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MEMORANDUM April 10, 2015

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

From: [Redacted]

Subject: **Analysis of Constitutional Issues Arising from a Proposal to Authorize a Federally Chartered Private Corporation to Provide Air Traffic Control Services**

This memorandum responds to your request for an analysis of potential constitutional issues that may arise if a proposal to create a federally chartered private corporation to provide air traffic control services were enacted. Currently, air traffic management and control is carried out in the United States primarily by the Air Traffic Organization (ATO), a unit of the Federal Aviation Administration (FAA), that was created in 2000 under Executive Order 13180.[1] ATO's functions include issuing obligatory aircraft traffic control instructions to: comply with operating rules; maintain safe separation between aircraft; and manage the efficient flow of air traffic. In addition to maintaining safety, air traffic procedures are implemented to make efficient use of airports and airspace and consequently have important economic implications for airspace users.

To maintain safety and efficiency, compliance with air traffic control procedures and instructions is mandatory for aircraft receiving air traffic control services.[2] Section 91.123 of Title 14 of the Code of Federal Regulations specifies that when an air traffic control clearance is obtained, pilots may not deviate

[1] Executive Order 13180, "Air Traffic Performance-Based Organization," Dec. 7, 2000, *available at* http://www.gpo.gov/fdsys/pkg/FR-2000-12-11/pdf/00-31697.pdf. 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 Report R43858, *Issues in the Reauthorization of the Federal Aviation Administration (FAA)*, by Bart Elias and Rachel Y. Tang. It is worth noting that there are some air traffic control facilities currently existing that do not fall under federal control. Those facilities, referred to as "non-federal contract towers," are operated by private entities that have contracts with state or local governments (which own and/or operate the airport) to provide air traffic control services. *See* FAA Advisory Circular AC90-93B, April 22, 2013, at 2 *available at* http://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_90-93B.pdf. "No Federal statutes or regulations prescribe uniform or consistent procedures and criteria for the establishment and management of these [air traffic control towers]." *Id*. FAA Advisory Circular AC90-93B establishes recommended procedures for these kinds of facilities with which the FAA requests *voluntary* compliance. *Id*. Non-federal contract towers are subject to safety oversight by the FAA, to ensure that equipment and personnel are properly certified. *See* 14 C.F.R. Part 171.

[2] 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.

from that clearance. Except in an emergency, pilots are prohibited from operating an aircraft contrary to air traffic instructions.[3] In addition to issuing mandatory instructions to aircraft, air traffic personnel perform various air traffic management functions such as 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).[4] 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.[5]

Proposal to Authorize a Federally Chartered Corporation to Provide Air Traffic Control Services

At this time, no detailed legislative proposal calling for the creation of a private corporation to provide air traffic control services is publicly available. Therefore, this memorandum will analyze a hypothetical proposal to create a federally chartered private corporation (the Corporation) based on the information provided by your office and as discussed with your staff. This hypothetical proposal includes the following features:

- The creation of a non-profit, private corporation that is not an agency or subdivision of the United States and is not backed by the full faith and credit of the United States.[6]
- The Corporation is operated by a Board of Directors comprised up of 11 members, with the following apportionment:[7]
    - three members designated by Airlines for America, representing major passenger airlines;

[3] 14 C.F.R. § 91.123.

[4] *See* FAA, "Traffic Flow Management in the National Airspace System," October 2009 at 9, *available at* www.fly.faa.gov/Products/Training/Traffic_Management_for_Pilots/TFM_in_the_NAS_Booklet_ca10.pdf [hereinafter Traffic Flow Management].

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

[6] *See* Business Roundtable, "Restructure of Air Traffic Control: Preliminary Term Sheet for Discussion Purposes," § 1, provided by your office via email on March 26, 2015 [hereinafter BRT Proposal]. This memorandum assumes that a hypothetical reviewing court would hold that the Corporation is, in fact, a private, non-profit corporation and not a governmental entity. It is important to note that a hypothetical reviewing court could determine that the Corporation is a governmental entity even if it is expressly established in federal statute as a private, non-governmental corporation. *See* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. __, slip op. at 7-10 (2015) [hereinafter *American Railroads*] ("Congressional pronouncements... are not dispositive of Amtrak's status as a governmental entity for the purposes of the separation of powers analysis under the Constitution... Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise... Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit."); Free Enter. Fund v. Pub. Co. Accountability Oversight Bd., 561 U.S. 477 (2010) (noting that although Congress created the Public Company Accountability Oversight Board (PCAOB) as a "private 'non-profit corporation,'" the parties agreed, and the Court accepted, that "the Board is 'part of the Government'..."); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392 (1995) ("But it is not for Congress to make the final determination of Amtrak's status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions.").

[7] BRT Proposal at § 2.

- one member designated by Cargo Airlines Association representing cargo carriers;
- one member designated by the National Business Aviation Association representing business aviation;
- one member designated by Aircraft Owners and Pilots Association representing general aviation;
- two members representing the Corporation's employees, one designated by each of the unions representing the two largest bargaining units within the Corporation;
- one member designated jointly by the American Association of Airport Executives (AAAE) and the Airports Council International - North America (ACI-NA) representing airports; and
- two members designated by the Secretary of Transportation representing air travelers and communities around airports.

- The Corporation would be entirely funded by user fees assessed to users of the national airspace system.[8]
  - For the first year of operation, the amount of the user fee will be calculated based on a formula established in statute.
  - After the first year of operation, the Corporation will have authority to set the amount of the fee for each user.
  - Users assessed a fee can challenge the reasonableness of the fee by appealing to the Department of Transportation (DOT). The DOT will determine if the fee is reasonable in view of the costs incurred by the Corporation and, if not, the fee will be refunded to the user within two months of the finding. However, such an appeal does not appear to change the amount of the fee assessed to the user that files the appeal, or any other user, in the future.
  - The Corporation will not receive any federal funds.
- The Corporation will be transferred certain assets by the federal government. The Secretary of Transportation will determine the purchase price, if any, for these assets, based on specific criteria established in statute.[9]
- The primary responsibilities of the Corporation will be:[10]
  - establishing air traffic control procedures, similar to those currently existing in FAA Order JO7110.65V, including procedures relating to:
    - minimum separation standards for aircraft;
    - maintenance of the efficient flow of air traffic and necessary tactical traffic flow control measures;

[8] *Id*. at § 5.

[9] *Id*. at § 3.

[10] "Regulatory Aspects of Air Traffic Control," provided by your office via email on March 26, 2015 [hereinafter Regulatory Aspects].

- issuing instructions to aircraft on the ground and in flight to ensure that aircraft remain safely separated;
- implementing modernization efforts, such as Next Gen, which includes:
    - decisions regarding what equipment will be required in order for aircraft to utilize the modernized air traffic control system and certification that equipment meets the required standards;
    - decisions regarding which airports will implement modernization projects first;
- reporting to the FAA each instance in which a pilot has failed to comply with an air traffic control instruction and cooperating with the FAA's investigation of such misconduct;
- participation in international forums, such as the United Nations International Civil Aviation Organization (ICAO).

- FAA will conduct safety oversight of the Corporation, to ensure that the procedures, instructions, and modernization programs adopted by the Corporation meet minimum safety standards.[11]

The analysis in this memorandum is limited to the general features stated above and does not consider other characteristics that may be included in future proposals to delegate authority to provide air traffic control services to a private entity. This memorandum does not address non-constitutional legal or policy concerns that may arise from such a proposal. Additionally, this memorandum does not analyze constitutional, other legal, or policy concerns of other potential proposals to change the administration of air traffic control services, including the creation of a government corporation or independent agency.

Potential Constitutional Concerns

It appears that there are three primary constitutional issues that may be implicated by the hypothetical proposal described above: possible violations of the nondelegation doctrine; due process concerns; and concerns regarding potential infringements upon executive power.

Delegation of Legislative Authority to a Private Entity

The Constitution's vesting of "all legislative powers" in "a Congress of the United States" has traditionally been interpreted as limiting Congress's authority to delegate "legislative power" to the other branches of government.[12] This "nondelegation doctrine" is based in the separation of powers and exists primarily to prevent Congress from abdicating the core legislative function assigned to it by Article I of

[11] BRT Proposal at § 8(a), (e). It is unclear how such an oversight program would be structured. The BRT Proposal calls for the creation of an advisory committee within the Radio Technical Commission for Aeronautics (RTCA) to suggest a structure for such a program. Additionally, it is unclear if the FAA would have any oversight function beyond ensuring the safe operation of air traffic control services.

[12] U.S. CONST. art. I, §1.

the Constitution.[13] By restricting Congress's ability to give power away, in many respects the non–delegation doctrine "protects Congress from itself."[14]

Although the Supreme Court has declared categorically that "the legislative power of Congress cannot be delegated,"[15] the standard adopted for determining whether Congress has in fact delegated "legislative authority" is a lenient one—as evidenced by the fact that the Court has used the test to invalidate federal laws only twice.[16] In order for a delegation to survive scrutiny, Congress need only establish an "intelligible principle" to govern the exercise of the delegated power.[17] Although allowing Congress to make broad delegations, the "intelligible principle" test ensures that Congress, not the delegee, renders the underlying policy decision by delineating reasonable legal standards for the exercise of the provided authority.[18] When a delegation is accompanied by an "intelligible principle," Congress is clearly transferring some degree of authority, but by confining the delegee's discretion in the exercise of that authority, the delegation is not of a "legislative" nature such that it would offend the separation of powers.

Some commentators have asserted that a congressional delegation should be treated the same whether it empowers a *private* or *public* entity.[19] Regardless of what entity ultimately exercises the delegated authority, under this line of reasoning the standard for evaluating its permissibility is the same: a court need only determine whether Congress has provided an "intelligible principle" to guide the entity's exercise of the delegated power. If a reviewing court were to adopt this position, any delegation that does not provide the Corporation with essentially unbridled discretion in carrying out its powers would likely be deemed valid for the purposes of the nondelegation doctrine.[20]

There are, however, other approaches that a reviewing court could adopt in evaluating such a delegation, which may employ different analytical frameworks. Rather than applying the "intelligible principle" test, some judicial decisions—including Supreme Court opinions—appear to have adopted a different approach to evaluating congressional delegations to private entities. Although these private delegation

[13] 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).

[14] *See* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 Rutgers L. Rev. 331, 358 (1998).

[15] *See, e.g.*, United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

[16] *See* Panama Refining v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[17] 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.").

[18] *See, e.g.*, *Panama Refining Co.*, 293 U.S. at 421 ("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.").

[19] *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."). Whether the courts treat public and private delegations differently is not an issues that this memorandum will address.

[20] The Supreme Court has previously found broad delegations to regulate in the "public interest" or in a "fair and equitable" manner to satisfy the intelligible principle test. Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1940); Yakus v. United States, 321 U.S. 414, 420 (1944).

cases are relatively rare, the reasoning applied generally finds its genesis in the 1936 Supreme Court case of *Carter v. Carter Coal Co.*[21]

In *Carter Coal*, the Supreme Court invalidated the Bituminous Coal Conservation Act of 1935, which provided a majority of coal producers and miners in a given region the authority to impose maximum hour and minimum wage standards on all other miners and producers in the region. 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."[22] Although appearing to characterize the wage and hour provisions as an unlawful "delegation" to a private entity, the Court held that the provision in question was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment."[23] The case has engendered significant confusion as to whether the Court's holding was based on nondelegation or due process principles.[24]

The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently interpreted *Carter Coal* as establishing a strict prohibition on congressional delegations of authority to private entities. This is a position that has not been expressly adopted by the Supreme Court, and has been subject to some criticism.[25] In *Assoc. of American Railroads v. U.S. Department of Transportation*, the D.C. Circuit flatly held that "[f]ederal lawmakers cannot delegate regulatory authority to a private entity. To do so would be 'legislative delegation in its most obnoxious form.'"[26] In reaching its holding, the court made a clear distinction between delegations to governmental and private entities. Whereas Congress need only "prescribe an intelligible principle governing the statute's enforcement," when delegating authority to government agencies, "even an intelligible principle cannot rescue a statute empowering private parties to wield *regulatory authority*."[27]

[21] 298 U.S. 238 (1936) [hereinafter *Carter Coal*]. Prior to *Carter Coal*, the Court had upheld relatively broad delegations to private entities. For example, in *St. Louis, I.M. & S. R. Co. v. Taylor*, 210 U.S. 281 (1908), the Supreme Court approved of a law that authorized the American Railway Association to "designate to the Interstate Commerce Commission the standard height of draw bars for freight cars..." *Id*. at 286.

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

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

[24] *See, e.g.*, Ass'n of Am. R.R. v. Dep't of Transp., 721 F.3d 666, 671 n.3 (D.C. Cir. 2013) ("At least one commentator has suggested that the 'doctrine forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation that sounds more in the Due Process Clause than in the separation of powers.' *Carter Coal* offers some textual support for this position, describing the impermissible delegation there as 'clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment.' While the distinction evokes scholarly interest, neither party before us makes this point, and our own precedent describes the problem as one of unconstitutional delegation.") (internal citations omitted); Brief of Professor Alexander Volokh as Amicus Curiae in Support of Petitioners at 2-3, Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. __, (2015) (arguing that the D.C. Circuit in *Association of American Railroads v. Department of Transportation* was wrong to strike down the statute using a delegation analysis and should have applied a due process analysis instead); A. Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution, 50 Duke L.J. 17, 153 (2000) ("The Carter Coal doctrine is known as a nondelegation doctrine, but in a way the name is misleading. Unlike the public nondelegation doctrine, which relies on the separation of powers to prevent Congress from making standardless delegations to administrative agencies, the Carter Coal doctrine forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation that sounds more in the Due Process Clause than in the separation of powers.").

[25] *See generally*, Volokh, *supra* note 19.

[26] *Ass'n of Am. R.R.*, 721 F.3d at 670 (quoting *Carter Coal*, 298 U.S. at 311).

[27] *Id*. at 671.

American Railroads involved a challenge to § 207 of the Passenger Rail Investment and Improvement Act of 2008,[28] which delegated authority to Amtrak and the Federal Railroad Administration (FRA) to jointly develop "metrics and standards" to improve enforcement of Amtrak's statutorily established passenger rail service priority.[29] The circuit court struck down the law as an unlawful delegation to a private entity. In determining that Amtrak, which the court found to be a private entity, had been delegated "regulatory authority," the court found it significant that the law placed Amtrak on "equal footing" with the FRA in the development of the performance standards, rather than in the required "advisory or subordinate role."[30] The court did not, however, define what it considered to be the contours of "regulatory authority."

On appeal, the Supreme Court vacated the D.C. Circuit opinion, holding that Amtrak was in fact a governmental entity.[31] Although disagreeing with the circuit court's characterization of Amtrak as private, the majority opinion did not reflect on the validity of the lower court's prohibition on the delegation of regulatory authority to private entities. Notably, Justices Alito and Thomas appear to have supported the lower court's view in their concurring opinions.[32] Justice Alito also emphasized, as did the D.C. Circuit, that "even the United States accepts that Congress 'cannot delegate regulatory authority to a private entity.'"[33] Nevertheless, while the reasoning in *American Railroads* may be probative of the D.C. Circuit's approach to private delegations, the opinion is not binding precedent within the D.C. Circuit, since it was vacated by the Supreme Court.

Assuming, *arguendo*, that, as the D.C. Circuit held, Congress cannot delegate "regulatory authority" to a private entity, it is clear that Congress may nonetheless empower a private party to play a more limited role in the regulatory process. The Supreme Court has approved of a number of more circumscribed delegations of authority to private entities. *Currin v. Wallace*[34] and *Sunshine Anthracite Coal Co. v. Adkins*[35] provide two such examples, which appear to be unaffected by the Supreme Court's decision in *American Railroads*.

In *Currin*, the Court upheld a law that delegated authority to regulate tobacco markets to the Secretary of Agriculture, but only upon the approval of two-thirds of the growers in the given regional market.[36] The law in question was an example of contingent legislation—or legislation that makes the effectiveness of a delegation contingent upon the occurrence of some future event. 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."[37] Rather it was Congress, consistent with delegation principles, that had exercised its "legislative authority in making the regulation and in prescribing the conditions of its application."[38] Under *Currin*, it would

[28] P.L. 110-432, Div. B (2008).

[29] *Ass'n of Am. R.R.*, 721 F.3d at 669-70. *See* 49 U.S.C. § 24308(c).

[30] *Ass'n of Am. R.R.*, 721 F.3d at 673.

[31] *American Railroads*, 575 U.S. __, slip op. at 2 ("[T]his Court now holds that, for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity.").

[32] *See id*. at 7 (Alito, J., concurring) ("By any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'"); *Id*. at 23 (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.").

[33] *Id*. at 6 (Alito, J., concurring).

[34] 306 U.S. 1 (1939).

[35] 310 U.S. 381 (1940).

[36] *Currin*, 306 U.S. at 6.

[37] *Id*. at 15.

[38] *Id*. at 16.

appear permissible for Congress to delegate to private entities the ability to trigger the exercise of authority in a government official.

In *Adkins*, the Court upheld a provision of the Bituminous Coal Act of 1937,[39] which authorized private coal producers to propose standards for the regulation coal prices.[40] Those proposals were provided to the National Bituminous Coal Commission (a governmental entity), which was then authorized to approve, disapprove, or modify the proposal.[41] The Court approved of this framework, relying heavily on the fact that the private coal producers played a subordinate role to the Commission, which clearly retained ultimate authority over the regulation of coal prices. Specifically, the Court held:

> Nor has Congress delegated its legislative authority to the industry. The [private coal producers] function subordinately to the Commission. It, not the [private coal producers], determines the prices. And it has authority and surveillance over the activities of these [private parties]. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid.[42]

The U.S. Court of Appeals for the Third Circuit (Third Circuit) applied the reasoning in *Adkins* to uphold a private delegation in *U.S. v. Frame*.[43] In that case, the Beef Promotion and Research Act of 1985[44] created the Cattleman's Beef Promotion and Research Board, a private entity comprised of cattle producers and importers designed to help strengthen the beef industry by coordinating "promotion and research."[45] The Act gives the Board the authority to collect a statutorily established assessment from the beef industry and to "take the initiative in planning how those funds will be spent," but "government oversight" over the Board was "considerable."[46] Relying on *Adkins*, the court held that "no law-making authority" had been entrusted to the Board primarily because the Board was "subject to the Secretary's pervasive surveillance and authority."[47] Board members were appointed, and removable, by the Secretary of Agriculture and nearly all activities of the Board, including "budgets, plans, or projects," required the Secretary's approval.[48]

Finally, the U.S. Courts of Appeals for the Fourth Circuit (Fourth Circuit) has likewise approved of Congress delegating authority to a private entity to play administrative or ministerial roles in the implementation of a governmental program. In *Pittston Co. v. United States*, the court upheld a statutory framework that delegated authority to the Combined Fund, a private entity, to both collect premiums from coal operators and to disperse benefit payments to coal workers.[49] In doing so, the court noted that

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[39] 50 Stat. 72 (1937).

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

[41] *Id*. at 388.

[42] *Id*. at 399.

[43] 885 F.2d 1119 (3d Cir. 1989).

[44] P.L. 99-198, Title XVI, Subtitle A, *codified at* 7 U.S.C. §§ 2901-2911.

[45] *Id*. at 1123.

[46] *Id*. at 1128.

[47] *Id*. at 1129. Other lower court opinions suggest that if an agency is overseeing the actions of a private entity, it must do so with diligence. *See, e.g.*, Todd & Co. v. Securities & Exchange Com., 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. Since it is a departure from the traditional governmental exercise of enforcement power in the first instance, confidence in the impartiality and fairness of the [private] Association's procedures must be maintained. The SEC, therefore, should not cavalierly dismiss procedural errors affecting the rights of those subjected to sanctions but should insist upon meticulous compliance by the private organization.").

[48] *Frame*, 885 F.2d at 1129.

[49] 368 F.3d 385 (4th Cir. 2004).

Congress had "set[] the specific formula for calculating the premiums to be paid" and that the Combined Fund was only "assigned the task of collecting the premiums *designated* by the statute from the persons *specified* by statute."[50] Moreover, the Combined Fund was directed to pay "benefits to the beneficiaries in an amount *specified* by the statute."[51] Because the Fund had no discretion to set the amount of the premium to be collected; the parties from which the premiums were to be collected; or the amount of benefits to be paid, the powers delegated to the private entity were "of an administrative or advisory nature, and delegation of them to the Trustees does not, we conclude, violate the nondelegation doctrine."[52]

Based on the analysis above, it seems clear that the scope of Congress's authority to delegate authority to private entities is unsettled. Yet, despite ongoing debates about the proper standards to be applied in such cases, a number of general principles can be gleaned from the above cited precedent regarding the scope of Congress's authority to empower private entities. It would appear that broad delegations of regulatory power to private entities are generally disfavored, and, at least in the D.C. Circuit, may likely be rejected under the theory put forward in *American Railroads* that Congress "cannot delegate regulatory authority to a private entity."[53]

As a result, a law that provides a private entity with ultimate authority to impose regulatory requirements that have a coercive effect on other private parties, or to otherwise exercise broad discretion to formulate policy, would likely raise constitutional concerns. However, some delegations to private entities have withstood constitutional scrutiny. Congress may clearly authorize private entities to engage in more limited regulatory roles. For example, 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 strict oversight and surveillance of a governmental entity; or administer a regulatory program in a purely ministerial manner.

Application to the Proposal

As discussed above, some courts have struck down delegations of regulatory authority to private entities while other courts have found delegations of administrative or ministerial authority, like those discussed in *Pittston* and *Frame*, to private entities to be permissible.[54] However, the courts have not been particularly clear in defining the differences between an administrative or ministerial authority and one that becomes impermissible because it is regulatory in nature. In *American Railroads*, Justice Thomas described the authority at issue in the case as "the formulation of generally applicable rules of private conduct."[55] In his own concurrence in the same case, Justice Alito determined that the power to set metrics and standards is "regulatory power" because private entities may be required to include the metrics and standards in their contracts[56] and "obedience to the metrics and standards materially reduces the risk of liability…"[57]

[50] *Id*. at 395.

[51] *Id*.

[52] *Id*. at 396.

[53] *Ass'n of Am. R.R.*, 721 F.3d at 670.

[54] *See Pittston*, 368 F.3d at 394-96; *Frame*, 885 F.2d at 1128-29.

[55] *American Railroads*, slip. op. at 4 (Thomas, J., concurring).

[56] *Id*. at 4 (Alito, J., concurring) ("The fact that private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts by itself makes this a regulatory scheme.").

[57] *Id*.

Taking the case law and these recent statements into account, it appears that a hallmark of regulatory authority is its coercive effect on private parties—i.e., whether the authorities delegated to the private entity allow it to impose rules upon other private parties with which those parties are required to comply.

Permissible Delegations

Several of the authorities granted to the Corporation would likely be considered by a hypothetical reviewing court to be permissible delegations of administrative or ministerial authority to a private entity.

Collection of a User Fee. Currently, air traffic control services are funded through a combination of annual congressional appropriations and money from the Airport and Airways Trust Fund (AATF). The AATF receives revenues from a number of excise taxes (including the passenger ticket tax, flight segment tax, cargo tax, and aviation fuel taxes for both commercial and general aviation) and fees.[58]

Under the proposal, various existing taxes and fees would be eliminated and the Corporation would generate all of its revenue through a user fee to be paid by certain users of the national airspace. The Corporation would be charged with collecting the user fee.

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 *Frame*, the Third Circuit concluded that Congress did not "unlawfully delegate[] its legislative authority to members of the beef industry merely because the Cattlemen's Board is authorized to collect assessments..."[59] since the collection of assessments was a "ministerial [function]."[60] Similarly, in *Pittston*, 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..."[61] Therefore, following this case law, it appears that there would be a substantial basis upon which a reviewing court could find that granting the Corporation authority to collect a user fee to be a permissible delegation of ministerial or administrative authority to a private entity. The Corporation's authority to set the amount of the user fee to be collected is discussed in detail below.

Advising on Enforcement Actions. Presently, air traffic controllers identify regulatory violations and deviations made by pilots and take part in safety investigations that may result in regulatory enforcement actions. However, findings and determinations and possible enforcement actions are ultimately responsibilities of the Office of Aviation Safety (OAS) and the Office of the Chief Counsel at FAA, and are not direct responsibilities of the ATO.[62]

Pursuant to the proposal, the Corporation would take over ATO's advisory role in enforcement actions. The Corporation would report to the FAA each instance in which a pilot failed to comply with an air traffic control instruction or is suspected of violating other safety regulations. The FAA would then be responsible for determining if an enforcement action is warranted and, if it is, would pursue such an

[58] For more information on FAA funding, *see* CRS Report R43858, *Issues in the Reauthorization of the Federal Aviation Administration (FAA)*, by Bart Elias and Rachel Y. Tang.

[59] *Frame*, 885 F.2d at 1128.

[60] *Id*. at 1129.

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

[62] *See* 14 C.F.R. § 13.3; FAA Office of Aviation Safety, "Air Traffic Safety Oversight Service," *available at* https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aov/.

action. Throughout these steps in the process, the Corporation would continue to advise the FAA by, for example, providing factual information about the circumstances of a potential violation.

Since the Corporation would be playing a purely advisory role in enforcement actions controlled by the FAA, the delegation of such authority is arguably a permissible delegation to a private entity.[63] It is clear that the Corporation's employees will be acting subordinately to the FAA, which would make final decisions on if, when, and how to carry out enforcement actions against private parties. Therefore, just as with the delegation of authority to a private entity upheld in *Adkins*, the governmental entity, here the FAA, will have "authority and surveillance" over the Corporation's participation in the enforcement process.[64] 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.[65] 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.[66]

Advocacy in International Forums. The FAA currently works closely with the U.S. Mission to the International Civil Aviation Organization (ICAO), a U.N. specialized agency whose mission is to develop international standards and recommended practices that can be referenced by its member states when creating their aviation laws and regulations.[67] Under the proposal, the Corporation would participate in ICAO, and other relevant international forums, to provide expert advice on air traffic control procedures, standards, and practices. The Corporation, when serving in this role, would be operating in an advisory capacity and would not represent the United States as a voting member-state signatory to ICAO.[68] As discussed above, because the Corporation would be authorized only to serve in an advisory role, it is unlikely that a reviewing court would conclude that this is an invalid delegation to a private entity.[69]

Potentially Problematic Delegations

Depending on how the authorities are described in an enabling statute; how the authorities are exercised; and the level of FAA oversight, many of the authorities granted to the Corporation *may* be viewed as impermissible delegations of authority to a private entity.

Setting the Amount of a User Fee. Under the proposal, after the first year of operation, the Corporation would have the sole responsibility to determine the amounts of user fees and which users of the airspace must pay such fees. Fees would not be subject to the approval of the FAA before going into effect. The

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

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

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

[66] *Id*.

[67] *See* United States Mission to the International Civil Aviation Organization, "About Us," www.icao.usmission.gov/about-us.html ("The U.S. Mission to ICAO is headed by an Ambassador who is supplemented by a Deputy Chief of Mission and Air Navigation Commissioner plus expert and support staff. Working closely with the U.S. State Department's Bureau of International Organization Affairs, Mission coordinates U.S. government efforts at ICAO. Mission works closely with the Federal Aviation Administration (FAA), the National Transportation Safety Board (NTSB), the Department of Homeland Security (DHS), and the Transportation Security Administration (TSA).").

[68] The United States has a representative on the ICAO council and votes as a general member state in the Assembly. *See* ICAO, "The ICAO Council," http://www.icao.int/about-icao/Pages/council.aspx. The U.S. also has a representative on the Air Navigation Commission. *See* ICAO, "Air Navigation Commission," http://www.icao.int/about-icao/Pages/Air-Navigation-Commission.aspx. Under the proposal, it does not appear that any of these functions would change. *See* Regulatory Aspects at 2.

[69] *See Pittston*, 368 F.3d at 394-96; *Frame*, 885 F.2d at 1128-29.

proposal does include a process by which individual users can challenge the amount of a specific fee that has been levied by lodging a complaint with the FAA. If the FAA determined the fee to be unreasonable, through an administrative proceeding, the fee would be refunded to users within two months of the finding.[70] However, it is not clear that this administrative "appeal" would have any effect on the Corporation's power to set the amount of the fee for that particular user or similarly-situated users in the future.[71]

Several courts have evaluated delegations of authority to private entities to *collect* similar user fees in the past, as discussed above.[72] In determining that the collection of a fee was a ministerial act, those courts focused on the fact that in each instance, the private entity did *not* have the authority to set the amount of the fee or decide who would be assessed the fee. For example, in *Adkins*, the Court upheld a delegation to a group of private coal producers because they acted subordinately to the National Bituminous Coal Commission, a governmental entity.[73] This subordination was evidenced, in part, by the fact that the Commission, not the private entity, had the authority to fix reasonable coal prices under the law. In *Frame*, the Third Circuit adopted this reasoning in finding that the collection of assessments across the beef industry by a private entity was not an unlawful delegation.[74] Again, the court focused on the fact that the amount of the assessment was set in statute by Congress and the private entity served a purely ministerial role in collection.[75] Finally, in *Pittston*, the Fourth Circuit upheld the authority of a private entity to collect premiums charged upon members of the coal industry.[76] Here, 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 operator.[77] 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.[78] In each instance, the courts suggest that allowing the private entity to set the amount of the charge imposed on private parties would transform the delegation from an administrative or ministerial function into a regulatory authority.[79]

Based on this case law, it appears that authorizing the Corporation to decide who will be required to pay a user fee and the amount of the fee could potentially be found by a reviewing court to constitute an unlawful delegation to a private entity. 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

[70] It is unclear from the proposal if the refund would be available only to the users that filed a complaint, or to all users that were subjected to the unreasonable fee. *See* BRT Proposal § 5(c).

[71] *Id*. For example, it is unclear if a successful appeal would prevent the Corporation from levying the "unreasonable" fee on those same users in the future.

[72] *See Pittston*, 368 F.3d at 394-96 (evaluating a private entity's authority to collect premiums mandated in law); *Frame*, 885 F.2d at 1128-29 (evaluating a private entity's authority to collect assessments required by law).

[73] *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).

[74] *Frame*, 885 F.2d at 1128-29.

[75] *Id*. at 1129 ("Therefore, we hold that the Beef Promotion Act does not constitute an unlawful delegation of legislative authority. In essence, the Cattlemen's Board and the Operating Committee[, private entities,] serve an advisory function, and in the case of collection of assessments, a ministerial one. Congress itself has set the amount of the assessments, while ultimately, it is the Secretary who decides how the funds will be spent.").

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

[77] *Id*. at 395.

[78] *Id*.

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

authorize a private corporation to take coercive action against other private entities, requiring them to either pay a user fee or cease their use of the national airspace.

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 FAA, approved the fee structure. Adding such FAA oversight would 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.[80] Alternatively, if the Corporation retains the authority to set the amount of the fee, the inclusion of a robust process within the FAA to challenge the amount of the fee may reduce concerns regarding an impermissible delegation. Under such a process, the FAA may need the authority to change the amount of the user fee being assessed going forward to ensure that the private entity is under the "authority and surveillance" of a governmental entity,[81] which is not contemplated in the language regarding an appeals process currently contained in the proposal.[82]

Creating Air Traffic Control Procedures and Instructions, and Maintaining Flow Controls. Currently, the FAA's ATO establishes air traffic control procedures by order.[83] FAA Order JO7110.65V details these procedures, including aircraft separation standards and standard phraseology for issuing instructions to pilots.[84] It provides that separating aircraft and issuing safety alerts are the first priority of controllers, followed by supporting national security and homeland defense activities, and providing additional services to the extent possible.[85] It mandates that controllers provide service on a "first come, first served" basis, with limited exceptions.[86] Controllers issue instructions based on the procedures established in the Order, which is routinely updated to reflect changes in procedures. Additionally, through Air Route Traffic Control Centers (ARTCC), and other select facilities, the FAA manages overall traffic in the system, implementing flow controls when necessary.[87] These flow controls, which could be needed due to congestion or weather, may include such actions as ground holds[88] and in-flight vectoring and holding patterns.[89]

The proposal would place the Corporation in control of establishing these kinds of procedures and instructions in the future. Additionally, the Corporation would take over the "flow control" function. Under the proposal, it appears that FAA Order JO7110.65V would cease to exist and the Corporation would decide how to conduct procedures going forward and create its own documents to advise its employees. The FAA may have limited oversight of the new procedures and instructions to ensure that they meet minimum safety requirements.

It appears likely that authorizing the Corporation to change *some* of these procedures and create their own new requirements, depending upon their nature and effect, would be a permissible delegation to a private

[80] *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).

[81] *Id*. at 399.

[82] *See* note 70 and accompanying text.

[83] FAA Order JO7110.65V, "Air Traffic Control," April 3, 2014, *available at* www.faa.gov/documentLibrary/media/Order/ATC.pdf.

[84] *Id*.

[85] *Id*. at § 2-1-2.

[86] *Id*. at § 2-1-4.

[87] *See* Traffic Flow Management, *supra* note 4, at 9 (discussing the role of ARTCCs in traffic flow management).

[88] *Id*. at 21, 37.

[89] *Id*. at 16, 19, 20.

entity. The ability to write procedures and instructions that solely apply to the conduct of controllers within the Corporation and do not substantively affect other private parties is unlikely to be viewed as a regulatory authority. For example, the Order establishes the proper terminology to be used in specific instances, such as instructing controllers to "[u]se the word 'immediately' only when expeditious compliance is required to avoid an imminent situation."[90] The ability to change the use of this terminology does not impose a binding requirement upon the conduct of another private entity, and therefore, is unlikely to be viewed as a regulatory authority. Other requirements regarding the conduct of controllers within the Corporation may be viewed as similarly benign.

However, authorizing the Corporation to change other procedures contained within the current FAA Order JO7110.65V may potentially be regarded as an unlawful delegation of authority to a private entity. Several of the Order's provisions *may* be characterized as imposing coercive requirements that control the conduct of other private entities, such as airlines and pilots. Additionally, those users of air traffic control services are required by law to comply with air traffic control procedures and instructions, and may be subject to FAA enforcement actions for noncompliance.[91]

For example, the Order mandates a "first come, first served" basis of priority, which means that aircraft receive services based on when they contact air traffic control for those services.[92] As part of its Next Generation Air Transportation System (NextGen) modernization effort, the FAA has been considering altering this "first come, first served" model by "designat[ing] aircraft with certain NextGen capabilities as eligible for priority handling."[93] This concept is currently known as Aircraft Priority Access Selection Sequence (AirPASS) (previously referred to as "best equipped, best served.")[94] Under this model, certain aircraft, based on the type of onboard equipment, would receive priority handling for operations such as takeoffs, approaches, and route changes.[95] If the Corporation were given complete authority over air traffic control procedures, it could choose to adopt a "best equipped, best served" model.[96] Such an authority may arguably be considered an unlawful delegation to a private entity, because it would allow the Corporation to advantage or disadvantage other private entities, such as airlines and private pilots, by altering where, when, and how quickly an aircraft can take off and land. Airlines and private pilots would be required to participate in this system, which controls their private conduct based in part on how much money each participant has spent on modernizing their equipment, or face a potential FAA enforcement action.[97]

Similarly, under the proposal, the Corporation would appear to be in charge of establishing requirements for the separation of aircraft (in the air and upon takeoff and landing) and determining when ground holds and in-flight holding patterns are necessary to manage overall traffic flow.[98] Imposing these requirements

[90] FAA Order JO7110.65V § 2-1-5.

[91] 14 C.F.R. § 91.123. *See American Railroads*, slip. op. at 4 (Alito, J., concurring) (discussing how private carriers may be required to incorporate metrics and standards into their contracts, and, thereby, abide by such metrics and standards, transforms the metrics and standards into a regulatory scheme).

[92] FAA Order JO7110.65V § 2-1-4.

[93] FAA, "Fact Sheet – Aircraft Priority Access Selection Sequence (AirPASS)," March 14, 2013, *available at* http://www.faa.gov/news/fact_sheets/news_story.cfm?newsid=14413.

[94] *Id*.

[95] *Id*.

[96] This action could presumably be accomplished by incorporating the "best equipped, best served" model into the air traffic control procedures document that will be created by the corporation to replace FAA Order JO7110.65V.

[97] *See* 14 C.F.R. § 91.123.

[98] *See* Regulatory Aspects at 1-2.

arguably has a coercive effect on other private entities that use the national airspace, such as airlines and private pilots. Changing the distance required between aircraft can reduce the overall capacity of the airspace and increase the amount of time required to take off and land, or vice versa. Furthermore, the Corporation would have the ability to ground flights or place holds on flights in the airspace. Private entities using the national airspace would be required to comply with these instructions, which could directly impact their ability to use the national airspace, or potentially be subject to an FAA enforcement action.[99] A reviewing court may view the delegation of authority to exercise such coercive functions as impermissible.

These potentially unlawful delegations of authority to a private entity may be less concerning to a reviewing court if the FAA were authorized to play an active role in overseeing and approving the Corporation's activities. For example, these provisions are less likely to constitute an unlawful delegation if the Corporation were required to adopt the existing FAA Order JO7110.65V, and other relevant policies, and required to seek FAA approval before making any amendments. As discussed above in relation to the setting of a user fee, introducing an FAA approval requirement may transform this arguably regulatory authority into a merely advisory, administrative, and/or ministerial function as upheld in *Adkins*.[100]

Developing and Implementing Modernization Programs. Modernization under the ongoing NextGen initiative involves investments both by FAA, as the current air traffic services provider, and by users of the airspace, including the airlines; private and corporate aircraft; government-owned and -operated aircraft; and military aircraft.[101] Modernization efforts will likely include the requirement that aircraft using air traffic control services be equipped with new technology, which will need to be purchased by the airline or pilot. For example, as part of NextGen, in 2010, FAA promulgated a final rule requiring aircraft operating in certain classes of airspace to be equipped with automatic dependent surveillance—broadcast (ADS-B) out avionics by 2020.[102]

Under the proposal, it appears as though the Corporation would take charge of all modernization efforts, including making decisions on the required equipage of aircraft.[103] These modernization efforts will likely also require new equipment to be installed in air traffic control towers and other assets held by the Corporation. Granting the Corporation authority to make modernization decisions that require the Corporation itself to invest in new equipment and technologies will likely be viewed as a permissible delegation. Like the issuance of air traffic control procedures and instructions that only affect controllers themselves, these modernization decisions do not have any coercive effect on outside private entities.

Alternatively, the authority to make modernization decisions that require other private entities to invest in new equipment would likely be viewed as a regulatory authority. In *Carter Coal*, the Supreme Court struck down a provision that delegated authority to private entities to fix maximum hours of labor and minimum wages for coal workers.[104] If a coal producer did not abide by these requirements, it was subject

[99] *See* 14 C.F.R. § 91.123.

[100] *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).

[101] *See generally* FAA, "NextGen Update 2015: Progress and Plans," *available at* https://www.faa.gov/nextgen/update/progress_and_plans/. For detailed information on NextGen, *see* CRS Report R43858, *Issues in the Reauthorization of the Federal Aviation Administration (FAA)*, by Bart Elias and Rachel Y. Tang.

[102] Automatic Dependent Surveillance—Broadcast (ADS–B) Out Performance Requirements To Support Air Traffic Control (ATC) Service, 75 Fed. Reg. 30160 (May 28, 2010).

[103] Regulatory Aspects at 1.

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

to penalties under the law.[105] The Court declared that such provisions clearly amounted to regulation of the production of coal and were "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..."[106] A reviewing court may view the authority to require private entities to invest in new equipment in order to continue using the national airspace as a similar regulation of the airspace—it applies coercive force to the private conduct of others. Just as in *Carter Coal*, entities that do not comply with such directives may be subject to FAA enforcement actions and/or excluded from the airspace altogether.[107]

As discussed above, these concerns may be at least partially alleviated by subjecting such new equipage requirements to FAA approval and oversight.[108]

Due Process

A delegation of authority to a private entity may also raise concerns under the Due Process Clause if the private entity is given coercive power over other private individuals, especially if those individuals are market competitors. Due Process seeks to ensure principles of fundamental fairness, including the notion that decision makers must be disinterested and unbiased.[109] These general principles may be offended when the federal government authorizes a private party to exercise coercive power over another that could be used in a biased or arbitrary manner.[110] As one commentator has summarized: "If a delegation creates the opportunity for private interests to dominate the use of governmental power, then those against whom the power is used may well have suffered deprivations without due process."[111]

Although *Carter Coal* is often cited as a nondelegation case, some commentators have suggested that it may more accurately be deemed a due process case.[112] 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."[113] The Court labeled this "delegation in its most obnoxious form" precisely because the law did not empower a "presumptively disinterested" government official, but rather "private persons whose interests may be and often are adverse to the

[105] *Id.* at 310-11.

[106] *Id.* at 311.

[107] *See* 14 C.F.R. § 91.123.

[108] *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).

[109] *See 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..."). *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.").

[110] *See Carter Coal*, 298 U.S. at 311. *See also* David M. Lawrence, *Private Exercise of Governmental Power*, 61 Ind. L.J. 647, 659 (1986) ("The concern is that governmental power—power coercive in nature—will be used to further the private interests of the private actor, as to some different public interest. When a public official is permitted to exercise a public power, he is generally expected to do so in a basically disinterested way. The community expects him to act from some conception of what is good for the community or according to standards that seek to further community interests, as opposed to acting to further his narrow private interests.").

[111] Lawrence, *supra* note 109, at 661.

[112] For a strong defense of the due process approach to private delegations, *see generally* Volokh, *supra* note 19 (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).

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

interests of others in the same business."[114] The opinion then went on to clearly articulate 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.[115]

The Supreme Court also looked to due process principles in *Currin* to inform its analysis.[116] 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."[117]

It is difficult to predict how, or even whether, a reviewing court would utilize Due Process principles in evaluating a private delegation. Recent private delegation cases in the circuit courts did not choose to evaluate the laws in question under due process principles. Moreover, it is not clear how such an application would differ doctrinally from the nondelegation principles discussed above.[118] The D.C. Circuit, for example, saw no difference between a due process approach and a nondelegation approach, noting that "in any event, neither court nor scholar has suggested a change in the label would effect a change in the inquiry."[119] Nevertheless, when considering due process limits on private delegations that arise from cases like *Carter Coal*, it would seem that an important consideration is *to whom* power is given, and *over whom* that power may be wielded.

Application to the Proposal

The Corporation would be led by a Board of Directors consisting of 11 members.[120] Different stakeholders within the aviation industry, including major airlines, general aviation, business aviation, cargo carriers, airports, air traffic controllers, and the public, would each be designated a specific number of seats on the Board.[121] Members of the Board are prohibited from being current employees of the stakeholder group, but presumably each member would represent the views of the stakeholder designating him or her.[122] As such, the Corporation would be run by a Board of Directors representing diverse

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[114] *Id.*

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

[116] 306 U.S. 1 (1939).

[117] *Id.* at 15.

[118] *See Ass'n of Am. R.R.*, 721 F.3d at 671 n.3. Professor Alexander Volokh notes that analyzing delegations to private parties under the Due Process clause, as opposed to the nondelegation doctrine, is preferable because it "better protects accountability:" Due Process "is incorporated against the states through the Fourteenth Amendment;" "preserves the availability of a damages action for injured parties;" and "has consistently been applied to issues of bias and fairness." *See* Brief of Professor Alexander Volokh as Amicus Curiae in Support of Petitioners at 2-3, Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. __, (2015).

[119] *Ass'n of Am. R.R.*, 721 F.3d at 671 n.3.

[120] BRT Proposal at § 2.

[121] *Id.*

[122] *Id.* at § 2(g).

stakeholders in the industry who may often have opposing points of view on the proper and efficient use of airspace. Finally, under the proposal, "Members of the Board will have a fiduciary duty to serve the best interests" of the Corporation.[123]

This composition of the Board of Directors and the potential that it may not act as a disinterested decision maker may lead a hypothetical reviewing court to raise concerns about how it comports with the due process principles discussed above. On the one hand, the composition of the Board does not directly appear to create the ability for the majority of the industry to assert itself over an "unwilling majority," which was so troubling to the Court in *Carter Coal*.[124] Additionally, the existence of a fiduciary duty owed to the Corporation would presumably prevent the Board members from purposefully acting in a manner that benefits their stakeholders but harms the Corporation's interests. On the other hand, despite the fact that no one faction contains a majority of votes on the Board, the members of the Board may still act in ways that benefit their specific stakeholder groups to the detriment of other market participants.[125] Furthermore, members of the Board may be able to satisfy their fiduciary duty while still advocating for policies that may advantage their stakeholder groups.

One can imagine a number of scenarios in which Board members representing different stakeholder groups may advocate for different policies that could specifically benefit their stakeholders, while disadvantaging others. For example, such disparities in advocacy may arise when discussing: setting the amount of the user fee for different users of the airspace, including airlines, general aviation, and cargo carriers; choosing where to implement modernization projects first, which may benefit one airport or users of that particular airspace;[126] deciding whether voluntary investments in new technology will result in prioritization of those users that can afford such purchases; determining what kinds of technology upgrades users will be required to purchase and install in order to continue using the airspace. In all of these scenarios, it is possible that Board members from a particular stakeholder, or a group of members whose interests may be aligned on a certain issue, could vote to authorize corporate action that advantages their slice of the industry while disadvantaging others. The *Pittston* court made clear that "[a]ny delegation of regulatory authority 'to private persons whose interests may be and often are adverse to the interests of others in the same business' is disfavored."[127]

Alternatively, these concerns may be mitigated by the fact that the stakeholder with the greatest representation on the Board, the airlines, only holds three out of 11 seats,[128] thereby, presumably lacking the number of votes necessary to force corporate action without building broader consensus within the Board. Furthermore, potential due process concerns may be alleviated if the Board's decision were subjected to review by an impartial decision maker, like the FAA.[129] This review could arguably be accomplished by requiring the FAA to approve Board decisions before they are implemented or,

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[123] *Id.*

[124] *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).

[125] 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 stakeholders, and specific factions within each stakeholder group, may align on different issues.

[126] *See* Regulatory Aspects at 2.

[127] *Pittston*, 368 F.3d at 394 (quoting *Carter Coal*, 298 U.S. at 311).

[128] BRT Proposal § 2.

[129] *See Carter Coal*, 298 U.S. at 311 (finding a delegation of authority violated due process because it empowered "private persons whose interests may be and often are adverse to the interests of other in the same business" as opposed to a "presumptively disinterested" official body).

potentially, creating a process by which aggrieved parties could appeal to the FAA to challenge specific Board decisions.

Given the uncertainty discussed above in the due process analysis and the manner in which the Board's powers would be exercised, it is unclear whether or how a hypothetical reviewing court might analyze this proposal in relation to the fundamental fairness principles discussed above.

Infringement on Executive Powers: Appointment Clause and Presidential Control

Arguments have also been forwarded that congressional delegations of governmental authority to private entities may infringe on *executive* power by violating the Appointments Clause and the President's constitutional duty to "take Care that the Laws be faithfully executed."[130] The potential application of both of these principles would appear to be governed by a determination of whether the Corporation exercises "significant authority pursuant to the laws of the United States."[131]

The Appointments Clause[132]

The Appointments Clause, which is "among the significant structural safeguards of the constitutional scheme," establishes the method by which certain federal officials may be appointed to positions established by Congress.[133] Under the Clause, the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[134]

In interpreting the Appointments Clause, the Court has made clear distinctions between "Officers of the United States," who are subject to the requirements of the Clause, and non-officers (or employees) who are not.[135] The amount of authority that an individual exercises will generally determine his or her classification as either an officer or non-officer. In *Buckley v. Valeo*, the Supreme Court determined that "Officers of the United States" are those appointees "exercising *significant authority* pursuant to the laws of the United States."[136] In *Buckley*, the Court analyzed provisions of the Federal Election Campaign Act of 1971,[137] which established a six member Federal Election Commission (FEC) to oversee federal elections. Although the *Buckley* Court did not engage in a substantive analysis of what kind of authority is considered "significant," the opinion suggested that powers relating to "rulemaking, advisory opinions, and determinations of eligibility for funds," along with the authority to engage in law enforcement and

[130] U.S. CONST. art. II, § 2, cl. 2; U.S. Const. art. II, § 3.

[131] Buckley v. Valeo, 424 U.S. 1, 126 (1976).

[132] Vivian S. Chu, Legislative Attorney, contributed to this section.

[133] Edmond v. United States, 520 U.S. 651, 659 (1997).

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

[135] *See, e.g.*, *Edmond*, 520 U.S. at 663 (declaring that the exercise of "'significant authority pursuant to the laws of the United States' marks...the line between officer and non-officer.").

[136] 424 U.S. 1, 126 (1976).

[137] P.L. 95-225 (1972).

civil ligation, were all suggestive of the exercise of "significant authority."[138] Although the proper application of the doctrine is debatable, the general principle is clear: any federal official exercising "significant authority" must be appointed in conformance with the requirements of the Clause.

Courts have not reached the Appointments Clause issue in the private delegation cases previously discussed. Arguments may, nevertheless, be forwarded that the Clause acts as a significant limitation on Congress's ability to delegate authority to private entities.[139] Yet, it is not clear whether the Clause applies to non-federal offices held by private, non-governmental actors. The Department of Justice (DOJ), for example, has concluded that "the Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors."[140] In this context, the DOJ's conclusion relied on court decisions where the "non-federal actors" were state or local government officials and where a "federal statute simply add[ed] federal authority to a pre-existing state office" that was not created by Congress.[141]

However, whether or not the Appointments Clause applies to private individuals may depend on the nature of the office that they occupy. For example, DOJ has noted that the Appointments Clause may not apply to private individuals when a federal statute does not create their position, with "such tenure, duration, emoluments and duties as would be associated with a public office."[142] Alternatively, if these features are present in the applicable, seemingly "non-federal office" being held by a private actor, then "a position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is 'continuing'" and such person must be appointed in accordance with the Appointments Clause.[143]

If the Appointments Clause does not apply to private actors, then the Clause will not act as a barrier to the Corporation's operation, and Congress is free to deviate from its requirements.[144]

If, however, the Clause does apply to the Board members by virtue of how the Corporation is established in federal statute, then the Board members may not exercise "significant authority" unless they are appointed in conformance with the Appointments Clause. Although the Corporation's 11 Board members are initially appointed by the Secretary of the Transportation, all subsequent Board members are to be elected by the Board, pursuant to the required stakeholder designations. This method of appointment does

[138] *Buckley*, 424 U.S. at 140-41 ("[E]ach of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law.").

[139] As discussed *supra*, a hypothetical reviewing court is unlikely to find an unlawful delegation of authority to a private entity if the private entity is not exercising "regulatory authority," such as the rulemaking function at issue in *American Railorads* discussed *supra*. However, a violation of the Appointments Clause could arguably present itself if it is determined to be applicable to a private actor and that actor is found to be exercising "significant authority pursuant to the laws of the United States," which could be arguably broader in scope than functions that are viewed as exercises of "regulatory authority."

[140] *See* The Constitutional Separation of Powers Between the President and Congress, 20 Op. Att'y Gen. 124, 145 (1996).

[141] *Id.* at 145. *See, e.g.*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States, 367 F.3d 650 (7th Cir. 2004); Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688 (9th Cir. 1997).

[142] *See* 20 Op. Att'y Gen at 145-46 n. 62.

[143] Officers of the United States Within the Meaning of the Appointments Clause, Memorandum from the Office of Legal Counsel for the General Counsels of the Executive Branch at 1 (April 16, 2007), *available at* http://www.justice.gov/sites/default/files/olc/opinions/2007/04/31/appointmentsclausev10.pdf.

[144] As described at the outset, the Corporation would be established as a non-profit, private corporation that is not an agency or subdivision of the United States. Notwithstanding this stipulation, it could still be possible for a reviewing court to determine that the Board members are in fact federal officers. *See, e.g.*, *Lebron*, 513 U.S. at 392 (1995) (holding that Amtrak is a governmental entity for purposes of the First Amendment and stating "[I]t is not for Congress to make the final determination of Amtrak's status as a government entity for purposes of determining constitutional rights of citizens affected by its actions.").

not comport with the requirements of the Clause. Therefore, it is necessary to determine if the Board exercises "significant authority." This question is discussed in depth below.[145]

Presidential Control Over the Execution of the Law

Arguments may also be forwarded that certain delegations to private entities prevent the President from exercising his obligation to "take Care the Laws be faithfully executed" by denying him meaningful control of those who are engaged in the execution of the law.[146] The Supreme Court has suggested on multiple occasions that the Constitution requires the President "personally and through officers whom he appoints" to "administer the laws enacted by Congress."[147]

This principle was employed by the Court most recently in *Free Enterprise Fund v. Public Company Accountability Oversight Board*, a case in which the Court invalidated a law that delegated expansive regulatory powers over the accounting industry to the Public Company Accounting Oversight Board (PCAOB).[148] Although Congress created the Board as a "private 'non-profit corporation,'" the parties agreed, and the Court accepted, that "the Board is 'part of the Government'...and that its members are 'Officers of the United States' who 'exercise significant authority pursuant to the laws of the United States.'"[149] In evaluating the law, the Court began by reiterating that "Article II confers on the President 'the general administrative control of those executing the laws.'"[150] That control, the Court reasoned, stems principally from the President's ability to demand accountability through the power of removal. The Court concluded that by insulating Board members from presidential control with dual-layers of "for cause" removal protections, the law had "impaired" the President's necessary authority to "hold[] his subordinates accountable for their conduct..." and "subvert[ed] the President's ability to ensure that the laws are faithfully executed."[151]

The Court's holding that the President must retain meaningful control over those who execute the laws—primarily via the power of removal—does not appear to apply to all exercises of executive power. Indeed, the Court appears to have limited the category of individuals that the President must retain oversight over to "'Officers of the United States' who 'exercise significant authority pursuant to the laws of the United States.'"[152] The Court left open the question of whether the President must retain meaningful control over those who *do not* exercise "significant authority," holding that:

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[145] *See* "Does the Corporation Exercise Significant Authority?".

[146] U.S. CONST. art. II, § 3. For a more thorough discussion of the Take Care Clause *see* CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

[147] *See* Printz v. United States, 521 U.S. 898 (1997) ("The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through officers whom he appoints..."); Myers v. United States, 272 U.S. 52, 135 (1925) ("The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.").

[148] 561 U.S. 477 (2010).

[149] *Id*. at 486.

[150] *Id* at 492 (citing *Myers*, 272 U.S. at 164). "It is his responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase. As we explained in *Myers*, the President therefore must have some 'power of removing those for whom he cannot continue to be responsible.'" *Id*.

[151] *Id*. at 496.

[152] *Id*. at 506.

> We do not decide the status of other Government employees, nor do we decide whether 'lesser functionaries subordinate to officers of the United States' must be subject to the same sort of control as those who exercise 'significant authority pursuant to the laws.'[153]

Nor did the Court address whether the Constitution requires the President to exercise meaningful control over non-federal governmental or private actors exercising "significant authority." While arguments can be forwarded that the Appointments Clause applies only to governmental, or public offices, it is unlikely that the principles of presidential control embodied in the Take Care Clause would similarly hinge on the private or public status of the official exercising the power. First, while the Appointments Clause explicitly references "Officers of the United States," the Take Care Clause does not. Second, were Congress able to freely vest private actors with "significant authority" to execute and enforce the law, the President's duty to oversee those administering the law would likely be "impermissibly undermine[d]" and may "prevent the Executive Branch from accomplishing its constitutionally assigned functions" in violation of the general separation of powers.[154] The importance of executive branch supervision over quasi-private individuals exercising delegated authority was evident in lower court consideration of the *qui tam* provision of the False Claims Act (FCA), which authorizes a private person (known as a relator) to initiate a civil proceeding "in the name of the government" for violations of the FCA.[155] That action, however, is subject to significant oversight and supervision by the federal government. Generally upholding the law, appellate courts focused on the degree of control that the executive branch exercised over the relator, including the government's authority to intervene, place limits on the relator's participation, restrict the relator's power in discovery, and ultimately to decide whether to settle or dismiss the case.[156] As such, the Executive retained "'sufficient control' over the relator's conduct to insure that the President is able to perform his constitutionally assigned duty."[157]

The President would exercise no control over the Corporation or the Board members.[158] Rather, because the Board would be private, the President would have no authority to remove any member of the Board, and arguably, no authority to oversee its execution of either the law or applicable FAA regulations, if any. If it is determined that the Corporation exercises "significant authority," the proposal may run afoul of the separation of powers generally, and, more specifically, the President's obligation to ensure the faithful execution of the laws.

Does the Corporation Exercise Significant Authority?

Whether the Appointments Clause and constitutional principles of presidential control act to limit Congress's ability to delegate authority to the Corporation to administer or execute the law may both hinge on whether the Corporation is exercising "significant authority pursuant to the laws of the United States."

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[153] *Id.*

[154] *See* Morrison v. Olson, 487 U.S. 654, 698 (1988).

[155] 31 U.S.C. § 3730.

[156] United States ex rel. Stone v. Rockwell International Corp., 282 F.3d 787, 805-807 (10th Cir. 2002); Riley v. St. Luke's Episcopal Hospital, 252 F.3d 749, 757 (5th Cir. 2001) (en banc); United States ex rel. Taxpayers Against Fraud v. General Electric Co., 41 F.3d 1032, 1041 (6th Cir. 1995); United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 757 (9th Cir. 1993).

[157] *General Electric Co.*, 41 F.3d at 1041.

[158] The proposal does not, as has been done in the past, attempt to insulate Board members from presidential influence by establishing a single layer of "for cause" removal protections. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Morrison v. Olson, 487 U.S. 654 (1988).

As noted, the majority opinion in *Buckley* provided only limited insight into the definition of this phrase, only going so far as to suggest that rulemaking, enforcement, and litigation authority would likely be considered "significant."[159] Justice White, in his concurring opinion, went on to opine that the existence of "significant authority" rests on the "breadth" of one's "assigned duties and the nature and importance of their assigned functions."[160] In addition, the D.C. Circuit has recently suggested that whether one exercises "significant authority" rests on "(1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions."[161] The DOJ has identified other factors that it considers pertinent to the inquiry, noting that significant authority is "continuing" rather than "temporary," and

> a legal power which may be rightfully exercised, and in its effects will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State, in contrast with a person whose acts have no authority and power of a public act or law absent the subsequent sanction of an officer or the legislature.[162]

Thus, it would appear that "significant authority" depends on the type and scope of the functions committed to the entity in question.

In many respects, the evaluation of whether the Corporation exercises "significant authority" is analogous to whether it exercises "regulatory authority."[163] To the extent that the Corporation is subject to significant FAA oversight; is limited to assisting or advising the FAA; or acting in a ministerial manner to implement FAA standards, it is unlikely to be exercising significant authority. Thus, a reviewing court is unlikely to consider the exercise of such authority by the Corporation to be an infringement on executive power. In contrast, the "potentially problematic delegations" identified above, especially when taken together, may well give a reviewing court grounds to determine that the Corporation is exercising "significant authority." Such a determination may subject the Corporation to possible constitutional challenges under the Appointments Clause and the separation of powers principles elucidated in *Free Enterprise Fund*.[164] However, these concerns could be ameliorated by providing the executive branch with greater involvement in both the appointment and removal of Board members.

Conclusion

In determining whether Congress has authorized the Corporation to exercise "regulatory authority," which may be considered to be an impermissible delegation to a private entity, a reviewing court would likely focus on the amount of discretion granted to the Corporation and the level of federal surveillance and control of its operations. A similar focus on "significant authority" would likely be applied in an

[159] *Buckley*, 424 U.S. at 140-41.

[160] *Id*. at 269-70 (White, J., concurring).

[161] Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012) (identifying the "main criteria for drawing the line between inferior Officers and employees not covered by the clause...").

[162] Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 143, at 8.

[163] The Court and Justice White's description of "significant authority" does not appear to be confined solely to the exercise of "regulatory authority," such as enforcement or rulemaking authorities. It is, thus, arguably conceivable that while the performance of regulatory functions falls within the realm of significant authority, what constitutes "significant authority" is perhaps broader in scope, as there are likely other functions and duties that would be considered the exercise of significant authority but not viewed as the exercise of traditional regulatory authority.

[164] *See supra* notes 148-53 and accompanying text.

evaluation of whether the Corporation complies with separation of powers principles arising from the Appointments Clause and the Take Care Clause.

A proposal intending to authorize a private entity, such as the Corporation, to provide air traffic control services would likely need to strike a careful balance: it must provide for enough government involvement in policy or regulatory decisions to comply with the constitutional requirements addressed in this memorandum, but not authorize so much government involvement that the Corporation, though intended to be private, is actually viewed by a reviewing court as a part of the government.[165]

[165] *See supra* note 6.