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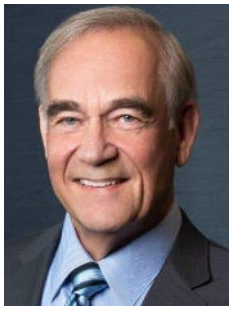
Would Biden Airline Service Order Raise 'Major Questions'?

By **Roger Clark** (July 6, 2023, 5:00 PM EDT)


Roger Clark

Triggered by a massive early winter storm, the well-known airline meltdown in December displaced and stranded legions of passengers whose flights were canceled and delayed. The blame game began faster than Tom Cruise could say, "I feel the need for speed."

Bad weather frequently plays havoc with commercial aviation, but there was more at play behind the meltdown than weather. Delays and cancellations were compounded by the technological debt of air carriers, primarily Southwest Airlines Co.

A failure to invest in the implementation of updated ticketing, scheduling and communication technologies meant that Southwest lacked the digital infrastructure to respond promptly to the weather emergency.[1]

Southwest, consistently ranked as one of the world's most admired companies by Fortune magazine, routinely compares favorably to its rivals with on-time arrival metrics. But a crisis, whether real or imagined, is political fodder for the folks in Washington. Several weeks after the meltdown, Sen. Richard Blumenthal, D-Conn., introduced his Airline Passengers' Bill of Rights.[2]

Passenger Bill of Rights

The proposed legislation would require the U.S. Department of Transportation to establish passenger remedies for canceled or delayed flights when the cancellation or delay was within the carrier's control.

The remedies would include automatic refunds, payment for meals, hotels and related expenses, and, on top of all that, cash payments of $1,350 to each passenger for flights delayed by at least four hours.

If Blumenthal's bill had been law in December, the mandated payouts could have been in the billions. They would have been a welcome windfall for delayed passengers — but a potentially devastating financial blow to the air carrier.

But the bill of rights would do far more than provide remedies for delayed and canceled flights. It would rewrite, if not repeal, much of the Airline Deregulation Act, which ended federal regulation of prices, routes and services in 1978, and preempted the states from attempting to do what the federal government could not.[3]

Airline Deregulation

The goal of the ADA was to place maximum reliance on competition in providing air transportation services. The proposed legislation would end nearly 50 years of this reliance on market forces, and would terminate the preemption of state regulation of services.

States would be allowed to enforce their consumer protection laws against airlines — something prohibited for almost half a century — and class actions would be allowed against airlines for violation of those consumer protection laws.

But services should not be confused with safety. When it comes to safety, the airline industry remains one of the most highly regulated businesses in the nation.

There are design specifications for almost every nut and bolt in an airplane, and clear and demanding regulatory qualifications for pilots and flight crews. The national airspace is regulated to such a degree that, by comparison, a drive down a limited access interstate seems like the Wild West.

But the contract of carriage between passengers and airlines, subject to limited exceptions, is an unregulated service, not a safety matter. Whether an airline refunds the price of your ticket, pays for your meals and hotel, or pays a penalty to you for not delivering you to your destination on time depends to the maximum extent possible upon the competition for passengers among the airlines.

If some airlines offer better deals on refunds and compensation when flights are canceled or delayed, passengers can book their flights accordingly. That is the theory, anyway. It makes a large assumption that real competition exists between airlines.

Since the ADA was enacted, there has been significant industry consolidation. There is often not much choice between airlines — particularly for passengers who want to fly a particular route at a particular time, and even more so for those not flying between major hubs.

We all complain about the meals served on airlines, about the narrow seats and the lack of legroom, about hidden fees and add-ons and a host of other service issues. These complaints are often justified.

But we continue to vote in favor of flying by purchasing our tickets, even though those tickets are subject to the terms of the airlines' contracts of carriage — available for review online, but never read — and even though, historically, those contractual terms provide limited remedies when our flights are delayed or canceled.

The ADA has been a major success in one area: the cost of travel. The average cost to fly is about 15 cents per mile, compared to about 58 cents per mile to drive.

These numbers are inflected, of course, by how many might be riding in the car, and whether the airplane is full or almost empty. But the point is that travel by air is probably the cheapest way to get around, and arguably the most convenient, at least when the distance traveled is more than 500 miles.

With the massive change in financial exposure posed by Blumenthal's passengers' bill of rights, it is not surprising that the airline industry would oppose the legislation. The bill remains parked right where it started, languishing in the Senate Committee on Commerce, Science and Transportation.

Major Questions Doctrine

And this is where the story takes an interesting turn. The issue may now be heading into "major questions doctrine" territory, a somewhat obscure and relatively recent creation of the U.S. Supreme Court.[4]

The major questions doctrine holds that government agencies cannot decide issues of major national significance without clear congressional authorization. The reasoning behind the doctrine is that the big issues should be resolved through representative democracy, not by unelected bureaucrats.[5]

On May 8, President Joe Biden announced plans to do by executive action what apparently could not be done legislatively. In the White House press release, Biden said:

> Later this year, my administration will propose a historic new rule that will make it mandatory, not voluntary — but mandatory for all U.S. airlines to compensate you with meals, hotels, taxis, ride shares or [rebooking fees], and cash, miles and/or travel vouchers, whenever they are the ones to blame for the cancellation or delay. And that's all on top of refunding the cost of your ticket.[6]

Would the new rule run afoul of the intent of Congress, that the services offered by an airline should, according to the ADA, rely to the maximum extent possible upon the competition among airlines?

Whether the major questions doctrine applies in this matter will ultimately depend on a determination that the issue to be regulated is of what the Supreme Court first referred to as "vast 'economic and political significance'" in its 2014 opinion in Utility Air Regulatory Group v. U.S. Environmental Protection Agency, and that Congress has not clearly bestowed upon the administration the authority to regulate the issue.[7]

But, so far, the court has only dealt with the doctrine in connection with action by an agency of the executive branch. It has not considered whether the White House itself is constrained by the doctrine. The court might soon be asked to resolve the issue.

The Fifth, Sixth and Eleventh Circuits extended the doctrine to direct presidential actions when they were asked to decide the legality of the president's mandate that federal contractors be vaccinated against COVID-19.

In Louisiana v. Biden, for example, the U.S. Court of Appeals for the Fifth Circuit wrote last year that "delegations to the President and delegations to an agency should be treated the same under the Major Questions Doctrine" because the Constitution "makes a single President responsible for the actions of the Executive Branch."[8]

But in April, the U.S. Court of Appeals for the Ninth Circuit, in Mayes v. Biden, took a contrary view, and ruled that the major questions doctrine "does not apply to actions by the President."[11]

The Ninth Circuit relied upon Franklin v. Massachusetts, a 1992 case in which the Supreme Court "required an 'express statement' to find that Congress meant to subject the President's actions to additional scrutiny."[12]

The appellate panel noted that "before our sister circuits enjoined the Contractor Mandate, the Major

Questions Doctrine had never been applied to the exercise of power by the President."

The Ninth Circuit further observed that:

> 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."

Which brings us back to the ADA and Biden. It is not yet clear whether his statement that "my administration will propose a historic new rule" meant that Biden was referring to the Department of Transportation, i.e., the Federal Aviation Administration, going through a traditional rulemaking process, or whether he had in mind an executive order issued directly from the White House.

If Biden acts by executive order, he will place in the crosshairs the dispute between the Ninth Circuit, on the one hand, and the Fifth, Sixth and Eleventh Circuits, on the other. But the language in Franklin that was noted by the Ninth Circuit states that an "express statement" is required to "subject the President's actions to additional scrutiny."

Is the congressional intent that prices, routes and services of airlines be governed by maximum reliance on competition among air carriers the necessary express statement that would subject an executive order of the president to the major questions doctrine — even under the reasoning of the Ninth Circuit in Mayes?

If so, then under these facts — the language of the ADA — there would be no true dispute between the Ninth Circuit and the other circuits.

The Ninth Circuit itself said in Mayes that, even if there are no major questions constraints on a president's authority to act, the president does not have a "blank check" to do whatever he wants. Under the contractor mandate under consideration in Mayes, for example, the court found that "the President's actions must be authorized and consistent with the Procurement Act."

So would an executive order imposing refunds and penalties for delayed and canceled flights be authorized and consistent with the ADA? Whether the "historic new rule" announced by Biden is achieved by executive order or by agency rulemaking, would the imposition of that rule touch upon an issue of vast economic and political significance?

The answer might require an economic test of whatever compensation scheme emerges. If the scheme includes statutorily prescribed damages of $1,350 per passenger — on top of the refund of the original ticket price and reimbursement of hotel and meal expenses — an air carrier could face potential bankruptcy in another massive meltdown like the one in December.

The answer might also depend upon whether courts see the airline industry as having a critical role in the nation's economy, as well as how they view the primacy of free markets and open competition.

When these questions are debated it will be important to remember that, in addition to maximum reliance upon competitive forces, the ADA has as a stated goal "[encouraging] efficient and well-managed carriers to earn adequate profits and to attract capital" within the context of the

"development and maintenance of a sound regulatory environment which is responsive to the needs of the public."

The public interest — in accordance with public convenience and necessity — is therefore paramount. Expect choppy air ahead.

Roger Clark is a neutral with Signature Resolution. He also teaches aviation law as a visiting professor at Rutgers Law School.

[1] https://www.nytimes.com/2022/12/28/us/southwest-airlines-canceled-flights.html.

[2] https://www.congress.gov/bill/118th-congress/senate-bill/178.

[3] https://www.congress.gov/bill/95th-congress/senate-bill/2493/text; Public Law No. 95-504.

[4] https://crsreports.congress.gov/product/pdf/IF/IF12077; https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2022-2023/january-february-2023/the-major-questions-doctrine/.

[5] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[6] https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/05/08/remarks-by-president-biden-on-airline-accountability/#:~:text=Later%20this%20year%2C%20my%20administration,are%20the%20ones%20to%20blame.

[7] Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014).

[8] Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022); Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022); Georgia v. President of the United States, 46 F.4th 1283 (11th Cir. 2022).

[11] https://cdn.ca9.uscourts.gov/datastore/opinions/2023/04/19/22-15518.pdf.

[12] Franklin v. Massachusetts, 505 U.S. 788 (1992).