Internal Memorandum
National Veterans Legal Services Program

To: Director of CAVC Litigation
From: William Nicholas
Date: April 16, 2019
Re: *Kisor vs. Wilkie*

This memo outlines the existing rulings pertaining to *Kisor vs. Wilkie*[i] in the U.S. Department of Veterans Affairs (VA) and the U.S. Court of Appeals for the Federal Circuit as well as its status before the U.S. Supreme Court. It will as detail the impact that the court's decision will have on the National Veterans Legal Services Program (NVLSP), as well as predict and explain the expected outcome as a ruling in favor of Wilkie and the VA. Finally, it will recommend potential remedial action that can be taken by NVLSP should the court rule in favor of the VA.

Background
James Kisor is a Marine Corps veteran of the Vietnam War who sought disability benefits from the VA for post-traumatic stress disorder (PTSD) in 1982[ii]. He was denied these benefits on the grounds that he did not demonstrate evidence of PTSD. In 2006, he successfully sought reconsideration of his claim under 38 C.F.R. § 3.156, enabling him to submit "new and material evidence" of his disability[iii]. After submitting his service record and an additional psychiatric evaluation, he was awarded disability from 2006 onwards.[iv] Following this, he appealed for additional retroactive benefits from 1982 until 2006, which were denied.[v] In the decision to deny them, the Board of Veterans' Appeals noted that "retroactive benefits can be applied if there are relevant service records that are newly associated with the claim."[vi] In the agency's interpretation, "relevant" refers to evidence that would have changed the outcome of the decision at the time, and they believe Kisor's newly submitted service record would not have done so.[vii]

Following the decision by the Board of Veterans' Appeals, Kisor appealed to the Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit, which both affirmed that *Auer* deference enabled the VA to interpret their own regulation.[viii] Finally, after a failed request for an *en banc* rehearing in the USCA Federal Circuit, Kisor petitioned the U.S. Supreme Court to hear the case.[ix] It was accepted, and oral arguments took place on March 27, 2019.[x]

The VA supports the affirmed *Auer* deference, but argues in this case that *Auer* is not necessary because that case was correctly decided.[xi] In the case of *Kisor*, the court's use of *Auer* deference does not decide if the agency has the freedom to decide if James Kisor's submission of his service record detailing a traumatic event in-service would merit consideration for retroactive benefits. [xii]The VA argues, however that *Auer* deference, established in 1945 as the *Seminole Rock* deference and reaffirmed 9-0 in 1997 in *Auer vs. Robbins*, has become an unshakable element of administrative jurisprudence and cannot be fully removed. However, the government's brief concedes that "overly broad reliance on agency interpretations can have harmful practical consequences.[xiii]" They support a limited version of the *Auer* deference in which only interpretations by the agency in line with previous interpretations are accepted.[xiv] Regardless, in the case of *Kisor vs. Wilkie*, they believe *Auer* was correctly applied and do not contend that the Court should limit deference in this instance. In the government's argument, the regulation

detailing "relevant service records" is sufficiently clear and James Kisor was correctly denied benefits.

By contrast, James Kisor argues that *Auer* deference enables agencies to intentionally write ambiguous regulations with the knowledge that they will be able to freely interpret them under judicial review.[xv] Furthermore, he argues that this practice enables agencies to subvert the Administrative Procedure Act (APA) by avoiding its notice-and-comment rulemaking mandate. Under the APA, regulations can be either legislative or interpretive. Legislative rules have the force of law but must be written through an official notice-and-comment process to ensure public participation.[xvi] Interpretive rules, by contrast, do not require a notice-and-comment period, but are not meant to be legally binding. The majority of rules are interpretive, but when they are upheld under judicial review by means of *Auer* deference, they secure the rule of law. Kisor argues that this is a violation of the APA, and in a broader sense the Congressional grant of power to agencies.[xvii]

The Supreme Court is expected to publish its opinion in summer 2019.[xviii]

Policy Impact on National Veterans Legal Services Program

Regardless of the outcome, the National Veterans Legal Services Program will be directly affected. In the work of supporting American veterans to ensure they secure their benefits as entitled, the NVLSP must consistently understand the application of the thousands of VA regulations. This will continue under either outcome, and a sizable change meriting extensive research should be expected in any case.

If the court rules for Wilkie and *Auer* deference is upheld, the NVLSP should expect to continue devoting significant legal research to VA regulations and their use in appeals cases. While the government's concession that the *Auer* deference may be overly broad in its current application may result in a narrowing by the court, the NVLSP will still be required to infer the Department's intentions from case-to-case. A narrowed *Auer* will provide some guidance based on the Department's previous interpretations and could be considered perhaps the most likely outcome.

If the *Auer* deference is narrowed or overruled, significant cost should be expected for attorney hours to understand the impact on prior and future cases. Past appeals that were rejected may qualify to be reconsidered, and the Program should be prepared for these.

Expected Outcome: Supreme Court Rules for Wilkie

I believe that the Supreme Court will rule in favor of Wilkie and uphold the use of *Auer* deference by the U.S. Court of Appeals for the Federal Circuit to accept the interpretation put forth by the Department of Veterans Affairs of an ambiguous Department regulation. Furthermore, I believe that the Supreme Court will narrow the allowable use of *Auer* deference in their ruling.

The argument for Kisor centers on the idea that the use of *Auer* deference enables the agencies to subvert the APA requirement for notice-and-comment rulemaking, and that this results in the agencies acting in excess of both statutory and Constitutional authority. Under the APA, regulations can be either legislative or interpretive, and only the former have the force of law.[xix] To secure that force of law, the agency must engage in notice-and-comment rulemaking.[xx]

Interpretive rules do not utilize that notice-and-comment process, and thus are merely guidance for regulated persons and entities, but represent the majority of rules enacted.[xxi] When interpretive rules are made without notice-and-comment but later upheld under judicial review and *Auer* deference, they secure the force of law. Kisor argues that this results in the agencies violating the APA by sidestepping the requirement for public comment. This argument is unlikely to be persuasive, however, in light of the Supreme Court's 2015 decision in *Perez vs. Mortgage Bankers Association* which found that requiring the agencies to submit revisions of interpretive rules to a notice-and-comment period was inconsistent with the APA.[xxii] Given this ruling, the Court did not find the need for public comment on interpretive rules to be a compelling argument, despite the knowledge that *Auer* deference would apply to such revisions.

Kisor points to section 706 of the APA to argue that it falls to the courts to:

> ". . .decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. . ."[xxiii]

However, this statute does not define the methods by which the courts shall determine the meaning or applicability of such terms. For the courts to determine the meaning by deferring to the agency as subject matter experts under *Auer* has been widely upheld.[xxiv]

The justices are equally unlikely to be swayed by the idea that *Auer* deference results in a violation of the Congressional grant of power to the agencies. When counsel for Kisor suggested in oral arguments that the Court has been willing to overrule decisions that could be in the hands of Congress, Justice Kagan noted that "there aren't very many of those cases. And we take it super-seriously when we do and we need a – I mean we used to – and we need a good reason for it."[xxv]

The government argues that notice-and-comment rulemaking will still very likely result in ambiguous rules once faced with interpretation.[xxvi] They contend that by preserving *Auer* deference in a narrowed format, regulated entities can "rely" on the federal government's interpretation, rather than that of various district and circuit courts.[xxvii] In the case of *Kisor*, however, they argue that the Department of Veterans Affairs correctly interpreted the rule and thus the outcome is not dependent on the use of *Auer* deference.[xxviii] They contend that the narrowed interpretation, requiring fair warning of the agency's interpretation, a basis in experience, and agency-wide deliberation, would be sufficient to meet the practical needs of all parties.[xxix]

Though significant case law supports *Auer*, the proposed modifications to *Auer* deference provided by the government coupled with the Court's tendency towards *stare decisis* will most likely result in a 5-4 ruling for Wilkie with a narrowed allowable application of *Auer*. Though the four most conservative justices oppose it, with Justices Thomas and Gorsuch contending in 2016 that the principle is "constitutionally suspect,"[xxx] the liberal wing of the court did not appear to be convinced in oral arguments.[xxxi] Chief Justice Roberts questioned the scale of the possible change[xxxii], but given the gravity of the decision and the wide range of opportunities for modifications to a preserved *Auer* presented by the government, it is likely he will side with the liberal wing in a 5-4 decision.

Recommendations
In the likely event that the Supreme Court rules for Wilkie, with a full or partial preservation of the *Auer* deference, the National Veterans Legal Services Program should take two steps in response:

1. Lobby Congress to amend 5 U.S.C. § 706 as follows:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action, **without deferring to agency interpretations of actions that have not been subject to public notice and comment**.

This would codify the requirement that agencies must submit language for notice and comment if they wish to secure the force of law under *Auer* deference, and would provide NVLSP with a much greater opportunity to impact regulations affecting veterans prior to their enaction.

2. Review cases within the NVLSP U.S. Court of Appeals for Veterans Claims group that represent potential arguments against the ruling in *Auer*, and prepare them for appeal

In curating future cases supported by NVLSP that represent a potential misuse of *Auer*, we will be able to consider the impact that this case has had on the long-term health of *Auer* deference and put forth cases for appeal that are likely to further erode this precedent. In doing so, the Department of Veterans Affairs will be forced to submit more regulation to notice-and-comment rulemaking, enabling us to more reliably understand the Department's approach in cases concerning the veterans we serve.

Conclusion
Kisor vs. Wilkie has raised for the Supreme Court's consideration a necessary question regarding the separation of powers in American government and the need for public comment in agency rulemaking on the issue of *Auer* deference. While it is expected that the Court will rule in favor of the government and uphold *Auer* deference, it is likely that this doctrine will be more narrowly tailored. As a result, a greater percentage of regulations promulgated by the Department of Veterans Affairs will be subject to notice-and-comment rulemaking and fewer interpretive rules will receive deference to the agency's interpretation. This will result in a more equitable regulatory structure in the context of veterans' claims but will require significant legal research within the NVLSP to understand the full extent of the impact. Finally, the NVLSP has two major areas for action to further reduce the impact that *Auer* deference has on the equity of veterans' claims: lobbying Congress for an amendment to the Administrative Procedure Act and preparing cases for appeal where deference questions are raised.

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[i] *Kisor v. Shulkin*, 869 F.3d 1360 (2017) at I
[ii] *Ibid.*
[iii] *Ibid.*
[iv] *Id at II.*
[v] *Ibid.*
[vi] *Ibid.*
[vii] *Ibid.*

[viii] *Ibid.*
[ix] *Kisor v. Shulkin,* 880 F.3d 1378 (2018), *Kisor v. Wilkie,* citation pending (2019)
[x] *Kisor v. Wilkie,* citation pending (2019)
[xi] Brief for Respondent Wilkie at 10 (Oct 31, 2018)
[xii] Brief for Respondent Wilkie at 12 (Oct 31, 2018)
[xiii] Brief for Respondent Wilkie at 26 (Feb 25, 2019)
[xiv] Brief for Respondent Wilkie at 12 (Feb 25, 2019),
William Yeatman. Preview of Oral Arguments in Kisor v. Wilkie. CATO Institute. (Mar. 25, 2019)
https://www.cato.org/blog/preview-oral-arguments-kisor-v-wilkie
[xv] Brief for Petitioner Kisor at 4 (Nov 19, 2018)
[xvi] Brief for Petitioner Kisor at 4 (Nov 19, 2018)
[xvii] *Ibid.*
[xviii] Amy Howe. Argument analysis: Justices divided on agency deference doctrine. SCOTUSblog. (Mar. 27, 2019)
https://www.scotusblog.com/2019/03/argument-analysis-justices-divided-on-agency-deference-doctrine/
[xix] Administrative Procedure Act 5 U.S.C. § 706
[xx] *Ibid.*
[xxi] Jennifer Huddleston. This Supreme Court Case Could Restrain Judicial Deference to Federal Agencies. The Federalist. (April 4, 2019)
https://thefederalist.com/2019/04/04/supreme-court-case-restrain-judicial-deference-federal-agencies/
[xxii] *Perez v. Mortgage Bankers Association* 135 S. Ct. 1199 (2015)
[xxiii] Administrative Procedure Act 5 U.S.C. § 706
[xxiv] Petition for writ of certiorari on behalf of HYOSUNG D&P CO., LTD at 23 (July 29, 2016) (No. 16-141)
[xxv] Transcript of Oral Argument at 19, *Kisor v. Wilkie,* citation pending (2019)
[xxvi] Transcript of Oral Argument at 23, *Kisor v. Wilkie,* citation pending (2019)
[xxvii] Transcript of Oral Argument at 37, *Kisor v. Wilkie,* citation pending (2019)
[xxviii] Brief for Respondent Wilkie at 10 (Oct 31, 2018)
[xxix] Brief for Respondent Wilkie at 26 (Feb 25, 2019)
[xxx] Dissent from denial of certiorari to petitioner Garco Construction, Inc. at 2 (March 19, 2018) (No.17-225)
[xxxi] Transcript of Oral Argument at 3, 4, 6, 7,10, 11, 12, 13, 23, 24, 30, *Kisor v. Wilkie,* citation pending (2019)
[xxxii] Transcript of Oral Argument at 26, *Kisor v. Wilkie,* citation pending (2019)