BRIEFING PAPERS® SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

The Sentinel Stirs: Government Procurement Law After *Loper Bright Enterprises*

By Christopher Yukins, Kristen Ittig & Nicole Williamson[*]

Administrative law—and by extension, government procurement law—is in a period of transition in the United States. The judiciary, sometimes alarmed by the perceived excesses of the administrative state, is reexamining the deference traditionally afforded agency interpretations of law. As part of that transition, the U.S. Supreme Court in *Loper Bright Enterprises v. Raimondo*[1] overruled the test it first established in *Chevron v. Natural Resources Defense Council,*[2] which held that if a statute was ambiguous, the courts would defer to an agency's reading of that statute as long as the agency's interpretation was reasonable. The collapse of the *Chevron* test may send shock waves across government procurement law as well,[3] as agencies and contractors contest the meaning of laws before the courts.

This BRIEFING PAPER proceeds in several parts. Part I describes the *Chevron* test and explains why the Court's review of the *Chevron* decision in *Loper Bright Enterprises* was so important. To help understand how government procurement law may evolve after *Loper Bright,* Part II reviews some of the key government contracts cases that have applied *Chevron* over the past 40 years, with a special emphasis on U.S. Court of Appeals for the Federal Circuit and Supreme Court cases that have taken a less deferential approach to agencies' readings of statutes and regulations—or (as in the "major questions" cases) have rejected those readings outright. Again for context, Part III assesses what commentators believed were possible outcomes in the Supreme Court's *Loper Bright Enterprises* case, including (a) returning to a less deferential approach to agencies' interpretations of statutes (the "*Skidmore v. Swift & Co.*"[4] approach), or (b) consolidating and restating earlier precedents which cabin agencies' discretion (the approach the Court took in *Kisor v. Wilkie*,[5]

IN THIS ISSUE:

[*]*Christopher R. Yukins serves as the Lynn David Research Professor in Government Procurement Law, George Washington University Law School. Kristen Ittig is a partner and Nicole Williamson is an associate at the firm of Arnold & Porter, where Chris Yukins also serves as counsel.*

which addressed the courts' review of agencies' interpretations of their own *regulations*). Parts IV and V review the Supreme Court's *Loper Bright* decision in detail (noting that the Court's majority decision leaned heavily on the 1944 *Skidmore* decision and essentially ignored *Kisor*). The discussion notes—as many commentators have—that while the decision makes clear the primary role of the courts in interpreting the law, the decision leaves many questions unresolved. Part VI, the conclusion, sums up to suggest that, as Professor Adrian Vermuele has suggested, the *Loper Bright Enterprises* opinion " 'expressed a mood,' as Justice Frankfurter once said of Congress . . . . The mood is that 'We the Judges say what the law is.' "[6] In this view, judges are sentinels of the law, tasked to check agency missteps or overreaches against the law—in public procurement as in the broader realm of administrative law. That understanding of *Loper Bright* undergirds the "guidelines" offered in Part VII, for those handling government procurement matters in the wake of the Supreme Court's landmark decision.

I. Background: Understanding The *Chevron* Test

As in most things, to know where we're going we need to know where we've been. Although *Loper Bright Enterprises* overruled *Chevron*, to understand the force of the *Loper Bright* opinion it is helpful to understand what *Loper Bright* sought to displace: 40 years of judicial deference to agencies under *Chevron*.

A. The Elements Of The *Chevron* Test

The test set forth by the Supreme Court in *Chevron* in 1984 applied where an agency had implemented a statute that was ambiguous. The *Chevron* test applied only when the statute was unclear. The test did not apply if the statute was unambiguous; as the Court noted in *Chevron*, if "Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[7]

In assessing an agency's interpretation of an *ambiguous* statute, under *Chevron* "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." This is because, the Court wrote, the " 'power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' "[8]

Assessing what is a "permissible" interpretation of a statute differed depending on whether Congress had "explicitly left a gap for the agency to fill, [and] there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." If so—if Congress had expressly delegated interpretative authority to the agency—under *Chevron* the agency's "legislative regulations are given controlling weight *unless they [were] arbitrary, capricious, or manifestly contrary to the statute*."[9]

Sometimes, though, as the Court noted in *Chevron*, "the *legislative delegation to an agency on a particu-*

Editor: Valerie L. Gross

Briefing Papers® (ISSN 0007-0025) is published monthly, except January (two issues) and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Customer Service: (800) 328-4880. POSTMASTER: Send address changes to Briefing Papers, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

lar question is implicit, rather than explicit." In those cases, "a court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency."[10]

These considerations in *Chevron* were drawn against what the Court called its long recognition "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," and that "the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.' "[11]

As Professor Thomas Merrill noted, the *Chevron* test could be summarized in a two-part test:

> First, if the court finds Congress provided a "clear" or "unambiguous" answer to the meaning of the statute, the court must enforce that understanding. But if the statute does not provide a clear answer—if it is ambiguous or silent—then, as a second step, the court is to enforce the agency's interpretation, as long as it is "reasonable."[12]

While this seems a relatively simple two-step test, over 40 years it has been applied in many different ways, in many different contexts in administrative law,[13] across what William Eskridge and Lauren Baer called a "continuum of deference."[14]

Writing two years after the *Chevron* decision, Kenneth Starr (then a judge on the U.S. Court of Appeals for the D.C. Circuit) argued that *Chevron,* in the second step of the analysis, restricted federal courts' power to override agencies' interpretations of statutes:

> *Chevron* also strengthened the deference principle by restricting the power of federal courts to reject an agency interpretation on the grounds of infidelity to the policies underlying the statute. Pre-*Chevron* cases . . . held that an agency interpretation could be overturned either because it violated Congress' clearly enunciated intent, or because it "frustrate[d] the policy that Congress sought to implement." . . . *Chevron*, by contrast, held that, once a court has determined that Congress had no intent with regard to the question before it, policy considerations should play little, if any, role.[15]

Starr noted, however, that *Chevron* left room for the courts to consider policy goals in the *first* step of the analysis—in assessing whether the statutory language at issue is unambiguous:

> After *Chevron*, the one clear avenue for courts to appeal to congressional policy in statutory interpretation cases arises under the first step of the *Chevron* analysis. For example, a reviewing court may find a statute's terms to be crystal clear but nonetheless irrational or patently contrary to the legislative history, leaving the court to look to the underlying purposes of the statute in order to resolve the conflict. This analytical mode is not, however, an open invitation for the judiciary to force recalcitrant agencies to implement more vigorously the policies that animated Congress in the first instance. Instead, upon analysis, this approach seems to be merely an exception to the "plain meaning" rule of statutory construction, which provides that statutory language is the starting point for divining legislative intent. Moreover, such cases are rare indeed, likely to exist only where the statutory language admits of only one reading and where that reading could not possibly have been embraced by a reasonable Congress seeking to attain the goals it sought.[16]

We will return below to Kenneth Starr's insight—that after *Chevron* courts could still impose policy considerations on agency interpretations by focusing on the *first* step in the analysis, i.e., on the ostensibly plain language of the statute—when we assess decisions applying *Chevron* to federal procurement questions.

B. The Challenge To The *Chevron* Test

Overruling the *Chevron* test was the question put squarely before the Supreme Court in the *Loper Bright Enterprises* case. Professor Merrill argued that we reached this point as part of a "crisis of legitimacy" in the administrative state—the modern American government dominated by administrative agencies:

> The latest crisis of legitimacy appears to have been triggered by efforts of the Obama Administration to tackle climate change and immigration reform by expanding existing administrative authority. Agitation about the legitimacy of these efforts led to dark warnings that

> America is governed by a "deep state," and, at least among conservative legal commentators, took as its most prominent target . . . "the *Chevron* doctrine." . . . After gradually consolidating its grip for over thirty-five years, the *Chevron* doctrine became a matter of intense controversy at the tail end of the Obama Administration. Conservative judges and lawyers—including two of the Justices named to the Supreme Court by President Trump—have argued that *Chevron* must be overruled or at least significantly modified. Liberal judges and lawyers—including the Justices named to the Court by Presidents Clinton and Obama—generally think *Chevron* should remain undisturbed or perhaps only modestly reformed. Both sides attribute great significance to the outcome of this debate.[17]

This crisis, Professor Merrill noted, has deeper roots in the *Chevron* test itself, because the test shifted substantial power to the executive branch:

> . . . [P]erhaps most fundamentally, the *Chevron* doctrine seems to validate a dramatic shift in power in our system of constitutional government. The two-step standard of review, taken at face value, seems to say that primary authority to interpret ambiguous agency statutes—and virtually every statute is unclear or silent on many points—has been transferred from courts to agencies. Courts since the days of Chief Justice John Marshall have been thought to have authority "to say what the law is." . . . *Chevron* seems to take a big chunk of that authority and transfer it to agencies, now widely regarded as part of the executive branch. This is significant because courts in matters of statutory interpretation generally act as "faithful agents" seeking to carry out the will of the Congress. The *Chevron* doctrine downplays the role of Congress's faithful agent, the courts, and elevates the roles of executive agencies, which are not so faithful because they are subject to oversight by the President, who often has different views about policy than did the enacting legislature. This has profound implications for how we think of the role of Congress under our system of government. The conventional view is that Congress is the prime mover in establishing policy, and the role of the agencies is to implement that policy, under the supervision of the courts. The *Chevron* doctrine seems to validate a different view, that agencies are a co-equal source of policy change, and Congress can constrain the agencies only by adopting limits—in "clear" language—on what agencies can do. Considered in this light, the *Chevron* doctrine may countenance one of the largest transfers of political power in our history, from Congress to the executive. One might think this would require a constitutional amendment, not a decision of the Supreme Court.[18]

Professor Merrill stressed that political perspectives on the *Chevron* doctrine have shifted over the decades, and that conservatives' distaste for *Chevron* is a relatively recent development:

> In terms of partisan politics, attitudes about the *Chevron* doctrine seem to shift in a discernible way with the political party of the incumbent President. In its early years, the *Chevron* doctrine was thought to favor the deregulation agenda of the Reagan and Bush I Administrations, and was generally opposed by Democrats . . . . Starting with the Clinton Administration and accelerating in the later years of the Obama Administration, the equation began to shift. Opposition to the *Chevron* doctrine on the part of liberal commentators and judges began noticeably to soften . . . . Conservative commentators and judges, for their part, became increasingly skeptical about the *Chevron* doctrine.[19]

Despite this political turmoil around the *Chevron* decision, Professor Merrill (like many of the other commentators discussed below) did not believe that the Supreme Court would reject *Chevron* outright in its *Loper Bright Enterprises* decision. He pointed out that the Court had "previously imposed limits on the doctrine," and the Court in *Kisor v. Wilkie* (discussed below) "substantially rewrote the legal doctrine that applies in a related area, dealing with judicial review of agency interpretations of their regulations." As a result, Merrill predicted, "it is not hard to imagine that the current Court, on which no Justice remains from the Court that decided *Chevron*, may undertake to rewrite the *Chevron* doctrine at some point in the future."[20]

In drawing the balance of authority between courts and the agencies, Professor Merrill argued, a "better approach . . . is to try to figure out where agencies have a comparative advantage and where courts have a comparative advantage, and to assign roles to each institution that reflect how each can make a positive 'marginal' contribution to the process of saying what the law is."[21] Merrill's very practical approach—what Ken Starr called a "sliding-scale" and "common-sense" approach that turns on the institutions' comparative advantage[22]—offers an important analytical tool as we assess the impact of *Loper Bright Enterprises* on government procurement law, below.

II. How Appellate Courts Have Applied *Chevron* To Federal Procurement Cases

Before looking forward, though, we should look back again, to review how the courts have applied *Chevron* in deciding *federal procurement cases* over the years. Our focus will be on the primary appellate courts that hear procurement law cases—the Supreme Court and the U.S. Court of Appeals for the Federal Circuit. Because the Supreme Court applied *Chevron* in only one federal procurement case, *Kingdomware Technologies, Inc. v. United State*s,[23] the Federal Circuit's decisions will dominate the discussion below.

As the discussion below shows, most of the decisions square with the findings of a leading academic study that showed that appellate courts, when they applied *Chevron*, did indeed tend to defer to agencies.[24] The Federal Circuit regularly deferred to established procurement regulations, including especially the Federal Acquisition Regulation (FAR), the core set of procurement rules that reflects over a century of regulatory development.[25] Where the courts determined *not* to defer to agencies, the courts—as Ken Starr predicted—typically focused on the *first* step in the *Chevron* analysis and declared the statute unambiguous, even if that meant directly disagreeing with the agency's reading. That left, though, the harder cases: decisions in which the courts had to decide between diametrically different ways to interpret a procurement statute or regulation. While *Loper Bright* did not solve those harder cases, it offered a new way to think about them without *Chevron*'s deference to the agencies.

A. Deference To The FAR And Other Procurement Regulations

The Federal Circuit's *Chevron* deference in procurement cases has perhaps been most pronounced when the court has been asked to review provisions from the FAR because Congress has explicitly authorized federal agencies to promulgate their procurement rules.[26] In *Brownlee v. DynCorp*,[27] for example, the Federal Circuit applied *Chevron* deference to an analysis of FAR provisions regarding cost accounting because the FAR, specifically authorized by Congress, is "the very type of regulations that the Supreme Court in *Chevron* and later cases has held should be afforded deference." Accordingly, the Federal Circuit concluded, the FAR's interpretation of a statute need only be "reasonable" to pass review.[28]

In *Newport News Shipbuilding & Dry Dock Co. v. Garrett*,[29] the Federal Circuit applied *Chevron* to give "considerable weight" to a provision in the FAR which (the court explained) reflected a statutory interpretation by the Office of Federal Procurement Policy (OFPP), an agency with statutory authority to promulgate direction as to who may certify a claim under the Contract Disputes Act.[30] The Federal Circuit deferred to the FAR because the rule "fill[ed] the gap Congress implicitly left regarding who may certify" a claim, so the rule was "clearly within the congressionally delegated authority" of the agency.[31] The Federal Circuit applied that same *Chevron* deference in *United States v. Grumman Aerospace Corp*.,[32] where it deferred to the agency's regulation limiting those who, under the Contract Disputes Act, may certify a claim—even though that rule excluded the contractor's chief financial officer. The "regulation being reasonable," said the Federal Circuit, "this court may not substitute its own construction of the statutory provision on which it rests. Nor is the writing or amendment of regulations our proper role." As a result, the court refused to inquire into whether the regulation was sensible. "We are not privy to all of the agency's reasons for its regulation and lack the expertise developed over the years by the agency in dealing with all aspects of certification," wrote the Federal Circuit as it rejected the contractor's arguments grounded in "policy and practicality."[33]

The Federal Circuit's deference under *Chevron* has extended to other implementing regulations, as well. In *Palladian Partners, Inc. v. United States*,[34] the Federal Circuit applied *Chevron* and its progeny to defer to the Small Business Administration's rules regarding challenges to small-business set-asides. "Where, as here, Congress has specifically delegated rulemaking authority to an agency," the Federal Circuit noted, "courts 'lack[ ] authority to undermine the

regime established . . . unless [the] regulation is "arbitrary, capricious, or manifestly contrary to the statute." ' "[35] In *Craft Machine Works, Inc. v. United States*,[36] the Federal Circuit considered the Department of Defense's (DOD's) implementing regulation under the Cargo Preference Act of 1904 and, citing *Chevron*, noted that the court "accords considerable weight to the prior long-standing interpretation, if reasonable, of the agency charged with administering a regulatory scheme."[37]

B. Focus On Whether The Statute Was Clear

In those cases where the Federal Circuit considered an agency's statutory interpretation under *Chevron* and the agency *lost* a public procurement appeal, the focus of the Federal Circuit's analysis—as Kenneth Starr predicted[38]—often was on the *first* step in the *Chevron* analysis, *i.e.,* on whether the statutory language was indeed ambiguous.

In *American Telephone & Telegraph Co v. United States*,[39] the Federal Circuit, sitting *en banc*, rejected the DOD's interpretation of a statute barring fixed-price development contracts for major systems, despite applying *Chevron* deference. The Federal Circuit concluded that by its terms the statute, taken in context, plainly limited the Department's authority to enter into the fixed-price contract at issue. And in *Res-Care, Inc. v. United States*,[40] the Federal Circuit applied other tools of statutory interpretation (including dictionary meaning, statutory context and legislative history) to conclude that the statute's meaning was unambiguous.

In *PDS Consultants, Inc. v. United States*,[41] the Federal Circuit, applying *Chevron* and traditional rules of statutory interpretation, rejected the agency's position because the court concluded that the statute requiring that opportunities be competed first among veteran-owned small businesses by the Department of Veterans Affairs was *not* ambiguous—it was more specific, and therefore took precedence over a more general statute which lent a competing procurement preference to persons with disabilities. The Federal Circuit rejected the agency's interpretation based upon "the plain language of the more specific, later-enacted" statute governing procurement by the Department of Veterans Affairs, "as well as the legislative history and Congress's intention" in enacting the statute.[42]

C. Where The Courts Have Afforded Little (Or Redirected) Deference

In several public procurement cases that raised difficult issues of public policy, the courts overrode the agency's interpretation by simply reading the law to be unambiguous—even if that required a sort of blunt force analysis. The cases seem to confirm what William Eskridge and Lauren Baer found in their broader review of decisions under *Chevron*: that although appellate courts will generally defer to agencies, the courts sometimes take a more critical approach when an agency position runs counter to the appellate judges' understanding of larger public norms.[43]

● *Kingdomware* (Supreme Court, 2016): In the lone Supreme Court case in this review of appellate procurement decisions citing *Chevron*, *Kingdomware Technologies, Inc. v. United State*s,[44] the Court simply read away a longstanding divide in procurement law in order to override the Department of Veterans Affairs' understanding that the set-aside at issue did not apply to service-disabled veteran-owned small businesses. The Court was interpreting 38 U.S.C.A. § 8127(d), which mandates that, when two or more service-disabled veteran-owned small businesses are available, contracts are to be set aside for those businesses. A conundrum at the core of the case—a point that was touched on repeatedly at oral argument—was why the Department of Veterans Affairs would take a position adverse to veterans, even if that position reduced the Department's administrative burdens.

Resolving that conundrum meant the Court had to interpret what a "contract" was, under the statute. (As noted, 38 U.S.C.A. § 8127(d) mandates that, when two or more service-disabled veteran-owned small businesses are available, *contracts* are to be set aside.) For decades, federal procurement law has distinguished between (1) master catalogue *contracts* (sometimes called "indefinite-delivery, indefinite-quantity" (IDIQ) contracts, or, as were at issue in *Kingdomware*, the Federal Supply Schedule (FSS) contracts run by the General Services Administration), and (2) the *orders*

issued under those contracts. The master contracts, as federal contracts, generally must be competed and transparent, and—the nub of the *Kingdomware* case—are subject to set-asides. Under U.S. procurement law, that is not always true for the orders issued under those contracts.[45] The government's brief opposing the grant of a writ of *certiorari* in *Kingdomware* pointed to that regulatory dichotomy between contracts and orders to argue that the Department of Veterans Affairs (VA) did not have to set aside *orders* for service-disabled veterans.[46]

During oral argument before the Supreme Court, the government opened by urging that the statutory "mandate here applies when the VA awards wholly new contracts, not when it places orders under old ones"—an argument which pivoted on the dichotomy between "contracts" and "orders."[47] But counsel for the government acknowledged later in the argument that FSS orders are themselves "contracts" (though he tried to backpedal on that point),[48] and the Court in *Kingdomware* ultimately rejected the dichotomy between contracts and orders. The Court ruled 8-0 that orders under an FSS master contract are indeed contracts, and as such—under a statute the Court found unambiguous—must be set aside for service-disabled veteran-owned small businesses when appropriate.[49] To rule against the agency, in other words, the Court returned to the first step in the *Chevron* analysis and found the statute's reference to "contracts" unambiguous.

● *Texas Commission for the Blind* (Federal Circuit, 1986): The Federal Circuit faced a similarly difficult decision in *Texas State Commission for the Blind v. United States*,[50] for the case turned on conflicting preferences for different groups. The statute at issue, the Randolph-Sheppard Act,[51] was intended to create revenue streams for blind persons, in part by permitting them to operate vending machines on federal property. The statute called for revenue-sharing with blind persons preferenced under the Act but exempted "income from vending machines within retail sales outlets under the control of exchange or ships' stores systems."[52] A DOD regulation interpreted this exemption to exclude income "from vending machines operated by or for the military exchange."[53] (Military commissaries and exchanges (sometimes referred to as "private exchanges" or "PX's") are cited by the DOD as an important benefit for military servicemembers and their families.[54])

The Federal Circuit, sitting *en banc* and very divided, applied *Chevron* and found ambiguity (the first step in the *Chevron* analysis) in the Randolph-Sheppard Act's reference to vending machines "within retail sales outlets under the control of exchange . . . systems," and deferred to the DOD's regulation—a result that benefited the DOD's private exchanges. Because the Federal Circuit found ambiguity in the statute (though the dissent found the language plainly unambiguous), the court deferred to the *user* agency (the DOD) even though another agency (what was then the Department of Health, Education, and Welfare) had primary authority for implementing the Act.

● *Allied Technology Group* (Federal Circuit, 2011): In *Allied Technology Group, Inc. v. United States*,[55] the Federal Circuit addressed requirements under § 508 of the Rehabilitation Act[56] that information technology purchased by the federal government must be accessible to persons with disabilities. In the background was an industry reality—that it is difficult to achieve full accessibility in information technology—which in practice conflicted with statutory language and implementing regulations that called for full accessibility.[57]

Although the regulations implementing § 508 required full compliance—and Judge Bryson argued in his dissent that those regulations were entitled to deference under *Chevron*—the Federal Circuit ultimately said in that bid protest that the awardee's hedging commitment to compliance was not enough to preclude award, since the awardee had committed to complying with § 508's requirements after award. The Federal Circuit thus resolved the case by deferring the core issue—meeting the accessibility standards—to the contracting officer's discretionary assessment of the vendor's representations in the evaluation process.

D. Cases Under The "Major Questions" Doctrine

While the cases surveyed above illustrate how *Chev-*

ron deference has tempered (or at least reshaped) appellate review in procurement cases, it is equally important to stress what those cases based on *Chevron* did *not* address: the "major questions" doctrine, which the Supreme Court has developed to address major questions on which the Court will *not* defer to the agencies. During the Covid-19 pandemic, the major questions doctrine was applied by other circuit courts (outside the Federal Circuit) to procurement rules, and the doctrine stands as an important alternative to deference where agency rules have a broad impact on society.

A Congressional Research Service report summarized the major questions doctrine as follows:

> Congress frequently delegates authority to agencies to regulate particular aspects of society, in general or broad terms. However, in a number of decisions, the Supreme Court has declared that if an agency seeks to decide an issue of major national significance, its action must be supported by clear congressional authorization. Courts and commentators have referred to this doctrine as the major questions doctrine (or major rules doctrine).[58]

In a series of decisions, spanning a wide range of policy questions, the Supreme Court has held that agencies lacked authority to regulate on major questions absent clear congressional authorization. As the Court noted in *West Virginia v. Environmental Protection Agency*,[59] "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."[60] Justice Gorsuch explained the basis for the major questions doctrine in his concurrence in *National Federation of Independent Business v. Department of Labor*:

> Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.[61]

Commentators have criticized the "major questions" doctrine as one that leaves too much discretion with the courts to strike down agency rules and opens the door to "politically infused" judgments in the lower courts.[62] Daniel Deacon and Leah Litman argued that the "major questions doctrine . . . supplies an additional means for minority rule in a constitutional system that already skews toward minority rule. What's more, it invites politically infused judgments by the federal courts, further eroding democratic control of policy. And it operates as a powerful deregulatory tool that limits or substantially nullifies congressional delegations to agencies in the circumstances where delegations are more likely to be used—and more likely to be effective . . . ."[63] Natasha Brunstein concluded, based on a survey of decisions, that lower courts have read the doctrine to provide "vast discretion . . . , treating the doctrine as little more than a grab-bag of factors at their disposal" and "in most cases concerning Biden Administration agency actions and executive orders, judges appear[ed] to apply the doctrine to reach outcomes that appear to align with the partisan preferences of the judge's appointing President."[64]

Critics have also argued that the major questions doctrine, by saying that the courts may strike down major regulations that lack an explicit congressional mandate, in effect shifts power from Congress to the courts. "What I do know," wrote retired D.C. Circuit Court of Appeals judge David Tatel in criticizing the major questions doctrine, "is that, by affording itself a roving mandate to disrupt any regulatory regime that strikes five justices as too 'major,' the Court strengthened its own hand at Congress's expense."[65]

The expansive nature of the "major questions" doctrine has left open questions about how it should be read with the *Chevron* doctrine. The Congressional Research Service noted that the "Court . . . has arguably applied the major questions doctrine in the *Chevron* context" (*i.e.*, where the Court is assessing an agency's implementation of a statute) "in an unclear,

ad hoc manner." The Court's failure to discuss the *Chevron* framework in key "major questions" decisions, said the Congressional Research Service, "possibly signal[s] that the major questions doctrine is an independent principle of statutory interpretation focused on ensuring Congress bears the responsibility for confronting questions of major national significance. . . . That silence leaves unanswered questions about how to determine which doctrine applies or whether courts should undertake a major questions inquiry prior to or as part of their *Chevron* analyses."[66]

Because of the broad potential reach of the "major questions" doctrine, even if the courts apply some measure of deference to agency interpretations after *Chevron*'s collapse, the major questions doctrine could in practice trump that deference, at least in cases involving issues of national importance. Appellate courts' past applications of the major questions doctrine to procurement cases provide, therefore, an important bellwether.

As a threshold matter, it is important to stress that many of the most controversial and far-reaching federal procurement policies—for example, those implementing environmental policies[67] or setting minimum wages for federal contractor employees[68]—have been based upon executive orders issued by the president, often under the authority lent the president by the Federal Property and Administrative Services Act of 1949.[69] How the "major questions" doctrine intersects with presidential power under executive orders is, therefore, a critical issue in U.S. procurement law.

Whether procurement rules issued under those executive orders are subject to the "major questions" doctrine came to a head during the pandemic, with regard to directives issued under executive order that required contractor employees to be vaccinated against the Covid-19 virus (known as the "Contractor Mandate").[70]

As the U.S. Court of Appeals for the Ninth Circuit noted in *Mayes v. Biden*,[71] there is a constitutionally grounded argument for *not* applying the major questions doctrine to procurement rules issued under an executive order:

> Through the Procurement Act, Congress delegated to *the President* the authority to "prescribe policies and directives that the President considers necessary" to "provide the Federal Government with an economical and efficient system" for "[p]rocuring . . . property and nonpersonal services, and performing related functions including contracting." 40 U.S.C. §§ 101, 121. The Major Questions Doctrine is motivated by skepticism of agency interpretations that "would bring about an enormous and transformative expansion in . . . regulatory authority without clear congressional authorization." . . .Those concerns are not implicated here as the President "does not suffer from the same lack of political accountability that agencies may, particularly when the President acts on a question of economic and political significance."[72]

The Ninth Circuit therefore concluded that the major questions doctrine would not trump the "Contractor Mandate."

At the same time, however—as the Ninth Circuit acknowledged in *Mayes*—three other circuit courts rejected the "Contractor Mandate," either explicitly or impliedly, under the major questions doctrine.[73] In its decision, the Eleventh Circuit found that the Contractor Mandate fell squarely into the major questions doctrine and suggested that the debate over the mandate was part of the ongoing controversy over checks on the administrative state:

> Our analysis is also informed by a well-established principle of statutory interpretation: we "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, [141 S. Ct. 2485, 2489 (2021)]. That doctrine has been applied in "all corners of the administrative state," and this case presents no exception. *West Virginia v. EPA*, [142 S. Ct. 2587, 2608 (2022)]. As the Supreme Court has emphasized, requiring widespread Covid-19 vaccination is "no everyday exercise of federal power." *Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, [142 S. Ct. 661, 665 (2022)] (quotation omitted). Including a Covid-19 vaccination requirement in every contract and solicitation, across broad procurement categories, requires "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2609 (quotation omitted).[74]

Notably the Supreme Court's decision in *Loper Bright Enterprises* did not reconcile the *Chevron* doc-

trine (deference to agency interpretations) with the major questions doctrine (no deference without an express congressional mandate); indeed, it never mentioned the major questions doctrine at all. Professor Richard Pierce has argued that this is because *Loper Bright Enterprises*, by giving the courts clear first authority to say what the law is, "eliminates any justification for continued application of the powerful new version of the major questions doctrine."[75] It will remain for future cases to determine whether Professor Pierce is right, or whether the major questions doctrine will continue to play a role when agencies interpret their statutory mandates to effect major policy changes.

III. Pre-Decision Predictions Of The Potential Impact Of *Loper Bright Enterprises*

During the months before the decision in *Loper Bright Enterprises* decision was issued, commentators speculated on how the case might be decided. Looking back to that discussion *before* the Supreme Court's June 2024 decision helps illuminate the course that the Supreme Court ultimately took in its *Loper Bright Enterprises* opinion—and helps predict how future courts might apply *Loper Bright* to procurement disputes.

A. Possible Outcomes—*Skidmore* And *Kisor*

In his assessment of possible outcomes before the *Loper Bright* opinion was issued, Professor Pierce wrote that, after oral arguments in that case, it appeared that the Justices "will either 'Kisorize' *Chevron* and leave it in effect or they will overrule *Chevron* and replace the *Chevron* test with the test the Supreme Court announced in its 1944 opinion, *Skidmore v. Swift & Co*."[76] Professor Pierce was referencing two landmark Supreme Court decisions, *Skidmore v. Swift & Co.*[77] and *Kisor v. Wilkie*.[78]

The Supreme Court's decision in 1944 in *Skidmore* called not for deference but instead a careful weighing of agency interpretations, one that turns "upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[79] As Richard Pierce noted, citing a 2017 survey of appellate opinions applying *Chevron*, courts have been significantly less deferential to agencies under *Skidmore* than under *Chevron*.[80]

The other path suggested by Professor Pierce—that the Court might "*Kisor*ize" the *Chevron* doctrine—is more complicated. Several Justices specifically asked about "*Kisor*izing" *Chevron* during the *Loper Bright Enterprises* oral argument on January 17, 2024,[81] and (until the Court addresses the issue directly) the Court's opinion in *Kisor* should be read in conjunction with *Loper Bright*.

Kisor dealt with a different question than that addressed by *Chevron*: while *Chevron* defined courts' deference to agencies' interpretations of *statutes*, *Kisor* dealt with how courts should approach agencies' interpretations of *regulations*. Writing for the Court, and gathering together decades of precedent, Justice Kagan set forth guiding rules of interpretation in *Kisor*. She began by framing the problem:

> This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. *See Auer v. Robbins*, 519 U. S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies. We answer that question no. *Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today. The deference doctrine we describe is potent in its place, but cabined in its scope.[82]

Justice Kagan (though here joined by only three other Justices) explained why agencies' interpretations of their own regulations can present knotty problems in administrative law:

> Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. They may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable

> reading. Sometimes, this sort of ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction. But often, ambiguity reflects the well-known limits of expression or knowledge. The subject matter of a rule "may be so specialized and varying in nature as to be impossible"—or at any rate, impracticable—to capture in its every detail. *SEC v. Chenery Corp.*, 332 U. S. 194, 203 (1947). Or a "problem[] may arise" that the agency, when drafting the rule, "could not [have] reasonably foresee[n]." *Id.*, at 202. Whichever the case, the result is to create real uncertainties about a regulation's meaning.[83]

Justice Kagan (still writing for only four Justices) then turned to history and noted that the courts have long deferred to agencies' interpretations:

> In answering that question, we have often thought that a court should defer to the agency's construction of its own regulation. For the last 20 or so years, we have referred to that doctrine as *Auer* deference, and applied it often. But the name is something of a misnomer. Before the doctrine was called *Auer* deference, it was called *Seminole Rock* deference—for the 1945 decision in which we declared that when "the meaning of [a regulation] is in doubt," the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U. S., at 414. And *Seminole Rock* itself was not built on sand. Deference to administrative agencies traces back to the late nineteenth century, and perhaps beyond. *See United States v. Eaton*, 169 U. S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution . . . is entitled to the greatest weight").[84]

Having described the long history of judicial deference to agencies' interpretations of their own regulations, Justice Kagan (for the plurality) then explained *why* the courts defer to agencies—because (as Justice Kagan explained) of the agencies' typically deeper expertise in the problem at hand:

> We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 151–153 (1991). Congress, we have pointed out, routinely delegates to agencies the power to implement statutes by issuing rules. . . . In doing so, Congress knows (how could it not?) that regulations will sometimes contain ambiguities. . . . But Congress almost never explicitly assigns responsibility to deal with that problem, either to agencies or to courts. Hence the need to presume, one way or the other, what Congress would want. And as between those two choices, agencies have gotten the nod. We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U. S., at 151. Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.[85]

Justice Kagan noted that this deference arises in part "because the agency that promulgated a rule is in the 'better position [to] reconstruct' its original meaning," because the "agency that 'wrote the regulation' will often have direct insight into what that rule was intended to mean." She cautioned, though, that this "justification has its limits," and it "does not work so well, for example, when the agency failed to anticipate an issue in crafting a rule," or when "lots of time has passed between the rule's issuance and its interpretation—especially if the interpretation differs from one that has come before." But all that said, she wrote for the plurality, "the point holds good for a significant category of 'contemporaneous' readings" by agencies of their own regulations. "Want to know what a rule means?," Justice Kagan asked, "Ask its author."[86]

Justice Kagan's opinion for the plurality in *Kisor* then shifted from text to context—explaining that a "presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often 'entail[s] the exercise of judgment grounded in policy concerns.' " "Congress," wrote Justice Kagan, "is attuned to the comparative advantages of agencies over courts in making such policy judgments."[87] She continued:

> Agencies (unlike courts) have "unique expertise," often of a scientific or technical nature, relevant to applying a regulation "to complex or changing circumstances." . . . Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory

> program. . . . And agencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public. . . . It is because of those features that Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. And so too, when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar.[88]

The last element of Justice Kagan's argument for deference rested on "the well-known benefits of uniformity in interpreting genuinely ambiguous rules," with a nod to "Congress's frequent 'preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation.' " That preference for uniformity through rulemaking, she wrote, "may be strongest when the interpretive issue arises in the context of a 'complex and highly technical regulatory program,' " because "judges are most likely to come to divergent conclusions when they are least likely to know what they are doing." That said, she noted, the "uniformity justification retains some weight even for more accessible rules, because their language too may give rise to more than one eminently reasonable reading."[89]

Justice Kagan's plurality decision thus laid out at least four rationales for deferring to agencies' interpretations of their own regulations—a history of deference, the agencies' greater expertise, the need to allow agencies to reconcile competing policy interests in a rule, and the need for uniformity in implementing the law. Those rationales were *not* adopted by a majority of the Court but—as Justice Kagan emphasized—were drawn from decades of precedents in administrative law.

Part II-B of the decision was the opinion of the Court, joined (because Chief Justice Roberts joined) by a majority of the Justices. There, Justice Kagan, writing for the Court, noted that it was "worth reinforcing some of the limits inherent in the *Auer* doctrine."[90] Those limitations on deference included:

(1) *Is the regulation ambiguous?* "First and foremost," the *Kisor* decision said, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." If there is no uncertainty, "there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." As *Kisor* noted, "if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would 'permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.' . . . *Auer* does not, and indeed could not, go that far." The history of 40 years of cases decided under *Chevron* (discussed above) suggests, however, that ambiguity is itself a subjective thing—indeed, as is discussed below, *Loper Bright* said exactly that—and a court may read a law to be *un*ambiguous on its way to an interpretation that differs sharply from an agency's. *Kisor* suggested as much, for its stressed that courts must exhaust traditional tools of construction before declaring a regulation ambiguous, and must " 'carefully consider[]' the text, structure, history, and purpose of a regulation in all the ways it would if it had no agency to fall back on. . . . Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference."[91]

(2) *Is the agency's interpretation of an ambiguous regulation reasonable?* Second, the *Kisor* decision said, only if "genuine ambiguity remains," before gaining a court's deference "the agency's reading must still be 'reasonable.' " In other words, wrote Justice Kagan for the Court, the agency's reading "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." She pointed out that "serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous." In assessing whether an agency's interpretation is "reasonable," the *Kisor* decision said, the "text, structure, history, and so forth at least establish the outer bounds of permissible interpretation." Justice Kagan wrote that at this stage of the analysis agencies' interpretations of *regulations* should *not* be given greater deference than agency constructions of *statutes*. She drew a direct parallel between *Auer* and *Chevron*, and so between agencies' readings of regulations and statutes: "Under *Auer*," she wrote for the Court, "as

under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.' '' And, Justice Kagan wrote for the Court, "let there be no mistake: That is a requirement an agency can fail."[92]

(3) *Is the agency's interpretation's entitled to controlling weight?* Third, Justice Kagan wrote for the Court in *Kisor,* even if the agency's interpretation seems reasonable, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." (This, she noted, is "an analogous though not identical inquiry" to that required for *Chevron* deference, with regard to interpretations of statutes.) Justice Kagan cited the rationales for deference discussed in the earlier part of her decision, which were not adopted by a majority of the Justices, "a set of reasons relating to the comparative attributes of courts and agencies." But because "the administrative realm is vast and varied," a presumption of deference "cannot always hold." The inquiry, wrote Justice Kagan for the Court, "does not reduce to any exhaustive test," but the Court had "laid out some especially important markers for identifying when *Auer* deference is and is not appropriate,"[93] such as:

- *Is the agency's interpretation authoritative?* "[T]he regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views." The interpretation "must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context."[94]

- *Is the agency's interpretation grounded in its expertise?* "Next," wrote Justice Kagan for the Court, "the agency's interpretation must in some way implicate its substantive expertise," as agencies' "knowledge and experience largely 'account [for] the presumption that Congress delegates interpretive lawmaking power to the agency.' '' The basis for deference therefore "ebbs when '[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary' duties or 'fall[s] within the scope of another agency's authority.' '' This balancing assessment "holds good as between agencies and courts," wrote the *Kisor* court. Although agencies may have a nuanced understanding of the regulations they administer, such as when the regulations are highly technical, there are situations where even technical issues—such as issues of legal property rights—"may fall more naturally into a judge's bailiwick." No deference need be afforded the agency, the *Kisor* Court suggested, when "the agency has no comparative expertise in resolving a regulatory ambiguity."[95]

- *Is the agency's interpretation a "fair and considered judgment"?* Finally, the *Kisor* decision said, "an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference." That means, the Court wrote, "that a court should decline to defer to a merely 'convenient litigating position' or 'post hoc rationalizatio[n] advanced' to 'defend past agency action against attack.' '' For much the same reasons, the Court wrote, a court "may not defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties," and that "disruption of expectations may occur when an agency substitutes one view of a rule for another." That means, in practice, that *Auer* deference is unlikely when there is an "agency construction 'conflict[ing] with a prior' one." The goal here is to avoid an "upending of reliance," which the Court noted may "happen [even] without such an explicit interpretive change"—the key question is whether the regulated parties had "fair warning," and if not, not to defer.[96]

Kisor is reviewed in detail here for several reasons. First, *Kisor* followed a *structural* approach which the Court notably did *not* adopt in *Loper Bright Enterprises*: *Kisor* pulled together prior precedents to create a coherent structure for judicial interpretation, one less open-ended than *Chevron*'s "reasonableness" test, and one that could have been used by the Court for *statutory* interpretation in the *Loper Bright Enterprises* case. The fact that the Court ultimately did not "*Kisor*-ize" *Chevron*—as is discussed below, the fact

that the Court in *Loper Bright* set forth only a loose test for assessing agency interpretations of statutes—thus may itself offer an important clue for understanding *Loper Bright*. Second, because *Kisor* drew clear parallels between the *Chevron* and *Auer* doctrines—between judicial deference to agencies' interpretations of statutes and regulations—the collapse of the *Chevron* doctrine in *Loper Bright* may mean that *Kisor*, too, will fall (discussed below).[97] Finally, *Kisor* was also important because it set a backdrop to pre-*Loper Bright* decisions in federal procurement, even where those decisions did not explicitly cite *Chevron* or *Kisor* on questions of judicial deference.

B. Procurement Cases After *Kisor* And Before *Loper Bright*

The Supreme Court's 2019 decision in *Kisor* has been cited by the Federal Circuit and its trial court, the U.S. Court of Federal Claims, in a handful of cases.[98] These decisions may reflect a shift in the courts' approach to interpretation, after *Kisor* (2019) and before *Loper Bright Enterprises* (2024), in procurement cases.[99]

These issues of interpretation arose most commonly in bid protests. Judge Tapp in *LS3, LLC v. United States*[100] framed the bases for review under the Administrative Procedure Act standard applied in bid protests per the Tucker Act, 28 U.S.C.A. § 1491:

> According to 28 U.S.C. § 1491(b)(4), the Court typically reviews agency procurement decisions under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Under the APA standard, "[i]n a bid protest case, the inquiry is whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and, if so, whether the error is prejudicial." *Glenn Def. Marine (ASIA), PTE Ltd. v. United States*, 720 F.3d 901, 907 (Fed. Cir. 2013). Thus, judicial review of agency action under the APA proceeds on two tracks: the Court could find (1) the agency's decision lacked either a rational basis or support from the administrative record or was arbitrary and capricious; and/or (2) the agency's procurement procedure involved a violation of regulation or statute. *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1358 (Fed. Cir. 2009). To obtain relief, after showing that the procuring agency violated the law or acted arbitrarily and capriciously, the protestor must also show that the agency's violation was prejudicial to the protestor. *Glenn Def. Marine,* 720 F.3d at 907.[101]

Issues of interpretation can arise under either track (1) or (2): for example, a question of legal interpretation can give context to whether an agency's procurement decision lacked a rational basis (track 1), or the agency's misinterpretation of a statute or regulation can lead to a violation of the law (track 2).

To assess an agency's interpretation of the law, the Federal Circuit and the Court of Federal Claims applied, in accordance with *Kisor*, standard rules of statutory construction.[102] To that end, the courts examined "the 'text, structure, history, and purpose' of a regulation to determine its meaning,"[103] looking to the " 'language itself to determine its plain meaning.' "[104] If the language was clear and unambiguous, the inquiry ended with the plain meaning—plain meaning that was discerned for " 'the whole statute or regulation, not of isolated sentences.' "[105]

While some post-*Kisor*/pre-*Loper Bright* decisions in the Federal Circuit and the Court of Federal Claims applied a plain meaning analysis to find ambiguity and therefore defer to the agencies' interpretations (to one degree or another),[106] in most cases the first *Chevron*/*Kisor* step—whether the law that an agency has relied upon is ambiguous—was the end of the analysis.[107]

The focus of the courts' analyses in these government contracts cases before *Loper Bright* was, therefore, typically on the first step in the *Chevron* and *Kisor* analysis—on finding that the statute or regulation at issue is unambiguous—because in practice that finding liberated the court to apply *its own* interpretation of the law. As was discussed above, this was the approach anticipated by Kenneth Starr when he predicted how courts could bring their policy concerns into the first step of the *Chevron* analysis, and the approach taken by the Supreme Court in *Kingdomware*—but the approach abandoned by the Supreme Court in *Loper Bright Enterprises* (discussed below), where the Court concluded that ambiguity should not matter anymore. Before *Loper Bright*, however, ambiguity (or the lack of it) was critically important, because under *Chevron* and *Kisor* a finding of "clarity" allowed a court to an-

nounce that the agency's interpretation of a statute or regulation was simply wrong, and so was owed no deference. This offered additional clues as to how cases may unfold after *Loper Bright Enterprises*, in a new, post-*Chevron* environment.

IV. The Supreme Court's Decision In *Loper Bright Enterprises*

Loper Bright Enterprises involved herring fishermen based in Cape May, New Jersey who opposed paying for government monitors on their boats. The statute at issue contemplated placing inspectors on board fishing vessels but did not clarify who should pay for them.[108] The National Marine Fisheries Service (also known as "NOAA Fisheries") published a rule that (as the Supreme Court explained) said if the agency determined that "an observer is required, but declines to assign a Government-paid one, the vessel must contract with and pay for a Government-certified third-party observer. [The agency] estimated that the cost of such an observer would be up to $710 per day, reducing annual returns to the vessel owner by up to 20 percent."[109] When the fishermen challenged the agency's interpretation of the statute, the lower courts applied *Chevron* and deferred to the agency. The Supreme Court reversed, overturning *Chevron* because (the Court said) statutory interpretation was a question for the courts, not the agencies.

A. Constitutional Basis For The Loper Bright Decision

Writing for a 6-3 majority on the Court, Chief Justice Roberts argued in *Loper Bright* that *Chevron* was incompatible with the Constitution, which gives the courts first authority to interpret the law:

> Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies" . . . . The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. Cognizant of the limits of human language and foresight, they anticipated that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation," would be "more or less obscure and equivocal, until their meaning" was settled "by a series of particular discussions and adjudications." The Federalist No. 37, p. 236 (J. Cooke ed. 1961) (J. Madison).
>
> The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." Id., No. 78, at 525 (A. Hamilton).[110]

Chief Justice Roberts also drew upon the decision in *Marbury v. Madison* (1803), in which Chief Justice Marshall "famously declared that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' "[111]

Justice Thomas' concurrence went a step beyond Chief Justice Roberts' decision for the Court and argued that *Chevron*—by requiring courts to defer to agencies' interpretation of the law—had unconstitutionally violated the separation of powers.[112]

B. The APA And *Loper Bright Enterprises*—And Procurement

Chief Justice Roberts then turned to the Administrative Procedure Act for further support for overturning *Chevron*. He pointed out that the APA[113] provides (with emphasis added): "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." Chief Justice Roberts said that the APA "thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. [The APA] specifies that courts, not agencies, will decide 'all relevant questions of law' arising on review of agency action, . . . even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions."[114] (In her dissent, Justice Kagan strongly disagreed with this reading of the APA; she argued that although the APA says courts are to decide issues of law, this does not mean the courts should afford no deference to agency interpretations.[115])

The Court's conclusion that the APA gives courts

first authority to say "what the law is" bears direct relevance to procurement cases, because the Tucker Act, in 28 U.S.C.A. § 1491, explicitly incorporates these APA standards to the courts' review of procurement protests. Section 1491 allows an "interested party" to bring an action objecting as to "[1] to a solicitation by a Federal agency for bids or proposals for a proposed contract or [2] a proposed award or the award of a contract or [3] any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[116] The statute specifically states that in any action brought under the Tucker Act "the courts shall review the agency's decision pursuant to the standards set forth in [5 U.S.C.A. § 706]"[117]—the APA standards called out in *Loper Bright Enterprises*.

C. Understanding the Roles Of The Courts And The Agencies

The decision in *Loper Bright Enterprises* goes beyond merely setting a new standard of review. More fundamentally, by so forcefully rejecting *Chevron* and its presumptive deference to agencies, the decision reaffirmed the leading role of the courts in interpreting the law—to the exclusion of the administrative agencies. Chief Justice Roberts wrote:

> Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.[118]

The decision reflected the conservative majority's concern that *Chevron*'s deference in essence surrendered the courts' power to the administrative state—an administrative state that many conservatives fear has grown out of control.[119] Chief Justice Roberts wrote:

> *Chevron* gravely erred . . . in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is least appropriate.[120]

Justice Kagan criticized this shift in power from the agencies to the courts in her very strong dissent. By abandoning *Chevron* and its deference to agencies, she wrote, it "is now 'the courts (rather than the agency)' that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris."[121]

In response to Justice Kagan's dissent decrying the Court's decision to abandon *Chevron,* a long-established precedent—to violate principles of *stare decisis*, in her view—Justice Gorsuch's concurrence argued that "*[s]tare decisis*'s true lesson today is not that we are bound to respect *Chevron*'s 'startling development,' but bound to inter it."[122]

D. How The Courts Will Proceed Under *Loper Bright Enterprises*

Despite all the furor, *Loper Bright Enterprises* actually provided lower courts with relatively sparse guidance. As is discussed further below, as a threshold matter courts need no longer wrestle with whether a law is ambiguous. Instead, the courts are to exercise "independent judgment in determining the meaning of statutory provisions."[123] Whether that "independent judgment" constitutes *de novo* review is an open question.[124]

In making their "independent judgments" regarding the meaning of the law, said the *Loper Bright* Court, "consistent with the APA," the "courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes," *i.e.,* the agencies. For this proposition the Court cited *Skidmore,* the 1944 decision discussed above.[125] "Careful attention to the judgment of the Executive Branch may help inform that inquiry," noted the Court in its conclusion.[126]

Agency expertise, said the *Loper Bright* Court, again drawing from *Skidmore*, "has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.' "[127] In assessing agencies' interpretations built on that expertise, said the Court, interpretations "issued contemporaneously with the statute

. . . and which have remained consistent over time, may be especially useful in determining the statute's meaning."[128] The Court emphasized, though, that statutes "no matter how impenetrable, do—in fact, must—have a single, best meaning," and that " 'every statute's meaning is fixed at the time of enactment.' "[129]

The *Loper Bright* Court also signaled that more respect for an agency's interpretation may be in order when—as is the case with the FAR (see above)—Congress has expressly delegated rulemaking authority to the agency. "When the best reading of a statute is that it delegates discretionary authority to an agency," Chief Justice Roberts wrote, "the role of the reviewing court under the APA is . . . to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' . . . and ensuring the agency has engaged in '"reasoned decisionmaking" ' within those boundaries . . . ."[130] In other words, said the Court in its conclusion, "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." But, the Court reminded, "*Chevron* is overruled," and "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[131]

Some commentators have argued from all this that the *Loper Bright Enterprises* decision left *Chevron* deference intact where Congress has delegated authority to the agencies.[132] Whether that proves true, or the Supreme Court's formulation in *Loper Bright* is simply a form of amplified *Skidmore* "respect" for agencies' interpretations where Congress has expressly delegated rulemaking authority, is a question that will have to be resolved through future decisions.

E. No More Ambiguity—But *Kisor* Unclarity

In discarding *Chevron,* the decision in *Loper Bright Enterprises* also abandoned the linchpin to *Chevron*—the apparent ambiguity of the legal text. Under *Chevron*, as noted, the courts were to defer to agencies when the statutory language of the text was ambiguous. That, Chief Justice Roberts said, was an unworkable test. Ambiguity, he wrote:

> . . . "is a term that may have different meanings for different judges." . . . A rule of law that is so wholly "in the eye of the beholder" . . . invites different results in like cases and is therefore "arbitrary in practice" . . . . Such an impressionistic and malleable concept "cannot stand as an every-day test for allocating" interpretive authority between courts and agencies.[133]

The Court's rejection of ambiguity as an interpretive tool may be subtly important because Chief Justice Roberts' decision in *Loper Bright Enterprises* did not explain how the Court's 2019 decision in *Kisor* will fare after *Loper Bright Enterprises*. As was discussed above, Justice Kagan's decision for the majority in *Kisor* said that, where *regulations* are ambiguous, courts should apply a set of arguably deferential standards in reviewing agencies' interpretations of those regulations. By abandoning ambiguity as a swivelpoint for review in *Loper Bright Enterprises*—and by taking the side opposite Justice Kagan—the majority in *Loper Bright Enterprises* left unresolved whether they were also abandoning *Kisor*. Professor Christopher J. Walker wrote of Justice Kagan's dissent in *Loper Bright Enterprises*:

> Justice Kagan cites *Kisor* more than a dozen times, including for the Court's approach there (joined by the Chief Justice) for *stare decisis* for judicial deference doctrines as well as for the massive disruption *Chevron*'s demise will have on the regulatory system. She concludes with a quote from *Chevron*: "Judges are not experts in the field, and are not part of either political branch of the Government." And she then writes what feels like a eulogy:
>
> > Those were the days, when we knew what we are not. When we knew that as between courts and agencies, Congress would usually think agencies the better choice to resolve the ambiguities and fill the gaps in regulatory statutes. Because agencies are "experts in the field." And because they are part of a political branch, with a claim to making interstitial policy. And because Congress has charged them, not us, with administering the statutes containing the open questions. At its core, *Chevron* is about respecting that allocation of responsibility—the conferral of primary authority over regulatory matters to agencies, not courts.[134]

V. Some Key Issues In The Wake Of The *Loper Bright* Decision

As Professor Walker noted, the *Loper Bright* decision opened a number of important questions, such as whether the courts' new approach may disrupt uniformity in the law as different courts review agencies' interpretations in different ways.[135] These developments in administrative law will affect the public procurement community as well. At the same time, *Loper Bright Enterprises* may create issues unique to procurement law, such as:

A. Green Procurement

The Biden administration recently published a final rule calling for "maximum practicable" purchase of environmentally sustainable goods and services, to counter global warming.[136] A related proposed rule,[137] which would require contractors to chronicle their greenhouse gas (GHG) emissions—and could hold them non-responsible (non-qualified) if they did not—has been stalled by Congress (which barred the DOD from gathering vendor GHG data, at least temporarily).[138] The proposed rule could, though, be finalized in a new administration, depending on the outcome of the November 2024 presidential election. Because of the scope and expense of the proposed GHG rule,[139] that final rule might face challenges under *Loper Bright* and/or the "major questions" doctrine.

B. Buy American Preferences

The Biden administration has issued guidance on domestic content requirements under the "Build America, Buy American" Act that sometimes conflicts with established "Buy American" requirements.[140] Vendors may challenge that guidance (and agencies' implementing rules) under *Loper Bright*, as agencies' inconsistencies in interpreting the law were a driving concern of the *Loper Bright* Court.[141]

C. Bid Protests

The Federal Circuit's June 2024 decision in *Percipient.ai, Inc. v. United States*[142] noted that the Tucker Act offers broader standing than the Competition in Contracting Act, which defines standing to protest before the Government Accountability Office (GAO).[143] This may persuade some protesters to file first at the Court of Federal Claims, rather than at the GAO, and the *Loper Bright* decision may accelerate that trend by encouraging protesters to argue under the Tucker Act and the APA (discussed above) that the Court of Federal Claims owes no deference to agencies' interpretations of procurement law.

D. *Corner Post* And Statutes Of Limitation

In a decision issued only days after *Loper Bright*, the Supreme Court in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*[144] held that an APA claim does not accrue for purposes of the general six-year statute of limitations[145] until the plaintiff is injured by final agency action—creating what Justice Jackson argued in her dissent is in practice an open-ended statute of limitations.[146] The *Corner Post* decision, taken together with *Loper Bright*'s expansive standard of review, may encourage vendors to challenge procurement rules many years after they are published.

These and other issues arising under *Loper Bright Enterprises* were reviewed in a July 8, 2024, GW Law Government Procurement Law Program webinar[147] and are likely to be points of ongoing discussion in the procurement law community.[148]

VI. Conclusion

In his 1986 article, Kenneth Starr argued that *Chevron* meant that courts should see "themselves not as supervisors of agencies, but more as a check or bulwark against abuses of agency power."[149] The decades of decisions since then in the government procurement realm have not changed that basic perspective; as the review above showed, the courts have generally deferred to agencies' interpretations of procurement law, except where agencies seem to have gone astray. The courts have acted less as meddlesome supervisors than as watchful sentinels. When the courts have intervened against an agency's interpretation, however, the courts have sometimes done so quite forcefully and disrupted the landscape of the law—creating uncertainty which can deter future agency excesses by encouraging agen-

cies to be more cautious in their rulemaking, and which in practice brings the courts into the center of future debates over what the law is. The question will be whether the *Loper Bright Enterprises* decision amplifies that approach—whether the Supreme Court's landmark decision rejecting judicial deference to agencies on questions of law will encourage the judicial sentinel to intervene more often and more forcefully or will merely provide a clearer framework for understanding how and when courts should (and should not) accept agencies' interpretations of the law.

VII. Guidelines

These *Guidelines* are intended to assist you in understanding the potential impact of *Loper Bright* in the public procurement realm. They are not, however, a substitute for professional representation in any specific situation.

1. Understanding the *context* for *Loper Bright* is very important—a context in which it is the courts, not the agencies, that are to "say what the law is" (in the words of Chief Justice Marshall in *Marbury v. Madison*). In that context, it will be more difficult to argue that the courts give reflexive deference to agencies' interpretations of the law.

2. The Supreme Court's decision in *Loper Bright Enterprises* left many issues unanswered, including whether *Loper Bright,* which directly addressed issues of agencies' interpretations of *statutes*, also should be applied to agencies' interpretations of *regulations*—and if so, what part the Court's decision in *Kisor v. Wilkie* (2019) should play. Nor did the *Loper Bright* Court explain whether the "major questions" doctrine survived as an independent basis for challenging agency regulations. For these and other reasons it will be important to monitor how courts *outside* the government procurement realm are implementing *Loper Bright* and its progeny.[150]

3. The Supreme Court's decision in *Loper Bright* left it to the lower courts to exercise their "independent judgment" in determining the meaning of statutory provisions. As the Court suggested, this may mean taking into account the agencies' expertise and interpretations of the statute at issue—including, especially, when Congress has delegated responsibility for implementing the statute to the agency.

4. Agency rulemaking may fall under closer scrutiny, especially after the *Corner Post* decision which made it easier to bring challenges much later under the APA. In assessing agencies' reading of the law in drafting regulations, per *Skidmore* the courts may look to the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." An agency's interpretation of law will more likely need to be "authoritative," made by those with official authority, as opposed to mere "ad hoc" statements by lesser officials. The courts likely will look to whether an agency's interpretation was grounded in the agency's expertise, and if it reflected the agency's "fair and considered" judgment.

5. As commentator Nathan Castellano has stressed, the decisions in *Loper Bright* and *Kisor* have "placed a premium on mastering the tools of [statutory and regulatory] interpretation."[151] Addressing disputes over contested laws will mean understanding, and applying, longstanding rules of statutory and regulatory interpretation.

6. The Federal Circuit's decision in *Percipient.ai* suggested a possible trajectory for future court challenges in the procurement realm: a narrow challenge to a perceived mistake by an agency, based upon a carefully drawn statutory argument, which (if resolved against the agency) could result in a substantial shift in established law.[152] In that context, it will be important for those experienced in public procurement to understand both the challenge and its possible ramifications.

ENDNOTES:

[1]Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[2]Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

[3]See, e.g., Nathaniel E. Castellano, "After Chevron: How Might Loper Bright Impact Procurement Law?," 38 Nash & Cibinic Rep. NL ¶ 49 (Aug. 2024).

[4]Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[5]Kisor v. Wilkie, 588 U.S. 558 (2019).

[6]Adrian Vermeule, "Chevron By Any Other Name: From 'Chevron Deference' to 'Loper Bright Delegation,' " The New Digest, June 28, 2024, https://thenewdigest.substack.com/p/chevron-by-any-other-name.

[7]Chevron, 467 U.S. at 842–43.

[8]467 U.S. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

[9]467 U.S. at 844 (emphasis added).

[10]467 U.S. at 844(emphasis added).

[11]467 U.S. at 844.

[12]Thomas W. Merrill, The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State 2 (Harvard University Press 2023).

[13]See, e.g., Kent Barnett & Christopher J. Walker, "Chevron in the Circuit Courts," 116 Mich. L. Rev. 1 (2016) (comprehensive empirical study of Chevron in the appellate courts).

[14]William N. Eskridge, Jr. & Lauren E. Baer, "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan," 96 Geo. L.J. 1083 (2008).

[15]Kenneth W. Starr, "Judicial Review in the Post-Chevron Era," 3 Yale J. on Reg. 283, 294 (1986).

[16]Starr, 3 Yale J. on Reg. at 295.

[17]Thomas W. Merrill, The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State 1 (Harvard University Press 2023). See generally Dwight Waldo, The Administrative State: A Study of the Political Theory of American Public Administration (1948) (commonly cited source of the term the "administrative state").

[18]Thomas W. Merrill, The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State 4 (Harvard University Press 2023).

[19]Id. at 6–7.

[20]Id. at 8.

[21]Id.

[22]Starr, 3 Yale J. on Reg. at 297.

[23]Kingdomware Techs., Inc. v. United States, 579 U.S. 162 (2016).

[24]Kent Barnett & Christopher J. Walker, "Chevron in the Circuit Courts," 116 Mich. L. Rev. 1 (2016) (comprehensive empirical study of Chevron in the appellate courts).

[25]See, e.g., James F. Nagle, History of Government Contracting chs. 21 & 22 (3d ed. 2012), available at https://scholarship.law.gwu.edu/history_gov_contracting/; Christopher Yukins, "The U.S. Federal Procurement System: An Introduction," 2017 UrT 69, 70–75, available at https://ssrn.com/abstract=3063559.

[26]See, e.g., Adams & Assocs., Inc. v. United States, 741 F.3d 102 (Fed. Cir. 2014); Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312 (Fed. Cir. 2003).

[27]Brownlee v. DynCorp, 349 F.3d 1343 (Fed. Cir. 2003).

[28]349 F.3d at 1354–55.

[29]Newport News Shipbldg. & Dry Dock Co. v. Garrett, 6 F.3d 1547 (Fed. Cir. 1993).

[30]See 41 U.S.C.A. § 7103(b).

[31]Newport News Shipbldg., 6 F.3d at 1552.

[32]United States v. Grumman Aerospace Corp., 927 F.2d 575 (Fed. Cir. 1991).

[33]927 F.2d at 579.

[34]Palladian Partners, Inc. v. United States, 783 F.3d 1243 (Fed. Cir. 2015).

[35]783 F.3d at 1258; see also N.Y. Guardian Mortgagee Corp. v. United States, 916 F.2d 1558, 1560 (Fed. Cir. 1990) (agency circular implementing the Prompt Payment Act given "controlling weight").

[36]Craft Mach. Works, Inc. v. United States, 926 F.2d 1110 (Fed. Cir. 1991).

[37]926 F.2d at 1114.

[38]See Kenneth W. Starr, "Judicial Review in the Post-Chevron Era," 3 Yale J. on Reg. 283 (1986).

[39]Am. Tel. & Tel. Co v. United States, 177 F.3d 1368 (Fed. Cir. 1999).

[40]Res-Care, Inc. v. United States, 735 F.3d 1384 (Fed. Cir. 2013).

[41]PDS Consultants, Inc. v. United States, 907 F.3d 1345 (Fed. Cir. 2018).

[42]907 F.3d at 1360–61.

[43]William N. Eskridge, Jr. & Lauren E. Baer, "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan," 96 Geo. L.J. 1083, 1157 (2008).

[44]Kingdomware Techs., Inc. v. United States, 579 U.S. 162 (2016).

[45]See FAR pts. 6, 8 & 16; see also Christopher R. Yukins, "Are IDIQs Inefficient? Sharing Lessons With European Framework Contracting," 37 Pub. Cont. L.J. 545, 565 (2008).

[46]Brief for the United States in Opposition at 21, Kingdomware Techs., Inc. v. United States, 579 U.S. 162 (2016) (No. 14-916), 2015 WL 1967579, at *21.

[47]Transcript of Oral Argument at 26, Kingdomware Techs., Inc. v. United States, 579 U.S. 162 (2016) (No.

14-916), 2016 WL 1028391, at *26.

[48]2016 WL 1028391, at *26–27.

[49]Kingdomware, 579 U.S. at 173–74.

[50]Texas State Comm'n for the Blind v. United States, 796 F.2d 400 (Fed. Cir. 1986).

[51]20 U.S.C.A. § 107 et seq.; see also U.S. Department of Education, Rehabilitation Services Program, Randolph Sheppard Vending Facility Program, https://rsa.ed.gov/program/rand-shep.

[52]20 U.S.C.A. § 107d-3(d).

[53]32 C.F.R. § 260.6(d)(3)(i).

[54]U.S. Department of Defense, Military OneSource, Commissary & Exchange, https://www.militaryonesource.mil/recreation-travel-shopping/commissary-exchange/.

[55]Allied Tech. Group, Inc. v. United States, 649 F.3d 1320 (Fed. Cir. 2011).

[56]29 U.S.C.A. § 794d.

[57]E.g., 29 U.S.C.A. § 794d; 36 C.F.R. § 1194.2; see also Christopher R. Yukins, "Making Federal Information Technology Accessible: A Case Study in Social Policy and Procurement," 33 Pub. Cont. L.J. 667 (2004), available at https://ssrn.com/abstract=531684.

[58]Congressional Research Service, In Focus IF12077, The Major Questions Doctrine 1 (Nov. 2022), available at https://crsreports.congress.gov/product/pdf/IF/IF12077.

[59]W. Va. v. Env't Prot. Agency 597 U.S. 697 (2022).

[60]597 U.S. at 722.

[61]Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 595 U.S. 109, 124 (2022).

[62]See, e.g., Josh Chafetz, "The New Judicial Power Grab," 67 St. Louis U. L.J. 635, 649–52 (2023).

[63]Daniel T. Deacon & Leah M. Litman, "The New Major Questions Doctrine," 109 Va. L. Rev. 1009 (2023).

[64]Natasha Brunstein, "Major Questions in Lower Courts," 75 Admin. L. Rev. 661, 692-93 (2023).

[65]David S. Tatel, Vision: A Memoir of Blindness and Justice 269 (Little, Brown & Co. 2024).

[66]Congressional Research Service, In Focus IF12077, The Major Questions Doctrine 2 (Nov. 2022), available at https://crsreports.congress.gov/product/pdf/IF/IF12077.

[67]See, e.g., 89 Fed. Reg. 30212 (Apr. 22, 2024) (requiring that agencies plan for "green procurement").

[68]See Bradford v. U.S. Dep't of Labor, 101 F.4th 707, 726–28 (10th Cir. 2024).

[69]40 U.S.C.A. § 101 et seq. (the "Procurement Act"); see, e.g., Sandy Hoe & Emma Merrill, "Feature Comment: How Presidential Power Over Procurement Can Be a Vehicle for Social Change," 64 GC ¶ 271 (Sept. 21, 2022).

[70]See, e.g., Sarah A. Schmoyer, Note, " 'Major' Challenges for Lower Courts: Inconsistent Applications of the Major Questions Doctrine in Lower Courts After West Virginia v. Environmental Protection Agency," 92 Fordham L. Rev. 1659, 1686–89 (2024); Elysa M. Dishman, "Calling the Shots: Multistate Challenges to Federal Vaccine Mandates," 96 S. Cal. L. Rev. Postscript 15, 30 (2023).

[71]Mayes v. Biden, 67 F.4th 921, 926 (9th Cir.), vacated as moot, 89 F.4th 1186 (9th Cir. 2023).

[72]67 F.4th at 933 (emphasis in original).

[73]See Kentucky v. Biden, 23 F.4th 585, 607 (6th Cir. 2022); Georgia v. President of the United States, 46 F.4th 1283, 1295 (11th Cir. 2022) (Procurement Act does not provide authority for the Contractor Mandate, for the statute merely "establishes a framework through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want"); Louisiana v. Biden, 55 F.4th 1017, 1028-31 (5th Cir. 2022).

[74]Georgia v. President of the United States, 46 F.4th at 1295–96.

[75]Richard J. Pierce, Jr., "Two Neglected Effects of Loper Bright," The Regulatory Review (July 1, 2024), available at https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/.

[76]Richard J. Pierce, Jr., "Court's New Chevron Analysis Likely To Follow One of These Paths," Bloomberg Law (Feb. 7, 2024).

[77]Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[78]Kisor v. Wilkie, 588 U.S. 558 (2019).

[79]Skidmore, 323 U.S. at 139.

[80]Richard J. Pierce, Jr., "Court's New Chevron Analysis Likely To Follow One of These Paths," Bloomberg Law (Feb. 7, 2024) (citing Kent Barnett & Christopher J. Walker, "Chevron in the Circuit Courts," 116 Mich. L. Rev. 1 (2016)).

[81]E.g., Transcript of Oral Argument, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451), 2024 WL 250658.

[82]Kisor, 588 U.S. at 563.

[83]588 U.S. at 566.

[84]588 U.S. at 569 (footnotes omitted).

[85]588 U.S. at 569–70 (citations omitted).

[86]588 U.S. at 570 (citations omitted).

[87]588 U.S. at 571

[88]588 U.S. at 571–72 (citations omitted).

[89]588 U.S. at 572.

[90]588 U.S. at 574.

[91]588 U.S. at 574–75.

[92]588 U.S. at 575–76.

[93]588 U.S. at 576.

[94]588 U.S. at 577.

[95]588 U.S. at 577–78.

[96]588 U.S. at 579; see, e.g., Christopher J. Walker, "What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine," Notice & Comment (Yale J. on Reg. blog) (June 26, 2019), https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/.

[97]But cf. Thomas E. Nielsen & Krista A. Stapleford, "What Loper Bright Might Portend for Auer Deference," Harvard L. Rev. Blog (July 5, 2024), https://harvardlawreview.org/blog/2024/07/what-loper-bright-might-portend-for-auer-deference/ ("Even though Loper Bright's stare decisis analysis appears to undermine Auer, Loper Bright's logic supports preserving that doctrine in some form. This is so because when a statute actually empowers an agency to interpret a particular provision, the statute necessarily also authorizes the agency to exercise a subsidiary power: to interpret its own pronouncements about the statute's meaning.").

[98]See Nathan E. Castellano & Issac D. Schabes, "Deference to Agency Interpretations of Procurement Regulations: Restraining Government Contracts Exceptionalism," 37 Nash & Cibinic Rep. NL ¶ 47 (July 2023) (summarizing cases).

[99]See, e.g., Def, Integrated Sols., LLC v. United States, 165 Fed. Cl. 352, 368 (2023) (applying Kisor, 588 U.S. 558, in Court of Federal Claims bid protest).

[100]LS3, LLC v. United States, 168 Fed. Cl. 722 (2023).

[101]168 Fed. Cl. at 731.

[102]Barry v. McDonough, 101 F.4th 1348, 1352 (Fed. Cir. 2024) (citing Goodman v. Shulkin, 870 F.3d 1383, 1386 (Fed. Cir. 2017)).

[103]101 F.4th 1348, 1352 (citing Kisor, 588 U.S. 558).

[104]101 F.4th 1348, 1352 (citing Hanser v. McDonough, 56 F.4th 967, 970 (Fed. Cir. 2022) (quoting Goodman, 870 F.3d at 1386)).

[105]Barry, 101 F.4th at 1352 (quoting Boeing Co. v. Sec'y of Air Force, 983 F.3d 1321, 1327 (Fed. Cir. 2020)).

[106]See, e.g., SH Synergy, LLC v. United States, 165 Fed. Cl. 745, 762 (2023).

[107]See, e.g., Consol. Safety Servs., Inc. v. United States, 167 Fed. Cl. 543, 554 & n.8 (2023) (court would defer only where regulation is "genuinely ambiguous" (citing Def. Integrated Sols,, LLC v. United States, 165 Fed. Cl. 352, 368 (2023) (in turn citing Kisor, Chevron, Auer et al.)); Goodwill Indus. of So. Fla., Inc. v. United States, 162 Fed. Cl. 160, 193 (2022); Melwood Horticultural Training Ctr., Inc. v. United States, 153 Fed. Cl. 723, 741 (2021) (noting, per Supreme Court precedents, the "ever-shrinking deference that courts owe to agency interpretations"); Raytheon Co. v. United States, 160 Fed. Cl. 428, 444 (2022) (holistic reading of technical data regulation and its purpose to derive its meaning); see also Feuer v. Nat'l Lab. Rels. Bd., 786 F. App'x 1014, 1019 (Fed. Cir. 2019).

[108]For plaintiffs' description of the background to the case see Loper Bright: Supreme Court Case, https://loperbrightcase.com/.

[109]Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2255 (2024).

[110]144 S. Ct. at 2257.

[111]144 S. Ct. at 2257 (quoting from Marbury v. Madison, 5 U.S. 137 (1 Cranch) (1803)).

[112]144 S. Ct. at 2273 (Thomas, J., concurring).

[113]5 U.S.C.A. § 706.

[114]144 S. Ct. at 2261.

[115]144 S. Ct. at 2302 (Kagan, J., dissenting).

[116]28 U.S.C.A. § 1491(b)(1). See generally Percipient.ai, Inc. v. United States, CACI, Inc.-Fed., 104 F.4th 839, 851 (Fed. Cir. 2024).

[117]28 U.S.C.A. § 1491(b)(4).

[118]Loper Bright Enters., 144 S. Ct. at 2266.

[119]See, e.g., Neil Gorsuch & Janie Nitze, Over Ruled: The Human Toll of Too Much Law ch. 3, "Bureaucracy Unbound" (Harper 2024).

[120]Loper Bright Enterprises, 144 S. Ct. at 2266.

[121]144 S. Ct. at 2294 (Kagan, J., dissenting).

[122]144 S. Ct. at 2293–94 (Gorsuch, J., concurring).

[123]144 S. Ct. at 2262.

[124]Compare Christopher J. Walker, "What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference," Notice & Comment (Yale J. on Reg. blog) (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/ ("Let's just

say that the majority opinion is ambiguous, but perhaps the best interpretation is that the Court embraces de novo review—in particular, what the Court repeatedly calls 'independent judgment.' "), with Patrick J. Sobkowski, "Chaos and Chevron in the Backyard," Notice & Comment (Yale J. on Reg. blog) (June 28, 2024), https://www.yalejreg.com/nc/chaos-and-chevron-in-the-backyard-by-patrick-j-sobkowski/ ("The majority's citation to Skidmore offers a small hint and suggests that de novo review is not the Court's desired standard. But the hint raises as many questions as it answers. For example . . . it is not always clear whether Congress intended to delegate authority to an agency. What's a court to do in such an instance? . . . It is not difficult to imagine different circuit courts articulating wildly different frameworks.").

[125]144 S. Ct. at 2262 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[126]144 S. Ct. at 2273.

[127]144 S. Ct. at 2267 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[128]144 S. Ct. at 2262; see Daniel Deacon, "Loper Bright, Skidmore, and the Gravitational Pull of Past Agency Interpretations," Notice & Comment (Yale J. on Reg. blog) (June 30, 2024), https://www.yalejreg.com/nc/loper-bright-skidmore-and-the-gravitational-pull-of-past-agency-interpretations/.

[129]144 S. Ct. at 2266 (quoting Wisc. Cent. Ltd. v. United States, 585 U.S. 274, 284 (2018)).

[130]144 S. Ct. at 2263.

[131]144 S. Ct. at 2273.

[132]See, e.g., Adrian Vermeule, "Chevron By Any Other Name: From 'Chevron Deference' to 'Loper Bright Delegation,' " The New Digest (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name ("Although the Supreme Court's decision in Loper Bright Enterprises v. Raimondo has now overruled the Chevron decision on deference to agencies, there is much less to Loper Bright than meets the eye. . . . It is entirely possible that much or most of what was (somewhat misleadingly) called 'Chevron deference' can be and will be recreated under a different label: 'Loper Bright delegation.' Indeed, the Court has already recreated it under that label, in the Loper Bright opinion itself.").

[133]Loper Bright, 144 S. Ct. at 2270 (quoting Swift & Co. v. Wickham, 382 U.S. 111, 125 (1965)).

[134]Christopher J. Walker, "What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference," Notice & Comment ((Yale J. on Reg. blog) (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/ (quoting Loper Bright, 104 S. Ct. at 2311 (Kagan, J., dissenting)).

[135]Christopher J. Walker, "What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference," Notice & Comment ((Yale J. on Reg. blog) (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/.

[136]89 Fed. Reg. 30212 (Apr. 22, 2024).

[137]87 Fed. Reg. 68312 (Nov. 14, 2022).

[138]See National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 318, 137 Stat. 136, 218 (2023). Background on § 318's effect on the proposed rule is available at https://publicprocurementinternational.com/national-defense-authorization-act-for-fiscal-year-2024-key-procurement-provisions/#Environmental_Sustainability.

[139]See, e.g., "Industry Criticizes FAR Greenhouse Gas Reporting Proposed Rule," 65 GC ¶ 44 (Feb. 22, 2023).

[140]See Christopher Yukins, Implementation Issues Under the BABA (2022), https://publicprocurementinternational.com/implementation-issues-under-the-baba/.

[141]See Richard J. Pierce, Jr., "Two Neglected Effects of Loper Bright," The Regulatory Review (July 1, 2024), available at https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/; Margaret H. Lemos & Deborah A. Widiss, The Solicitor General, Consistency, and Credibility (Mar. 25, 2024) (Notre Dame L. Rev. forthcoming), available at https://ssrn.com/abstract=4771600.

[142]Percipient.ai, Inc. v. United States, CACI, Inc.-Fed., 104 F.4th 839 (Fed. Cir. 2024).

[143]See Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2741, 98 Stat. 494 (1984).

[144]Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 144 S. Ct. 2440 (2024).

[145]28 U.S.C. § 2401(a).

[146]144 S. Ct. at 2470 (Jackson, J., dissenting); see, e.g., Amy Howe, "Supreme Court Expands Time Frame To Sue Federal Agencies," SCOTUSblog (July 2, 2024).

[147] https://publicprocurementinternational.com/webinar-after-chevron/.

[148]See, e.g., Nathaniel E. Castellano, "After Chevron: How Might Loper Bright Impact Procurement Law?," 38 Nash & Cibinic Rep. NL ¶ 49 (Aug. 2024) ("Even with express legislative delegations of procurement rulemaking authority, without Chevron some established FAR provisions may be ripe for disruption—particularly the Cost Principles governing allowability of a contractor's legal costs."); Eric S.

Crusius & David S. Black, "The Impact of Chevron Reversal on Government Contracting," Holland & Knight Government Contracts Blog (July 11, 2024), https://www.hklaw.com/en/insights/publications/2024/07/the-impact-of-chevron-reversal-on-government-contracting (noting that regulations under the Service Contract Act may be subject to challenge); W. Barron A. Avery et al., "US Supreme Court Jettisons Chevron Deference: Practical Impact for Government Contractors," MorganLewis Law Flash (July 8, 2024) (TikTok and other regulatory bans), https://www.morganlewis.com/pubs/2024/07/us-supreme-court-jettisons-chevron-deference-practical-impact-for-government-contractors-practical-guidance-guidance; Sandeep N. Nandivada, "The End of Chevron Deference: What It Means for Government Contractors," Morrison & Foerster Government Contracts Insights (July 3, 2024), https://govcon.mofo.com/topics/the-end-of-chevron-deference-what-it-means-for-government-contractors (cybersecurity regulations).

[149]Kenneth W. Starr, "Judicial Review in the Post-Chevron Era," 3 Yale J. on Reg. 283, 300–01 (1986).

[150]See, e.g., Solar Energy Indus. Ass'n v. United States, No. 2022-1392, 2024 WL 3762779, at *2 (Fed. Cir. Aug. 13, 2024) (Federal Circuit panel supplemented its decision in an international trade case per the decision in Loper Bright, noting that the case's outcome would be the same under a de novo standard of review); Sunnyside Coal Co. v. Dir., Off. of Workers' Comp. Programs, United States Dep't of Lab., No. 23-9517, 2024 WL 3764555, at *4 (10th Cir. Aug. 13, 2024) (citing Loper Bright for the proposition that the agency's interpretation of statutes was owed no deference); Perez v. Owl, Inc., No. 22-12974, 2024 WL 3665313, at *8 (11th Cir. Aug. 6, 2024) (finding agency's longstanding interpretation persuasive); Texas Med. Ass'n v. U.S. Dep't of Health & Human Servs., No. 23-40217, 2024 WL 3633795 (5th Cir. Aug. 2, 2024) (agency's arbitration rules exceeded statutory mandate); Walden v. Raimondo, No. 5:21-CV-304 (MTT), 2024 WL 3639369, at *5 (M.D. Ga. Aug. 2, 2024) (acknowledging agency guidance which "thoroughly examines relevant case law, . . . is consistent with that case law, and . . . has remained unchanged since 1990").

[151]Castellano, 38 Nash & Cibinic Rep. NL ¶ 49 (citing ELB Servs., LLC v. U.S., Fed. Cl., 172 Fed. Cl. 233 (2024) (Davis, J.); Defense Integrated Sols., LLC. v. U.S., 165 Fed. Cl. 352 (2023) (Solomson, J.); eSimplicity, Inc. v. U.S., 162 Fed. Cl. 372 (2022), 64 GC ¶ 314 (Schwartz, J.); Nycal Offshore Dev. Corp. v. U.S., 148 Fed. Cl. 1 (2020) (Holte, J.); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012); Shambie Singer & Norman Singer, Sutherland Statutes and Statutory Construction (Thomson Reuters)).

[152]See Christopher Yukins, "Feature Comment: Assessing Percipient.ai After Loper Bright Enterprises—Potentially a New Trajectory in Government Procurement Law," 66 GC ¶ 221 (Aug. 21, 2024).

NOTES:

NOTES:

NOTES:

BRIEFING PAPERS