U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 24, 2011

The Honorable John D. Rockefeller IV
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Washington, D.C. 20510

The Honorable John L. Mica
Chairman
Committee on Transportation and
Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Messrs. Chairmen:

This letter presents the views of the Department of Justice (DOJ) on S. 223, the Federal Aviation Administration (FAA) Air Transportation Modernization and Safety Improvement Act, which the Senate incorporated as an amendment to H.R. 658 on April 7, 2011, and on H.R. 658, the FAA Air Transportation Modernization and Safety Improvement Act, as passed by the House on April 1, 2011.

Comments on S. 223

Section 505

DOJ supports the language contained in section 802 of the House passed version of H.R. 658, rather than the language currently found in section 505 (FAA Access to Criminal History Records or Database Systems) of S. 223 (the Senate passed version). Section 802 is more limited in scope and addresses the FAA's need for access to criminal history record information without being unnecessarily prescriptive about the terms of that access.

Constitutional Concerns

The Department has four constitutional concerns with the bill. Our primary concern is with sections 301 and 302, establishing an Air Traffic Control Modernization Oversight Board and a Chief NextGen Officer in the FAA, which appear to violate the Appointments Clause in two respects. First, section 301 confers authority on a new Chief NextGen Officer to oversee the implementation of all FAA NextGen, which we would consider to be "significant authority" for Appointments Clauses purposes. But section 302 provides that the Chief NextGen Officer shall be appointed by the FAA Administrator, who is not the head of a department and thus cannot appoint officers. As we explain below, we recommend that section 302 be revised either to provide for appointment of the Chief NextGen Officer by the Secretary of Transportation—the relevant department head—or by the Administrator of the FAA with the approval of the Secretary of Transportation. Second, section 301 imposes narrow qualifications on whom the President may appoint to the Air Traffic Control Modernization Oversight Board. These qualifications unduly constrain the President's Appointments Clause authority. We recommend that these appointment qualifications be made precatory.

Our next three constitutional concerns arise from provisions that could be read to interfere with the President's constitutional prerogatives to conduct diplomacy, to recommend legislation to Congress, and to supervise the executive branch. With respect to each of these provisions, we either recommend a textual revision that would remedy our concerns, or explain how the provision would be construed so as to avoid raising constitutional problems.

I. Sections 301, 302, and 323—Appointments Clause

Section 301 of the bill would establish an Air Traffic Control Modernization Oversight Board that "shall consist of" the following nine voting members:

(1) the [FAA] Administrator;

(2) a representative from the Department of Defense;

(3) a member "who shall have a fiduciary responsibility to represent the public interest";

(4) the CEO of an airport;

(5) the CEO of an air carrier;

(6) a representative of a labor organization representing FAA air traffic control operators;

(7) a "representative with extensive operational experience in the general aviation community";

(8) a representative from an aircraft manufacturer; and

(9) a representative from a labor organization representing FAA air traffic control maintenance personnel . . . .

In addition, section 302 would provide that the FAA Administrator shall appoint a "Chief NextGen Officer," who would be responsible for implementing all FAA programs associated with the Next Generation Air Transportation System, and would serve as a non-voting member of the Air Traffic Control Modernization Board.

Although title III initially states that the Secretary of Transportation shall establish the Air Traffic Control Modernization Oversight Board and appoint the members of the Board, the remainder of section 301 makes clear that the Secretary would not appoint most of the Board's members. The FAA Administrator is already appointed by the President with the advice and consent of the Senate, *see* 49 U.S.C. § 106(b), and would automatically be a member of the Board. S. 223, § 301 (amending 49 U.S.C. § 106(p)(2)(A)). The "representative from the Department of Defense," *id.* (amending 49 U.S.C. § 106(p)(2)(A)), might be selected by the Secretary of Transportation, but the statute does not make that requirement clear, raising the possibility that it would be read to authorize the Secretary of Defense to appoint that representative. The remaining seven board members (members #3 through #9 above) would be appointed by the President by and with the advice and consent of the Senate. *Id.* (amending 49 U.S.C. § 106(p)(3)(A)). And the new 49 U.S.C. § 106(p)(6)(E) would provide that those same seven members of the Board (members #3 through #9 above) would be removable by the President "for cause."

This scheme raises two Appointments Clause concerns that are sufficiently weighty to warrant a change in the statutory language.

First, the Chief NextGen officer would apparently be an inferior officer, and the administrator of the FAA, because he is not a department head, cannot appoint an inferior officer under the Appointments Clause. The Chief NextGen Officer's duties would include overseeing the implementation of all FAA NextGen programs, developing an annual NextGen implementation plan, and overseeing the Joint Planning and Development Office's facilitation of cooperation among all Federal agencies whose operations are affected by NextGen programs. S. 223 ES, § 302(b). The Chief NextGen Officer would thus appear to "exercise significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976). Because his position is one of employment by the federal government, he would appear to be an "Officer[] of the United States" for purposes of the Appointments Clause. U.S. Const., art. II, § 2, cl. 2; *Constitutional Separation of Powers Between the President & Congress*, 20 Op. O.L.C.

124, 139-49 (1996) ("Dellinger Memo"). And because he would "report to" the FAA Administrator, he would appear to be an inferior officer. *Edmond v. United States*, 520 U.S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate").

The Appointments Clause permits Congress to vest authority to appoint inferior officers in the President, "the Courts of Law," and "the Heads of Departments." The Administrator of the FAA, however, does not qualify as the head of a department eligible to appoint inferior officers, because the FAA is a component of the Department of Transportation. Dellinger Memo, 20 Op. O.L.C. at 152 n. 81. To avoid a violation of the Appointments Clause, section 302 should be revised either to provide for appointment of the Chief NextGen Officer by the Secretary of Transportation—the relevant department head—or by the Administrator of the FAA with the approval of the Secretary of Transportation.

Second, the statutory qualifications for service on the Air Traffic Control Modernization Oversight Board unduly restrict the appointment discretion of the President. One member of the Air Traffic Control Modernization Oversight Board would have to be a CEO of an airport, one the CEO of an air carrier, one a representative of the union that represents FAA operators, and one a representative of the union that represents FAA maintenance personnel. As a general matter, Congress may prescribe reasonable statutory qualifications for the appointment of officers of the United States. *Myers v. United States*, 272 U.S. 52, 128-29 (1926); *see also id.* at 264-75 (Brandeis, J., dissenting). However, statutorily imposed qualifications must leave sufficient "scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment"—in the case of these Board members, the President. *Constitutionality of Statute Governing Appointment of United States Trade Representative*, 20 Op. O.L.C. 279, 280 (1996) (quoting Civil Service Commission, 13 Op. Att'y Gen. 516, 520 (1871)). The requirements listed above—in particular, the requirement that one officer be the CEO of an airport and another be the CEO of an air carrier—may significantly constrict the pool of qualifying individuals from which the President would be able to make those appointments. To the extent they would do so, they could impermissibly limit the scope of the President's appointment power. We therefore recommend that these qualifications be eliminated or made precatory.

Third, section 323 would establish an FAA Task Force on Air Traffic Control Facility Conditions. The Task Force would be composed of 11 members, 7 of whom would be "appointed by the Administrator" and 4 of whom would be "appointed by labor unions representing employees who work at field facilities of the Administration." S. 223, § 323(b). The Task Force would be charged with studying conditions at air traffic control facilities, *see id.* § 323(f), making recommendations regarding improving facility conditions, *see id.* § 323(g), and submitting a report (within 6 months of the establishment of the Task Force) containing such recommendations to the Administrator

and Congress, *see id.* § 323(h). Section 323 would also provide that the Administrator would have 30 days from the submission of the report to "submit" to Congress "a report that includes a plan and timeline to implement the recommendations of the Task Force and to align future budgets and priorities of the Administration accordingly." *Id.* § 323(i). Section 323 would require that the Task Force be terminated "on the last day of the 30-day period beginning on the date on which the report . . . is submitted." *Id.* § 323(j).

Although members of the Task Force would not be compensated, it is possible that such members would be "Officers of the United States" for purposes of the Appointments Clause given that they would exercise significant governmental authority in issuing binding recommendations and that the membership role likely would last more than six months. *See generally The Constitutional Separation of Powers Between Congress and the President*, 20 Op. O.L.C. 124, 139 (May 7, 1996) ("Not everyone who performs duties for the federal government is an 'officer' within the meaning of the Appointments Clause. From the early days of the Republic, this term has been understood to embrace the ideas of 'tenure, duration, emolument, and duties.'") (quoting *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868)); *Hartwell*, 73 U.S. at 393 ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."). In that case, their manner of appointment would violate the Appointments Clause, as the FAA Administrator and the labor unions are not the President, Courts of Law, or Heads of Departments. U.S. Const., art. II, § 2, cl. 2 ("[The President], by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such Inferior Officers, as they think proper, in the President alone, the Courts of Law, or in the Heads of Departments").

Even if the Task Force members were not federal employees (due to their lack of compensation and relatively short terms) and thus not Officers of the United States, section 323 would raise constitutional concerns by delegating governmental authority to non-public actors. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); Memorandum for Jamie Gorelick, Deputy Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Proposals for Construction of a Prison in Mexico to House Deportable Mexican Alien Prisoners* (May 9, 1995) (explaining that Carter Coal "operates as a constitutional limit on the federal government's power to delegate federal authority to non-federal actors"). To avoid any Appointments Clause or non-delegation doctrine concerns, section 323 should be amended to make clear that the recommendations issued by the Task Force are advisory and not binding on the Administrator. This change could be accomplished by revising section 323(i) to require the Administrator to issue "a report that includes, as the Administrator considers appropriate, a plan and timeline to implement the

recommendations of the Task Force and to align future budgets and priorities of the Administration accordingly."

II. Section 521—Conduct of Diplomacy

Section 521 could impinge upon the President's constitutional authority over the conduct of diplomacy in three respects.

First, section 521(a) would impose certain restrictions on safety inspection agreements negotiated by the FAA Administrator with foreign countries:

> Within 1 year after the date of enactment of the FAA Air Transportation Modernization and Safety Improvement Act the Administrator of the Federal Aviation Administration shall establish and implement a safety assessment system for all part 145 repair stations based on the type, scope, and complexity of work being performed. The system shall—
>
> (1) ensure that repair stations outside the United States are subject to appropriate inspections based on identified risk and consistent with existing United States requirements;
>
> (2) consider inspection results and findings submitted by foreign civil aviation authorities operating under a maintenance safety or maintenance implementation agreement with the United States in meeting the requirements of the safety assessment system; and
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> (3) require all maintenance safety or maintenance implementation agreements to provide an opportunity for the Federal Aviation Administration to conduct independent inspections of covered part 145 repair stations when safety concerns warrant such inspections.

S. 223 ES, § 521(a) (adding 49 U.S.C. § 44730(a)(3)).

The President has "'exclusive authority to determine the time, scope, and objectives' of international negotiations or discussions." Memorandum for Joan E. Donoghue, Acting Legal Adviser, Department of State, from David J. Barron, Acting AAG/OLC, *Re: Constitutionality of Section 7054 of the Fiscal Year 2009 Department of State, Foreign Operations, and Related Programs Appropriations Act* at 8 (June 1, 2009) (quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 41 (1990)) (available at http://www.justice.gov/olc). Accordingly, Congress may not require the Executive to "initiate discussion with foreign nations" or "order[] the Executive to negotiate and enter into treaties" or other types of international agreements. *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652-53 (9th Cir. 1993); *see also, e.g.*, 35 Weekly Comp. Pres. Doc. 1927, 1930 (Oct. 5, 1999) (President Clinton's statement on signing the National Defense Authorization Act for FY 2000) ("Congress may not direct that the

President initiate discussions or negotiations with foreign governments."); 35 Weekly Comp. Pres. Doc. 2305, 2305 (Nov. 8, 1999) (President Clinton's statement on signing Legislation to Locate and Secure the Return of Zachary Baumel, a United States Citizen, and Other Israeli Soldiers Missing in Action) ("To the extent that this provision can be read to direct the Secretary of State to take certain positions in communications with foreign governments, it interferes with my sole constitutional authority over the conduct of diplomatic negotiations.").

To the extent section 521(a)'s requirement with respect to "all maintenance safety or maintenance implementation agreements" would dictate the content of the agreements the President could reach prior to submitting them for the congressional approval necessary to give them binding legal effect (i.e., treaties and congressional-executive agreements), this provision would infringe upon this exclusive presidential authority to conduct international negotiations. Although the Senate or Congress could of course refuse to consent to any agreement that did not include the terms required by section 521(a), Congress may not direct the President to pursue or enter agreements with those terms and thereby limit the types of agreements he may negotiate and then present for approval to Congress. Therefore, to the extent section 521 is intended to apply to agreements that are presented for approval to Congress, we would construe section 521 as indicating the preference of Congress to include such terms in an agreement.

Second, section 521(a) would appear to require the FAA Administrator to report to Congress when he initiates international negotiations concerning a safety inspection agreement:

> The Administrator [of the Federal Aviation Administration] shall notify the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Transportation and Infrastructure within 30 days after initiating formal negotiations with foreign aviation authorities or other appropriate foreign government agencies on a new maintenance safety or maintenance implementation agreement.

S. 223 ES, § 521(a) (adding 49 U.S.C. § 44730(b)). In practice, all Presidents have, whenever possible, voluntarily provided considerable information to Congress about diplomatic communications. The conduct of diplomatic negotiations, however, is a function committed to the President by the Constitution, and a categorical requirement to disclose diplomatic communications to Congress impermissibly intrudes on the President's ability to maintain the confidentiality of sensitive diplomatic discussions.

We therefore recommend that section 521(a) be revised to make clear that the President retains the discretion to withhold such information from the required reports as he considers necessary. If the provision is enacted without such change, the Executive Branch would construe it as not requiring reporting to Congress of the substance of sensitive communications and deliberations with foreign governments.

Finally, section 521(a) would provide:

> The Secretaries of State and Transportation jointly shall request the governments of foreign countries that are members of the International Civil Aviation Organization to establish international standards for alcohol and controlled substances testing of persons that perform safety sensitive maintenance functions upon commercial air carrier aircraft."

S. 223 ES, § 521(a) (adding 49 U.S.C. § 44730(d)(1)). As noted above, Congress may not require the Executive to "initiate discussion with foreign nations" or "order[] the Executive to negotiate and enter into treaties" or other types of international agreements. *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652-53 (9th Cir. 1993). We therefore recommend that this provision be revised to state that the Secretaries "may work with representatives of foreign governments, as appropriate, to establish international standards . . . ."

III. Section 319—Recommendations Clause

Section 319 of the bill would state as follows:

> Not later than 120 days after the date of the enactment of this Act, the Administrator of the Federal Aviation Administration shall submit to Congress a report that contains—
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> (1) a financing proposal that—
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> > (A) uses innovative methods to fully fund the development and implementation of technology for the Next Generation Air Transportation System in a manner that does not increase the Federal deficit; and
> >
> > (B) takes into consideration opportunities for involvement by public-private partnerships; and
> >
> > (C) recommends creative financing proposals other than user fees or higher taxes; and
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> (2) recommendations with respect to how the Administrator and Congress can provide operational benefits, such as benefits relating to preferred airspace, routings, or runway access, for all aircraft, including air carriers and general aviation, that equip their aircraft with technology necessary for the operation of the Next Generation Air Transportation System before the date by which the Administrator requires the use of such technology.

A financing proposal seems likely to entail the proposal of legislation inasmuch as the Executive Branch lacks authority other than as provided by Congress to raise funds through taxes or user fees or public-private partnerships. Section 319 accordingly would appear to require the FAA Administrator, a member of the Executive Branch, to make a legislative recommendation. To avoid conflict with the Recommendations Clause, which commits to the President the discretion to make such legislative recommendations "as he shall judge necessary and expedient," we recommend that section 319 be made precatory, by inserting "if appropriate" after "financing proposal" in subsection (1).

IV. Section 518—Presidential Supervision of the Executive Branch in the Disclosure of Confidential Information

Section 518 would amend 49 U.S.C. § 106 to provide:

> The Secretary [of Transportation], the Administrator [of the FAA], or any officer or employee of the [FAA] may not prevent or prohibit the Director [of the Aviation Safety Whistleblower Investigation Office] from initiating, carrying out, or completing any assessment of a complaint or information submitted [by certain aircraft operator employees under a provision of the bill] or from reporting to Congress on any such assessment.

S. 223 IS, § 518 (adding 49 U.S.C. § 106(s)(3)(C)). By its terms this provision would not prevent the President or other Executive Branch officers outside the FAA from controlling the disclosure of information that is the subject of a proper claim of executive privilege and from otherwise supervising the Director's handling of complaints covered by this provision. However, it interferes with the President's supervision of the Executive Branch by limiting which of his subordinates may control the disclosure of privileged information and otherwise supervise this officer.

To assure both the protection of whistleblowers and the President's control of privileged information, we recommend eliminating the phrase: "or from reporting to Congress on any such assessment." The provision thus would read:

> The Secretary [of Transportation], the Administrator [of the FAA], or any officer or employee of the [FAA] may not prevent or prohibit the Director [of the Aviation Safety Whistleblower Investigation Office] from initiating, carrying out, or completing any assessment of a complaint or information submitted [by certain aircraft operator employees under a provision of the bill].

Comments on H.R. 658

Section 334

To the extent that section 334(s)(3)(B) is intended to constitute a statutory exemption from disclosure under the Freedom of Information Act, it fails to comply with the requirement of 5 U.S.C. section 552(b)(3)(b) requiring that any statutory exemption cite specifically to that provision of the FOIA. Further, the provision is imprecise and unclear in its use of the phrase "otherwise unavoidable" and we suggest using different language. Otherwise, a court could find that this provision is so impermissibly vague that it does not qualify as a FOIA Exemption 3 withholding statute.

Section 823

With regard to section 823(b)(1)(B), DOJ questions the workability and feasibility of the provision specifying that records will be made available in response to a Freedom of Information Act request "subject to a prohibition on use of the documents for commercial purposes." Any agency record is subject to the FOIA, so if a requester declined to abide by a prohibition on commercial use of a document, the document would still be subject to release under the FOIA. The effect of this section is therefore unclear.

Constitutional Concerns

The Department has four constitutional concerns with the bill. First, sections 204 and 208 would endow two new positions of employment in the federal government—a Chief NextGen Officer and an Associate Administrator for the Next Generation Air Transportation System—with what appears to be significant authority, rendering them officers for purposes of the Appointments Clause, U.S. Const., art. II, § 2, cl. 2. They would be appointed by the Administrator of the Federal Aviation Administration ("FAA"), however, who is not the Head of a Department and thus is not permitted to appoint inferior officers. We recommend that sections 204 and 208 be revised to provide that these officers will be appointed by the Secretary of Transportation, or by the FAA Administrator with the approval of the Secretary of Transportation.

Second, the Aviation Facilities and Services Board established by section 804(g) raises aggrandizement concerns in that it includes the Comptroller General, a legislative branch official, as a non-voting member. The recommendations of this Board for realigning and consolidating FAA services and facilities would be binding on the FAA Administrator. To avoid aggrandizement, we recommend either that the Comptroller General be excluded from the Board or that the Board's recommendations to the FAA Administrator be made non-binding.

Third, three provisions in section 316 would interfere with the President's conduct of diplomacy. The first would impose certain restrictions on safety inspection agreements negotiated by the FAA Administrator with foreign countries. The second would require the FAA Administrator to notify Congress after initiating negotiations with a foreign aviation authority of a new safety maintenance safety or maintenance implementation agreement. The third would require the Secretaries of State and Transportation to request foreign countries that are members of the International Civil Aviation Organization to establish international standards for substance abuse testing of safety personnel. We recommend that all of these provisions be made precatory.

Our final constitutional concern is with section 334, which would interfere with the President's supervision of the Executive Branch in the disclosure of confidential information by prohibiting the Secretary of Transportation, the FAA Administrator, or any FAA officer or employee from preventing or prohibiting the Director of the Aviation Safety Whistleblower Investigation Office "from initiating, carrying out, or completing any assessment of a complaint or information submitted [by certain aircraft operator employees under a provision of the bill] or from reporting to Congress on any such assessment." To assure both the protection of whistleblowers and the President's control of privileged information, we recommend eliminating the phrase: "or from reporting to Congress on any such assessment."

I. Sections 204 and 208—Appointments Clause

Section 204 would provide that "[t]here shall be a Chief NextGen Officer appointed by the [FAA] Administrator" who would "report directly to the Administrator and [would] be subject to the authority of the administrator." H.R. 658 EH, § 204 (proposed 49 U.S.C. § 106(s)(1)(A)).

This scheme raises a constitutional concern under the Appointments Clause. The Appointments Clause permits Congress to vest authority to appoint inferior officers in the President, "the Courts of Law," and "the Heads of Departments." U.S. Const., art. II, § 2, cl. 2. The Chief NextGen Officer would apparently be an inferior officer for purposes of the Appointments Clause. The Chief NextGen Officer's duties would include overseeing the implementation of all FAA NextGen programs, developing an annual NextGen implementation plan, and overseeing the Joint Planning and Development Office's facilitation of cooperation among all Federal agencies whose operations are affected by NextGen programs. H.R. 658 EH, § 204 (proposed 49 U.S.C. § 106(s)(5)).

In light of those responsibilities, the Chief NextGen Officer would appear to "exercise significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976). And, because his position is one of employment by the federal government, he would appear to be an "Officer[] of the United States" for purposes of the Appointments Clause. U.S. Const., art. II, § 2, cl. 2; *Constitutional Separation of Powers Between the President & Congress*, 20 Op. O.L.C. 124, 139-49

(1996) ("Dellinger Memo"). Furthermore, because he would "report to" the FAA Administrator, he would appear to be an inferior officer. *See Edmond v. United States*, 520 U.S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate").

The FAA Administrator, however, does not qualify as the head of a department eligible to appoint inferior officers, because the FAA is a component of the Department of Transportation. *See* Dellinger Memo, 20 Op. O.L.C. at 152 n. 81. To avoid a violation of the Appointments Clause, section 204 should be revised either to provide for appointment of the Chief NextGen Officer by the Secretary of Transportation—the relevant department head—or by the Administrator of the FAA with the approval of the Secretary of Transportation.

Section 208 would amend section 709(a) of the Vision—100 Century of Aviation Reauthorization Act (49 U.S.C. 40101 note)—which established a Air Transportation System Joint Planning and Development Office—to provide for an "Associate Administrator for Next Generation Air Transportation System Planning, Development, and Interagency Coordination" to be the head of Office. H.R. 658 EH, § 208. The Associate Administrator would be "appointed by the Administrator of the [FAA]." *Id.*

The Associate Administrator would appear to be an inferior officer for the purposes of the Appointments Clause. The Associate Administrator would appear to exercise significant governmental authority, as the Office which he would head would be charged with, among other things, creating and carrying out an integrated plan for a Next Generation Air Transportation System, overseeing research and development on that system, and establishing specific quantitative goals for the safety, capacity, efficiency, performance, and environmental impacts of each phase of the Next Generation Air Transportation System. *Id.* The Associate Administrator would also be a "voting member of the Joint Resources Council of the Federal Aviation Administration." *Id.* Because the position would appear to be one of employment and because the Associate Administrator would appear to report to the FAA Administrator, the person occupying the position would be an inferior officer. To avoid a violation of the Appointments Clause, section 208 should be revised either to provide for appointment of the Associate Administrator by the Secretary of Transportation—the relevant department head—or by the Administrator of the FAA with the approval of the Secretary of Transportation.

II. Section 804—Aggrandizement

Section 804(a) would amend 49 U.S.C. § 44519(g)(1) to require the Secretary of Transportation to "establish an independent board to be known as the 'Aviation Facilities and Services Board.'" The Board would be composed of the Secretary (or his designee), two members appointed by the Secretary who are not officers or employees of the Federal Government, and the Comptroller General (or his designee), who would be a

nonvoting member of the Board. 49 U.S.C. § 44519(g)(2) (as amended by H.R. 658 EH). The Board would review the FAA Administrator's recommendations for realigning and consolidating FAA services and facilities and issue a report including its own recommendations. *Id.* § 44519(d). The FAA Administrator would then be required to follow the Board's recommendations absent intervening legislation. *Id.* § 44519(e).

The presence of the Comptroller General (or his designee) on the Board raises constitutional concerns even though he would be a nonvoting member. The Comptroller General is an official "removable only at the initiative of Congress," *Bowsher v. Synar*, 478 U.S. 714, 728 (1986), and a statute may not give such a congressional agent the authority to perform executive branch functions. *The Constitutional Separation of Powers between the President and Congress*, 20 Op. O.L.C. 124, 160 n. 95 (1996) ("designating a member of Congress to serve on a commission with any executive functions, even in what was expressly labeled a ceremonial or advisory role, may render the delegation of significant governmental authority to the commission unconstitutional as a violation of the anti-aggrandizement principle") (citing *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993) (holding unconstitutional a statute that authorized agents of Congress to serve on the FEC in a non-voting capacity)). To avoid this constitutional concern, either the Comptroller General should not be made a member of the Board or the Board's functions should be amended to be purely advisory.

We note also that the two other members of the Board, because they are appointed by the Secretary, would be subject to the Secretary's removal and supervisory authority. This means, however, that the Board would not truly be "independent." If the drafters' intent is to create a board that is not entirely controlled by the Secretary, the other two members should not be appointed by the Secretary and furthermore would have to be principal officers, since they would not be subject to supervision by anybody except the President. *Edmond*, 520 U.S. at 663. They would accordingly need to be appointed by the President and confirmed by the Senate. U.S. Const. art. II, § 2, cl. 2.

III. Section 315—Conduct of Diplomacy

Section 315 could impinge upon the President's constitutional authority over the conduct of diplomacy in three respects.

First, section 315(a) would impose certain restrictions on safety inspection agreements negotiated by the FAA Administrator with foreign countries:

> Not later than 1 year after the date of enactment of this section, the Administrator of the Federal Aviation Administration shall establish and implement a safety assessment system for each part 145 repair station based on the type, scope, and complexity of work being performed. The system shall—

> (1) ensure that repair stations outside the United States are subject to appropriate inspections based on identified risks and consistent with existing United States requirements;
>
> (2) accept consideration of inspection results and findings submitted by foreign civil aviation authorities operating under a maintenance safety or maintenance implementation agreement with the United States in meeting the requirements of the safety assessment system; and
>
> (3) require all maintenance safety or maintenance implementation agreements to provide an opportunity for the Federal Aviation Administration to conduct independent inspections of covered part 145 repair stations when safety concerns warrant such inspections.

H.R. 658 EH, § 315(a) (adding 49 U.S.C. § 44733(a)(3)).

The President has "'exclusive authority to determine the time, scope, and objectives' of international negotiations or discussions." Memorandum for Joan E. Donoghue, Acting Legal Adviser, Department of State, from David J. Barron, Acting AAG/OLC, *Re: Constitutionality of Section 7054 of the Fiscal Year 2009 Department of State, Foreign Operations, and Related Programs Appropriations Act* at 8 (June 1, 2009) (quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 41 (1990)) (available at http://www.justice.gov/olc). Accordingly, Congress may not require the Executive to "initiate discussion with foreign nations" or "order[] the Executive to negotiate and enter into treaties" or other types of international agreements. *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652-53 (9th Cir. 1993); *see also, e.g.*, 35 Weekly Comp. Pres. Doc. 1927, 1930 (Oct. 5, 1999) (President Clinton's statement on signing the National Defense Authorization Act for FY 2000) ("Congress may not direct that the President initiate discussions or negotiations with foreign governments."); 35 Weekly Comp. Pres. Doc. 2305, 2305 (Nov. 8, 1999) (President Clinton's statement on signing Legislation to Locate and Secure the Return of Zachary Baumel, a United States Citizen, and Other Israeli Soldiers Missing in Action) ("To the extent that this provision can be read to direct the Secretary of State to take certain positions in communications with foreign governments, it interferes with my sole constitutional authority over the conduct of diplomatic negotiations.").

To the extent section 315(a)'s requirement with respect to "all maintenance safety or maintenance implementation agreements" would dictate the content of the agreements the President could reach prior to submitting them for the congressional approval necessary to give them binding legal effect (i.e., treaties and congressional-executive agreements), this provision would infringe upon this exclusive presidential authority to conduct international negotiations. Although the Senate or Congress could of course refuse to consent to any agreement that did not include the terms required by section 315(a), Congress may not direct the President to pursue or enter agreements with those

terms and thereby limit the types of agreements he may negotiate and then present for approval to Congress. Therefore, to the extent section 315 is intended to apply to agreements that are presented for approval to Congress, we would construe section 315 as indicating the preference of Congress to include such terms in an agreement.

Second, section 315(b) would appear to require the FAA Administrator to report to Congress when he initiates international negotiations concerning a safety inspection agreement:

> The Administrator [of the Federal Aviation Administration] shall notify the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives on or before the 30th day after initiating formal negotiations with a foreign aviation authority or other appropriate foreign government agency on a new maintenance safety or maintenance implementation agreement.

H.R. 658 EH, § 315(a) (adding 49 U.S.C. § 44733(b)). In practice, all Presidents have, whenever possible, voluntarily provided considerable information to Congress about diplomatic communications. The conduct of diplomatic negotiations, however, is a function committed to the President by the Constitution, and a categorical requirement to disclose diplomatic communications to Congress impermissibly intrudes on the President's ability to maintain the confidentiality of sensitive diplomatic discussions.

We therefore recommend that section 315(a) be revised to make clear that the President retains the discretion to withhold such information from the required reports as he considers necessary. If the provision is enacted without such change, the Executive Branch would construe it as not requiring reporting to Congress of the substance of sensitive communications and deliberations with foreign governments.

Finally, section 315(a) would provide:

> The Secretary of State and the Secretary of Transportation shall request, jointly, the governments of foreign countries that are members of the International Civil Aviation Organization to establish international standards for alcohol and controlled substances testing of persons that perform safety-sensitive maintenance functions upon commercial air carrier aircraft.

H.R. 658 EH, § 315(a) (adding 49 U.S.C. § 44733(d)). As noted above, Congress may not require the Executive to "initiate discussion with foreign nations" or "order[] the Executive to negotiate and enter into treaties" or other types of international agreements. *Earth Island Inst.*, 6 F.3d 648, at 652-53. We therefore recommend that this provision be revised to state that the Secretaries "may work with representatives of foreign governments, as appropriate, to establish international standards . . . ."

IV. Section 334—Presidential Supervision of the Executive Branch in the Disclosure of Confidential Information

Section 334 would amend 49 U.S.C. § 106 to provide:

> The Secretary [of Transportation], the Administrator [of the FAA], or any officer or employee of the [FAA] may not prevent or prohibit the Director [of the Aviation Safety Whistleblower Investigation Office] from initiating, carrying out, or completing any assessment of a complaint or information submitted [by certain aircraft operator employees under a provision of the bill] or from reporting to Congress on any such assessment.

H.R. 658 EH, § 334 (adding 49 U.S.C. § 106(t)(3)(C)). By its terms this provision would not prevent the President or other Executive Branch officers outside the FAA from controlling the disclosure of information that is the subject of a proper claim of executive privilege and from otherwise supervising the Director's handling of complaints covered by this provision. However, it interferes with the President's supervision of the Executive Branch by limiting which of his subordinates may control the disclosure of privileged information and otherwise supervise this officer.

To assure both the protection of whistleblowers and the President's control of privileged information, we recommend eliminating the phrase: "or from reporting to Congress on any such assessment." The provision thus would read:

> The Secretary [of Transportation], the Administrator [of the FAA], or any officer or employee of the [FAA] may not prevent or prohibit the Director [of the Aviation Safety Whistleblower Investigation Office] from initiating, carrying out, or completing any assessment of a complaint or information submitted [by certain aircraft operator employees under a provision of the bill].

49 U.S.C. § 106(t)(3)(C) (as amended).

Thank you for the consideration of our views. If we may be of further assistance on this legislation, please do not hesitate to contact this office. The Office of Management and Budget has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Kay Bailey Hutchison
Ranking Minority Member

The Honorable Nick J. Rahall
Ranking Minority Member