

THE UNCONSTITUTIONALITY OF PRIVATIZING AIR TRAFFIC CONTROL

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INTRODUCTION

Every day the Federal Aviation Administration’s (FAA) Air Traffic Organization (ATO) provides “service to more than 43,000 flights and 2.5 million airline passengers across more than 29 million square miles of airspace.”¹ Such a vast and complex system would be impossible without the work of air traffic control (ATC). This network is in charge of directing aircrafts on day-to-day operations.² Rural airports, skydive drop zones, and various aviation associations would be the first to suffer when it comes to Congress’s proposed bill, the 21st Century Aviation Innovation, Reform, and Reauthorization Act (the “21st Century AIRR Act”),

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1. Teri L. Bristol, *Message from the COO, in* FED. AVIATION ADMIN., AIR TRAFFIC BY THE NUMBERS, at ii (2017), https://www.faa.gov/air_traffic/by_the_numbers/media/Air_Traffic_by_the_Numbers_2017_Final.pdf.

2. FED. AVIATION ADMIN., TRAFFIC FLOW MANAGEMENT IN THE NATIONAL AIRSPACE SYSTEM 11 (2009), http://www.fly.faa.gov/Products/Training/Traffic_Management_for_Pilots/TFM_in_the_NAS_Booklet_ca10.pdf (discussing the role of Traffic Management in organizing air traffic flow).

that aims at privatizing ATC.³ Privatizing ATC would mean the largest transfer of a governmental asset in U.S. history.⁴ Such a transfer would give operational control over to a private not-for-profit corporation.⁵ Such a transfer would not only have detrimental policy consequences, but would likely be deemed unconstitutional.

The goal of this Note is to demonstrate that the privatization of ATC would not only be detrimental as a policy, but would be seen as unconstitutional under the non-delegation doctrine and the Due Process Clause. Since the constitutional challenges vary based on whether the Corporation is interpreted as either a private entity or a government actor, this Note will examine both possibilities.

Part I provides an overview of the history of ATC and the involvement of the FAA in its functions and evolution. Part II discusses the continued attempts by Congress to privatize ATC and the repeated failures of such efforts. The importance of this is to demonstrate why the current proposed bill would just as easily fail as it is based on similar failed proposals. Part III will dive into the most relevant title of the proposed bill, Title II, where the proposed not-for-profit corporation is presented. That framework will explore the various proposed regulatory functions to be performed by the corporation with a focus on the board and the selection process behind it.

Part IV will analyze the proposed corporation as a governmental entity and how that would be a violation under the Due Process Clause. Applying the five-factor test established in *Department of Transportation v. Ass'n of American Railroads (Amtrak I)*, it is evident that a court could consider the proposed corporation a governmental entity.⁶ While functioning as a governmental entity, the proposed bill would violate due process by providing regulatory authority over its competitors; such an analysis will apply the Court's reasoning from *Carter v. Carter Coal Co.*⁷

Conversely, Part V will analyze the proposed bill as a private entity, thus violating the non-delegation doctrine since Congress would be delegating certain regulatory authority, such as issuing air traffic instructions, collecting and setting rates, and safety oversight and enforcement, which

3. See 21st Century Aviation Innovation, Reform, and Reauthorization Act, H.R. 2997, 115th Cong. (as reported by H. Comm. on Transp. & Infrastructure, Sept. 6, 2017).

4. *House Committee Passes Bill to Privatize Air Traffic Control*, CHI. TRIB. (Feb. 12, 2016), <https://www.chicagotribune.com/news/nationworld/ct-faa-privatization-20160211-story.html>.

5. H.R. 2997 § 211(a) (amending 49 U.S.C.).

6. 135 S. Ct. 1225, 1231–32 (2015).

7. See generally 298 U.S. 238 (1936) (holding that coal production and distribution could not be regulated by Congress under the Commerce Clause).

is prohibited unless conducted by a governmental actor.

Finally, Part VI will outline other potential changes to ATC and present various policy arguments for such changes. This is designed to show that recent improvements in ATC are due to years of continued improvements by the FAA and such progress should be continued without privatization.

I. HISTORY OF AIR TRAFFIC CONTROL (ATC) AND THE FEDERAL AVIATION ADMINISTRATION (FAA)

ATC is the “system by which the movements of aircraft are monitored and directed by ground personnel communicating with pilots.”⁸ Currently, ATC is governed by the FAA, an organization that itself is under the operational agency of the Department of Transportation (DOT).⁹ The ATO is responsible for issuing ATC instructions to all civilian aircrafts in U.S. controlled airspace.¹⁰ The system that we now know as ATC, however, was established through many transnational systems starting with the transcontinental airmail service established in 1920.¹¹ Until the establishment of the FAA in August 1958, ATC was a decentralized network.¹² As aircraft capabilities evolved and the need for safety regulations became prevalent, leaders of the aviation industry called for federal action, which resulted in the passing of the Air Commerce Act of 1926.¹³ This legislation “charged the Secretary of Commerce with setting air traffic rules, certifying pilots and aircraft, establishing airways and operating aids to navigation.”¹⁴ After the need for radio communication with pilots for landing and takeoff at local airports became apparent in 1932, the Department of Commerce (DOC) established eighty-three radio towers across the country.¹⁵

The increased need and expansion of air traffic led the DOC to establish the Civil Aeronautics Authority in 1938.¹⁶ World War II brought

8. *Air Traffic Control*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/air%20traffic%20control> (last visited Mar. 7, 2019).

9. 49 U.S.C. § 106(a) (2012).

10. Exec. Order No. 13,180, 65 Fed. Reg. 77,493 (Dec. 7, 2000), *reprinted as amended in* 49 U.S.C. § 106; *A Brief History of the FAA*, FED. AVIATION ADMIN., https://www.faa.gov/about/history/brief_history/ (last modified Jan. 4, 2017).

11. *A History of Air Traffic Control*, NATCA, https://www.natca.org/images/NATCA_PDFs/Publications/ATCHistory.pdf (last visited Mar. 7, 2019).

12. *See* Federal Aviation Act of 1958, 85 Pub. L. No. 726, § 301, 72 Stat. 731, 744; *A Brief History of the FAA*, *supra* note 10.

13. *See* Air Commerce Act of 1926, 69 Pub. L. No. 254, 44 Stat. 658; *A History of Air Traffic Control*, *supra* note 11.

14. *A History of Air Traffic Control*, *supra* note 11.

15. *Id.*

16. *See* Civil Aeronautics Act of 1938, 75 Pub. L. No. 706, § 201, 52 Stat. 973, 980–81;

about developments in technology and the need for expanded air transportation.¹⁷ With the proliferation of commercial airlines and passenger travel, the FAA established the Central Flow Control Facility in 1970 as a means of relieving air traffic congestion.¹⁸ In the mid-1990s, as a response to aging technology costing billions in delayed and wasted resources, Congress overhauled the FAA through major reform legislation.¹⁹ The reform streamlined the FAA by establishing long-term budgeting capabilities that allowed for “multi-year acquisitions funded by trust fund revenues,” which allowed the FAA to update its technology.²⁰ Even though many argued that ATC was grossly inefficient, when tragedy struck on September 11, 2001, the system did not fail. ATC was able to ground all flights in U.S. airspace in two and a half hours.²¹

ATC has been in development since the 1920s and saw the most progression with the creation of the FAA in August 1958.²² There has been a long, difficult, and contentious effort to privatize ATC services, and with such a complex and profitable system, it is no wonder why.

II. BRIEF HISTORY OF ATTEMPTS AT PRIVATIZATION OF ATC

Attempts to privatize ATC have been a reoccurring theme in U.S. history. For the past four decades, Congress has tried and failed to transfer one of the government’s largest assets over to private corporations.²³ Since 1996, U.S. taxpayers have invested over \$53 billion in ATC assets, including FAA facilities and equipment.²⁴ Throughout the years, Congress put forth two major alternatives for ATC to be taken out of the purview of the FAA: corporatization and privatization.²⁵ The former focused on establishing a “wholly owned government corporation or quasi-governmental entity,” while the latter “would entail creating some form of private ownership and control of an air traffic services corporation.”²⁶ Privatization of ATC has not been mentioned in Congress since its failure

A History of Air Traffic Control, *supra* note 11.

17. *A History of Air Traffic Control*, *supra* note 11.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Federal Aviation Act of 1958, 85 Pub. L. No 726, § 301, 72 Stat. 731, 744; *A Brief History of the FAA*, *supra* note 10.

23. BART ELIAS, CONG. RESEARCH SERV., R43844, AIR TRAFFIC INC.: CONSIDERATIONS REGARDING THE CORPORATIZATION OF AIR TRAFFIC CONTROL 1 (2017).

24. Memorandum from Democratic Staff, Subcomm. on Aviation, House Comm. on Transp. and Infrastructure, to Interested Parties 4 (Feb. 10, 2016) [hereinafter ATC Reform Memo] (on file with the House Comm. on Transp. and Infrastructure Democrats).

25. ELIAS, *supra* note 23.

26. *Id.*

to pass a proposed bill under the Clinton administration in the 1990s.²⁷ It has reemerged as an option in 2013 related to funding cuts.²⁸

Proposals for the privatization of ATC date back to at least 1974.²⁹ The proposals were primarily aimed at five areas that were deemed problematic and in need of reform. One of the key areas was FAA funding. The FAA does not possess a dedicated budget and therefore cannot partake in long-term expenditures.³⁰ That, along with the fact that the FAA has “no independent access to financial markets,” prevents them from investing in better technologies.³¹ FAA funding is “tied to annual appropriations and multiyear authorizations that can suffer delays or cuts due to political wrangling.”³² The other four problem areas all relate to strained resources and labor relations that lead to an overall lack of progress in technology, development of facilities and equipment, and difficulty in retaining highly trained personnel.³³

For years, there were various reports conducted on the status and efficiency of ATC and the possibility of privatization.³⁴ Many argued that the functions the FAA carries out would be better suited for an “independent government corporation.”³⁵ During his administration, President Ronald Reagan looked at ATC when assessing various areas of government that could potentially be privatized.³⁶ Surprisingly, the report commissioned for President Reagan suggested that, for the most part, the FAA should retain control over ATC—a conclusion that went against previous reports and recommendations.³⁷

The United States Air Traffic Service Corporation Act of 1995 is an earlier version of the proposed 21st Century AIRR Act.³⁸ The 1995 Act called for the establishment of a corporation, albeit a governmental one, that would be in charge of setting user fees and other charges.³⁹ General aviation strongly opposed the proposed bill for similar reasons to that of

27. *Id.* at 7.

28. *Id.* at 1.

29. *Id.* at 2.

30. ELIAS, *supra* note 23, at 2.

31. *Id.*

32. *Id.*

33. *Id.* at 3.

34. *Id.* at 2–3.

35. *E.g.*, ELIAS, *supra* note 23, at 3.

36. *Id.* at 4.

37. *Id.*

38. *Compare* United States Air Traffic Service Corporation Act, H.R. 1441, 104th Cong. (1995), *with* 21st Century Aviation Innovation, Reform, and Reauthorization Act, H.R. 2997, 115th Cong. (as reported by H. Comm. on Transp. & Infrastructure, Sept. 6, 2017).

39. H.R. 1441 §§ 201, 209; ELIAS, *supra* note 23, at 5–6.

the opposition to the 21st Century AIRR Act.⁴⁰ Most importantly, general aviation associations were concerned about the influence that commercial airlines would be able to exercise over the proposed corporate board—a board that in and of itself would be dominated by airline interests.⁴¹ In an effort to maximize profits, commercial airlines might be tempted to cut corners in the allocation of resources at the expense of the general aviation community as well as commercial passengers. Alliance for Aviation Across America, a group representing general aviation and rural groups, stated in a letter to Congress that “a private board dominated by the largest commercial operators would undoubtedly direct resources and investments to the largest hub airports and urban areas where these investments would be most likely to benefit their bottom line.”⁴² This raises serious concerns for rural airports that would stand to lose a large portion of investments under the 21st Century AIRR Act.

III. PROPOSED CORPORATION UNDER TITLE II OF THE 21ST CENTURY AIRR ACT

Under the 21st Century AIRR Act, ATC services that are currently under FAA and DOT control would be transferred to a not-for-profit corporation, the American Air Navigation Services Corporation (the “Corporation”), for the purposes of providing “more efficient operation and improvement of air traffic services.”⁴³ The proposed date of transfer of ATC services from the FAA to the Corporation is October 1, 2020.⁴⁴ For all intents and purposes, the Corporation would be the sole provider of ATC services within U.S. airspace.⁴⁵

A. The Board of Directors

The Corporation would be composed of thirteen members on the Board of Directors (the “Board”) that would be in charge of governing all ATC services.⁴⁶ Eleven of the Board members would be nominated by panels comprised of various representatives of ATC service users/operators, while the remaining two would be appointed by the Secretary of Transportation (the “Secretary”).⁴⁷ Before the transfer date, the eleven

40. *Id.* at 6.

41. *Id.*

42. Letter from Agric. Retailers Ass’n et al., to Rep. Bill Shuster, Chairman, House Comm. on Transp. and Infrastructure (Apr. 5, 2017) (on file with authors), <https://www.aviationacrossamerica.org/wp-content/uploads/Agriculture-Rural-Letter-to-Congress.pdf>.

43. H.R. 2997 §§ 201, 211(a).

44. *Id.* § 211(a) (adding 49 U.S.C. § 90101(a)(8)).

45. *Id.* (adding 49 U.S.C. § 90302(c)).

46. *Id.* (adding 49 U.S.C. § 90306(a)–(b)).

47. *Id.* (adding 49 U.S.C. § 90306(c)(1)(B)).

Board members would be selected by the Secretary from the nomination list, but after the transfer date, the Board members would be selected by the Board itself.⁴⁸ The various panels would be composed of representatives from each respective area of aviation that meet certain limitations set forth in order to participate on the panels. For example, the Passenger Air Carrier Nomination Panel is composed of “one representative of each passenger air carrier with more than 30,000,000 annual passenger boardings.”⁴⁹

B. ATC Services

As previously mentioned, ATC services, as defined in House Bill 2997, are services “(A) used for the monitoring, directing, control, and guidance of aircraft or flows of aircraft and for the safe conduct of flight, including communications, navigation, and surveillance services and provision of aeronautical information; and (B) provided directly, or contracted for, by the FAA before the date of transfer.”⁵⁰ The critical point here is that the Corporation is the sole provider of any and all ATC services.

Subject to certain performance and safety standards set forth by the FAA, the Corporation would be authorized to “establish and carry out plans for the management and operation of air traffic services within United States airspace and international airspace delegated to the United States.”⁵¹ Furthermore, the Secretary would transfer FAA facilities, employees, and other assets without any compensation from the Corporation.⁵² This would in effect allow the Corporation to acquire multi-million dollars’ worth of governmental assets for free. DOT and FAA “orders, determinations, rules, regulations, personnel actions, permits, agreements, grants, contracts, certificates, licenses, registrations, and privileges” would remain in effect even after the transfer.⁵³ Therefore, safety regarding ATC services would remain largely unchanged, but profitable resources would be put under the effective and immediate control of the Corporation. This would allow the Corporation to reallocate massive quantities of resources at its discretion.

48. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90306(c)(1)(A), (c)(2)(B)).

49. *Id.* (adding 49 U.S.C. § 90305(b)(1)); Memorandum from Linda Tsang & Jared Cole, Cong. Research Serv., to the Ranking Member of the House Comm. on Transp. & Infrastructure, at 3 (July 18, 2017) [hereinafter AIRR Act Memo] (on file with the Cong. Research Serv.).

50. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90101(a)(2)).

51. *Id.* (adding 49 U.S.C. § 90302(b)).

52. *Id.* (adding 49 U.S.C. §§ 90316, 90317).

53. *Id.* (adding 49 U.S.C. § 91302(a)).

C. Fees and Charges for ATC Services

For providing ATC services to users, the Corporation would be allowed to assess and collect charges and fees.⁵⁴ The proposed bill defines users as “any individual or entity using air traffic services provided by the Corporation within United States airspace or international airspace delegated to the United States.”⁵⁵ The Board would be in charge of establishing a schedule for charges that would then be submitted to the Secretary.⁵⁶ After receiving the proposed schedule for charges, the Secretary would then solicit public comment on the proposed schedule.⁵⁷ Once the requisite time frames expire, the Secretary would issue a decision taking into account all the necessary regulations—ensuring that the charges and fees schedules comply with international regulations, do not affect safety and accessibility to services, and do not discriminate.⁵⁸ If users were to disagree with the schedule and refuse to pay, then the Corporation would have the authority to collect penalties and interest on the late or non-payments.⁵⁹ The proposed bill, however, is silent on how the Corporation would calculate penalties in regard to users.

The 21st Century AIRR Act provides that the Corporation would not constitute a “department, agency, or instrumentality of the United States Government,”⁶⁰ and would not be allowed to receive funding from the Airport and Airway Trust Fund (AATF).⁶¹ Without this massive funding,⁶² the potential for stagnation in the development in ATC technology could have devastating effects on the efficiency of the system.⁶³

D. Regulation and Safety Oversight of the Corporation

Under the proposed bill, the FAA would retain safety enforcement authority and oversight over the Corporation’s activities.⁶⁴ Before the

54. *Id.* (adding 49 U.S.C. § 90101(a)(6)) (defining charges and fees as “any rate, charge, fee, or other service charge for the use of air traffic services”).

55. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90101(a)(3)).

56. *Id.* (adding 49 U.S.C. § 90313(b)(3)).

57. *Id.* (adding 49 U.S.C. § 90313(c)(1)).

58. *Id.* (adding 49 U.S.C. § 90313(d)(1)–(3)).

59. *Id.* (adding 49 U.S.C. § 90313(f)(2)).

60. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90304(a)).

61. *Id.* § 244(a). The AATF currently provides most of the funding to the FAA for various expenditures relating, but not limited to, ATC services. *See* RACHEL Y. TANG & BART ELIAS, CONG. RESEARCH SERV., R44749, THE AIRPORT AND AIRWAY TRUST FUND (AATF) 1 (2017).

62. TANG & ELIAS, *supra* note 61, at 7 fig.2.

63. *See* S. REP. NO. 104-126, at 18–19 (1995).

64. AIRR Act Memo, *supra* note 49, at 7.

date of transfer, the Corporation would be subject to the Secretary's assigned safety management system.⁶⁵ Furthermore, the Secretary would be in charge of setting (1) performance-based regulations and minimum safety standards for air traffic services, and (2) regulations and safety standards for the certification and operation of air navigation facilities by the Corporation.⁶⁶ For two years after the date of transfer, the FAA should retain the "same oversight and procedures in use before the date of transfer."⁶⁷

After the date of transfer, any interested party would be able to submit proposals for modification of "(A) air traffic management procedures, assignments, classifications of airspace, or other actions affecting airspace access that are developed pursuant to the safety management system; and (B) FAA policies and other administrative materials"⁶⁸ In regards to safety enforcement, the Corporation would be required to report to the FAA noncompliance with traffic control instructions, operation in controlled airspace, and any other activities that "endanger[] persons or property in the air or on the ground."⁶⁹

IV. THE DUE PROCESS CLAUSE ANALYSIS

Since the two constitutional analyses that follow depend on whether the courts would categorize the Corporation as either a governmental or private entity, this Note will analyze the Corporation as either a private or governmental entity depending on the analysis being applied. For the due process analysis, the Corporation will be analyzed as a governmental entity, while for the non-delegation analysis the Corporation will be viewed as a private entity.

Turning to due process, one could make the argument that ATC is inherently governmental because of the functions that it would provide. Inherently governmental functions are defined as "[f]unctions that federal law and policy require to be performed by government personnel, not contractor employees."⁷⁰ This definition is based on statutory and policy definitions of "inherently governmental functions," the former established in the Federal Activities Inventory Reform Act of 1998 and the latter in the Office of Management and Budget Circular A-76.⁷¹ However,

65. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90501(a)).

66. *Id.*

67. *Id.* (adding 49 U.S.C. § 90501(b)(4)).

68. *Id.* (adding 49 U.S.C. § 90501(c)(1)).

69. *Id.* (adding 49 U.S.C. § 90505(a)(3)).

70. KATE M. MANUEL, CONG. RESEARCH SERV., R42325, DEFINITIONS OF "INHERENTLY GOVERNMENTAL FUNCTION" IN FEDERAL PROCUREMENT LAW AND GUIDANCE 1 (2014).

71. *See* Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270,

the Supreme Court recently established a five-factor test in determining whether an established corporation should be considered either private or governmental.

In *Amtrak I*, the Supreme Court held Amtrak to be a governmental entity based on a five factor test.⁷² The Court looked to Amtrak's (1) ownership and corporate structure, (2) political branches' supervision over its priorities and operations, (3) statutory goals, (4) day-to-day management, and (5) federal financial support.⁷³ The Court held that Amtrak did not constitute an "autonomous private enterprise" based on the context and functions provided.⁷⁴

Additionally, in *Lebron v. National Railroad Passenger Corp.*, the Supreme Court made it clear that Amtrak's declaration that it was not a governmental entity simply because its charter disclaimed any agency status was not determinative or indicative of its actual status.⁷⁵ The Court held that "it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions."⁷⁶ Therefore, any unilateral statement or declaration from Congress regarding the Corporation's status is not dispositive.

The extent of how the DOT and FAA policies and oversight would be implemented over the Corporation could easily be seen as the requisite level of discretionary exercise of governmental authority as to render it an "act of governing." Thus, applying the factors presented in *Amtrak I*, the Corporation, like Amtrak, would constitute a governmental entity.⁷⁷ When relating to the first prong pertaining to ownership and corporate structure, the Corporation's Board would have two members that are appointed directly by a governmental actor (the Secretary).⁷⁸ Even though in *Amtrak I* the President appointed, and the Senate confirmed seven of the nine Board members,⁷⁹ the argument that only appointing and confirming two members of a thirteen-member Board makes a determinative

§ 5(2)(A), 112 Stat. 2382, 2384; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-76 § 6(e) (1983) (revised 1999), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A76/a076.pdf>; see also MANUEL, *supra* note 70, at 2.

72. Dep't of Transp. v. Ass'n of Am. R.R. (*Amtrak I*), 135 S. Ct. 1225, 1231–32 (2015).

73. AIRR Act Memo, *supra* note 49, at 8.

74. *Amtrak I*, 135 S. Ct. at 1232.

75. 513 U.S. 374, 392 (1995).

76. *Id.*

77. *Amtrak I*, 135 S. Ct. at 1233.

78. 21st Century Aviation Innovation, Reform, and Reauthorization Act, H.R. 2997, 115th Cong. § 211(a) (2017) (as reported by H. Comm. on Transp. & Infrastructure, Sept. 6, 2017) (adding 49 U.S.C. § 90306(c)(1)(B)).

79. *Amtrak I*, 135 S. Ct. at 1231 (citing 49 U.S.C. § 24302(a)(1) (2012)).

difference is tenuous.⁸⁰ Any amount of influence on the Board from a governmental agency could render the Corporation susceptible to undue influence. Furthermore, even though the government would possess no formal ownership over the Corporation, it would nonetheless have substantial control over day-to-day operations of ATC services, thus satisfying the fourth prong of the test.⁸¹ So, even though there may be no formal governmental ownership, the government's ability to exercise regulatory control over very specific operations may render it as a form of indirect ownership.

Like Amtrak, the Corporation here would have significant supervision over its priorities and operations by political branches, thus satisfying the second prong.⁸² As mentioned earlier, the FAA would retain significant safety enforcement authority, as well as providing oversight in relation to several of the Corporation's activities.⁸³ In *Amtrak I*, Amtrak had to submit annual reports to both Congress and the President, and was subject to frequent oversight hearings into Amtrak's budget, routes, and prices.⁸⁴ Similarly, the Corporation, under Title II, would be required to submit a report on the state of ATC services to the Secretary every two years, an annual financial and action plan, an initial strategic plan, and any subsequent updates to that strategic plan that were to be approved by the Board.⁸⁵

As to the third prong, the Corporation assumes most of the FAA's management functions and responsibilities; it would be the sole provider of ATC services after the transfer.⁸⁶ Therefore, unlike Amtrak, the Corporation would not be required to pursue additional goals defined by statute. Amtrak was required to "provide efficient and effective intercity passenger rail mobility," "minimize Government subsidies," provide reduced fares to the disabled and elderly, and ensure mobility in times of national disaster."⁸⁷ Here, the 21st Century AIRR Act does not require the Corporation to pursue additional statutory goals in relation to its functions.⁸⁸

It seems that the Corporation would fail the fifth prong of the test

80. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90306(c)(1)(B)).

81. *Amtrak I*, 135 S. Ct. at 1232.

82. *See id.*

83. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90505(a)).

84. *Amtrak I*, 135 S. Ct. at 1232.

85. H.R. 2297 § 211(a) (adding 49 U.S.C. §§ 91502–91505).

86. *Id.* (adding 49 U.S.C. § 90302(c)).

87. *Amtrak I*, 135 S. Ct. at 1232 (first citing 49 U.S.C. § 24101(b), (d) (2012); then citing 49 U.S.C. § 24307(a) (2012); and then citing 49 U.S.C. § 24101(c)(9)).

88. Not considering FAA safety oversight and regulation as an additional statutory goal, but more of a provisional condition to the transferring of ATC services.

since it would garner no federal financial support after the date of transfer. The Corporation would not be able to accept or receive any funds from the AATF and it would also be prohibited from issuing or selling shares of itself.⁸⁹

The Court failed to provide any guidance in how the five factor test should be applied and it remained silent on whether each prong should be given equal weight. Therefore, even though the Corporation does not fulfill all five factors wholly, it is difficult to determine whether that would automatically disqualify it from constituting a governmental entity. The three fulfilled prongs arguably hold more weight than the simple failure of being financially supported by the government and pursuing additional statutory goals. The Court's flexibility when relating and applying the multi-factor test, as well as the limited jurisprudence in this area provides us with uncertainty when predicting how a court will come out on the question of the Corporation's status. For the purposes of this Note, however, the Corporation will be viewed as a governmental entity.

The Due Process Clause, under the Fifth Amendment, prohibits the federal government from depriving an entity of "life, liberty, or property without due process of law."⁹⁰ Here, the proposed Corporation, analyzed as a governmental entity per the analysis above, would have the potential to exercise regulatory authority over its competitors, thereby violating due process and rendering it unconstitutional.

The controlling cases for arguing that the transfer of ATC services to the Corporation would violate due process are *Amtrak I* and *Carter Coal*. The Supreme Court announced the due process problems that arose from providing regulatory authority to a private entity.⁹¹ The Court argued that the "difference between producing coal and regulating its production is fundamental" in determining a Due Process Clause violation.⁹² Regulating coal constitutes a governmental function, while the production is purely a private activity.⁹³ By allowing a private entity the power to regulate coal, the government "undertakes an intolerable and unconstitutional interference with personal liberty and private property" that renders it a clear "denial of rights safeguarded by the Due Process Clause of the Fifth Amendment."⁹⁴

89. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90312(b)(2)); *see id.* § 244.

90. U.S. Const. amend. V., cl. 5.

91. *See generally* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding that the enforcement of the general purposes of the Bituminous Coal Conservation Act of 1935 was beyond the power of Congress).

92. *Id.* at 311.

93. *Id.*

94. *Id.* 311–12 (emphasis omitted) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)).

When the Supreme Court remanded the Amtrak case to determine whether delegating certain regulatory authority to “boundary agencies”⁹⁵ violated the Due Process Clause, the circuit court determined that it would be a violation only if each agency was “(1) a self-interested entity (2) with regulatory authority over its competitors.”⁹⁶ Conclusively, the court held that Amtrak was a self-interested party in that it operated as a for-profit corporation and was required by law to “maximize its revenues.”⁹⁷

In determining whether Amtrak had regulatory authority over its competitors, the court inquired into whether the “metrics and standards” developed by Amtrak would “force freight operators to alter their behavior.”⁹⁸ The court reasoned that Amtrak’s coercive power could “lend definite regulatory force to an otherwise broad statutory mandate” because if a freight operator refused to give Amtrak preference, then that action would most likely lead to enforcement against them.⁹⁹ Additionally, in *Pittston Co. v. United States*, the court established the general rule that “Congress may employ private entities for ministerial or advisory roles, but it may not give these entities governmental power over others.”¹⁰⁰

Here, the Corporation could be considered a self-interested party after review of the roles and responsibilities of the Board. Even though the Board would not have similar profit goals to those of Amtrak because it is qualified as a not-for-profit organization, one could look at the self-interest of the specific Board members themselves. “[S]ome Board members may propose charges and fees that benefit their specific stakeholder groups to the detriment of other market participants.”¹⁰¹ As mentioned previously, the Board would have the authority to set charges, fees, penalties, and interest without the Secretary’s approval.¹⁰² Thus, it is easy to conceptualize some members of the Board, who share similar interests

95. Boundary agencies can be defined as corporations that have both public and private aspects, a concept that has complicated how courts analyze due process challengers to authority that is delegated to these entities by the Government. See Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 894 (2014).

96. Ass’n of Am. R.R. v. U.S. Dep’t of Transp. (*Amtrak II*), 821 F.3d 19, 31 (D.C. Cir. 2016).

97. See *id.* at 32 (first quoting 49 U.S.C. § 24301(a)(2) (2012); and then quoting 49 U.S.C. § 24101(d) (2012)).

98. *Id.*

99. *Id.* at 33 (citing Ass’n of Am. R.R. v. U.S. Dep’t of Transp., 721 F.3d 666, 672 (D.C. Cir. 2013)).

100. 368 F.3d 385, 395 (4th Cir. 2004) (emphasis omitted).

101. AIRR Act Memo, *supra* note 49, at 23.

102. 21st Century Aviation Innovation, Reform, and Reauthorization Act, H.R. 2997, 115th Cong. §§ 201, 211(a) (2017) (as reported by H. Comm. on Transp. & Infrastructure, Sept. 6, 2017) (adding 49 U.S.C. § 90101(a)(6)).

with one another, proposing to cut fees for certain users, which in turn would have negative impacts (both competitively and economically) on other users who would otherwise not benefit. Such a possibility is a clear violation of the Due Process Clause both under the jurisprudence set forth in *Carter Coal and Ass'n of American Railroads v. U.S. Department of Transportation (Amtrak II)*.

Furthermore, the Corporation established by the 21st Century AIRR Act would have some regulatory authority over its competitors. Even though after the transfer date the Corporation shall be the sole provider of ATC services, one could nonetheless make the argument that a court would determine whether, through the Board, the Corporation would be regulating entities with whom the Board members themselves would otherwise compete with commercially. The court in *Amtrak II* examined whether Amtrak would have coercive power over its competitors when changing and implementing “metrics and standards”¹⁰³ Therefore, the court would have to determine whether the Corporation’s coercive power would in effect alter the behavior of air traffic users. Since the Corporation would have regulatory force due to its ability of establishing managerial and operational plans regarding ATC services, a court could determine that users would thus be forced to pay fees and charges directly to the Corporation, and not the FAA, in order to access ATC services. Failure to pay such fees and charges would prohibit the users from accessing ATC services. Furthermore, if the Board members decided to charge some users different fees and charges, the other users would have to deal with the disparity in fees. The same would apply to the payment of penalties and interest. Since the Corporation would be a self-interested party that would exercise regulatory authority over its competitors, it would be in violation of the Due Process Clause, thus rendering it unconstitutional.

V. THE NON-DELEGATION DOCTRINE ANALYSIS

Under the non-delegation doctrine, the Corporation would be deemed unconstitutional as it pertains to provisions relating to the separation of powers. If the Corporation is deemed a private entity, it would be found unconstitutional since Congress would be wrongfully delegating regulatory authority to a private entity.

Once we establish the Corporation as a private entity, the argument that it would violate the non-delegation doctrine becomes straightforward.¹⁰⁴ The non-delegation doctrine, under Article I, states that “[a]ll

103. 821 F.3d at 32.

104. Established jurisprudence exists regarding the delegation of authority to governmental entities. The Supreme Court has established a lenient “intelligible principle” test that

legislative Powers herein granted shall be vested in a Congress of the United States.”¹⁰⁵ These legislative powers have been traditionally “interpreted by the courts as limiting Congress’s authority to delegate ‘legislative power’ to the other branches of government or private entities.”¹⁰⁶ Legislative or regulatory authority in this context means “the power to regulate the business of another.”¹⁰⁷ The Corporation would exercise a degree of authority in carrying out its delegated functions, such as through issuing air traffic instructions, collecting and setting rates, and safety oversight and enforcement. Such powers and functions can be analyzed as law-making authority and therefore constitute an impermissible delegation of authority to a private entity.

The controlling case in the context of delegating authority to a private entity is *Carter Coal*.¹⁰⁸ There the Supreme Court held that Congress’s delegation of authority allowing a majority of coal miners and producers in a specific region the authority to determine wages of other miners and producers in that region was unconstitutional.¹⁰⁹ The Court reasoned that by allowing the majority to regulate in “the affairs of an unwilling minority,” Congress was in effect delegating regulatory authority to private individuals “whose interests may be and often are adverse to the interests of others in the same business.”¹¹⁰

Here, the Corporation would be exercising regulatory authority as a private entity. The Corporation’s proposals for fees and charges would be an aspect of regulatory authority that cannot be delegated to a private entity. Collecting the user charges and fees, however, would most likely be rendered as an acceptable ministerial or administrative function. In *United States v. Frame*, the Supreme Court held that the collection of assessments by members of the beef industry constituted a “ministerial [function]” and therefore Congress did not unlawfully delegate its legislative authority.¹¹¹ Additionally, in *Pittston Co. v. United States*, the U.S. Court of Appeals for the Fourth Circuit concluded that the delegation of

allows Congress to delegate rulemaking authority to governmental entities. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Therefore, if a court were to determine that the Corporation would constitute a governmental entity, it would then conclude that the non-delegation doctrine was not violated.

105. U.S. Const. art. I, § 1.

106. Memorandum from James H. Burnley & Andrew E. Bigrat, Partners, Venable LLP, to David A. Berg, Senior Vice President, Gen. Counsel and Corporate Sec’y, Airlines for Am. (July 2016) (on file with Venable LLP).

107. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

108. *See id.*

109. *Id.*

110. *Id.*

111. 885 F.2d 1119, 1129 (3d Cir. 1989).

authority that allowed a private entity to collect premiums was permissible since it was “administrative or advisory in nature.”¹¹² However, setting the amount of the charges and fees is where a court would most likely find a violation.

Under the 21st Century AIRR Act, the Corporation would possess the authority to propose an initial schedule of fees and changes in the schedule, which would be submitted to the Secretary and would then be deemed approved, unless the Secretary files an express disapproval within forty-five days.¹¹³ However, the Board would not need to submit proposals for approval in order to “decrease a charge or fee.”¹¹⁴ Courts have looked at who has the authority to set the fee and who is subject to the fee when evaluating such delegation of authority.¹¹⁵ Courts have held that allowing private entities to advise and propose to the government the setting of fees and prices was an acceptable form of delegation so long as a governmental entity had the ultimate say on the matter.¹¹⁶ This would ensure that a governmental entity would have the effect of ruling and issuing regulatory authority that would otherwise be impermissible by a private entity.

Proponents of privatization of ATC services argue that the Corporation serves only an advisory role in that it simply proposes the charges and fees with the Secretary then having ultimate authority to approve or disapprove. We know, however, that that is not the case in all instances. For example, the Board may propose a fee schedule that would automatically be deemed approved if the Secretary were to not issue a timely disapproval within forty-five days.¹¹⁷ This mechanism would authorize the Corporation to set mandatory fees and charges for ATC services with little government involvement. Such a result would be in clear violation of the non-delegation doctrine as set forth above.

Additionally, the 21st Century AIRR Act allows the Board to decrease fees and charges without the Secretary’s approval.¹¹⁸ In both *Pittston* and *Sunshine Anthracite Coal*, the courts held that a private entity would need “specific formulas” or guiding principles when being delegated the power to set charges on other private parties who had the same

112. 368 F.3d 385, 396 (4th Cir. 2004).

113. 21st Century Aviation Innovation, Reform, and Reauthorization Act, H.R. 2997, 115th Cong. § 211(a) (2017) (as reported by H. Comm. on Transp. & Infrastructure, Sept. 6, 2017) (adding 49 U.S.C. § 90313(b)–(c)).

114. *Id.* (adding 49 U.S.C. § 90313(b)(3)).

115. AIRR Act Memo, *supra* note 49, at 16.

116. *See* *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *Pittston*, 368 F.3d at 394–95.

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

118. *Id.* (adding 49 U.S.C. § 90313(b)(3)).

interests involved.¹¹⁹ The 21st Century AIRR Act only sets guidelines in relation to setting fees and charges by subjecting the fees and charges to be “in accordance with the standards described in section 90313.”¹²⁰ However, that provision only applies to the Secretary’s review of any Board proposal¹²¹—this would not include the unilateral decrease of fees and charges.¹²² The fact that the Board would have no guidance or standards to follow when decreasing fees and charges could be viewed by a court as Congress allowing them to go beyond a simple advisory/ministerial role. In effect, certain Board members would be able to form majority coalitions that could decide to lower fees and charges for certain users of ATC services while maintaining the set fees and charges for other users. Without the Secretary’s approval, the Board’s decision would have binding benefits for certain users—an exercise in power that the courts would hold as improper delegation to a private entity.

Furthermore, the 21st Century AIRR Act delegates to the Corporation the power to impose penalties and interest on non-compliant users.¹²³ Even though users have the option of filing a dispute on any fees and charges imposed,¹²⁴ the 21st Century AIRR Act remains silent on how the Board should calculate the penalties and interests involved. Just as setting fees and charges could be viewed as improper delegation of regulatory authority, so too can the determination and enforcement of penalties. In his concurrence in *Amtrak I*, Justice Samuel Alito argued that actions by private entities that would present “incentives to obey” or reduce “risk of liability” would constitute as regulatory authority.¹²⁵ The approval and calculation of the penalties and interests to be imposed would be subject only to the bylaws created by the Board¹²⁶—all done without the Secretary’s approval. Without any referral to a governmental body in relation to the penalties, the Secretary would have no supervisory role. This lack of governmental control and regulation of the Corporation’s activities would be unconstitutional delegation.

Ultimately, both the setting of fees and charges, as well as the enforcement of any penalties and interests upon users of ATC services would function as regulatory power that would be improperly delegated

119. See *Sunshine Anthracite Coal*, 310 U.S. at 397; *Pittston*, 368 F.3d at 395 (citing 26 U.S.C. § 9706(a) (2012)).

120. H.R. 2997 § 211(a) (adding 49 U.S.C. § 90308(c)(5)).

121. *Id.* (adding 49 U.S.C. § 90313).

122. *Id.* (adding 49 U.S.C. § 90313(b)(3)).

123. *Id.* (adding 49 U.S.C. § 90313(f)(2)–(3)).

124. *Id.* (adding 49 U.S.C. § 90502).

125. 135 S. Ct. 1225, 1236 (Alito, J., concurring) (citing *Bennett v. Spear*, 520 U.S. 154, 169–71 (1996)).

126. H.R. 2997 § 211(a) (adding 49 U.S.C. §§ 90306(g)(3), 90308).

to the Corporation as a private entity.

VI. POLICY ARGUMENTS AND PROPOSED CHANGES

There are three policy arguments for not privatizing ATC. First, privatizing ATC puts it under the effective control of airlines. This in effect could lead to issues with efficiency and safety in a system that is already extensively criticized for such problems. Under the bill, three of the Corporation's thirteen directors are appointed by airlines, with the possibility of four additional appointments of directors friendly to airline interests through two Secretarial appointments and two appointments decided by the members of the board.¹²⁷ Thus, the majority control of the Board would be in the hands of the airlines, and the Corporation's strategic decisions could be designed to benefit airlines.¹²⁸ The Government Accountability Office (GAO) reported on February 10, 2016, aviation experts' concern that "small and rural communities could be negatively affected by a restructured ATC [system]."¹²⁹

Second, it splits the FAA into two separate operational and administrative bodies. This disrupts all FAA programs and fails to solve the most significant problems facing the aviation system. Current FAA development programs, like NextGen, would be rendered obsolete—jeopardizing the current progress and investment in such programs. The likelihood that NextGen will be scrapped by the Corporation is high due to frequent criticism of its slow progression.¹³⁰ By splitting the FAA in two, the plan leaves critical FAA safety programs, including programs to certify new aircraft and equipment and to conduct robust safety oversight of the airline industry, subject to year-to-year funding uncertainty. These safety programs, primarily funded by the AATF under current law, are shifted to funding exclusively from the General Fund of the Treasury. Thus, uncertainty surrounding budgeting would have negative consequences on the development of new technologies that would improve efficiency.

Third, it would convey free of charge, to a private corporation, billions of dollars' worth of assets that American taxpayers have bought and

127. *Id.* (adding 49 U.S.C. § 90305).

128. An industry that is already under serious criticism for anticompetitive practices. Richard Robinson & Terrence J. Kearney, *Anti-Competitive Marketing Practices in the Airline Industry: A Public Policy Perspective*, 1999 MKTG. MGMT. ASS'N CONF. 174, 176.

129. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-386R, PRELIMINARY OBSERVATIONS OF POTENTIAL AIR TRAFFIC CONTROL RESTRUCTURING TRANSITION ISSUES 8 (2016).

130. Meredith Somers, *Privatization 'Clearing the Runway' for Air Traffic Control, But Unions Worry Turbulence Ahead for FAA Employees*, FED. NEWS NETWORK (June 5, 2017, 5:27 PM), <https://federalnewsradio.com/management/2017/06/privatization-clearing-the-runway-for-air-traffic-control-but-unions-worry-turbulence-ahead-for-faa-employees/>.

paid for over the years. Taxpayers have invested approximately \$50 billion in these assets since 1996.¹³¹ The plan hands over taxpayer-purchased ATC facilities and equipment to a private company.¹³² The only two other governments in the world that have privatized their ATC systems—Canada and the United Kingdom—received compensation when they transferred public assets.¹³³ Other governments, even those that have separated their ATC systems from safety regulators, own their ATC assets.¹³⁴ While privatization of ATC services may have worked in both Canada and the United Kingdom, the United States is in a unique position, possessing the “largest and busiest airspace in the world, more than four times bigger than Canada’s airspace, with five times as many annual flights and seven times as many air traffic controllers.”¹³⁵ With such an enormous system, it is difficult to see how privatization would be the solution to most of the problems stemming from inefficiency.

Holding off on privatizing ATC would alleviate current inefficiencies of ATC services. For one, allowing the NextGen program to come to completion would not only save the government millions in investment, but would provide for the necessary changes that the 21st Century AIRR Act purports to fix. Second, allowing separate funding for ATC services under the FAA would allow more proper and better investments that would be used to allow NextGen plans to come into fruition more quickly.

CONCLUSION

The 21st Century AIRR Act should not be passed into law allowing ATC services to be privatized since it would be rendered unconstitutional under the two constitutional principles of due process and non-delegation, as discussed above. Furthermore, avoiding the privatization would serve better public policies if it remained under the control of the DOT and the FAA. As a larger and more complex system, the United States’ ATC services serve a unique case both under pragmatic and constitutional matters.

131. ATC Reform Memo, *supra* note 24, at 3.

132. *Id.*

133. Melanie Zanona, *House Panel Approves Proposal to Privatize Air Traffic Control*, HILL (June 27, 2017), <http://thehill.com/policy/transportation/339763-house-panel-approves-proposal-to-privatize-air-traffic-control>; ATC Reform Memo, *supra* note 24, at 3.

134. ATC Reform Memo, *supra* note 24, at 3.

135. Hugo Martin, *Trump’s Plan to Privatize Air Traffic Control Has Benefits and Pitfalls*, L.A. TIMES (Apr. 15, 2017), <http://www.latimes.com/business/la-fi-air-traffic-control-20170415-story.html>.