Supreme Court Keeps *Auer*, but Dilutes Its Power

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On June 26, 2019, in *Kisor v. Wilkie*, the Supreme Court of the United States declined to overrule its prior decisions in *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). These cases introduced the practice of judicial deference to a federal agency's interpretation of an ambiguous regulation. Many courts and scholars criticize *Auer* deference for various reasons and believed that the Supreme Court's decision in *Kisor* would overrule *Auer*. Instead, the Court upheld the longstanding precedent, but imposed new "guidance" on when to apply *Auer* deference.

**Background**

The litigation stemmed from a disability benefits case in which a Vietnam War veteran and the Department of Veterans Affairs (VA) fought over the meaning of the word "relevant" in a regulation that allowed the agency to grant retroactive benefits based on "relevant official service department records" not considered in an earlier denial of benefits. The veteran claimed new psychiatric reports were such "relevant" records, whereas the VA asserted they were not, arguing they were unrelated to the original denial of his claim in 1982. The administrative law judge (ALJ) presiding over the matter ruled in the VA's favor, and the Court of Appeals for Veterans Claims affirmed the ALJ's decision.

On appeal, the U.S. Court of Appeals for the Federal Circuit found the term "relevant" to be ambiguous, and invoking *Auer* deference, affirmed the decision to deny the veteran retroactive benefits. The Supreme Court agreed to hear the case on one issue: "Whether the Court should overrule *Auer* and *Seminole Rock*"

**Opinion of the Supreme Court**

Although the Supreme Court allowed *Auer* to live another day, the justices could not agree on its future. All nine members of the Court agreed that the Federal Circuit misapplied *Auer* and remanded the case for further proceedings. Five justices, in a majority opinion written by Justice Kagan, declined to overrule *Auer* on the grounds of *stare decisis*. Justices Ginsburg, Breyer, and Sotomayor joined her opinion in its entirety. Chief Justice Roberts joined most of Justice Kagan's opinion, but declined to join in her history section (which frankly reads like an ode to judicial deference) and the section specifically rejecting the veteran's arguments to overturn *Auer*. Justices Roberts, Gorsuch, and Kavanaugh each wrote separate concurring opinions, agreeing with the decision to remand, but criticizing the majority's decision to keep *Auer* on "life support"
Acknowledging that the Supreme Court has sent “mixed messages” in applying Auer without significant analysis of the underlying regulation, Justice Kagan’s opinion expends a great deal of energy telling us when Auer deference does not apply explaining that “it often doesn’t.”

Justice Kagan’s opinion then sets forth a clarification of the rare circumstances when Auer would apply:

1. First, the regulation must be “genuinely ambiguous.” (Emphasis added.)

   “[I]f there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense.”

   “And before concluding that a rule is genuinely ambiguous, a court must exhaust all the ‘traditional tools’ of construction. . . . That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read.”

   “[A] court must ‘carefully consider[]’ the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.”

2. If genuine ambiguity remains, the agency’s interpretation must be reasonable.

   “[I]t must come within the zone of ambiguity the court has identified after employing all its interpretive tools. (Note that serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.)”

   “Some courts have thought (perhaps because of Seminole Rock’s ‘plainly erroneous’ formulation) that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes. . . . But that is not so.”

3. Even if the agency’s interpretation is reasonable, it still may not receive Auer

   “[T]he regulatory interpretation must be one actually made by the agency. In other words, it must be the agency’s ‘authoritative’ or ‘official position,’ rather than any more ad hoc statement not reflecting the agency’s views.”

   “[T]he agency’s interpretation must in some way implicate its substantive expertise. . . . So the basis for deference ebbs when ‘[the subject matter of the dispute is] distant[] from the agency’s ordinary’ duties or ‘fall[es] within the scope of another agency’s authority.’”

4. The agency’s interpretation must reflect “fair and considered judgment.”

   “That means . . . that a court should decline to defer to a merely ‘convenient litigating position’ or ‘post hoc rationalization[ ] advanced’ to ‘defend past agency action against attack.’”

While spending a majority of the decision explaining what Auer is not, ultimately the majority held that stare decisis cuts strongly against overruling Auer. Even assuming Seminole Rock and Auer were “badly reasoned,” as the petitioner argued, “that is not the test for overturning precedent.”
Applying these principles to the Federal Circuit’s decision, the Supreme Court held that Auer deference was inapplicable and found two errors in the Federal Circuit’s analysis. First, it “jumped the gun in declaring the regulation ambiguous.” Instead, courts “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.” Second, it “assumed too fast that Auer deference should apply in the event of genuine ambiguity.” The correct analysis requires courts to “assess whether the interpretation is of the sort that Congress would want to receive deference.” That was not the case here. Since the Board’s decisions have “no precedential value,” its ruling did not “reflect[] the considered judgement of the agency as a whole.”

The Dissenting “Concurrences”

While Justice Gorsuch technically concurred in the outcome—namely, that the Federal Circuit misapplied Auer and that the Court remand the case, he and Justice Thomas, Justice Kavanaugh, and Justice Alito all stated that they believe Auer should have been overruled. Their “concurring” opinions read like dissents.

Calling it a “stay of execution,” Justice Gorsuch wrote:

> It should have been easy for the Court to say goodbye to Auer v. Robbins.[] … This rule creates a ‘systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else.’[] Nor is Auer’s biased rule the product of some congressional mandate we are powerless to correct: This Court invented it, almost by accident and without any meaningful effort to reconcile it with the Administrative Procedure Act or the Constitution. A legion of academics, lower court judges, and Members of this Court—even Auer’s author—has called on us to abandon Auer. … Instead, a majority retains Auer only because of stare decisis. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on Auer that THE CHIEF JUSTICE claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.

Chief Justice Roberts and Justice Kavanaugh, joined by Justice Alito, both wrote separate concurring opinions to suggest that “the distance between the majority and JUSTICE GORSUCH is not as great as it may initially appear.” If a reviewing court were to employ the traditional tools of construction that were outlined in the majority’s opinion, the court would almost always reach a conclusion about the best interpretation of the statute without having to adopt or defer to an agency’s contrary interpretation.

Key Takeaways

Although Justice Kagan and the majority caution that the Supreme Court may need a “special justification” to reverse Auer, the new limitations are ambiguous. The Kisor decision gives federal judges many justifications to decline to extend Auer deference to an agency interpretation of a regulation. But what’s the difference between ambiguous and genuinely ambiguous? What are the benchmarks for an “authoritative” or “official position?” Does an agency letter of interpretation count? Must such “positions” appear in the Federal Register? Our take: not necessarily, but it helps.) Four justices are ready to kill Auer deference, and four wish to save it. Chief Justice Roberts stepped in the middle to save the doctrine, and attempted to limit its application to rare circumstances. With fuzzy guidance, however, many courts are
likely to apply Auer in either an inconsistent manner, or worse, a manner contrary to Kisor. Justice Gorsuch’s prediction will likely come true; we will see Auer deference pay another visit to the Supreme Court sometime in the future.

Chief Justice Roberts also strongly signaled that while he voted to save Auer for now, he holds no such sentiment for Chevron deference, Auer’s better-known cousin. “Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress,” he wrote. “I do not regard the Court’s decision today to touch upon the latter question.”