
THE GEORGE WASHINGTON UNIVERSITY
GOVERNMENT PROCUREMENT LAW PROGRAM
GOVERNMENT PROCUREMENT
AFTER LOPER BRIGHT
FREE WEBINAR
July 8, 2024 – 9 am Eastern – 15:00 CET

Welcome

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GW Law School – Government Procurement Law Program

- Recording and materials at **www.publicprocurementinternational.com** and recording at **GW Law Government Procurement Law Program YouTube** page
- Audience Questions & Answers
- Speakers' statements are in their personal capacities
- Background discussion paper is on https://publicprocurementinternational.com/webinar-after-chevron/

Agenda

- Introductions
- Joshua Schwartz – *Skidmore, Chevron* and *Kisor,* and the "Major Questions" Doctrine
- Nicole Williamson – Major Government Contracts Decisions Under *Chevron*
- Christopher Yukins – *Percipient.ai* (Fed. Cir. June 7, 2024) – the first "post-*Chevron*" government contracts decision?
- Nathan Castellano – *Loper Bright Enterprises*
- Panel Discussion & Questions

Panelists

Joshua Schwartz – E.K. Gubin Professor of Government Contracts Law, George Washington University Law School

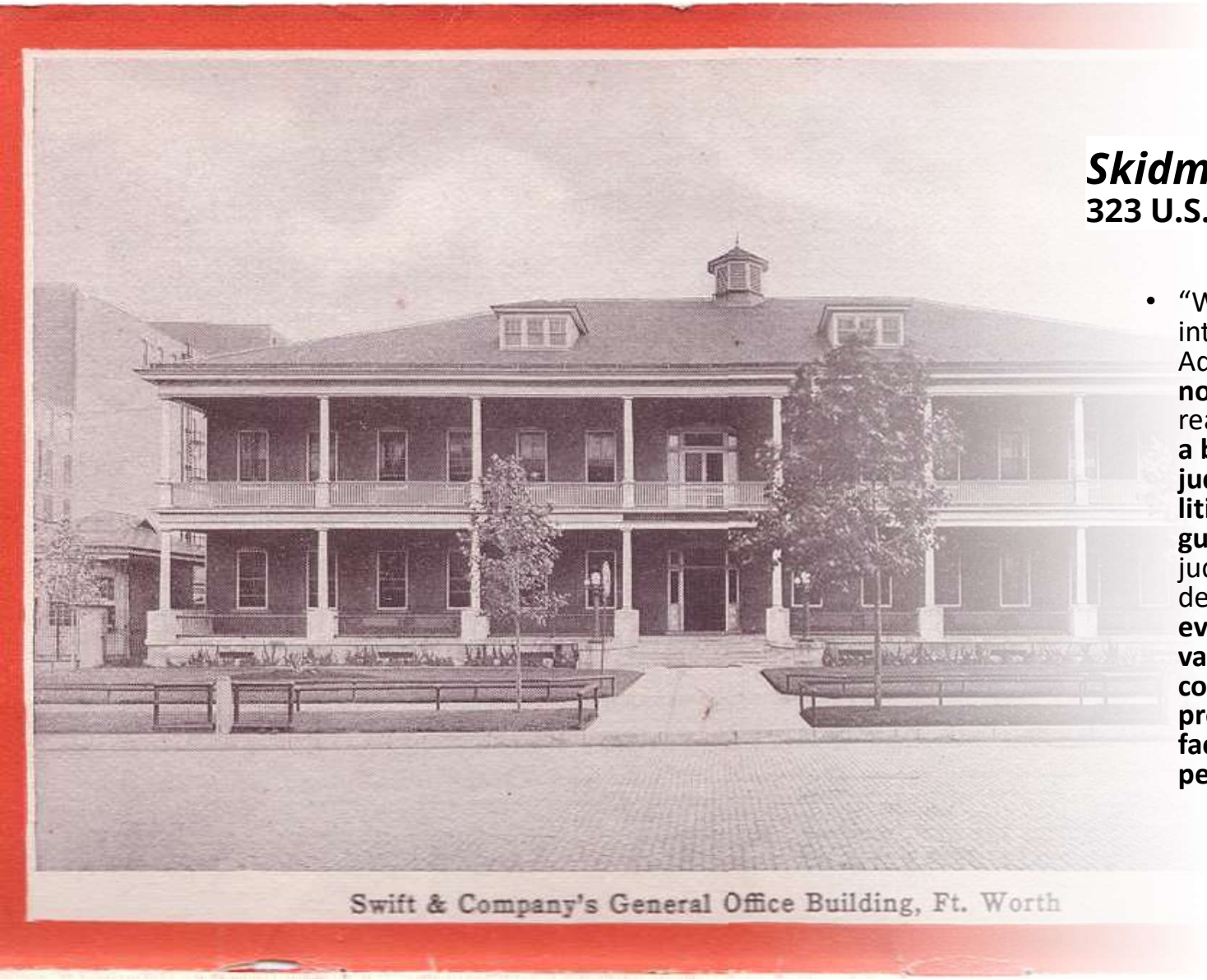
Nicole Williamson – Associate, Arnold & Porter

Nathan Castellano – Special Counsel, Jenner & Block

Chevron: From *Skidmore* to *Kisor*, and the "Major Questions" Doctrine

Joshua Schwartz

E.K. Gubin Professor of Government Contracts Law
George Washington University Law School

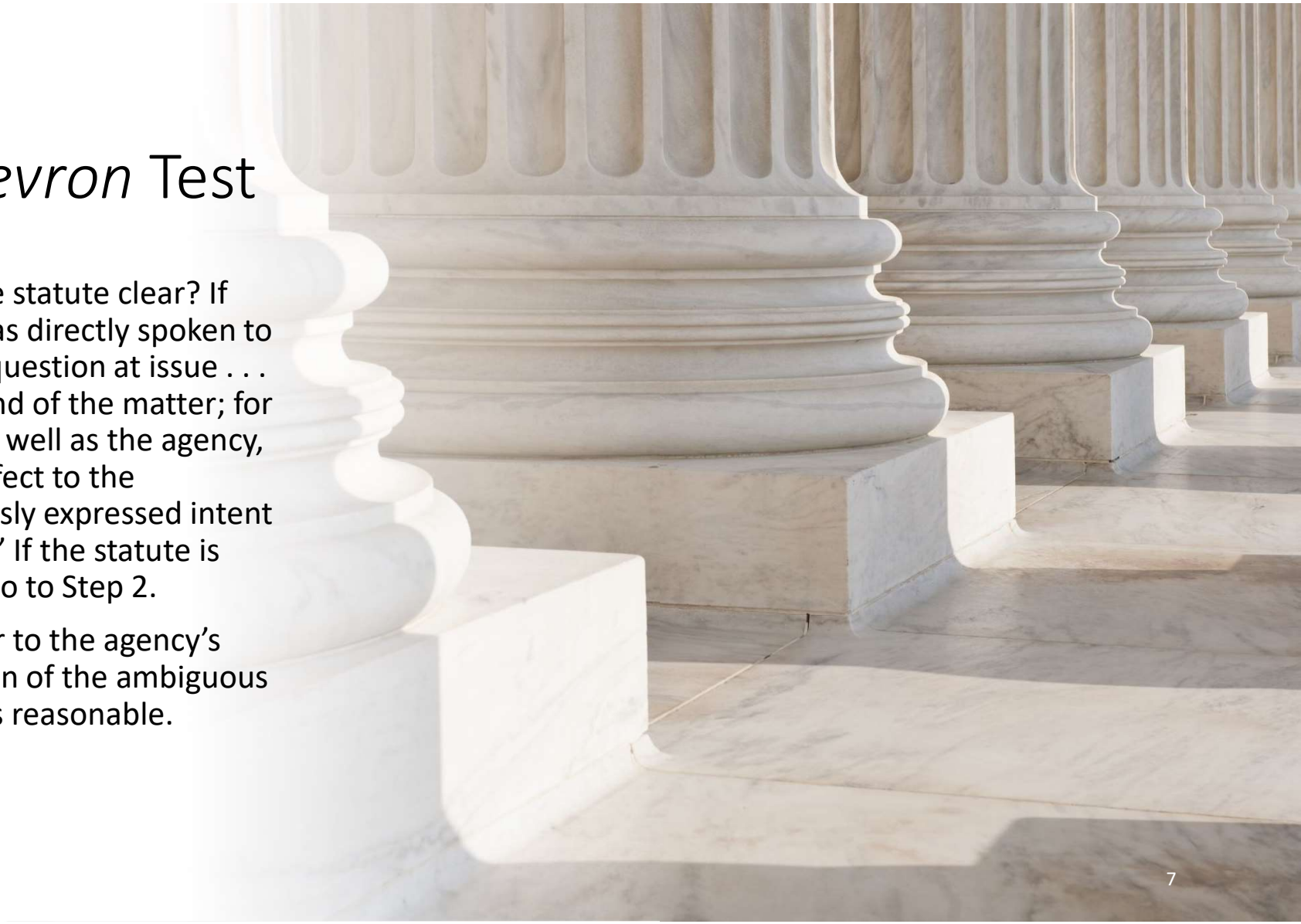


Skidmore v. Swift & Co.
323 U.S. 134 (1944)

- "We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while **not controlling upon the courts** by reason of their authority, do constitute **a body of experience and informed judgment to which courts and litigants may properly resort for guidance**. The weight of such a judgment in a particular case will depend upon the **thoroughness evident in its 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**."

The *Chevron* Test

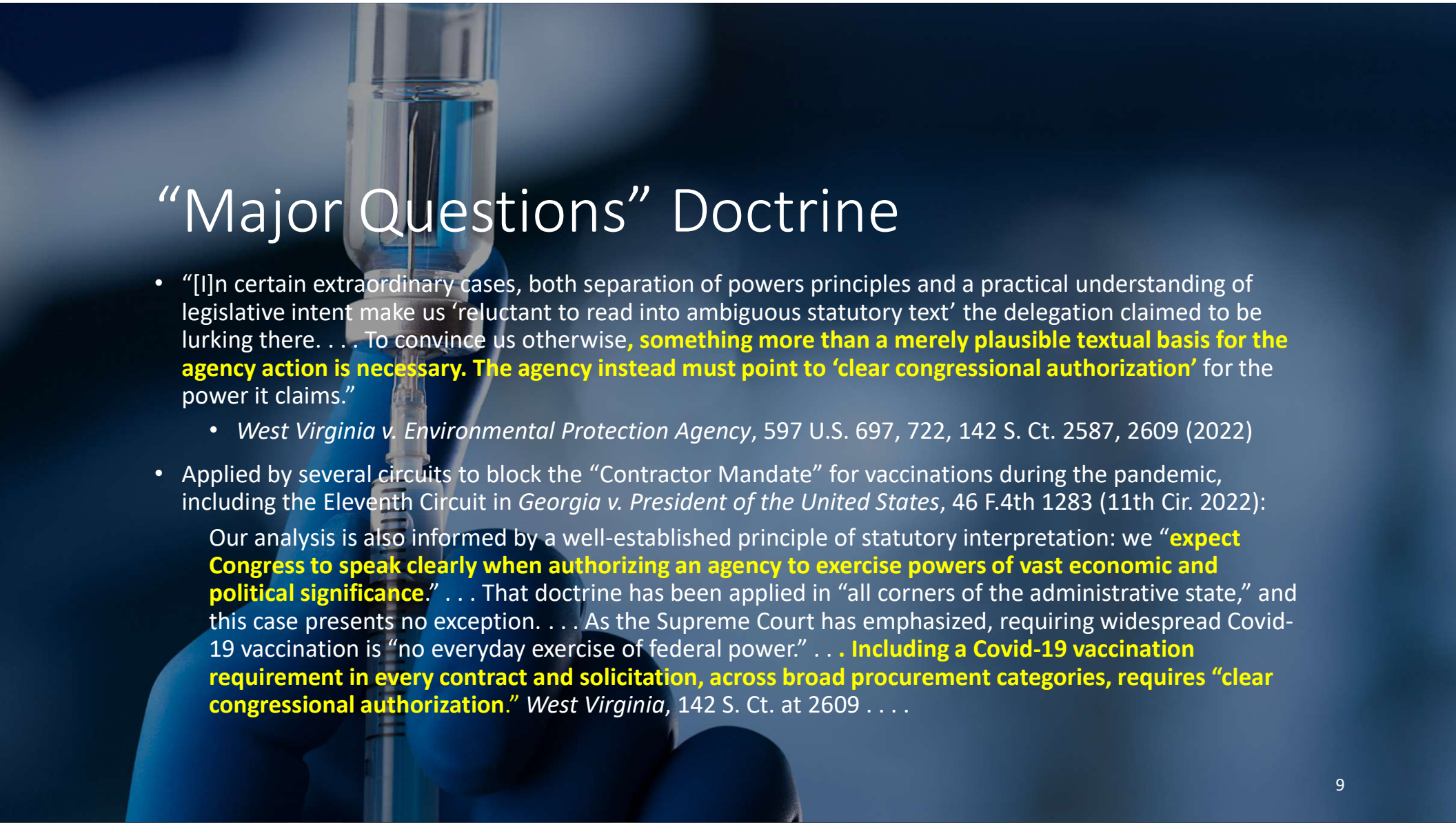
- **Step 1**: Is the statute clear? If "Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If the statute is ambiguous go to Step 2.
- **Step 2**: Defer to the agency's interpretation of the ambiguous statute if it is reasonable.



Kisor v. Wilkie (U.S. 2019) (Kagan, J.)

Factors for Courts to Consider When Assessing Deference to Agency Interpretations of Regulation

- Is the regulation ambiguous?
- Is the agency's interpretation of an ambiguous regulation reasonable?
- Is the agency's interpretation entitled to controlling weight?
  - Is the agency's interpretation authoritative?
  - Is the agency's interpretation grounded in its expertise?
  - Is the agency's interpretation a "fair and considered judgment"?



"Major Questions" Doctrine

- "[I]n 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."
  - *West Virginia v. Environmental Protection Agency*, 597 U.S. 697, 722, 142 S. Ct. 2587, 2609 (2022)
- Applied by several circuits to block the "Contractor Mandate" for vaccinations during the pandemic, including the Eleventh Circuit in *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022):

  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**." . . . That doctrine has been applied in "all corners of the administrative state," and this case presents no exception. . . . As the Supreme Court has emphasized, requiring widespread Covid-19 vaccination is "no everyday exercise of federal power." . . **. 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 . . . .

Government Procurement Law Cases During the *Chevron* Era

Nicole Williamson – Arnold & Porter

Historical examples of deference under *Chevron*

Case Law Examples

- **Deference to FAR provisions**
  - ***Newport News Shipbuilding & Dry Dock Co. v. Garrett***, 6 F.3d 1547 (Fed. Cir. 1993)
- **Deference to SBA regulations**
  - ***Palladian Partners, Inc. v. United States***, 783 F.3d 1243 (Fed. Cir. 2015)
- **Cost Accounting**
  - ***Brownlee v. DynCorp***, 349 F.3d 1343 (Fed. Cir. 2003)

Kingdomware Technologies, Inc. v. United States

579 U.S. 162 (2016)

- Justice Thomas, writing for 8-0 Court, addressed the Department of Veterans Affairs' understanding that **"Rule of Two"** set-aside for service-disabled veteran-owned small businesses **did *not* apply to GSA Multiple Award Schedule orders**
- 38 U.S.C. § 8127(d) says that, when two or more service-disabled veteran-owned small businesses are available, **contracts are to be set aside** for those businesses.
- Department of Veterans Affairs did not want to apply that set-aside to orders because of **potential administrative burdens and bid protests**
- To resolve, Court had to interpret **what a "contract" was**
- Court **bypassed decades of division between "contracts" and "orders"** and (pivoting on government admission at argument) held that the **statute was unambiguous and that GSA Multiple Award Schedule orders are "contracts"** subject to the Rule of Two

Texas Commission for the Blind
(Federal Circuit 1986)

- Case turned on conflicting preferences
- Randolph-Sheppard Act was intended to create **revenue streams for persons with disabilities**, including through **vending machines on federal property**.
    - **Act** 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"**
    - **Defense Department regulation** interpreted this exemption **to exclude income "from vending machines operated by or for the military exchange"**
- Federal Circuit, sitting en banc and divided, **applied *Chevron* and found ambiguity** (the first step in the Chevron analysis) in the Randolph-Sheppard Act
- **Federal Circuit deferred to the Defense Department's regulation** – a result that benefited the **Defense Department's private exchanges.**
    - **Court deferred to the user agency** (the Defense Department) even though another agency (what was then the Department of Health, Education and Welfare (HEW)) had primary authority for implementing the Act
- **Dissent found the Act's language plainly unambiguous**

Allied Technology Group (Federal Circuit 2011)

- Federal Circuit addressed requirements under Section 508 of the Rehabilitation Act: information technology purchased by the federal government **must be accessible to persons with disabilities**.
- Court had to juggle industry reality – that it **is very difficult to achieve full access**ibility – with statutory language and implementing regulations which **contemplate full accessibility**
- 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, though the awardee hedged regarding its accessibility, **it was enough that the awardee 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.

Was *Percipient.ai* the First Post-*Chevron* Bid Protest?

Christopher Yukins – GW Law School

Percipient.ai (Fed. Cir. June 7, 2024): The First Post-*Chevron* Public Procurement Case?

- **Standing Even Though Percipient Was Not a Bidder**
  - In a matter of first impression, an offeror of commercial items is an **interested party** with statutory standing if its **direct economic interest** would be affected by an **alleged violation of a statute establishing a preference** for commercial products and it had a **substantial chance** of its items being acquired to meet agency needs had the violation not occurred (West)
- **Tucker Act (Subject Matter) Jurisdiction**
  - Percipient's protest – though long after award – was **"in connection with"** a procurement
- **The Task Order Bar Did Not Apply**
  - Protest was **not** regarding the issuance of a task order
- **Dissent (Judge Clevenger) Highlighted *Percipient*'s Departures from Precedent**
  - Door opened to **subcontractor protests**?

Percipient and the Pattern of Post-*Chevron* Cases

- **Disturbing Action in the Administrative State**
  - *Percipient* (Federal Circuit): 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 [which requires agencies and prime contractors to consider commercial solutions] 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.
  - *Kingdomware* (Supreme Court): Department of Veterans Affairs failed to apply a veteran's preference – so as to reduce the Department's administrative burden and bid protests
- **Assumption That Statute/Regulation Is Unambiguous**
  - Courts argue fidelity to Congress' intent; avoid deference to agencies
  - Sweep away objections such as the subcontractor protest bar
    - *Kingdomware* largely ignored the contract/order dichotomy
- **Leaves Uncertain Gaps in the Law**
  - Discourages activist agencies – uncertain outcome if challenged
  - Keeps courts (and lawyers) at the center of determining "what the law is"

The *Loper Bright Enterprises* Decision

28 June 2024

Nathaniel Castellano – Jenner & Block

Photo: https://loperbrightcase.com/

Case Background

- *Loper Bright Enterprises* involved herring fishermen based in Cape May, NJ.
- Statute contemplated inspectors on board fishing vessels, but **did not clarify who should pay** for them.
- National Marine Fisheries Service (NMFS) (also known as "NOAA Fisheries") published a rule which said if the agency determines 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**."
- **Lower courts applied *Chevron* and deferred** to agency.

Constitutional Foundation

- "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)."
- In *Marbury v. Madison* (1803), Chief Justice Marshall "famously declared that **'[i]t is emphatically the province and duty of the judicial department to say what the law is.'"**
- Justice Thomas concurrence: *Chevron* unconstitutionally violated separation of powers

Statutory Foundation: Administrative Procedure Act (APA) 5 USC 706

- "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."
- *Loper Bright Enterprises*: "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, §706 . . . 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."

The Court Rejected *Chevron*'s Deference to Agencies When Statutes Are Ambiguous

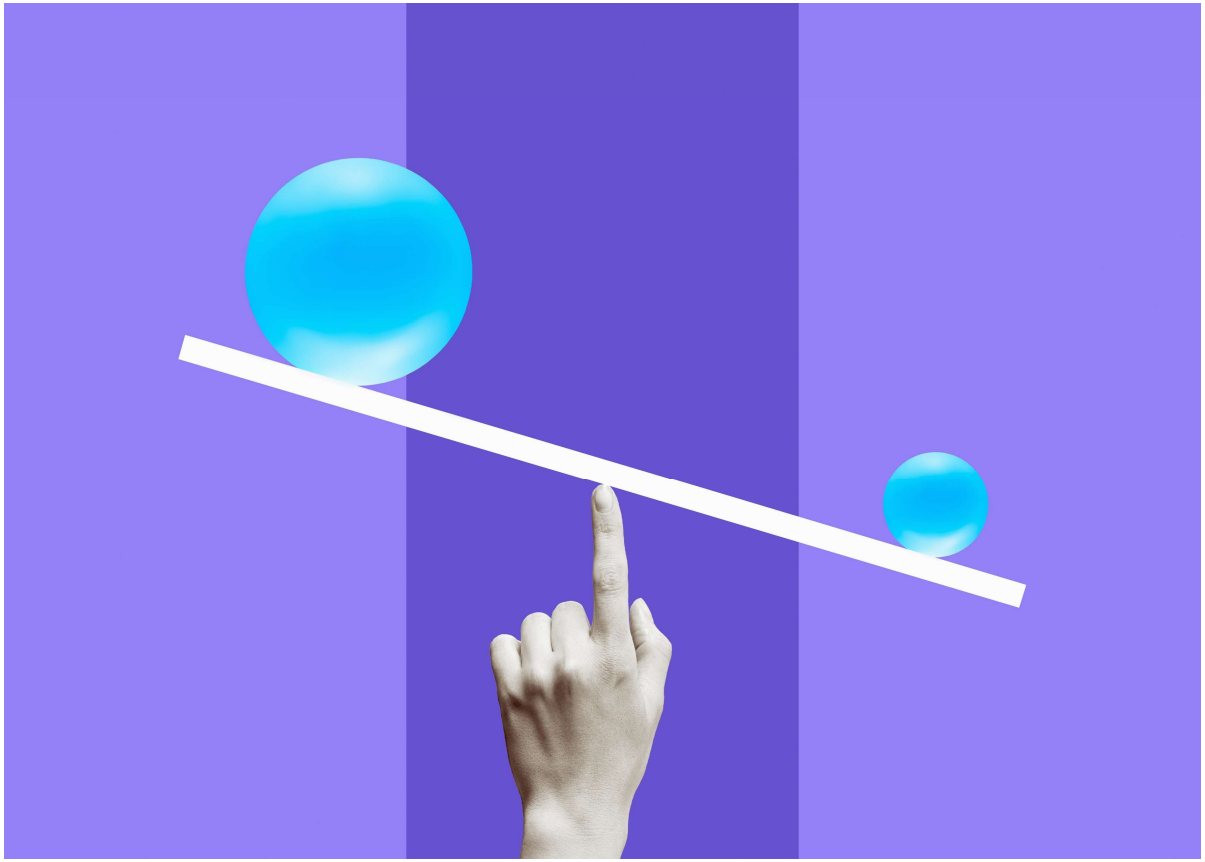
- "Perhaps most fundamentally, *Chevron*'s presumption is misguided because **agencies have no special competence in resolving statutory ambiguities. Courts do**."
- "*Chevron* gravely erred . . . in concluding that the inquiry is fundamentally different just because an administrative interpretation 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**."
- **"'"[A]mbiguity" 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."
- Justice Gorsuch's concurrence: "*Stare decisis*'s true lesson today is not that we are bound to respect *Chevron*'s 'startling development,' but bound to inter it."

When *Will* the Courts Defer to Agencies?

- "Courts exercising independent judgment in determining the meaning of statutory provisions, consistent with the APA, may—as they have from the start—**seek aid from the interpretations of those responsible for implementing** particular statutes." (citing *Skidmore*)
- **Agency expertise "has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control**.'" (citing *Skidmore*)
- **"[I]nterpretations issued contemporaneously with the statute . . .** and which have **remained consistent** over time, may be especially useful in determining the statute's meaning."
  - "[S]tatutes, no matter how impenetrable, do—in fact, must—have a **single, best meaning**."
  - "[E]very **statute's meaning is fixed at the time of enactment**."
- "When the **best reading of a statute is that it delegates discretionary authority to an agency**, 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 . . . ."

Dissent by Justice Kagan

- “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.”



Panel & Audience Discussion

- Could the Supreme Court's decision *in Loper Bright Enterprises* have an impact on the following issues in procurement law:
  - Green procurement
  - Buy American and other preferences
  - Cost accounting
  - FAR rulemaking
  - Bid protests
  - *Corner Post* interaction – statutes of limitation
- Audience Questions

Conclusion

Video recording of today's session will be available on GW Law – Government Procurement Law **YouTube Page** & **www.publicprocurementinternational.com**