Kisor v. Wilkie Makes *Auer* a Paper Tiger

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Other Views:

• Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy, Kisor*, and the Formation and Future of Administrative Law*, 133 Harv. L. Rev. 164, 187 (2019), https://harvardlawreview.org/wp-content/uploads/2019/11/164-199_Online.pdf.

• Ronald A. Cass, *Deference to Agency Rule Interpretations: Problems of Expanding Constitutionally Questionable Authority in the Administrative State*, 19 Federalist Soc'y Rev. 54 (2018), https://fedsoc.org/commentary/publications/deference-to-agency-rule-interpretations-problems-of-expanding-constitutionally-questionable-authority-in-the-administrative-state.

• Eric S. Schmitt, *Symposium:* Kisor v. Wilkie*--A Swing and a Miss*, SCOTUSBlog, Jun. 27, 2019, https://www.scotusblog.com/2019/06/symposium-kisor-v-wilkie-a-swing-and-a-miss/.

• Ronald Levin, *Symposium:* Auer *deference — Supreme Court chooses evolution, not revolution*, SCOTUSBlog, Jun. 27, 2019, https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution/.

• Dan Walters, *Symposium: Laying bare the realpolitik of administrative deconstruction*, SCOTUSBlog, Jun. 27, 2019, https://www.scotusblog.com/2019/06/symposium-laying-bare-the-realpolitik-of-administrative-deconstruction/.

Over the last several terms, the Supreme Court has been increasingly skeptical of the ever-growing administrative state.[1] Consequently, advocates have been asking the Court to reconsider judicial doctrines that they believe have aided in that growth.[2]

I. The Supreme Court Limits *Auer* in *Kisor v. Wilkie*

Last term, in *Kisor v. Wilkie*, the Supreme Court considered one such judicially-created doctrine—*Auer* deference. *Auer* deference is named after *Auer v. Robbins*[3] and sometimes referred to as *Seminole Rock* deference after *Bowles v. Seminole Rock and Sand Co*.[4]A judge applying *Auer* defers to a federal agency's interpretation of its own regulation.[5] Previously, such deference was required unless the agency's interpretation was plainly erroneous or inconsistent with the statute. But the Supreme Court's decision in *Kisor v. Wilkie* on June 26, 2019 cabined *Auer* deference without expressly overruling it. Justice Gorsuch concurred in the decision, but he called it "a stay of execution" for the now "zombified" doctrine.[6]

In 1982, James Kisor filed a claim for disability benefits with the Veterans Administration (VA) asserting he suffered from post-traumatic stress disorder (PTSD) as a result of his service in Vietnam. In 1983, the VA denied his claim for disability benefits. In 2006, Mr. Kisor sought to have his denial of disability benefits reconsidered under a regulation that provides that "if VA receives or associates with the claims file *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim."[7] Mr. Kisor provided records of his service in Operation Harvest Moon, in which 13 of his fellow soldiers were killed and he experienced significant mortar rounds and sniper fire. The VA ultimately granted disability relief under a different provision, which allows a veteran to ask that his claim be "reopened."[8] As a result, benefits would only flow starting in 2006, when Mr. Kisor asked that his claim be reconsidered. The Board of Veterans' Appeals denied his request for "reconsideration" under (c)(1), which, if granted, would have

1 *See* King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015); Michigan v. E.P.A., 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J. concurring).

2 *See, e.g.* Petition for Certiorari, Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, No. 18A1352 (June 21, 2019); Petition for Certiorari, California Sea Urchin Commission v. Combs, No. 17-1636 (June 4, 2018) (*cert. denied* Oct. 29, 2018); Petition for Certiorari, United Parcel Service, Inc. v. Postal Regulatory Commission , No. 18-853 (Jan. 4, 2019) (*cert. denied* May 20, 2019).

3 519 U.S. 452 (1997).

4 325 U.S. 410 (1945).

5 *Auer*, 519 U.S. at 457-58.

6 Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019).

7 38 C.F.R. Sec. 3.156(c)(1) (emphasis added).

8 38 C.F.R. 3.156(a).

allowed benefits to flow starting in 1983. The denial was based on a determination that the combat records were not "relevant" under (c)(1)'s process for a reconsideration of the denied claim because the materials didn't establish PTSD as a current disability and, as a result, would not have changed the result at the time. According to the VA, records had to be "outcome determinative" to be found relevant under (c)(1).[9] Kisor argued that a record should be deemed relevant if it has "any tendency to make the termination of the action more [or less] probable."[10]

The Federal Circuit agreed with the VA. It acknowledged that the term "relevant" was ambiguous in the regulations and applied *Auer* deference. It quoted *Auer* saying that "[a]n agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted."[11] Deferring to the VA's interpretation, it held that Mr. Kisor's benefits should be calculated under the less generous "reopened" provision.

The Supreme Court vacated the decision below. In an opinion authored by Justice Elena Kagan, the Court upheld *Auer* deference, but not before seriously circumscribing its applicability. Justice Kagan argued that reflexive application of *Auer* deference is a "caricature of the doctrine."[12] Before accepting an agency's interpretation of a regulation, a court must perform its own independent analysis and exercise the courts' traditional "reviewing and restraining functions."[13] A court must exhaust all of its traditional tools of construction before concluding that a rule is ambiguous. Even if reading an administrative rule makes "the eyes glaze over," a court should not "wave the ambiguity flag" until it has thoroughly analyzed the regulation.[14] In other words, courts may no longer rubber stamp an agency's interpretation of its regulation and cite to *Auer*.

Even if an administrative rule is "genuinely ambiguous," the agency's interpretation of that rule must still be "reasonable."[15] Rebuffing *Seminole Rock's* "plainly erroneous" formulation, Justice Kagan cabined the reasonableness inquiry by focusing on three important markers.[16] First, Justice Kagan noted that the regulatory interpretation must be the agency's "authoritative" or "official position."[17] An off-hand comment by an agency employee or an informal memo is not enough to state an agency's interpretation of a regulation.

More importantly, the agency's interpretation must reflect its area of substantive expertise. If the presumption justifying *Auer* deference is that Congress delegates its lawmaking authority to an agency because of its administrative knowledge and expertise, then it makes no sense to defer to an agency's interpretation of a topic outside of that scope.[18] Although the majority opinion did not weigh in on the specific interpretation at issue in *Kisor*, it noted that certain provisions may be better interpreted by a judge, such as the meaning of a common law property term or a question of the award of attorney's fees.[19] An evidentiary issue might very well be more in a judge's wheelhouse than that of an administrative agency.

Finally, an agency's interpretation is rarely reasonable if it is inconsistent. A post hoc interpretation that serves as a "convenient litigating position" does not warrant *Auer* deference.[20] A court may not defer to an agency's interpretation that creates "unfair surprise" or upsets settled reliance interests.[21] For example, imposing retroactive liability for longstanding conduct that had never before been addressed by the agency does not warrant *Auer* deference.[22]

II. Concurring Opinions Focus on the Limits of *Auer* Deference

Justice Gorsuch concurred in the decision, but he would have jettisoned *Auer* entirely. He thought the majority's new limitations left *Auer* deference on "life support," and that the Court would have to resolve remaining issues at a later date.[23] Tracing the history of *Auer* deference back to its roots in *Seminole Rock*, Justice Gorsuch opined that the doctrine was never intended to be more than dicta.[24] The "controlling weight" discussion in *Seminole Rock* was not central to the holding in that case, yet increasingly the Supreme Court and lower courts "mechanically applied and reflexively treated" that dicta.[25]

Justice Gorsuch argued that courts faced with cases that turn on the interpretations of regulations should be applying the Administrative Procedure Act (APA), not "writing on a blank slate or exercising some common-law-making power."[26] And the APA's directives are clear. Section 706 of the APA directs courts to "decide all relevant questions of law" and "set aside agency action . . . found to be . . . not in accordance with law."[27] Further, courts must "determine the meaning" of any "agency action."[28] Thus courts must decide for themselves the best meaning of a disputed

9 Kisor v. Shulkin, 869 F.3d 1360, 1364 (Fed. Cir. 2017), cert. granted in part sub nom. Kisor v. Wilkie, 139 S. Ct. 657 (2018), and vacated and remanded sub nom. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

10 *Id.* at 1366.

11 *Id.* at 1367.

12 *Kisor*, 139 S. Ct. at 2415.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at 2416.

17 *Id.*

18 *Id.* at 2417.

19 *Id.*

20 *Id.*

21 *Id.* at 2418.

22 *Id.*

23 *Id.* at 2425.

24 *Id.* at 2428-29.

25 *Id.* at 2429.

26 *Id.* at 2432.

27 5 U.S.C. § 706.

28 *Id.*; *see* 5 U.S.C. 551(13) (defining "agency action").

regulation.[29] A court deferring to an agency's interpretation "is abdicating the duty Congress assigned to it in the APA."[30]

Moreover, Justice Gorsuch opined that *Auer* allows agencies to sidestep the notice-and-comment procedures promulgated under Section 553 of the APA.[31] Section 553 requires agencies to follow notice-and-comment procedures when adopting or amending regulations that carry the force of law.[32] On the other hand, "an agency can announce an interpretation of an existing substantive regulation without advance warning and in pretty much whatever form it chooses."[33] Under *Auer*, a court must treat an agency's "mere interpretations" as "controlling."[34] The end result is that *Auer* "obliterates a distinction Congress thought vital and supplies agencies with a shortcut around the APA's required procedures for issuing and amending substantive rules that bind the public with the full force and effect of law."[35] Unable to square *Auer* deference with the text of the APA, Justice Gorsuch concluded that *Auer* was wrongly decided, and that there is no reason to uphold it because of stare decisis.[36]

Moreover, Justice Gorsuch voiced his concern that *Auer* deference is at odds with the Constitution's separation of powers to the extent that it prevents judges from exercising their duty under Article III.[37] Judges should be able to independently analyze a regulation, with the agency's interpretation providing persuasive, but not controlling, weight so long as the agency offers a valid rationale for a consistent interpretation within its area of expertise.[38]

Both Chief Justice John Roberts and Justice Kavanaugh wrote separate concurrences that emphasized a similar point: there is not much distance between Justice Kagan and Justice Gorsuch's opinions. Chief Justice Roberts noted that the majority's prerequisites for applying *Auer* deference are very similar to Justice Gorsuch's list of reasons a court might find an agency's interpretation influential.[39] Justice Kavanaugh wrote to emphasize that the practical result of either the majority approach or Justice Gorsuch's approach is likely to be similar, if not the same.[40] While formally rejecting *Auer* would have been more direct, both approaches require a judge to appropriately scrutinize a regulation by employing the traditional tools of construction, which will "almost always" lead to the best interpretation of the issue, negating the need to defer to an agency's interpretation at all.[41]

III. A Philosophical Split on the Role of Stare Decisis

The opinions reveal a split in judicial philosophies about the role of stare decisis, "the special care [the Justices] take to preserve [thei]r precedents" but that "is not an inexorable command."[42] Five of the Justices—Justices Kagan, Ginsburg, Breyer, and Sotomayor in the controlling opinion and Chief Justice Roberts in his concurrence—agreed that stare decisis weighed against overturning *Auer*. Overruling *Auer*, Justice Kagan reasoned, would mean overturning "dozens of cases" the Supreme Court has decided, as well as "thousands" of lower court decisions.[43] Overturning *Auer* would upset many settled constructions of rules, particularly in the context of administrative law. These Justices also seemed to be wary of opening the floodgates for fresh challenges to settled administrative rules; Justice Kagan quoted the Solicitor General's assessment at oral argument that every ruling based on *Seminole Rock* would need to be relitigated.[44] Moreover, Justice Kagan reasoned, Congress could step in at any time to amend the APA, lessening the need for the Supreme Court to act as a final backstop and overrule *Auer*.[45]

Justices Gorsuch, Thomas, and Kavanaugh did not share the majority's concerns regarding stare decisis.[46] Rather, they pointed to the explosive growth of the administrative state as a reason for *not* following stare decisis. Justice Gorsuch contended that *Auer* has not generated serious reliance interests because an agency's expectation of *Auer* deference as an entitlement is not a legitimate interest when weighed against "the countervailing interest of all citizens in having their constitutional rights fully protected."[47] Instead, the number of cases decided under *Auer* only magnifies the harm that could be corrected by overturning *Auer*. While reliance interests have long been a factor the Court considers in its stare decisis analysis, Justice Gorsuch indicated that not all interests should carry the same weight. Rather, interests closer to the core of the Constitution, such as "the interests of citizens in a fair hearing before an independent judge," are more important than "the convenience of government officials."[48] Justice Gorsuch also noted that the majority's imposition of new limitations on *Auer* would lead to many settled decisions being relitigated anyways.[49]

29 *Kisor*, 139 S. Ct. at 2432.

30 *Id.*

31 *Id.* at 2434; 5 U.S.C. § 553.

32 5 U.S.C. § 553.

33 *Kisor*, 139 S. Ct. 2400 at 2434.

34 *Id.*

35 *Id.*

36 *Id.* at 2444-45.

37 *Id.* at 2437.

38 *Id.* at 2447.

39 *Id.* at 2424-25.

40 *Id.* at 2448.

41 *Id.*

42 *Id.* at 2418 (Kagan, J.); *Id.* at 2445 (Gorsuch, J., concurring).

43 *Id.* at 2422.

44 *Id.*

45 *Id.* at 2422-23.

46 Justice Alito expressed no opinion on the role of stare decisis in this case.

47 *Id.* at 2447.

48 *Id.*

49 *Id.*

IV. Early Post-*Kisor* Decisions Show Lower Courts Are Cutting Back on *Auer* Deference

Lower courts have begun applying the new *Kisor* standard in a variety of contexts. For instance, the Ninth Circuit considered a dispute between the Secretary of Labor and OSHA over conflicting interpretations of respirator use regulations.[50] The Ninth Circuit sided with the secretary, concluding that the regulation at issue was unambiguous and refusing to defer to OSHA's interpretations under *Auer*.[51] The same court considered Amazon's challenge to the IRS's interpretation of its regulations that resulted in reallocating income from a European subsidiary back to the U.S., finding that the IRS had incorrectly characterized Amazon's European assets and refusing to accord *Auer* deference.[52]

In at least one high-profile case, a court has struck down an agency's interpretation using the factors outlined in *Kisor*. In *Romero v. Barr*, the Fourth Circuit considered whether the U.S. Attorney General's interpretation of the Immigration and Nationality Act warranted *Auer* deference.[53] In 2018, the Attorney General issued a decision determining that immigration judges and the Board of Immigration Appeals do not have authority under existing regulations to administratively close an immigration proceeding.[54] Applying the recently announced factors from *Kisor*, the Fourth Circuit held that the Attorney General's interpretation failed at every step and therefore did not merit *Auer* deference. First, the court, applying traditional tools of interpretation, concluded that the regulations at issue "unambiguously provide [immigration judges] and the [Board of Immigration Appeals] with the general authority to administratively close cases."[55] Even if the regulation were somehow ambiguous, the Attorney General's reading would still not warrant deference because it amounts to "unfair surprise"—the new interpretation "breaks with decades of the agency's use and acceptance of administrative closure" and does not give "fair warning" to the regulated parties.[56] After going through the *Kisor* factors, the Fourth Circuit finally noted that the Attorney General's reading was not persuasive under Justice Gorsuch's test either because it "comes too late in the game."[57]

V. Next Stop—*Chevron* Deference?

Finally, the *Kisor* decision serves as a preview to a much-anticipated showdown over *Auer's* big brother, *Chevron*. For at least two decades, there has been a fierce debate within the administrative law bar about whether the *Chevron* doctrine has outlived its usefulness.[58] The doctrine is named after *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, in which the Supreme Court said that when a statute is ambiguous, judges are to defer to the interpretation of the federal agency charged with implementing it, as long as that interpretation is reasonable.[59] Proponents of *Chevron* argue, among other things, that agency experts are better positioned than judges to understand the practical implications of the statutes they are implementing via regulations. When discerning the requirements of an ambiguous statute, a judge should not override the agency expert's reasonable interpretation. Instead, she should defer.

Chief Justice Roberts specifically noted in his concurrence that his opinion in *Kisor* does not "touch upon" the issue of *Chevron* deference.[60] Justices Kavanaugh and Alito expressly joined this sentiment. Yet at least five Justices seem to be skeptical of, or at least willing to reexamine, *Chevron*. Justice Gorsuch in his concurrence, which Justice Thomas joined, wrote in a footnote that "there are serious questions . . . about whether [*Chevron* deference] comports with the APA and the Constitution."[61] On the other side, Justice Kagan's opinion in *Kisor* approvingly cited to *Chevron*, perhaps to reaffirm the continuing vitality of the doctrine. Justices Breyer, Ginsburg, and Sotomayor all joined Justice Kagan's opinion in full. It remains to be seen where all the Justices will ultimately come down.

We may get some answers this term if the Supreme Court decides to take *Baldwin v. United States*. *Baldwin* addresses *Brand X* deference, a subset of *Chevron* deference. Under *Brand X*, an agency's interpretation of a statute is due *Chevron* deference regardless of whether it is inconsistent with prior practice.[62] The question in *Baldwin* is whether an administrative agency can overrule a *court's* prior interpretation of a statute. In this case, the Ninth Circuit had previously construed a statute regulating the postmark date of tax documents filed with the IRS, an important issue when there is a dispute about whether a tax document was timely filed.[63] The Ninth Circuit held that the statute did not displace the common law mailbox rule.[64] The mailbox rule allows proof of mailing to establish a presumption that a document is physically delivered on the date of the postmark. In 2011, the IRS amended its regulations to hold that the statute *does* displace the common law mailbox rule, disallowing taxpayers from presenting

50 Sec'y of Labor, U.S. Dep't of Labor v. Seward Ship's Drydock, Inc., 937 F.3d 1301 (9th Cir. 2019).

51 *Id.* at 1310.

52 Amazon.com, Inc. v. Comm'r of Internal Revenue, 934 F.3d 976 (9th Cir. 2019).

53 937 F.3d 282 (4th Cir. 2019).

54 *Id.* at 286.

55 *Id.* at 292.

56 *Id.* at 295.

57 *Id.* at 297.

58 *See generally* Josh Blackman, *Presidential Maladministration*, 2018 U. Ill. L. Rev. 397 (2018); Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 NYU J.L. & Liberty 491, 505–15 (2008); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989).

59 468 U.S. 837 (1984).

60 *Kisor*, 139 S. Ct. at 2425.

61 *Id.* at 2446, n.114.

62 *See* Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980–82 (2005).

63 Petition for Certiorari at 3-5, Baldwin v. United States, No. 19-402 (Sept. 23, 2019).

64 *Id.* at 7-8.

evidence to establish a postmark date.[65] Under *Brand X*, the IRS's new interpretation is given *Chevron* deference even though it conflicts with a prior court ruling.[66]

VI. Conclusion

In the few months since *Kisor v. Wilkie* was decided, it appears that *Auer* 2.0—the newly limited version of the doctrine formulated in Justice Kagan's opinion—may end up being the paper tiger Justices Roberts and Kavanaugh predicted it would be. It is becoming clear that the Justices recognize that a day of reckoning is coming—sooner rather than later—for the judicial doctrines that have aided and abetted an ever-growing administrative state.

65 *Id.* at 8-9.

66 *Id.* at 9.