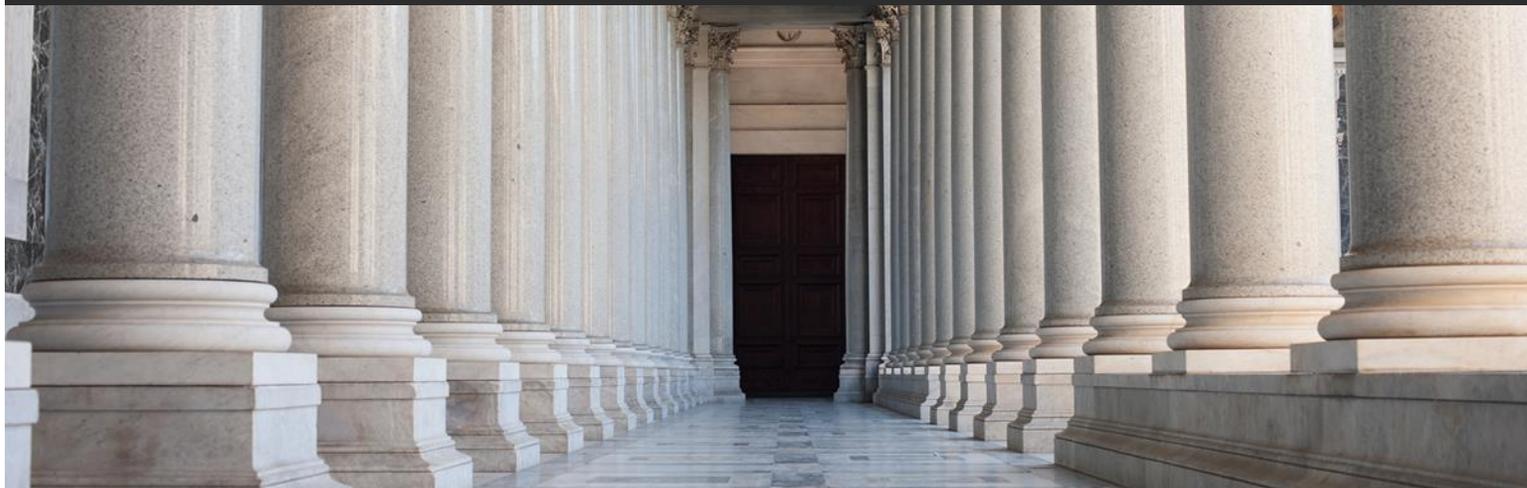


Alert | Federal Regulatory & Administrative Law



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Supreme Court to Decide if Courts Must Defer to an Agency's Construction of Ambiguous Regulations

The U.S. Supreme Court heard oral argument March 27 in what could be one of the most important administrative law cases to come before the Court in many years: *Kisor v. Wilkie*, No. 18-15. The question in *Kisor* is whether the Court should overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), decisions holding that courts must defer to an agency's reasonable interpretation of its own ambiguous regulation. This is generally referred to as "Auer deference."

Background

Kisor raises questions about the respective responsibilities of courts and administrative agencies. It is fundamental that courts have the responsibility to say what the law is, but in administrative law, agencies have the responsibility to carry out their statutory mandates, including applying their own regulations in a manner that furthers that responsibility. Under *Auer* and *Seminole Rock*, responsibility for construing and applying an ambiguous regulation rests with the agency that promulgated it, so long as the agency's interpretation is reasonable. In recent years, a number of Justices as well as legal scholars have criticized *Auer* deference as inconsistent with both the Administrative Procedure Act (APA) and separation of powers principles. Those critics note that the APA gives agency rules binding effect only if they go through notice-and-comment rulemaking, whereas *Auer* deference allows agencies to make legally binding

interpretive decisions without going through notice-and-comment rulemaking. The critics also contend that section 706 of the APA, which governs judicial review of agency action, gives the reviewing court and not the agency authority to determine the meaning of an agency rule. More broadly, critics of *Auer* deference contend that allowing agencies to determine the meaning of ambiguous regulations usurps the core responsibility assigned to courts by Article III of the Constitution.

In *Kisor*, the petitioner (Kisor) adopts these and other related criticisms, and contends that *Auer* and *Seminole Rock* should be overruled, which would leave courts to interpret ambiguous agency regulations without deference to the agency's construction. Notably, respondent Wilkie, the secretary of Veterans Affairs, represented by the solicitor general, acknowledges various problems with *Auer* deference – both in his brief and at argument. But Wilkie contends only that resort to *Auer* deference should be narrowed, not eliminated altogether. He argues that overruling *Auer* and *Seminole Rock* would call into question hundreds of court decisions that deferred to, and thus adopted, agency interpretations of ambiguous regulations. Wilkie also contends that *Auer* deference is appropriate in some limited contexts, such as where scientific or other highly specialized technical expertise is necessary to properly apply an agency regulation.

Facts of the Case

The facts in *Kisor* are straightforward. Kisor is a Vietnam War Veteran who applied for disability benefits in 1982, claiming he suffered from post-traumatic stress disorder (PTSD). The VA denied the claim, based on evidence that Kisor suffered not from PTSD but from a non-service-related condition. In 2006 Kisor asked the VA to “reopen” his claim and presented some new documentary evidence from VA’s files. A VA examiner then diagnosed Kisor with PTSD, and the VA awarded benefits, effective on the date of his request to reopen, June 5, 2006. Kisor appealed the effective date, citing a VA regulation providing that when “reconsidered” claims are granted, benefits are retroactive to the date of a service member’s original claim for benefits (in contrast to grants of “reopened” claims, which provide only prospective benefits). Under the regulation, claims are deemed “reconsidered,” as opposed to “reopened,” when they are based on “relevant” service department records that are newly associated with the claim.

In the decision the Court is reviewing, the Federal Circuit held the term “relevant evidence” in the regulation was ambiguous, and therefore deferred to the VA’s construction of the term. Kisor claimed the term meant any evidence bearing on entitlement to benefits. Wilkie claimed that “relevant” evidence is evidence that would alter the VA’s decision. The new documents Kisor presented in 2006 contained facts bearing on Kisor’s condition, but those facts were otherwise before the VA in 1982, and did not lead to the 2006 decision to grant Kisor benefits. Hence, under the VA’s interpretation, those facts were not “relevant” because they would not have altered the 1982 decision.

The Federal Circuit was unpersuaded by Kisor’s argument that deferring to the VA’s construction in this case contravenes two other well-established interpretative canons: first, that where veterans’ benefits are concerned, ambiguities should be resolved in favor of the veteran; and second, that no deference is due to the government’s self-serving interpretations of ambiguous texts, as here, where the VA was able to avoid paying monetary benefits due to its construction of the regulation. Kisor advanced both those arguments in the Supreme Court, in support of abandoning *Auer* deference, at least in this case. Perhaps concerned by those arguments, the solicitor general argued in Wilkie’s merits brief not only that *Auer* deference should be narrowed but retained, but also that in this particular case, the regulation at issue is not ambiguous. Rather, he argued, the only possible reading of “relevant” is to describe evidence that would change the outcome of the VA’s decision. In other words, Wilkie’s ultimate position is that *Auer* deference need not be invoked in this case because the VA regulation addressing “relevant” evidence is not ambiguous.

A decision in *Kisor* should be rendered before the Court's term ends in late June.

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