Kisor v. Wilkie: Auer Deference Lives On, But In What Form?

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The Supreme Court in ***Kisor v. Wilkie*** has declined to overrule *Auer v. Robbins*[1] and *Bowles v. Seminole Rock & Sand Co.*,[2] instead narrowing deference to a federal agency's interpretation of its own ambiguous regulations by putting in place new guideposts around its use.[3] The concurrence remarked that the *Auer* "doctrine emerges maimed and enfeebled—in truth, zombified" and the *Kisor* decision "is more a stay of execution than a pardon."[4] Moreover, three justices signed on to part of an opinion casting doubt on not only *Auer* but also *Chevron*.[5] The tension between the majority and concurring opinions as to both *Auer* and *Chevron* is likely to lead to a fresh spate of litigation as well as cause some confusion in the federal agencies.

A Narrow Majority Opinion

Asked to overrule *Auer* and *Seminole Rock*, five justices, in an opinion written by Justice Kagan, held that doing so would be inappropriate in light of strong *stare decisis* considerations.[6] Before reaching that conclusion, however, Justice Kagan's majority opinion marked out a number of limits on *Auer* deference, in an effort to "clear up some mixed messages" the Court had sent in prior cases.[7] According to the *Kisor* majority, a court's *Auer* analysis must proceed in multiple steps. We will leave it to the administrative law scholars to debate, as they have done in the *Chevron* context, just how many analytical steps *Kisor* contains.[8]

Genuinely Ambiguous: First, a court should not apply *Auer* deference unless a regulation is "genuinely ambiguous."[9] In order to conclude that a regulation is genuinely ambiguous, a court must "exhaust all the traditional tools of construction."[10]

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[1] 519 U.S. 452 (1997).

[2] 325 U.S. 410 (1945).

[3] Justice Kagan announced the judgment of the Court and delivered the opinion of the Court, joined by Chief Justice Roberts, Justice Ginsburg, Justice Breyer and Justice Sotomayor. Some parts of Justice Kagan's opinion did not command a majority of the Court; Chief Justice Roberts did not sign on to all parts of her opinion and wrote his own short separate concurrence. Justice Gorsuch, joined at least in part by Justice Thomas, Justice Alito and Justice Kavanaugh, wrote a lengthy concurrence in the judgment. Justice Kavanaugh, joined by Justice Alito, wrote a short concurrence in the judgment.

[4] *Kisor*, slip op. at 1–2 (Gorsuch, J., concurring in the judgment).

[5] *Id.*, slip op. at 39 n.114 (Gorsuch, J., concurring in the judgment and joined by Thomas, J., and Kavanaugh, J.). *Chevron* directs courts to defer to an agency's reasonable interpretation of ambiguous statutory language.

[6] Justice Kagan, joined by three other justices, also offered policy, statutory and constitutional arguments as to why *Auer* and *Seminole Rock* should not be overruled. *Id.*, slip op. at 19–25 (majority opinion).

[7] *Id.*, slip op. at 12.

[8] *See, e.g.*, Daniel J. Hemel and Aaron L. Nielson, *Chevron* Step One-and-a-Half, 84 U. Chi. L. Rev. 757, 758–59 (2017) (noting that *Chevron* deference has been variously described as a one-, two-, three- or four-step test).

[9] *Kisor*, slip op. at 11.

[10] *Id.*, slip op. at 14 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984)) (internal quotations omitted).

Agency Reading Must Be Reasonable: Second, even if the purported ambiguity of a regulation is genuine, the agency's reading must be reasonable. That is, the reading must "come within the zone of ambiguity the court has identified after employing its interpretive tools."[11] This is a real test, and one that "an agency can fail."[12]

Deference Must Be Appropriate: Next, even if the court has determined that an agency has indeed offered a reasonable interpretation of its ambiguous regulation, the court must nonetheless determine whether providing *Auer* deference to that interpretation is appropriate. This is an "independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[13] The Court offered three "especially important markers" to aid courts in making that determination:[14]

- **Authoritative or Official Position**: To be entitled to *Auer* deference, an interpretation must "at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context."[15]
- **Implication of Substantive Expertise**: When an agency has "no comparative expertise in resolving a regulatory ambiguity" and is instead considering an interpretive issue that would be more naturally within a court's realm of expertise, an agency may not be entitled to *Auer* deference.[16]
- **Fair and Considered Judgment**: *Auer* deference is not appropriate for an agency's interpretation that is offered *post hoc*.[17] Nor is it appropriate for an agency's interpretation that disrupts the expectations of the parties, for example by substituting one rule for another[18] or by creating an "unfair surprise."[19] In a part of her opinion that garnered the support of three other justices, Justice Kagan made the related point that "a court deciding whether to give *Auer* deference must heed the same procedural values as [the notice-and-comment provision of the Administrative Procedure Act] reflects. Remember that a court may defer to only an agency's authoritative and considered judgments. No *ad hoc* statements or *post hoc* rationalizations need apply. And recall too that deference turns on whether an agency's interpretation creates unfair surprise or upsets reliance interests."[20] Justice Kagan also observed that an enforcement action must be based on a legislative rule that has gone through notice and comment and that "an interpretive rule itself never forms the basis for an enforcement action."[21]

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[11] *Id.*

[12] *Id.*

[13] *Id.*, slip op. at 15 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

[14] *Id.*, slip op. at 15.

[15] *Id.*, slip op. at 16.

[16] *Id.*, slip op. at 16–17.

[17] *Id.*, slip op. at 17.

[18] *Id.*, slip op. at 18.

[19] *Id.* (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

[20] *Id.*, slip op. at 23 (opinion of Kagan, J.) (internal citations omitted).

[21] *Id.* (citing *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1135, 1208 n.4). Chief Justice Roberts did not join this portion of this opinion.

Applying this analysis to the case before them,[22] the majority opinion determined that the lower court had faltered in at least two steps in the newly clarified *Kisor* analysis.[23] First, it had not used all the traditional tools of interpretation available to it before concluding that the regulation at issue was genuinely ambiguous. Second, even if the regulation was ambiguous, the lower court had "assumed too fast" that *Auer* deference was appropriate in this instance.[24]

Gorsuch Concurrence

In his concurrence in the judgment, Justice Gorsuch, joined in relevant parts by Justices Thomas, Alito and Kavanaugh,[25] agreed with the majority that the lower court had gotten Kisor's case wrong. Justice Gorsuch, however, rested his opinion on very different grounds. He would have made the "easy" decision "to say goodbye" to *Auer* deference,[26] finding that *Auer* cannot be reconciled with the Administrative Procedure Act and also "sits uneasily with the Constitution."[27]

Roberts Concurrence—*Chevron* Next?

One elephant in the courtroom is the future of *Chevron* deference. Although the *Kisor* majority did not directly address the decision's impact on *Chevron*, Chief Justice Roberts wrote a separate short concurring opinion that did, citing *Chevron* to expressly distinguish "issues surrounding judicial deference to agency interpretations of their own regulations [as] distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress" and leaving any decision on the latter to another day.[28] When and if that day will come will remain subject to much speculation, though at least three justices yesterday signaled that they hope that it comes soon,[29] and at least two others have expressed significant reservations about *Chevron*'s present-day application.[30]

Remaining Uncertainties

For the Vietnam veteran Kisor, the Supreme Court's holding may have real effect following its action to vacate the Federal Circuit's decision and remand to the Federal Circuit for reconsideration. This means that the Federal Circuit is required to reconsider Kisor's arguments as if its prior decision had never been made and to do so in light of the Court's new guardrails around *Auer* deference. How far the Court's holding goes beyond that remains uncertain. Chief Justice Roberts voiced his belief that the distance between *Auer*, as narrowed by the *Kisor* majority, and Justice Gorsuch's proposed return to *Skidmore*

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[22] Kisor, a Vietnam veteran, brought his case to the Supreme Court on appeal from the Federal Circuit, which, applying *Auer*, had held that the Department of Veterans' Affairs was entitled to deference with respect to an interpretation of its regulations made by the Board of Veterans' Appeals.

[23] *Kisor*, slip op. at 28.

[24] The Court did not need to address whether the interpretation offered by the Board of Veterans' Appeals was reasonable, as that task is only necessary once ambiguity is established.

[25] Justice Alito did not join the portions of Justice Gorsuch's opinion discussing policy arguments or *stare decisis* arguments surrounding *Auer*.

[26] *Kisor*, slip op. at 1 (Gorsuch, J., concurring in the judgment).

[27] *Id.*, slip op. at 22.

[28] *Id.*, slip op. at 2 (Roberts, C.J., concurring in part). Justice Kavanaugh's concurrence, joined by Justice Alito, articulated the same sentiment. *Id.*, slip op. at 2 (Kavanaugh, J., concurring in the judgment) (quoting *id.*, slip op. at 2 (Roberts, C.J., concurring in part)).

[29] *Id.*, slip op. at 39 n.114 (Gorsuch, J., concurring in the judgment and joined by Thomas, J., and Kavanaugh, J.).

[30] *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting). Justice Alito joined the dissent of the Chief Justice in full.

deference[31] is "not as great as it may initially appear."[32] If so, *Kisor* may indeed have turned *Auer* into something resembling a "paper tiger."[33]

It is far too soon to tell whether this will be the case, or whether the Court's *Kisor* decision will affect agency rulemaking processes at the agency decision-making stage.[34] Given *Kisor*'s narrowing of *Auer*, agencies may or may not change their behavior. To the extent agencies rely on guidance in a manner inconsistent with *Kisor*'s multi-step test for deference, the private sector now has every incentive to appropriately push back against agency overreach. Of course, how the courts will implement *Kisor* in practice also remains to be seen. These questions will likely be settled only through future agency decisions and litigation.

[31] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (setting forth a standard of deference only to the extent an agency's reading has the "power to persuade").

[32] *Kisor*, Slip op. at 1 (Roberts, C.J., concurring in part). Justice Kavanaugh expressed the same view. *Id.*, slip op. at 1 (Kavanaugh, J., concurring in the judgment) (quoting *id.*, slip op. at 1 (Roberts, C.J., concurring in part)).

[33] *Id.*, slip op. at 3 (Gorsuch, J., concurring in the judgment).

[34] Opponents of *Auer*-type deference have long raised a concern that *Auer* and *Seminole Rock* incentivize agencies to craft ambiguous regulations, leaving the details to be filled in as convenient. *See generally, e.g.*, John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612 (1996); *see also Decker v. Northwest Environmental Defense Center*, 568 U. S. 597, 620–21 (2013) (Scalia, J., concurring in part and dissenting in part) (citing Manning). In a portion of her opinion not joined by Chief Justice Roberts, Justice Kagan takes that the view that there are "notable weaknesses, empirical and theoretical alike" related to this claim. *Kisor*, slip op. at 24 (opinion of Kagan, J.). *See also generally* Cass Sunstein & Adrian Vermeule, The Unbearable Rightness of *Auer*, 84 U. Chi. L. Rev. 297 (2017) (similarly calling this claim into question).

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