Kisor v. Wilkie, 588 U.S. __ (2019).

The Supreme Court Signals the End of *Auer* Deference

In *Kisor v. Wilkie*, the Supreme Court upheld the scope of deference afforded to federal administrative agencies in interpreting their own rules. This level of deference is known as *Auer* deference, which mandates that if an agency-created regulation is ambiguous, then the court should defer to the agency's interpretation of the regulation. *Auer v. Robbins*, 519 U.S. 452 (1997). Through its reasoning, the Supreme Court indicated that a federal agency will not receive *Auer* deference unless it shows: (1) the regulation is genuinely ambiguous even after a court utilizes the traditional tools of statutory interpretation; (2) that its interpretation is reasonable and reflects its authoritative, expertise-based, and fair and considered judgment; and (3) its interpretation avoids unfair surprise and takes into account the interests of the parties that reasonably relied on the agency's interpretation.

In *Kisor*, a Veterans Affairs ("VA") Board denied Kisor's claim based upon its interpretation of a rule promulgated by the VA. Kisor appealed this decision up to the Federal Circuit, which found that the language was ambiguous because both parties offered an interpretation that was not unreasonable. The Supreme Court reviewed the case and reversed and remanded the lower court's decision for two reasons. First, there was no indication that the Federal Circuit made any independent attempt to determine if the statute was ambiguous. Second, it was unclear whether a ruling by the VA Board reflected the judgment of the agency as a whole.

Though Justice Kagan gave the opinion of the Court, the Justices in the majority could not come to a consensus as to what should be the future of *Auer*. Justices Gorsuch, Alito, Kavanaugh, and Thomas agreed with Justice Kagan's ruling, but took issue with her reasoning and attacked her opinion on statutory, constitutional, and policy grounds. The concurrence offered by Justice Gorsuch ultimately advocated overturning *Auer*. Justice Gorsuch's concerns with *Auer* mirrored the arguments raised by Kisor who advocated for *Auer* to be overturned. This suggests litigants are tailoring their arguments to appeal to the new, more conservative Supreme Court. Further, it suggests that future attempts to weaken the power of administrative agencies by way of the Supreme Court may be yet to come, and may likely be successful.

While *Auer* is still good law, *Kisor* suggests the level of deference it affords to agencies may be tenuous. As Chief Justice Roberts and Justice Kavanaugh stated in separate concurring opinions, the requirements outlined by Justice Kagan for an agency to receive *Auer* deference are essentially the same as the alternative requirements Justice Gorsuch advocated for.[2] This suggests federal agencies will only receive deference if their interpretation of an ambiguous agency-promulgated rule is persuasive, which is similar to the lesser form of deference articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[2] Justice Gorsuch and those who joined in his concurrence would take into account whether the agency (1) thoroughly considered the problem; (2) offered a valid rationale; (3) brought its expertise to bear; and (4) interpreted the regulation in a manner consistent with earlier and later pronouncements.