The Court's opinion in *Kisor v. Wilkie* was eagerly awaited by administrative law experts. It is one skirmish in the ongoing war over deference to agencies. In this case, the issue was whether to overrule the *Auer* doctrine, which requires courts to defer to an agency's reasonable interpretation of its own regulations. This doctrine, like its big brother, the *Chevron* doctrine, has become a target for conservative scholars and judges. The *Auer* doctrine has obvious relevance to environmental law, where agencies like EPA frequently have to interpret their own regulations in making decisions about permits or enforcement.

Kisor v. Wilkies seems like an unpromising vehicle for a major Supreme Court opinion. The case involves a mundane disputes over the start date for a combat veteran's claim for compensation for his PTSD. The facts are explained in detail in the lower court opinion. Kisor, the veteran, had filed a previous claim for service related disability. That claim had been denied because at that time he had not been diagnosed with PTSD. He did not appeal that loss. More than a dozen years later, he presented evidence of PTSD, and the government granted the claim on that basis. The question was whether the benefits should be paid retroactively or only starting with his new application.

A regulation allows retroactive benefits if a denial is reconsidered based on "relevant," newly discovered service records. Retroactive benefits are not provided based on other types of new evidence, such as the new diagnosis of PTSD in Kisor's case. The newly discovered service record in this case showed that the veteran had been involved in a combat operation, Operation Harvest Moon, a fact that was not disputed by the government anyway. Basically, the service document merely confirmed a fact that was not in dispute, which was that he had been in combat of a kind that might cause PTSD. So the document was relevant in that it related to a fact that had been part of the original proceeding, but not relevant in the sense of offering any basis for thinking that the original decision might have been wrong or even relating to an issue that was contested in the earlier proceeding.

The issue then was the circumstances under which newly discovered service documents count as relevant when they do not address the prior basis for rejecting the claim. The government did not argue for a blanket rule requiring such a connection in order to establish the relevance of the document. Instead, it merely argued that on the facts, the new records were not relevant. Deferring to the agency's interpretation under the *Auer* doctrine, the lower court rejected the veteran's argument.

The Supreme Court agreed to hear this case as a vehicle for considering whether to overrule *Auer*. At oral argument, it seemed clear that there were at least several votes to overrule *Auer*, and quite possibly five. The liberals, however, seemed to be supportive of *Auer.* The case received considerable public attention because overruling *Auer* would be a

first step toward overruling the more important *Chevron* doctrine, which requires deferring to agencies' interpretations of statutes, not merely interpretations of their own rules.

As it turned out, *Auer* survived, with Chief Justice Roberts being the swing vote. Justice Kagan wrote the lead opinion on behalf of the four liberal members of the Court. She explained that the *Auer* doctrine is "rooted in a presumption that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules." The primary reason is that interpreting regulations often entails understanding their underlying policies and how to apply them. Kagan gives the example of TSA regulations for travelers:

> "In most of their applications, terms like "liquids" and "gels" are clear enough. (Traveler checklist: Pretzels OK; water not.) But resolving the uncertain issues—the truffle pâtés or olive tapenades of the world—requires getting in the weeds of the rule's policy: Why does TSA ban liquids and gels in the first instance? What makes them dangerous? Can a potential hijacker use pâté jars in the same way as soda cans?"

Kagan was also careful to point out the limits of the presumption in favor of agency interpretations, such as interpretations made without real deliberation or in the course of litigation. Finally, she relied on the doctrine of stare decisis, which says that the Court is bound by its own precedents except in unusual circumstances. On these latter two points, she wrote for a majority of the Court, with Chief Justice Roberts joining the four liberals.

As expected, the four most conservative Justices took the opposite view. Justice Gorsuch wrote the lead opinion for this group of Justices. In his view,

> "It should have been easy for the Court to say goodbye to *Auer v. Robbins*. In disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading. This rule creates a 'systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else.'"

Even Gorusch, however, conceded that agencies are entitled to some degree of judicial respect: "[N]o one doubts that courts should pay close attention to an expert agency's views on technical questions in its field." Just as a court would want to know what famous legal

scholars said about issues in their fields, "so too should courts carefully consider what the Food and Drug Administration thinks about how its prescription drug safety regulations operate."

Interestingly, however, Justices Alito and Kavanaugh joined only portions of Gorsuch's dissent. In particular, Justice Alito did not join a portion of the Gorsuch opinion arguing that the *Auer* doctrine violated the separation of powers, and both Kavanaugh and Alito argued that agency interpretations should carry more weight than Gorsuch seemed to allow. In their view, when a regulation calls for broad policy discretion, "courts allow an agency to reasonably exercise its discretion to choose among the options allowed by the text of the rule."

As I mentioned above, the swing voter was Chief Justice Roberts. He joined the portions of Justice Kagan's opinion explaining the limits of the rule and relying on the doctrine of stare decisis, but not her defense of the merits of the rule. Instead, he wrote separately to emphasize two points. First, he did not see Kagan and Gorsuch as being terribly far apart in practical terms, since Kagan recognized important exceptions to the *Auer* doctrine and Gorsuch recognized a significant role for agencies' interpretations of their own regulations. Second, Roberts emphasized that *Chevron* might involve different issues that were not before the Court in *Kisor* (a point with which Alito and Kavanaugh also agreed).

All of this may seem to be very much "in the weeds," but there are important implications. There is a spectrum of views on the Court about the general question of how much leeway to give administrative agencies. Justices Gorsuch and Thomas would give the least discretion to agencies, but even they are willing to provide at least a bit of leeway. At the other extreme, the four liberals are willing to give considerable deference. Roberts, Kavanaugh, and Alito are in the middle. Specifically in terms of the *Chevron* doctrine, Gorsuch and Thomas are clearly committed to overruling it, while the liberals would uphold it. The three Justice in the middle aren't willing to commit themselves at this point.

Given the key role of agencies like EPA in environmental law, the way that all of this plays out in the future will be critical to environmental regulation. In particular, the fate of the *Chevron* doctrine is as yet undetermined. That's going to have very practical implications for questions like how far EPA can go in regulating greenhouse gas emissions.