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**MEMORANDUM** July 18, 2017

**To:** Honorable Peter A. DeFazio, Ranking Member of the House Committee on Transportation and Infrastructure
Attention: Ward McCarragher

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**Subject:** **Legal Analysis of Title II of H.R. 2997, 21st Century Aviation, Innovation, Reform, and Reauthorization (AIRR) Act**

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As requested, this memorandum[1] provides a legal analysis of Title II of H.R. 2997, 21st Century Aviation, Innovation, Reform, and Reauthorization Act (21st Century AIRR Act).[2] Specifically, the memorandum addresses several related, but distinct constitutional questions that Title II could potentially raise. Title II generally aims to transfer air traffic control services currently provided by the Department of Transportation (DOT), Federal Aviation Administration (FAA) to a separate, not-for-profit corporate entity, the American Air Navigation Services Corporation (Corporation).[3] This memorandum begins with a brief discussion on the current regulatory structure for air traffic control; reviews the major provisions of Title II of the 21st Century AIRR Act; and analyzes potential issues concerning the nondelegation doctrine, the Due Process Clause, and the Appointments Clause.[4]

Because any constitutional challenge on nondelegation, due process, or appointments grounds triggers the question of whether the Corporation is viewed as a government actor or a private entity—a question for which there is very little guidance from the courts—it is difficult to predict how a reviewing court might ultimately view the various constitutional issues presented by Title II of the bill. For reasons discussed in more detail below, various provisions proposed in Title II to establish and transfer air traffic services to

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[1] Information in this memorandum is drawn from publicly available sources and is of general interest to Congress. As such, all or part of this information may be provided by CRS in memoranda or reports for general distribution to Congress. Your confidentiality as a requester will be preserved in any case.

[2] 21st Century Aviation, Innovation, Reform, and Reauthorization Act, H.R. 2997, 115th Cong. §§ 201-243 (2017). Citations in this memorandum refer to the bill text published by the House Committee on Rules on July 12, 2017, available at http://docs.house.gov/billsthisweek/20170717/BILLS%20-115HR2997-RCP115-25.pdf.

[3] This memorandum does not analyze other amendments to federal aviation laws covered under Title II, including H.R. 2997 § 211(a) (adding 49 U.S.C. ch. 909, Continuity of Air Traffic Services to Department of Defense and Other Public Agencies); H.R. 2997 § 211(a) (adding 49 U.S.C. ch. 911, Employee Management); and H.R. 2997 § 211(a) (adding 49 U.S.C. ch. 915, Congressional Oversight of Air Traffic Services Provider).

[4] This memorandum is intended as an initial analysis of potential legal issues raised by Title II of the bill and does not purport to provide any definitive conclusion about the constitutionality of the legislation. Because of the complexities of the underlying legal issues, potential changes that could be made to substantive provisions of the bill during the legislative process, and the likelihood that the scope of Corporation's exact functions would change during implementation, the legal analysis presented in this memorandum is only preliminary.

the Corporation appear to respect the boundaries of the three constitutional doctrines analyzed. There are a few discrete issues raised by the delegation of authority to the Corporation that could be viewed as a colorable constitutional claim if challenged in court. Even so, none of the potential constitutional issues raised by the bill seem necessarily insurmountable, and, as a result, the memorandum discusses both legislative and judicial methods that could resolve potential constitutional concerns with Title II of the legislation.

## Current Regulatory Structure for Air Traffic Management and Control

The Department of Transportation's (DOT's) Federal Aviation Administration (FAA) currently oversees all civilian air traffic control operations across the United States.[5] The Air Traffic Organization (ATO) is the unit within the FAA that issues obligatory aircraft traffic control instructions to comply with operating rules, maintains safe separation between aircraft, and manages the efficient flow of air traffic.[6]

To maintain safety and efficiency, compliance with air traffic control procedures and instructions is mandatory for aircraft receiving air traffic control services.[7] FAA regulations specify that when an air traffic control clearance is obtained, pilots may not deviate from that clearance.[8] Except in an emergency, pilots are prohibited from operating an aircraft contrary to air traffic instructions.[9] In addition to issuing mandatory instructions to aircraft, air traffic personnel perform various air traffic management functions, including defining flight routes and procedures to maintain the safe and efficient flow of air traffic and imposing tactical traffic flow control measures (such as ground holds and in-flight vectoring and holding patterns).[10] Also, FAA air traffic controllers, as subject matter experts for specific airspace, are integrally involved in defining and reviewing air traffic routes and procedures and establishing and enforcing temporary flight restrictions and other special operating rules, all of which are currently established through federal regulation.[11]

## H.R. 2997, Title II, American Air Navigation Services Corporation

As introduced on June 22, 2017, the 21st Century AIRR Act proposes a six-year reauthorization of certain FAA programs.[12] The bill primarily addresses the FAA's certification process for aircraft and aviation products, air travel safety, unmanned aircraft systems, funding for airport infrastructure, and air traffic

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[5] For more information regarding current air traffic control, see CRS Report R43844, *Air Traffic Inc.: Considerations Regarding the Corporatization of Air Traffic Control*, by Bart Elias.

[6] The ATO was created in 2000 under Executive Order 13180. Exec. Order No. 13180, Air Traffic Performance-Based Organization, 65 Fed. Reg. 77,493 (Dec. 7, 2000), amended by Exec. Order No. 13264, 67 Fed. Reg. 39, 243 (Jun. 7, 2002). Air traffic control towers are primarily under the control of the federal government and staffed by FAA employees or operate under the Federal Contract Tower Program. Contract towers are operated by employees that are FAA contractors. For more information on the Contract Tower Program, see CRS In Focus IF10621, *Key Issues in FAA Reauthorization in the 115th Congress*, by Bart Elias and Rachel Y. Tang.

[7] In general, aircraft required to receive air traffic control services and comply with applicable air traffic procedures and instructions include all aircraft on instrument flight plans as well as other aircraft landing and departing from towered airports or transiting through designated terminal airspace. 14 C.F.R. § 91.123.

[8] *Id.*

[9] *Id.*

[10] *See* FAA, TRAFFIC FLOW MANAGEMENT IN THE NATIONAL AIRSPACE SYSTEM 9 (2009), www.fly.faa.gov/Products/Training/Traffic_Management_for_Pilots/TFM_in_the_NAS_Booklet_ca10.pdf.

[11] Designation of airspace is covered in 14 C.F.R. ch. I, subch. E (Airspace), while instrument flight procedures are defined in 14 C.F.R. pt. 97 (Standard Instrument Procedures). Additional operating rules for all air traffic are covered in various parts of 14 C.F.R. ch. I, subch. F (Air Traffic and General Operating Rules).

[12] H.R. 2997, § 101.

control services.[13] Title II of the bill proposes "to transfer operation of air traffic services currently provided by the FAA to a separate not-for-profit corporate entity to provide for the more efficient operation and improvement of air traffic services" beginning October 1, 2020.[14] The bill outlines the following roles and responsibilities for the corporate entity, the DOT, and the FAA regarding air traffic services and safety.

## Corporation Creation and Governance

Title II of the 21st Century AIRR Act would establish a federally chartered, not-for-profit entity to monitor, direct, and control aircraft services, including safe navigation, communications, and surveillance.[15] The bill provides that the Corporation would not be a "department, agency, or instrumentality of the United States Government."[16] It would also be prohibited from accepting and receiving any funds from the Airport and Airway Trust Fund, which currently provides the FAA with most of its funding.[17]

## Board Composition

The Corporation would be governed[18] by a 13-member Board of Directors (Board)[19] composed of the following:

- Chief Executive Officer (CEO) of the Corporation that would be hired by the initial Board;[20]
- Two Directors appointed by the Secretary without Board approval;
- One Director nominated by the Passenger Air Carrier Nomination Panel that is composed of one representative of each passenger air carrier with more than 30,000,000 annual passenger boardings;

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[13] *See generally* H.R. 2997; Press Release, H. Comm. on Transp. and Infrastructure, Sweeping Bipartisan FAA Reform Legislation Introduced in the House (July 22, 2017), https://transportation.house.gov/news/documentsingle.aspx?DocumentID=401599. For additional information regarding reauthorization and funding of FAA programs proposed, see CRS Insight IN10735, *Aviation Bills Take Flight, but Legislative Path Remains Unclear*, by Bart Elias and Rachel Y. Tang.

[14] H.R. 2997 §§ 201, 211 (adding 49 U.S.C. § 90101(a)(8)).

[15] *Id.* § 211(a) (adding 49 U.S.C. §§ 90101(a)(2)(A), (a)(7); 90301(a)).

[16] *Id.* § 211(a) (adding 49 U.S.C. § 90304(a)).

[17] *Id.* § 244. The Airport and Airway Trust Fund is the major funding source for federal aviation programs, financing FAA capital investments in the airport and airway system and supporting FAA research and operations costs. *See* CRS Report R44749, *The Airport and Airway Trust Fund (AATF): An Overview*, by Rachel Y. Tang and Bart Elias.

[18] The bylaws of the Corporation would outline the duties and responsibilities of the Board and the operational procedures of the Corporation. H.R. 2997 § 211(a) (adding 49 U.S.C. § 91308).

[19] The bill would establish an Advisory Board of the Corporation that may, on its own initiative, study, report, and make recommendations related to air traffic services and associated safety considerations. *Id.* § 211(a) (adding 49 U.S.C. §§ 90310(a)-(b)). The Advisory Board would consist of not more than 15 individuals, with representatives from air carriers, general aviation, business aviation, commercial service airports, operators and manufacturers of commercial unmanned aircraft systems, related labor organizations, the Department of Defense, small communities, including at least one community primarily served by a non-hub airport. *Id.* § 211(a) (adding 49 U.S.C. § 90310(c)). A non-hub airport is defined as "a commercial service airport (as defined in 49 U.S.C. 47102) that has less than 0.05 percent of the passenger boardings in the U.S. in the prior calendar year on an aircraft in service in air commerce." 14 C.F.R. § 158.3.

[20] After the Secretary appoints and selects the initial Board members, the Board would hire an interim CEO who serves until the Board hires a CEO. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90311(c)).

- One Director nominated by the Cargo Air Carrier Nomination Panel that is composed of one representative of each all-cargo air carrier with more than 1,000,000 total annual cargo revenue tons;
- One Director nominated by the Regional Air Carrier Nomination Panel that is composed of one representative of each of the three largest regional air carriers;
- One Director nominated by the General Aviation Nomination Panel that is composed of six representatives of noncommercial owners and recreational operators of general aviation aircraft;
- One Director nominated by the Business Aviation Nomination Panel that is composed of two representatives of owners, operators, and users of general aviation aircraft used exclusively for business enterprises; two representatives of aviation-related businesses, including fixed-base operators; and two representatives of general aviation aircraft and equipment manufacturers;
- One Director nominated by the Air Traffic Controller Nomination Panel that is composed of six representatives designated by the largest organization engaged in collective bargaining on behalf of air traffic controllers employed by the Corporation;
- One Director nominated by the Airport Nomination Panel that is composed of three representatives designated by the principal organization representing commercial service airports; and three representatives designated by the principal organization representing airport executives;
- One Director nominated by the Commercial Pilot Nomination Panel that is composed of one representative from each commercial pilot organization engaged in collective bargaining on behalf of air carrier pilots with more than 5,000 members designating; and
- Two Directors nominated and selected by the other Directors.[21]

The appointment of the Board members differs before and after the transfer of air traffic control services to the Corporation. Before air traffic control services are transferred to the Corporation, the Secretary of Transportation (Secretary) would select Directors from the nominee lists submitted by the nomination panels and appoint two Directors on her own accord.[22] The Directors selected or appointed by the Secretary would serve for two years after the date of transfer.[23] After the Secretary's appointments, the Board would then nominate and select two additional directors by a two-thirds vote.[24]

Similarly, the terms of the Board members differ before and after the date of transfer. The Directors selected or appointed by the Secretary before the transfer would continue to serve for two years after the date of transfer[25] and retain their positions until they are replaced.[26] After the transfer, the Board would fill Board vacancies from the nominee lists to serve for four-year terms.[27] Directors may not serve on the Board for more than eight years.[28] The Board may remove a Director who breaches a fiduciary duty[29] to the Corporation in accordance with the bylaws adopted by the Board.[30]

[21] *Id.* § 211(a) (adding 49 U.S.C. §§ 90305, 90306, 90311).

[22] *Id.* § 211(a) (adding 49 U.S.C. § 90306(c)(1)(B)).

[23] *Id.* § 211(a) (adding 49 U.S.C. § 90306(e)).

[24] *Id.* § 211(a) (adding 49 U.S.C. § 90306(c)(1)(D)).

[25] *Id.* § 211(a) (adding 49 U.S.C. § 90306(e)).

[26] *Id.* § 211(a) (adding 49 U.S.C. § 90306(f)(3)).

[27] *Id.* § 211(a) (adding 49 U.S.C. § 90306(c)(2)), (e)(1)).

[28] *Id.* § 211(a) (adding 49 U.S.C. § 90306(e)(4))).

In short, after the Corporation's Board is fully operational, there are 13 members of the Board; two of whom are appointed by the Secretary. The remaining Board members are nominated by representatives of air traffic service users and operators and selected by the Secretary before the transfer and then by the Board.

## Air Traffic Services

The bill proposes to transfer operational control over air traffic services to the Corporation on October 1, 2020—the "date of transfer."[31] Air traffic services are defined as services "used for the monitoring, directing, control, and guidance of aircraft or flows of aircraft and for the safe conduct of flight, including communications, navigation, and surveillance services and provision of aeronautical information; and . . . provided directly, or contracted for, by the FAA before the date of transfer."[32] The bill provides that no other entity can provide air traffic services other than the Corporation.[33]

Subject to FAA's safety and performance standards, the bill would authorize the Corporation to "establish and carry out plans for the management and operation of air traffic services within United States airspace and international airspace delegated to the United States."[34] The Secretary would transfer certain FAA employees, facilities, and other assets without charge to the Corporation.[35] The bill declares that any function transferred to the Corporation that was "vested in law" to the Secretary, DOT, Administrator of the FAA, or the FAA would "no longer be a function of the Government."[36] Any completed administrative actions by the FAA or DOT, including "orders, determinations, rules, regulations, personnel actions, permits, agreements, grants, contracts, certificates, licenses, registrations, and privileges" would continue to remain in effect after the air traffic services are transferred to the Corporation.[37]

## Charges and Fees for Air Traffic Control Services

The Corporation would be authorized to assess and collect charges and fees[38] for air traffic services provided to users.[39] The bill defines an "air traffic services user" as "any individual or entity using air traffic services provided by the Corporation within United States airspace or international airspace delegated to the United States."[40] The bill provides that the Corporation will be the sole provider of air traffic services after the date of transfer.[41]

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(...continued)

[29] The bill does not define "fiduciary duty." In general, a "fiduciary" can be "[s]omeone who must exercise a high standard of care in managing another's money or property." BLACK'S LAW DICTIONARY (10th ed. 2014). A "duty" can refer to "[a]ny action, performance, task, or observance owed by a person in an official or fiduciary capacity." *Id.*

[30] H.R. 2997 § 211(a) (adding 49 U.S.C. §§ 90307(c)(1), 90308(a)).

[31] *Id.* § 211(a) (adding 49 U.S.C. §§ 90301(a)(8); 90302(a)).

[32] *Id.* § 211(a) (adding 49 U.S.C. § 90101(a)(2)).

[33] *Id.* § 211(a) (adding 49 U.S.C. § 90302(c)).

[34] *Id.* § 211(a) (adding 49 U.S.C. § 90302(b)).

[35] *Id.* § 211(a) (adding 49 U.S.C. §§ 90316; 90317).

[36] *Id.* § 211(a) (adding 49 U.S.C. § 91301).

[37] *Id.* § 211(a) (adding 49 U.S.C. § 91302).

[38] Under Title II, charges and fees are defined as "any rate, charge, fee, or other service charge for the use of air traffic services." *Id.* § 211(a) (adding 49 U.S.C. § 90101(a)(6)).

[39] *Id.* § 211(a) (adding 49 U.S.C. § 90313(a)).

[40] *Id.* § 211(a) (adding 49 U.S.C. § 90101(a)(3)).

[41] *Id.* § 211(a) (adding 49 U.S.C. § 90302(c)).

The Board would submit an initial schedule of charges and fees and any subsequent changes in the schedule to the Secretary for review 90 days prior to its effective date.[42] The Board would also be required to provide notice to air traffic service users and other interested parties regarding the proposed fee schedule.[43] The Board would not be required to submit a proposal to "decrease a charge or fee" to the Secretary for review, however, the Board would need to take action to approve the decrease according to its bylaws.[44]

After receiving the proposal, the Secretary would solicit public comment on the proposed fee schedule for 30 days and approve or disapprove the proposal within 15 days after the public comment period ends.[45] In reviewing the proposal, the Secretary would apply specific standards to ensure that the charges and fees do not discriminate, adversely affect accessibility to services and airspace, or diminish safety.[46] The Secretary's review would also determine if the proposed charges and fees are consistent with international obligations and policies and do not generate revenues exceeding the Corporation's financial requirements that are needed to provide air traffic control services.[47] If the Secretary fails to issue a decision within 45 days of the Board's submittal, the proposal is "deemed approved."[48]

Users would be required to pay the charges or fees for air traffic services provided by the Corporation.[49] Users may file a written complaint with the Secretary to dispute a charge or fee assessed by the Corporation.[50] Within 90 days after the complaint is received, the Secretary must issue a final order determining whether the charge or fee is "correct" based on review procedures promulgated by the Secretary.[51] During the Secretary's review, the Corporation may not withhold air traffic control services if the user pays the disputed charge or fee "under protest."[52] The Corporation may only withhold air traffic control services if (1) the user fails to pay the disputed charge or fee under protest and (2) the Secretary approves a request from the Corporation to do so.[53] A party to the complaint may seek judicial review of the Secretary's final determination.[54]

The Corporation may assess and collect interest and penalties for late or non-payment and may file suit in district court to enforce payments of fees, charges, penalties, and interest.[55] The bill does not specify how the Corporation would calculate the penalties or interest. Users may dispute the penalty or interest following the procedure for disputing user charges and fees discussed above.[56]

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[42] *Id.* § 211(a) (adding 49 U.S.C. § 90313(b)).

[43] *Id.* § 211(a) (adding 49 U.S.C. § 90313(b)(2)).

[44] *Id.* § 211(a) (adding 49 U.S.C. § 90313(b)(3)).

[45] *Id.* § 211(a) (adding 49 U.S.C. § 90313(c)).

[46] *Id.* § 211(a) (adding 49 U.S.C. § 90313(d)(1), (3)).

[47] *Id.* § 211(a) (adding 49 U.S.C. § 90313(d)(2), (4), (9)).

[48] *Id.* § 211(a) (adding 49 U.S.C. § 90313(c)(2)(B)).

[49] *Id.* § 211(a) (adding 49 U.S.C. § 90313(f)(1).

[50] *Id.* § 211(a) (adding 49 U.S.C. § 90502(a)(1).

[51] *Id.* § 211(a) (adding 49 U.S.C. § 90502(c)-(d)). The Secretary may also dismiss the complaint or assign the matter to an administrative law judge within 30 days of receiving the written complaint. *Id.* § 211(a) (adding 49 U.S.C. § 90502(d)(2)-(4)).

[52] *Id.* § 211(a) (adding 49 U.S.C. § 90502(e)(1)-(2)).

[53] *Id.* § 211(a) (adding 49 U.S.C. § 90502(e)(3)).

[54] *Id.* § 211(a) (adding 49 U.S.C. § 90502(d)(5)).

[55] *Id.* § 211(a) (adding 49 U.S.C. § 90313(f)(2)-(3)).

[56] *Id.* § 211(a) (adding 49 U.S.C. § 90502(a)(2)).

### Safety Oversight and Regulation of the Corporation

Before the air traffic control services are transferred to the Corporation, the bill would require the Secretary to set (1) performance-based regulations and minimum safety standards for air traffic services and (2) regulations and safety standards for the certification and operation of air navigation facilities by the Corporation.[57] The performance, safety, operation, and certification regulations would include a safety management system (based on the current system used by the FAA's ATO) for air traffic control services provided by the Corporation.[58] The Secretary would also identify FAA policies and administrative materials that would apply to the Corporation.[59] After the transfer, the Corporation would provide safety information to air traffic users and the public.[60]

After the air traffic control services are transferred to the Corporation, the Corporation or an "interested party" may submit to the Secretary a proposal to modify "air traffic management procedures, assignments, classifications of airspace, or other actions affecting airspace access that are developed pursuant to the safety management system; [] and FAA policies and other administrative materials."[61] The Secretary has 45 days to approve or disapprove the proposal.[62] The Secretary's approval or disapproval is subject to judicial review.[63] If the Secretary takes no action, the Corporation or other party is "entitled to a writ of mandamus in a Federal district court with venue" that presumably would seek action from the Secretary.[64]

Under the bill, the FAA would retain safety enforcement authority and provide some oversight over the Corporation's activities. The FAA's Air Traffic Safety Oversight Service would provide oversight of safety and performance of the Corporation for at least two years after the date air traffic control services are transferred to the Corporation.[65] The bill does not specify how long the FAA may continue its oversight role.[66] In addition, the FAA would remain responsible for enforcement of safety requirements. After the date of transfer, the Corporation would be required to report to the FAA non-compliance with air traffic control clearances or instructions, noncompliant operations in controlled airspace, and other activities that "endanger[] persons or property in the air or on the ground."[67]

## Is an Entity a Governmental or Private Entity?

As will be discussed in more detail throughout this memorandum, a threshold legal issue is whether a Court would determine that the Corporation is a private or governmental entity. This threshold question is closely tied to the substantive issues underlying the delegation, due process, and appointments analyses that follow. After all, constitutional provisions like the Due Process Clause, only apply to governmental

[57] *Id.* § 211(a) (adding 49 U.S.C. § 90501(a)(1)-(2)).

[58] *Id.* § 211(a) (adding 49 U.S.C. § 90501(b).

[59] *Id.* § 211(a) (adding 49 U.S.C. § 90501(a)(3)).

[60] *Id.* § 211(a) (adding 49 U.S.C. § 90504(a)).

[61] *Id.* § 211(a) (adding 49 U.S.C. § 90501(c)(1)).

[62] *Id.* § 211(a) (adding 49 U.S.C. § 90501(c)(4)).

[63] *Id.* § 211(a) (adding 49 U.S.C. § 90501(d)).

[64] *Id.* § 211(a) (adding 49 U.S.C. § 90501(c)(5)). See *infra* note 135 for discussion of the writ of mandamus.

[65] *Id.* § 211(a) (adding 49 U.S.C. § 90501(b)(4)).

[66] The bill requires the Corporation to submit to the Secretary every two years a report on the state of air traffic services; every year an annual action plan and a financial report; and the initial strategic plan and subsequent updates approved by the Board. *Id.* § 211(a) (adding 49 U.S.C. § 90502-90505). The Secretary will submit these reports and plans to Congress. *Id.*

[67] *Id.* § 211(a) (adding 49 U.S.C. § 90505(a)).

entities, while the private nondelegation doctrine that prohibits the delegation of governmental functions to nongovernmental entities is only relevant if the corporation is a private entity.

The Supreme Court has held that a legislative declaration that an entity is either a private or governmental entity is not dispositive for purposes of determining the entity's status.[68] However, recent case law highlights "the judiciary's unsettled approach to analyzing the constitutional status of 'boundary agencies' that sit at the public-private border."[69] For "boundary agencies" set up as private corporations with varying degrees of governmental involvement and oversight, it is unclear whether courts would consider these corporations as private or governmental entities and what test courts would apply in reviewing constitutional challenges to their authority.

In the most recent Supreme Court case on this issue, *Department of Transportation v. Association of American Railroads*,[70] the Supreme Court reviewed a determination by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) that concluded that Amtrak was a private entity "with respect to Congress's power to delegate regulatory authority."[71] Consistent with that threshold determination, the D.C. Circuit invalidated the joint regulatory provisions of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA)[72] established by Amtrak and the Federal Railroad Administration (FRA) on the grounds that "[f]ederal lawmakers cannot delegate regulatory authority to a private entity. To do so would be 'legislative delegation in its most obnoxious form.'"[73]

On appeal, the Supreme Court vacated the D.C. Circuit opinion, holding that "Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in [the] case."[74] The court reasoned that "for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status."[75] As a result, the Court gave little weight to a provision within PRIIA that Amtrak "is not a department, agency, or instrumentality of the United States Government' and 'shall be operated and managed as a for-profit corporation.'"[76]

In concluding that Amtrak was a governmental entity, the Court relied on a multi-factor test, looking to Amtrak's (1) ownership and corporate structure; (2) political branches' supervision over its priorities and operations; (3) statutory goals; (4) day-to-day management; and (5) federal financial support.[77] The Court determined that

> Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political

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[68] Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1228 (2015); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394 (1995).

[69] *The Supreme Court 2014 Term: Leading Case: Federal Statutes & Regulations: Passenger Rail Investment and Improvement Act--Nondelegation--Department of Transportation v. Association of American Railroads*, 129 HARV. L. REV. 341, 350 (2015) (citing Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 894 (2014)).

[70] Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1228 (2015).

[71] Ass'n of Am. R.R. v. Dep't of Transp., 721 F.3d 666, 677 (D.C. Cir. 2013) [hereinafter *American Railroads I*].

[72] Pub. L. No. 110-432, Div. B (2008).

[73] *American Railroads I,* 721 F.3d at 670 (quoting *Carter Coal*, 298 U.S. 238, 311 (1936)).

[74] *Dep't of Transp.*, 135 S. Ct. at 1233. *See also* Lebron v. National Railroad Passenger Corp., 513 U. S. 374, 394 (1995) (holding that Amtrak "is an agency or instrumentality of the United States for the purpose of individual [First Amendment] rights guaranteed against the Government by the Constitution").

[75] *Dep't of Transp.*, 135 S. Ct. at 1233.

[76] *Id.* at 1231.

[77] *Id.* at 1231-32.

> branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit.[78]

In applying this multi-factor test, the Court concluded that, "in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions. And that exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers."[79] Of note, the Court did not explain the relative importance of the various factors in the test announced in *Association of American Railroads,* and the Court provided little guidance on how the test might apply beyond the specific circumstances respecting Amtrak. The Supreme Court remanded the case to the D.C. Circuit to reconsider the nondelegation, due process, and other constitutional claims in light of the determination that Amtrak is a governmental entity.[80]

Applying the factors used by the Supreme Court in *Association of American Railroads* to the legislation in question, the government appears to have less control, ownership, and involvement with the Corporation created by Title II relative to Amtrak. The Corporation has distinct features from Amtrak that may support a court's conclusion that the Corporation is a private entity. In comparing the ownership and corporate structure of Amtrak and the Corporation, it appears that government has no ownership and less involvement in the corporate structure of the Corporation than Amtrak. The government owns all of Amtrak's preferred stock and most of its common stock.[81] In contrast, the bill provides that the Corporation is funded through revenue generated through charges and fees imposed on air traffic service users[82] and prohibits the Corporation from (1) issuing or selling shares in the Corporation[83] and (2) accepting and receiving any funds from the Airport and Airway Trust Fund.[84]

With respect to the structure of the Corporation, while both Amtrak and the corporate entity created by Title II are governed by a Board of Directors, the government has a more limited role in appointing Directors for the Corporation. For the Corporation, the Secretary appoints two members of the initial Board and selects nine of the members from nominees provided by nomination panels.[85] Once the air traffic services are transferred to the Corporation, the Board itself would fill Board vacancies except for the two that are appointed by the Secretary and have the power to remove members according to its bylaws.[86] In contrast, the government has substantially more involvement in Amtrak's Board where seven of the nine members are appointed by the President and confirmed by the Senate, and serve at the pleasure of the President.[87]

Moreover, unlike Amtrak, the government has less involvement in the day-to-day operations of the Corporation established by Title II. Congress mandated certain aspects of Amtrak's day-to-day operations, including maintaining specific routes, improvement priorities, and purchasing specifications.[88] As

[78] *Id.* at 1232-33.

[79] *Id.* at 1233.

[80] *Id.*.

[81] *Id.* at 1231.

[82] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90313(e)).

[83] *Id.* § 211(a) (adding 49 U.S.C. § 90312(b)(1)).

[84] *Id.* § 244. The Airport and Airway Trust Fund is the major funding source for federal aviation programs, financing FAA capital investments in the airport and airway system and supporting FAA research and operations costs.

[85] *Id.* § 211(a) (adding 49 U.S.C. § 90306(c)(1)(B)).

[86] *Id.* § 211(a) (adding 49 U.S.C. §§ 90307(c)(1), 90308(a). 90310(a)-(b)).

[87] *Dep't of Transp.*, 135 S. Ct. at 1231.

[88] *See id.* (citing 49 U.S.C. §§ 24101(c)(6), 24902(b), 24305(f)).

proposed, the bill provides the Corporation with the authority "to establish and carry out plans for the management and operation of air traffic services within United States airspace and international airspace delegated to the United States" subject to FAA safety standards and some oversight by the Secretary.[89] For example, the Board would be allowed to develop its own bylaws, adopt a budget, enter into contracts, and own property without the Secretary's approval.[90]

In addition, the bill does not provide any "broad public objectives" for the Corporation. In contrast, as the Supreme Court noted in *Association of American Railroads,* Congress defined Amtrak "to pursue numerous, additional goals" "rather than advancing its own private economic interests."[91] Here, the bill provides the Corporation with a broad mandate to operate and manage air traffic services and retains the FAA's role in determining safety standards and enforcement.[92] The bill proposes that the Corporation assume many of the FAA's air traffic management functions and responsibilities, which may makes it seem more like a governmental entity.[93] The bill provides that no other entity can provide air traffic services other than the Corporation after the date of transfer.[94] However, the Supreme Court has stated that "the fact 'that a private entity performs a function which serves the public does not make its acts [governmental] action.'"[95]

A court, however, could conclude that there are several similarities between the Corporation and Amtrak. Like Amtrak, the political branches would exercise "substantial, statutorily mandated supervision" over the Corporation. The FAA would retain its safety enforcement authority and provide oversight over several of the Corporation's activities.[96] The bill requires the Corporation to submit to the Secretary every two years a report on the state of air traffic services; every year an annual action plan and a financial report; and the initial strategic plan and subsequent updates approved by the Board.[97] The bill would require the Secretary to submit these reports and plans to Congress.[98] Similarly, Amtrak must submit annual reports to both Congress and the President and is subject to frequent oversight hearings into Amtrak's budget, routes, and prices.[99] More broadly, the Corporation is assuming many of the FAA's functions and responsibilities and will be the sole provider of air traffic services,[100] which may makes it seem more like a governmental entity.[101]

As a result, based on a review of all of these factors, a court could certainly distinguish the Corporation from Amtrak and conclude that the Corporation does not act as a governmental entity. On the other hand,

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[89] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90302(b)).

[90] *Id.* § 211(a) (adding 49 U.S.C. §§ 90307, 90308, 90312).

[91] *Dep't of Transp.*, 135 S. Ct. at 1232.

[92] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90302(b)).

[93] *Id.* § 211(a) (adding 49 U.S.C. § 90302(b)).

[94] *Id.* § 211(a) (adding 49 U.S.C. § 90302(c)).

[95] San Francisco Arts & Ath., Inc. v. U.S. Olympic Comm., 483 U.S. 522, 544 (1987) (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982)). For the purposes of reviewing a Fifth Amendment discrimination claim, the Supreme Court in *San Francisco Arts* held that the U.S. Olympic Committee (USOC) was not a governmental actor to whom the Fifth Amendment applies. *Id.* at 546. The Court reasoned that the USOC is not a government entity even if it was established through a corporate charter by Congress and received government grants and funding. *Id.* Further, the Court held that the coordinating activities of national interest that have been performed by other private entities is further evidence of its private status. *Id.*

[96] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90501(b)(4)).

[97] *Id.* § 211(a) (adding 49 U.S.C. § 90502-90505).

[98] *Id.*

[99] *Dep't of Transp.*, 135 S. Ct. at 1232.

[100] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90302(b)).

[101] *Cf.* Jackson v. Metro. Edison Co., 419 U.S. 345, 353, 95 S. Ct. 449, 455 (1974) (holding that a public utility was not a governmental function because "supplying of utility service is not traditionally the exclusive prerogative of the State").

similarities between the Corporation and Amtrak do exist. Because of the limited jurisprudence and the flexible multi-factor test that governs the determination of whether an entity, such as Amtrak or the Corporation, should be considered a governmental or private entity, it is difficult to predict with any certainty how a reviewing court may interpret Title II's statutory language or weigh the various factors in the *Association of American Railroads* balancing test.[102] As a result, this memorandum will explore how courts may review the substantive constitutional claims respecting the Corporation if the entity is viewed as *either* a private actor or a governmental actor.

## Nondelegation Doctrine

The bill's proposal to establish and transfer air traffic services to the Corporation potentially implicates several constitutional issues, the first of which is the nondelegation doctrine. Under Article I of the Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[103] The "nondelegation doctrine" has traditionally been interpreted as limiting Congress's authority to delegate "legislative power" to the other branches of government.[104] This doctrine is based on the larger doctrine of separation of powers and exists primarily to prevent Congress from abdicating its core legislative function as established under Article I of the Constitution.[105] The legal principles respecting the doctrine differ based on whether the delegation is to a government entity or to a private entity. As a result, a threshold issue to be determined is whether an entity can be described as a governmental entity.

### Delegation to Official Governmental Entities

The Supreme Court has upheld delegations of authority to governmental entities, including the President, executive officials, judicial bodies, and federal agencies when Congress provides an "intelligible principle" to govern its delegation.[106] In allowing limited delegation of legislative authority, the Court acknowledged in *Mistretta v. United States* that "no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it."[107] The "intelligible principle" test requires that Congress, not the delegatee, be the entity that delineates a legal framework to guide and constrain the authority of the

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[102] *Dep't of Transp.*, 135 S. Ct. at 1233.

[103] U.S. CONST. art. I, § 1.

[104] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests 'all legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . .") (internal citations omitted).

[105] Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' and we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch.") (internal citations omitted).

[106] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized [] is directed to conform, such legislative action is not a forbidden delegation of legislative power."). *See also Whitman*, 531 U.S. at 472 ("[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" (quoting *J.W. Hampton, Jr. & Co.*, 276 U.S. at 409)); Loving v. United States, 517 U.S. 748, 771 (1996) ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.").

[107] *Mistretta*, 488 U.S. at 415

delegatee, such as a federal executive agency.[108] Congressional delegation of regulatory power to a federal agency is often accompanied by the authority to implement the delegation through rulemaking.[109]

If the court were to determine that the Corporation is an official governmental entity, delegation of authority to the Corporation would likely pass the "intelligible principle" test.[110] The Supreme Court has upheld very broad congressional delegations of authority to federal agencies as satisfying the "intelligible principle" test,[111] having invalidated federal laws only twice under the test.[112] For example, the Court has previously held that broad delegations to regulate in the "public interest" or in a "fair and equitable" manner to satisfy the "intelligible principle" test.[113]

## Delegations to Private Entities

In contrast to the relative leeway the Court has provided to Congress under the "intelligible principle" test with respect to delegations of legal authority to federal agencies, the Supreme Court has held that Congress cannot wholly delegate unrestrained federal authority to a private entity.[114] The seminal case addressing delegations to a private entity is *Carter v. Carter Coal Co.*[115] In *Carter Coal,* the Supreme Court invalidated the Bituminous Coal Conservation Act of 1935, a law that had provided for a majority of coal producers and miners in a given region the authority to impose maximum hour and minimum

[108] *See, e.g.*, Panama Refining v. Ryan, 293 U.S. 388, 421 (1935) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.").

[109] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *see, e.g.,* 26 U.S.C. § 7805 (providing the Secretary of the Treasury with the authority to "prescribe all needful rules and regulations . . ."); 33 U.S.C. § 1607 (authorizing the promulgation of "such reasonable rules and regulations as are necessary to implement the provisions of this Act"); 42 U.S.C. § 3614a (authorizing the Secretary of Housing and Urban Development to "make rules . . . to carry out this subchapter").

[110] *See* Ass'n of Am. R.R. v. Dep't of Transp., 821 F.3d 19, 36 (D.C. Cir. 2016) (determining that the "Supreme Court's conclusion that Amtrak is a governmental entity resolved the nondelegation issue that was the primary focus" of its decision in *American Railroads I*) [hereinafter *American Railroads II*].

[111] *See, e. g., Whitman*, 531 U.S. at 476 (2001) (upholding delegation to the Environmental Protection Agency to set "ambient air quality standards" based on certain criteria); Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946) (upholding delegation to the Securities and Exchange Commission to modify the structure of holding company systems); Nat'l Broad. Co. v. United States, 319 U.S. 190, 216-217 (1943) (upholding delegation to the Federal Communications Commission to regulate radio broadcasting according to "public interest, convenience, or necessity"); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24-25 (1932) (upholding delegation to Interstate Commerce Commission to regulate railroad consolidation).

[112] *See Panama Refining*, 293 U.S. at 340 (invalidating a statutory provision that authorized the President to prohibit the transportation of petroleum as an unconstitutional delegation because "Congress has declared no policy, has established no standard, has laid down no rule"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (invalidating a statutory provision that allowed the President "virtually unfettered" authority to approve detailed codes to govern all business as an "unconstitutional delegation of legislative power").

[113] *Nat'l Broad. Co.*, 319 U.S. at 216; Yakus v. United States, 321 U.S. 414, 420 (1944).

[114] *See* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1238 (2015) (Alito, J., concurring) ("By any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'") (quoting *Carter v. Carter Coal Co.,* 298 U.S. 238, (1936)); *id*. at 1254 (Thomas, J., concurring) ("Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court . . . the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government . . . . For this reason, a conclusion that Amtrak is private—that is, not part of the Government at all—would necessarily mean that it cannot exercise these three categories of governmental power."). *See also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1957 (2015) (Roberts, C.J., dissenting) ("It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions).

[115] 298 U.S. 238 (1936) [hereinafter *Carter Coal*].

wage standards on all other miners and producers in the region.[116] The Court reasoned that by conferring on a majority of private individuals the authority to regulate "the affairs of an unwilling minority," the law was "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[117]

*Carter Coal* has not been interpreted as a comprehensive ban on private involvement in regulation. In the context of private parties aiding in regulatory functions and decisions, the Court has indicated that Congress may empower a private party to play a more limited role in the regulatory process. For example, in *Currin v. Wallace*,[118] the Court upheld a law that authorized the Secretary of Agriculture to issue a regulation respecting the tobacco market, but only if two-thirds of the growers in that market voted for the Secretary to do so.[119] Citing to *Carter Coal*, the Court stated that "this is not a case where a group of producers may make the law and force it upon a minority."[120] Rather, it was Congress that had exercised its "legislative authority in making the regulation and in prescribing the conditions of its application."[121]

Similarly, in *Sunshine Anthracite Coal Co. v. Adkins*,[122] the Supreme Court upheld a provision of the Bituminous Coal Act of 1937,[123] which authorized private coal producers to propose standards for the regulation of coal prices.[124] Those proposals were provided to a governmental entity, which was then authorized to approve, disapprove, or modify the proposal.[125] The Court approved this framework, relying heavily on the fact that the private coal producers did not have the authority to set coal prices, but rather played a subordinate role to the federal agency, which retained ultimate authority over the regulation of coal prices.[126]

In *Currin* and *Adkins*, the Supreme Court did not evaluate whether Congress laid out an "intelligible principle" guiding these private entities. Rather than applying the "intelligible principle" test,[127] the Court reviewed whether the responsibilities given to the private entities were acts of legislative or regulatory authority.[128] In both statutes challenged in *Currin* and *Adkins*, the private entities did not impose or enforce binding legal requirements.[129] Because the private entity's responsibilities were primarily

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[116] *Id*. at 311-12.

[117] *Id*. at 311. As will be discussed in more detail, the Court appeared to characterize the wage and hour provisions as an unlawful "delegation" to a private entity, but also held that the provision in question was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, leading some to question whether *Carter* should be considered a nondelegation case, at all. *Id*. at 311-12. The Supreme Court has interpreted the Due Process Clause to, in part, ensure principles of fundamental fairness, including the notion that decision makers must be disinterested and unbiased. *See, e.g.*, Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

[118] 306 U.S. 1 (1939) [hereinafter *Currin*].

[119] *Id*. at 6.

[120] *Id*. at 15.

[121] *Id*. at 16.

[122] 310 U.S. 381 (1940) [hereinafter *Adkins*].

[123] Pub. L. No. 75-48, 50 Stat. 72 (1937).

[124] *Adkins*, 310 U.S. at 388-89.

[125] *Id*. at 388.

[126] *Id*. at 399.

[127] Some commentators have asserted that a judicial review of congressional delegation should be treated the same whether it empowers a *private* or *governmental* entity. *See, e.g.*, Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 955 (2014) ("Nor is there any difference between public and private delegations.").

[128] *Adkins*, 310 U.S. at 388-89; *Currin*, 306 U.S. 1,15-16 (1939).

[129] *Id.*

administrative or advisory, the Court determined that the statute did not violate the nondelegation doctrine.

Other courts have relied on the Supreme Court's holdings in *Currin* and *Adkins* to uphold limited delegation of authority to private entities with agency approval or oversight. For example, courts have held that private entities may: trigger authority in a governmental entity; assist or aid a governmental entity in the exercise of its regulatory power; play an advisory or subordinate role to a governmental entity; exercise authority subject to the control of a governmental entity; or administer a regulatory program in a purely ministerial manner.[130] In these cases, the courts concluded that the private entities were not exercising regulatory authority but rather performed limited administrative or advisory functions subject to considerable governmental oversight.[131]

## Delegations to the Corporation as a Private Entity

In reviewing the functions delegated to the Corporation as a private entity, including the Corporation's advisory, administrative, and reporting roles related to safety standards and the collection of user charges and fees generally appear to be permissible delegations of authority if the Corporation is considered a private entity. Other authority related to the setting and enforcement of charges and fees may be viewed by a court with more skepticism with regard to the nondelegation doctrine.

### *Safety Oversight and Enforcement*

Under the bill, the Secretary would continue to set performance-based regulations and minimum safety standards for (1) air traffic services, and (2) the certification and operation of air navigations facilities by the Corporation.[132] The Corporation or an "interested party" may submit to the Secretary a proposal to modify air traffic management procedures, assignments, classifications of airspace, or other actions affecting airspace access.[133] The Secretary has 45 days to approve or disapprove the proposal.[134] If the Secretary takes no action, the Corporation or other party is "entitled to a writ of mandamus in a Federal district court with venue,"[135] to presumably seek a position by the Secretary.

[130] *See, e.g.,* Pittston Co. v. United States, 368 F.3d 385 (4th Cir. 2004) (holding that a delegation of federal authority to a private entity was not a violation of the Constitution where powers were "of an administrative or advisory nature") [hereinafter *Pittston*]; United States v. Frame, 885 F.2d 1119, 1129 (3d Cir. 1989) (holding that "no law-making authority" had been entrusted to private body that is "subject to the [Secretary of Agriculture's] pervasive surveillance and authority.") [hereinafter *Frame*]; Todd & Co. v. SEC, 557 F.2d 1008, 1014 (3d Cir. 1977) ("The independent review function entrusted to the SEC is a significant factor in meeting serious constitutional challenges to this self-regulatory mechanism.").

[131] *See, e.g., Frame,* 885 F.2d at 1129 (holding that Congress lawfully delegated authority to Cattleman's Beef Promotion and Research Board, a private entity comprised of cattle producers and importers created under the Beef Promotion and Research Act of 1985, to collect a statutorily established assessment from the beef industry).

[132] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90501(a)(1)-(2)).

[133] *Id.* § 211(a) (adding 49 U.S.C. § 90501(c)(1)).

[134] *Id.* § 211(a) (adding 49 U.S.C. § 90501(c)(4)).

[135] *Id.* § 211(a) (adding 49 U.S.C. § 90501(c)(5)). In general, a writ of mandamus is "[a] writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usu[ally] to correct a prior action or failure to act." BLACK'S LAW DICTIONARY (10th ed. 2014). It is unclear whether the bill intends to require the court to issue the writ of mandamus to compel the Secretary to make a decision on the proposal or to provide the Corporation or other entity the right to seek a writ from a district court to compel the Secretary to act. "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. In general, "[t]o show entitlement to mandamus, plaintiffs must demonstrate (1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists. These three threshold requirements are jurisdictional; unless all are met, a court must dismiss the case for lack of jurisdiction." Am. Hosp. Assn'n v. Burwell, 812 F.3d 183, 189 (D.C. Cir. 2016) (internal citations omitted).

Under the bill, the FAA would remain responsible for enforcement of safety requirements. The Corporation would be required to report to the FAA non-compliance with air traffic control clearances or instructions, noncompliant operations in controlled airspace, and other activities that "endanger[] persons or property in the air or on the ground."[136]

Because the Corporation would be playing a purely advisory role in proposing changes to safety standards and reporting non-compliance with those standards, the delegation of such authority is arguably a permissible delegation to a private entity akin to *Adkins*.[137] The Corporation would be acting subordinately to the FAA, which would make final decisions on if, when, and how to modify safety standards or carry out enforcement actions against private parties. Unlike the Corporation's proposals for charges and fees that can automatically go into effect without the Secretary's approval, these provisions do not allow any proposed changes to the safety and management standards without the Secretary's affirmative approval.[138] Therefore, just as with the delegation of authority to a private entity upheld in *Adkins*, the governmental entity, here the FAA, would have "authority and surveillance" over the Corporation's participation in the enforcement process.[139]

### *Collecting User Charges and Fees*[140]

Under the bill, the Corporation would generate all of its revenue through charges and fees to be paid by certain users of the national airspace.[141] The Corporation would be charged with assessing and collecting the user fees.[142]

Several courts have evaluated delegations of authority to private entities to collect fees or assessments and have determined that such delegations are lawful because the act of collecting a fee is a ministerial or administrative function. In *United States v. Frame*, the Third Circuit concluded that Congress did not "unlawfully delegate[] its legislative authority to members of the beef industry because the authority to collect assessments was a "ministerial [function]."[143] Similarly, in *Pittston Co. v. United States*, the Fourth Circuit concluded that the delegation of authority to a private entity to collect premiums to be paid by market participants was permissible because such a power was "administrative or advisory in nature."[144] Therefore, if a reviewing court were to follow this case law, it appears that granting the Corporation authority to collect a user fee would be viewed as a permissible delegation of ministerial or administrative authority to a private entity.

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[136] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90505(a)).

[137] *See Adkins*, 310 U.S. at 399. *See also Pittston*, 368 F.3d at 394-96; *Frame*, 885 F.2d at 1128-29.

[138] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90501(c)(4)).

[139] *Adkins*, 310 U.S. at 399. Furthermore, in *Pittston*, the Fourth Circuit upheld a similar arrangement in which members of a private entity were delegated authority "to refer delinquent operators" to a government agency, which would determine if a penalty should be imposed. *Pittston*, 368 F.3d at 397. The court declared this function to be "just an 'advisory' role, subject to the [government agency's] supervisory authority." and, therefore, was not an invalid delegation of authority to a private entity. *Id.*

[140] This memorandum does not analyze whether the charges and fees under the bill are considered taxes under Article I, Section 8 of the Constitution. Even if the charges and fees are considered taxes, the Supreme Court has held that that taxing delegation should be treated like any other congressional delegation. *See* Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222-23 (1989) ("We find no support, then, for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.").

[141] H.R. 2997 § 244. The Airport and Airway Trust Fund is the major funding source for federal aviation programs, financing FAA capital investments in the airport and airway system and supporting FAA research and operations costs. *See* CRS Report R44749, *The Airport and Airway Trust Fund (AATF): An Overview*, by Rachel Y. Tang and Bart Elias.

[142] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90313(a)).

[143] *Id*. at 1129.

[144] *Pittston*, 368 F.3d at 396.

### *Setting the Amount of User Charges and Fees*

Under H.R. 2997, the Board of the Corporation approves a proposal for an initial schedule of fees, as well as any change in the schedule, which is submitted to the Secretary and goes into effect (and "deemed approved") unless the Secretary issues an express disapproval within 45 days.[145] The Board would not, however, be required to submit a proposal to "decrease a charge or fee" to the Secretary for review.[146] In reviewing the proposal, the Secretary would apply specific standards to ensure, among other things, that the charges and fees do not discriminate, adversely affect accessibility to services and airspace, or diminish safety.[147]

In evaluating delegations of authority to set fees, courts have focused on who has the authority to set the fee and who is subject to the fee.[148] Courts have held that authorizing private entities to advise the government or to propose prices or fees does not violate the nondelegation doctrine so long as a governmental entity ultimately determines the final prices or fees. For example, in *Adkins*, the Supreme Court determined that Congress had not delegated legislative authority to a group of private coal producers who proposed to the Bituminous Coal Commission, a governmental entity, prices pursuant to statutory standards.[149] The Court reasoned that the private entities acted "subordinately" to the Commission who ultimately determined the coal prices and who would be subject to those prices.[150]

Others courts have similarly allowed private entities to serve an advisory or administrative role in setting fees and prices. In *Pittston*, the Fourth Circuit upheld the authority of a private entity to collect premiums charged upon members of the coal industry.[151] There, the court emphasized that the law defined who would be required to pay and "set out specific formulas for calculating the premiums to be paid" by each covered member.[152] The Social Security Commissioner, not the private entity, had complete control over determining *who* would be charged and the *amount* to be paid based on the formula established in statute.[153] Nonetheless, the case law uniformly suggests that allowing the private entity to set the amount of the charge that is imposed on other private parties would transform the delegation from an administrative or ministerial function into an impermissible regulatory authority.[154]

Based on this case law, it appears that much of the statutory scheme in Title II proposed for setting user charges and fees may be viewed by a court as permissible delegations of authority. Because the bill only allows the Corporation to propose user charges and fees to the Secretary for review and approval, it might appear that Congress has not delegated any "law-making authority"[155] to the Corporation, a private entity. Similar to *Adkins* and *Pittston*, the Corporation, as a private entity, would not determine the applicability or scope of fees imposed on users; the bill provides the types of fees to be imposed and which users are

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[145] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90313(b)-(c)).

[146] *Id.* § 211(a) (adding 49 U.S.C. § 90313(b)(3)).

[147] *Id.* § 211(a) (adding 49 U.S.C. § 90313(d)(1), (3)).

[148] *See supra* section "Delegations to Private Entities."

[149] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

[150] *See Adkins*, 310 U.S. at 399 ("Nor has Congress delegated its legislative authority to the industry. The members of the code[, a private entity,] function subordinately to the Commission[, a government entity]. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid.") (internal citations omitted).

[151] *Pittston*, 368 F.3d at 396.

[152] *Id*. at 395.

[153] *Id*.

[154] *See Adkins*, 310 U.S. at 398; *Pittston*, 368 F.3d at 395-96; *Frame*, 885 F.2d at 1128-29.

[155] *Adkins*, 310 U.S. at 399.

subject to the fees.[156] Unlike *Adkins,* where the governmental entity set coal prices according to statutory standards, the bill does not provide any standards that the Board must follow to propose charges and fees. The bill only provides standards by which the Secretary would review the fee proposal.[157] But even without standards guiding the Board's fee proposal, one could argue that Corporation has more of an advisory role because the Secretary, a government official, has the ultimate authority to disapprove the proposal within 45 days of its submittal.[158]

However, other aspects of the fee-setting structure in the bill may be met with more skepticism under the nondelegation doctrine. As proposed in the bill, the Secretary does not *in all circumstances* determine the final fees imposed on the users. For example, the Board's proposed fee schedule is "deemed approved" and effective if the Secretary does not issue a timely disapproval within 45 days of the proposal submittal.[159] This automatic approval mechanism could be viewed as authorizing the Corporation, a private entity, to set mandatory charges and fees for air traffic services users without the government's involvement. In addition, a court could determine that the 45-day review period is an insufficient amount of time for the Secretary to realistically exercise her authority to approve or disapprove the fee proposal, thus preventing the Secretary from having sufficient "authority and surveillance over the activities" of the Corporation.[160]

As discussed above, some courts have determined that "pervasive surveillance and authority" prevents a private entity from exercising impermissible "law-making authority."[161] Here, the Secretary would have no "pervasive surveillance and authority" over the Board in other aspects of setting user charges and fees. The bill allows the Board to decrease charges and fees without the Secretary's review and approval.[162] In decreasing charges and fees, the Corporation would not be guided by "specific formulas"[163] or guiding standards.[164] While the Secretary's review and approval of the proposed fees are based on statutory standards, the bill does not provide the Corporation, a private entity, any standards by which to decrease fees to ensure, among other things, that changes in fees do not discriminate among users.[165] Although the bill requires the Board to assess, modify, and collect charges and fees for air traffic services "in accordance with the standards described in section 90313," the standards in section 90313 only apply to the Secretary's review of the Board's proposal.[166]

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156 *See* H.R. 2997 § 211(a) (adding 49 U.S.C. § 90101(a)(2), (3), (6) (defining "air traffic services," "air traffic user," and "charge; fee").

157 *Id.* § 211(a) (adding 49 U.S.C. § 90313(d)(1), (3)).

158 *See, e.g.*, *Pittston*, 368 F.3d at 395.

159 H.R. 2997 § 211(a) (adding 49 U.S.C. § 90313(c)(2)(B)).

160 *Adkins*, 310 U.S. at 399. This memorandum does not resolve potential legal issues related to the period of time provided for the Secretary's review of the fee proposal.

161 United States v. Frame, 885 F.2d 1119, 1129 (3d Cir. 1989) (holding that "no law-making authority" had been entrusted to a private body that is "subject to the [Secretary of Agriculture's] pervasive surveillance and authority.");

162 H.R. 2997 § 211(a) (adding 49 U.S.C. § 90313(b)(3)).

163 *See Pittston*, 368 F.3d at 395 ("[T]he Act sets out specific formulas for calculating premiums to be paid by each operator.").

164 *See Adkins*, 310 U.S. at 398 (explaining that the statute provided the "standard of 'just and reasonable' to guide the administrative body in the rate-making process").

165 H.R. 2997 § 211(a) (adding 49 U.S.C. § 90313(d)(1), (3)).

166 *Compare id.* § 211(a) (adding 49 U.S.C. § 90308(c)(4)) (listing one of the Board's responsibilities to include assessment, modification, and collection of charges and fees for air traffic services in accordance with the standards described in section 90313), *with id.* (adding 49 U.S.C. § 90313(d)(3) (requiring that the "Secretary shall apply the following standards in reviewing a proposal from the Corporation").

The lack of specific, guiding standards for decreasing fees could be viewed by a court as authorizing the Corporation, a private entity, to go beyond an administrative and advisory role.[167] Without these guiding standards, the Corporation could potentially benefit certain users by decreasing their charges and fees while maintaining the same fees for others. Without the Secretary's approval, the Corporation's decreases in fees would become a binding benefit for some users, exercising powers that courts have held as "law-making" or "regulatory" authority that cannot be delegated to a private entity.[168]

Further, the bill does not provide a process to submit comments or challenge the amount of charges and fees if they are automatically approved or decreased. As a private entity, these actions by the Corporation would not be subject to judicial review under Administrative Procedure Act.[169] In contrast, the bill provides the Corporation a private right of action to enforce collection of fees and charges.[170] Users would not be able to challenge the charges or fees until after the Corporation imposes the fees.[171]

On balance, the ability for the Corporation to set and decrease fees without affirmative approval or oversight from a governmental entity could be viewed as an improper delegation of legislative authority to a private entity. Based on the case law discussed above, the imposition of a user fee, which must be paid in order for private parties to use the national airspace, appears to constitute regulatory authority. Such an arrangement would authorize a private corporation to take coercive action against other private entities, requiring them to pay a user fee determined by the Corporation.

A reviewing court may be less likely to find this to be an unlawful delegation if the user fee did not go into effect until a government entity, like the Secretary, affirmatively approved the fee structure and any changes to the fees. Adding this additional oversight and eliminating the automatic approval mechanism could arguably bring this delegation in line with the authority upheld in *Adkins*, in which the private entity played a purely subordinate and advisory role to the governmental entity in proposing minimum coal prices.[172] Alternatively, the bill could mirror the requirements for review of the Corporation's proposal to modify air traffic safety and management standards that does not allow for automatic approval if the Secretary fails to issue a timely decision on the proposal but instead allows the Corporation to seek a writ of mandamus in a federal district court to compel the Secretary to make a decision on the proposal.[173]

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[167] *See, e.g.*, A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (holding that the involvement of private trade groups in the drawing up of binding codes of competition in conjunction with governmental agencies violated the nondelegation doctrine because the statute lacked adequate standards to develop the codes). In two subsequent cases, the Court referred to *Schechter* as having struck down a delegation for its lack of standards. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001).

[168] *Cf. Adkins*, 310 U.S. at 399 ("Nor has Congress delegated its legislative authority to the industry. The members of the code[, a private entity,] function subordinately to the Commission[, a government entity]. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid.") (internal citations omitted);

[169] *See* 5 U.S.C. § 702 (providing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review). For more information on judicial review of agency actions under the Administrative Procedure Act (APA), *see* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole. Judicial review under the APA is limited to agency action defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

[170] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90313(f)(3)).

[171] *Id.* § 211(a) (adding 49 U.S.C. §§ 90313, 90502).

[172] *See Adkins*, 310 U.S. at 398-99 (upholding the delegation to a private entity because a government entity had "authority and surveillance" over the private entity).

[173] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90501(c)(5)).

### *Enforcement of User Charges and Fees*

The Corporation may assess and collect interest and penalties for late or non-payment and may file suit in district court to enforce payments of fees, charges, penalties, and interest.[174] The bill does not specify how the Corporation would calculate the penalties or interest. Users may dispute the penalty or interest following the procedure for disputing user charges and fees discussed above.[175]

Granting the Corporation authority to determine and assess penalties and interest for failure to pay the charges or fees may be viewed as regulatory authority that violates the nondelegation doctrine. The Supreme Court has stated that "it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute."[176] Similarly, in his concurrence in *Department of Transportation v. Association of American Railroads*, Justice Alito explained that actions by entities that mitigate "risks of liability" or provide "incentives to obey" is a form of "regulatory power."[177]

A reviewing court could view the Corporation's authority to determine and impose penalties or interest on users as moving beyond an advisory role subject to oversight by a governmental entity. In *Pittston*, the Fourth Circuit upheld an arrangement in which members of a private entity were delegated authority "to refer delinquent operators" to a government agency, which would determine if a penalty should be imposed.[178] Unlike *Pittston*, here the Secretary is not required to approve of how the Corporation would calculate penalties and interest. In addition, Title II provides the Secretary with no supervisory role in determining if a penalty and interest should be imposed. In addition, the Board would be allowed to determine how those penalties and interests are approved.[179] The bill does not prescribe how the Corporation would calculate the penalties or interest imposed on users who allegedly fail to pay the charges and fees.[180] The approval of the penalties and interest would only be subject to bylaws that are developed by the Board without the Secretary's approval.

Additional oversight and approval by the Secretary could potentially cure constitutional issues related to a delegation of enforcement authority. The Corporation's authority to impose penalties and interest may be a permissible administrative function if the bill provided a formula used to calculate the penalties and interest or if the Corporation reported users that failed to pay charges and fees to the Secretary who could then impose penalties and interest. Adding this additional specificity or governmental oversight could arguably bring this delegation in line with the enforcement authority upheld by the Fourth Circuit in *Pittston*.[181]

## The Due Process Clause and Delegations to Government-Created Corporate Entities

In addition to the nondelegation issue discussed above, Title II of the bill may also implicate the Due Process Clause of the Fifth Amendment, which prohibits the federal government from depriving any

[174] *Id.* § 211(a) (adding 49 U.S.C. § 90313(f)(2)-(3)).

[175] *Id.* § 211(a) (adding 49 U.S.C. § 90502(a)(2)).

[176] L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, 404 (1944).

[177] Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1236 (2015) (Alito, J., concurring).

[178] *Pittston*, 368 F.3d at 397.

[179] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90306(g)(3)).

[180] *Id.* § 211(a) (adding 49 U.S.C. § 90308).

[181] *Pittston*, 368 F.3d at 397.

entity of "life, liberty, or property without due process of law."[182] The Due Process Clause, by its very nature, only applies to the actions of the federal government.[183] While the Due Process Clause is conceptually distinct from the private nondelegation doctrine, in that the latter is only implicated by delegations to private entities, the rationales behind both constitutional principles as they relate to government-created corporate entities are similar. The potential Due Process issues in Title II has its roots in the same case as the origin of the private nondelegation doctrine, *Carter Coal.*

### *Carter Coal* and Due Process

Although *Carter Coal* is often cited as establishing the private nondelegation doctrine, some commentators have suggested that it may more accurately be viewed as a due process case.[184] In striking down the delegation to coal producers and miners to impose standards on other miners and producers, the Court focused on the coercive power that the majority could exercise over the "unwilling minority."[185] The opinion articulated the due process problems involved with providing regulatory authority to private entities:

> The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.[186]

The Supreme Court also looked to due process principles in *Currin* to inform its analysis.[187] In *Currin*, the Court cited to three due process cases, including *Carter Coal*, and used clear due process language in determining that the delegation to tobacco growers at issue was "not a case where a group of producers may make the law and force it upon a minority [] or where a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners."[188]

### Government-Created Corporations

The due process issues are relevant to government-created corporate entities that are not traditional government agencies but have been viewed as being "governmental" as opposed to private entities.[189]

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[182] U.S. CONST. amend. V. *See also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."); *Carter Coal,* 298 U.S. at 311; Eubank v. City of Richmond, 226 U.S. 137, 143-44 (1912) (invalidating a city ordinance on the grounds that it established "no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously . . . .").

[183] *See* Farrington v. Tokushige, 273 U.S. 284, 299 (1927) ("[T]he inhibition of the Fifth Amendment – 'no, 'No person shall . . . be deprived of life, liberty or property without due process of law'—applies to the federal government and agencies set up by Congress for the government of the Territory.").

[184] For a strong defense of the due process approach to private delegations, *see generally* Volokh, *supra* note 127 (identifying additional cases involving city ordinances and state statutes for support of the proposition that the Court has historically used the Due Process Clause to evaluate private delegations).

[185] *Carter Coal*, 298 U.S. at 311.

[186] *Id*. at 311-12.

[187] *Currin,* 306 U.S. at 15.

[188] *Id.*

[189] *See supra* section "Is an Entity a Governmental or Private Entity?"

Congress has created different types of corporations to achieve its legislative goals.[190] Similar to the Corporation proposed in Title II, Congress has established "private corporations" that are managed by boards of directors and not (as declared in the enabling legislation) "agencies" or "instrumentalities" of the Government.[191] The increased use of corporations that have both public and private aspects ("boundary agencies") has further complicated how courts have analyzed due process challenges to the authority delegated to these entities.[192]

On remand, the D.C. Circuit's decision in *Association of American Railroads v. Department of Transportation* (*American Railroads II*)[193] sets forth a test for determining whether the delegation of authority to a "boundary agency" violates the Due Process Clause. First, the court determined that the "Supreme Court's conclusion that Amtrak is a governmental entity resolved the nondelegation issue that was the primary focus" of its decision in *American Railroads I*.[194] The court then focused its review on whether the delegation of authority to Amtrak as a "public-private enterprise," violates the Due Process Clause.[195] The court explained that

> the government's increasing reliance on public-private partnerships portends an even more ill-fitting accommodation between the exercise of regulatory power and concerns about fairness and accountability. Curbing the misuse of public power was the aim of the Magna Carta, and the Supreme Court has consistently concluded the delegation of coercive power to private parties can raise similar due process concerns. . . . Make no mistake; our decision today does not foreclose Congress from tapping into whatever creative spark spawned the Amtrak experiment in public-private enterprise. But the Due Process Clause of the Fifth Amendment puts Congress to a choice: its chartered entities may *either* compete, as market participants, *or* regulate, as official bodies. After all, '[t]he difference between producing . . . and regulating . . . production is, of course, *fundamental*.' To do both is an affront to 'the very nature of things,' especially due process.[196]

The court determined that due process of law is violated if the entity is "(1) a self-interested entity (2) with regulatory authority over its competitors."[197] The court held that "giving a self-interested entity rulemaking authority over its competitors" violated the Due Process Clause.[198] It reasoned that "what primarily dr[ove] the [Supreme] Court" in *Carter Coal* was not the delegation of authority to "private persons," but rather the "self-interested character" of the empowered coal producers.[199]

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190 *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 386-391 (1995) (discussing examples of corporations created by Congress).

191 *See e.g.*, *id*. at 390-91. *See also* 47 U.S.C. § 396(b)-(c) (establishing "a nonprofit corporation, to be known as the 'Corporation for Public Broadcasting', which will not be an agency or establishment of the United States Government" with a nine-member board of directors "appointed by the President, by and with the advice and consent of the Senate"); 42 U.S.C. § 2996b (establishing "a private nonmembership nonprofit corporation, which shall be known as the Legal Services Corporation, for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance"). For more information regarding government-created corporations, *see* CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*, by Kevin R. Kosar and CRS Report RS22230, *Congressional or Federal Charters: Overview and Enduring Issues*, by Henry B. Hogue.

192 Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 894 (2014).

193 *American Railroads II*, 821 F.3d at 36.

194 *Id*. Notably, the D.C. Circuit, in *American Railroads I*, stated that if Amtrak is "just one more government agency—then the regulatory power it wields . . . is of no constitutional moment." *American Railroads I*, 721 F.3d at 674.

195 *American Railroads II*, 821 F.3d at 36 (citing *Carter Coal*, 298 U.S. at 311).

196 *Id.* (internal citations omitted).

197 *Id.* at 31.

198 *Id*. at 27-28.

199 *See id*. at 27-28 ("At first blush, it's not clear precisely which aspect of the delegation offended the Court. By one reading, it was the Act's delegation to 'private persons rather than official bodies. By another, it was the delegation to persons 'whose interests may be and often are adverse to the interests of others in the same business' rather than persons who are 'presumptively

(continued...)

In applying this due process test, the D.C. Circuit first concluded that Amtrak, though governmental, is similarly "self-interested" in that it is operated as a "for-profit corporation" and is required by law to "maximize its revenues."[200] Importantly, the court suggests that even if a corporation is deemed a "governmental entity," a court may not presume that it is "disinterested" official body.[201] "Delegating legislative authority to official bodies is inoffensive because we presume those bodies are disinterested, that their loyalties lie with the public good, not their private gain."[202] However, delegating regulatory authority to a self-interested entity with power over its competitors would constitute an "unconstitutional interference with personal liberty and private property."[203] This distinction between a self-interested governmental entity and an official governmental body indicates that a court may view a "boundary agency" such as Amtrak as a separate type of government entity that is subject to a different type of scrutiny under the Due Process Clause.[204]

In applying the second part of the test, the court determined that Amtrak has regulatory power over its competitors.[205] The court explained that the failure of an Amtrak competitor to incorporate the metrics and standards developed by Amtrak and "constrained very partially" by the FRA, could increase the risk of enforcement.[206] "Because obedience to the metrics and standards materially reduces the risk of liability, railroads face powerful incentives to obey. That is regulatory power."[207] As such, the court invalidated the PRIIA's provision of joint regulatory authority to Amtrak, holding that the fundamental principle of "fairness" that emanates from the Due Process Clause does not permit Congress to delegate to Amtrak the "coercive power to impose a disadvantageous regulatory regime on its market competitors."[208] In sum, the D.C. Circuit in *American Railroads II* stated that, as a threshold matter, the due process test for government-created corporate entities such as Amtrak looks at whether the entity is a "self-interested" actor before determining whether it regulates its competitors.[209]

### *Is the Corporation a Self-interested Entity?*

A court would likely review the roles and responsibilities of the Board of Directors to determine if the Corporation is a self-interested entity with respect to air traffic services. Certain aspects of the Board's structure appear to support a conclusion that the Corporation is not self-interested. In *American Railroads II*, the court reviewed Amtrak's profit goals to determine that Amtrak was self-interested.[210] The court reasoned that Amtrak is statutorily mandated to maximize profits, contrasting Amtrak with "more traditional governmental entities that are decidedly not self-interested. . . . Unlike for-profit corporations, government strives—at least in theory—for an equilibrium of revenues and expenditures, where the

(...continued)

disinterested,' as official bodies tend to be. Of course, the Court also may have been offended on both fronts. But as the opinion continues, it becomes clear that what primarily drives the Court to strike down this provision is the self-interested character of the delegatees'. . . .").

[200] *Id*. at 31-32 (citing 49 U.S.C. §§ 24301(a)(2), 24101(d)).

[201] *Id*. at 35.

[202] *Id*. at 29.

[203] *Id*.

[204] *See id*. ("[T]he Due Process Clause of the Fifth Amendment puts Congress to a choice: its chartered entities may *either* compete, as market participants, *or* regulate, as official bodies.").

[205] *Id*. at 31-32.

[206] *Id*.

[207] *Id*. at 33 (quoting Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1236 (2015) (Alito, J., concurring)).

[208] *Id.* at 31.

[209] *Id.*

[210] *Id.* at 32.

revenue obtained is no more and no less than the operating costs of the services provided."[211] Unlike Amtrak, the Corporation would operate as a non-profit entity with the Secretary ensuring that charges and fees proposed by the Board do "not generate revenues exceeding the Corporation's current and anticipated financial requirements in relation to the provision of air traffic services."[212] More broadly, unlike Amtrak, which—in addition to being tasked with creating metrics and standards under PRIIA—ran a for-profit passenger railroad service in which it competed against the entities it was regulating under PRIIA, the Corporation's exclusive function would be to provide on a non-profit basis air traffic services to the domestic airspace, a role in which it has no competitors.[213] Because the Corporation does not have similar profit motivations as Amtrak, which, in the D.C. Circuit's opinion, indicated its self-interest, a court may view the Corporation as being an economically disinterested entity.

Because, outside of *American Railroads II,* there is no case law that examines the self-interested nature of a government-created non-profit entity such as the Corporation, an argument could be made that one should look beyond the Corporation's *own* self-interest to determine if the Board or its members could act in a self-interested manner. The composition of the Board, however, does not directly appear to create the ability for the majority of one stakeholder group to act in its self-interest over an "unwilling minority," which was troubling to the Supreme Court in *Carter Coal*.[214] Nonetheless, some Board members may propose charges and fees that benefit their specific stakeholder groups to the detriment of other market participants.[215] As discussed above, the Board has the authority to decrease charges and fees and set penalties and interest without the Secretary's approval or statutory standards to guide their authority.[216] For example, some Directors of the Board with similar interests could propose cutting fees for certain users, which could have potentially negative economic or competitive impacts on other users who do not benefit from the decrease in fees. At the same time, the existence of a fiduciary duty owed to the Corporation would presumably prevents the Board members from purposefully acting in a manner that benefits their own interests above those of the Corporation,[217] and traditionally it is presumed that a member of a corporate board complies with his fiduciary duties.[218] Moreover, the legislative requires that no one stakeholder group holds the majority of votes necessary to force corporate action and instead must build broad consensus within the Board for a position to prevail, suggesting that the bill mitigates the risk of self-interest.[219]

[211] *Id*.

[212] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90313(e)).

[213] *Id.* § 211(a) (adding 49 U.S.C. § 90302(c)) (providing that the Corporation will be the sole provider of air traffic services for the domestic airspace).

[214] *Carter Coal*, 298 U.S. at 311 ("The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority . . . . The delegation is . . . a denial of rights safeguarded by the due process clause of the Fifth Amendment . . . ."). The airlines are most heavily represented on the Board, but still only hold three of 11 seats. BRT Proposal at § 2(a).

[215] It is also possible that persons within one stakeholder group would not have uniform opinions on how the Board should act. Given the breadth of potential decisions being made by the Corporation, it is not possible to determine how the various stakeholders, and specific factions within each stakeholder group, may align on different issues in this memorandum.

[216] *See supra* section "Charges and Fees for Air Traffic Control Services."

[217] H.R. 2997 § 211(a) (adding 49 U.S.C. §§ 90307(a)). The bill does not define "fiduciary duty." In general, a "fiduciary" can be "[s]omeone who must exercise a high standard of care in managing another's money or property." BLACK'S LAW DICTIONARY (10th ed. 2014). A "duty" can refer to "[a]ny action, performance, task, or observance owed by a person in an official or fiduciary capacity." *Id.*

[218] *See* Beam v. Stewart, 845 A.2d 1040, 1048 (Del. 2004) ("The key principle upon which this area of our jurisprudence is based is that the directors are entitled to a presumption that they were faithful to their fiduciary duties.").

[219] *See supra* section "Board Composition."

Furthermore, a court could consider how the Secretary constrains the Corporation's potential self-interest. In *American Railroads II*, the court determined the FRA, a governmental agency, could not "keep Amtrak's naked self-interest in check" because Amtrak and FRA occupied "positions of equal authority."[220] Here, the bill requires the Secretary, a presumably disinterested official entity, to approve of the Corporation's actions related to setting initial charges and fees for air traffic services and limits the Corporation's role in safety enforcement.[221] However, as discussed above, other powers given to the Corporation, including decreases in fees and penalty assessments, are not "safeguarded" by the Secretary's oversight.[222] In addition, the Board would have the power to fill Board vacancies in accordance with the nominations process but without the Secretary's approval.[223] Nonetheless, given the limited jurisprudence on due process concerns regarding government-created corporate entities and the manner in which the Board's powers would be exercised, while a reviewing court has ample ground to distinguish the Corporation from Amtrak and to conclude the Corporation is not a self-interested entity, the case law is simply undeveloped to definitively resolve the first prong of the due process test.

### *Does the Corporation Have Regulatory Authority Over Its "Competitors"?*

With respect to the second prong of the *American Railroads II* due process test—whether the governmental entity has regulatory authority over its competitors—it is difficult to predict how a court would resolve that question with respect to the Corporation, as it is unclear who the competitors of the Corporation are for the purposes of a due process analysis. As discussed above, unlike Amtrak, which has competitors for railroad services, the bill proposes that after the transfer, the Corporation will be the sole provider of air traffic services for the domestic airspace.[224] No other entity will be able to provide competing air traffic services. Nonetheless, assuming the most plausible argument for how a court could view the Corporation to be a self-interested entity is viewed favorably by a court (i.e., the fact that the Corporation's Board is controlled by industry organizations that would be regulating others within the aviation industry), the court, at the second prong of the due process analysis would presumably be looking to whether the Corporation, through its Board, is regulating entities with whom the Board members otherwise compete.

A court could look to the D.C. Circuit's opinion in *American Railroads II* for guidance on whether the Corporation has regulatory authority over its competitors. In reviewing whether Amtrak had regulatory authority over its competitors, the court examined whether the "metrics and standards" that were jointly developed by Amtrak and FRA would "force freight operators to alter their behavior."[225] The court reasoned that Amtrak's "coercive power" could "lend definite regulatory force to an otherwise broad statutory mandate" because the failure of a freight operator to give preference to Amtrak over freight transportation could lead to enforcement.[226]

Applying these principles to this legislation, although the Corporation does not have "competitors" in a traditional sense, a court could review whether the Corporation had "coercive power" to "force" air traffic

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[220] *American Railroads II*, 821 F.3d at 35.

[221] *See supra* sections "Charges and Fees for Air Traffic Control Services" and "Safety Oversight and Regulation of the Corporation."

[222] *See American Railroads II*, 821 F.3d at 35 ("FRA cannot keep Amtrak's naked self-interest in check, and therefore the requirement of joint development does not somehow sanitize the Act.").

[223] *See supra* section "Board Composition."

[224] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90302(c)).

[225] *American Railroads II*, 821 F.3d at 32.

[226] *Id.* at 33.

users to "alter their behavior."[227] Similar to Amtrak, the Corporation would have "regulatory force" to achieve its "broad statutory mandate" to "establish and carry out plans for management and operation of air traffic services."[228] A court could determine that air traffic services users are "forced" to pay charges and fees to Corporation (and not to the FAA) to have access to airspace and air traffic services.[229] If a user fails to pay the fees, the Corporation could potentially deny the user air traffic services.[230] In some circumstances, the bill could also require users to comply with a disparity in fees if the Corporation decides to decrease fees for certain users while maintaining the same level of fees for other users.[231] Courts have held that setting fees or prices without approval by a governmental entity as examples of "law-making" or "regulatory" authority.[232] In addition, users would be required to pay penalties and interest determined solely by the Corporation for failing to pay fees.[233] As discussed above, a reviewing court could view the Corporation's authority to determine and impose penalties or interest to users as a form of coercive "regulatory power."[234] As the D.C. Circuit concluded in *American Railroads II*, "the due process of law is violated when a self-interested entity is 'entrusted with the power to regulate the business . . . of a competitor.' '[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property' and transgresses 'the very nature of [governmental function].'[235] If the Corporation is considered a self-interested entity, a reviewing court could hold that these grants of authority allow the Corporation to regulate air traffic users and thereby violate due process.

## Appointments Clause

In addition to questions concerning whether certain responsibilities of the Corporation violate the nondelegation doctrine or the Due Process Clause, a few of the bill's provisions regarding the authority of the Corporation's Board of Directors may also implicate the Constitution's requirements regarding the appointment of certain federal officials. As discussed above, the bill provides for the appointment of the Corporation's 13 Board members in two central ways. *Before the transfer date* of the relevant functions of the FAA to the Corporation, the bill authorizes the Secretary to appoint most Board members from lists generated by various nomination panels composed of private individuals,[236] except for (1) two members the Secretary appoints independently,[237] (2) two members selected by the Board itself,[238] (3) and an interim CEO hired by the Board.[239] *After the transfer date*, new members of the Board are selected by the

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[227] *American Railroads II*, 821 F.3d at 31.

[228] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90302(b)).

[229] *Id.* (adding 49 U.S.C. § 90313(a)).

[230] *Id.* (adding 49 U.S.C. § 90502(e)(3)).

[231] *Id.* (adding 49 U.S.C. § 90313(a)).

[232] *See supra* section "Setting the Amount of User Charges and Fees." As discussed above, in reviewing nondelegation claims, the courts have analyzed whether Congress has delegated regulatory or law-making authority to a private entity. *See supra* section "Delegations to Private Entities." For due process claims, the question is essentially the same: has Congress delegated regulatory authority to a self-interested governmental entity. *Id.*

[233] H.R. 2997 § 211(a) (adding 49 U.S.C. §§ 90313(f)(2)-(3), 90502(a)(2)).

[234] *American Railroads II*, 821 F.3d at 33 (quoting Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1236 (2015) (Alito, J., concurring).

[235] *Id.* at 31 (quoting *Carter Coal*, 298 U.S. at 311).

[236] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90306(c)(1)(B)(ii)).

[237] *Id.* § 211(a) (adding 49 U.S.C. § 90306(c)(1)(B)(i)).

[238] *Id.* § 211(a) (adding 49 U.S.C. § 90306(c)(1)(D)).

[239] *Id.* § 211(a) (adding 49 U.S.C. § 90311(c)).

Board itself from lists offered by nominations panels,[240] except for two members selected by the Secretary,[241] and the CEO, who is hired by the Board according to certain statutory criteria.[242] In other words, before the transfer date the bulk of the Board members are appointed by the Secretary, while after the transfer date, most new members are selected by the Board itself. Because the primary duties of the Board are not authorized until after the transfer date, the composition of the Board before that point likely does not raise issues under the Appointments Clause.[243] However, because the Board members appointed before the transfer date carry over in their positions for two years after the transfer,[244] and retain their positions until they are replaced,[245] their manner of appointment is important for actions taken by the Corporation once the transfer of authority has occurred.

The Appointments Clause of Article II of the Constitution requires "officers of the United States" to be appointed by the President "with the Advice and Consent of the Senate," although Congress may vest the appointment of "inferior" officers "in the President alone, in the Courts of Law, or in the Heads of Departments."[246] In contrast, non-officers are not subject to any constitutionally required method of appointment.[247] The Appointments Clause has been viewed as one of the Constitution's key features that preserve a separation of powers between the executive, legislative, and judicial branches.[248] The Appointments Clause and the concomitant power of removal of executive branch officials ensure a measure of accountability for executive branch actions by vesting decision making in individuals accountable to the President who, in turn, is accountable to the voters.[249] Congress may not aggrandize its own power at the expense of the executive branch by arrogating to itself authority to appoint officers.[250] Moreover, the Constitution bars the "diffusion" of the appointment power by, for example, placing the power to appoint a principal officer in the hands of someone other than the President.[251] Accordingly, if the members of the Board qualify as officers of the United States, those individuals not appointed

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[240] *Id.* § 211(a) (adding 49 U.S.C. § 90306(c)(2)(B)).

[241] *Id.* § 211(a) (adding 49 U.S.C. § 90306(b)(2)).

[242] *Id.* § 211(a) (adding 49 U.S.C. § 90311(a)).

[243] *Id.* § 211(a) (adding 49 U.S.C. § 90302).

[244] *Id.* § 211(a) (adding 49 U.S.C. § 90306(e)(1)).

[245] *Id.* § 211(a) (adding 49 U.S.C. § 90306(f)(3)).

[246] U.S. CONST. art. II, § 2, cl. 2; Edmond v. United States, 520 U.S. 651, 662 (1997) ("The President's power to select principal officers of the United States was not left unguarded, however, as Article II further requires the 'Advice and Consent of the Senate.'").

[247] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) ("We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of . . . Article [I].").

[248] Freytag v. Comm'r of IRS, 501 U.S. 868, 882 (1991) ("The principle of separation of powers is embedded in the Appointments Clause.").

[249] Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring) (noting that the Appointments Clause "ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people."); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497-498 (2010) ("The people do not vote for the 'Officers of the United States.' Art. II, § 2, cl. 2. They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'") (quoting THE FEDERALIST No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton)); *Freytag*, 501 U.S. at 884 ("The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people . . . Even with respect to 'inferior Officers,' the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.").

[250] *Buckley*, 424 U.S. at 126.

[251] *Freytag*, 501 U.S. at 883-84; Weiss v. United States, 510 U.S. 163, 188 (1994) (Souter, J., concurring) ("And if Congress, with the President's approval, authorizes a lower level Executive Branch official to appoint a principal officer, it again has adopted a more diffuse and less accountable mode of appointment than the Constitution requires; this time it has violated the bar on abdication.").

according to the Appointment Clause's terms may be subject to a legal challenge. A crucial threshold question respecting the Appointments Clause is thus who constitutes an "officer" of the United States.

A position's degree of authority generally determines whether it reaches officer status under the Appointments Clause.[252] In the seminal case explaining who qualifies as an officer, *Buckley v. Valeo*, the Supreme Court established that "Officers of the United States" are those positions "exercising *significant authority* pursuant to the laws of the United States."[253] In that case, the Court examined the appointment of certain members of the Federal Election Commission (FEC) charged with regulating federal elections by enforcing the Federal Election Campaign Act.[254] In examining whether the FEC members wielded significant authority, the *Buckley* Court distinguished between three types of powers they exercised—functions: (1) concerning the flow of information—"receipt, dissemination, and investigation"; (2) respecting the implementation of the statute—"rulemaking and advisory opinions"; and (3) that are necessary to compel compliance with the statute—"informal procedures, administrative determinations and hearings, and civil suits."[255]

The *Buckley* Court held that the first category of FEC duties were not executive in nature because they were "investigative and informative," essentially "in aid of the legislative function of Congress."[256] Therefore, such functions could be exercised by individuals not appointed in conformity with the Appointments Clause.[257] The latter two categories of functions, however, were executive in nature and constituted "significant authority." The power to enforce the underlying statute, "exemplified by [the Commissioner's] discretionary power to seek judicial relief" by instituting civil litigation to vindicate public rights, amounted to authority that, according to the Court, must be exercised by an officer appointed pursuant to the Appointments Clause.[258] Likewise, the duties regarding implementation of the statute—including rulemaking, disbursal of funds, and decisions about who may run for a federal office—constituted significant authority that could only be executed by "Officers of the United States."[259]

Nearly 15 years after *Buckley*, the Supreme Court's opinion in *Freytag v. Commissioner of Internal Revenue* again examined what responsibilities qualify an individual as an officer of the United States, concluding that a special trial judge of the U.S. Tax Court qualifies as such an officer.[260] The Court ruled

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[252] *See, e.g.*, Edmond v. United States, 520 U.S. 651, 662 (1997) (acknowledging that military appellate judges exercise "significant authority"); *Freytag*, 501 U.S. at 881-82 (holding that special trial judges of Article I tax courts are "Officers of the United States" based on the degree of authority they exercise); *Buckley*, 424 U.S. at 138 (concluding that members of the Federal Election Commission exercised "significant authority" because they performed quasi-legislative, executive, and judicial duties); *see also* United States v. Germaine, 99 U.S. 508, 511-12 (1878) (noting that that an office "embraces the ideas of tenure, duration, emolument, and duties, and that the latter [are] continuing and permanent, not occasional or temporary") (*citing* United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393-94 (1867) (discussing the term "office")).

[253] *Buckley*, 424 U.S. at 126 (emphasis added).

[254] *Id.* Congress had provided that the FEC be composed of eight members, which included six voting members and two non-voting ex officio members. Of the six voting members, all were required to be confirmed by a majority of both houses of Congresses, with two selected by the President, two by the President pro tempore of the Senate, and two by the Speaker of the House. *Id.* at 113.

[255] *Id*. at 137.

[256] *Id*. at 138.

[257] *Id*. at 138.

[258] *Id*.

[259] *Id*. at 140-41. The Court also noted with approval that prior decisions had found a postmaster first class and the clerk of a district court qualified as officers. *Id*. at 126 (citing Myers v. United States, 272 U.S. 52 (1926) (postmaster) and *Ex parte* Hennen, 38 U.S. 225 (1839) (clerk)).

[260] The Court held that the special trial judge was an inferior officer, rather than an employee. Freytag v. Comm'r of IRS, 501 U.S. 868, 881-82 (1991). However, the Court subsequently made clear that the exercise of significant authority establishes the line not between inferior and principal officers, but between "officer and non-officer." Edmond v. United States, 520 U.S. 651, 662 (1997). In other words, whether a position qualifies as an "inferior officer" under *Freytag* concerns the difference between (continued...)

that the special trial judges were officers because of the significance of the duties they held. Their positions are "established by Law" and their "duties, salary and means of appointment" are specified in statute; this contrasts with the position of special masters, who temporarily assist Article III judges on an "episodic" basis, and whose positions, "duties[,] and functions are not delineated in a statute."[261] Further, special trial judges are entrusted with duties beyond "ministerial tasks," exercising significant discretion in taking testimony, conducting trials, ruling on evidence, and enforcing compliance with discovery orders.[262] In addition, the Court noted that even leaving aside these duties, special trial judges qualified as officers, because the underlying statute authorized the Chief Judge of the Tax Court to assign authority to special trial judges to render binding independent decisions in certain cases.[263]

While the Supreme Court has articulated "significant authority" as the standard for weighing whether a position is subject to the Appointments Clause, precisely what duties are encapsulated in this metric are disputed. A circuit split amongst the federal Courts of Appeals concerning the constitutional status of Administrative Law Judges (ALJs) at the Securities and Exchange Commission (SEC) illustrates the uncertainty of the question. The SEC is charged with bringing enforcement actions for violations of the federal securities laws both in internal administrative proceedings and federal court.[264] ALJs are selected by an agency employee from an available pool – not in accordance with the Appointments Clause – and preside over administrative actions in adjudications that share similarities with a trial.[265] The ALJ's decision is appealable to the Commissioners and then to federal court.[266]

The Court of Appeals for the Tenth Circuit, in a challenge to the constitutional status of ALJs at the SEC, focused on the range of discretionary duties exercised by the ALJs and found that they qualified as officers who must be appointed pursuant to the Appointments Clause.[267] The court noted that the ALJs' positions are established by law and their duties, salaries, and method of appointment were set by statute.[268] The ALJs also exercise similar discretion to the officers in *Freytag*, including taking testimony, overseeing the production of documents and depositions, ruling on the admissibility of evidence and motions, issuing subpoenas, and making credibility determinations that are afforded "considerable weight" at the agency review stage.[269] In addition, ALJs can render initial decisions and issue sanctions,

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(...continued)

employees and officers and is conceptually distinct from whether an officer is properly viewed as a principal or inferior officer.

[261] *Freytag*, 501 U.S. at 881.

[262] *Id*. at 881-82.

[263] *Id*. at 882. While the Supreme Court has not established a conclusive test for what constitutes significant authority, a Department of Justice Office of Legal Counsel (OLC) opinion argues that two characteristics define an office of the United States. *See* Officers of the United States Within the Meaning of the Appointments Clause, 2007 OLC LEXIS 3, *1 (OLC) (April 16, 2007). According to the OLC, the position must first be endowed with delegated sovereign authority, such as the power to "bind third parties, or the Government itself, for the public benefit." *Id*. at 37. In addition, the position must be "continuing." *Id*. at 74. The OLC opinion offers two indicia of a continuing position. A position is continuing if it is "permanent, meaning that it is not limited by time or by being of such a nature that it will terminate by the very act of performance." *Id*. at 101 (internal quotations omitted). Alternatively, even if a position is temporary, the presence of three factors can indicate a continuing position: (1) the existence of the position is not personal; (2) it is not a "transient" position; and (3) the duties of the position are more than "incidental" to the government's operations. *Id*. at 102-05.

[264] 15 U.S.C. §§ 77h-1, 78d, 78o, 78u-3.

[265] 17 C.F.R. § 200.14 ("Office of Administrative Law Judges"); 5 C.F.R. pt. 930, subpt. B ("Administrative Law Judge Program").

[266] 15 U.S.C. §§ 77i(a); 78d-1(b); 78y(a)(1).

[267] Bandimere v. Sec. & Exch. Comm'n, 844 F.3d 1168, 1170 (10th Cir. 2016).

[268] *Id*. at 1179. *See* 5 U.S.C. § 556.

[269] *Id*. at 1179-80. *See* 17 C.F.R. § 200.14 ("Office of Administrative Law Judges").

which become final absent appeal.[270] And even when an appeal occurs, the agency can decline to review certain cases.[271] Finally, ALJs can enter default judgements, control the outcome of proceedings by requiring attendance at settlement conferences, and modify temporary sanctions imposed by the agency.[272]

In a parallel challenge, the Court of Appeals for the District of Columbia (D.C. Circuit) has taken the opposite view.[273] Under its analysis, whether a position exercises significant authority depends on (1) "the significance of the matters resolved"; (2) the discretion exercised; and (3) the finality of their decision.[274] That court determined that SEC ALJs do not satisfy the final requirement – finality—because the Commission retains power to review their decisions *de novo*.[275] And even when the Commission decides not to review a decision, it must issue an order saying so and specifying the date that any applicable sanctions will take effect.[276] The ALJ's decision, therefore, is not truly final until affirmative action is taken by the Commission.[277] For the D.C. Circuit, because ALJs do not render final decisions on behalf of the government, they do not qualify as officers under the Appointments Clause and their current method of selection is, therefore, appropriate.

Although it is well established that "significant authority" is the test that demarks officers and employees, the test that distinguishes between principal officers and inferior officers is less clear. As mentioned above, principal officers of the United States must be appointed by the President and confirmed by the Senate; but Congress may vest the appointment of inferior officers in the President alone, the courts of law, or the heads of departments.[278] At times, the Court has employed a multi-factor, holistic balancing test that would suggest that the principal/inferior distinction is governed by an evaluation of the degree of authority exercised.[279] More recently, however, in *Edmond v. United States*, the Court adopted a different analysis, suggesting that the distinction between a principal and inferior officer hinges on whether the officer is subject to some measure of supervision and control by a principal officer, not on the amount of overall authority exercised.[280] Under this approach, principal officers are generally subject only to supervision by the President, whereas inferior officers are generally subject to supervision and control by a higher ranking Senate–confirmed official.[281]

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[270] *Id*. at 1180-81.

[271] *Id*.

[272] *Id*.

[273] Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm'n, 832 F.3d 277, 284 (D.C. Cir. 2016), *reh'g en banc granted, judgment vacated*, 2017 U.S. App. LEXIS 2732 (D.C. Cir. Feb. 16, 2017), on *reh'g en banc*, 2017 U.S. App. LEXIS 11298 (D.C. Cir., June 26, 2017) (per curiam) (denying the petition for review by an equally divided court).

[274] The court also noted that it comes to the question of significant authority following the threshold issue of whether a position is established by law and its "duties, salary, and means of appointment" are specified by statute. *Id*. at 284.

[275] *Id*. at 285-86.

[276] *Id*. at 286.

[277] *Id*.

[278] U.S. CONST. art. II, § 2, cl. 2.

[279] *See* Morrison v. Olson, 487 U.S. 654, 671-72 (1988) (noting that "[s]everal factors lead to th[e] conclusion" that the independent counsel is an inferior officer).

[280] *Edmond*, 520 U.S. at 663; Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010) (affirming this reasoning in determining that members of an oversight board were inferior officers because the SEC oversaw the Board's conduct).

[281] *Edmond*, 520 U.S. at 663.

## Do the Board Members Qualify as Officers?

Applying these principles to the issues raised by Title II, whether the Board's members, based on their duties, would be viewed as officers for purposes of the Appointments Clause is unclear.[282] Initially it is important to note that the Appointments Clause applies to "officers" who wield "significant authority pursuant to the laws of the United States."[283] Given the unique structure and duties of the Corporation, a threshold question for analysis might be whether the Board is a governmental entity that exercises the sovereign authority of the United States at all and whether the Appointments Clause applies. As the foregoing analysis suggests,[284] many of the Corporation's functions are not exclusively governmental powers, such as its advisory and ministerial roles. For example, the ability to propose modifications to air traffic management procedures and to collect fees for services rendered do not appear to be exercises of governmental power. To the extent the Corporation's functions are not governmental authorities executed pursuant to the sovereign power of the United States, the Corporation is unlikely to implicate concerns under the Appointments Clause.[285] Nonetheless, certain authorities bestowed on the Corporation might be considered governmental duties which flow from the sovereign power of the United States. As the preceding analysis suggested, one key indicium of the exercise of sovereign power is the legal authority to implement federal law by binding private citizens on behalf of the United States.[286] To the extent the Corporation exercises coercive power pursuant to the law of the United States – for example, through the enforcement of federal law via the imposition of sanctions or the issuance of binding regulations – the Corporation may be seen as executing the sovereign power of the United States.[287]

On one hand, some of the Board's characteristics could qualify its members as officers. For example, the bill would establish the Board pursuant to federal law and bar all states and local governments from enforcing their own laws relating to air traffic services.[288] No entity would be permitted to operate air traffic services in the United States other than the Corporation,[289] which may assess and collect charges and fees from air traffic service users[290] who "shall pay a charge or fee assessed" by the Corporation.[291] The Corporation is authorized to deny services to users, notwithstanding an appeal to the Secretary, if the

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[282] Another threshold question might be who effectively exercises the authority given to the corporation. The bill appears to bestow the corporation's powers on the Board of Directors. The bill provides that the Board "shall be responsible for the actions of the Corporation," including adopting a budget, approving a strategic plan, authorizing debt, assessing, modifying, and collecting fees, supervising the CEO, and adopting a code of conduct for the corporation's employees. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90308(c)). The bill also gives the Board authority over hiring and removing the CEO, revoking the CEO's decisions, setting the salaries of the CEO, chief operating officer, and chief financial officer, *id.* § 211(a) (adding 49 U.S.C. § 90311(a)(3)), and adopting the corporation's bylaws including its operational procedures. *id.* § 211(a) (adding 49 U.S.C. § 90308(b)).

[283] U.S. CONST. art. II, § 2, cl. 2; Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

[284] *See supra* sections "Safety Oversight and Enforcement" and "Collecting User Charges and Fees".

[285] *Buckley*, 424 U.S. at 137-38.

[286] *See* Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1235–36 (2015) (Alito, J., concurring) (indicating that the power of an arbitrator to issue binding decisions regarding metrics and standards for railroad companies constitutes regulatory power); Ass'n of Am. Railroads v. Dep't of Transp., 821 F.3d 19, 37 (D.C. Cir. 2016) (concluding that the power to issue a binding decision that impacts railroads "obligations" constitutes "significant authority pursuant to the laws of the United States.") (quotations omitted); *see also* Officers of the United States Within the Meaning of the Appointments Clause, 2007 OLC LEXIS 3, *1 (OLC) (April 16, 2007) (asserting that a "federal office involves a position to which is delegated by legal authority a portion of the sovereign powers of the federal Government. Such powers primarily involve binding the Government or third parties for the benefit of the public, such as by administering, executing, or authoritatively interpreting the laws").

[287] *Buckley*, 424 U.S. at 137-38.

[288] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90314).

[289] *Id.* § 211(a) (adding 49 U.S.C. § 90302(c)).

[290] *Id.* § 211(a) (adding 49 U.S.C. § 90313(a)).

[291] *Id.* § 211(a) (adding 49 U.S.C. § 90313(f)(1)).

user does not provide a payment under protest.[292] The Corporation may file suit in federal district court to enforce this requirement.[293] The Board also approves a proposal for an initial schedule of fees, as well as any change in the schedule, which is submitted to the Secretary and goes into effect unless the Secretary issues an express disapproval within 45 days.[294] The Board is not required, however, to submit a proposal to the Secretary if it simply decreases fees.[295]

Like the special trial judges found to qualify as officers in *Freytag*, the Board of Directors' positions, duties, and means of appointments are established by federal law. Likewise, some of their duties might be considered more than ministerial, including determining and assessing penalties. In addition, the Board's authority to approve fee proposals and impose penalties without review of the Secretary in certain situations, notably when seeking to decrease a fee, arguably resembles the exercise of final decision-making authority considered by the *Freytag* Court to constitute significant authority.[296]

Finally, the Corporation's power to initiate litigation in federal court to enforce the provisions of the bill – which establishes by federal law an entity who is exclusively authorized to provide air traffic services in the United States and levy charges and fees from users who are required to pay those fines – arguably mirrors the significant authority of the FEC Commissioners in *Buckley*. In that case, the Court held that the discretionary power to enforce federal law by seeking judicial relief through civil litigation must be exercised by officers of the United States.[297] At least under the Tenth Circuit's more flexible test for determining whether a position wields significant authority, these discretionary duties might point to a conclusion that the Board members are properly considered officers.

On the other hand, a number of characteristics of the Board might indicate non-officer status for its members. For instance, the Board members would not draw a salary from the federal treasury. Much of the Board's duties are subject to the Secretary's oversight, such as the proposal of fee schedules that do not simply decrease a charge.[298] Further, the imposition of a penalty may be appealed to the Secretary, who retains authority to reverse a charge for contradicting certain statutory criteria.[299] The Board thus lacks the ability in these circumstances to bind members of the public without the approval of an executive branch officer. In a challenge to the Board's constitutional status, a reviewing court that followed the D.C. Circuit's analysis, which requires final decision making power to render a position an officer of the United States,[300] might be less likely to find that the Board members constitute officers due to the Corporation's lack of power to render final decisions without the Secretary's approval in most situations.

## Do the Board Members Qualify as Inferior Officers?

As mentioned above, while the Appointments Clause applies to all officers of the United States, its requirements differ depending on whether an individual is a principal or inferior officer. Principal officers must be appointed by the President and confirmed by the Senate, but the appointment of inferior officers

[292] *Id.* § 211(a) (adding 49 U.S.C. § 90502(e)).

[293] *Id.* § 211(a) (adding 49 U.S.C. § 90313(f)(3)).

[294] *Id.* § 211(a) (adding 49 U.S.C. § 90313(b)).

[295] *Id.* § 211(a) (adding 49 U.S.C. § 90313(b)(3)).

[296] *Freytag*, 501 U.S. at 882.

[297] *Buckley*, 424 U.S. at 138.

[298] H.R. 2997 § 211(a) (adding 49 U.S.C. § 90313(b)(2)).

[299] *Id.* § 211(a) (adding 49 U.S.C. § 90502(a)(2)).

[300] Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm'n, 832 F.3d 277, 284 (D.C. Cir. 2016).

may be placed with the President alone, the courts of law, or the head of a department.[301] Assuming the Board members constitute officers, because none of the Board's members are appointed by the President subject to Senate confirmation, their selection is invalid if they qualify as *principal* officers.[302] Nonetheless, their selection may be appropriate if they qualify as *inferior* officers and are appointed by a department head.[303]

Whether Board members constitute inferior officers is also a close question. Title II does provide for extensive supervision and control of some of the Board's decisions. For example, the fee schedule proposal approved by the Board is subject to the Secretary's review unless it simply proposes a decrease in charges. And the charges and fees issued by the Corporation are appealable to the Secretary. In *Edmond*, the Court indicated that the inability to render a final decision unless permitted to do so by a superior officer is an important indicator of inferior officer status.[304] On the other hand, the Corporation's unilateral ability to approve fee schedules that only decrease charges, impose fees that must be paid under protest even pending appeal, and the power to enforce the bill's provisions through the initiation of civil litigation without approval of the Secretary all indicate that the Board has substantial independence from a principal officer's control.[305]

In addition, the Supreme Court has recognized the importance of the threat of removal by a principal officer in indicating a position's inferior status.[306] The bill, however, provides that the Board shall remove any member who breaches a fiduciary duty to the Corporation.[307] And in general, the removal of an official must comply with any statutory specifications regarding removal.[308] At a minimum, vesting the power to remove Board members in the Board itself indicates that some locus of control exists outside of

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[301] U.S. CONST. art. II, § 2, cl. 2.

[302] Some Board members would be selected by the Secretary from lists provided by nominations panels. Restricting who the Secretary may choose for a position to individuals contained in a list created by a private party may itself raise objections from the executive branch as an improper intrusion into the President's executive power under Article II to appoint principal officers who head federal agencies and supervise inferior officers. For example, Presidents have historically objected to similar limitations on their own appointment power, as well as requirements that appointees to a board must include no more than a certain number of individuals of a particular political party, to not be legally binding. *See, e.g.*, Jimmy Carter, Statement on Signing H.R. 6370 into Law, 2 PUB. PAPERS 1479 (Aug. 18, 1977), http://www.presidency.ucsb.edu/ws/index.php?pid=7972; George H.W. Bush, Statement on Signing the National and Community Service Act of 1990, 2 PUB. PAPERS 1613 (Nov. 16, 1990), http://www.presidency.ucsb.edu/ws/index.php?pid=19052. Courts have noted the potential constitutional issues raised by such restrictions but have not squarely addressed the issue. *See, e.g.*, Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 824 (D.C. Cir. 1993) (recognizing that "[c]ongressional limitations—even the placement of burdens—on the President's appointment power may raise serious constitutional questions" but dismissing on standing grounds); *see also* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 465–66 (1989) (construing the Federal Advisory Committee Act not to apply to the Justice Department's consultations with the American Bar Association regarding judicial appointments because that reading would present "formidable constitutional difficulties" under Article II and a plausible alternative construction was available).

[303] Because the bill does not provide for appointment of Board members by the President or courts of law, to the extent the Board qualifies as inferior officers, they must be appointed by the head of a department.

[304] *Edmond*, 520 U.S. at 665.

[305] *See id*. ("What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."); Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1340–41 (D.C. Cir. 2012) (holding that Copyright Royalty Judges (CRJ) constituted principal officers because they exercised significant authority without sufficient supervision by a superior; remedying the constitutional violation by invalidating the statutory provision restricting their removal by the Librarian of Congress, rendering CRJ's validly appointed inferior officers).

[306] *Edmond*, 520 U.S. at 664; Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1338-39 (D.C. Cir. 2012) ("In concluding that the judges of the Coast Guard Court of Criminal Appeals were inferior officers, the [*Edmond*] Court emphasized three factors ... [including that] the judges were removable by the Judge Advocate General without cause.").

[307] H.R. 2997 § 211(a) (adding 49 U.S.C. §§ 90307(c)(1), 90308(a)).

[308] Bowsher v. Synar, 478 U.S. 714, 727-28 (1986) (concluding that because a statute specified removal of the Comptroller General by impeachment or joint resolution that these were the exclusive methods of removal).

a principal officer of the executive branch.[309] At least according to more recent Supreme Court doctrine, to the extent the Board members are not subject to supervision by a principal officer, they likely cannot be considered inferior officers.[310] That said, the Court has in the past employed a multi-factor, holistic balancing test to distinguish between principal and inferior officers based on their degree of authority.[311] Were the Court to return to this analysis, it might be more likely to find that the Board constituted inferior officers by examining the overall scope of its authority, rather than its relationship with a superior officer.

Assuming the Board members do qualify as inferior officers, the method of appointment for certain members might be constitutional.[312] Depending on whether air traffic services have been transferred to the Corporation, several Board members would be appointed by the Secretary. The Supreme Court has ruled that the heads of departments who may be vested with authority to appoint inferior officers are heads of "freestanding component[s] of the Executive Branch, not subordinate to or contained within any other such component."[313] The SEC, for example, qualifies as such a department because it is not subordinate to another federal agency.[314] Similarly, the DOT is headed by a Secretary answerable to and removable by the President alone.[315] For that reason, the Secretary qualifies as the head of a department for purposes of the Appointments Clause and the appointment of inferior officers may be vested in her.[316]

However, other Board members would be appointed by the Board itself. At least according to the bill's current provisions, the Board appears unlikely to constitute the head of a department under the Appointments Clause.[317] As mentioned above, the departments whose heads may appoint inferior officers are freestanding components of the executive branch not subordinate to any other component. But the Board may in fact be subordinate to the Secretary, in so far as its decisions and proposals are subject to review.[318] Further, a Board composed of inferior officers arguably could not constitute a freestanding component of the executive branch that is not subordinate to another entity because those officers, by definition, are subject to the supervision and control of a principal officer.[319] Moreover, for a Board, composed of individuals not appointed by the President and confirmed by the Senate, to be considered a head of a department authorized to appoint inferior officers might permit a "diffusion" of the appointment

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309 *Bowsher*, 478 U.S. at 726 ("As the District Court observed: 'Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.'") (citing Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C. 1986)).

310 *Edmond*, 520 U.S. at 663 ("Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.").

311 *See* Morrison v. Olson, 487 U.S. 654, 671-72 (1988) (noting that "[s]everal factors lead to th[e] conclusion" that the independent counsel is an inferior officer).

312 Aside from the distinction between a principal and inferior officer, placing the power of removal of an officer of the United States outside of the discretion of the President, a head of a department, or a court of law itself raises constitutional questions. *See infra* note 333 - 335.

313 *Free Enter. Fund*, 561 U.S. at 51.

314 *Id.*

315 *See* 49 U.S.C. § 102(b).

316 *See generally* 5 U.S.C. § 105 (listing the Department of Transportation as one of the "Executive departments" in Title V).

317 Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1235–36 (2015) (Alito, J., concurring) ("[T]hose who head agencies must be principal officers."); Freytag v. C.I.R., 501 U.S. 868, 920 (1991) (Scalia, J., concurring) ("The Constitution is clear, I think, about the chain of appointment and supervision that it envisions: Principal officers could be permitted by law to appoint their subordinates.").

318 *See supra* notes 299-300.

319 *Edmond*, 520 U.S. at 663.

power in tension with the background principle of accountability that underlies the Appointment Clause.[320]

## The Removal Power

Finally, assuming the members of the Board exercise significant authority and are considered officers under the Appointments Clause, the method of their removal may contradict Article II's vestment of executive power in the President. The Supreme Court has established that the Constitution's grant of the appointment power to the President includes discretion to remove those officers.[321] The Court has outlined the scope of this authority in a series of cases. In the 1926 case of *Myers v. United States*, the Court invalidated a statutory provision that prohibited the President from removing Postmasters General without first obtaining the advice and consent of the Senate.[322] In striking down the limitation, the Court held that Article II grants the President "the general administrative control of those executing the laws, including the power of appointment and removal of executive officers . . . ."[323]

The otherwise broad holding in *Myers* was curtailed shortly thereafter in the case of *Humphrey's Executor v. United States.*[324] In that case, the Court held that Congress had the authority to limit the President's ability to remove members of the Federal Trade Commission (FTC) by providing commissioners with "for cause" removal protections.[325] The Court noted a difference between purely executive departments, such as the one at issue in *Myers*, whose heads the President generally must be able to remove at will, and other agencies engaged in quasi-legislative or quasi-judicial functions that are intended to function with decreased presidential control.[326] Likewise, the Court has also upheld restrictions on the removal of certain inferior officers.[327] In *Morrison v. Olson*, the Court upheld a statute that provided for the appointment of an independent counsel who could be removed by the Attorney General only "for cause."[328] The Court recognized that the independent counsel operated with a measure of independence from the President, but concluded that the statute gave "the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[329]

[320] Freytag v. Comm'r, 501 U.S. 868, 883-84 (1991); Weiss v. United States, 510 U.S. 163, 188 (1994) (Souter, J., concurring).

[321] Myers v. United States, 272 U.S. 52, 164 (1926).

[322] 272 U.S. 52 (1926).

[323] *Id*. at 164.

[324] 295 U.S. 602 (1935). *See* Wiener v. United States, 357 U.S. 349, 352 (1958) ("The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure.").

[325] *Humphrey's Ex'r,* 295 U.S. at 619-20.

[326] *Id*. at 627. The Court later reaffirmed the principles of *Humphrey's Executor* in *Wiener v. United States*. 357 U.S. 349 (1958). In that case, the Court held that the President had no authority to remove a member of the War Claims Commission at will, despite the fact that Congress had not expressly provided such members with "for cause" removal protections. *Id*. at 353-56. In reaching that determination, the Court relied on the adjudicatory "nature of the function that Congress vested in the War Claims Commission." *Id*. at 353.

[327] United States v. Perkins, 116 U.S. 483, 485 (1886) ("We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest.").

[328] 487 U.S. 654, 693-96 (1988).The independent counsel was removable by the Attorney General "only for good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability) or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596. The independent counsel provisions have since expired. 28 U.S.C. § 599.

[329] *Morrison,* 487 U.S. at 693-96.

More recently, the Court announced an important outer limit on Congress's ability to shield executive branch officers from removal. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, (*PCAOB*) the Court invalidated statutory structural provisions providing that members of the PCAOB could be removed only "for cause" by the Securities and Exchange Commission, whose members were, in turn, also protected from removal by for cause removal protections. [330] The Court concluded that while *Humphrey*'s approved such protections for independent agencies, and *Morrison* did the same for inferior officers, the combination of dual "for cause" removal protections "impaired" the President's "ability to execute the laws."[331]

## The Removal of Board Members

The bill provides that the Board members may only be removed by the Board itself for breach of a fiduciary duty to the Corporation.[332] Because the default rule is that the power of removal is "incident to the power of appointment,"[333] for those Board members appointed by the Board itself, neither the President, nor an executive branch officer responsible to the President, appears empowered to remove them. Assuming the Board's duties qualify its members as officers of the United States, however, such a restriction would be in tension with the vestment of executive power in the President under Article II by impairing the President's ability to execute the laws.[334] If dual for cause limitations on the President's removal power are unconstitutional, completely eliminating his removal discretion is impermissible for executive branch officers as it impairs the President's ability to execute the laws by holding such officers accountable.[335]

Likewise, with respect to members of the Board appointed by the Secretary,[336] it does not appear that they would be subject to executive branch control through removal. The President appoints the Secretary, subject to Senate confirmation, and can remove her if desired.[337] This preserves presidential influence over the Secretary's decision of who to *appoint* to the Board. Nevertheless, because the bill provides that the Board itself is entrusted with the removal of Board members, rather than the Secretary who appoints those Board members,[338] neither the President nor the Secretary appear empowered to remove them. If so, completely eliminating the President's removal discretion over executive branch officers violates Article II of the Constitution by conferring on the Board "executive power without the Executive's oversight."[339]

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[330] 561 U.S. 477, 491 (2010).

[331] *Id*. at 496.

[332] H.R. 2997 § 211(a) (adding 49 U.S.C. §§ 90307(c)(1), 90308(a)).

[333] *Free Enter. Fund*, 561 U.S. at 509; Myers v. United States, 272 U.S. 52, 119 (1926) (("[A]s a constitutional principle the power of appointment carried with it the power of removal. This principle as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since.") (citations omitted); *In re* Hennen, 38 U.S. 230, 259 (1839) ("In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.").

[334] *See Free Enter. Fund*., 561 U.S. at 498 ("By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.").

[335] *Id*. at 496 ("Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired."); Bowsher v. Synar, 478 U.S. 714, 726 (1986).

[336] *See supra* notes 238-42.

[337] 49 U.S.C. § 102(b).

[338] H.R. 2997 § 211(a) (adding 49 U.S.C. §§ 90307(c)(1), 90308(a)).

[339] *Free Enter. Fund*, 561 U.S. at 492. As mentioned below, *infra* notes 341-45, a court faced with a legal challenge to the Board's removal authority over members appointed by the Secretary potentially could sever an unconstitutional removal (continued...)

## Severance and Options for Congress

While certain functions of the Corporation might raise issues under the Appointments Clause, these issues are not necessarily fatal to the existence of the Board. Courts have sometimes remedied violations of the Appointments Clause by severing specific offending statutory provisions but otherwise leaving congressionally created entities intact.[340] For example, because "[u]nder the default rule, removal is incident to the power of appointment[,]"[341] if a court were to sever the bill's provisions permitting the Board to remove the members that were appointed by the Secretary, then those members might be removable consequently by her.[342] If so, they would presumably qualify as inferior officers because they would be subject to the control and supervision of a principal officer – the Secretary.[343] That said, this remedy would seemingly not apply to Board members who were appointed by the Board itself, rather than the Secretary, as the default rule is that the power of removal generally rests with the power of appointment. In other words, because the Secretary generally plays no role in the appointment of 11 of the 13 directors, after the Corporation controls air traffic services, severing their method of removal would presumably not automatically place the authority to remove them in an executive branch official.[344] Legislative modification of these issues could also solve concerns under the Appointments Clause.

In addition, if a court found that specific functions of the Board of Directors qualified them as officers of the United States, one potential remedy a court could reach is severance of the offending duties, but preservation of the rest of the Board's authority. For instance, in *Buckley v. Valeo*, the Supreme Court ruled that the Commission – a majority of whose members were improperly appointed – could not exercise certain "executive" functions that qualified the Commission as officers of the United States, but could continue to exercise those duties the Court deemed in aid of Congress's legislative role.[345] Likewise, modification of the bill before passage of any of the Board's duties that constitute significant authority would resolve such concerns.

(...continued)

restriction, which arguably would place the power of removal of such Board members in the hands of the Secretary. *See id*. at 509 ("Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully responsible for the Board's actions, which are no less subject than the Commission's own functions to Presidential oversight.").

340 *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 508 ("[W]e agree with the Government that the unconstitutional tenure provisions are severable from the remainder of the statute."); Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1338-39 (D.C. Cir. 2012).

341 *Free Enter. Fund*, 561 U.S. at 509.

342 *Id.* at 509 ("Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully responsible for the Board's actions, which are no less subject than the Commission's own functions to Presidential oversight.").

343 *Id.* at 493 (noting that when Congress vests the appointment of inferior officers in the heads of departments, "it is ordinarily the department head, rather than the President, who enjoys the power of removal") (citing Myers v. United States, 272 U.S. 52, 127 (1926) and Ex Parte Hennen, 38 U.S. 230, 259-60 (1839)).

344 *See* Buckley v. Valeo, 424 U.S. 1, 109, 140-41 (1976) (per curiam) (concluding that as the majority of a multi-member commission's appointment violated the appointments clause, it could not carry out functions that constituted "significant authority").

345 *Id*.