

ADMINISTRATIVE DEFERENCE IN THE UNITED STATES:

Kisor and the Consolidation of *Auer* Jurisprudence

Ilaria Di-Gioia*

Birmingham City University, United Kingdom

Auer deference, i.e. the extent to which courts defer to an agency's interpretation of its own ambiguous regulation, is under the spotlight in the United States.

The doctrine has been greatly criticised by both academics and judges concerned about the increase of the power of administrative agencies¹ but in June 2019 the U.S. Supreme Court confirmed its constitutionality by a 5-4 majority in *Kisor v. Wilkie*.² Justice Kagan authored the majority opinion and insisted that the *Auer* doctrine is still alive. Justice Gorsuch, on the other hand, argued in his concurrence that because of the new limitations that *Kisor* imposes on administrative deference, *Auer* has become a paper tiger, meaning that it has lost its bite and efficacy.

This abstract briefly reviews the *Kisor* decision and the points raised in the majority opinion. It argues that the decision has not changed the *Auer* doctrine but instead consolidated its technical aspects.

* Dr Ilaria Di Gioia is a Lecturer in Law. She teaches Public Law, Legal Method, American Legal Practice, the Individual and the US Constitution and Federalism and the US Constitution. She devotes her free time to public service, is her capacity of Honorary Vice-Consul for Italy in Birmingham. Dr. Di Gioia is an active member of the American Politics Group (UK), a sub-group of the Political Studies Association and has presented her research at several conferences in the UK, Europe, the US and Latin-America.

¹ For instance, Justice Thomas expressed discomfort with the existing deference regime and in *Michigan v. EPA*, argued that Chevron delegation “is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies” and in tension with Art. I “which vests ‘[a]ll legislative Powers herein granted’ in Congress” thus advancing the case for revision of the doctrine.

² *Kisor v. Wilkie*, 139 S. Ct. 657 (2019).

First, a few words on the facts of the case. The lawsuit involved a Marine veteran seeking appeal against the decision of the Department of Veterans Affairs (VA) to refuse him the award of retroactive disability benefits for his service-related post-traumatic stress disorder (PTSD) because the evidence provided by the claimant was, according to the VA's interpretation of its regulations, not "relevant".³ On appeal, the Federal Circuit Court found that "uncertainty in application suggests that the regulation is ambiguous" and therefore applied *Auer* deference affirming the VA's construction of the regulation and, as a consequence, the VA's denial of retroactive benefits. The question before the Supreme Court was whether *Auer v. Robbins*⁴ and *Bowles v. Seminole Rock & Sand Co.*,⁵ which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation, should be overruled. Despite fears and rumours that a majority of conservative justices would have axed *Auer*, the Roberts Court used this opportunity to reiterate the standing of the doctrine and clarify technical issues related to the process of administrative deference. The majority did not miss the chance to defend *Auer* on the basis of *stare decisis* but this is not the main point of the decision. The significance of *Kisor*, in this author's opinion, lies in its consolidation of previous jurisprudence and explanation of the circumstances in which the courts should be deferring interpretation to the agencies. According to Justice Kagan, the doctrine remains "potent in its place but cabined in its scope".⁶ Cabined because, she explains, the courts can defer interpretation only if the following requirements are satisfied:

- a) the regulation is genuinely ambiguous⁷
- b) the agency's reading is reasonable⁸
- c) the regulatory interpretation is authoritative, i.e. one actually made by the agency⁹

³ Department of Veterans Affairs' New and Material Evidence regulation. 38 C.F.R. § 3.156, "A claimant may reopen a finally adjudicated claim by submitting new and material evidence". 38 C.F.R. "Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, 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, VA will reconsider the claim, notwithstanding paragraph (a) of this section.

⁴ *Auer v. Robbins*, 519 U.S. 452 (1997).

⁵ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

⁶ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

⁷ *Id.* at 2415.

⁸ *Id.* at 2416.

⁹ *Id.* The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context

- d) the agency's interpretation is expertise based, i.e. in some way it implicates agency substantive expertise¹⁰
- e) an agency's reading of a rule in question reflects a "fair and considered judgment"¹¹

As to point A and B, these are well-established requirements and they apply to *Chevron* deference more generally.¹²

Point C is an attempt to consolidate jurisprudence around the distinction between authoritative interpretations and non-binding ones. The issue is particularly relevant with regards to interpretive rules and legislative rules. In *Perez v. Mortgage Bankers Assn* (2015),¹³ a unanimous court established that when a federal administrative agency first issues a rule interpreting one of its regulations, it is generally not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA or Act).¹⁴ As a consequence, *Perez* confirmed that interpretive rules do not have the force or effect of law.¹⁵ On the other hand, legislative rules which impose obligations, or produce other significant effects on private interests do require the notice and comment procedure.¹⁶ *Kisor* confirmed the different procedural requirements for interpretive rules and legislative rules. Furthermore, in its attempt to consolidate the jurisprudence around authoritativeness of agency interpretations, it seemed to respond to Justice Scalia's concurrence in *Perez* regarding the role of the courts. In *Perez*, Justice Scalia stated that an agency can interpret its regulations, but the courts have the final say in deciding whether that interpretation is correct:

I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.¹⁷

¹⁰ *Id.* at 2417 (2019).

¹¹ *Id.*

¹² Before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction: *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

¹³ *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015).

¹⁴ 5 U.S.C. § 553(b)(A).

¹⁵ *Perez v. Mortgage Bankers Assn.*, 575 U. S. 92, —, 135 S.Ct. 1199, 1204, 191 L.Ed.2d 186 (2015).

¹⁶ 126 A.L.R. Fed. 347 (Originally published in 1995).

¹⁷ *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015).

In response to Scalia's comments, Justice Kagan confirmed that interpretive rules do not have the force of law but also clarified that the meaning of legislative rules "remains in the hands of the courts":

An interpretive rule itself never forms the basis for an enforcement action [...] the meaning of a legislative rule remains in the hands of courts, even if they sometimes divine that meaning by looking to the agency's interpretation. Courts first decide whether the rule is clear; if it is not, whether the agency's reading falls within its zone of ambiguity; and even if the reading does so, whether it should receive deference. In short, courts retain the final authority to approve—or not—the agency's reading of a notice-and-comment rule.¹⁸

As to point D, expertise of the agency is a foundational requirement for *Auer* because, Justice Kagan explains, administrative knowledge and experience largely "account [for] the presumption that Congress delegates interpretive lawmaking power to the agency."¹⁹ In other words, expertise is the reason why we assume that Congress delegated interpretation; if the agency does not have expertise there is no presumption of delegation.

In regards to point E, deference to "fair and considered judgement", courts are required to assess whether the agency interpretation is fair and does not create "unfair surprise" to regulated parties.²⁰ Justice Kagan explains: "we have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one."²¹ Again, the court is inclined to maintain certainty of the law; it does not innovate but cites to previous judgements in an attempt to strengthen jurisprudence.

Kisor is certainly not the revolutionary decision that many were expecting. Instead, this abstract argues, it is an exercise in doctrine consolidation. Time only will tell whether the consolidation of the doctrine is real or only another temporary block to the predicted decline of administrative deference in the United States.

¹⁸ *Supra* note 6 at 2400, 2420 (2019).

¹⁹ *Id.* at 2417 (2019), citing to *Martin v. Occupational Safety and Health Review Com'n*, 499 U.S. at 153, 111 S.Ct. 1171.

²⁰ *Long Island Care Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 at 170, 127 S.Ct. 2339 (2007).

²¹ *Supra* note 6 at 2400, 2418 (2019) citing *Thomas Jefferson*, 512 U.S. at 515, 114 S.Ct. 2381.

REFERENCE LIST

126 A.L.R. Fed. (Originally published in 1995).

5 U.S.Code § 553(b)(A).

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