The final *Auer*: Midnight approaches for an important deference doctrine

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In *Kisor v. Wilkie*, the Supreme Court stands poised to banish *Auer* deference from the arsenal of tools available to federal agencies in regulatory litigation.

The clock has been ticking

After years of signaling, the U.S. Supreme Court has agreed to reconsider whether agency interpretations of their own ambiguous regulations deserve judicial deference under *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.* For Court watchers, it was just a matter of time. In *Perez v. Mortgage Bankers*, the Court unanimously ruled that agencies need not utilize notice-and-comment rulemaking under the Administrative Procedure Act (APA) to reverse prior interpretations of their own regulations. Although *Perez* did not cleanly present the question, some justices took the opportunity to invite would-be petitioners to serve up such a case. Justice Thomas reasoned that "[b]y my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case." Justice Alito observed that there is "an understandable concern about the aggrandizement of the power of administrative agencies" that stems from doctrines of judicial deference, warning that "I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." Justice Scalia, who, ironically, penned the opinion in *Auer*, stated during oral argument that "[m]aybe we shouldn't give deference to agency interpretations of [their] own regulations. . . . For me it would be easy." He then wrote in concurrence that he would "restore the balance originally struck by the [APA] . . . by abandoning *Auer* and applying the [APA] as written."

The Petitioner in *Kisor* answered the Court's call. The sole question presented was whether the *Auer* doctrine should be overruled. On December 10, 2018, the Court agreed to hear the case, presumably to provide a definitive answer to that question.

The dawn of *Auer* deference

Judicial deference is a judge-made aid of interpretation, useful when a court must decide whether agency pronouncements and actions fall within the scope of their enabling statutes. In *Chevron*

USA, Inc. v. Natural Resources Defense Council, the Supreme Court held that where a statute the agency is charged with administering is ambiguous on "the precise question at issue," courts should defer to the agency's interpretation of that ambiguity so long as the interpretation (usually expressed in an implementing regulation) is reasonable. In *Auer v. Robbins*, the Court cemented a similar but even more deferential doctrine for use when considering agency interpretations of their own regulations. Briefly, agency interpretations of their own regulations are entitled to deference unless plainly inconsistent with the regulatory text.

Agencies point to administrative efficiencies that *Auer* deference offers, notably an agency's ability to implement and enforce policies more flexibly and expediently than would be possible if notice-and-comment rulemaking were necessary. They also argue that *Auer* leads to more consistent nationwide application of existing regulations and that doing away with the doctrine could lead to disparate court holdings across the nation about what a regulation means. But many argue that this administrative flexibility in turn incentivizes agencies to draft intentionally ambiguous regulations, with the confidence that changes in policy achieved outside of rulemaking will be upheld by the courts if challenged. Meanwhile, lack of APA procedures deprives regulated parties of a meaningful opportunity to shape agency policy through the notice-and-comment rulemaking process, even while saddling the regulated with the compliance costs resulting from the policy shift. (This is, of course, as with many administrative law principles, a double-edged sword. Deregulatory interpretations can just as easily be given effect through administrative reinterpretations of existing regulations as more stringent interpretations.)

Thus, although *Auer* at first blush appears to be a logical extension of *Chevron*, the criticisms generally applied to *Chevron* deference apply to *Auer* with far greater force. While *Chevron* respects the right of agencies to apply their institutional expertise to fill gaps in the statutory schemes created by Congress, that respect is premised on Congress itself—as the lawmaking body of the United States—having directed the agencies to act through legislation. By that logic, which admittedly has many critics, *Chevron* does not divest courts of their fundamental function of interpreting the laws. Rather, at least in theory, it does no more than instruct the courts to allow agencies to fulfill the role Congress created for them. By contrast, *Auer* permits agencies to draft ambiguous regulations in the first instance and then revisit the meaning of those regulations outside of rulemaking, thus allowing agencies to change their minds long after the notice-and-comment rulemaking period has closed. So while both doctrines have strong critics, *Auer* is the more constitutionally suspect of the two.

Kisor **answers the Court's invitation**

Kisor brings the various arguments for and against *Auer* deference into sharp focus. Petitioner Kisor served in the U.S Marine Corps from 1962 to 1966 and suffered post-traumatic stress disorder (PTSD), but the U.S. Department of Veterans Affairs (VA) denied his claim for benefits, reasoning that he had not been diagnosed with service-related PTSD. Although Kisor qualified for benefits in 2006 with new evidence of his PTSD diagnosis, the VA rejected his request to make his benefits retroactive to 1982 under VA's interpretation of "relevant" records.

The Federal Circuit sided with the VA. While finding that both Kisor and the VA posited reasonable interpretations of the word "relevant," the court felt bound by *Auer* to defer to the VA's.

Interestingly, in its brief opposing certiorari, the United States acknowledged that the time may be ripe for the Court to reconsider *Auer* deference, but argued that this was not the right case for it to do so because the VA would have prevailed regardless of whether the Court deferred to its interpretation of the word "relevant." By granting certiorari, at least four justices have indicated they disagree.

Midnight approaches

The demise of *Auer* seems imminent. As Justice Thomas noted in *Garco Construction Inc. v. Speer*, *Auer* deference undermines "the judicial 'check' on the political branches by ceding the courts' authority to independently interpret and apply legal texts." Indeed, the frequency with which agencies invoke deference is a testament to the immense power that has accrued to agencies under *Auer.* Frequent commentary from individual justices pillorying *Auer* all but guarantees that *Auer*'s hours are running out.