

# Administrative Agency Deference Theme Reemerges with SCOTUS Considering Overturning Auer



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The U.S. Supreme Court signaled that it remains concerned with the issue of administrative deference following its grant of certiorari last week to hear *Kisor v. O'Rourke* specific to the issue of whether the Court should overrule *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.* Overruling one or both of these decisions could result in courts giving considerably less deference to agencies' interpretations of their own regulations.

The ability of regulatory agencies to interpret their own regulations is a fundamental issue in many environmental disputes. Both *Auer* and *Seminole Rock* are frequently cited in environmental cases to support agency actions, as these decisions require courts to give agencies near-absolute deference, so long as their decisions are not "plainly erroneous or inconsistent" with other regulations.

In practice, agencies that promulgate vague regulations through notice-and-comment procedures required by the federal Administrative Procedure Act can later expand the ambit of these regulations through informal memoranda or regulatory interpretations. These less formal processes preempt the ability of the public and regulated community to meaningfully participate in the regulatory process.

Administrative deference is an ongoing theme that we have seen arise a number of times in the past few years. Indeed, the legal community had pondered whether the Supreme Court would review administrative deference issues in the [\*Weyerhaeuser Co. v. U.S. Fish & Wildlife Service\*](#) case involving the dusky gopher frog that was decided a few weeks ago. Although the Supreme Court decided *Weyerhaeuser* without reference to issues of administrative deference, the *Kisor* case is a clear example that this is not going away.

However, *Kisor* actually arises in a context fairly atypical for administrative deference. The case involves a claim for PTSD-related retroactive disability benefits brought by a former Vietnam-War-era Marine who was denied retroactive disability benefits for PTSD he suffered as a result of his service in Vietnam. *Kisor*'s eligibility for such benefits hinged on whether the VA received "relevant official service department records" after initially denying his claim for benefits in 1982.

*Kisor* argued that material he submitted to the VA relating to his service in Vietnam constituted "relevant official service department records" and entitled him to retroactive benefits. The Board of Veterans Appeals ("Board") disagreed, stating that, in *Kisor*'s case, "relevant" records were those relating to a diagnosis of PTSD (which was contested at the time of his initial denial). That *Kisor* served in the military was never in dispute.

The Court of Federal Claims upheld the Board's interpretation of the meaning of "relevant." In so holding, the court concluded that the term was ambiguous, and that the Board's interpretation was entitled to deference under *Auer*, *Seminole Rock*, and their progeny, because it was neither "plainly erroneous or inconsistent" with the VA's regulatory framework.

*Kisor* illustrates the breadth of power granted to agencies by *Auer* and *Seminole Rock* – the agency's determination of whether "relevant" records were provided was quite possibly outcome-determinative for the involved claims.

The case is expected to be heard by the Court at some point in 2019. We will keep an eye out for further developments on *Kisor* and similar cases touching on administrative deference.

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