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Government Contracts and Chevron Deference: Justice Gorsuch Weighs In

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Under *Chevron U.S.A. v. NRDC* and its progeny, courts show great deference to administrative agencies' interpretations of *statutes and regulations*. However, it does not necessarily follow that courts will provide that same deference to agencies' interpretations of *government contracts*. Last week, in a statement respecting the denial of certiorari in *Scenic America, Inc. v. Dept. of Transportation*, Supreme Court Justice Neil Gorsuch pointed out this distinction and raised an issue that merits further judicial attention.

Chevron holds that as long as an agency presents a "reasonable" interpretation of a statute, a court will typically side with the agency's interpretation. The Supreme Court has extended the *Chevron* doctrine to agencies' interpretations of their own regulations. *See, e.g., Auer v. Robbins*, 519 U.S. 452 (1997). The Supreme Court has also placed important limitations on the *Chevron* doctrine, refusing to give deference when it is clear that Congress did not intend to delegate such authority to the agency. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480 (2015). However, the Supreme Court has never considered the applicability of *Chevron* to agencies' interpretation of government contracts.

In the absence of guidance from the Supreme Court, federal appellate courts have split over how much deference to show an agency's interpretation of a government contract. The Federal, First, and Fifth Circuits hold that general contracting principles should apply (principles which would include the doctrine of *contra proferentem*—meaning that ambiguities are resolved against the drafter).[1] *See, e.g., Turner Construction Co., Inc. v. United States*, 367 F.3d 1319 (Fed. Cir. 2004); *Meadow Green-Wildcat Corp. v. Hathaway,* 936 F.2d 601 (1st Cir. 1991); *Mid-Louisiana Gas Co. v. FERC,* 780 F.2d 1238 (5th Cir. 1986). Alternatively, the D.C. Circuit holds that a contract entered into by an agency "takes on a public interest gloss" and therefore merits *Chevron* deference. *See, e.g., Cajun Electric Power Coop., Inc. v. FERC*, 924 F.2d 1132 (D.C. Cir. 1991).

As Justice (then-Chief Judge) Stephen Breyer noted in *Meadow Green-Wildcat Corp.*, the *Chevron* line of cases "reflect the common sense intuition that an agency is more likely than a court to know what its own regulations mean, as well as the legal inference that Congress, delegating

authority to an agency to promulgate such regulations, likely intended a degree of deference." The question is whether those same intuitions apply—or apply with the same force—in the interpretation of a contract.

On October 16, 2017, in a statement joined by Chief Justice John Roberts and Justice Samuel Alito, Justice Gorsuch signaled agreement with the Federal, First, and Fifth Circuits' method of interpreting government contracts. Justice Gorsuch—who has previously expressed skepticism of the propriety and scope of *Chevron* deference more generally—declared that "whatever one thinks of that practice in statutory interpretation cases, it seems quite another thing to suggest that the doctrine (or something like it) should displace the traditional rules of contract interpretation too." The statement observed that "contracts usually represent compromises between two or more parties" and questioned whether courts should "suppose that one side to a compromise always has more insight into its meaning." Although the case before the Court included several antecedent questions which made it inappropriate for certiorari, the statement signaled that at least three Justices found "the issues lying at its core are surely worthy of consideration."

Government contractors should be aware that the Federal Circuit continues to hold that general contracting principles apply when interpreting government contracts. However, other federal courts—in particular, the D.C. Circuit—currently defer to administrative agencies in the event of an ambiguity in a contract. Fortunately, the Supreme Court may soon bring more clarity and guidance to this question. At the very least, the amount of deference given to agencies' interpretations of government contracts is one "worthy of consideration" by litigants and scholars.

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[1] The Federal Circuit has long applied the doctrine of *contra proferentem*, on the grounds that the government holds more authority over the contracting process: "The Government, as the author, has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions—as well as the main risk of a failure to carry that responsibility." *WPC Enterprises Inc. v. United States*, 163 Ct. Ct. 1 (1963); *cf. Helene Curtis Industries, Inc. v. United States*, 160 Ct. Cl. 437 (1963) (holding that "the Government—where the balance of knowledge is so clearly on its side—can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word").

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