The FAA, DOT and NTSB: What to Expect in the Next Four Years!

20TH ANNIVERSARY

2025 Aviation Symposium

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Overview

- How recent events present opportunities for regulated aviation companies and challenges for the FAA and DOT
- How the Supreme Court caused an earthquake in administrative law
- Review of polarized judiciary and importance of venue
- Impact of 2024 Elections

What is the Law?

- At the federal level, the law generally falls into a hierarchy of three categories:
  - The Constitution – Sets the framework for how the government can operate
  - Statutes – Passed by Congress, they set broad Federal policy and spending priorities
  - Regulations – Issued by the Executive branch to implement the will of Congress as expressed in the statutes
- While Regulations are at the "lowest" level, in many ways they have the greatest impact
  - Constitution – 4 pages
  - US Code – approximately 55,000 pages
  - CFR - over 200,000 pages

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What are regulations?

- Congress is the body entrusted with making laws
- Federal agencies have been delegated authority by Congress to make regulations to implement statutes
- Primary authority is the Administrative Procedures Act
- Rulemaking generally requires public input through notice and comment
- Regulations that exceed an agency's grant of authority over a subject are invalid

How do we know if an agency has exceeded its authority?

- Regulations can be challenged in court, with the court making the determination of whether an agency has exceeded its authority
- The standard applied by the court can dramatically affect the outcome of the review
- Prior to this year, the Court applied what was known as "*Chevron* deference"
- Under this standard, the court would "defer" to the administrative agency's interpretation of the statutes which empower it, placing a higher burden on anyone challenging the regulations validity

The Test for Chevron Deference

- Chevron stood for the proposition that courts should defer to a federal agency's interpretation of a silent or ambiguous statute so long as the interpretation is "permissible." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2247 (2024)
- Under Chevron, the reviewing court would determine "whether Congress has directly spoken to the precise question at issue." Id.
- If Congress had not, if "'the statute is silent or ambiguous with respect to the specific issue' at hand," the court would defer to the agency as long as its interpretation of the statute was "permissible." Id.

Key Court Decisions

- *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024)
- *West Virginia v. EPA*, 597 U.S. 697 (2022)
- *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 219 L.Ed.2d 1139 (2024)

Loper Bright – Background

- Loper Bright is a family Atlantic herring fishery business. 144 S. Ct. at 2255-56
- The Court granted certiorari on two cases involving multiple owners of Atlantic, family-owned commercial herring fisheries or fishing vessels who challenged a regulation of the National Marine Fisheries Service (The Agency) under the Magnuson-Stevens Fishery Conservation and Management Act, which incorporates the Administrative Procedure Act (APA). *Id*. at 2255-57

Loper Bright – The Statute

The Magnuson-Stevens Fishery Conservation and Management Act ("MSA") specifies three groups that must cover costs associated with observers:

> (1) foreign fishing vessels … (which *must* carry observers) …;
>
> (2) vessels participating in certain limited access privilege programs, which impose quotas permitting fishermen to harvest only specific quantities of a fishery's total allowable catch …; and
>
> (3) vessels within the jurisdiction of the North Pacific Council, where many of the largest and most successful commercial fishing enterprises in the Nation operate ….

The MSA does not contain terms addressing whether Atlantic herring fishermen may be required to bear costs associated with observers.

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Loper Bright – The Regulation and Lower Court Decision

- Regulation required Atlantic herring fisherman to contract and pay for government-certified third-party observers on fishing trips
- The challengers argued that the existence of explicit statutory language mandating the payments demonstrated the agency lacked the authorization to impose similar requirements on them
- The First Circuit Court of Appeals, however, affirmed the district court's decision upholding the regulation, reasoning that the agency's interpretation did not exceed "the bounds of the permissible"

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Loper Bright Overturns *Chevron*

- *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024)
- Overturned *Chevron* deference. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984)
- *Chevron* was a 6-0 decision
- *Chevron* was in place for 40 years and made challenging regulations issued by agencies such as the FAA/DOT very difficult

Loper Bright – Majority Opinion

- On June 28, 2024, the Court held, in a 6 to 3 decision authored by Chief Justice Roberts: "The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled." *Loper Bright*, 144 S. Ct. at 2247
- The APA is a "check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Id.*, citing *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)
- Now, courts decide for themselves the meaning of federal statutes under which the FAA and DOT issue regulations

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Loper Bright – Critique of *Chevron*

- Under *Chevron*, a court had to defer to the agency's interpretation, even if the Court believed the interpretation was wrong. *Loper Bright*, 144 S. Ct. at 2247
- Chevron marked a departure from the judiciary's role of interpreting the meaning of statutes. *Id*.
- By 1996, Chevron had led to a Supreme Court decision based on a theory that Congress understands a statutory ambiguity will be resolved by an agency and that the agency, not a court, possesses discretion to resolve it. *Id*., citing *Smiley v. Citibank*, 517 U.S. 735 (1996)

Loper Bright – *Chevron* Critique Continued

- "Neither *Chevron*, nor any subsequent decision of the Court attempted to reconcile its framework with the APA. *Chevron* defies the command of the APA that 'the reviewing court' – not the agency whose action it reviews—is to 'decided all relevant questions of law' and 'interpret statutory provisions.'" *Loper Bright,* 144 S. Ct. at 2247
- Under the APA, "[t]o 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." 5 U.S.C. § 706

Loper Bright – *Chevron* Critique Continued

- The theory that Congress intends for agencies to resolve ambiguities ignores the fact that many ambiguities are unintentional. *Loper Bright*, 144 S. Ct. at 2247.
- "*Chevron's* presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do." *Id*.
- The Court's Article III role to interpret statutory ambiguities 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." *Id*.

Note: Loper Bright Left Intact a Measure of Deference to Agencies

- *Loper Bright* recognized that agency interpretations based on specialized experience are entitled to weight based on the thoroughness of its effort, the validity of its reasoning, its consistency with earlier/later pronouncements, and its overall power of persuasion. 144 S. Ct. at 2259, citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
- *See Radiance Technologies, Inc.*, B-422615, 2024 CPD ¶ 210, Aug 30, 2024 ("*Loper* involved an agency's interpretation of ambiguous provisions of a statute, as opposed to agency regulations. ... Further, even if the SBA's regulations were ambiguous, the agency's interpretation of its own ambiguous regulations would be entitled to deference...")

Loper Bright – The Dissent (Justice Kagan)

- Accuses the majority of turning the Court into the country's administrative czar, citing examples involving the Food & Drug Administration and the Public Health Services Act, Fish & Wildlife Services and the Endangered Species Act, and Health and Human Service and Medicare.
- Chides the majority for defending its "move as one (suddenly) required by (the nearly 80-year-old Administrative Procedure Act)," enacted in 1946.
- Notes that Congress rarely provides an explicit instruction for dealing with gaps or ambiguities and that Congress could have refuted *Chevron* deference but has not done so in *Chevron's* 40-year existence. Instead, Congress authorized or reauthorized hundreds of statutes in the era of *Chevron* deference.

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Lopez – The Dissent Continued

- Criticizes the majority for relying on Section 706 of the APA, which does not provide a *de novo* or other standard of review
- States that *Chevron* was previously upheld in 70 Supreme Court cases and thousands of lower court cases
- Notes that Congress could have refuted *Chevron* but chose not to

West Virginia v. EPA – Additional Check on Agency Power

- *West Virginia v. EPA*, 597 U.S. 697 (2022)
- Announces Major Questions Doctrine
- An agency's attempt to assert vast economic and political power requires clear statutory authorization
- EPA action to enact climate pollution standards to shift electrical generation from existing power plants to renewable sources exceeded the EPA's authority

Corner Post v. Bd. of Governors – Increases Ability to Challenge Agency Action

- *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 219 L.Ed.2d 1139 (2024).
- Widens the window to challenge federal regulations under the Administrative Procedure Act by ruling that an APA claim first accrues when a rule first adversely affects a plaintiff, not when the agency issues the rule
- Issue was whether someone can bring claims challenging regulations decades after rules are issued. The Court framed the question & answer as follows:
- "We must decide when a claim brought under the Administrative Procedure Act 'accrues' for purposes of this provision. The answer is straightforward. A claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action."

Corner Post v. Bd. of Governors – Majority Opinion (Justice Barrett)

- The applicable statute of limitations, 28 U.S.C. § 2401(a): "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." (Emphasis added.) This provision applies generally to suits against the United States unless the timing provision of a more specific statute displaces it."
- Majority (6-3)(J. Barrett): "Held: An APAP claim does not accrue for purposes of § 2401(a)'s 6-year statute of limitation until the plaintiff is injured by final agency action."

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Corner Post v. Bd. of Governors – Dissent (Justice Jackson)

- Dissent (J. Jackson): "Today's ruling is not only baseless. It is also extraordinarily consequential. In one fell swoop, the Court has effectively eliminated any limitations period for APA lawsuits, despite Congress's unmistakable policy determination to cut off such suits within six years of the final agency action. The Court has decided that the clock starts for limitations purposes whenever a new regulated entity is created. This means that, from this day forward, administrative agencies can be sued in perpetuity over every final decision they make."

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What is the practical effect of these decisions?

- Causes administrative agencies to second-guess themselves, causing short-term uncertainty as they review their prior statutory interpretations for compliance with *Loper Bright*
- Potentially increases delay in issuance of regulations as agencies consider the risk a court will disagree with its statutory interpretation
- Means aviation companies can be more aggressive with challenges to unreasonable statutory interpretations of the FAA and DOT
- Increasing opportunities to forum shop as some circuits and courts are more aggressive at striking down regulatory action

FAA – Evidence of Newfound Hesitancy

- Since *Loper Bright* was decided, the FAA has rescinded four legal interpretations, clarified another, and issued a stay of a sixth
- October 15, 2024, FAA issued stay of legal interpretation of 14 CFR 43.3(d), issued on September 3, 2024, stating that the phrase "in person" requires a supervisor to physically be present, rather than a virtual presence, to allow a person to perform maintenance the supervisor is authorized to perform

Case Study – *Huerta v. Haughwout*, 2016 WL 3919799 (D. Conn. July 18, 2016)

- Two videos uploaded in 2015 of drones flying several feet over the ground within the homeowner's property; a gun and flamethrower were attached to the drone and were fired/activated in the videos
- FAA issued subpoenas for documents and to appear at a deposition to the minor who uploaded the videos and his father, seeking information on the drones, photographs and names of witnesses, among other things
- The Haughwouts refused to comply and argued administrative overreach

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Huerta – The Statute

- Court noted that Congress authorized the FAA to issue the subpoena if it reasonably appears a person is violating the Federal Aviation Act
- The Haughwouts argued the devices are not aircraft and thus not subject to regulation
- Court noted the statute – 49 USC § 40103(b) – authorizes the FAA to regulate the navigable airspace and that Congress defined aircraft broadly as "any contrivance invented, used, or designed to navigate, or fly in, the air." 49 USC § 40102

Huerta – FAA Overreach?

- Having decided the narrow question before it, however, the Court took pains to note that if the case presented a challenge to a regulatory enforcement action, as opposed to an investigation, that the Haughwouts would have a "substantial" challenge to the FAA's authority, stating the FAA's position that it can regulate "every cubic inch of outdoor air" (noting the FAA's position that UAS in one's own yard must be registered if over .55 pounds) is "difficult to reconcile" with the statute's reference to "navigable airspace."
- "It is far from clear that Congress intends – or could constitutionally intend – to regulate all that is airborne on one's own property and that poses no plausible threat to or substantial effect on air transport or interstate commerce in general."

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Case Study – *Aeronautical Repair Station Assoc. v. FAA, 494 F.3d 161* (D.C. Cir. 2007)

- Petition to DC Circuit for review of agency final rule
- Case challenging 2006 Final Rule Mandating Drug and Alcohol Testing of noncertificated maintenance subcontractors

ARSA – The Statute

- Omnibus Transportation Employee Testing Act (1991)
- The FAA "shall … require() air carriers … to [test] airmen, crewmembers, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions … for use … of alcohol or a controlled substance."

ARSA – The Regulation

In 2006, the FAA revised its 1994 Regulations to require testing employees who perform safety-sensitive functions "directly or by contract (including by subcontract at any tier)."

ARSA – The Petitioner's Position

- The phrase "air carrier employees" does not include noncertificated maintenance subcontractors
- The phrase "responsible for safety-sensitive functions" does not include noncertificated personnel because the certificated personnel are the ones regulatorily responsible for the maintenance

ARSA – Majority Opinion Regarding Term "Employees"

- Reviewed the regulation under the *Chevron* two-step approach:
  - Look to see if Congress spoke directly to the issue;
  - If Congress did not speak directly to the issue, review whether the agency "permissibly" construed the statute
- "We conclude that the statutory language is ambiguous as to whether the testing requirement applies to employees of all subcontractors, at whatever tier, and that the FAA reasonably construed the statute under the second step of Chevron to determine that it does." *Id*. at 166.

ARSA – Majority Opinion Cont'd

- "[T]he FAA reasonably concluded that the phrase 'other air carrier employees' can include employees of an air carrier's contractors as well as its direct employees ()" despite acknowledging that such a definition of "employee" is "not perhaps its most common meaning." *Id*. at 166.
- The court further reasoned that the statute's inclusion of airport security screening contract personnel "suggests" that Congress considered contract personnel to be employees, even with respect to non-security personnel such as maintenance providers. *Id*.
- The FAA's interpretation is "not unreasonable" because requiring testing of both certificated and non-certification maintenance employees helps ensure safety. *Id*. at 168-69.

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ARSA – Majority Opinion Regarding Phrase "Responsible for"

The FAA permissibly interpreted the phrase "responsible for" as meaning the "agent" or "cause" of something, rather than "legally responsible for"

ARSA – The Dissent

- Pointed out that "[t]o find statutory authority for the Rule, the FAA must argue that employees of subcontractors 'at any tier' are 'air carrier employees' under the Act."
- "[W]e need not canvass all known uses of the word 'employee' to know that an employee of a subcontractor performing work for a contractor which in turn has a contract with an air carrier is not, in an ordinary sense, an 'air carrier employee.'"
- "[T]he reasonable inference from the phrase 'airport security screening contract personnel' is that where Congress intended the Act to reach non-air carrier employees, it said so explicitly."
- "The FAA … exceeded … its statutory authority here."

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Increasingly Polarized Judiciary Presents Opportunities to Challenge Agency Action

- Studies have found marked increase in polarization in the federal judiciary since the mid-1980s, growing over time
- Increases opportunity to venue-shop for best circuit to challenge regulations
- Under APA Section 703, judicial review is generally allowed in any court of competent jurisdiction
- The venue statute for suits against federal agencies provides for suits in any judicial district where the defendant resides or the claim arises or any relevant real property is situated or, if no real property is involved, where the plaintiff resides." 28 USC § 1391(e)

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Increasingly Polarized Judiciary Presents Opportunities to Challenge Agency Action

- *Audubon v. EPA* – Just a few weeks ago, the DC Circuit declared all regulations passed by the Council on Environmental Quality *ultra vires*
- Suit over approval of air tours in San Francisco Bay area
- FAA and EPA struggled for decades in how to apply NEPA environmental impact requirements to air tour operators
- White House created CEQ in 1978 to enact regulations binding on other agencies on how NEPA should be enforced
- Congress did not create CEQ and never delegated it any rulemaking authority
- Environmental groups called the ruling “demonstrably dangerous” and are seeking reconsideration

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Elections Have Consequences - Department of Governmental Efficiency (DOGE)

- Co-heads of DOGE Elon Musk and Vivek Ramaswamy stated "[m]ost legal edicts aren't laws enacted by Congress but 'rules and regulations' promulgated by unelected bureaucrats."
- DOGE intends to (1) roll back illegitimate regulations; (2) streamline federal agencies; and (3) achieve cost savings via overhauled federal procurement and reduced waste, fraud and abuse

DOGE – Targeting Regulations

- Co-heads of DOGE Elon Musk and Vivek Ramaswamy stated that of the "tens of thousands of regulations" that "many" "exceed the constitutional authority granted
- Their plan intends to use Loper Bright and West Virginia as guides to identifying regulations enacted without "explicit congressional approval" which will be presented to President Trump for issuance of executive orders to "pause enforcement" and potentially "resci[nd]" them

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Thank You

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