US Supreme Court's decision in Loper Bright a sea change for US maritime sector

As the old adage goes, you cannot change the direction of the wind, but you can adjust your sails to reach your destination. This may prove more poignant than ever as the US Supreme Court just issued an opinion that signals a sea change for the maritime sector.

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The industry is now well aware of the June 28, 2024 ruling by the US Supreme Court in *Loper Bright Enterprises v. Raimondo*, in which the Court overruled the 40-year-old *Chevron* doctrine. *Chevron* served as a central doctrine of administrative law as it granted significant deference to US agencies' interpretations of federal statutes, which they administer and enforce. The *Chevron* doctrine touches on the full reach of US federal regulations, and thus, any maritime stakeholder subject to such regulations could be impacted by the Supreme Court's decision. Maritime stakeholders should take note particularly within the areas of:

- The Jones Act;
- The Act to Prevent Pollution from Ships (APPS);
- OPA 90; and
- COLREGS

The Chevron doctrine left in the wake

Under *Chevron* deference—named for the 1984 case *Chevron U.S.A. Inc. v. Natural Resources Defense Council*—the prior Supreme Court required courts to defer to certain agency interpretations of ambiguous statutes and regulations. Essentially, the *Chevron* doctrine meant that courts would grant deference to an agency's interpretation of an applicable law if the agency's interpretation was generally rational or reasonable and was given in a form that would have the force of law, deferring to agency interpretations where the relevant statutory text was ambiguous.

Over a robust dissent, the Court found that *Chevron* conflicts with the Administrative Procedure Act (APA) and "makes clear that agency interpretations of statutes – such as agency interpretations of the Constitution – are not entitled to deference," a view in keeping with the framers' intent. Now, judges will rely on their own interpretation of the law as they are called upon to make rulings in all aspects of administrative-based admiralty and maritime matters. In so doing, courts will be able to overturn regulations more easily by exercising their independent judgment in deciding whether an agency has acted within its statutory authority.

The rising tide of implications of the "Loper Bright" decision on the maritime sector

With *Loper Bright*, the Supreme Court has created potentially far-reaching ramifications to federal regulators in the maritime industry. While the full impact of the Court's decision is yet-to-be-realized until challenges play out in courts, agencies such as the US Coast Guard (USCG), US Maritime Administration (MarAd) and US Customs and Border Protection (CBP) should be braced for challenges for years to come as decisions by these agencies are based, at least in part, on statutory interpretations. Some examples of agency-related determinations that may now face additional scrutiny include:

The Jones Act coastwise trade

The most prominent maritime law that may become subject to scrutiny under *Loper Bright* could be Section 27 of the Merchant Marine Act of 1920 (P.L. 66-261), commonly referred to as the "Jones Act," which requires that vessels transporting cargo from one US point to another US point be US-flag, US-built and owned and crewed by US citizens. The Jones Act aims to protect US shipyards, domestic vessels and US merchant mariners from foreign competition.

The Coast Guard is the lead agency tasked with enforcing the Jones Act's US-build requirement for vessels, US ownership of the vessels and US crewing requirements. The Coast Guard enforces these requirements through issuance of a "coastwise endorsement," thereby designating a vessel as "coastwise qualified," if the vessel meets all these construction, ownership and control requirements.

The Coast Guard has for decades promulgated a series of interpretative "determination letters" on responses to requests seeking confirmation that regulatory standards to establish US build are met, as well as responses to requests seeking confirmation that work performed outside of the US on US-built vessels will not result in the loss of coastwise eligibility. Other determinations include responses seeking citizenship determinations and vessel eligibility.

Separately, CBP has primary responsibility for determining what constitutes "transportation" under the Jones Act and whether the origin and destination of a voyage are "US points." CBP issues its interpretations of the Jones Act through Customs Bulletins and Decisions, as well as CROSS Rulings, on which industry relies in assessing operational parameters and investment in the US market. CBP's interpretative rulings have been subject to scrutiny in several facets, including the Passenger Vessel Services Act (PVSA). For example, CBP has determined that a cruise ship carrying passengers between two US ports does not have to be coastwise qualified provided it has visited a distant foreign port on a specific voyage, and issued interpretations of so-called "voyages to nowhere" for vessels that do not call on any other ports besides the one at which they embark and disembark passengers. CBP also determines which persons are "passengers" and may not be carried by a non-US vessel between US ports, as opposed to crew and contractor personnel, who may be carried in such trades under certain circumstances.

In the offshore energy sector, CBP has issued interpretations of the Jones Act that affect offshore supply vessels (OSV) and other construction and installation vessels used to supply construct energy platforms. Determinations related to the Jones Act compliance in the servicing of the offshore sector have included, for example, whether: an OSV is transporting supplies or workers to an oil rig; a vessel is "lightering;" a vessel is installing equipment; a vessel is laying cable or pipeline; an OSV is transporting supplies and rig workers or just carrying its own crew and equipment; a vessel is involved in installing rig equipment or conducting surveying; and a vessel operates as a "flotel." And, because the coastwise laws apply to offshore wind on the U.S. Outer Continental Shelf (OCS), CBP has issued rulings applying the Jones Act to the offshore wind industry, to clarify how offshore wind work can be performed in compliance with the law and to include installations at pristine sites on the OCS. Regarding the energy trade, CBP has issued important interpretations related to whether merchandise that is transformed (manufactured or processed) into a new and different product at an intermediate foreign port.

The Coast Guard, and a sister agency, MarAd, have, during these same decades, made a substantial number of rulings as to whether a specific corporate, partnership or trust ownership structure involving both US and foreign directors, managers, board members and equity ownership will qualify as a "US citizen" generally for eligibility to register the vessel under the US flag, and also whether such vessel meets additional management, control and a 75% equity ownership requirement to be coastwise eligible. Key statutory interpretations govern what constitutes ownership or control, especially in the case of vessels owned by publicly traded corporations or trusts, and whether any specific transaction may have constituted a foreign sale of the vessel effecting future coastwise eligibility. Even with the *Chevron* deference in place, there have been many court challenges to these interpretations by the Coast Guard and MarAd.

An oft-raised question under the Jones Act is whether the Act can be waived to allow foreign-flag vessels to operate in an otherwise prohibited trade. Based on current interpretations, such Jones Act waivers are rare, generally limited to emergency use of available foreign vessel where US shipping is not available in sufficient time or quantity to resupply refinery feedstocks, or reach badly-affected remote ports following a hurricane or extreme winter storm event, but generally are available only in the interest of "national defense." The final issuer of any Jones Act waiver is either the Secretary of Defense (who has virtually sole discretion to grant a waiver on national security grounds) or the Secretary of Homeland Security, although if a DHS waiver

application has sufficient "interest of national defense," MarAd is consulted regarding the availability of qualified US flag capacity to meet the national defense requirements. Under the *Loper Bright* framework, new challenges to the interpretation of what amounts to "interest of national defense" in the waiver context could conceivably arise.

Environmental compliance under the APPS and OPA 90

Another area of scrutiny post-*Loper Bright* involves potential challenges to legal frameworks related to interpretation of the Oil Pollution Act of 1990 (OPA 90) and the authorities under the Act to Prevent Pollution from Ships (APPS), the domestic implementing statute of the International Convention for the Prevention of Pollution from Ships (MARPOL). Under OPA 90, challenges may arise to the authority Congress granted the Coast Guard to determine what removal costs should be paid for by the Oil Spill Liability Fund and OPA 90's provision for recovery of pure economic loss, as well as other factors impacting a responsible party. Courts have found ambiguity in certain provisions of OPA 90, an important consideration as OPA 90 defines situations where liability may be unlimited for a responsible party. USCG interpretations of OPA 90 have also focused upon whether there is flexibility under OPA to allow P&I clubs any policy defenses with respect to oil pollution liability as well as Congress' intent related to direct action against insurers. Courts have also reviewed suits brought by marine pollution insurance carriers challenging decisions by the USCG National Pollution Funds Center (NPFC) and an insurer's OPA claim for reimbursement for oil spill removal costs.

Besides OPA 90, the United States maintains an aggressive enforcement posture—somewhat unique in this regard globally—in its enforcement of vessel waste oil discharges under the APPS. Indeed, several federal district and appellate courts have addressed relevant issues under the APPS regarding the United States' environmental criminal enforcement authority, such as the scope of the Coast Guard's statutory authority to impose financial conditions on a foreign-flag vessel for departure clearance after the vessel was detained at a US port under 33 U.S.C. § 1908(e), a provision that allows the USCG to request CBP to withhold customs clearance for a vessel if reasonable cause exists to believe that the vessel, its owner or the operator violated APPS. Notably, that statute does not expressly refer to "ship managers," an entity that in recent years the Coast Guard has interpreted to be subject to APPS' departure clearance security agreements. Courts will now be tasked with reviewing future challenges to the Coast Guard's exercise of its discretion under the APPS as regulated maritime industry entities may test the limits of the *Loper Bright* framework.

Marine safety and security

Additionally, the Coast Guard has a primary role in regulating matters of maritime security and safety. In the context of marine causalities, courts have reviewed the agency's interpretation of the Safety Management System when determining the cause of marine casualties, as well as navigational decisions of pilots and crew under the 1972 International Regulations for Preventing Collisions at Sea (COLREGS). Looking ahead, regulatory uncertainty with novel technologies, such as those related to alternative fuels and air emissions under the Clean Air Act, reduced crewing on autonomous vessels, and outer space launch and reentry operations may create uncertainty in statutory interpretations. Moreover, future challenges could emerge in the context of the Coast Guard's efforts to regulate cybersecurity at facilities, on vessels and in the OCS, as well as compliance with multiple International Maritime Organization Conventions that substantially affect US ocean commerce, such as the International Ship and Port Facility Security Code. But these are just a handful of examples of the types of maritime-related issues that may be litigated with different or new results under *Loper Bright*. The real-world impact of the decision, however, remains uncertain.

Conclusions

The shipping industry has often looked to the courts for further consideration of key agency decisions impacting vital maritime interests. *Chevron* deference resulted in little traction being gained in those judicial reviews. The Supreme Court's *Loper Bright* ruling will lead to revisiting important industry questions and taking careful coordination with stakeholders to bring the appropriate challenges and shape rulemaking.

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