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**Webinar Background Paper**

**The Sentinel Stirs: Government Procurement Law After *Chevron***

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On July 8, 2024 GW Law’s Government Procurement Law Program will host a [webinar](https://publicprocurementinternational.com/webinar-after-chevron/) on the impact of the Supreme Court’s pending decision in [*Loper Bright Enterprises, Inc. v. Raimondo*](https://www.supremecourt.gov/docket/docketfiles/html/public/22-451.html), No. 22-451– a decision in which the Supreme Court is expected to address the deference that U.S. courts have long afforded agencies under [*Chevron v. Natural Resources Defense Council, Inc.*](https://supreme.justia.com/cases/federal/us/467/837/#842), 467 U.S. 837 (1984) when agencies interpret and implement statutes. This paper reviews some of the key issues to be addressed at that webinar.

This paper will be updated once the expected decision in *Loper Bright Enterprises* is issued by the Supreme Court (see [Supreme Court slip opinions page](https://www.supremecourt.gov/opinions/slipopinion/23)). (The decision may instead carry the name of a companion case, [*Relentless, Inc. v. Department of Commerce*](https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-1219.html), No. 22-1219.)

# **Introduction**

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 Supreme Court will likely rewrite the *Chevron* test, which holds that if a statute is ambiguous, the agency’s reading of that statute is controlling so long as it is reasonable. A shift in the *Chevron* test is likely to send shock waves across government procurement law as well, as agencies and contractors contest the meaning of laws before the courts.

This paper proceeds in several parts. Part II describes the *Chevron* test, and explains why the Court’s current review of the *Chevron* decision is so important. Part III reviews some of the key government contracts cases which have applied *Chevron* over the past 40 years, with a special emphasis on Federal Circuit and Supreme Court cases which 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. Part III also assesses possible outcomes in the Supreme Court’s pending *Loper Bright Enterprises* case, including (a) returning to a less deferential approach to agencies’ interpretations of statutes (the “[*Skidmore v. Swift & Co.*](https://tile.loc.gov/storage-services/service/ll/usrep/usrep323/usrep323134/usrep323134.pdf)” solution), or (b) consolidating and restating earlier precedents which cabin agencies’ discretion (the approach the Court took in *Kisor v. Wilkie*, which addressed the courts’ review of agencies’ interpretations of their own *regulations*). The paper goes into *Kisor* in detail because, although regulatory interpretation is the common grist of government contracts disputes, *Kisor* is seldom cited in government procurement law cases – something which may change in the future, as post-*Chevron* judicial scrutiny catches up with public procurement law. The paper also asks whether the Federal Circuit has already issued what is, in essence, the first post-*Chevron* decision – [*Percipient.ai v. United States*,](https://cafc.uscourts.gov/opinions-orders/23-1970.OPINION.6-7-2024_2330550.pdf) a bid protest decision issued early in June 2024 in which the U.S. Court of Appeals for the Federal Circuit read the applicable statutes (including the Tucker Act’s bid protest provisions) aggressively to sweep away agency defenses to an administrative imbroglio – a typical scenario among post-*Chevron* challenges to the administrative state. Part IV of this paper, to be published after the *Loper Bright Enterprises* (or *Relentless*) decision is issued, will put the Supreme Court’s most recent decision into context given this history of judicial review in government procurement law cases. Part V, the conclusion, will sum up to suggest that while judicial oversight is essential to effective administration, an overly forceful approach – for the courts, for example, to cast aside existing doctrines simply because of an abiding distrust of the administrative state – could have costs of its own. Deciding procurement disputes demands a close understanding of the roles and risks assigned to the government and its contractors in a very dynamic procurement process, and so a judicial approach born of upheaval – in reordering the allocations of power between the legislature, the agencies, the courts and the people – can produce the wrong answers when deciding a public procurement dispute.

# **Background: Understanding the *Chevron* Test**

## **The Elements of the Test**

The test set forth by the Supreme Court in [*Chevron*](https://supreme.justia.com/cases/federal/us/467/837/#842)applies where an agency has implemented a statute which is ambiguous. The *Chevron* test applies only when the statute is unclear. The test does not apply if the statute is 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.”

In assessing an agency’s interpretation of an *ambiguous* statute, “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.’”

Assessing what is a “permissible” interpretation of a statute differs depending on whether Congress has “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 has expressly delegated interpretative authority to the agency -- the agency’s “legislative regulations are given controlling weight *unless they are arbitrary, capricious, or manifestly contrary to the statute*.” (Emphasis added.)

Sometimes, though, as the Court noted in *Chevron*, “the *legislative delegation to an agency on a particular 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.” (Emphasis added.)

These *Chevron* tests 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.’”

As Professor Thomas Merrill has noted, the *Chevron* test can generally 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.”

Thomas W. Merrill, *The* Chevron *Doctrine: Its Rise and Fall, and the Future of the Administrative State*, at 2 ([Harvard University Press](https://www.hup.harvard.edu/books/9780674297340), 2023) ([Amazon](https://www.amazon.com/Chevron-Doctrine-Future-Administrative-State/dp/0674260457)). 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, *see, e.g.,* Kent Harris Barnett & Christopher J. Walker, [Chevron *in the Circuit Courts*](https://ssrn.com/abstract=2808848)*,* 116 Mich. L. Rev. 1 (2016) (comprehensive empirical study of *Chevron* in the appellate courts), across what William Eskridge and Lauren Baer have called a “continuum of deference,” William N. Eskridge & Lauren Baer, [*The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*](https://ssrn.com/abstract=1132368), 96 Geo. L.J. 1083 (2008).

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 “frustate[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.

Kenneth W. Starr, [*Judicial Review in the Post-*Chevron *Era*](https://openyls.law.yale.edu/bitstream/handle/20.500.13051/8169/14_3YaleJonReg283_1985_1986_.pdf?sequence=2&isAllowed=y), 3 Yale J. Reg. 282 (1986). Starr noted, however, that *Chevron* left the courts room to consider policy goals in the *first* step of the analysis – in assessing whether the statutory language at issue is unambiguous. He wrote:

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.

*Id.* at 295. We will return below to 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.

## **The Current Challenge to *Chevron***

Now the *Chevron* test may be changed (at least in part) by the Supreme Court in the *Loper Bright Enterprises* case. Professor Merrill describes this 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.

Thomas W. Merrill, *supra*, at \_\_\_; *see, e.g.,* Dwight Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration* (1948) ([Amazon](https://www.amazon.com/Administrative-State-Political-American-Administration/dp/141280597X/ref=sr_1_1?dib=eyJ2IjoiMSJ9.kAn9Ob5wTzYjhoAOcfgD7GRKpu6wZclL1DTo4q3tYc4jProX_-jQc5b2Rr8ODUY_QmJ1hN4w2wn43-fP0UC_6JmAS5j0ci5Cxq2t5mIRQ7m_71ujmhlY3mY392WACmySKDv2pm4fWgR2WZybfJM3CDj70Fefs83GJWAAzpRtBRu4CZ_nUMuT3GZyn1fqTvYhPBur_lywb2aKU-sShVd6eHt399-b1h4ONaDhv48e6zM.PzGnBj88PCLtfY8HeVXieOV2CMAt77LlKsVSoE_rcEQ&dib_tag=se&keywords=Waldo+the+administrative+state&qid=1717965574&sr=8-1)).

This crisis, Professor Merrill notes, 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](https://supreme.justia.com/cases/federal/us/5/137/).” . . . *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.

Thomas W. Merrill, *supra,* at 4.

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.

Thomas W. Merrill, *supra*, at 6-7.

Notably, Professor Merrill does not believe that the Supreme Court will reject *Chevron* outright in its *Loper Bright Enterprises* decision. “Much more likely,” he writes, “is a decision (or series of decisions) adopting new limits on the doctrine, or clarifying it in important respects.” He points out that the Court “has previously imposed limits on the doctrine,” and the Court in *Kisor* “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 wrote, “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.” *Id.* at 8.

In drawing the balance of authority between courts and the agencies, Professor Merrill argues, 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.” *Id.* at 8. Merrill’s very practical approach – what Ken Starr called a “sliding-scale,” “common-sense” approach which turns on the institutions’ comparative advantage, 3 [Yale J. Regul. at 297](https://openyls.law.yale.edu/bitstream/handle/20.500.13051/8169/14_3YaleJonReg283_1985_1986_.pdf?sequence=2&isAllowed=y) – will offer an important analytical tool as we assess the impact of *Loper Bright Enterprises* on government procurement law, below.

# **How Appellate Courts Have Applied *Chevron* to Federal Procurement Cases**

Before looking forward, though, we should look back, to review how the courts have applied *Chevron* in deciding federal procurement cases over the years. Our focus will be on the most important 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 has applied *Chevron* in only one case, *Kingdomware*, 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 which showed that appellate courts, when they apply *Chevron*, do indeed tend to defer to agencies. The Federal Circuit regularly defers to established procurement regulations, including especially the Federal Acquisition Regulation (FAR), the core set of procurement rules which reflects over a century of regulatory development. Where the courts decide *not* to defer to agencies, the courts– as Ken Starr predicted – typically focus on the *first* step in the *Chevron* analysis and declare the statute unambiguous, even if that means directly disagreeing with the agency’s reading. That leaves, though, the harder cases: decisions in which the courts have to decide between diametrically different ways to interpret a procurement statute or regulation.

## **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 Federal Acquisition Regulation, because Congress has explicitly authorized federal agencies to promulgate their procurement rules. *See, e.g., Adams & Assocs., Inc. v. United State*s, 741 F.3d 102 (Fed. Cir. 2014); *Information Technology & Applications Corp. v. United States*, 316 F.3d 1312 (Fed. Cir. 2003). In *Brownlee v. DynCorp*, 349 F.3d 1343 (Fed. Cir. 2003), for example, the Federal Circuit applied *Chevron* deference to an analysis of the FAR 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. *Id.* at \_\_\_\_.

The Federal Circuit’s deference to the FAR has extended even to agency positions that made the court uncomfortable. In *Newport News Shipbuilding & Dry Dock Co. v. Garrett,* 6 F.3d 1547 (Fed. Cir. 1993), the Federal Circuit applied *Chevron* to give “considerable weight” to a provision in the FAR which reflected a statutory interpretation by the Office of Federal Procurement Policy (OFPP) as to who may certify a claim under the Contract Disputes Act. 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.

The Federal Circuit applied that same *Chevron* deference in *United States v. Grumman Aerospace Corp*., 927 F.2d 575 (Fed. Cir. 1991), 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.”

The Federal Circuit’s deference has extended to other implementing regulations, as well. In *Palladian Partners, Inc. v. United States*, 783 F.3d 1243 (Fed. Cir. 2015), 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.’” *Id.*; *see also New York Guardian Mortgagee Corp. v. United States*, 916 F.2d 1558, 1560 (Fed. Cir. 1990) (agency circular implementing the Prompt Payment Act given “controlling weight”). In *Craft Machine Works, Inc. v. United States*, 926 F.2d 1110 (Fed. Cir. 1991), the Federal Circuit, 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.”

## **Focus on Whether the Statute Was Clear**

When the *Chevron* test has been applied and agencies have *lost* public procurement appeals at the Federal Circuit, the focus of the Federal Circuit’s analysis – as Kenneth Starr predicted, *see supra* – 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*, 177 F.3d 1368 (Fed. Cir. 1999), the Federal Circuit, sitting *en banc*, rejected the Defense Department’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*, 735 F.3d 1384 (Fed. Cir. 2013), in order to conclude that relevant statutory language was unambiguous, 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*](https://casetext.com/case/pds-consultants-inc-v-united-states), 907 F.3d 1345 (Fed. Cir. 2018), 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.

## **Cases Where the Courts Have Afforded Little or No Deference**

In several cases which 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132368) 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. 96 Geo. L.J. at 1157.

### ***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](https://supreme.justia.com/cases/federal/us/579/14-916/), 579 U.S. 162 (2016), 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 veteran-owned businesses. The Court was interpreting 38 U.S.C. § 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. § 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 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. *See* FAR Parts 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). The [government’s brief](https://sblog.s3.amazonaws.com/wp-content/uploads/2015/06/2015.05.01-Brief-for-the-United-States-in-Opposition_ActiveUS145107895ActiveUS1.pdf) in *Kingdomware* (at page 21) pointed to that regulatory dichotomy between contracts and orders to argue that the Department of Veterans Affairs did not have to set aside *orders* for service-disabled veterans.

During [oral argument](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-916_llh1.pdf) 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.” But counsel for the government acknowledged later in the argument that FSS orders are themselves “contracts” (though he tried to backpedal on that point), and the Court in *Kingdomware* ultimately rejected the dichotomy between contracts and orders. The Court ruled 8-0 that orders under a Federal Supply Schedule 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. 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 Comm'n for the Blind v. United States*](https://casetext.com/case/texas-state-comn-for-the-blind-v-us), 796 F.2d 400 (Fed. Cir. 1986), for the case turned on conflicting preferences for different disadvantaged groups.

The statute at issue, the [Randolph-Sheppard Act](https://rsa.ed.gov/program/rand-shep), was intended to create revenue streams for persons with disabilities, including through vending machines on federal property. The statute called for revenue-sharing between blind persons (the vendors preferenced under the Act), but exempted “income from vending machines within retail sales outlets under the control of exchange or ships' stores systems.” The 1985 version of a Defense Department regulation, [32 C.F.R. § 260.3(i)(3)(i)](https://www.law.cornell.edu/cfr/text/32/260.3), interpreted this exemption to exclude income “from vending machines operated by or for the military exchange.”

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 Defense Department’s regulation – a result that benefited the Defense Department’s private exchanges. Because the plurality decision found ambiguity in the statute (though the dissent found the language plainly unambiguous), the court deferred to the *user* agency (the Defense Department) 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*](https://casetext.com/case/allied-technology-group-inc-v-us), 649 F.3d 1320 (Fed. Cir. 2011), the Federal Circuit addressed requirements under Section 508 of the Rehabilitation Act that information technology purchased by the federal government must be accessible to persons with disabilities. The court had to juggle industry reality – that it is very difficult to achieve full accessibility – with statutory language and implementing regulations which require full accessibility. *E.g.,* 29 U.S.C. § 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.

Although the regulations implementing Section 508 required full compliance – and, as Judge Bryson pointed out in his dissent, those regulations were entitled to deference under *Chevron* – the Federal Circuit ultimately said that the awardee’s hedging notes of qualification were not enough to preclude award, since the offeror had committed to complying with Section 508’s requirements. 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.

## **Cases Under the “Major Questions” Doctrine**

While the cases surveyed above illustrate how *Chevron* 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 a number of courts 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](https://crsreports.congress.gov/product/pdf/IF/IF12077) 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).

In a series of decisions, spanning a wide range of policy questions, the Court has held that agencies lacked authority to regulate on major questions absent clear congressional authorization. *See*, *e.g., West Virginia v. Environmental Protection Agency*, 597 U.S. 697, 722, 142 S. Ct. 2587, 2609 (2022) (“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.”).

Justice Gorsuch explained the basis for the major questions doctrine in his concurrence in

*National Federation of Independent Business v. Department of Labor,* 595 U.S. 109, 142 S. Ct. 661, 211 L. Ed. 2d 448 (2022):

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.

*Id.* at 124, 142 S. St. at 668.

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. *See, e.g.,* Josh Chafetz, [*The New Judicial Power Grab*](https://ssrn.com/abstract=4321887), 67 St. Louis U. L.J. 635, 649-52 (2023); Daniel Deacon & Leah Litman, [*The New Major Questions Doctrine*](https://ssrn.com/abstract=4165724), 109 Va. L. Rev. 1009 (2023) (the “new 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 de-regulatory 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”); Natasha Brunstein, [*Major Questions in Lower Courts*](https://policyintegrity.org/publications/detail/major-questions-in-lower-courts), 75 Admin. L. Rev. 661, 692–93 (2023) (survey concluded 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”).

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.” David S. Tatel, *Vision: A Memoir of Blindness and Justice,* at 269 (Little, Brown and Company 2024).

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.” *Id.* at 2.

Because of the broad potential reach of the “major questions” doctrine, even if the Court retains some measure of deference to agency interpretations after *Chevron*, the major questions doctrine could in practice trump that deference, at least in cases involving issues of national importance. Appellate courts’ past application of the major questions doctrine to procurement cases is, 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, *see, e.g.,* 89 Fed. Reg. 30212 (Apr. 22, 2024) (requiring that agencies plan for “green procurement” ), or minimum wages for federal contractor employees, *see Bradford v. U.S. Department of Labor*, 101 F.4th 707, 726-28 (10th Cir. 2024) – 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, 40 U.S.C. § 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*](https://www.cov.com/en/news-and-insights/insights/2022/09/how-presidential-power-over-procurement-can-be-a-vehicle-for-social-change#layout=card&numberOfResults=12), 64 Government Contractor ¶ 271 (Thomson Reuters/West, 2022). 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 which required that contractor employees be vaccinated against the Covid-19 virus (known as the “Contractor Mandate”). *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).

As the U.S. Court of Appeals for the Ninth Circuit noted in *Mayes v. Biden*, 67 F.4th 921, 926 (9th Cir.), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023), there is a constitutionally ground 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.”

*Mayes,* 67 F.4th at 933. 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. *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). 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*. . . . That doctrine has been applied in “all corners of the administrative state,” and this case presents no exception. *West Virginia v. EPA*, . . . 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.*, ––– U.S. ––––, 142 S. Ct. 661, 665, 211 L.Ed.2d 448 (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).

*Georgia v. President of the United States*, 46 F.4th 1283, 1295–96 (11th Cir. 2022).

In sum, unless the Supreme Court’s decision in *Loper Bright Enterprises* explicitly reconciles the *Chevron* doctrine (deference to agency interpretations) with the major questions doctrine (no deference without an express congressional mandate), the major questions doctrine could play a continuing, concomitant role in future cases which raise challenges to an agency’s interpretation of its statutory mandate.

## **Potential Impact of *Loper Bright Enterprises* on Federal Procurement**

This current draft of the paper chronicles the expectations which precede the decision in *Loper Bright Enterprises* – expectations which may well inform application of that decision in public procurement law, once it is issued. (As noted, this paper will be updated when the Supreme Court issues its decision.)

### **Possible Outcomes – *Skidmore* and *Kisor***

In his assessment of possible outcomes in the *Loper Bright Enterprises* case, GW Law’s Professor Richard Pierce wrote that, after oral arguments in that case, it appears 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*.” Professor Pierce was referencing two landmark Supreme Court decisions, [*Skidmore v. Swift & Co.*](https://supreme.justia.com/cases/federal/us/323/134/), 323 U.S. 134 (1944) and [*Kisor v. Wilkie*](https://supreme.justia.com/cases/federal/us/588/18-15/#tab-opinion-4113757), 588 U.S. \_\_\_\_ (2019).

#### ***Skidmore v. Swift & Co.* (U.S. 1944)**

If the Supreme Court returns to the *Skidmore* test, it would mark a return a more careful deference, one that would depends “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.” As Richard Pierce noted, citing a [2017 survey](https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1667&context=mlr) of appellate opinions applying *Chevron*, courts have been significantly less deferential to agencies under *Skidmore* than under *Chevron*. *Id.* (citing Kent Barnett & Christopher J. Walker, [Chevron *in the Circuit Courts*,](https://repository.law.umich.edu/mlr/vol116/iss1/1/) 116 Mich. L. Rev. 1 (2017)).

#### ***Kisor v. Wilkie* (U.S. 2019)**

The other path suggested by Professor Pierce – that the Court might “*Kisor*ize” the *Chevron* doctrine – is more complicated. (Notably, several Justices specifically asked about “*Kisor*izing” *Chevron* during the *Loper Bright Enterprises* [oral argument](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-451_o7jp.pdf) on January 17, 2024.)

*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 their *own regulations*. Writing for the Court, and gathering together decades of precedents, 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.

After a discussion of the facts of the *Kisor* case – which she acknowledged had almost no “bearing on the rest of our decision” – 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.

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”).

(Footnotes omitted.)

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 of their 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.

(Citations omitted.) 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.”

Justice Kagan’s plurality opinion 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.” 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.

(Citations omitted.)

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.”

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.

Part II-B of the decision, however, is the opinion of the Court, 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.” 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 the decision 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 forty years of cases decided under *Chevron* (discussed above) suggests, however, that ambiguity is itself a subjective thing, 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.”
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 the 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* greater deference than agency constructions of *statutes*.” (Emphasis added.) 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.’”
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,” 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.”
   * **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.”
   * **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.

*Kisor* is reviewed in such detail here for several reasons. First, *Kisor* may offer a *structural* model for the post-*Chevron* decision in *Loper Bright Enterprises*: a decision which pulls together prior precedents to create a coherent structure for judicial interpretation, one less open-ended that *Chevron*’s “reasonableness” test, and one that might be used by the Court for *statutory* interpretation in the *Loper Bright Enterprises* case. Second, because *Kisor* made clear the parallels between the *Chevron* and *Auer* doctrines – between judicial deference to agencies’ interpretations of statutes and regulations – it is even more likely that the Court may indeed “*Kisor*ize” the *Chevron* doctrine. Finally, *Kisor* is also important because it helps explain ongoing decisions in the federal procurement arena, even where those decisions do not explicitly cite *Chevron* on questions of judicial deference.

#### **Procurement Cases Relying on *Kisor* – A Potential Trajectory**

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. *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). These decisions suggest how a new judicial approach to interpretation might apply to procurement cases involving statutory interpretations, post-*Chevron*. *See, e.g., Defense Integrated Solutions, LLC v. United States,* 165 Fed. Cl. 352, 368 (2023)(applying *Kisor* in Court of Federal Claims bid protest).

These issues of interpretation arise most commonly in bid protests. Judge Tapp in *LS3, LLC v. United States*, 168 Fed. Cl. 722, 731 (2023), framed the bases for review under the Administrative Procedure Act standard applied in bid protests per the Tucker Act, 28 U.S.C. § 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.

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 interpretations of the law, the Federal Circuit and the Court of Federal Claims have applied, in accordance with *Kisor*, standard rules of statutory construction. *Barry v. McDonough*, 101 F.4th 1348, 1352 (Fed. Cir. 2024) (citing *Goodman v. Shulkin*, 870 F.3d 1383, 1386 (Fed. Cir. 2017)). To that end, the courts “examine the ‘text, structure, history, and purpose’ of a regulation to determine its meaning,” *id.* (citing *Kisor*), looking to the “’language itself to determine its plain meaning,’” *id.* (citing *Hanser v. McDonough*, 56 F.4th 967, 970 (Fed. Cir. 2022) (quoting *Goodman*, 870 F.3d at 1386)). If the language is clear and unambiguous, the inquiry ends with the plain meaning – plain meeting which is discerned for “’the whole statute or regulation, not of isolated sentences.’” *Barry,* 101 F.4th at 1352 (quoting *Boeing Co. v. Sec'y of Air Force*, 983 F.3d 1321, 1327 (Fed. Cir. 2020)).

While some post-*Kisor* decisions in the Federal Circuit and the Court of Federal Claims, applying the plain meaning analysis, have found ambiguity and deferred to the agencies’ interpretations (to one degree or another), *see, e.g., SH Synergy, LLC v. United States,* 165 Fed. Cl. 745, 762 (2023), in most cases the first step in the analysis (under both *Kisor* and *Chevron,* whether the law that an agency has relied upon is ambiguous) has been the end of the analysis. *See, e.g., Consolidated Safety Servs., Inc. v. United States,* 167 Fed. Cl. 543, 554 & n.8 (2023) (court would defer only where regulation is “genuinely ambiguous” (citing *Defense* *Integrated Solutions, LLC v. United States*, 165 Fed. Cl. 352, 368 (2023) (in turn citing *Kisor*, *Chevron*, *Auer* et al.)); *Goodwill Indus. of S. 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).

The focus of the courts’ analyses in these government contracts cases has, therefore, typically been on the first step in the analysis – on finding that the statute or regulation at issue is unambiguous – because in practice that finding liberates 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, the approach taken by the Supreme Court in *Kingdomware*, and the approach that courts may take in the future, after *Chevron*, in government procurement cases: to announce that the agencies’ interpretation of a statute or regulation is simply wrong, and so is owed no deference.

## ***Percipient.ai*: The First Post-*Chevron* Case?**

Notably, the first of those post-*Chevron* cases may have been decided already by the Federal Circuit *before* the Supreme Court’s decision in *Loper Bright Enterprises* was issued – before the *Chevron* doctrine was rewritten -- in *Percipient.ai, Inc. v. United States*, \_\_ Fed.4th \_\_\_\_, Fed. Cir. No. 2023-1970 (June 7, 2024). *See* Michael J. Anstett, Alexander B. Ginsberg & James J. McCullough*, Fed. Cir. Narrows Task Order Protest Bar, Broadens Interested-Party Test,* 66 Gov. Contractor ¶ 171 (Thomson Reuters/West, June 26, 2024); *also* Nathaniel E. Castellano, *Eyes on the Docket: Significant Appeals Before the Federal Circuit,* 37 Nash & Cibinic Rep. NL ¶ 54 (Thomson Reuters/West, Aug. 2023) (discussing case’s procedural history). In an approach which echoed the decisions discussed above where courts refused to defer to agency interpretations, in *Percipient* the Federal Circuit, apparently troubled by the agency’s actions, read the applicable law aggressively and issued a decision which reversed the agency and left open critical legal issues – and thus opened the door for judicial interventions in future cases, as well.

The *Percipient* case stemmed from a commercial artificial intelligence product which Percipient wanted to sell to the National Geospatial-Intelligence Agency (NGA), and the facts here are those the Federal Circuit drew from Percipient’s allegations. Because Percipient could meet only part of the agency’s requirements for artificial intelligence with its product, Percipient did not bid on or protest a single-award indefinite-delivery/indefinite-quantity contract which was awarded to another prime contractor. Percipient pressed the agency and the prime contractor to consider what Percipient argued was its readily available and much cheaper commercial solution, but the agency demurred, and (per Percipient’s complaint) ultimately the prime contractor was tasked to develop its own solution. Percipient protested, arguing that 10 U.S.C. § 3453(a) required the agency and its contractor to consider, to the “maximum extent practicable,” commercial alternatives such as Percipient’s. *See generally* Ralph C. Nash, *Postscript: Mandatory Consideration of Commercial Products*, 37 Nash & Cibinic Rep. NL ¶ 38 (June 2023) (discussing cases arising under § 3453).

The agency moved to dismiss, arguing, among other things, that Percipient’s protest: (1) was not brought by an “interested party,” as required by the Tucker Act’s, 28 U.S.C. § 1491, (2) was not made “in connection with a procurement or a proposed procurement,” also as required by the Tucker Act; (3) was a protest of a task order and thus was barred by the Federal Acquisition Streamlining Act, 10 U.S.C. § 3406(f). On appeal, the Federal Circuit disposed of each of these arguments.

### **Standing Even Though Percipient Was Not a Bidder**

In a significant discussion of standing in Tucker Act bid protests, *see* Nathaniel E. Castellano & Aime J. Joo, *Bid Protest Jurisdiction and Standing:* Percipient.ai *Presents Federal Circuit with Critical Questions*, 38 Nash & Cibinic Rep. NL ¶ 5 (Jan. 2024), the Federal Circuit held that Percipient had standing as an “interested party” even though it was not a bidder and its challenge was not to a solicitation or award (as would be the case in a more traditional bid protest). It was enough, the Federal Circuit said, that the protester was alleging violations of 10 U.S.C. § 3453 for failing to consider commercially available solutions, and was “an offeror of a commercial product or commercial service that had a substantial chance of being acquired to meet the needs of the agency had the violation not occurred.” The court (in what it called a case of first impression) said that standing under the Tucker Act for “any alleged violation of statute or regulation in connection with a procurement or a proposed procurement” – the “third prong” of standing under the Tucker Act – is more expansive than the Competition in Contracting Act, per 31 U.S.C. § 3551, which lends standing in Government Accountability Office (GAO) protests to only an actual or prospective bidder. Under principles of statutory construction, said the Federal Circuit, it was “obliged to interpret the term ‘interested party’ in the context of this broader third prong [*i.e.,* standing based on any statutory or regulatory violation] to give it independent import.” *See also id.* (“CICA is a different statute governing the bid-protest jurisdiction of the U.S. Government Accountability Office and does not include prong three.”).

In finding standing in *Percipient*, the Federal Circuit pointed to the substantive statute at issue, which it said provided “context” for understanding why this alleged violation of law could create standing under the Tucker Act. *See Despite Failure To Bid, Software Company Has Standing To Protest Agency’s Failure To Use Commercial Software,* 65 No. 15 Government Contractor ¶ 101 (Apr. 2023) (discussing cases which stressed that standing assessment should be “sensitive to a protester’s specific claim”). The *Percipient* decision pointed out that by its terms Section 3453 is “meant to ensure that, ‘to the maximum extent practicable,’ agencies provide offerors of commercial services an opportunity to compete in procurements, and to give a preference for commercial products and commercial services.” The court said that if “parties like Percipient, who offer significant commercial . . . items likely to meet contract requirements but who cannot bid . . . are unable to challenge statutory violations in connection with procurements, the statute would have minimal bite—it would rely on an agency to self-regulate and on [prime] contractors . . . . to act against their own interest” by opening opportunities for new commercial competitors. The court pointed to the legislative history as well, and noted that because Section 3453 became law shortly before the Tucker Act’s bid protest jurisdiction was expanded in 1996, it was unlikely Congress, in revising the Tucker Act, intended to eliminate “any meaningful enforcement of the post-award preferences for commercial items.”

### **Tucker Act Jurisdiction Because Percipient’s Protest – Though Long After Award -- Was “In Connection with a Procurement”**

The Federal Circuit found that the *Percipient* protest came within the Court of Federal Claims’ subject matter jurisdiction under the Tucker Act because the protest raised an “alleged violation of statute or regulation in connection with a procurement or a proposed procurement,” 28 U.S.C. § 1491(b)(1), specifically an alleged violation of 10 U.S.C. § 3453 and related regulations (which require preferencing commercial goods and services), and because the alleged violations were “in connection with” a broader procurement. *See RAMCOR Servs. Group, Inc. v. United States,* 185 F.3d 1286, 1289 (noting that Tucker Act language is “sweeping in scope” and that so “long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction”). The court, on the plain language of the Tucker Act (which reaches any alleged “violation of statute or regulation in connection with a procurement”), rejected the agency’s interpretation that bid protests under the Tucker Act should be confined to contract *formation* disputes; bid protests can also be brought, said the court, regarding alleged violations that arise during contract *administration*.

### **The Task Order Bar Did Not Apply**

The court further held that because no task order was being challenged, the task order bar under 10 U.S.C. § 3406(a) was inapplicable. The court read the statutory bar against task orders, taken in its plain meaning, to apply only when a protest is brought “in connection with the issuance or proposed issuance” of a task order. Here, the court found, the protest was against the agency’s failure to ensure that commercially available solutions were considered – not against the issuance of a task order.

### **Dissent Highlighted *Percipient*’s Departures from Precedent**

The force of Judge Clevenger’s dissent in *Percipient* confirmed the potential impact of the majority decision. “This is a very important government contract case,” Judge Clevenger wrote, one that contradicted binding authority in the circuit and which “will have an enormous impact on government procurements.” Judge Clevenger’s dissent argued that the majority erred “in significantly narrowing the existing scope of the task order bar . . . by reinterpreting the statute to bar only protests focused on a task order, not protests more broadly made in connection with the issuance of a task order.” The dissent said that the majority also erred “in significantly broadening the existing scope of ‘interested party’ statutory standing” under the Tucker Act “by permitting potential subcontractors for the first time to bring suit under § 1491(b)(1).” Judge Clevenger argued that, under settled law, it was a mistake to “open the protest door to potential subcontractors,” even if those protests could enhance compliance and accountability.

### ***Percipient* and the Pattern of Post-*Chevron* Cases**

While the dissent and most commentary from the bar focused on *what* the majority decision in *Percipient* said, what is just as interesting was *how the majority decision was reasoned*, for the decision followed a pattern seen in cases that have departed from *Chevron* deference, outlined above.

* **Troubling Failures in the Administrative State:** As in many of the other cases outlined above where the courts refused to defer to agencies, the *Percipient* case presented a thorny policy question -- how to ensure maximum use of commercially available technology by an agency that may have been bogged down by its own procurement procedures. (Compare, for example, the facts in the Supreme Court’s decision in *Kingdomware*, where the Department of Veterans Appeals, to reduce its administrative burden, refused to extend a procurement preference to its own service-disabled veterans.) The policy question in *Percipient*, as in the earlier cases, went to the heart of the current battle over *Chevron*: how to deal with the perceived failures of the administrative state.
* **Aggressive Reading of the Law:** To reach the policy question, the *Percipient* court construed the applicable statutes (the Tucker Act and the task order bar under the Federal Acquisition Streamlining Act) quite aggressively, as the *Percipient* dissent confirmed. Kenneth Starr had anticipated this in his 1986 article on *Chevron* – that courts that sought to address policy issues would do so in the *first* step of *Chevron,* to apply rules of statutory construction forcefully to conclude that a statute was unambiguous and supported the court’s approach, without deference to agency interpretations.
* **By Demolishing Barriers to Accountability, Decision Curtailed Agencies’ Authority and Left Door Open to Future Judicial Intervention:** The *Percipient* decision’s forceful reading of the law demolished legal barriers, such as (see Judge Clevenger’s dissent) the bar against protests by subcontractors. Compare *Kingdomware,* where Justice Thomas simply stepped past a longstanding division between task orders and contracts to rule against the agency. By using aggressive interpretations of law to break down traditional doctrinal “guardrails,” the *Percipient* decision, like the other cases discussed above where the courts refused to defer to agencies, left open many questions. For example, would *any* violation of statute *at any point in time* constitute grounds for a protest, or would only violations of the statute at issue in *Percipient* qualify? This kind of uncertainty may be by design, for that uncertainty – and the resulting risk of losing in a court challenge – may deter agencies from interpreting their authority expansively, knowing that traditional doctrinal barriers to accountability, such as protester standing or subject matter jurisdiction, are less likely to protect the agencies against a more probing judicial review. The uncertainty in the law may also encourage more bid protests – a welcome outcome if, in a post-*Chevron* world, the goal is to maximize accountability in the administrative state. *See* David Drabkin & Christopher Yukins, *DoD Bid Protests* (Acquisition Innovation Research Center 2023)(protests serve important role in highlighting failures in the procurement system), *available at* <https://dair.nps.edu/handle/123456789/4842>. At the very least, the uncertainty created by the courts’ aggressive reading means, in practice, that the courts are more likely to be the ones “to say what the law is” (see [*Marbury v. Madison*](https://www.archives.gov/milestone-documents/marbury-v-madison)) – not the agencies. Although courts have argued in *Percipient* and other post-*Chevron* cases that courts, by not deferring to agencies, are simply seeking to reinforce Congress’ authority, in practice because those decisions often leave issues unresolved when they interpret the law, those decisions will likely bring the courts into the center of continuing debates over the meaning of the law.

# **Supreme Court’s Decision in Loper Bright Enterprises**

[To be completed after the Supreme Court’s decision is announced in the *Loper Bright Enterprises* and *Relentless* cases.]

# **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.” 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, except where agencies seem to have steered badly wrong. 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 often done so quite forcefully, and sometimes left gaps of uncertainty in the law – sometimes disruptive uncertainty which can deter agency abuses by encouraging a more cautious approach, and uncertainty 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 fundamentally changes that approach, or merely provides a clearer framework for understanding how and when courts should (and should not) defer to agencies’ interpretations of the law.

[To be completed after the Supreme Court’s decision is announced in the *Loper Bright Enterprises* and *Relentless* cases.]