor v. Wilkie

In response to these criticisms, in *Kisor*, the Supreme Court has been asked to overrule *Auer*. James L. Kisor, a Vietnam veteran who had successfully sought the Department of Veterans Affairs' (VA's) reexamination of his previously denied claim for disability compensation, challenged the agency's denial of his request for retroactive benefits. Under a VA regulation, an individual whose claim is reconsidered is

potentially entitled to an award that is effective as of the date the VA received the original claim—December 1982 in Kisor's case—if the award is based on "relevant official service department records" which "had not been associated with the claims file" previously. The VA ultimately determined, however, that Kisor was not entitled to retroactive benefits because the new records he had submitted in 2006 were not "relevant" under the regulation, a determination that—as later characterized on appeal by the Federal Circuit—"was . . . based upon the proposition that. . . 'relevant' [under the governing regulation] means noncumulative and pertinent to the matter at issue in the case." On appeal to the Federal Circuit, however, Kisor offered a competing interpretation, arguing that records are "relevant" under the regulation if they merely have "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable." Faced with contending interpretations, the Federal Circuit determined that the term "relevant" was ambiguous and, deferring under *Auer*, affirmed the VA's decision.

Kisor sought Supreme Court review, arguing that the Court should overrule *Auer*. His arguments are similar to those frequently made by *Auer* critics mentioned above, including that the doctrine is irreconcilable with the APA and upsets the policies underling notice-and-comment rulemaking, as well as that it is incompatible with separation-of-powers principles. Instead of applying the deference commanded by *Auer*, Kisor argues that courts should evaluate regulatory interpretations based on their persuasiveness.

The U.S. Solicitor General (SG), who represents the VA before the Supreme Court, argues that *Auer* should not be overruled. The SG does, however, raise several criticisms of the doctrine in his brief and suggests its application should be circumscribed. For example, he asserts that *Auer* leads some courts to engage in cursory examinations of regulations. But he also recognizes that *Auer* is respectful of agency expertise and encourages legal uniformity, regulatory predictability, and accountability. The SG therefore argues that *Auer* should not be overruled, but that the Court should curtail its application in several respects. The SG's approach is twofold. First, he argues that before applying *Auer* to an agency's interpretation, courts should deploy "all 'the ordinary tools' of statutory and regulatory construction" to determine whether a regulation is actually ambiguous (and thus whether deference is potentially available). He also argues that only an interpretation that is truly reasonable should be entitled to deference. Second, the SG asks the Court to impose several limitations on *Auer*. He argues, for example, that *Auer* deference should not apply to interpretations that conflict with an agency's previous position, nor to those that are not the product of agency expertise.

Kisor's Potential Impact

The Court's decision in *Kisor* could have a significant effect on administrative agencies' approach to decision making. Some have suggested overruling *Auer* would make agencies more inclined to draft clear regulations, as those agencies' interpretations of ambiguous regulatory language would carry less weight in judicial challenges. In contrast, one administrative law scholar has suggested that eliminating *Auer* deference could encourage some agencies that place a premium on flexibility to issue fewer regulations. Instead, those agencies may elect to more heavily rely upon administrative adjudication—the case-by-case resolution of disputes that, depending on the specific adjudicative program, may resemble civil litigation in federal court. This outcome may not be appealing to many interested parties, as agency interpretations announced in adjudicative decisions on a case-by-case basis can afford less notice of agency-imposed obligations than regulations, which normally set forth requirements prospectively.

The parties in *Kisor* dispute the potential effects of overruling *Auer*. The SG argues, for example, that regulated entities have "ordered their affairs in reasonable reliance on" the doctrine and that overturning *Auer* would disturb such reliance interests. He also cautions that overturning *Auer* would jeopardize the continued existence or effectiveness of *Auer*'s principal benefits, such as the doctrine's respect for agency expertise. Kisor, however, disputes that *Auer* generates significant private reliance interests, arguing

instead that the doctrine creates instability. He maintains that regulated entities would experience no "mass disruption[s]" were the doctrine overturned.

Of course, even if the Court sides with Kisor, it may not necessarily overrule *Auer*. As discussed above, over the years, the Court has announced several exceptions to *Auer*, including the rule that deference under *Auer* is unavailable when it does not appear the interpretation reflects the agency's fair and considered judgment of the matter. It is possible that the Court could continue to chip away at *Auer*, as the SG supports, perhaps by clarifying existing exceptions or developing further limitations on *Auer*'s applicability.

The Court's decision in *Kisor* might also raise questions about the continued vitality of other deference regimes. Notably, Kisor's argument that deference to agency regulatory interpretations is incompatible with the procedural and substantive protections of the APA may prompt examination of the *Chevron* doctrine—arguably an even more consequential administrative law doctrine than *Auer*— especially given some Justices' (notably Justices Thomas and Gorsuch's) reservations about *Chevron* and the Court's recent narrowing of its application. That said, some commentators argue that the ruling in *Kisor* will not impact *Chevron* because *Auer* and *Chevron* rest on different legal foundations.

Several Members of the Court hold public views on *Auer*. Chief Justice Roberts and Justices Thomas and Alito have all written opinions expressing a possible willingness or desire to reconsider *Auer*, and Justice Gorsuch joined Justice Thomas's dissent from the denial of a petition for certiorari last year that asked the Court to overrule *Auer*. However, while Justice Kavanaugh once predicted favorably that the Court would one day overrule *Auer*, it is an open question whether the Court will do so in *Kisor*. Oral argument, scheduled for Wednesday, March 27, may ultimately provide insight into the direction the Court is likely to take in *Kisor*.