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Amtrak [2]

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To: Elena Kagan

[STAFF WORKING DRAFT]

JULY 19, 1995

104TH CONGRESS
1ST SESSION

S. _____

To reform the statutes relating to Amtrak, to authorize appropriations for Amtrak, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY — (legislative day, (MONTH) (1)), 1995

Mr. _____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To reform the statutes relating to Amtrak, to authorize appropriations for Amtrak, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Amtrak and Local Rail
5 Revitalization Act of 1995".

6 **SEC. 2. FINDINGS.**

7 The Congress finds that—

1 (1) intercity rail passenger service is an essen-
2 tial component of a national intermodal passenger
3 transportation system, and the National Railroad
4 Passenger Corporation (Amtrak) must provide a
5 quality transportation product in the form of clean,
6 comfortable, and on-time service to achieve its full
7 potential;

8 (2) Amtrak has been forced to significantly cut
9 back its basic system due to cash shortages, and fur-
10 ther cutback may be required unless Amtrak is able
11 to reduce its costs and increase its revenues;

12 (3) to ensure Amtrak's long-term viability as a
13 provider of intercity rail passenger service, all of
14 Amtrak's stakeholders must participate in efforts to
15 reduce Amtrak's costs and increase its revenues;

16 (4) additional management flexibility is needed
17 to allow Amtrak to operate in a businesslike manner
18 in order to adjust quickly to meet demand and
19 changing customer needs;

20 (5) Amtrak's management and employees are
21 dedicated to providing the high-quality service that
22 Amtrak's customers deserve but additional capital
23 investment is needed to acquire the modern equip-
24 ment and efficient facilities that are essential to sat-

1 isfy the demand for superior intercity rail passenger
2 service:

3 (6) adequate levels of capital investment from
4 the Federal Government and State governments and
5 innovative partnerships with the private sector will
6 enable Amtrak to provide the world class service
7 American rail passengers deserve and will help re-
8 duce operating costs in the long term;

9 (7) Amtrak's management should be held ac-
10 countable to ensure that all capital investment by
11 the Federal Government and State governments is
12 used effectively to improve the quality of service and
13 the long-term financial health of Amtrak;

14 (8) Amtrak's employees should share equitably
15 in the burden of restoring Amtrak to financial
16 health;

17 (9) States, local governments, and private par-
18 ties can and should play an increasingly significant
19 role in supporting cost-efficient intercity rail pas-
20 senger transportation and in addressing local trans-
21 portation needs and air quality control;

22 (10) mandatory payments reflecting funds paid
23 into the railroad retirement and railroad unemploy-
24 ment systems on Amtrak's behalf in excess of the
25 funds needed to pay retirement and unemployment

1 - benefits for Amtrak's employees and their bene-
2 ficiaries should not be considered a Federal operat-
3 ing subsidy of Amtrak;

4 (11) Federal financial assistance to cover oper-
5 ating losses incurred by Amtrak should be elimi-
6 nated by the year 2001;

7 (12) Amtrak and its employees should proceed
8 quickly with proposals to modify collective bargain-
9 ing agreements to make more efficient use of man-
10 power and to realize cost savings which are nec-
11 essary to eliminate Federal financial assistance to
12 cover its operating losses by the fiscal year following
13 the fifth anniversary of the date of enactment of this

3 and
14 Act)

15 (13) Amtrak should ensure that new manage-
16 ment flexibility produces cost savings without com-
17 promising safety.

18 TITLE I—PROCUREMENT

19 REFORMS

20 SEC. 101. CONTRACTING OUT.

21 (a) CONTRACTING OUT REFORM.—Effective 180
22 days after the date of enactment of this Act, section
23 24312(b) of title 49, United States Code, is amended—

24 (1) by striking “(a)(1)” in subsection (a)(1)
25 and inserting “(a)”;

1 (2) by striking "(2)" in subsection (a)(2) and
2 inserting "(b)"; and

3 (3) by striking subsection (b).

4 The amendment made by paragraph (3) is without preju-
5 dice to the power of Amtrak to contract out the provision
6 of food and beverage services on board Amtrak trains or
7 to contract out work not resulting in the layoff of Amtrak
8 employees.

9 (b) NEGOTIATION OF CONTRACTING OUT RULES.—

10 (1) IN GENERAL.—Within 5 days after the date
11 of enactment of this Act, Amtrak and its labor orga-
12 nizations shall meet to resolve the issue of under
13 what conditions, if any, Amtrak may contract out
14 work normally performed by an employee in a bar-
15 gaining unit covered by a contract between Amtrak
16 and its labor organizations when the contracting out
17 results in the layoff of employees in the bargaining
18 unit. The issue for negotiation under this paragraph
19 does not include the contracting out of work involv-
20 ing food and beverage services provided on Amtrak
21 trains or the contracting out of work not resulting
22 in the layoff of Amtrak employees.

23 (2) ASSISTED NEGOTIATIONS IF ISSUE UNRE-
24 SOLVED WITHIN 90 DAYS.—If the parties negotiat-
25 ing under paragraph (1) are unable to resolve the

1 issue within 90 days after such date of enactment,
2 they shall each select a neutral person from the list
3 of National Mediation Board arbitrators. The per-
4 sons selected shall meet and select an arbitrator who
5 will assist the parties in their discussions and arbi-
6 trate the dispute if the parties fail to negotiate a
7 resolution of the issue. If the National Mediation
8 Board is not informed of the selection of the arbitra-
9 tor within 120 days after such date of enactment,
10 the National Mediation Board will immediately se-
11 lect the arbitrator for the issue in dispute. One half
12 of the expenses of the neutral persons and the arbi-
13 trator selected under this paragraph will be borne by
14 Amtrak, and the other half by the labor organiza-
15 tions jointly.

16 (3) HEARING SCHEDULED.—If the issue re-
17 mains unresolved 120 days after such date of enact-
18 ment, the arbitrator selected under paragraph (2)
19 shall schedule a hearing to be held 150 days after
20 such date of enactment and shall meet with the par-
21 ties to mediate the issue before the hearing.

22 (4) LAST BEST OFFERS.—If the issue has not
23 been resolved before the date of the hearing sched-
24 uled under paragraph (3), each party involved in the

1 negotiation shall submit its last best offer to the ar-
2 bitrator at the time of the hearing.

3 (5) HEARING PROCEDURE.—At the hearing,
4 the arbitrator shall receive the arguments and sup-
5 porting evidence for the positions of the parties, as
6 well as any clarifications of last best offers submit-
7 ted by the parties. All materials to be reviewed by
8 the arbitrator shall be presented at the hearing.

9 (6) AWARD.—

10 (A) IN GENERAL.—Within 170 days after
11 such date of enactment, the arbitrator will se-
12 lect either of the last best offers and render an
13 award resolving the issue. The authority of the
14 arbitrator is limited to resolving the issue pre-
15 sented by the hearing. The award will take ef-
16 fect on the 180th day after such date of enact-
17 ment, and, except as provided in subparagraph
18 (B) shall be final and binding on all parties.

19 (B) CONTEST OF AWARD.—The United
20 States District Court for the District of Colum-
21 bia has exclusive jurisdiction to hear an action
22 contesting an award under subparagraph (A).
23 The court may not set aside or modify such an
24 award except on—

- 1 (i) the grounds that the proceeding or
2 the award plainly does not conform to the
3 substantive requirements of this section; or
4 (ii) grounds set forth in section 9
5 Third (c) of the Railway Labor Act (45
6 U.S.C. 159 Third (c)).

7 Except as otherwise provided in this section,
8 the provisions of section 9 of such Act (45
9 U.S.C. 159) govern any contest of an award
10 under subparagraph (A) of this section.

11 (C) AWARD SUPERSEDES EXISTING COL-
12 LECTIVE BARGAINING ARRANGEMENTS.—An
13 award under subparagraph (A) supersedes any
14 collective bargaining agreement entered into be-
15 fore the award is made, and any practice in ef-
16 fect before the award is made, to the extent
17 that such agreement or practice is inconsistent
18 with the award or limits the right to engage in
19 subcontracting under the award.

20 (7) AMENDMENT OF AWARD.—The award re-
21 mains in effect until amended by mutual agreement
22 of the parties. Notices under section 6 of the Rail-
23 way Labor Act to amend the award may not be
24 served until 30 days before the end of the third year
25 after the effective date of the award

1 (b) NO PRECEDENT FOR FREIGHT.—Nothing in this
2 section shall be a precedent for the resolution of any dis-
3 pute between a freight railroad and any labor organization
4 representing that railroad's employees.

5 **SEC. 102. CONTRACTING PRACTICES.**

6 (a) BELOW-COST COMPETITION.—Section 24305(b)
7 of title 49, United States Code, is amended to read as
8 follows:

9 “(b) BELOW-COST COMPETITION.—Amtrak shall not
10 submit any bid for the performance of services under a
11 contract for an amount less than the cost to Amtrak of
12 performing such services, with respect to any activity
13 other than the provision of intercity rail passenger trans-
14 portation, or mail or express transportation. For purposes
15 of this subsection, the cost to Amtrak of performing serv-
16 ices shall be determined using generally accepted account^{ing}
17 principles for contracting. This subsection shall not apply
18 for any fiscal year for which Amtrak receives no Federal
19 operating subsidy.”

20 (b) THROUGH SERVICE IN CONJUNCTION WITH
21 INTERCITY BUS OPERATIONS.—Section 24305(a) of title
22 49, United States Code, is amended by adding at the end
23 the following new paragraph:

24 “(3)(A) Except as provided in subsection (d)(2), Am-
25 trak may enter into a contract with a motor carrier of

1 passengers for the intercity transportation of passengers
2 by motor carrier over regular routes only—

3 “(i) if the motor carrier is not a public recipient
4 of governmental assistance, as such term is defined
5 in section 10922(d)(1)(F)(i) of this title, other than
6 a recipient of funds under section 18 of the Federal
7 Transit Act;

8 “(ii) for passengers who have had prior move-
9 ment by rail or will have subsequent movement by
10 rail; and

11 “(iii) if the buses, when used in the provision
12 of such transportation, are used exclusively for the
13 transportation of passengers described in clause (ii).

14 “(B) Subparagraph (A) shall not apply to transpor-
15 tation funded predominantly by a State or local govern-
16 ment, or to ticket selling agreements.”

17 (2) Section 24305(d) of title 49, United States Code,
18 is amended by adding at the end the following new para-
19 graph:

20 “(3) Congress encourages Amtrak and motor com-
21 mon carriers of passengers to use the authority conferred
22 in section 11342(a) of this title for the purpose of provid-
23 ing improved service to the public and economy of oper-
24 ation.”

1 **SEC. 103. RAIL AND MOTOR CARRIER PASSENGER SERVICE.**

2 (a) IN GENERAL.—Notwithstanding any other provi-
3 sion of law, Amtrak and motor carriers of passengers are
4 authorized—

5 (1) to combine or package their respective serv-
6 ices and facilities to the public as a means of in-
7 creasing revenues; and

8 (2) to coordinate schedules, routes, rates, res-
9 ervations, and ticketing to provide for enhanced
10 intermodal surface transportation.

11 (b) REVIEW.—The authority granted by subsection
12 (a) is subject to the review of the Interstate Commerce
13 Commission and such authority may be modified or re-
14 voked by the Interstate Commerce Commission if in the
15 public interest.

16 **SEC. 104. WORLD CLASS SERVICE.**

17 Section 24101(c) of title 49, United States Code, is
18 amended by redesignating paragraphs (10) and (11) as
19 (12) and (13), respectively, and by inserting after para-
20 graph (9) the following:

21 “(10) manage capital investment in such a way
22 as to provide customers with world class service;

23 “(11) treat all passengers with respect, cour-
24 tesy, and dignity;”.

1 **SEC. 105. PASSENGER CHOICE.**

2 Federal employees shall be permitted to choose travel
3 on Amtrak for official business where total travel cost
4 from office to office is competitive on a total trip or time
5 basis.

6 **SEC. 106. FREEDOM OF INFORMATION ACT.**

7 Section 24301(e) of title 49, United States Code, is
8 amended by adding at the end thereof the following: "Sec-
9 tion 552 of title 5, United States Code, shall apply to Am-
10 trak in any fiscal year for which Amtrak receives a Fed-
11 eral operating subsidy."

12 **TITLE II—OPERATIONAL**
13 **REFORMS**

14 **SEC. 201. BASIC SYSTEM.**

15 (a) **OPERATION OF BASIC SYSTEM.**—Amtrak shall
16 strive to operate as a national rail passenger transpor-
17 tation system which provides access to all areas of the
18 country and ties together existing and emergent regional
19 rail passenger networks and other intermodal passenger
20 service.

21 (b) **IMPROVING RAIL PASSENGER TRANSPOR-**
22 **TATION.**—Section 24702 of title 49, United States Code,
23 and the item relating thereto in the table of sections of
24 chapter 247 of such title, are repealed.

25 (c) **DISCONTINUANCE.**—Section 24706 of title 49,
26 United States Code, is amended—

1 (1) by striking "90 days" and inserting "180
2 days" in subsection (a)(1);

3 (2) by striking "a discontinuance under section
4 24704 or 24707(a) or (b) of this title" in subsection
5 (a)(1) and inserting "discontinuing service over a
6 route";

7 (3) by inserting "or assume" after "agree to
8 share" in subsection (a)(1); and

9 (4) by striking "section 24704 or 24707(a) or
10 (b) of this title" in subsections (a)(2) and (b)(1) and
11 inserting "paragraph (1)".

12 (d) **COST AND PERFORMANCE REVIEW.**—Section
13 24707 of title 49, United States Code, and the item relat-
14 ing thereto in the table of sections of chapter 247 of such
15 title, are repealed.

16 (e) **SPECIAL COMMUTER TRANSPORTATION.**—Section
17 24708 of title 49, United States Code, and the item relat-
18 ing thereto in the table of sections of chapter 247 of such
19 title, are repealed.

20 (f) **CONFORMING AMENDMENT.**—Section
21 24312(a)(1) of title 49, United States Code, is amended
22 by striking ", 24701(a),".

1 SEC. 202. MAIL, EXPRESS, AND AUTO-FERRY TRANSPOR-
2 TATION.

3 (a) REPEAL.—Section 24306 of title 49, United
4 States Code, and the item relating thereto in the table of
5 sections of chapter 243 of such title, are repealed.

6 (b) CONFORMING AMENDMENT.—Section 24301 of
7 title 49, United States Code, is amended by adding at the
8 end the following new subsection:

9 “(o) NONAPPLICATION OF CERTAIN OTHER LAWS.—
10 State and local laws and regulations that impair the provi-
11 sion of mail, express, and auto-ferry transportation do not
12 apply to Amtrak or a rail carrier providing mail, express,
13 or auto-ferry transportation.”

14 SEC. 203. ROUTE AND SERVICE CRITERIA.

15 Section 24703 of title 49, United States Code, and
16 the item relating thereto in the table of sections of chapter
17 247 of such title, are repealed.

18 SEC. 204. ADDITIONAL QUALIFYING ROUTES.

19 Section 24705 of title 49, United States Code, and
20 the item relating thereto in the table of sections of chapter
21 247 of such title, are repealed.

22 SEC. 205. TRANSPORTATION REQUESTED BY STATES, AU-
23 THORITIES, AND OTHER PERSONS.

24 (a) REPEAL.—Section 24704 of title 49, United
25 States Code, and the item relating thereto in the table of
26 sections of chapter 247 of such title, are repealed.

1 (b) EXISTING AGREEMENTS.—Amtrak shall not,
2 after the date of the enactment of this Act, be required
3 to provide transportation services pursuant to an agree-
4 ment entered into before such date of enactment under
5 the section repealed by subsection (a) of this section.

6 (c) STATE, REGIONAL, AND LOCAL COOPERATION.—
7 Section 24101(c)(2) of title 49, United States Code, is
8 amended by inserting “, separately or in combination,”
9 after “and the private sector”.

10 (d) CONFORMING AMENDMENT.—Section
11 24312(a)(1) of title 49, United States Code, is amended
12 by striking “or 24704(b)(2)”.

13 **SEC. 208. AMTRAK COMMUTER.**

14 (a) REPEAL OF CHAPTER 245.—Chapter 245 of title
15 49, United States Code, and the item relating thereto in
16 the table of chapters of subtitle V of such title, are re-
17 pealed.

18 (b) CONFORMING AMENDMENT.—Section 24301(f) of
19 title 49, United States Code, is amended to read as fol-
20 lows:

21 “(f) TAX EXEMPTION FOR CERTAIN COMMUTER AU-
22 THORITIES.—A commuter authority that was eligible to
23 make a contract with Amtrak Commuter to provide com-
24 muter rail passenger transportation but which decided to
25 provide its own rail passenger transportation beginning

1 January 1, 1983, is exempt, effective October 1, 1981,
2 from paying a tax or fee to the same extent Amtrak is
3 exempt.”.

4 (c) TRACKAGE RIGHTS NOT AFFECTED.—Subsection
5 (a) of this section shall not affect any trackage rights held
6 by Amtrak or the Consolidated Rail Corporation.

7 **SEC. 207. COMMUTER COST SHARING ON THE NORTHEAST**
8 **CORRIDOR.**

9 (a) DETERMINATION OF COMPENSATION.—(1) Sec-
10 tion 24904(c)(2) of title 49, United States Code, is
11 amended—

12 (A) by striking “between intercity rail pas-
13 senger and rail freight transportation” and inserting
14 “among intercity rail passenger, commuter rail pas-
15 senger, and rail freight transportation”; and

16 (B) by inserting “commuter rail carrier or”
17 after “Commission shall assign to a”.

18 (2) The amendments made by paragraph (1) of this
19 subsection shall take effect 2 years after the date of the
20 enactment of this Act.

21 (b) PRIVATIZATION.—Section 24101(d) of title 49,
22 United States Code, is amended to read as follows:

23 “(d) MINIMIZING GOVERNMENT SUBSIDIES.—To
24 carry out this part, Amtrak is encouraged to make agree-
25 ments with the private sector and undertake initiatives

1 that are consistent with good business judgment, that
2 produce income to minimize Government subsidies, and
3 that promote the potential privatization of Amtrak's oper-
4 ations."

5 **SEC. 208. ACCESS TO RECORDS AND ACCOUNTS.**

6 Section 24315 of title 49, United States Code, is
7 amended by adding at the end the following new sub-
8 section:

9 "(h) ACCESS TO RECORDS AND ACCOUNTS.—A State
10 shall have access to Amtrak's records, accounts, and other
11 necessary documents used to determine the amount of any
12 payment to Amtrak required of the State."

13 **TITLE III—EMPLOYEE**
14 **PROTECTION REFORMS**

15 **SEC. 301. SERVICE DISCONTINUANCE.**

16 (a) REPEAL.—Section 24706(c) of title 49, United
17 States Code, is amended to read as follows:

18 "(c) EMPLOYEE PROTECTION.—Notwithstanding any
19 arrangement in effect before the enactment of the Amtrak
20 and Local Rail Revitalization Act of 1995—

21 "(1) an employee of Amtrak shall be entitled to
22 protective benefits only if deprived of employment as
23 a result of a discontinuance of intercity rail pas-
24 senger service or other transaction creating an enti-
25 tlement to such benefits;

1 “(2) the total amount of protective payments
2 shall not exceed 6 months’ pay; and

3 “(3) fringe benefits shall not be continued in
4 excess of 6 months or the minimum period estab-
5 lished by other Federal law for such benefits, which-
6 ever is longer.”.

7 (b) INTERCITY PASSENGER SERVICE EMPLOYEES.—

8 Section 1165(a) of the Northeast Rail Service Act of 1981
9 (45 U.S.C. 1113(a)) is amended—

10 (1) by inserting “(1)” before “After January 1,
11 1983”;

12 (2) by striking “Amtrak, Amtrak Commuter,
13 and Conrail” and inserting “Amtrak and Conrail”;

14 (3) by striking “Such agreement shall ensure”
15 and all that follows through “submitted to binding
16 arbitration.”; and

17 (4) by adding at the end the following new
18 paragraph: --

19 “(2) Notwithstanding any other provision of law,
20 agreement, or arrangement, with respect to employees in
21 any class or craft in train or engine service, Conrail shall
22 have the right to furlough one such employee for each em-
23 ployee in train or engine service who moves from Amtrak
24 to Conrail in excess of the cumulative number of such em-
25 ployees who move from Conrail to Amtrak. Conrail shall

1 not be obligated to fill any position governed by an agree-
2 ment concerning crew consist, attrition arrangements, re-
3 serve boards, or reserve engine service positions, where an
4 increase in positions is the result of the return of an Am-
5 trak employee pursuant to an agreement entered into
6 under paragraph (1). Conrail's collective bargaining agree-
7 ments with organizations representing its train and engine
8 service employees shall be deemed to have been amended
9 to conform to this paragraph. Any dispute or controversy
10 with respect to the interpretation, application, or enforce-
11 ment of this paragraph which has not been resolved within
12 90 days after the date of the enactment of this paragraph
13 may be submitted by either party to an adjustment board
14 for a final and binding decision under section 3 of the
15 Railway Labor Act."

16 (f) TECHNICAL AMENDMENT.—Section 11347 of title
17 49, United States Code, is amended by striking "sections
18 24307(c), 24312, and" and inserting "section".

19 **TITLE IV—USE OF RAILROAD**
20 **FACILITIES**

21 **SEC. 401. LIABILITY LIMITATION.**

22 (a) AMENDMENT.—Chapter 281 of title 49, United
23 States Code, is amended by adding at the end the follow-
24 ing new section:

1 "§ 28103. Limitations on rail passenger transpor-
2 tation liability

3 "(a) LIMITATIONS.—

4 "(1) Notwithstanding any other statutory or
5 common law or public policy, or the nature of the
6 conduct giving rise to damages or liability, contract
7 between Amtrak and its passengers regarding claims
8 for personal injury, death, or damage to property
9 arising from or in connection with the provision of
10 rail passenger transportation, or from or in connec-
11 tion with any operations over or use of right-of-way
12 or facilities owned, leased, or maintained by Amtrak,
13 or from or in connection with any rail passenger
14 transportation operations over or rail passenger
15 transportation use of right-of-way or facilities
16 owned, leased, or maintained by any high-speed rail-
17 road authority or operator, any commuter authority
18 or operator, or any rail carrier shall be enforceable
19 if—

20 "(A) punitive or exemplary damages,
21 where permitted, are not limited to less than 2
22 times compensatory damages awarded to any
23 claimant by any State or Federal court or ad-
24 ministrative agency, or in any arbitration pro-
25 ceeding, or in any other forum or \$250,000,
26 whichever is greater;

1 “(B) passengers are provided adequate no-
2 tice of any such contractual limitation or waiver
3 or choice of forum; and

4 “(C) passengers are given an opportunity
5 to purchase supplemental insurance coverage
6 when a ticket is purchased or at point of depar-
7 ture.

8 “(2) For purposes of this subsection, the term
9 ‘claim’ means a claim made directly or indirectly—

10 “(A) against Amtrak, any high-speed rail-
11 road authority or operator, any commuter au-
12 thority or operator, or any rail carrier including
13 the Alaskan Railroad or private rail cars; or

14 “(B) against an affiliate engaged in rail-
15 road operations, officer, employee, or agent of,
16 Amtrak, any high-speed railroad authority or
17 operator, any commuter authority or operator,
18 or any rail carrier.

19 “(3) Notwithstanding paragraph (1)(A), if, any
20 case in which death was caused, the law of the place
21 where the act or omission complained of occurred
22 provides, or has been construed to provide, for dam-
23 ages only punitive in nature, a claimant may recover
24 in a claim limited by this subsection for actual or
25 compensatory damages measured by the pecuniary

1 injuries. resulting from such death, to the persons
2 for whose benefit the action was brought, subject to
3 the provisions of paragraph (1)(B).

4 “(b) EFFECT ON OTHER LAWS.—This section shall
5 not affect the damages that may be recovered under the
6 Act of April 27, 1908 (45 U.S.C. 51 et seq.; popularly
7 known as the ‘Federal Employers’ Liability Act’) or under
8 any workers compensation act.”

9 (b) CONFORMING AMENDMENT.—The table of sec-
10 tions of chapter 281 of title 49, United States Code, is
11 amended by adding at the end the following new item:

“28103. Limitations on rail passenger transportation liability.”

12 **TITLE V—FINANCIAL REFORMS**

13 **SEC. 501. AMTRAK FINANCIAL GOALS.**

14 Section 24101(d) of title 49, United States Code, is
15 amended by adding at the end thereof the following: “Am-
16 trak shall prepare a financial plan to operate within the
17 funding levels authorized by section 24104 of this chapter,
18 including budgetary goals for fiscal years 1995 through
19 1997. Commencing no later than the fiscal year following
20 the fifth anniversary of the enactment of the Amtrak and
21 Local Rail Revitalization Act of 1995, Amtrak shall oper-
22 ate without the need for any Federal operating grant
23 funds appropriated for its benefit. The plan shall include
24 internal reforms to maximize cost savings through over-
25 head reduction and productivity improvement, steps to

1 maximize revenue, implementation of a commercially
2 rationalized national route system, and achievement
3 through negotiation of substantial reductions in costs di-
4 rectly relating to health and welfare plans, train and en-
5 gine crew size requirements, and mechanical workforce in-
6 efficiencies. Each year before the fifth anniversary of the
7 date of enactment of the Amtrak and Local Rail Revital-
8 ization Act of 1995, the Amtrak Reform Council shall sub-
9 mit to the Congress a progress report outlining the likeli-
10 hood that Amtrak will not require Federal operating
11 grants after that anniversary.”

12 **SEC. 502. AMTRAK SUNSET TRIGGER.**

13 Section 24104 of title 49, United States Code, is
14 amended by adding at the end thereof the following:

15 “(g) SUNSET TRIGGER.—

16 “(1) Following the third anniversary of the en-
17 actment of the Amtrak and Local Rail Revitalization
18 Act of 1995, the Amtrak Reform Council shall re-
19 view the progress Amtrak has made under its plan
20 to achieve the financial goals specified in section
21 24101(d), and determine on the basis of perform-
22 ance under the plan the likelihood that Amtrak will
23 not require Federal operating grant funds appro-
24 priated for its benefit after fifth anniversary of the
25 enactment of that Act. The Amtrak Reform Council

1 will submit a report on its findings and determina-
2 tions to the Congress 90 days after the third anni-
3 versary of the enactment of that Act. Authorizations
4 for appropriations made by this section for fiscal
5 years beginning after the submission of the report to
6 the Congress pursuant to this subsection are condi-
7 tioned on [Amtrak achieving the targets in its plan
8 and findings that Amtrak will not require Federal
9 operating grant funds to be appropriated for its ben-
10 efit in fiscal years following the fifth anniversary of
11 the enactment of that Act.

2
12 “(3) In determining whether Amtrak has met
13 the targets in its plans and the likelihood that it will
14 not require a Federal operating subsidy for fiscal
15 years beginning after the fifth anniversary of the
16 date of enactment of the Amtrak and Local Rail Re-
17 vitalization Act of 1995, the Amtrak Reform Council
18 shall take into account Acts of God, national emer-
19 gencies, and other events beyond the reasonable con-
20 trol of Amtrak.

3
21 “(4) If the Amtrak Reform Council finds
22 that—

23 “(A) Amtrak has met the financial goals
24 anticipated for it at the end of 3 years, taking
25 into account the factors in paragraph (3), then 2

1 the Secretary and Amtrak shall implement the
2 Amtrak plan developed under section
3 601(b)(6)(A) of the Amtrak and Local Rail Re-
4 vivalization Act of 1995 providing the continued
5 operation of Amtrak unless the Congress dis-
6 approves the plan within 45 days after it is sub-
7 mitted to the Congress; or

8 “(B) Amtrak has failed to meet the finan-
9 cial goals anticipated for it at the end of 3
10 years, taking into account the factors in para-
11 graph (3), then the Secretary and Amtrak shall
12 implement the Amtrak sunset plan developed
13 under section 601(b)(6)(B) of that Act provid-
14 ing for the complete liquidation of Amtrak.

4

15 “(5) The annual report of the Amtrak Reform
16 Council shall include an assessment of progress on
17 the resolution or status of productivity issues, in-
18 cluding—

19 “(A) train and engine manning require-
20 ments;

21 “(B) utilization of employees in the me-
22 chanical operations;

23 “(C) health and welfare benefits and plan
24 design;

25 “(D) management efficiency improvement;

- 1 “(E) property utilization and management;
2 “(F) revenue enhancement and ridership;
3 “(G) Amtrak’s operation as a national pas-
4 senger rail system which provides access to all
5 areas of the country and ties together existing
6 and emerging regional rail passenger networks
7 and other intermodal passenger service;
8 “(H) technology utilization; and
9 “(I) procurement reforms.”.

10 **SEC. 503. DISBURSEMENT OF FEDERAL FUNDS; GRANT RE-**
11 **LEASE DATE.**

12 Section 24104(d) of title 49, United States Code, is
13 amended to read as follows:

14 “(d) ADMINISTRATION OF APPROPRIATIONS.—Funds
15 appropriated pursuant to this section shall be provided to
16 Amtrak upon appropriation when requested by Amtrak.
17 Notwithstanding any agreement to the contrary, funds
18 that have been appropriated to the Secretary for use in
19 implementing the Northeast Corridor Improvement
20 Project prior to September 30, 1995, shall be made imme-
21 diately available to Amtrak for use in undertaking the im-
22 provements authorized by chapter 249 of this title.”.

1 **SEC. 504. TRANSFER OF EXCESS RAILROAD TAXES.**

2 Section 24301 of title 49, United States Code, as
3 amended by section 504, is amended by adding at the end
4 thereof the following new subsection:

5 “(q) TAX RELIEF.—

6 “(1) IN GENERAL.—Notwithstanding any other
7 provision of law, Amtrak shall, effective October 1,
8 1995, be relieved from any liability or obligation to
9 pay—

10 “(A) tax liabilities under section 3221 of
11 the Internal Revenue Code of 1986 that are
12 more than the amount needed for benefits for
13 individuals who retire from Amtrak and for
14 their beneficiaries;

15 “(B) obligations of Amtrak under section
16 8(a) of the Railroad Unemployment Insurance
17 Act (45 U.S.C. 358(a)) that are more than obli-
18 gations of Amtrak calculated on an experience-
19 related basis; and

20 “(C) obligations of Amtrak due under sec-
21 tion 3321 of the Internal Revenue Code of
22 1986.

23 “(2) SCOPE.—

24 “(A) EMPLOYEE CLASSIFICATION.—In de-
25 termining Amtrak’s liabilities or obligations
26 under this paragraph, workers not on Amtrak’s

1 employee roster shall not be classified as Am-
2 trak's employees.

3 “(B) NO REDUCTION OF BENEFIT.—Noth-
4 ing in this paragraph shall be construed as a
5 basis for reducing any benefit payable to any
6 railroad employee, retiree, or beneficiary.

7 “(C) RESIDUAL LIABILITY.—Amtrak re-
8 mains liable for any obligations not paid under
9 paragraph 3.

10 “(3) AUTHORIZATION OF APPROPRIATIONS.—
11 There are authorized to be appropriated to the Sec-
12 retary amounts equal to the tax liabilities or obliga-
13 tions from which Amtrak has been relieved here-
14 under. Appropriations to the Secretary which have
15 been authorized by this subsection shall paid in the
16 same manner as tax liabilities or obligations from
17 which Amtrak has not been relieved. In no event
18 shall the Secretary's payments to the Railroad Trust
19 Fund be less than that which would have been re-
20 quired to be paid by Amtrak before enactment of the
21 Amtrak and Local Rail Revitalization Act of 1995.
22 Amounts appropriated under this subsection shall
23 not be considered a United States Government sub-
24 sidy of Amtrak but rather a subsidy of the railroad
25 retirement system as a whole.”

1 **SEC. 505. REPORTS AND AUDITS.**

2 Section 24315 of title 49, United States Code, is
3 amended—

4 (1) by striking subsections (a) and (c);

5 (2) by redesignating subsections (b), (d), (e),
6 (f), and (g) as subsections (a), (b), (c), (d), and (e),
7 respectively; and

8 (3) in subsection (d), as so redesignated by
9 paragraph (2) of this section, by striking “(d) or
10 (e)” and inserting “(b) or (c)”.

11 **SEC. 506. OFFICERS' PAY.**

12 Section 24303(b) of title 49, United States Code, is
13 amended by adding at the end the following: “The preced-
14 ing sentence shall not apply for any fiscal year for which
15 no Federal operating assistance is provided to Amtrak.”.

16 **SEC. 507. EXEMPTION FROM TAXES.**

17 Section 24301(l)(1) of title 49, United States Code,
18 is amended—

19 (1) by inserting “, and any passenger or other
20 customer of Amtrak or such subsidiary,” after “sub-
21 sidiary of Amtrak”;

22 (2) by striking “or fee imposed” and all that
23 follows through “levied on it” and inserting “, fee,
24 head charge, or other charge, imposed or levied by
25 a State, political subdivision, or local taxing author-
26 ity, directly or indirectly on Amtrak, a rail carrier

1 subsidiary of Amtrak, or on persons traveling in
2 intercity rail passenger transportation or on mail or
3 express transportation provided by Amtrak or such
4 a subsidiary, or on the carriage of such persons,
5 mail, or express, or on the sale of any such transpor-
6 tation, or on the gross receipts derived therefrom";
7 and

8 (3) by striking the last sentence and inserting
9 the following: "Amtrak is not exempt from a tax or
10 fee it was required to pay as of September 10, 1982,
11 if that tax or fee was assessed before April 1,
12 1995."

13 **TITLE VI—MISCELLANEOUS**

14 **SEC. 601. AMTRAK REFORM COUNCIL.**

15 (a) **ESTABLISHMENT.**—There is established an inde-
16 pendent commission to be known as the Amtrak Reform
17 Council:

18 (b) **DUTIES.**—The Council shall—

19 (1) evaluate Amtrak's performance and report
20 thereon annually to the Congress;

21 (2) prepare an analysis and critique of Am-
22 trak's business plan;

23 (3) suggest strategies for further cost contain-
24 ment and productivity improvements, including

*NB -
only
advisory
etc*

1 strategies with the potential for further reduction in
2 Federal operating subsidies;

3 (4) consider the merits, costs, and service impli-
4 cations of the partial or complete privatization of
5 Amtrak's operations;

6 (5) recommend appropriate methods for adop-
7 tion of uniform cost and accounting procedures
8 throughout the Amtrak system, based on generally
9 accepted accounting principles; and

10 (6) either—

11 (A) develop, and submit to the Congress,
12 an action plan for Amtrak, to take effect not
13 later than the fiscal year beginning after the
14 fifth anniversary of the date of enactment of
15 this Act in the event that the Amtrak sunset is
16 not triggered under section 24104(g) of title
17 49, United States Code; or

18 (B) develop an action plan for complete
19 liquidation of Amtrak no later than the fifth
20 anniversary of the date of enactment of this Act
21 in the event Amtrak sunset is triggered under
22 section 24104(g) of title 49, United States
23 Code.

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Congressional
approval
not needed.

1 (c) MEMBERSHIP.—(1)(A) The Council shall consist
2 of 8 members appointed by the President, by and with
3 the advise and consent of the Senate.

*normal
good
appointments
process*

4 (B) The President shall transmit to the Senate the
5 nominations for appointment to the Commission within 90
6 days after the date of enactment of this Act.

7 (C) Members shall serve for terms of 5 years.

8 (2) Appointments under paragraph (1) shall be made
9 from among individuals who—

10 (A) have technical qualification, professional
11 standing, and demonstrated expertise in the fields of
12 transportation, rail labor, and corporate manage-
13 ment; and

*except
some
limits a
total
discretion
(fairly
memo)*

14 (B) are not employees of Amtrak, employees of
15 the United States, or representatives of rail labor or
16 rail management.

17 (3) In selecting individuals for nominations for ap-
18 point to the Council, the President shall consult with—

*consultative
requirements*

19 (A) the Speaker of the House of Representa-
20 tives concerning the appointment of 2 members;

21 (B) the majority leader of the Senate concern-
22 ing the appointment of 2 members;

23 (C) the minority leader of the House of Rep-
24 resentatives concerning the appointment of 1 mem-
25 ber; and

1 (D) the minority leader of the Senate concern-
2 ing the appointment of 1 member.

3 (4) At the time the President nominates individuals
4 for appointment to the Council, the President shall des-
5 ignate one such individual as Chairman. The Chairman
6 shall serve as chairman until the confirmation of his suc-
7 cessor.

8 (5) If a vacancy occurs other than by the expiration
9 of a term, the individual appointed to fill the vacancy shall
10 serve only for the unexpired portion of the term for which
11 that individual's predecessor was appointed.

12 (d) MEETINGS.—

13 (1) Each meeting of the Council, other than
14 meetings in which proprietary information is to be
15 discussed, shall be open to the public.

16 (2) All proceedings, information, and delibera-
17 tions of the Council shall be open, upon request, to
18 the Chairman and the ranking minority party mem-
19 ber of the Subcommittee on Surface Transportation
20 of the Committee on Commerce, Science, and Trans-
21 portation of the Senate or such other members of
22 the subcommittee designated by the chairman or
23 ranking minority party member.

24 (e) TRAVEL EXPENSES.—Each member of the Coun-
25 cil shall serve without pay, but shall receive travel ex-

1 penses, including per diem in lieu of subsistence, in ac-
2 cordance with sections 5702 and 5703 of title 5, United
3 States Code.

4 (f) ADMINISTRATIVE SUPPORT.—The Secretary of
5 Transportation shall provide to the Council such adminis-
6 trative support as the Council requires to carry out this
7 section.

8 (g) ACCESS TO INFORMATION.—Amtrak shall make
9 available to the Council all information the Council re-
10 quires to carry out this section. The Council shall establish
11 appropriate procedures to ensure against the public disclo-
12 sure of any information obtained under this subsection
13 which is a trade secret or commercial or financial informa-
14 tion that is privileged or confidential.

15 (h) REPORTS.—(1) Within 180 days after the date
16 of the enactment of this Act, the Council shall transmit
17 to the Amtrak board of directors and the Congress an in-
18 terim report on its findings and recommendations.

19 (2) Within 1 year after the date of the enactment
20 of this Act, the Council shall transmit to the Amtrak
21 board of directors and the Congress a final report on its
22 findings and recommendations.

23 (i) STATUS.—The Council shall not be subject to the
24 Federal Advisory Committee Act (5 U.S.C. App.) or sec-

1 tion 552 of title 5, United States Code (commonly referred
2 to as the Freedom of Information Act).

3 **SEC. 602. PRINCIPAL OFFICE AND PLACE OF BUSINESS.**

4 Section 24301 of title 49, United States Code, is
5 amended—

6 (1) by striking the first sentence of subsection
7 (b);

8 (2) by striking "District of Columbia" in sub-
9 section (b) and inserting "State in which its prin-
10 cipal office and place of business is located";

11 (3) by adding at the end of subsection (b) the
12 following: "For purposes of this subsection, the term
13 'State' includes the District of Columbia. Notwith-
14 standing section 3 of the District of Columbia Busi-
15 ness Corporation Act, Amtrak may, at its election,
16 continue to be organized under the provisions of that
17 Act."; and

18 (4) by striking "the District of Columbia Busi-
19 ness Corporation Act" in subsection (e) and insert-
20 ing "the corporate law of the State in which it is in-
21 corporated".

22 **SEC. 603. STATUS AND APPLICABLE LAWS.**

23 Section 24301 of title 49, United States Code, is
24 amended—

1 (1) in subsection (a)(1), by striking "rail car-
2 rier under section 10102" and inserting "railroad
3 carrier under section 20102(2) and chapters 261
4 and 281"; and

5 (2) by amending subsection (c) to read as fol-
6 lows:

7 "(c) APPLICATION OF SUBTITLE IV.—Subtitle IV of
8 this title shall not apply to Amtrak, except for sections
9 11303, 11342(a), 11504(a) and (d), and 11707. Notwith-
10 standing the preceding sentence, Amtrak shall continue to
11 be considered an employer under the Railroad Retirement
12 Act of 1974, the Railroad Unemployment Insurance Act,
13 and the Railroad Retirement Tax Act."

14 **SEC. 604. WASTE DISPOSAL.**

15 Section 24301(m)(1)(A) of title 49, United States
16 Code, is amended by striking "1996" and inserting
17 "2001".

18 **SEC. 605. ASSISTANCE FOR UPGRADING FACILITIES.**

19 Section 24310 of title 49, United States Code, and
20 the item relating thereto in the table of sections of chapter
21 243 of such title, are repealed.

22 **SEC. 606. RAIL SAFETY SYSTEM PROGRAM.**

23 Section 24313 of title 49, United States Code, and
24 the item relating thereto in the table of sections of chapter
25 243 of such title, are repealed.

1 **SEC. 607. DEMONSTRATION OF NEW TECHNOLOGY.**

2 Section 24314 of title 49, United States Code, and
3 the item relating thereto in the table of sections of chapter
4 243 of such title, are repealed.

5 **SEC. 608. NORTHEAST CORRIDOR IMPROVEMENT PROJECT.**

6 Section 24902 of title 49, United States Code, as
7 amended by section 608 of this Act, is amended by adding
8 at the end the following new subsection:

9 “(k) **APPLICABLE PROCEDURES.**—For the purpose of
10 any State or local requirement for permit or other ap-
11 proval for construction or operation of any improvement
12 undertaken by or for the benefit of Amtrak as part of,
13 or in furtherance of, the Northeast Corridor Improvement
14 Project, or chapter 241, 243, or 247 of this title, the ex-
15 emptions and procedures applicable to a project under-
16 taken by the Federal Government or an agency thereof
17 shall apply. The preceding sentence shall not apply to any
18 project initiated in any fiscal year for which Amtrak re-
19 ceives no Federal operating subsidy.”

20 **SEC. 609. PROGRAM MASTER PLAN FOR BOSTON-NEW YORK**

21 **MAIN LINE.**

22 (a) **REPEAL.**—Section 24903 of title 49, United
23 States Code, is repealed and the table of sections for chap-
24 ter 249 of such title is amended by striking the item relat-
25 ing to that section.

26 (b) **CONFORMING AMENDMENTS.**—

1 (1) Section 24902 of title 49, United States
2 Code, is amended by striking subsections (a), (c),
3 and (d) and redesignating subsection (b) as sub-
4 section (a) and subsections (e) through (l) as sub-
5 sections (c) through (j), respectively.

6 (2) Section 24904(a)(8) is amended by striking
7 “the high-speed rail passenger transportation area
8 specified in section 24902(a)(1) and (2)” and insert-
9 ing “a high-speed rail passenger transportation
10 area”.

11 **SEC. 610. AMERICANS WITH DISABILITIES ACT OF 1990.**

12 **(a) APPLICATION TO AMTRAK.**—Amtrak shall not be
13 subject to any requirement under subsections (a)(1) and
14 (3) and under subsection (e)(2) of section 242 the Ameri-
15 cans With Disabilities Act of 1990 (42 U.S.C. 12162)
16 until—

17 (1) January 1, 1998, for subsections (a)(1) and
18 (3); and

19 (2) October 15, 2001, for subsection (e)(2).

20 **(b) CONFORMING AMENDMENT.**—Section 24307 of
21 title 49, United States Code, is amended—

22 (1) by striking subsection (b); and

23 (2) by redesignating subsection (c) as sub-
24 section (b).

1 **SEC. 611. DEFINITIONS.**

2 Section 24102 of title 49, United States Code, is
3 amended—

4 (1) by striking paragraphs (2), (3), and (11);

5 (2) by redesignating paragraphs (4) through
6 (8) as paragraphs (2) through (6), respectively;

7 (3) by inserting after paragraph (6), as so re-
8 designated by paragraph (2) of this section, the fol-
9 lowing new paragraph:

10 “(7) ‘rail passenger transportation’ means the
11 interstate, intrastate, or international transportation
12 of passengers by rail, including mail and express;”;

13 (4) in paragraph (6), as so redesignated by
14 paragraph (2) of this section, by inserting “, includ-
15 ing a unit of State or local government,” after
16 “means a person”; and

17 (5) by redesignating paragraphs (9) and (10)
18 as paragraphs (8) and (9), respectively.

19 **SEC. 612. NORTHEAST CORRIDOR COST DISPUTE.**

20 Section 1163 of the Northeast Rail Service Act of
21 1981 (45 U.S.C. 1111) is repealed.

22 **SEC. 613. INSPECTOR GENERAL ACT OF 1978 AMENDMENT.**

23 (a) **AMENDMENT.—**

24 (1) **IN GENERAL.—**Section 8G(a)(2) of the In-
25 spector General Act of 1978 (5 U.S.C. App.) is
26 amended by striking “Amtrak.”

1 (2) EFFECTIVE DATE.—The amendment made
2 by paragraph (1) takes effect in the first fiscal year
3 for which Amtrak receives no Federal operating sub-
4 sidy.

5 (b) AMTRAK NOT FEDERAL ENTITY.—Amtrak shall
6 not be considered a Federal entity for purposes of the In-
7 specter General Act of 1978. The preceding sentence shall
8 apply for any fiscal year for which Amtrak receives no
9 Federal operating subsidy.

10 **SEC. 614. CONSOLIDATED RAIL CORPORATION.**

11 Section 4023 of the Conrail Privatization Act (45
12 U.S.C. 1323), and the item relating thereto in the table
13 of contents of such Act, are repealed.

14 **SEC. 615. INTERSTATE RAIL COMPACTS.**

15 (a) CONSENT TO COMPACTS.—Congress grants con-
16 sent to States with an interest in a specific form, route,
17 or corridor of intercity passenger rail service (including
18 high speed rail service) to enter into interstate compacts
19 to promote the provision of the service, including—

20 (1) retaining an existing service or commencing
21 a new service;

22 (2) assembling rights-of-way; and

23 (3) performing capital improvements, includ-
24 ing—

1 (A) the construction and rehabilitation of
2 maintenance facilities;

3 (B) the purchase of locomotives; and

4 (C) operational improvements, including
5 communications, signals, and other systems.

6 (b) FINANCING.—An interstate compact established
7 by States under subsection (a) may provide that, in order
8 to carry out the compact, the States may—

9 (1) accept contributions from a unit of State or
10 local government or a person;

11 (2) use any Federal or State funds made avail-
12 able for intercity passenger rail service (except funds
13 made available for the National Railroad Passenger
14 Corporation);

15 (3) on such terms and conditions as the States
16 consider advisable—

17 (A) borrow money on a short-term basis
18 and issue notes for the borrowing; and

19 (B) issue bonds; and

20 (4) obtain financing by other means permitted
21 under Federal or State law.

1 **TITLE VII—AUTHORIZATION OF**
2 **APPROPRIATIONS**

3 **SEC. 701. AUTHORIZATION OF APPROPRIATIONS.**

4 (a) **IN GENERAL.**—Section 24104(a) of title 49,
5 United States Code, is amended to read as follows:

6 “(a) **IN GENERAL.**—There are authorized to be ap-
7 propriated to the Secretary of Transportation—

8 “(1) \$772,000,000 for fiscal year 1995;

9 “(2) \$712,000,000 for fiscal year 1996;

10 “(3) \$712,000,000 for fiscal year 1997;

11 “(4) \$712,000,000 for fiscal year 1998; and

12 “(5) \$403,000,000 for fiscal year 1999,

13 for the benefit of Amtrak for capital expenditures under
14 chapters 243 and 247 of this title, operating expenses, and
15 payments described in subsection (c)(1)(A) through (C).
16 In fiscal years following the fifth anniversary of the enact-
17 ment of the Amtrak and Local Rail Revitalization Act of
18 1995 no funds authorized for Amtrak shall be used for
19 operating expenses.”

20 (b) **ADDITIONAL AUTHORIZATIONS.**—Section
21 24104(b) of title 49, United States Code, is amended to
22 read as follows:

23 “(b) **ADDITIONAL AUTHORIZATIONS.**—In addition to
24 amounts appropriated under subsection (a), there are au-

1 thORIZED to be appropriated to the Secretary of Transpor-
2 tation—

3 “(1) \$200,000,000 for fiscal year 1995;

4 “(2) \$200,000,000 for fiscal year 1996;

5 “(3) \$200,000,000 for fiscal year 1997;

6 “(4) \$200,000,000 for fiscal year 1998; and

7 “(5) \$200,000,000 for fiscal year 1999,

8 for the benefit of Amtrak to make capital expenditures
9 under chapter 249 of this title.

10 (c) CONFORMING AMENDMENTS.—Section 24909 of
11 title 49, United States Code, and the item relating thereto
12 in the table of sections of chapter 249 of such title, are
13 repealed.

14 (d) GUARANTEE OF OBLIGATIONS.—There are au-
15 thORIZED to be appropriated to the Secretary of Transpor-
16 tation—

17 (1) \$50,000,000 for fiscal year 1996;

18 (2) \$50,000,000 for fiscal year 1997;

19 (3) \$50,000,000 for fiscal year 1998; and

20 (4) \$50,000,000 for fiscal year 1999,

21 for guaranteeing obligations of Amtrak under section 511
22 of the Railroad Revitalization and Regulatory Reform Act
23 of 1976 (45 U.S.C. 831). Notwithstanding any other pro-
24 vision of law to the contrary, the proceeds of the obliga-
25 tions guaranteed hereunder may be used for the acquisi-

1 tion, rehabilitation, improvement, development, or estab-
2 lishment of any intercity rail passenger equipment or fa-
3 cilities or the re-financing of any of the foregoing. The
4 United States shall be deemed to have reasonable protec-
5 tion and security if the Secretary obtains a lien or mort-
6 gage encumbering such facilities or equipment, which lien
7 or mortgage may be subordinated to any mortgages or
8 liens thereon securing obligations to a lender or lessor.
9 The Secretary shall not be required to make any finding
10 regarding the value or prospective earning power of the
11 equipment or facilities or the earning power of the obligor
12 or the place where high-speed rail facilities or equipment
13 are mined, produced, or manufactured. The obligor may
14 incur the obligations guaranteed by the Secretary here-
15 under without obtaining the consent of the Secretary
16 under section 24304(f) of title 49, United States Code.
17 The obligations shall have a liquidation interest superior
18 to the preferred stock of the obligor issued to the Sec-
19 retary and may be secured by a lien or mortgage on the
20 property of the obligor superior to any lien or mortgage
21 held by the Secretary. The Secretary shall not require that
22 pre-existing obligations of the obligor be subordinated to
23 the rights of the Secretary in the event of a default. The
24 Secretary shall act on an application for a guarantee here-
25 under within 30 days after it is submitted.

1 (e) Amtrak shall expend capital funds equitably
2 across its national passenger rail system on projects
3 deemed necessary to meet its most critical operating and
4 capital needs without compromising safety. Priority shall
5 be given to those projects which offer significant return
6 on investment ~~without compromising safety~~ and which le-
7 verage the highest levels of State, local, and private finan-
8 cial support.

9 **TITLE VIII-AMTRAK REVENUE**
10 **ENHANCEMENT**

11 **SEC. 801. INTERCITY RAIL PASSENGER ACCOUNT.**

12 (a) IN GENERAL.—Chapter 243 of title 49, United
13 States Code, is amended by adding at the end thereof the
14 following new section:

15 **“24316. Intercity Rail Passenger Account**

16 **“(a) ESTABLISHMENT.—Amtrak shall establish an**
17 **Intercity Rail Passenger Account. Amounts deposited to**
18 **in this account shall be available for use by Amtrak to—**

19 **“(1) acquire passenger equipment and loco-**
20 **motives;**

21 **“(2) encourage State and local investment in**
22 **facilities and equipment used to provide intercity rail**
23 **passenger transportation; and**

24 **“(3) address other critical capital priorities.**

1 “(b) DEPOSITS.—During fiscal years 1995 through
2 1999, Amtrak shall deposit amounts equal in the aggre-
3 gate to 5 percent of ticket revenue for that 5 fiscal year
4 period into the Intercity Rail Passenger Account and may
5 deposit into the Account—

6 “(1) payments received for the use of its equip-
7 ment or facilities;

8 “(2) claims recovered by Amtrak;

9 “(3) amounts from any other source to the ex-
10 tent authorized by law; and

11 “(4) amounts received by Amtrak as refunds of
12 taxes on the fuel required for its operations.”.

13 (b) CLERICAL AMENDMENT.—The table of sections
14 for chapter 243 of such title is amended by adding at the
15 end thereof the following:

 “24316. Intercity Rail Passenger Account”.

16 **SEC. 802. UNION STATION STATE OF GOOD REPAIR.**

17 In lieu of payments to the Secretary of Transpor-
18 tation for loan repayments, the Union Station Redvelop-
19 ment Corporation shall make an equal payment into a cap-
20 ital reserve account to maintain Washington Union Sta-
21 tion in a state of good repair.

22 **SEC. 803. COMMERCIAL DIVERSIFICATION.**

23 (a) Amtrak may increase non-Federal revenues
24 through—

1 (1) the sale of concessions and the use of vend-
2 ing machines and video and audio entertainment on
3 trains;

4 (2) the sale of advertising space on trains and
5 in rail stations;

6 (3) use of telecommunications networks or in-
7 frastructure; and

8 (4) other creative marketing and services activi-
9 ties.

10 (b) **APPLICABLE LAWS.**—Section 24301 of title 49,
11 United States Code, as amended by section 505 of this
12 Act, is amended by adding at the end thereof the follow-
13 ing:

14 “(r) **POWER PURCHASES.**—The sale of power to Am-
15 trak for its own use, including operating its electric trac-
16 tion system, does not constitute a direct sale of electric
17 energy to an ultimate consumer under section 212(h)(1)
18 of the Federal Power Act (16 U.S.C. 824k(h)(1)).

19 “(s) **POWER SALES TO COMMUTER AUTHORITIES**
20 **AND OTHERS.**—A state or other law, rule, regulation,
21 order, or standards relating to the licensing, rates, terms,
22 and conditions of sales of electric energy at retail does not
23 apply to Amtrak in making sales of electric energy from
24 its electric power transmission and distribution system to
25 commuter authorities and other consumers of electricity.

1 “(t) TRANSMISSION SERVICE.—Any entity selling
2 power to Amtrak for its own use or to be resold by Amtrak
3 to Commuter authorities or other consumers of electricity
4 may seek an order under section 211(a) of the Federal
5 Power Act (16 U.S.C. 824j(a)) requiring a utility to pro-
6 vide transmission service for this power without regard to
7 any restrictions in subsections (g) and (h) of section 212
8 of such Act (16 U.S.C. 824k).”

9 (c) DEFINITION OF AMTRAK.—Section 24102 of title
10 49, United States Code, is amended by redesignating
11 paragraphs (1) through (11) as (2) through (12), respec-
12 tively, and by inserting before paragraph (2), as so redes-
13 igned, the following:

14 “(1) ‘Amtrak’ means the National Railroad
15 Passenger Corporation and any successor, assign,
16 subsidiary, affiliate, or joint venture in which that
17 Corporation has a material interest.”

18 (d) AUTHORITY TO SELL SURPLUS POWER.—Section
19 24305 of title 49, United States Code, is amended by add-
20 ing at the end the following:

21 “(g) SALE OF SURPLUS POWER.—Whenever Amtrak
22 owns electric energy or power transmission capacity that
23 is surplus to its traction power needs, it may sell such
24 power at wholesale or retail to any purchaser, sell power
25 transmission services, seek interconnection under section

1 210 of the Federal Power Act (16 U.S.C. 824i), and enter
2 into coordination, power pooling, and other arrangements
3 with electric utilities designed to increase Amtrak's reve-
4 nues or decrease its costs.”.

5 (e) CONFORMING AMENDMENT.—Section
6 212(h)(2)(A) of the Federal Power Act (16 U.S.C.
7 824k(h)(2)(A)) is amended by inserting “Amtrak;” after
8 “a State or any political subdivision of a State (or an
9 agency, authority or instrumentality of a State or any po-
10 litical subdivision of a State);”.

11 **TITLE IX-PRESERVATION OF**
12 **RAIL INFRASTRUCTURE**

13 **SEC 901. SHORT TITLE.**

14 This title may be cited as the “Rail Infrastructure
15 Preservation Act of 1995”.

16 **SEC. 902. LOCAL RAIL FREIGHT ASSISTANCE; AUTHORIZA-**
17 **TION OF APPROPRIATIONS.**

18 Section 22108 of title 49, United States Code, is
19 amended—

20 (1) by striking out so much of subsection (a) as
21 precedes paragraph (2) and inserting the following:

22 “(a) GENERAL.—(1) There is authorized to be appro-
23 priated to the Secretary of Transportation to carry out
24 this chapter the sum of \$25,000,000 for the fiscal year

1 ending September 30, 1996, and for each subsequent fis-
2 cal year.”; and

3 (2) by striking subsection (a)(3).

4 **SEC. 903. DISASTER FUNDING FOR RAILROADS.**

5 Section 22101 of title 49, United States Code, is
6 amended by redesignating subsection (d) as (e), and by
7 inserting after subsection (c) the following—

8 **“(d) DISASTER FUNDING FOR RAILROADS.—**

9 **“(1) The Secretary may declare that a disaster**
10 **has occurred and that it is necessary to repair and**
11 **rebuild rail lines damaged as a result of such disas-**
12 **ter. If the Secretary makes the declaration under**
13 **this paragraph, the Secretary may—**

14 **“(A) waive the requirements of this sec-**
15 **tion; and**

16 **“(B) prescribe the form and time for appli-**
17 **cations for assistance made available herein.**

18 **“(2) The Secretary may not provide assistance**
19 **under this subsection unless emergency disaster re-**
20 **lief funds are appropriated for that purpose.**

21 **“(3) Funds provided for under this subsection**
22 **shall remain available until extended.”.**

23 **SEC. 904. GRADE-CROSSING ELIGIBILITY.**

24 Section 22101(a) of title 49, United States Code, is
25 amended—

1 (1) by striking "and" after the semicolon in
2 paragraph (2);

3 (2) by striking the period at the end of para-
4 graph (3) and inserting a semicolon; and

5 (3) by adding at the end thereof the following
6 new paragraphs:

7 "(4) the cost of closing or improving a railroad
8 grade crossing or series of railroad grade crossings;
9 and

10 "(5) the cost of creating a State-supervised
11 grain car pool."

12 **SEC. 905. DECLARATION OF POLICY.**

13 Section 101(a) of the Railroad Revitalization and
14 Regulatory Reform Act of 1976 (45 U.S.C. 801(a)(4)) is
15 amended to read as follows:

16 "(4) continuation of service on, or preservation
17 of, light density lines that are necessary to continued
18 employment and community well-being throughout
19 the United States;"

20 **SEC. 906. RAILROAD LOAN GUARANTEES; MAXIMUM RATE**
21 **OF INTEREST.**

22 Section 511(f) of the Railroad Revitalization and
23 Regulatory Reform Act of 1976 (45 U.S.C. 831(f)) is
24 amended by striking "shall not exceed an annual percent-
25 age rate which the Secretary determines to be reasonable,

1 taking into consideration the prevailing interest rates for
2 similar obligations in the private market." and inserting
3 "shall not exceed the annual percentage rate charged
4 equivalent to the cost of money to the Federal govern-
5 ment."

6 **SEC. 907. RAILROAD LOAN GUARANTEES; MINIMUM REPAY-**
7 **MENT PERIOD AND PREPAYMENT PEN-**
8 **ALTIES.**

9 Section 511(g)(2) of the Railroad Revitalization and
10 Regulatory Reform Act of 1976 (45 U.S.C. 831(g)(2)) is
11 amended to read as follows:

12 "(2) payment of the obligation is required by its
13 terms to be made not less than 15 years not more
14 than 25 years from the date of its execution, with
15 no penalty imposed for prepayment after 5 years;"

16 **SEC. 908. RAILROAD LOANS GUARANTEES; DETERMINA-**
17 **TION OF REPAYABILITY.**

18 Section 511(g)(5) of the Railroad Revitalization and
19 Regulatory Reform Act of 1976 (45 U.S.C. 831(g)(5)) is
20 amended to read as follows:

21 "(5) either the loan can reasonably be repaid by
22 the applicant or the loan is collateralized at no more
23 than the current value of assets being financed
24 under this section to provide protection to the Unit-
25 ed States;"

1 SEC. 909. RAILROAD LOANS GUARANTEES; RIGHTS OF SEC.
2 RETARY.

3 Section 511(i) of the Railroad Revitalization and
4 Regulatory Reform Act of 1976 (45 U.S.C. 831(i)) is
5 amended by adding at the end the following;

6 “(4) The Secretary shall not require, as a con-
7 dition for guarantee of an obligation, that all pre-
8 existing secured obligations of an obligor be subordi-
9 nated to the rights of the Secretary in the event of
10 a default.”.

11 **TITLE X—FISCAL**
12 **REVITALIZATION**

13 **SEC. 1001. ON-TIME PERFORMANCE INCENTIVES.**

14 (a) IN GENERAL.—Part III of subchapter B of chap-
15 ter 1 of the Internal Revenue Code of 1986 is amended—

16 (1) by redesignating section 135 as 136; and

17 (2) by inserting after section 134 the following:

18 **“SEC. 135. INCENTIVE PAYMENTS FOR ON-TIME PERFORM-**
19 **ANCE.**

20 “Gross income does not include payments received by
21 a railroad as an incentive for the on-time operation of
22 intercity passenger trains.”.

23 (b) The table of sections for such part is amended
24 by striking the item relating to section 135 and inserting
25 the following:

"Sec. 135. On-time performance incentives.

"Sec. 136. Cross references to other Acts."

1 SEC.1002. PAYMENT TO THE INTERCITY RAIL PASSENGER
2 ACCOUNT OF EXCISE TAXES ON FUEL.

3 Section 6427 of the Internal Revenue Code of 1986
4 (relating to fuels not used for taxable purposes) is amend-
5 ed by redesignating subsection (r) as subsection (s) and
6 by inserting after subsection (p) the following:

7 "(r) AMTRAK INTERCITY PASSENGER TRAINS.—The
8 Secretary shall pay (without interest) to the Intercity Rail
9 Passenger Account established by section 24316 of title
10 49, United States Code, the amount of tax paid by Amtrak
11 under chapter 31 or 32 on any fuel used in the operation
12 of intercity passenger trains. For purposes of subsection
13 (k)(1) of this section, payment to the Intercity Rail Pas-
14 senger Account shall be considered to be a payment de-
15 scribed in subsection (k)(1)(A)."

16 SEC. 1003. FUNDING FOR THE NATIONAL RAILROAD PAS-
17 Senger CORPORATION FROM THE MASS
18 TRANSIT ACCOUNT.

19 Section 9503(e) of the Internal Revenue Code of
20 1986 (relating to establishment of mass transit account)
21 is amended by adding at the end thereof the following:

22 "(6) TRANSFERS TO THE INTERCITY RAIL PAS-
23 Senger ACCOUNT.—Notwithstanding any other pro-
24 vision of law to the contrary, the Secretary shall

1 transfer from the Mass Transit Account to the
2 Intercity Rail Passenger Account established under
3 section 24316 of title 49, United States Code, the
4 intercity rail passenger portion of the amounts ap-
5 propriated under subsection (b) of this section which
6 are attributable to taxes under sections 4041 and
7 4081 imposed on or after October 1, 1995. The
8 intercity rail passenger portion is appropriated for
9 the benefit of Amtrak for expenditure in accordance
10 with the provisions of such section 24316. For pur-
11 poses of this paragraph, the term 'intercity rail pas-
12 senger portion' means the amount attributable to
13 0.5 cent per gallon of the 2 cents per gallon to be
14 transferred to the Mass Transit Account pursuant to
15 section 13244 of Public Law No. 103-66, 107 Stat.
16 529. The Secretary shall transfer such funds at the
17 end of each quarter of a fiscal year."

18 **SEC. 1004. SAFEHARBOR LEASING OF INTERCITY RAIL PAS-**
19 **SENGER EQUIPMENT AND FACILITIES.**

20 (a) IN GENERAL.—Section 168 of the Internal Reve-
21 nue Code of 1986 (relating to accelerated cost recovery
22 system) is amended by adding at the end thereof the fol-
23 lowing new subsection:

24 "(k) LEASED PROPERTY USED IN THE PROVISION
25 OF INTERCITY RAIL PASSENGER SERVICE.—

1 “(1) IN GENERAL.—In the case of an agree-
2 ment with respect to qualified leased property, if all
3 of the parties to the agreement characterize such
4 agreement as a lease and elect to have the provisions
5 of this subsection apply with respect to such agree-
6 ment, and if the requirements of paragraph (2) are
7 met, then, for purposes of this subtitle, such agree-
8 ment shall be treated as a lease entered into by the
9 parties in the course of carrying on a trade or busi-
10 ness and the lessor shall be treated as the owner of
11 the property and the lessee shall be treated as the
12 lessee of the property.

13 “(2) CERTAIN REQUIREMENTS MUST BE MET.—
14 The requirements of this subsection are met if the
15 minimum investment of the lessor at the time the
16 property is first placed in service under the lease
17 and at all times during the lease term is not less
18 than 10 percent of the adjusted basis of such prop-
19 erty and the term of the lease (including any exten-
20 sions) does not exceed the greater of 90 percent of
21 the useful life of such property or 150 percent of the
22 class life of such property.

23 “(3) NO OTHER FACTORS TAKEN INTO AC-
24 COUNT.—If the requirements of paragraphs (1) and
25 (2) are met with respect to any transaction de-

1 - scribed in paragraph (1), no other factors shall be
2 taken into account in making a determination as to
3 whether paragraph (1) applies with respect to the
4 transaction.

5 “(4) QUALIFIED LEASED PROPERTY.—For pur-
6 poses of this subsection, the term ‘qualified leased
7 property’ means property used in the provision of
8 intercity rail passenger service which was leased
9 within 3 months after such property was placed in
10 service by the lessee and with respect to which the
11 adjusted basis of the lessor does not exceed the ad-
12 justed basis of the lessee at the time of the lease.

13 “(5) MINIMUM INVESTMENT.—For purposes of
14 paragraph (1), the term ‘minimum investment’
15 means the amount the lessor has at risk with respect
16 to the property (other than financing from the lessee
17 or a related party of the lessee). For the purposes
18 of the preceding sentence, an agreement between the
19 lessor and lessee requiring either or both parties to
20 purchase or sell the qualified leased property at
21 some price (whether or not fixed in the agreement
22 at the end of the lease term) shall not affect the
23 amount the lessor is treated as having at risk with
24 respect to the property.

1 “(6) USE OF PRIVATE ACTIVITY BOND FINANC-
2 ING.—A private activity bond issued to finance
3 qualified leased property shall be deemed to be a
4 qualified bond (within the meaning of section 141)
5 for the purpose of section 103 and subpart A of part
6 IV of this chapter. Qualified leased property fi-
7 nanced by a private activity bond shall not be
8 deemed to be ‘tax-exempt bond financed property’ or
9 ‘tax-exempt use property’ for the purpose of sub-
10 section (g).

11 “(7) CHARACTERIZATION BY PARTIES.—For
12 purposes of this subsection, any determination as to
13 whether a person is a lessor or lessee, or whether
14 property is leased, shall be made on the basis of the
15 characterization of such person or property under
16 the agreement described in paragraph (1).

17 “(8) REGULATIONS.—The Secretary shall pre-
18 scribe such regulations as may be necessary to carry
19 out the purposes of this subsection, including regula-
20 tions consistent with such purposes which limit the
21 aggregate amount of (and timing of) deductions and
22 credits in respect of qualified leased property to the
23 aggregate amount (and the timing) allowable with-
24 out regard to this subsection.”

1 (b) EFFECTIVE DATE.—The amendment made by
2 this section shall apply with respect to property placed in
3 service after the date of enactment of this Act.

4 SEC. 1005. ISSUANCE OF TAX-EXEMPT DEBT.

5 (a) IN GENERAL.—Section 150 of the Internal Reve-
6 nue Code of 1986 (relating to definitions and special
7 rules) is amended by adding at the end thereof the follow-
8 ing:

9 “(f) INTERCITY RAIL PASSENGER BONDS.—

10 “(1) IN GENERAL.—For purposes of this part
11 and section 103—

12 “(A) TREATMENT AS STATE OR LOCAL
13 BOND.—An intercity rail passenger bond shall
14 be treated as a State or local bond.

15 “(B) DEFINITION OF INTERCITY RAIL PAS-
16 Senger BOND.—The term ‘intercity rail pas-
17 senger bond’ means a bond issued by an inter-
18 city passenger railroad created under an Act of
19 Congress (or a related party thereto) 95 per-
20 cent or more of the net proceeds of which are
21 to be used by the issuer (or a related party) in
22 the trade or business of operating an intercity
23 passenger railroad, including the acquisition,
24 construction, reconstruction, or improvement of
25 property to be used for such purposes and other

1 general purposes of the issuer. Issuance of not
2 more than \$—,000,000 per year shall be treat-
3 ed as a State or local bond under this section.

4 “(C) NOT FEDERALLY-GUARANTEED OR
5 PRIVATE ACTIVITY BOND.—An intercity rail
6 passenger bond shall not be treated as a private
7 activity bond or as Federally guaranteed.

8 “(2) COORDINATION WITH OTHER PROVI-
9 SIONS.—

10 “(A) TREATMENT OF BOND-FINANCED
11 PROPERTY.—Property acquired with the pro-
12 ceeds of intercity rail passenger bonds shall not
13 be treated as tax-exempt bond financed prop-
14 erty for purposes of section 168.

15 “(B) TREATMENT OF ISSUER.—The issuer
16 of such a bond shall not be treated as a tax-
17 exempt entity for any purpose of this title solely
18 because of such issuance.

19 “(C) TREATMENT OF LEASE AGREE-
20 MENTS.—An agreement entered into by the is-
21 suer of such a bond which otherwise qualifies as
22 a lease of property to the issuer under this title
23 will be treated as a lease, notwithstanding any
24 use of proceeds of the bonds to finance the ac-
25 quisition of leased property.”

1 (b) EFFECTIVE DATE.—The amendment made by
2 subsection (a) applies to bonds issued after the date of
3 enactment of this Act.

○

1 Dorgan amendment -- insert part in italic.

2 **SEC. 502. AMTRAK SUNSET TRIGGER.**

3 Section 24104 of title 49, United States Code, is
4 amended by adding at the end thereof the following:

5 **“(g) SUNSET TRIGGER.—**

6 **“(1) Following the third anniversary of the en-**
7 **actment of the Amtrak and Local Rail Revitalization**
8 **Act of 1995, the Amtrak Reform Council shall re-**
9 **view the progress Amtrak has made under its plan**
10 **to achieve the financial goals specified in section**
11 **24101(d), and determine on the basis of perform-**
12 **ance under the plan the likelihood that Amtrak will**
13 **not require Federal operating grant funds appro-**
14 **priated for its benefit after fifth anniversary of the**
15 **enactment of that Act. The Amtrak Reform Council**
16 **will submit a report on its findings and determina-**
17 **tions to the Congress 90 days after the third anni-**
18 **versary of the enactment of that Act. Authorizations**
19 **for appropriations made by this section for fiscal**
20 **years beginning after the submission of the report to**
21 **the Congress pursuant to this subsection are condi-**
22 **tioned on Amtrak achieving the targets in its plan**
23 **and findings that Amtrak will not require Federal**
24 **operating grant funds to be appropriated for its ben-**
25 **efit in fiscal years following the fifth anniversary of**
26 **the enactment of that Act.**

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1 “(3) In determining whether Amtrak has met
2 the targets in its plans and the likelihood that it will
3 not require a Federal operating subsidy for fiscal
4 years beginning after the fifth anniversary of the
5 date of enactment of the Amtrak and Local Rail Re-
6 vitalization Act of 1995, the Amtrak Reform Council
7 shall take into account Acts of God, national emer-
8 gencies, and other events beyond the reasonable con-
9 trol of Amtrak.

10 “(4) If the Amtrak Reform Council finds
11 that—

12 “(A) Amtrak—

13 “(i) has met the financial goals antici-
14 pated for it at the end of 3 years, taking
15 into account the factors in paragraph (3),
16 and

17 “(ii) *Amtrak will be able to maintain*
18 *a national passenger rail system which pro-*
19 *vides access to all areas of the country with-*
20 *out Federal operational support,*

21 then the Secretary and Amtrak shall implement
22 the Amtrak plan developed under section
23 601(b)(6)(A) of the Amtrak and Local Rail Re-
24 vitalization Act of 1995 providing the continued
25 operation of Amtrak unless the Congress dis-

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1 approves the plan within 45 days after it is sub-
2 mitted to the Congress; or

3 “(B) Amtrak has failed to meet the finan-
4 cial goals anticipated for it at the end of 3
5 years, taking into account the factors in para-
6 graph (3), then the Secretary and Amtrak shall
7 implement the Amtrak sunset plan developed
8 under section 601(b)(6)(B) of that Act provid-
9 ing for the complete liquidation of Amtrak.

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10 “(5) The annual report of the Amtrak Reform
11 Council shall include an assessment of progress on
12 the resolution or status of productivity issues, in-
13 cluding—

14 “(A) train and engine manning require-
15 ments;

16 “(B) utilization of employees in the me-
17 chanical operations;

18 “(C) health and welfare benefits and plan
19 design;

20 “(D) management efficiency improvement;

21 “(E) property utilization and management;

22 “(F) revenue enhancement and ridership;

23 “(G) Amtrak’s operation as a national pas-
24 senger rail system which provides access to all
25 areas of the country and ties together existing

- 1 and emerging regional rail passenger networks
- 2 and other intermodal passenger service;
- 3 “(H) technology utilization; and
- 4 “(I) procurement reforms.”.

Memorandum

Subject
H.R. 1788, Amtrak Privatization and Reform Act
of 1995

Date
July 31, 1995

To
Andrew Fois
Assistant Attorney General

From
Richard L. Shiffrin *RS*
Deputy Assistant
Attorney General

Attn: Velma Taylor

The bill would establish the Emergency Reform Board ("Board"), which would "assume the responsibilities of the Board of Directors of Amtrak." H.R. 1788, § 503. The Board would comprise seven members, of which one would be appointed by the President and the remaining six would be appointed by the congressional leadership. This appointment mechanism would violate the Appointments Clause, see U.S. Const. art. II, § 2, cl. 2, as well as the constitutional doctrine of separation of powers.

The Supreme Court has recently held that Amtrak is a governmental agency subject to all constitutional obligations and duties. See Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995). The Appointments Clause requires all officers of the United States to be appointed by the President and confirmed by the Senate, except that Congress may direct that inferior officers be appointed by the President alone, the courts of law, or the head of a department. See U.S. Const. art. II, § 2, cl. 2. An appointee must be appointed in this manner if the appointment is to a position of employment within the federal government that carries significant authority. See Buckley v. Valeo, 424 U.S. 1, 124-41 (1976) (per curiam); Auffmordt v. Hedden, 137 U.S. 310 (1890).

Because the members of the Board who are appointed by the congressional leadership are voting members, they exercise significant authority and may not be appointed by Congress or a member or agent of Congress. In Buckley the Supreme Court held that the designation of certain agents of Congress to sit on the Federal Election Commission violated the Appointments Clause. The Court reasoned that voting membership on the FEC is an office within the meaning of the Appointments Clause and therefore that such members must be appointed in conformity with that provision. See 424 U.S. at 124-41. Because the Appointments Clause does not authorize the Speaker of the House, the Majority Leader of the Senate, the Minority Leader of either body, or any other agent of Congress or even the Congress as a whole to appoint an officer of

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the United States, the composition of the Board set forth in H.R. 1788 is unconstitutional.

Moreover, the constitutional separation of powers doctrine forbids Congress from aggrandizing its power by enacting legislation that confers non-legislative authority on Congress, its agents, appointees, or anyone subject to its direct control. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (holding Comptroller General is subject to the control of Congress and therefore may not exercise non-legislative power). Similarly, appointees or agents of Congress may not direct the exercise of non-legislative authority. See, e.g., Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991); Hechinger v. Metropolitan Washington Airports Auth., 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995).

Amtrak is a governmental agency that does not exercise legislative power. In directing Amtrak's exercise of authority, then, the Board itself would exercise non-legislative, in this case executive, power. Consequently, Bowsher's anti-aggrandizement principle forbids congressional agents or appointees from sitting as members of the Board, even if they do not comprise a majority of the Board or even if they sit only as non-voting members. See FEC v. NRA-Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), aff'd, 115 S. Ct. 537 (1994).

Memorandum



Subject
B.307, section-by-section analysis of
Congressional draft of the Amtrak Reform and
Local Revitalization Act

Date
July 19, 1995

To
Andrew Fois
Assistant Attorney General

From
Richard Shiffrin
Deputy Assistant
Attorney General

RS

Attn: Velma Taylor

We have not seen the text of the actual legislation. The description contained in the section-by-section analysis strongly suggests that provisions of the bill's financial reform section are unconstitutional. According to the section-by-section analysis, the bill would require Amtrak to establish a financial plan to eliminate the need for federal subsidies within five years. Simultaneously, the Amtrak Reform and Privatization Council ("Council"), which would develop a privatization plan and a liquidation plan. After three years, the General Accounting Office ("GAO") would assess Amtrak's progress toward meeting the goals set forth in the financial plan written by Amtrak. If GAO determines that Amtrak is meeting its goals, then the bill would require Amtrak to implement the Council's privatization plan. If, on the other hand, GAO determines that Amtrak is not meeting its goals, the bill would require Amtrak to implement the Council's liquidation, or "sunset," plan.

The mechanism described in the section-by-section analysis violates the Appointments Clause as well as the anti-aggrandizement principle of the Constitution's separation of powers doctrine. See U.S. Const. art. II, § 2, cl. 2. The Supreme Court has recently held that Amtrak is a governmental agency and subject to all constitutional obligations and duties. See Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995). The section-by-section analysis describes the Council as comprising seven members "appointed by the House Speaker, Senate Majority Leader, President and Amtrak." The constitutional separation of powers doctrine forbids Congress from aggrandizing itself by enacting legislation that confers non-legislative authority on Congress, its agents, appointees, or anyone subject to its direct control. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (holding Comptroller General is subject to the control of Congress and therefore may not exercise non-legislative power). Similarly, appointees or agents of Congress may not direct the exercise of non-legislative authority. See, e.g., Metropolitan

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Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991); Hechinger v. Metropolitan Washington Airports Auth., 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995).

Amtrak is a governmental agency and it is impossible to conceptualize it as exercising legislative or judicial as opposed to executive power. In directing Amtrak's exercise of authority, then, the Council itself exercises executive power. Because the Council exercises executive authority, Bowsher's anti-aggrandizement principle forbids congressional agents or appointees from sitting as members of the Council, even if they do not comprise a majority of the Council or even if they sit only as non-voting members. See FEC v. NRA-Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), aff'd, 115 S. Ct. 537 (1994).

The mode of the appointments, as described in the section-by-section analysis, violates the Appointments Clause. That Clause requires all officers of the United States to be appointed by the President and confirmed by the Senate, except that Congress may direct that inferior officers be appointed by the President alone, the courts of law, or the head of a department. See U.S. Const. art. II, § 2, cl. 2. One must be appointed in this manner if one is appointed to a position of employment within the federal government that carries significant authority. See Buckley v. Valeo, 424 U.S. 1, 124-41 (1976) (per curiam); Auffmordt v. Hedden, 137 U.S. 310 (1890).

If the members of the Council who are appointed by the Speaker of the House and the Majority Leader of the Senate are voting members, then they exercise significant authority and may not be appointed by Congress or a member or agent of Congress. In Buckley the Supreme Court held that the designation of certain agents of Congress to sit on the Federal Election Commission violated the Appointments Clause. The Court reasoned that voting membership on the FEC is an office within the meaning of the Appointments Clause and therefore that such members must be appointed in conformity with that provision. See 424 U.S. at 124-41. Because the Appointments Clause does not authorize the Speaker of the House or the Majority Leader of the Senate or any other agent of Congress or even the Congress as a whole to appoint an officer of the United States, the composition of the Council as described in the section-by-section analysis is unconstitutional.

The section-by-section analysis also lists Amtrak as one of the authorities that is to appoint member(s) of the Council. If Amtrak is a department within the meaning of the Appointments Clause, see generally Freytag v. Commissioner, 501 U.S. 868 (1991), the head of that department -- Amtrak's board of directors -- may be vested with authority only to appoint inferior officers. See U.S. Const. art. II, § 2, cl. 2. Even if Council members may be inferior officers, see generally Morrison v. Olson, 487 U.S. 654 (1988), Amtrak's board of directors may

not exercise that authority because Amtrak's board of directors is not appointed conformably with the Appointments Clause. See, e.g., Buckley, 424 U.S. at 124-41 (a federal officer may exercise executive authority, such as appointing other officers, only if the officer has been appointed pursuant to the Appointments Clause).

The provision authorizing the GAO to decide whether "Amtrak is meeting its financial goals" and making the determination of which of the Council's two plans, privatization or liquidation, is implemented depend exclusively and entirely upon the GAO's judgment also violates the Bowsher anti-aggrandizement principle. The Supreme Court has held that for separation of powers purposes, the GAO is subject to the control of Congress. See Bowsher, 478 U.S. at 727-32. As described in the section-by-section analysis, the GAO's role is to execute the law. The GAO exercises its independent judgment as to whether Amtrak is meeting its financial goals and ultimately determines which of the Council's plans Amtrak and the Secretary of Transportation are required to implement. This indistinguishable from the role performed by the Comptroller General in Bowsher and which the Supreme Court held that the Comptroller General, the head of the GAO, could not constitutionally perform.]

Memorandum

Subject Proposed Testimony of Mortimer Downey regarding Amtrak Reauthorization	Date June 15, 1995
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To
Kent Markus
Acting Assistant
Attorney General

From
Dawn Johnsen *DJ*
Deputy Assistant
Attorney General

Attn: Velma Taylor

We ask that the following be transmitted to the Office of Management and Budget and to the Department of Transportation:

The Office of Legal Counsel has no objection to the proposed testimony of Deputy Secretary of Transportation Mortimer Downey concerning legislative proposals relating to Amtrak, because that testimony does not discuss the composition of Amtrak's board of directors. We wish to advise you, however, that we adhere to the position set forth in our comment of March 24, 1995, on S.693 that the composition of Amtrak's board of directors is unconstitutional in light of the Supreme Court's decision in Lebron v. National Railroad Passenger Corp., 115 S. Ct. 961 (1995).

Memorandum

Subject B. 116, The Amtrak Reform and Privatization Act of 1995	Date June 13, 1995
To Kent Markus Acting Assistant Attorney General	From Richard Shiffrin <i>RS</i> Deputy Assistant Attorney General

Attn: Velma Taylor

The Supreme Court recently held that Amtrak is a government agency subject to the obligations and limitations of the Constitution. See Lebron v. National Passenger Railroad Corporation, 115 S. Ct. 961, 973 (1995) ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). As such, Amtrak may only exercise statutory authority insofar as it conforms to the requirements of the Constitution. Currently, Amtrak's board of directors is not appointed conformably with the Appointments Clause. U.S. Const. art. II, § 2, cl. 2.

The Amtrak Reform and Privatization Act of 1995 seeks to make Amtrak a private corporation that is not an agency or instrumentality of the government for constitutional purposes. The bill would repeal 49 U.S.C. § 24302, which authorizes the government to appoint a majority of the board of directors. If enacted, the bill would ostensibly relinquish the government's "permanent authority to appoint a majority of the directors." Lebron, 115 S. Ct. at 974. We believe that the government's retention of permanent appointment authority over a majority of the board is a necessary condition to concluding that an entity is a government agency or instrumentality to which the obligations of the constitution apply. See id. To the extent, then, that the bill results in the government relinquishing permanent appointment authority, it would successfully privatize Amtrak. However, the bill is completely obscure as to how directors would be chosen henceforth and as to who, if anyone, will own stock or otherwise control the corporation in the future. As such, we cannot offer a definitive conclusion as to whether the bill would actually privatize Amtrak; we can only state that the bill would allow the privatization of Amtrak.

Where is this new?

Could this be a description of what the current Hunk bill does?!



Subject B. 116, The Amtrak Restructuring Act of 1995	Date March 24, 1995
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To
 Kent Markus
 Acting Assistant
 Attorney General
 Office of Legislative Affairs

From
 Richard L. Shiffrin *RS*
 Deputy Assistant
 Attorney General
 Office of Legal Counsel

Attention: Velma Taylor

The proposed Amtrak Restructuring Act of 1995 raises significant constitutional concerns.¹ The Supreme Court has held that federal officials "who exercise[] significant authority pursuant to the laws of the United States [are] officers of the United States and therefore must be appointed pursuant to the Appointments Clause." Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). Because the proposed Act would vest significant authority in federal officials who are not appointed conformably with the Appointments Clause, the proposed Act violates the Appointments Clause. See U.S. Const. art. II, § 2, cl. 2.

The Supreme Court recently held that Amtrak is a federal government entity for the purpose of determining whether it has violated an individual's First Amendment rights. See Lebron v. National Railroad Passenger Corp., 115 S.Ct. 961 (Feb. 21, 1995). The Court's opinion in Lebron was careful to define the Court's holding with reference to the specific question presented in the case: "we conclude that [Amtrak] is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 115 S.Ct. at 972.² It is possible to argue, therefore, that Lebron does not require the conclusion that Amtrak is part of the federal government for the purpose of determining the application

¹ We have been asked only for our views regarding the proposed Act. Therefore, we limit our comments to the authority the proposal would vest in Amtrak. We have not reviewed and do not discuss any pre-existing authority that Amtrak might possess.

² See also id. at 967 (question is whether Amtrak "must be regarded as a Government entity for First Amendment purposes"), 974 (holding is that Amtrak "is an agency of the Government, for the purposes of the constitutional obligations of the Government"), at 974-75 ("We hold that [Amtrak] is part of the Government for purposes of the First Amendment.").

of the structural requirements of the Constitution such as the Appointments Clause. Those structural requirements do not create "individual rights guaranteed against the Government by the Constitution" in the sense that provisions such as the first amendment do, and Lebron's wording could be read to imply that Amtrak should not be considered a federal agency for Appointments Clause purposes.³

While this argument is not obviously incorrect, on balance we do not think that the courts would accept it as the best reading of Lebron, at least with respect to the applicability of the Appointments Clause to Amtrak. While it is true that the Appointments Clause does not directly create "individual rights," its ultimate purpose, like the first amendment's, is the protection of liberty. As the Court stated in the seminal modern Appointments Clause case, the founders, not content to rely on paper definitions of the rights secured to the people, "viewed the separation of powers as a vital check on tyranny." Buckley v. Valeo, 424 U.S. 1, 121 (1976). The Appointments Clause protects liberty by diffusing power and designating clear lines of responsibility and is therefore a vital complement to the protections provided by individual-rights guarantees. Through the Appointments Clause, "the Constitution constrains governmental action" just as surely as it does through the first amendment. Lebron's holding that Amtrak's actions are limited by the first amendment because it is "by its very nature, what the Constitution regards as the Government," 115 S.Ct. at 971, implies that its actions are also limited by the requirement of the Appointments Clause that federal officials exercising significant authority do so only if appointed in accordance with the Clause. Therefore, any official of Amtrak who exercises significant authority must be appointed pursuant to the Appointments Clause. Put another way, no statute may vest significant authority in any employee of Amtrak who is not appointed conformably with the Appointments Clause. See generally Buckley, 424 U.S. at 124-41.

³ One sentence in Lebron provides modest affirmative support for this argument; at one point the Court referred to its conclusion as being "[t]hat Government-created and -controlled corporations are (for many purposes at least) part of the Government itself." 115 S.Ct. at 973 (emphasis added). While the words we have emphasized certainly demonstrate that the Lebron Court contemplated the possibility of a corporation being part of government for some purposes and not others, we do not think much can be built on such a passing comment in the present context. See also id. at 974 (distinguishing an 1824 decision in which the Court held that a state-chartered bank did not enjoy "privileges of the government" such as eleventh amendment immunity).

The Act vests Amtrak's officers with significant authority. Section 10 authorizes Amtrak to provide "intercity rail passenger service . . . throughout the United States." Section 10 also authorizes Amtrak to "adjust its route structure as it deems appropriate." Section 11 gives Amtrak authority to "negotiate new employee protective arrangements," and section 6 empowers Amtrak to negotiate with its unions and enter into an agreement regarding "contracting out work." Negotiating and entering into contracts on behalf of a federal government agency with the employees of a federal agency is manifestly significant authority and any federal official who exercises such authority must be an officer of the United States. Section 13 authorizes Amtrak to construct an electrification system between Boston, Massachusetts, and New Haven, Connecticut. Section 13 also grants Amtrak complete discretion with respect to this project. Therefore, we think that this represents an exercise of significant authority. Finally, section 15 authorizes Amtrak to make such capital improvements in the Northeast Corridor as Amtrak deems necessary. Such broad discretion commits significant authority to Amtrak.

If the officers of Amtrak, who are clearly federal officials pursuant to Lebron, were appointed in conformity with the Appointments Clause of the Constitution, there would be no prohibition on vesting them with the foregoing powers; however, with one clear and another dubious exception, they are not. We turn first to the five board members who are not appointed as principal officers. See U.S. Const. art. II, § 2, cl. 2. (requiring principal officers to be appointed by the President and confirmed by the Senate).⁴ The courts have never definitively addressed the question of whether a collective department head⁵ may comprise inferior as well as principal officers, cf. Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring); Silver v. United States, 951 F.2d 1033 (9th Cir. 1991). We need not resolve that issue here because none of these five board members is validly appointed as an inferior officer.

The Appointments Clause requires that inferior officers be appointed by the President and confirmed by the Senate, unless Congress expressly provides that the appointment is to be made by the President alone, the head of a department, or a court of law. U.S. Const. art. II, § 2, cl. 2. Two of the five non-Senate confirmed board members are nominally appointed by the President

⁴ The five are the two members appointed by the President alone, the two elected by the preferred stockholders, and the President of Amtrak. See 49 U.S.C. § 24302(a)(1)(B), (D), (E).

⁵ The head of Amtrak is its board of directors. See, e.g., Silver, 951 F.2d at 1038-39.

alone. Under the proposed bill, however, these two would be appointed from a list of five names submitted by commuter authorities.⁶ The Attorneys General have long held that any requirement that the President make an appointment from a list represents a patent violation of the President's constitutional appointment power. See, e.g., Promotion of Marine Officer, 41 Op. Att'y Gen. 291 (1956); Civil Service Commission, 13 Op. Att'y Gen. 516 (1871). Another two of the five non-Senate confirmed board members are elected by Amtrak's preferred shareholders. 49 U.S.C. § 24302(a)(1)(E). These shares may potentially be held by anyone who wishes to purchase them. Such shareholders need not be the President, a department head, or a court of law and so are not necessarily a valid repository of the constitutional authority to appoint an officer of the United States.⁷ The fifth of the members is the President of Amtrak ex officio, who is appointed by the other eight members of the Board. Assuming arguendo that the Board is the head of a department within the meaning of the Appointments Clause, see generally Freytag v. Commissioner, 501 U.S. 868 (1991), and that a collective head of a department may itself appoint members of that collectivity, see generally Silver, 951 F.2d at 1038-41 (leaving this question open), the President of Amtrak is nevertheless not a properly appointed inferior officer. Because no more than two of the eight members are validly appointed, the Board as it is currently composed may not exercise the constitutional appointment power, even though an argument might be made that a validly appointed board could.

⁶ This is only a slight modification to the current mechanism for choosing the two members who are appointed alone. The statute provides that they are to be appointed from "a list of names consisting of one individual nominated by each commuter authority for which Amtrak Commuter provides commuter rail passenger transportation . . . and one individual nominated by each commuter authority in the region . . . that provides its own commuter rail passenger transportation." 49 U.S.C. § 24302(a)(1)(D).

⁷ As it happens, all of Amtrak's preferred stock is held by the United States. See Lebron, slip op. at 11. It is not clear whether that stock is voted by the President or a department head. However, even if the Constitution permits the President or a department head to appoint inferior officers through the mechanism of exercising a shareholder's election rights, this would not save the validity of the Board. If any member of a collectivity is appointed in a constitutionally offensive manner the entire collectivity is invalid. See, e.g., Buckley, 424 U.S. at 141-43; cf. FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), aff'd, 115 S. Ct. 537 (1994).

Of the four members who are subject to Senate confirmation, only the Secretary of Transportation, who sits ex officio, is clearly appointed in conformity with the Constitution. Cf. Weiss v. United States, 114 S. Ct. 752, 768 (1994); Shoemaker v. United States, 147 U.S. 282 (1893). The remaining three are each chosen in a distinct manner. One must be appointed from a list submitted by various interest groups. See 49 U.S.C. § 24302(a)(1)(C). As discussed above, this mechanism violates the President's constitutional appointment power. See, e.g., Promotion of Marine Officer, 41 Op. Att'y Gen. 291 (1956); Civil Service Commission, 13 Op. Att'y Gen. 516 (1871).

Another must be chosen from among the Governors of states with an interest in rail transportation. Even if this includes all fifty states, it does not leave sufficient "scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment. The parts of the Constitution which confer this power are as valid as those parts from which Congress derives the power to create offices, and one part should not be sacrificed to the other. An office cannot be created except under the conditions that it shall be filled according to the constitutional rule." 13 Op. Att'y Gen. at 520-21.⁸

The final Board member is not appointed from a list or a small, finite universe of individuals; instead, the President may choose anyone for this slot as long as the appointee might be

⁸ The Constitution does not ordain a magic number of potential appointees such that Congress may not enact any requirement or qualification that limits the field to a smaller number. We do not believe that this observation at all undermines the principle that there exists a constitutionally mandatory scope of discretion that must be accorded to the constitutional repository of the appointment power -- here, as typically, the President. As Attorney General Amos Akerman put it,

But it may be asked, at what point must the contracting process stop? I confess my inability to answer. But the difficulty of drawing a line between such limitations as are, and such as are not, allowed by the Constitution, is no proof that both classes do not exist. In constitutional and legal inquiries, right or wrong is often a question of degree. Yet it is impossible to tell precisely where in the scale right ceases and wrong begins. . . . In the matter now in question, it is not supposable that Congress or the President would require of candidates for office qualifications unattainable by a sufficient number to afford ample room for choice.

13 Op. Att'y Gen. at 525.

said to act "as a representative of business with an interest in rail transportation." 49 U.S.C. § 24302(a)(1)(C)(iii).⁹ We do not regard it as necessary to resolve the question of whether Congress may impose such a qualification or whether an officer of the United States may be permitted to represent any interest narrower or more specialized than the public interest of the United States. Even if provisions for filling this seat on the Board are constitutionally permissible, that would bring to only two the number of Board members who are validly appointed. A nine-member Board that comprises seven invalidly appointed members may not receive or exercise significant governmental authority. See Buckley, 424 U.S. at 141-43 (invalidating eight member board on which four of the six voting members were held invalidly appointed but upholding the board's prior actions); cf. FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993) (striking down eight-member board that included two constitutionally objectionable members), aff'd, 115 S. Ct. 537 (1994).

For these reasons, Amtrak's Board of Directors, as presently composed, is invalidly appointed and may not exercise or receive significant executive authority. Therefore, the proposed bill may not constitutionally include the provisions of sections 6, 10, 11, 13, or 15 cited above, unless the bill is amended to provide for a Board of Directors that is appointed in conformity with the Constitution. Whether the bill is amended to delete the provisions granting Amtrak authority or to provide for the Board to be appointed by the President by and with the advice and consent of the Senate, the bill's additional unconstitutional infringement on the President's appointment power, contained in section 8(a) (requiring the President to make an appointment from a list), should be deleted.

⁹ The requirement that, of the three Senate confirmed Board members other than the Secretary of Transportation, no more than two may be held by members of the same party also represents a significant and, we believe, difficult to justify intrusion on the President's constitutional appointment power. Without endorsing any particular test for reviewing such restrictions, we do not see how requiring a political balance among only a small subset of a board that is not charged with an apparently partisan task can be said to be reasonably advance any legitimate governmental interest.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

LRM NO: 2226

FILE NO: 990

8/1/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): _____

TO: Legislative Liaison Officer - See Distribution below:
FROM: James JUKES (for)
Assistant Director for Legislative Reference
OMB CONTACT: James BROWN 395-3473
Legislative Assistant's line (for simple responses): 395-3454
Daniel TANGHERLINI 395-5707
SUBJECT: TRANSPORTATION Proposed Report RE: HR1788, Amtrak Reform and Privatization Act of 1995

DEADLINE: 3:00 p.m. Today Tuesday, August 01, 1995

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: A copy of the latest staff draft of this bill is also attached. This bill is scheduled to be marked up tomorrow. If we do not hear from you by the deadline, we will therefore assume that you have no objection to clearance of this letter.

LEGISLATIVE REFERRAL MEMORANDUM
Distribution List**LRM NO: 2228****FILE NO: 990**

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Ed Clarke
Jonathan Breul
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Randy Lyon
Sue Murrin

**RESPONSE TO
LEGISLATIVE REFERRAL MEMORANDUM**

**LRM NO: 2225
FILE NO: 990**

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter.

Please include the LRM number shown above, and the subject shown below.

TO: James BROWN 395-3473
 Office of Management and Budget
 Fax Number: 395-3109
 Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

SUBJECT: TRANSPORTATION Proposed Report RE: HR1788, Amtrak Reform and Privatization Act of 1995

The following is the response of our agency to your request for views on the above-captioned subject:

- _____ Concur
- _____ No Objection
- _____ No Comment
- _____ See proposed edits on pages _____
- _____ Other: _____
- _____ FAX RETURN of _____ pages, attached to this response sheet

The Honorable Bud Shuster
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Shuster:

The Department of Transportation shares with the Committee a belief in the importance of intercity rail passenger service as a component of this Nation's intermodal transportation system. I appreciate your efforts in moving legislation to reauthorize Amtrak and want to provide you with the Administration's views on several of the key issues as the Transportation and Infrastructure Committee prepares to continue consideration of H.R. 1788.

On June 13, I wrote to you of my concerns with several of the proposals that were included in the Railroads Subcommittee approved bill. Chief among these were the provisions on labor-management relations and the financial reforms included in Title V of the bill. I am pleased to see that some progress is being made in revising the labor sections to stress achieving reform through labor-management dialogue. I continue to believe that labor-management negotiations are the best method for achieving real reforms.

We remain troubled by the financial reforms included in Title V of the current draft of the bill because they unnecessarily jeopardize the substantial Federal government investment in Amtrak by immediately giving up taxpayer protections before Amtrak has undertaken the actions necessary to successfully restructure itself. Clearly, the issues surrounding the method and pace for moving Amtrak to operating self-sufficiency are complicated ones and the stakes are high. We continue to believe the Conrail experience provides a valuable model. As I noted in my June 13 letter, Conrail needed statutory changes to free it from unnecessary government regulation and sufficient time for capable management to take advantage of the new freedoms to turn the corporation around. The Federal government did not release its interests in Conrail in 1981 when NERSA was enacted but in 1986 when it was clear that Conrail's restructuring was complete. I believe we should adopt a similar approach with Amtrak. We should set a goal now and enact the reforms that will enable Amtrak to meet that goal. There will be sufficient time as Amtrak completes its restructuring over the next several years for us to review the corporation's progress and for determining the appropriate long-term relationship between the Federal government and a new Amtrak.

Given the significant nature of the present challenges confronting Amtrak, I am very concerned that the current draft of the bill would discharge Amtrak's current Board of Directors in favor of a totally new "Emergency Reform Board" that would manage the corporation for the next four years. I believe this change is unnecessary and counterproductive. The current Board has demonstrated a firm commitment to eliminate Amtrak's dependence on its Federal operating subsidy over the next five years and a dedication to taking the hard-nosed business decisions necessary to achieve this goal. Replacing the Board at this critical juncture with any new group of individuals, let alone a group that might respond to political rather than business concerns, could cause Amtrak to lose

2

focus and valuable time in its efforts to eliminate the subsidy. There is no indication that the current board is unable or unwilling to lead Amtrak towards self-sufficiency. In my view, the current board and management are ready to move forward with the new tools that will be provided by the reauthorization legislation. I support giving them the chance to show their resolve.

*merit -
all to run
with
press?*

I also believe there is an important role for the Secretary to play on the Amtrak Board because of the significant Federal investment. Recognizing the importance of a coordinated approach to transportation programs and the need to protect the public interest, the Secretary has been a member of the Amtrak Board since the corporation was created in 1971. Similarly, it seems to me to represent sound management to have the president of the Corporation represented on the Board. This is consistent with the practice of major private sector corporations.

The proposed legislation would eliminate the security interests the Federal Government has in Amtrak, including the preferred stock holdings and the note/mortgage on the Northeast Corridor. Congress mandated these security interests in 1976 and 1981 in order to protect the public's interest in Amtrak's assets that were purchased with taxpayer dollars and to ensure that these assets continue to be used for rail passenger service. The Northeast Corridor note/mortgage serve the additional important purpose of protecting the broader transportation importance of this vital asset. The public's need for this protection is not eliminated simply because Amtrak is charting a new course towards operating self-sufficiency. Amtrak has used billions of taxpayer funds to acquire equipment and facilities and to maintain its operations. The authorizations in this bill promise an additional \$4 billion over fiscal years 1995 through 1999. The public's existing security interests should not be simply erased. We have an obligation to represent and protect the interests of the taxpayers and retain sufficient control to assure that the assets they have purchased remain dedicated to rail passenger service.

Finally, the Administration has reservations with the inclusion of caps on punitive damages in Title IV of the bill.

The Committee leadership's proposed legislation is a positive contribution to the debate on how to ensure the long-term vitality of intercity rail passenger service. It has helped focus the various stakeholders in Amtrak on issues of importance and on the measures needed to make Amtrak a commercially-focused provider of quality transportation service that is free of its dependence on a Federal operating subsidy. The Department looks forward to continue to work with the Committee in crafting a meaningful legislative package that will help Amtrak achieve our shared vision for the Corporation. Please do not hesitate to contact me or Steven O. Palmer, Assistant Secretary for Governmental Affairs, so that we can begin this cooperative effort.

Sincerely,

Federico Peña

Tanno Lieber - 7/31/75 11:30

Const of Amtrak order?

Don't alert cong opponents re problems w/ existing Bd.
If bill didn't mess w/ existing Bd, Dellinger would
OK not to make big to-do.

Two proposals

Senate - leave Bd intact + commission.

const of com'n. - no immed. need.

Send *
to me.

House - existing Bd out. Replace it w/ new Bd -
Pres subj to confirmation; but consultation.

Full comte - mark-up - ^{maybe by} Wednesday.

~~Subcommittee~~

(views letter)

← "Have some 2's abt const of proposal"
no details

low-key as long as possible.

A lot of these are shaking out.

~~R~~

encourage
you to consider.

Dellinger - Schicklin -

if go under, Fed govt

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this.

- blow-up Amtrak

- affect other agencies

- if decide A. is a fed'l

entity, counting all EEs

of A. - more jobs.

- A. ee's - 6 yrs severance



134574

Robert Barkin
Kathy Shaw
Bethesda

Call: Doug Letter -

Anthrax - Jano Lipber

Dep Asst Secy of Trans.

366-4450

#800-sky page - 273-4251

- Reauthorization
- Union Ks - negotiation
- OCT - Lebanon.

↓
 POB not equipped so as to be
 in compliance w/ appointments cl.
 fully liable for all debts?
 fed govt

← reauth bill

Admin proposed bill - tinkered w/ POB. configuration.
 Negot w/ Dellinger

cutte / floor?

What say
 abt Senate
 side?
 Bob Damus - IAB
 Walker's shop.

Lieber - last wh - reported cut reauth bill - new.
 Brach Commission approach -> peculiar structure
 (base realignment)
 const supposedly - control over by submission process

Want us to opine

House version - Schuster - blanket vid of Buckley v Valeo
 POB this -> Chair - Transport Cutte
 New - amend? Do something now?

look at - see if problem.

Talk to leg atts -
 Un OMB (Damus)

> see if they're doing
 a SAP.

Call: Justice
 Jennifer O'Connor
 Intro from James -

- Any short materials on PRRK?
How is it appointed?

Current Bd - consist of 3 there

Commission - Pres/cent by law

- but describe the slightly
- consultation neg

Report on profitability,

If kind OK, implement plan, unless Corp
vetoes.

If kind not OK, kill ~~ADP/PRK~~

(Corp + Am bank) - no corp
veto!

How
compare
to
PRK?

Ch. 10
Share

905 F2d 400

It need. presented to Pres

Indep commission — mems directly appointed by secy of
Defense.
Review secy's recs
prep recs report to Pres.
P. approve or disapprove
transmit to Coma + Cong
Cong has 45 days ~~from date of sig~~ to pass
JR (subject to presentment) disapproving req
in toto

800 SKY-PAGE

To JAMES 273-4251

Date 7-24 Time 6:05

2 + X
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WHILE YOU WERE OUT

JANNO LIEBER

Dot

Phone 366-4450

Area Code Number Extension

TELEPHONED	<u>PLEASE CALL</u>	
CALLED TO SEE YOU	WILL CALL AGAIN	
WANTS TO SEE YOU	URGENT	

RETURNED YOUR CALL

Message (Amtrak)

Senate Committee reported
bill out with existing board plus
BRAC

Shuster — ^{Operator} Congressionally
appointed

*copy to Elena
then file: Amtrak*



U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
400 Seventh Street, S.W.
Washington, D.C. 20590

OFFICE OF THE ASSISTANT SECRETARY FOR TRANSPORTATION POLICY

Number of Pages including this page: 9

Date: 7-26-95

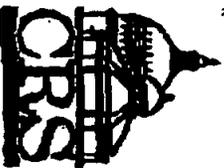
TO: James Castello

FROM: Janno Lieber

Deputy Assistant Secretary for Transportation Policy

FAX MESSAGE:

Please call me to discuss.



Congressional Research Service • The Library of Congress • Washington, D.C. 20540-76

July 20, 1994

TO : House Subcommittee on Railroads
Attention: Jack Walls

FROM : American Law Division

SUBJECT : Appointment of Amtrak Board of Directors by Congressional
Leaders

This memorandum is in response to your request for an evaluation of a proposal to alter the method by which Amtrak's Board of Directors would be appointed. At present, a majority of the Board is appointed by the President of the United States. 49 U.S.C. § 24502. Under the proposal, a new Board would be created, with four members appointed by the majority leadership of Congress, three by the minority leadership of Congress, and one by the President. The Board would be a temporary body, which would draft by-laws for selecting a new Board, and it would expire in four years.

Amtrak as an entity is designated by its congressional authorizing legislation as "not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24501(a)(3). As a limitation of the application of United States statutory law to the entity, with specific exceptions and limitations scattered throughout the statute, this designation is well understood and accepted jurisprudentially. However, whether a body created by Congress is an entity governed by the United States Constitution is another matter altogether.

In *Labron v. National Railroad Passenger Corp.*, 115 S.Ct. 961 (1995), the issue was whether Amtrak could conduct itself in a manner that would violate the First Amendment if government engaged in the activity. Noting the various provisions of the law that defined what Amtrak was, the Court held that, while the statute was dispositive of the governmental status of the entity for purposes of matters within Congress' control, it was not determinative of the status of the entity for purposes of the Constitution's application. Because Amtrak is created by federal law, because it is governed by a Board composed largely of government appointees - that is, it is a government-created and -controlled corporation - it is a government actor for purposes of the Constitution. The precise holding was that it is an agency or instrumentality of the United States for purposes of the protection of individual constitutional rights - the exact issue presented - but there is little doubt that Amtrak would be so analyzed for consideration of other constitutional provisions.

CRS-2

The particular constitutional provision that is implicated by the proposal before us is the appointments clause, Article II, § 2, cl. 2. This clause authorizes the President to nominate and to appoint by and with the advice and consent of the Senate "Officers of the United States," but it also empowers Congress to vest the appointments of "inferior Officers" in the President alone, in the Courts of Law, or in the Heads of Departments." Now, who is a "principal" officer of the United States and who is an "inferior" officer may present a nice question. *Morrison v. Olson*, 487 U.S. 654, 670-677 (1988). But we need not concern ourselves with that issue. It is plain that officers of the United States, either principal or inferior, are those who execute the laws enacted by Congress and exercise the authority of the United States. They must be appointed pursuant to the appointments clause. *Buckley v. Valeo*, 424 U.S. 1, 109-143 (1976).

The Court has been exacting in several cases. Congress may not take part in the administration or execution of the laws it enacts. Congress may not empower its officers or employees or agents within its control to take part in administration or execution. Congress may not appoint persons or exercise too much influence over the appointment of persons to administer or execute the laws. *Buckley v. Valeo*, supra; *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise*, 501 U.S. 268 (1991). And see *Hechinger v. Metropolitan Washington Airports Authority*, 36 F.3d 97 (D.C.Cir. 1994), cert. den., 115 S.Ct. 984 (1995).

Thus, *Buckley v. Valeo*, supra, invalidated provisions of the Federal Election Campaign Act Amendments of 1974 giving Congress authority to appoint four members of the six-member Federal Election Commission, two by the Speaker of the House of Representatives, two by the President pro tempore of the Senate. Because the agency administered and executed the laws of the United States, Congress could have no role in the appointing process. Recently, in *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C.Cir. 1993), cert. denied for want of jurisdiction, 115 S.Ct. 587 (1994), the Court of Appeals held constitutionally improper the inclusion as ex officio members of the FEC the Secretary of the Senate and the Clerk of the House of Representatives or their designees, on the ground that they could exercise some measure of congressional influence in the decisions of the Commission.

While it is clear that the FEC members are officers of the United States for purposes of the appointments clause, one might argue that the Amtrak Board of Directors, despite *Lebron*, is not. We think, however, it to be evident that if the entity is governed by the Constitution for Bill-of-Rights application, it must be governed as well by the structural provisions of the Constitution, such as the appointments clause. Otherwise, Congress would be enabled to avoid the constraints of the Constitution by creating entities that it would define as outside the perimeters of constitutional coverage. The Court views such possibilities with great disdain. *Airports Authority*, supra, 501 U.S., 269-270, 276-277.

This is
not self-
evident...

CRS-1

The *Airports Authority* case illustrates the constraints under which Congress operates in attempting to play a role such as the one envisioned in the proposal. Congress had insisted in 1986, when it transferred control of National and Dulles Airports to an interstate entity created pursuant to its approval, that the interstate body create a Board of Review, composed of Members of Congress, which could veto a range of decisions made by the Board of Directors of the entity. The Board of Review was held unconstitutional by the Court because of the congressional role, and the subsequent reconstitution of the Board of Review that continued congressional review was likewise invalidated by the appellate court in *Heckinger*. To the defense in the first case before the Supreme Court that the interstate agency was not subject to the constitutional constraints because it did not exercise federal power or act as an agent of Congress, the Court concluded in a brief analysis that the agency was subject to constitutional oversight. *Airports Authority*, supra, 501 U.S., 285-270. "We thus confront," said the Court, "an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officers. Such an entity necessarily exercises sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny." *Id.*, 289. We would not expect a different judicial outcome with respect to a law that structured the Board of Directors of Amtrak in accordance with the proposal presented to us.

As we are informed, the reconstituted Board would develop permanent by-laws for the appointment of a new Board of Directors. This function could be performed by a Board organized in line with the proposal; the function is the typical factfinding and reporting activity that commissions and other bodies are generally authorized to do, while being constituted by appointees of two or all three of the branches of the Federal Government. *Buckley v. Valeo*, supra, 424 U.S., 137-138. But, inasmuch as it would direct the operation of Amtrak for four years, it would be administering and executing the laws of the United States, and a Board of Directors constituted as proposed would run afoul of the separation-of-powers limitations of the appointments clause as established in the precedents that we have cited.


Johnny H. Killian
Senior Specialist
American Constitutional Law

Robly D. Carle
Clerk

Cheryl Lau
General Counsel

Office of the Clerk
U.S. House of Representatives
Washington, DC 20515-6601

July 24, 1995

MEMORANDUM

TO: The Honorable Bud Shuster, Chairman
Committee on Transportation and Infrastructure

FROM: Cheryl Lau
General Counsel

RE: The Constitutionality of the Emergency Reform Board's
Appointment of Membership under the Amtrak Reform and
Privatization Act of 1995

You have asked for an informal opinion regarding the constitutionality of Congressional appointment of the Emergency Reform Board's membership under Section 24302 of the Amtrak Reform and Privatization Act of 1995. Your specific question is whether the appointments to the Emergency Reform Board, albeit a temporary body which would expire in four years, would be governed by the United States Constitution and pass constitutional muster.

BACKGROUND

Amtrak was created when Congress enacted the Rail Passenger Service Act, Pub. L. No. 91-518, 84 Stat. 1327, October 30, 1970, 45 U.S.C. Section 510 et. seq. (1982). The Act authorized Amtrak as a "for profit corporation, the purpose of which shall be to provide intercity and commuter rail passenger service, . . . so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements." 45 U.S.C. Section 541. Thus the drafter(s) envisioned that Amtrak "would not be an agency or establishment of the United States Government." Id.

In July, 1995, an amendment was offered under the "Amtrak Reform and Privatization Act of 1995." Title V - Financial Reforms Section 503, Board of Directors Section 24302 (a) Emergency Reform Board (2) membership asserts in pertinent part:

"(2) Membership - (A) The Emergency Reform Board shall consist of 7 members appointed as follows:

"(i) Two individuals to be appointed by the Speaker of the House of Representatives.

July 24, 1995
Page 2

"(ii) One individual to be appointed by the minority leader of the House of Representatives.

"(iii) Two individuals to be appointed by the majority leader of the Senate.

"(iv) One individual to be appointed by the minority leader of the Senate.

"(v) One individual to be appointed by the President.

I. Is Amtrak Governed by the United States Constitution?

The charter of the National Railroad Passenger Corporation (Amtrak) stipulates that Amtrak "will not be an agency or establishment of the United States Government." 84 Stat., at 1330. In Lebron v. National Railroad Passenger Corp., 115 S. Ct. 961 (1995), however, the Supreme Court held that Amtrak is a part of the Government for purposes of the First Amendment. Id. 115 S. Ct. 961 at 975. The court ruled that the agency disclaimer incorporated into Amtrak's enabling legislation could "suffice to deprive Amtrak of all those inherent powers and immunities of Government agencies that is within the power of Congress to eliminate" but held that Congress did not have the power to determine Amtrak's governmental status with respect to the constitutional rights of individuals affected by its actions. Id. 115 S. Ct. 961 at 971. The court found that the goals, administrators, and impetus for creation of Amtrak all emanated directly from the Federal government, and thus was a government agency for Constitutional purposes.

The stated rationale used by Lebron to enforce the First Amendment on Amtrak should be equally valid with respect to the Appointments Clause of the Constitution. Art. II, sec. 2, cl. 2. The court's analysis encompassed all provisions of the Constitution that Congress does not have the power to control.¹ The Appointments Clause clearly would not fall into this category, as it was itself meant to be a check on the power of the legislature.

The structural reforms for Amtrak outlined in the proposed legislation should not make a difference in its status with respect to the Constitution. The focus of the court was creation and control by the Federal Government, and the retooled Amtrak will not

¹ "Section 541 is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control. . . . 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 it's actions." Lebron, 115 S. Ct. 961, 971.

July 24, 1995
Page 3.

differ significantly in this respect. The elimination of voting rights for preferred stock holders (the United States currently holds all preferred stock of Amtrak) and other privatization measures enacted by the proposed legislation diminishes the extent of government control, but nonetheless it remains that Amtrak ". . . is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees." Id. 115 S. Ct. at 973. The proposed legislation also tries to cast Amtrak as a private corporation by exempting it from Title 31 of the U.S. Code and striking out sections of the code that define "mixed-ownership" entities like Amtrak as "Government Corporations". Lebron made it clear, however, that Congress does not have the power to liberate Amtrak from constitutional restraints by legislative fiat.²

II. Since Amtrak is Governed by the United States Constitution, does Amtrak Administer and Execute the Laws of the United States and What are the Consequences?

The events regarding the Metropolitan Washington Airports would be instructive in this matter.

In Citizens for the Abatement of Aircraft Noise, Inc. v. MWA, 718 F. Supp. 974 (D.D.C. 1989) rev'd in part, 917 F. 2d 48 (D.C. Cir. 1990), aff'd, 111 S. Ct. 2298 (1991), the Supreme Court held that the Board of Review as comprised of Members of Congress was unconstitutional as violative of the separation of powers doctrine, determining that the Board of Review was an agent of Congress. In sum, the Court invalidated the Board of Review because it was "an entity created at the initiative of Congress, the power of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to Congressional officials." Id. at 2308.

In response, Congress passed the Metropolitan Airport Authority of Washington Act Amendments of 1991, Pub. L. No. 102-240, Title VII, 105 Stat. 2197 ("1991 Amendments"). While the 1991 Amendments altered the composition, qualifications and membership of the Board of Review, the new Board of Review was to be chosen by the Directors based on lists submitted by the Speaker of the House, and President pro tempore of the Senate. The 1991 Amendments notwithstanding, a subsequent challenge to the Act as amended resulted in a second determination of unconstitutionality as the retention of control by the Congress in the Board of Review was

² "If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment." Lebron, 115 S. Ct. at 971.

July 24, 1995

Page 4

once again deemed violative of the separation of powers with the District Court finding the Board an agent of Congress that impermissibly exercised Executive power.

The Court also found the appointment system for the members of the Board of Review to be violative of the Appointments Clause of the Constitution. Hechinger v. MVAA, 845 F. Supp. 902 (D.D.C. 1994) aff'd, 36 F.3d 97 (D.C. Cir. 1994) (affirming decision on separation of powers grounds but not reaching the Appointments Clause issue).

The Appointments Clause authorizes the President to nominate and to appoint with the advice and consent of the Senate "Officers of the United States," but it also empowers Congress to vest the appointment of inferior Officers in the President alone, in the Courts of Law, or in the Heads of Departments. Thus Officers of the United States execute the laws enacted by Congress with the authority of the United States. According to Buckley v. Valeo, 424 U.S. 1, 109-143 (1976), they are appointed pursuant to the Appointments Clause.

In Buckley v. Valeo, supra, certain provisions of the Federal Election Campaign Act Amendments of 1974 were invalidated because Congress had the appointment power four of the six member Federal Election Commission (FEC). Since the Federal Election Commission administered and executed the laws of the United States, Congress could not have the decisive role in the appointing process.

Moreover, in REC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. denied for want of juris., 115 S. Ct. 537 (1994), the Court of Appeals held that it was constitutionally improper to include the Secretary of the Senate and the Clerk of the House of Representatives or their designees, (emphasis added), as ex officio members of the FEC because of the possibility of a measure of Congressional influence in commission decisions.

Since Amtrak administers and executes the laws of the United States and would likely be governed by the Constitution as proffered by the reasoning of Lebron v. National Railroad Passenger Corp., we believe that Amtrak's interim Emergency Reform Board's membership is subject to provisions of the United States Constitution, including the Appointments Clause and the Doctrine of Separation of Powers.

Analyzing the Emergency Reform Board's membership against the above decisions, the appointment of members by the Speaker, the minority leaders and the majority leader does not pass constitutional scrutiny as it does violate the separation of powers and the Appointments Clause.

July 24, 1995
Page 5

III. Alternatives to a Congressionally Appointed Board of Directors

The interpretation of the U.S. Constitution, both as to Separation of Powers and the Appointments Clause, Art 2, § 2, Clause 2, by the Supreme Court makes any alternative which includes the appointment by Congress of a majority of Amtrak policy makers suspect.

There are few avenues to get around the clear ban on Congressional involvement in enforcing the law in this case, the Rail Passenger Service Act, supra. We imagine that any alternative we suggest has already been considered by your Committee. Nonetheless, the following might accomplish your aims:

1. Reform the ratio of Congressional to Presidential appointments. This would require giving the President a majority of the Board appointments. However, a 4/3 or 5/4 ratio might retain some Congressional control and still get court approval.

Pro Amtrak here.

2. Leave the Board untouched, but instead appoint a base closure type Commission to review and recommend a long term solution for Amtrak. This might not cure the problem you are dealing with, but could provide the groundwork for a later solution of the problems involved in dealing with Amtrak.

3. Consider offering Amtrak's limited North East Corridor to a consortium of the seven states in the corridor, on a take it or lose it basis. The package might involve a declining federal subsidy with Congressional oversight for a period of five or ten years.

4. Consider a sequenced conditional disposition of the line to existing private rail lines.

As you are aware, none of the above suggestions is new or satisfactory. The problem, however, is less legal than it is political and economic.

We have stated our opinion that no solution, crafted to allow substantial Congressional enforcement or management input, can be expected to survive court challenge. That being the case it is our view that the form of the pending proposal will not produce the result it intends.

copy to Elena.
then file: Amtrak



U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
400 Seventh Street, S.W.
Washington, D.C. 20590

OFFICE OF THE ASSISTANT SECRETARY FOR TRANSPORTATION POLICY

Number of Pages ^{NAT} including this page: 3

Date: 7/27/95

TO James Costello
FAX: 456-6279

FROM: JANNO LIEBER
Telephone: 366-4450 Fax: 366-7127

FAX MESSAGE:

LIABILITY PROVISIONS OF THE AMTRAK REAUTHORIZATION BILLS

STATUS OF THE BILLS

- ▶ The Senate Commerce, Science and Transportation Committee approved Amtrak reauthorization legislation (the "Amtrak and Local Rail Revitalization Act of 1995") on July 20, 1995. Floor action has not been scheduled.
- ▶ The House Transportation and Infrastructure Committee adjourned without completing action on Amtrak reauthorization legislation (the "Amtrak Reform and Privatization Act of 1995") on June 14, 1995. A scheduled Committee meeting on July 26 to consider a revised bill to be offered by Chairman Shuster was postponed. Future action is uncertain.

LIABILITY PROVISIONS IN THE SENATE AMTRAK REAUTHORIZATION BILL

- ▶ Punitive/exemplary damages to rail passengers limited to greater of 2 times compensatory or \$250,000; provided, passengers are given adequate notice of limits and opportunity to purchase supplementary insurance.
- ▶ Limits apply to rail passenger claims against Amtrak, any high-speed railroad authority, any commuter authority, and any rail carrier (including the Alaska Railroad and private rail cars).
- ▶ Limits do not apply to FELA/workers' compensation suits.
- ▶ Punitive damages are not limited if they are the only recognized damages in the jurisdiction.

LIABILITY PROVISIONS IN THE HOUSE AMTRAK REAUTHORIZATION BILL (SHUSTER SUBSTITUTE of 7/21/95)

- ▶ Punitive damages not to exceed greater of \$250,000 or 3 times economic damages; and damages to any claimant are not to exceed economic losses by more than \$250,000.
- ▶ Limits apply to claims against Amtrak, any high speed railroad authority, any commuter authority and any rail carrier.
- ▶ Limits do not apply to FELA/workers' compensation suits.
- ▶ Punitive damages are not limited if they are the only recognized damages in a jurisdiction.
- ▶ Agreements allocating liability amongst the parties would be fully enforceable notwithstanding other laws, public policy, or the nature of the conduct giving rise to liability.

DOT POSITION

- ▶ To date, the Department has not provided its views to the House or Senate committees on the liability provisions included in either bill. The Administration is developing its views in the context of the larger efforts underway in the House and Senate to enact liability reform legislation.

AMTRAK POSITION

- ▶ Amtrak strongly advocates liability limitations and negotiated an agreement with the Association of American Railroads that specified a package of liability limitations to be sought from the Congress. Amtrak believes renegotiation of its operating agreements with the host freight railroads (the existing 25 year agreements expire in 1996) will be easier and cheaper if statutory liability limitations are in place. Amtrak fears it will be forced to purchase significant levels of insurance to protect the interests of the freight railroads.

FREIGHT RAILROADS POSITION

- ▶ The freight railroads want enactment of provisions making liability allocation agreements fully enforceable so that they will not be liable for ordinary or gross negligence in the passenger context. The Chase Maryland Amtrak/Conrail accident involved use of drugs and the disabling of safety warning devices by a Conrail employee after going on duty; the Federal District Court refused to enforce an indemnification agreement by Amtrak finding it against public policy to the extent the agreement covered Conrail's gross negligence. The freight railroads do not want to face this type of liability for passenger service which they argue provides no benefits to them.

BACKGROUND

- ▶ Several Democratic members of the Senate Commerce Committee expressed concerns with the liability provisions in the bill. A Breaux amendment to add language prohibiting railroads from contracting away liability for gross negligence was rejected by the Committee. Continued discussions between Democratic members and Senator Lott and refinements to the liability provisions are likely between now and floor consideration.
- ▶ Some Democratic members of the House Transportation Committee similarly opposed the liability provisions in the House bill during subcommittee consideration. The staff draft bill contained a total prohibition on punitive damages and was changed to the current provision through a Nadler amendment. The issue of liability had not been addressed when Chairman Shuster adjourned the mark-up on June 14. Amendments were likely from Democratic members and can be expected when the mark-up reconvenes.

- ▶ Liability limitations were considered by Congress in 1993 and 1994 in the context of enacting high-speed rail legislation. The freight railroads contend that such limits are essential to the use of shared rights-of-way for high-speed rail. Liability limits were included in the Senate bill but dropped from the enacted Swift Rail Development Act which focuses on planning and development rather than operational issues.

- ▶ In 1990, Congress enacted specific liability limitations in the context of the Virginia Railway Express' use of Conrail tracks—liability against Amtrak, Conrail and VRE is limited to \$200 million per accident and VRE must maintain insurance coverage equal to that amount.

H. maj.

Hour

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Greate

- bar closing-type] -
Coming to the floor.] -
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September
end of FY.

unless entire connect b/w
approps + authorization

Call Dellinger - set up mtg.

Lieber - This week good.

THE WHITE HOUSE
WASHINGTON

Tim

Mr. White says the

House / Senate

where both are
both reconstituted BOD
both are probably unconst.

Harri talked to Dell

but then when I understood
he was willing not to raise a
stick it new bill had no
changes in current BOD
(also unconst)
but not it BOD reconstituted
differently

DOT - clearly wants to ignore this -
to pretend no problem
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What do we do?

Tanno

Dellinger

Conte blamed labor for
raising new issues.

Sit up if it's not next week
see it later. blinks.

...

...

...

...

...

THE WHITE HOUSE
WASHINGTON

DATE: _____

TO:

FROM: White House Counsel
Room 125, OEOB, x6-7901

- FYI
- Appropriate Action
- Let's Discuss
- Per Our Conversation
- Per Your Request
- Please Return
- Other

- Tanno Lieber -

OMB refused to comment on anything involving "enact" w/out OCC participation

James - Has to be involved at some point. So may as well get them in now.

Tanno - agreed, but not for this letter.

Mark-up today? Letter go up? If not, wait + get them involved now?

leg vet - Jim Brown

THE WHITE HOUSE
WASHINGTON

initial draft to OMB -
↓
of letter
↓
viewer

Not into every legal detail -
just flag problem.

Not able to change this at
this state of game.

66350

Jim Brown

366-4450
Tel call
w/ Vanno
Lieber

THE WHITE HOUSE
WASHINGTON

Re: call w/

Dawson make as easy as

poss. -

dispond to come down
on side that this is
OK.

Support them -
don't go any
further than
they want to go.

Ted call a/

THE WHITE HOUSE
WASHINGTON

Jennifer O'Connor -

Draw attention to
completely bill it.

If possible not to
mention anything,
would rather do
that.

Do we have a policy
saying we have to
hide court concerns
if we have them?

Tell, call
w/ James
Castello

THE WHITE HOUSE
WASHINGTON

Have to live eventually
Covers bed to ruin
for 1st time on floor -
where were you?

The Honorable Bud Shuster
 Chairman
 Committee on Transportation and Infrastructure
 U.S. House of Representatives
 Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Transportation shares with the Committee a belief in the importance of intercity rail passenger service as a component of this Nation's intermodal transportation system. I appreciate your efforts in developing legislation to reauthorize Amtrak and want to provide you with the Administration's views on several of the key issues as the Transportation and Infrastructure Committee continues consideration of H.R. 1788.

On June 13, I wrote to you of my concerns with several of the proposals that were included in the Railroads Subcommittee-approved bill. Chief among these were the provisions on labor-management relations and the financial reforms included in Title V of the bill. I am pleased that the labor provisions of the bill have been altered ~~for reforms to~~ be achieved through labor-management dialogue rather than Congressionally dictated outcomes. Labor and management negotiations are the best hope of achieving real reforms.

so that change will be

We remain troubled by the financial reforms included in Title V of the current draft of the bill. These proposals unnecessarily jeopardize the substantial Federal Government investment in Amtrak by immediately surrendering the taxpayer's financial interests, including our preferred stock holdings (which would be rendered worthless) and the mortgage on the Northeast Corridor before Amtrak has undertaken the actions necessary to successfully restructure itself. Amtrak has used billions of taxpayer funds to acquire equipment and facilities and to maintain its operations and the authorizations in this bill promise an additional \$4 billion over fiscal years 1995 through 1999. These security interests in Amtrak were mandated by the Congress to ensure that these taxpayer-funded assets continue to be used for rail passenger service. The public's need for this protection is not eliminated simply because Amtrak is charting a new course towards operating self-sufficiency. We have an obligation to represent and protect the public's interest and retain sufficient control to assure that the assets they have purchased remain dedicated to rail passenger service.

carrying out

American taxpayers

~~Given the significant nature of the present challenges confronting Amtrak, I am very concerned that the current draft of the bill would discharge Amtrak's current Board of Directors in favor of a totally new "Emergency Reform Board" that would manage the corporation for the next four years. I believe this change is unnecessary and counterproductive.~~

also

This provision not only replaces the existing Board, but would disqualify many existing Board

Insert # from p. 2

(As you know,

2

members from serving on the reconstituted Board. Specifically, the bill would preclude employees of Amtrak or the United States, or representatives of rail labor or management, from serving as Board members.) The current Board has demonstrated a firm commitment to eliminate Amtrak's dependence on its Federal operating subsidy over the next five years and a dedication to taking the difficult business decisions necessary to achieve this goal. Replacing the Board at this critical juncture with any new group of individuals could cause Amtrak to lose focus and valuable time in its efforts to become a more customer-oriented commercially-viable entity. I support giving the current Board and management the opportunity to move forward with the new tools that will be provided by the reauthorization legislation.

Further, we have questions about whether the process for selecting and appointing members of the Emergency Reform Board outlined in the substitute bill is workable, or even constitutionally permissible. Even if the bill were to pass scrutiny, American taxpayers would not be well-served by having the future of rail passenger service in this country set by unelected judges. ~~of the bill~~ provision in section 503 ~~provision~~ for appointment of a Director General ~~would guarantee~~.

... a very strong possibility in light of

I also believe there is an important role for the Secretary to play on the Amtrak Board because of the significant Federal investment and taxpayer interest in Amtrak, and because of the need for passenger rail policy to be coordinated with other transportation programs. Similarly, it seems to me to represent sound management to have the president of the Corporation represented on the Board. This is consistent with the practice of major private sector corporations.

in the event Congress fails to comply with the new Emergency Board within 60 days of after the legislation is enacted.

Clearly, the issues surrounding the method and pace for moving Amtrak to operating self-sufficiency are complicated ones and the stakes are high. We continue to believe the Conrail experience provides a valuable model. As I noted in my June 13 letter, Conrail needed statutory changes to free it from unnecessary government regulation and sufficient time for capable management to take advantage of the new freedoms to turn the corporation around. The Federal Government did not release its interests in Conrail in 1981 when NERSA was enacted but in 1986 when it was clear that Conrail's restructuring was complete. I believe we should adopt a similar approach with Amtrak. ~~We should set a goal now and enact the reforms that will enable Amtrak to meet that goal. There will be sufficient time as Amtrak completes its restructuring over the next several years for us to review the corporation's progress and for determining the appropriate long-term relationship between the Federal Government and a new Amtrak.~~

have to p. 1

Finally, the Administration opposes the inclusion of caps on punitive damages in Title IV of the bill. The Administration would support, however, judicial determination of punitive damage amounts.

The Committee's proposed legislation is a positive contribution to the debate on how to ensure the long-term vitality of intercity rail passenger service. It has helped focus the various stakeholders in Amtrak on issues of importance and on the measures needed to make Amtrak a commercially-focused provider of quality transportation service that is free of its dependence on a Federal operating subsidy. The Department looks forward to continuing to work with the Committee in crafting a legislative package that will help Amtrak achieve our shared vision for the Corporation. Please ~~do not hesitate to~~ contact me or Steven O. Palmer, Assistant Secretary for Governmental Affairs, so that we can pursue this cooperative effort.

whenever we can assist in

08/01/85

14:57

☎202 366 7718

FRA CHF COUNSEL

004/004

3

The Office of Management and Budget advises that from the perspective of the Administration's program there is no objection to the submission of these views for the consideration of the Committee.

Sincerely,

Federico Peña

GOVERNMENT CORPORATIONS AND
GOVERNMENT SPONSORED ENTERPRISES

Mixed-ownership Government Corporations

Amtrak
Federal Deposit Insurance Corporation
Resolution Trust Corporation

Wholly Owned Government Corporations

Commodity Credit Corporation
Export-Import Bank of the United States - *fine*
Federal Crop Insurance Corporation
Federal Prison Industries, Incorporated - 18 USC 4121
Corporation for National and Community Service
✓ Government National Mortgage Association
Overseas Private Investment Corporation
✓ Pennsylvania Avenue Development Corporation
✓ Pension Benefit Guaranty Corporation *fine*
✓ Rural Telephone Bank
✓ Saint Lawrence Seaway Development Corporation *fine*
Tennessee Valley Authority
✓ United States Enrichment Corporation - *fine*

Other Government Corporations

Legal Services Corporation - *fine*
✓ Corporation for Public Broadcasting
Inter-American Foundation
✓ Neighborhood Reinvestment Corporation - *fine*

Government Sponsored Enterprises

Banks for Cooperatives and Farm Credit Banks
College Construction Loan Insurance Association
Federal Agricultural Mortgage Corporation
Federal Home Loan Banks
Federal Home Loan Mortgage Corporation
Federal National Mortgage Association
Financing Corporation
Resolution Funding Corporation
Student Loan Marketing Association

Richard - OMB put together this list. Should the Federal Reserve
Banks be on it too? Also what about an entity like the
Civil Rights Commission? You might want to check the decisions in
Silver (9th Cir.), Seattle Master Builders (9th Cir.), and
Melcher (DC Cir.?). Doug Letter

1. Validly Constituted Governmental Entities
a. Headed by Principal Officers

Federal Housing Finance Board
Government National Mortgage Ass'n (Ginnie Mae)
Legal Services Corp.
Inter-American Foundation
Neighborhood Reinvestment Corp.
Corporation for Public Broadcasting
Export-Import Bank of the United States
United States Enrichment Corp.
Corp. for National and Community Service
Thrift Depositor Protection Oversight Board
Resolution Trust Corp.
St. Lawrence Seaway Development Corp.
Commodity Credit Corp.
Pension Benefit Guaranty Corp.
Federal Deposit Insurance Corp.

*This is
not a
list*

b. Headed by Inferior Officers

Resolution Funding Corp. (within RTC)
Financing Corp. (within the Fed. Housing Fin. Bd.)
Overseas Private Investment Corp.
Rural Telephone Bank
Federal Crop Insurance Corp.

2. Invalidly Constituted Government Entities

Tennessee Valley Authority (not because of Lebron; can be cured by executive interpretation)

3. Governmental Entities That May Be Invalidly Constituted

Federal Prison Industries
Pennsylvania Avenue Development Corp.

4. Validly Constituted Private Entities

Banks for Cooperatives
Farm Credit Banks

5. Possibly Governmental Entities That
Would Be Invalidly Constituted

College Construction Loan Insurance Ass'n (Connie Lee)
Federal Home Loan Banks
Federal Home Loan Mortgage Corp.
Federal National Mortgage Ass'n (Fannie Mae)
Federal Agricultural Mortgage Corp. (Farmer Mac)
Student Loan Marketing Ass'n (Sallie Mae)

-- As to all of these entities, we believe a persuasive case can be made that they are not within the government under Lebron.

Memorandum



Subject B. 116, The Amtrak Restructuring Act of 1995	Date March 24, 1995
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To
Office of Legislative Affairs
Attention: Velma Taylor

From
Richard L. Shiffrin *RS*
Deputy Assistant
Attorney General
Office of Legal Counsel

The proposed Amtrak Restructuring Act of 1995 raises significant constitutional concerns. The Supreme Court has held that federal officials "who exercise[] significant authority pursuant to the laws of the United States [are] officers of the United States and therefore must be appointed pursuant to the Appointments Clause." Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). Because the proposed Act would vest significant authority in federal officials who are not appointed conformably with the Appointments Clause, the proposed Act violates the Appointments Clause. See U.S. Const. art. II, § 2, cl. 2.

The Supreme Court recently held that Amtrak is a federal government entity for the purpose of determining whether it has violated an individual's First Amendment rights. See Lebron v. National Railroad Passenger Corp., 115 S.Ct. 961 (Feb. 21, 1995). The Court's opinion in Lebron was careful to define the Court's holding with reference to the specific question presented in the case: "we conclude that [Amtrak] is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 115 S.Ct. at 972.² It is possible to argue, therefore, that Lebron does not require the conclusion that Amtrak is part of the federal government for the purpose of determining the application

¹ We have been asked only for our views regarding the proposed Act. Therefore, we limit our comments to the authority the proposal would vest in Amtrak. We have not reviewed and do not discuss any pre-existing authority that Amtrak might possess.

² See also id. at 967 (question is whether Amtrak "must be regarded as a Government entity for First Amendment purposes"), 974 (holding is that Amtrak "is an agency of the Government, for the purposes of the constitutional obligations of the Government"), at 974-75 ("We hold that [Amtrak] is part of the Government for purposes of the First Amendment.").

of the structural requirements of the Constitution such as the Appointments Clause. Those structural requirements do not create "individual rights guaranteed against the Government by the Constitution" in the sense that provisions such as the first amendment do, and Lebron's wording could be read to imply that Amtrak should not be considered a federal agency for Appointments Clause purposes.

While this argument is not obviously incorrect, on balance we do not think that the courts would accept it as the best reading of Lebron, at least with respect to the applicability of the Appointments Clause to Amtrak. While it is true that the Appointments Clause does not directly create "individual rights," its ultimate purpose, like the first amendment's, is the protection of liberty. As the Court stated in the seminal modern Appointments Clause case, the founders, not content to rely on paper definitions of the rights secured to the people, "viewed the separation of powers as a vital check on tyranny." Buckley v. Valeo, 424 U.S. 1, 121 (1976). [The Appointments Clause protects liberty by diffusing power and designating clear lines of responsibility and is therefore a vital complement to the protections provided by individual-rights guarantees. Through the Appointments Clause, "the Constitution constrains governmental action" just as surely as it does through the first amendment. Lebron's holding that Amtrak's actions are limited by the first amendment because it is "by its very nature, what the Constitution regards as the Government," 115 S.Ct. at 971, implies that its actions are also limited by the requirement of the Appointments Clause that federal officials exercising significant authority (do so only if appointed in accordance with the Clause. Therefore, any official of Amtrak who exercises significant authority must be appointed pursuant to the Appointments Clause. Put another way, no statute may vest significant authority in any employee of Amtrak who is not appointed conformably with the Appointments Clause. See generally Buckley, 424 U.S. at 124-41.

³ One sentence in Lebron provides modest affirmative support for this argument; at one point the Court referred to its conclusion as being "[t]hat Government-created and -controlled corporations are (for many purposes at least) part of the Government itself." 115 S.Ct. at 973 (emphasis added). While the words we have emphasized certainly demonstrate that the Lebron Court contemplated the possibility of a corporation being part of government for some purposes and not others, we do not think much can be built on such a passing comment in the present context. See also id. at 974 (distinguishing an 1824 decision in which the Court held that a state-chartered bank did not enjoy "privileges of the government" such as eleventh amendment immunity).

The Act vests Amtrak's officers with significant authority. Section 10 authorizes Amtrak to provide "intercity rail passenger service . . . throughout the United States." Section 10 also authorizes Amtrak to "adjust its route structure as it deems appropriate." Section 11 gives Amtrak authority to "negotiate new employee protective arrangements," and section 6 empowers Amtrak to negotiate with its unions and enter into an agreement regarding "contracting out work." Negotiating and entering into contracts on behalf of a federal government agency with the employees of a federal agency is manifestly significant authority and any federal official who exercises such authority must be an officer of the United States. Section 13 authorizes Amtrak to construct an electrification system between Boston, Massachusetts, and New Haven, Connecticut. Section 13 also grants Amtrak complete discretion with respect to this project. Therefore, we think that this represents an exercise of significant authority. Finally, section 15 authorizes Amtrak to make such capital improvements in the Northeast Corridor as Amtrak deems necessary. Such broad discretion commits significant authority to Amtrak.

If the officers of Amtrak, who are clearly federal officials pursuant to Lebron, were appointed in conformity with the Appointments Clause of the Constitution, there would be no prohibition on vesting them with the foregoing powers; however, with one clear and another dubious exception, they are not. We turn first to the five board members who are not appointed as principal officers. See U.S. Const. art. II, § 2, cl. 2. (requiring principal officers to be appointed by the President and confirmed by the Senate). The courts have never definitively addressed the question of whether a collective department head⁴ may comprise inferior as well as principal officers, cf. Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring); Silver v. United States, 951 F.2d 1033 (9th Cir. 1991). We need not resolve that issue here because none of these five board members is validly appointed as an inferior officer.

Superior or inferior - need not decide.

The Appointments Clause requires that inferior officers be appointed by the President and confirmed by the Senate, unless Congress expressly provides that the appointment is to be made by the President alone, the head of a department, or a court of law. U.S. Const. art. II, § 2, cl. 2. Two of the five non-Senate confirmed board members are nominally appointed by the President

⁴ The five are the two members appointed by the President alone, the two elected by the preferred stockholders, and the President of Amtrak. See 49 U.S.C. § 24302(a)(1)(B), (D), (E).

⁵ The head of Amtrak is its board of directors. See, e.g., Silver, 951 F.2d at 1038-39.

alone. Under the proposed bill, however, these two would be appointed from a list of five names submitted by commuter authorities.⁶ The Attorneys General have long held that any requirement that the President make an appointment from a list represents a patent violation of the President's constitutional appointment power. See, e.g., Promotion of Marine Officer, 41 Op. Att'y Gen. 291 (1956); Civil Service Commission, 13 Op. Att'y Gen. 516 (1871). Another two of the five non-Senate confirmed board members are elected by Amtrak's preferred shareholders. 49 U.S.C. § 24302(a)(1)(E). These shares may potentially be held by anyone who wishes to purchase them. Such shareholders need not be the President, a department head, or a court of law and so are not necessarily a valid repository of the constitutional authority to appoint an officer of the United States. The fifth of the members is the President of Amtrak ex officio, who is appointed by the other eight members of the Board. Assuming arguendo that the Board is the head of a department within the meaning of the Appointments Clause, see generally Freytag v. Commissioner, 501 U.S. 868 (1991), and that a collective head of a department may itself appoint members of that collectivity, see generally Silver, 951 F.2d at 1038-41 (leaving this question open), the President of Amtrak is nevertheless not a properly appointed inferior officer. Because no more than two of the eight members are validly appointed, the Board as it is currently composed may not exercise the constitutional appointment power, even though an argument might be made that a validly appointed board could.

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⁶ This is only a slight modification to the current mechanism for choosing the two members who are appointed alone. The statute provides that they are to be appointed from "a list of names consisting of one individual nominated by each commuter authority for which Amtrak Commuter provides commuter rail passenger transportation . . . and one individual nominated by each commuter authority in the region . . . that provides its own commuter rail passenger transportation." 49 U.S.C. § 24302(a)(1)(D).

⁷ As it happens, all of Amtrak's preferred stock is held by the United States. See Lebron, slip op. at 11. It is not clear whether that stock is voted by the President or a department head. However, even if the Constitution permits the President or a department head to appoint inferior officers through the mechanism of exercising a shareholder's election rights, this would not save the validity of the Board. If any member of a collectivity is appointed in a constitutionally offensive manner the entire collectivity is invalid. See, e.g., Buckley, 424 U.S. at 141-43; cf. FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), aff'd, 115 S. Ct. 537 (1994).

Of the four members who are subject to Senate confirmation, only the Secretary of Transportation, who sits ex officio, is clearly appointed in conformity with the Constitution. Cf. Weiss v. United States, 114 S. Ct. 752, 768 (1994); Shoemaker v. United States, 147 U.S. 282 (1893). The remaining three are each chosen in a distinct manner. One must be appointed from a list submitted by various interest groups. See 49 U.S.C. § 24302(a)(1)(C). As discussed above, this mechanism violates the President's constitutional appointment power. See, e.g., Promotion of Marine Officer, 41 Op. Att'y Gen. 291 (1956); Civil Service Commission, 13 Op. Att'y Gen. 516 (1871).

Another must be chosen from among the Governors of states with an interest in rail transportation. Even if this includes all fifty states, it does not leave sufficient "scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment. The parts of the Constitution which confer this power are as valid as those parts from which Congress derives the power to create offices, and one part should not be sacrificed to the other. An office cannot be created except under the conditions that it shall be filled according to the constitutional rule." 13 Op. Att'y Gen. at 520-21.⁸

The final Board member is not appointed from a list or a small, finite universe of individuals; instead, the President may choose anyone for this slot as long as the appointee might be

⁸ The Constitution does not ordain a magic number of potential appointees such that Congress may not enact any requirement or qualification that limits the field to a smaller number. We do not believe that this observation at all undermines the principle that there exists a constitutionally mandatory scope of discretion that must be accorded to the constitutional repository of the appointment power -- here, as typically, the President. As Attorney General Amos Akerman put it,

But it may be asked, at what point must the contracting process stop? I confess my inability to answer. But the difficulty of drawing a line between such limitations as are, and such as are not, allowed by the Constitution, is no proof that both classes do not exist. In constitutional and legal inquiries, right or wrong is often a question of degree. Yet it is impossible to tell precisely where in the scale right ceases and wrong begins. . . . In the matter now in question, it is not supposable that Congress or the President would require of candidates for office qualifications unattainable by a sufficient number to afford ample room for choice.

13 Op. Att'y Gen. at 525.

said to act "as a representative of business with an interest in rail transportation." 49 U.S.C. § 24302(a)(1)(C)(iii).⁹ We do not regard it as necessary to resolve the question of whether Congress may impose such a qualification or whether an officer of the United States may be permitted to represent any interest narrower or more specialized than the public interest of the United States. Even if provisions for filling this seat on the Board are constitutionally permissible, that would bring to only two the number of Board members who are validly appointed. A nine-member Board that comprises seven invalidly appointed members may not receive or exercise significant governmental authority. See Buckley, 424 U.S. at 141-43 (invalidating eight member board on which four of the six voting members were held invalidly appointed but upholding the board's prior actions); cf. FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993) (striking down eight-member board that included two constitutionally objectionable members), aff'd, 115 S. Ct. 537 (1994).

For these reasons, Amtrak's Board of Directors, as presently composed, is invalidly appointed and may not exercise or receive significant executive authority. Therefore, the proposed bill may not constitutionally include the provisions of sections 6, 10, 11, 13, or 15 cited above, unless the bill is amended to provide for a Board of Directors that is appointed in conformity with the Constitution. Whether the bill is amended to delete the provisions granting Amtrak authority or to provide for the Board to be appointed by the President by and with the advice and consent of the Senate, the bill's additional unconstitutional infringement on the President's appointment power, contained in section 8(a) (requiring the President to make an appointment from a list), should be deleted.

⁹ The requirement that, of the three Senate confirmed Board members other than the Secretary of Transportation, no more than two may be held by members of the same party also represents a significant and, we believe, difficult to justify intrusion on the President's constitutional appointment power. Without endorsing any particular test for reviewing such restrictions, we do not see how requiring a political balance among only a small subset of a board that is not charged with an apparently partisan task can be said to be reasonably advance any legitimate governmental interest.

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The time?