

Litigation Alert: Supreme Court Reaffirms Deference to Agency Interpretations of Regulations

July 2, 2019

In a decision handed down in the last days of its 2018-19 term, the United States Supreme Court, in *Kisor v. Wilkie*, 588 US ____ (June 26, 2019), reaffirmed that federal courts must defer to an agency's reasonable interpretation of that agency's ambiguous regulations. In that case, Kisor, a Vietnam War veteran, challenged a decision by the Department of Veterans Affairs that denied him certain veteran's benefits. The Federal Circuit Court of Appeals affirmed the Board's decision based on deference to the agency's interpretation of a VA rule. The specific issue for decision in *Kisor* was whether the Supreme Court should overrule its decisions in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 10 (1945), which require deference to agency interpretations of administrative regulations.

The Supreme Court declined to overrule *Auer* and *Seminole Rock* and affirmed the Federal Circuit's decision. "*Auer* deference," the Court explained, is rooted in "a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities." The Court also observed that the doctrine had been applied often since *Auer* was decided and Congress had never acted to overrule or modify it legislatively.

The Court also took the opportunity to provide guidance to the lower courts regarding when to apply *Auer* deference, noting that deference "is not the answer to every question of interpreting an agency's rules." First, *Auer* deference is not appropriate unless the court, applying "traditional rules of construction," concludes that the regulation at issue is genuinely ambiguous. Second, in order for *Auer* to be applicable, the agency's interpretations of the regulation must be reasonable. Third, the interpretation must represent the agency's official position rather than merely an *ad hoc* statement or litigation position. Fourth, the interpretation must implicate the agency's substantive expertise. Finally, in order to receive deference, the agency's interpretation must reflect the agency's fair and considered judgment.

The Court also found that *stare decisis* cut strongly against overruling *Auer*, noting that Kisor sought to overrule not just a single case but a long line of established precedent. According to the Court, overruling *Auer* deference would cast doubt on many settled constructions of administrative rules, resulting in significant uncertainty for agencies and private parties. The Court said that it would not overrule *Auer* without a particularly "sound justification" and that Kisor had not presented such justification.



What's the big picture? In addition to confirming the continuing vitality of a legal doctrine that parties and courts have been relying on for decades, the *Kisor* decision potentially provides some insight into the Court's approach to some broader issues. First, with the regulatory state under attack on various fronts, the Court's continued endorsement of agency deference was not necessarily a forgone conclusion. This decision shores up the doctrine of deference and may reflect a more nuanced approach to issues of administrative law than might previously had been predicted. Second, the decision provides at least some limited insight into how the Court views its precedent and the ongoing importance of *stare decisis*, at least as it relates to non-constitutional questions.

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