Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Kisor v. Wilkie: Supreme Court Upholds the *Auer* Doctrine but Clarifies Its Limitations

Daniel J. Sheffner
Legislative Attorney

July 3, 2019

On June 26, 2019, the Supreme Court decided *Kisor v. Wilkie*, declining the petitioner's request to overturn one of the most significant and contentious doctrines in administrative law. That doctrine, commonly called the *Auer* or *Seminole Rock* doctrine, generally instructs courts to defer to agencies' reasonable construction of ambiguous regulatory language. While the Court in *Kisor* declined to dispatch this deferential rule, it emphasized limitations to the doctrine's scope and application that may bear consequences for future courts' review of agency action and, perhaps, the manner in which agencies go about the decision-making process. This Sidebar provides an overview of the *Kisor* decision.

The Supreme Court has established several doctrines to guide judicial review of agency action. Perhaps the most well known is the *Chevron* doctrine, which generally instructs courts to defer to an agency's reasonable interpretation of an ambiguous statute it administers. *Auer* deference takes its name from the Supreme Court's 1997 decision in *Auer v. Robbins*, but has roots in the Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.* (and, according to some Members of the Court, may have even earlier antecedents). Subject to limitations, *Auer* generally instructs courts to defer to an agency's interpretation of ambiguous regulatory language "unless it is plainly erroneous or inconsistent with the regulation." While *Chevron* deference applies to agency interpretations of statutes, and generally then only when those interpretations are in agency statements that have the force of law (e.g., regulations promulgated following notice-and-comment), *Auer* deference has been applied to a range of non-binding agency memoranda and other materials that construe ambiguous regulatory language.

As discussed in an earlier Sidebar, even prior to the *Kisor* decision, the Supreme Court recognized circumstances when *Auer* deference was not appropriate. For example, deference is not owed when an agency interprets a regulation that simply restates the terms of the statute being administered. Nor is *Auer* deference warranted when the agency's interpretation is not a product of its "fair and considered judgment."

Congressional Research Service
7-5700
www.crs.gov
LSB10322

The *Kisor* case arose after the Department of Veterans Affairs (VA) denied the petitioner's request for retroactive disability compensation benefits because the agency determined that records petitioner submitted were not "relevant" as required by the governing regulation. On appeal to the U.S. Court of Appeals for the Federal Circuit, the court held that the term "relevant" was ambiguous and, applying *Auer* deference to the VA's interpretation, affirmed the VA's decision. The Supreme Court granted the petitioner's request for review to consider whether to overturn *Auer*.

While the Supreme Court unanimously agreed to vacate the Federal Circuit's decision and remand the case for further proceedings, the Justices fractured on whether to overrule *Auer*, with a bare majority voting to uphold it. Writing on behalf of five Members of the Court, Justice Kagan—joined by Chief Justice Roberts and Justices Breyer, Ginsburg, and Sotomayor—grounded the decision to uphold *Auer* on *stare decisis* principles. Those principles typically lead the Court to follow rules set forth in prior decisions unless there is a "special justification" or "strong grounds" for overruling that precedent. Justice Kagan concluded that the petitioner had not put forth sufficient justifications to abandon *Auer* deference in light of the extensive body of precedent, going back at least to *Seminole Rock*, which supported continued use of a doctrine that "pervades the whole corpus of administrative law." The *Kisor* majority also expressed concern that abandonment of *Auer* deference could result in litigants revisiting any of the myriad cases that applied the doctrine. And, the Court continued, "particularly 'special justifications,'" which had not been offered by the petitioner, were necessary to overturn a doctrine such as *Auer* that Congress has left undisturbed for so long, despite the Court's repeated assertions that the doctrine rests on a presumption "that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules."

Although the Court did not overrule *Auer*, it took "the opportunity to restate, and somewhat expand on" the doctrine's limitations. In so doing, the Court formulated a multi-step process for determining whether *Auer* deference should be afforded to an agency's interpretation of a regulation. *First*, a reviewing "court must exhaust all the 'traditional tools' of construction" before concluding that the regulation at issue "is genuinely ambiguous." *Second*, even if ambiguity exists, *Auer* will not apply unless the court determines that the regulatory interpretation is "reasonable"; that is, the interpretation is "within the zone of ambiguity" that the court uncovered through its exhaustion of the tools of construction. And *third*, even if a court determines the regulation is ambiguous and the agency's interpretation is reasonable, it must still independently assess "whether the character and context of the agency interpretation entitles it to controlling weight." Though the Court cautioned that this examination cannot be reduced "to any exhaustive test," the Court indicated *Auer* deference shall not extend to interpretations that (1) are not the official or authoritative position of the agency; (2) do not somehow implicate the agency's "substantive expertise," or (3) do not represent the agency's "fair and considered judgment."

Two portions of Justice Kagan's opinion that defended *Auer* on grounds other than *stare decisis* did not gain the support of a majority of the Court. Joined by Justices Breyer, Ginsburg, and Sotomayor, Justice Kagan argued that *Auer* deference follows from "a presumption that Congress would generally want [agencies] to play the primary role in resolving regulatory ambiguities." A presumption that Congress intended agencies themselves, rather than the courts, to take the leading role in clarifying the meaning of ambiguous regulatory language is justified on several grounds, including agencies' significant substantive expertise; the political accountability of agencies, which is based on their subordination to the President; and the view that the agency responsible for issuing a regulation is often best situated to determine the meaning of the regulations it promulgates. The four Justices also took issue with the petitioner's statutory, policy, and constitutional arguments for overruling *Auer*.

Justice Gorsuch concurred in the Court's judgment to vacate and send the case back to the court of appeals, but, joined in full by Justice Thomas and in substantial part by Justices Alito and Kavanaugh, disagreed with the majority's refusal to overrule *Auer*. Justice Gorsuch maintained that *Auer* deference forces judges "to subordinate their own views about what the law means to those of a political actor." He

argued instead that judges should employ the *Skidmore* doctrine when attempting to discern the meaning of an agency regulation. Under *Skidmore*, courts independently interpret the text of a regulation, but may accord non-binding weight to an administrative interpretation, consistent with "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."

Chief Justice Roberts, who provided the crucial fifth vote to uphold *Auer*, authored a partial concurrence contending that the "distance" between the controlling portion of Justice Kagan's opinion and the position put forth by Justice Gorsuch "is not as great as it may initially appear." Chief Justice Roberts noted that the requirements announced by the *Kisor* majority for according binding status on an agency's regulatory interpretation—that an interpretation must, among other things, be based on the agency's "authoritative, expertise-based, and fair and considered judgment"—is not so different from those factors that Justice Gorsuch believes may persuade a court to follow an interpretation—e.g, that the interpretation is based on the agency's thorough consideration of the question, supported by valid reasoning, and not in conflict with prior and later interpretations. Perhaps anticipating a future legal challenge to the continuing viability of the *Chevron* doctrine, the Chief Justice also wrote that the *Auer* and *Chevron* doctrines are analytically distinct. The Court's refusal to overrule *Auer*, the Chief Justice contended, has no bearing on issues associated with *Chevron*. The Chief Justice did not elaborate on the reasons he believed the doctrines are distinct. But the High Court has recognized that *Chevron* is based on a presumption that Congress sometimes intends agencies to fill gaps in ambiguous statutes they administer. Some commentators and Justices have argued that *Auer* is not premised on a similar presumption about legislative intent, and, notably, the Chief Justice did not join the portion of Justice Kagan's opinion that argued that *Auer* deference is based on such a presumption.

Justice Kavanaugh also filed an opinion concurring in the judgment. Like Justice Gorsuch, he argued that *Auer* should be overruled, but he also agreed with the Chief Justice that the *Kisor* majority and Justice Gorsuch's approaches may not be that far apart. Justice Kavanaugh contended that the *Kisor* majority's instruction that courts exhaust the traditional canons of construction before concluding that a regulation is ambiguous "will almost always [lead a court to] reach a conclusion about the best interpretation of the regulation at issue." Justice Kavanaugh also agreed with the Chief Justice that the majority's refusal to overturn *Auer* is not relevant to the issue of *Chevron*.

While the Court in *Kisor* upheld the *Auer* doctrine, the framework it elucidated for assessing whether deference is appropriate may provide further guidance, and, perhaps, constraints for lower courts tasked with determining whether to defer to an agency's regulatory interpretation. It remains to be seen how courts will apply *Kisor*'s reframing of *Auer* deference, including whether courts will be more hesitant to conclude that deference is warranted. It is also unclear whether *Kisor*'s elaborations on the limits of *Auer* deference will inform agency decision making. For instance, if an agency believes its interpretation of a regulation is unlikely to receive *Auer* deference, some contend the agency might devote more time to ensure regulatory texts are sufficiently precise to withstand greater judicial scrutiny. In any event, the Court in *Kisor* made clear that *Auer* deference is not constitutionally required, and Congress may opt to memorialize, abrogate, or modify application of the doctrine by statute. For example, Congress could amend the judicial review provision of the Administrative Procedure Act (APA) to explicitly provide that judicial review of agency interpretations of regulations shall be accorded no deference (i.e., "de novo") or instead be subject to some other standard. Congress could also potentially legislate on whether *Auer* deference or some other standard of judicial review should be applied to regulatory interpretations in particular statutes, instead of the generally applicable APA.