

Statement of
The Honorable Jeffrey A. Rosen
General Counsel, U.S. Department of Transportation
Before the
Committee on Transportation and Infrastructure
Subcommittee on Railroads
House of Representatives
November 15, 2005

Mr. Chairman, Ranking Member Brown, and members of the Subcommittee, I am pleased to appear before you to again underscore the need for reform of intercity passenger rail service. As I have testified previously, the Administration wants to save and improve intercity passenger rail.

Introduction

As you know, Amtrak is a private, for-profit business corporation—having been established as such by Congress. As with any business corporation, Amtrak is governed by a Board of Directors. As in any business corporation, it is emphatically the role of the Board of Directors to hold management accountable, and to demand positive results.

In this regard, it is indeed telling that Congress' own experts at the GAO ten days ago identified more than 150 pages of "Systemic Problems" with "Amtrak Management", and called for greater management accountability at Amtrak. See "Amtrak Management: Systemic Problems Require Actions to Improve Efficiency, Effectiveness, and Accountability" (GAO-06-145, November 4, 2005). Nor was the GAO the first or only observer to identify these major, ongoing problems. See, e.g., DOT Inspector General, "Report on Analysis of Cost Savings on Amtrak's Long-Distance Services" (July 22,

2005); Joseph Vranich, "End of the Line: The Failure of Amtrak and The Future of America's Passenger Trains" (AEI, December 2004).

Corroborating what others have observed, the GAO Report on "Amtrak Management" that was released ten days ago highlights the systemic and wide-ranging problems that have existed at Amtrak in recent years, and a senior management refusal to address them:

• "The [Amtrak] president said that Amtrak's management team has identified the problems "as only we can" and has developed an approach that "works best for us." He said that the strategic planning mechanisms we recommend or that government agencies adopt may not be in line with those followed by Amtrak, but the goals are the same. He reiterated that to him, while process is important, results are what matter. GAO agrees that results matter, but, overall, results are not improving." (page 21)

• "Overall, the president said that he was not convinced that GAO's recommendations would produce the results GAO expects.... Basically, he said that "the results speak for themselves." GAO believes that, although improvements have been made, the overall results have not been satisfactory. During the last 3 fiscal years, Amtrak's operating losses have increased to over \$1 billion annually, and such losses are projected to increase about 40 percent by 2009. In addition, GAO found systemic problems in all five areas that it reviewed and found that Amtrak faces major challenges in instituting and strengthening its basic business systems." (pages 19-20)

• "The views reflected in the comments of Amtrak's president that steady incremental improvements are the best approach for addressing Amtrak's problems do not appear consistent with the magnitude of changes discussed in Amtrak's April 2005 strategic reform initiatives." (page 20)

A Look Back at Amtrak's Board of Directors Over Time

When Amtrak was formed under the Rail Passenger Service Act of 1970, Congress expected Amtrak to capitalize upon the efficiencies of pulling together the various freight railroads' passenger service operations and to thereby swiftly wean itself from

transitional Federal subsidies. With this in mind, Amtrak was purposefully created as a *for-profit* private corporation with a Board of Directors suited for that purpose.

A corporation's Board of Directors is responsible for setting overall corporate policy and strategy, hiring management, holding management accountable, and being accountable to the stockholders. Management, on the other hand, is responsible for implementing the goals and strategy set by the Board and providing knowledgeable, accurate information and professional advice to the Board. It is not the role of senior management to ignore the Board, evade the Board's direction, or to devote large amounts of time seeking to ask Congress to countermand the Board.

The Rail Passenger Service Act of 1970, P.L. 91-518, authorized a 15-member board, having eight members appointed by the President with the advice and consent of the Senate for four-year terms, one of whom would be the Secretary and one a consumer representative; three members elected annually by the common stockholders; and four members elected annually by preferred stockholders (when preferred stock is issued). That Board launched the corporation as a nationwide business, but instead of fulfilling its actual purpose, it also set Amtrak's course down the path of dependence on ever-increasing Federal subsidies.

The Amtrak Improvement Act of 1973, P.L. 93-146, authorized a 17 member board including the Secretary of Transportation, nine members appointed by the President with the advice and consent of the Senate with no more than five from the same political party,

and three members to serve as consumer representatives; three members elected annually by the common stockholders; and four members elected annually by the preferred stockholders (when preferred stock is issued).

The Amtrak Improvement Act of 1976, P.L. 94-555, made the Corporation's President an *ex officio* member of the Board of Directors and reduced the Presidential appointees from nine to eight.

Unfortunately, the changes made to the Board of Directors in 1973 and 1976 made no difference in the performance of Amtrak as a business. Passengers continued to complain that service was inadequate, and the financial performance of the company went from bad to worse. So much so that, by 1981, Amtrak persuaded Congress on a one-time basis to have the federal taxpayers take over responsibility for approximately \$1 billion in Amtrak debt and interest in exchange for giving the Government preferred stock of equal par value.

The Amtrak Improvement Act of 1981, P.L. 97-35, established a new structure for the Board of Directors, to be comprised of nine members including the Secretary of Transportation (represented by FRA Administrator or General Counsel), the Corporation's president, three members appointed by the President with the advice and consent of the Senate of which no more than two could be from the same political party (one chosen from a Railway Labor Executives Association list, one Governor, and one business representative with an interest in rail transportation); two members selected by

the President from a list prepared by commuter authorities; and two members selected annually by the preferred stockholders (preferred stock first issued to the Secretary of Transportation after the 1981 Act in exchange for past guaranteed debt and future Federal grants). *The common stockholders lost their board seats at this time.* It was obvious that the role of the original stockholders had changed dramatically from when Amtrak began, as the company's losses were so great and it was so deeply in debt it could go forward only through either forgiveness of the federally-guaranteed debt or through bankruptcy.

Unfortunately, even this change in the Board of Directors and the company's financial structure was ineffectual: Amtrak went back to spending substantially more than it earned--with no end in sight, and with no one held accountable for the results. During the 1980's, the Executive Branch proposed eliminating subsidies to Amtrak, but Congress instead continued to accept Amtrak's poor overall performance and its lack of accountability.

The Amtrak Reform and Accountability Act of 1997, P.L. 105-134, was supposed to change all that. By 1997, Congress determined that something drastic had to be done to fix Amtrak's business practices, deliver value to customers, and wean Amtrak from federal subsidies. Congress set up a new framework that removed restrictions on Amtrak, and looked to the company to reform itself. The Amtrak Reform and Accountability Act of 1997 established a new structure for a *Reform Board of Directors* comprised of only seven members appointed by the President with the advice and consent

of the Senate, of which "at least 4 members" are needed to act as the Board. 49 U.S.C. § 24302(a). Each member is appointed "for a term of 5 years." The key difference between this Board of Directors and its predecessors is that its members are to have qualifications, professional standing and demonstrated expertise and not to be representatives of rail labor or management or Federal or Amtrak employees.¹

The 1997 Amtrak Reform Act contemplated that Amtrak's Board would step in to require Amtrak management to fix the business' many problems, under a legal dictate that operating subsidies end in 2002, with dramatic consequences if that was not met. In creating this business-oriented board, and anticipating an end to federal operating subsidies, Congress eliminated the DOT-selected Directors representing the preferred stock and removed the provision making the Secretary a member *ex officio*. Indeed, early in this Administration, the Secretary of Transportation was not represented on the Amtrak Board at all, and the then-Board and management were not accountable to DOT. Unfortunately, the Board members in the 1990's were unable to accomplish what the Act required. This Committee is all too familiar with what Amtrak management did in response: Amtrak claimed to be on the "glide path" to self-sufficiency when, in fact, it was on the glide path to bankruptcy. Instead of needing no federal operating subsidies by

¹ S. 1516, which is pending in the Senate, would change the Amtrak Reform Board from the present business-oriented model back to a more politicized Board, akin to some of the earlier formulas, by expanding it from seven to nine members, no more than four of whom can be from the same political party. Nominees would be selected in consultation with the leadership of the House and Senate, and an attempt would be made to provide geographic balance. Such a change would appear to reduce accountability rather than improve it, and would be inferior to the current Reform Board model. One suggestion has been that it could be better to have the Department of Transportation, as the holder of (a) more than 99 percent of the equity in the corporation, (b) the largest debt holder, and (c) the mortgage holder on the Northeast Corridor, have majority control of the Board so long as the Federal taxpayers continue to subsidize Amtrak. This approach would improve accountability, but such a framework would only be appropriate on a transitional basis until Amtrak can become financially stable and cease to receive Federal operating subsidies. The key principle is that Amtrak needs to be run as a business, and its Board needs to hold Amtrak management accountable for that.

2002, as the statute directed, Amtrak needed both desperate measures to hold off bankruptcy and record levels of operating subsidies from the federal Treasury. Amtrak's management failed to fix the problems, and the Reform Board of Directors appointed in the late 1990's did not reform Amtrak.

Today's Amtrak Reform Board of Directors

It is noteworthy, amidst this sad business history, that the current Reform Board of Directors appears to be the first one on which all four of the Directors met the statutory qualifications set for them.² This business-oriented Reform Board has demanded improvements at Amtrak in financial transparency and management accountability, and retained KPMG to assist the Audit Committee of the Board. This Board of Directors last April also approved a Strategic Reform Initiative plan to improve Amtrak (<http://www.amtrak.com/pdf/strategic06.pdf>) and is monitoring Amtrak management's progress in carrying out those parts that are in Amtrak's own control.

This Reform Board of Directors has indicated that it means to achieve meaningful improvements in Amtrak's business, and not turn a blind eye to the company's continuing and worsening business failings. Since 2002, Amtrak's revenues have been declining; it loses more than \$100 million subsidizing food and beverage service on trains; its labor costs have continued to exceed its ticket sales; its on-time performance on

² During this Subcommittee's Hearing on September 21, 2005, the Chairman asked both Amtrak and DOT to provide legal opinions about Amtrak's corporate governance for the record. Both Amtrak and DOT reported that Amtrak's Board of Directors is validly constituted, has a legal quorum, and is fully empowered to take the full range of actions entrusted to a corporate board under applicable law. *Copies of those are attached hereto, [along with other applicable legal precedent].* It is noteworthy that no private parties to date have questioned or challenged this conclusion, no court has differed with it, and it is unclear that anyone else has shared these concerns.

many routes is terrible; its huge per-passenger subsidies exceed those of any other form of transportation, and are both economically extreme and unfair; and its routes and customer service remain insufficiently responsive to market needs.

The current Reform Board of Directors, as set forth in the Amtrak Reform and Accountability Act of 1997, has a demonstrated commitment to fixing Amtrak's business, in a business-oriented and economically sound way. Media reports suggest that there are some who prefer the 1960's approach, and oppose all change to Amtrak, but that approach is not viable in the near-term nor the long-term, any more than it would be for an airline or an intercity bus company. Despite good intentions, that approach would eventually lead to the demise of intercity passenger rail. By contrast, the Administration seeks to save and improve intercity passenger rail. Accordingly, the Administration supports efforts of the Amtrak Reform Board of Directors to reform and improve Amtrak's business. Moreover, while the Amtrak Board is doing its part, Congress can contribute to this goal by moving forward with H.R. 1713, or comparable legislation that embodies the same principles and objectives of Amtrak reform.

Thank you for this opportunity to share our observations regarding the continuing need for Amtrak reform, and the role of Amtrak's corporate Board of Directors in setting the company's direction.



**U.S. Department
of Transportation**

Office of the Secretary
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

OCTOBER 26, 2005

The Honorable Steve LaTourette
Chairman
Subcommittee on Railroads
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Chairman LaTourette:

This letter responds to your request for an opinion from the Department of Transportation concerning the Amtrak Board of Directors. I am aware that you have previously received a memorandum from Amtrak itself on this subject, which provides a chronology and analysis indicating that the Amtrak Board of Directors is validly constituted, has a legal quorum, and is fully empowered to take the full range of actions entrusted to a corporate board under the applicable law. I concur in that assessment.

The Amtrak Reform and Accountability Act of 1997 ("ARAA") amended Part C of Subtitle V of title 49, 49 U.S.C. § 24301 et seq., which is Amtrak's governing statute. Chapter 234 of title 49 states that Amtrak shall be operated and managed as a for-profit corporation. 49 U.S.C. § 24301(a)(2). The statute further provides that the District of Columbia Business Corporations Act ("D. C. Act"), to the extent consistent with the Amtrak governing statute, shall also apply to Amtrak. 49 U.S.C. § 24301(e) and D. C. Code § 29-101.01 et seq.

Chapter 243 of title 49 states that Amtrak shall have a board of directors consisting of 7 voting members appointed by the President with the advice and consent of the Senate, for a term of 5 years (except that the Secretary of Transportation does not need separate Senate approval). 49 U.S.C. § 24302(a)(2). The statute further provides that, if Amtrak failed to achieve operating self-sufficiency in fiscal year 2003, then the Board members shall continue to be selected in accordance with the procedures of the current statute. 49 U.S.C. § 24302(b)(1). Because Amtrak received Federal assistance in 2003 and receives Federal assistance currently, the procedures of the current statute apply.

The D. C. Act states that a corporation's business and affairs shall be managed by a board of directors, and the number of directors required to transact the corporation's business is a quorum consisting of a majority of the number of directors prescribed in the applicable governing document. For Amtrak, this means 4 of the 7 voting members of the Board prescribed in Chapter 243 of title 49, as *amended* by ARAA. D. C. Code § 29-101.32 and 101.36. When ARAA created the original Amtrak Reform Board

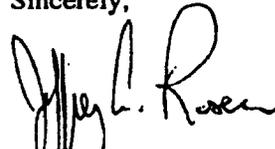
consisting of 7 voting members, Congress specifically stated that the Reform Board shall assume the responsibilities of the Board by a certain date in 1998, or as soon thereafter as at least 4 members had been appointed and qualified. 49 U.S.C. § 24302(a)(1).

In addition, the Bylaws of Amtrak in Article IV, Board of Directors, Section 4.08, specifically address the issue of what constitutes a quorum for the purpose of conducting the business of the Board. The provision states "A majority of the total number of Directors with voting powers fixed by statute shall constitute a quorum for the purpose of conducting the business of the Board. Except as otherwise specifically provided by statute, the Articles of Incorporation, or these Bylaws, the acts of a majority of the Directors with voting powers present at a meeting at which a quorum exists shall be the acts of the Board of Directors." Presently, there are 4 duly appointed Board members and therefore the current Board meets the requirements of the Bylaws for a quorum, as 4 constitutes a majority of the 7 Board members called for by 49 U.S.C. § 24302(a)(2). The Board may delegate all its powers to an executive committee consisting of two or more directors, which shall have and may exercise all of the authority of the Board. D. C. Code § 29-101.37.

The Bylaws of Amtrak in Article 5, Committees, Section 5.01, Executive Committee, also authorize the creation of an Executive Committee. The provision states, "The Board of Directors, by resolution adopted by a majority of the Directors with voting powers then in office may designate two or more Directors to constitute an Executive Committee, to have and exercise, consistent with applicable law, all of authority of the Board of Directors in the management of the business and affairs of the Corporation. One of the members of the Executive Committee shall be the Secretary of Transportation or his designee."

Simply put, the Amtrak Board of Directors is validly constituted, has a legal quorum, and is fully empowered to take the full range of actions entrusted to a corporate board under the applicable law. If you have any further questions, please feel free to contact me at (202) 366-4702.

Sincerely,



Jeffrey A. Rosen

cc: David M. Laney, Chairman, Amtrak Board of Directors

October 18, 2005

AMTRAK'S BOARD OF DIRECTORS

The following is a brief outline of the history of Amtrak's Board composition and structure since the Amtrak Reform and Accountability Act of 1997, P.L. 105-134 (the "ARAA") was enacted into law on December 2, 1997. The ARAA amended the Rail Passenger Services Act, 49 U.S.C. 24301, *et seq.* ("RPSA"), which is Amtrak's governing statute.

I. Key Statutory and Amtrak Bylaw Provisions

There are several key statutory and Amtrak bylaw provisions affecting Amtrak's corporate governance:

- RPSA, as most recently amended by Congress in 1997, states that Amtrak shall be managed as a for-profit corporation, subject to the District of Columbia Business Corporation Act (the "D.C. Act") to the extent consistent with the RPSA. 49 U.S. Code 24301(a) and (e) and 29 D.C. Code 101.01 *et seq.*
- The RPSA also states that Amtrak shall have a board of directors consisting of seven voting members appointed by the President, subject to Senate confirmation. 49 U.S. Code 24302(a). Because Amtrak failed to achieve the goal of operating self-sufficiency in fiscal year 2003, the 1997 provisions governing appointment of directors by the President continue in effect. 49 U.S. Code 24302(b).
- Unlike the pre-1997 provisions of the RPSA, the appointment of a member to fill a vacancy occurring before the end of a term of an Amtrak board member is not limited to the unexpired term of the member they are appointed to succeed. Compare Section 411(a) of the Amtrak Reform and Accountability Act of 1997 (the "ARAA") with 49 U.S.C. 24302(e) as adopted in 1994.
- The D. C. Act states that a corporation's business and affairs shall be managed by a board of directors, and the number of directors required to transact the corporation's business is a quorum consisting of a majority of the number of directors prescribed in the applicable governing document. For Amtrak, this means four of the seven voting members prescribed in the RPSA. 29 D. C. Code 101.32 and .36. However, the board may delegate all its powers to an executive committee consisting of two or more directors. 29 D.C. Code 101.37.
- Article IV, Board of Directors, Section 4.08 of Amtrak's Bylaws, state "A majority of the total number of Directors with voting powers fixed by statute shall constitute a quorum for the purpose of conducting the business of the Board. Except as otherwise specifically provided by statute, the Articles of Incorporation, or these Bylaws, the acts of a majority of the Directors with voting

powers present at a meeting at which a quorum exists shall be the acts of the Board of Directors." Presently, there are 4 duly appointed Board members and therefore the current Board meets the requirements of the Bylaws for a quorum, as 4 constitutes a majority of the 7 Board members called for in 49 U.S.C. § 24302(a).

- Article V, Committees, Section 5.01 Executive Committee of Amtrak's Bylaws also authorize the creation of an Executive Committee. The provision states, "The Board of Directors, by resolution adopted by a majority of the Directors with voting powers then in office may designate two or more Directors to constitute an Executive Committee, to have and exercise, consistent with applicable law, all of authority of the Board of Directors in the management of the business and affairs of the Corporation. One of the members of the Executive Committee shall be the Secretary of Transportation or his designee."

II. Appointments to Amtrak's Board through 2002

Section 411(a) of the ARAA replaced Amtrak's 1997 board structure with the current board consisting of seven voting members appointed by the President for a term of five years, subject to confirmation by the Senate. (The Secretary of Transportation can be and was appointed as one of the seven but without Senate confirmation.) 49 U.S.C. 24302 (a)(2). In June 1998, President Clinton appointed then Secretary Rodney Slater to the board and, following Senate confirmation, Governors Michael Dukakis and Tommy Thompson and Mayor John Robert Smith. The appointment of the first four members – a quorum – in June 1998 satisfied the statutory condition requiring that the newly established board assume its responsibilities before July 1, 1998. The former Amtrak board was thereupon dissolved. 49 U.S.C. 24302(a)(1) and section 411(b) of the ARAA. Three other members were appointed in 1998 and 1999 following Senate confirmation as follows: Governor Linwood Holton and Ms. Amy Rosen, September 25, 1998, and Ms. Sylvia De Leon, August 9, 1999.

Secretary Mineta was appointed to replace Secretary Slater in June 2001. Further, after Governor Thompson resigned in May 2001, President Bush nominated, and the Senate confirmed, Mr. David Laney as a member of Amtrak's board. Mr. Laney was appointed by the President in November 2002 for a five-year term.

III. Creation of an Executive Committee of the Board and Additional Appointments in 2003 and 2004

In 2003, the terms of four Amtrak board members were to expire: Governor Dukakis and Mayor Smith in June and Ms. Rosen and Governor Holton in September. Because of the possibility that the Board could be without a quorum of four directors, in September 2003 – prior to the expiration of the terms

of Ms. Rosen and Governor Holton, the Board: (1) amended Section 5.01 of Amtrak's Bylaws to conform to D.C. law and permit an executive committee of two members (the prior Section 5.01 required that an executive committee have three members); and (2) adopted resolutions creating an executive committee of two or more members authorized to exercise all powers of the Board with respect to Amtrak. These resolutions were adopted unanimously by Ms. De Leon, Governor Holton, Mr. Laney, Ms. Rosen, and the Secretary's representative. Initially, the board designated Mr. Laney, Ms. De Leon, and Secretary Mineta as members of the executive committee. (A copy of these resolutions is attached.)

In July 2004, the President appointed Mr. Floyd Hall to be a member of Amtrak's board, without Senate confirmation while the Senate was in recess. Immediately after this appointment, the board amended the resolutions with respect to the executive committee that had been adopted in September 2003. Mr. Hall was appointed to the executive committee in lieu of Ms. De Leon, whose term on the board was to expire in August 2004. Further, in the event of a vacancy in the executive committee, the remaining two members were authorized to exercise the powers of that committee. These resolutions were unanimously adopted by Ms. De Leon, Mr. Laney, Mr. Hall, and the Secretary's representative. (A copy is also attached).

In August 2004, the President appointed Mr. Enrique Sosa to Amtrak's board, again without Senate confirmation while the Senate was in recess. Since the appointment of Mr. Sosa, the Amtrak Board has functioned with a quorum of four.

**RESOLUTIONS AMENDING SECTION 5.01 OF THE BYLAWS
AND DESIGNATING AN EXECUTIVE COMMITTEE OF
THE BOARD OF DIRECTORS**

WHEREAS, Section 5.01 of Amtrak's Bylaws currently permits the Board to designate an Executive Committee comprised of three or more members, one of which must be the Secretary of Transportation or his designee, and the Executive Committee may, consistent with applicable law, exercise all of the authority of the Board of Directors in the management of the business and affairs of the Corporation in between meetings of the Board of Directors; and

WHEREAS, District of Columbia law permits a Board of Directors to designate an Executive Committee of as few as two members to "exercise all the authority of the Board of Directors in the management of the business and affairs of the Corporation"; and

WHEREAS, The Board has determined that it is in the best interests of the Company to designate an Executive Committee of the Board of Directors to have and exercise the authority of the Board; therefore, be it

RESOLVED, That the first sentence of Section 5.01 of Amtrak's Bylaws is amended to conform to District of Columbia law by permitting designation of two Directors to serve on an Executive Committee and by eliminating the language regarding the Executive Committee exercise of authority "in between meetings of the Board of Directors." The new first sentence of Section 5.01 shall read as follows: "The Board of Directors, by resolution adopted by a majority of the Directors with voting powers then in office, may designate two or more Directors to constitute an Executive Committee, to have and exercise, consistent with applicable law, all of the authority of the Board of Directors in the management of the business and affairs of the Corporation"; and

FURTHER RESOLVED, That an Executive Committee of the Board shall be established with the following members: David Laney, Chairman; Sylvia de Leon, Vice Chairman; and the Secretary of Transportation or his designee. In the event that one of these three members is unable to serve, the remaining two members shall constitute the Executive Committee and exercise all the powers thereof.

.....
National Railroad Passenger Corporation
Board of Directors
Adopted September 24, 2003

**RESOLUTIONS DESIGNATING AN EXECUTIVE COMMITTEE
OF THE BOARD OF DIRECTORS**

WHEREAS, Section 5.01 of Amtrak's Bylaws, in accordance with D.C. law, currently permits the Amtrak Board of Directors ("the Board") to designate an Executive Committee comprised of two or more members, one of which must be the Secretary of Transportation or his designee and this Executive Committee may, consistent with applicable law, exercise the full authority of the Board in the management of the business and affairs of the Corporation; and

WHEREAS, By Resolution adopted September 24, 2003, the Board established an Executive Committee comprised of the following members: David Laney, Chairman, Sylvia de Leon, Vice Chairman, and the Secretary of Transportation or his designee; and

WHEREAS, The term of Sylvia de Leon as a Member of the Board is scheduled to expire on August 8, 2004; and

WHEREAS, The Board has determined that it is in the best interests of the Corporation to reconstitute the membership of such Executive Committee of the Board to have and exercise the authority of the Board; therefore, be it

RESOLVED, An Executive Committee of the Board is reestablished with the following members: David Laney, Chairman, Floyd Hall and the Secretary of Transportation or his designee; and be it

FURTHER RESOLVED, That in the event that one of these three members resigns or otherwise leaves or vacates his or her position as a Member of the Board, the remaining two members shall constitute the Executive Committee and exercise all the powers thereof; and be it

FURTHER RESOLVED, That in the event that any member of the Executive Committee designated by these Resolutions resigns or otherwise leaves or vacates his or her position as a Member of the Board, and a new member is appointed to the Board, that individual shall assume the vacated position on the Executive Committee and the Committee shall remain in effect.

National Railroad Passenger Corporation
Board of Directors
Adopted July 22, 2004



Office of the Assistant Attorney General

Washington, D.C. 20530

September 22, 2003

**MEMORANDUM FOR ALBERTO R. GONZALES
COUNSEL TO THE PRESIDENT**

Re: Amtrak Board of Directors

You have asked for our opinion whether a member of Amtrak's Reform Board whose statutory term has expired may hold over in office until a successor is appointed. We believe that he may not. You have also asked whether the President may remove a member without cause. We believe that the President has that power.

I.

Under the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570 (1997) ("Amtrak Act" or "Act"), Amtrak is a rail carrier "operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a)(1), (2) (2000). It is under the direction of a "Reform Board," which "consist[s] of 7 voting members appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years." *Id.* § 24302(a). Under the Act, it "is not a department, agency, or instrumentality of the United States Government," *id.* § 24301(a)(3), and "to the extent consistent with [the Act], the District of Columbia Business Corporation Act (D.C. Code sec. 29-301 et seq.) appl[ies]," *id.* § 24301(e).

The Act does not provide that a member of the Reform Board may hold over after his five-year term expires. We believe, therefore, that when a member's term expires, he may no longer sit on the Reform Board:

By the common law, as well as by the statutes of the United States, and the laws of most states, when the term of office to which one is elected or appointed expires, his power to perform its duties ceases. This is the general rule.

The term of office of a district attorney of the United States is fixed by statute at four years. When this four years comes round, his right or power to perform the duties of the office is at an end, as completely as if he had never held the office.

Badger v. United States, 93 U.S. 599, 601 (1876) (citation omitted). As the Supreme Court similarly stated in *United States v. Eckford's Executors*, 42 U.S. (1 How.) 250, 258 (1843), "[a]t the end of [the statutory] term, the office becomes vacant, and must be filled by a new appointment."

The executive branch recognizes the same rule. The opinions of our Office have followed it. See Memorandum for John P. Schmitz, Deputy Counsel to the President, from John C. Harrison, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Expiration of the Term of the Chairman of the Federal Reserve System* at 1 (July 5, 1991) (Because “[t]here is no statutory provision allowing the Chairman to hold over upon the expiration of his term,” “that office will become vacant when Mr. Greenspan’s term as Chairman expires”); *Federal Reserve Board – Vacancy With the Office of the Chairman – Status of the Vice Chairman* (12 U.S.C. § 242, 244), 2 Op. O.L.C. 394, 395 (1978) (“Because the incumbent is not entitled to continue to exercise his powers absent reappointment, a vacancy in the position results.”). And a long line of prior opinions by the Attorneys General reached the same conclusion. See *Reappointment of the District of Columbia Rent Commissioners*, 33 Op. Att’y Gen. 43, 44 (1921) (“The general rule is that where Congress has not authorized an officer to hold over, his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then have been made.”); *Interstate Commerce Commission – Term of Office*, 25 Op. Att’y Gen. 332, 332-33 (1905); *Chiefs of Bureaus in the Navy Department*, 17 Op. Att’y Gen. 648, 649 (1884); *Liability on Sureties on Official Bond*, 15 Op. Att’y Gen. 214, 214-15 (1877); *Resignation of Office*, 14 Op. Att’y Gen. 259, 261-62 (1873); *Secretary of New Mexico*, 12 Op. Att’y Gen. 130 (1867); *Tenure of Navy Agents*, 11 Op. Att’y Gen. 286, 286-87 (1865) (overruling *Naval Officers Hold Over till Successors Are Qualified*, 2 Op. Att’y Gen. 713 (1835)).

We are aware of only one argument for the position that, in the circumstances here, this rule should not apply. The District of Columbia Business Corporation Act (“D.C. Business Corporation Act”) provides that “[e]ach director [of a for-profit corporation] shall hold office for the term for which elected or until a successor shall have been elected and qualified.” D.C. Code Ann. § 29-101.33 (2001). The Act establishing Amtrak makes the D.C. Business Corporation Act applicable “to the extent consistent with” the Amtrak Act, 49 U.S.C. § 24301(e), and, according to the argument, it would be consistent with the Amtrak Act for the members of the Reform Board, having served their statutory terms, to hold over under the provision of District of Columbia law.¹

We believe that this argument would be mistaken. In order to determine whether, and to what extent, a provision of the D.C. Business Corporation Act is “consistent with” the Amtrak

¹ The Amtrak statute actually refers to “D.C. Code § 29-301 et seq.,” and although that citation at one time would have referred to provisions about for-profit corporations, the citation now refers to the provisions governing non-profit corporations. See D.C. Code § 29-301, note (2001) (referring to 1981 edition). The provision of District of Columbia law governing for-profit corporations, by its terms, does not fit the situation of Amtrak’s Board of Directors. That provision states that a director may continue to serve “until a successor shall have been elected and qualified.” D.C. Code § 29.101.33 (2001). Amtrak’s Board of Directors, however, is appointed, not elected. The provision on non-profit corporations, by contrast, uses the language “until his successor shall have been elected or appointed.” D.C. Code § 29.301.19(c). We find it unnecessary to attempt to resolve which part of the District of Columbia law of corporations – the part governing for-profit corporations or the part governing non-profits – applies to Amtrak “to the extent consistent with” the Amtrak Act, because, as we explain below, the holdover rights under each are not consistent with the Amtrak Act.

Act, we must first determine what the Amtrak Act, standing alone, means and must then ascertain whether the provision of the D.C. Business Corporation Act supplements – or instead conflicts with – that meaning. In view of the well-established principle that an appointee may not continue past his term unless the statute provides for him to hold over, we believe that the Amtrak Act’s specification of a simple five-year term affirmatively excludes the existence of holdover rights. Congress passed the Act against the background of the longstanding interpretation on holdover rights, and “we may presume ‘that our elected representatives, like other citizens, know the law.’” *Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 319 (1983) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)). See also *Edelman v. Lynchburg College*, 535 U.S. 106, 117 (2002) (“Congress being presumed to have known of this settled judicial treatment”). Furthermore, the federal statute at one time expressly allowed a director to hold over after his term had ended, until a new director was selected, see 49 U.S.C. § 24302(a)(2)-(4) (1994), but Congress later deleted this provision, compare Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 906 (1994), with Pub. L. No. 105-134, § 411(a), 111 Stat. 2570, 2588 (1997). The holdover rights under the D.C. Business Corporation Act therefore do not fill in a term that the Amtrak Act leaves open, but instead conflict with that statute’s rejection of holdover rights.

In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 385 (1995), where the Supreme Court held that Amtrak is part of the federal government for purposes of the First Amendment but ordinarily is treated, for statutory purposes, as a corporation under the laws of the District of Columbia, the Court noted that the statutory provisions governing Amtrak are nevertheless contrary to District of Columbia law “with respect to many matters of structure and power, including the manner of selecting the company’s board of directors.” The Court listed, as an instance where the federal statute conflicts with District of Columbia law, the provision that, at the time, set a four-year term for a director. *Id.* So, too, the provision of the Act that now sets a simple five-year term is inconsistent with, and therefore is not supplemented by, District of Columbia law.

II.

We believe that the President, even without cause, may remove a member of Amtrak’s Reform Board. As a general matter, the power of appointment “carrie[s] with it the power of removal.” *Myers v. United States*, 272 U.S. 52, 119 (1926). This “rule of constitutional and statutory construction” recognizes that “those in charge of and responsible for administering functions of government who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint.” *Id.* See also *Sampson v. Murray*, 415 U.S. 61, 70 n.17 (1974); *Keim v. United States*, 177 U.S. 290, 293-94 (1900); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). The power of removal aids the President in carrying out his constitutional duty to exercise “the executive Power” and “take Care that the Laws be faithfully executed.” U.S. Const. art. II, §§ 1, 3. See *Morrison v. Olson*, 487 U.S. 654, 689-90 (1988).

This structural principle, we believe, applies to Amtrak. Although for statutory purposes Amtrak “is not a department, agency, or instrumentality of the United States Government,” 49 U.S.C. § 24301(a)(3), the Supreme Court in *Lebron* held, in the context of claims that Amtrak had violated the First Amendment, that it is “an agency of the Government, for purposes of the constitutional obligations of the Government . . . when the [Government] has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees.” 513 U.S. at 399. Applying *Lebron*, our Office has concluded that “[w]e can conceive of no principled basis for distinguishing between the status of a federal entity vis-a-vis constitutional obligations relating to individual rights and vis-a-vis the structural obligations that the Constitution imposes on federal entities.” *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 148 n.70 (1996) (citation omitted) (“*Constitutional Separation of Powers*”). A fundamental element of executive-branch structure is that presidential appointees are subject to removal by the President.

Congress provided no express restriction against removal, without cause, of members of the Reform Board. Because the removal power is a principal means by which the President carries out the executive power and takes care that the laws be faithfully executed, we do not believe that any restriction on the President’s removal authority should be inferred. See *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (“When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear.”).

To be sure, in *Wiener v. United States*, 357 U.S. 349 (1958), the Supreme Court did infer a tenure protection from statutory silence. There, the Court held that the President could not remove, without cause, a member of the War Claims Commission, “an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination ‘not subject to review by any other official of the United States or by any court by mandamus or otherwise.’” *Id.* at 354-55 (citation omitted). The Court reasoned that the “intrinsic judicial character of the task with which the Commission was charged” could not be squared with tenure at the pleasure of the President.² *Id.* The Amtrak Reform Board runs a business; it is not an adjudicatory body. Consequently, there is no ground for inferring any tenure protection for the Reform Board’s members under the reasoning of *Wiener*.

In *Constitutional Separation of Powers*, we analyzed the cases about removal restrictions and concluded that “[i]n situations in which Congress does not enact express removal limitations, . . . the executive branch should resist any further application of the *Wiener* rationale, under which a court may infer the existence of a for-cause limit on presidential removal, except with respect to officers whose only functions are adjudicatory.” 20 Op. O.L.C. at 170 (footnote

² Although the Court’s later decision in *Morrison v. Olson*, 487 U.S. 654 (1988), stated that an officer’s function is only one consideration in deciding whether an express statutory protection of tenure is constitutional, *id.* at 691, the Court in *Morrison* did not address the role of an officer’s function when tenure protection might be inferred from statutory silence.

omitted). However, even if we were to concede that removal restrictions sometimes may be inferred for officers whose duties are not wholly adjudicatory, such as the members of the “independent” regulatory commissions, the Reform Board lacks some critical characteristics of the multi-member boards whose members the lower courts have assumed to be tenure-protected despite the absence of any express statutory limit on removal. The members of the Reform Board do not serve staggered terms; they are not subject to political balance requirements, although the President is to consult with both the majority and minority leaders in making his selections; and they do not engage in regulation through agency adjudication and rulemaking.³ Cf. *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (the Federal Election Commission was “likely correct” that “the President can remove the commissioners only for good cause, which limitation is implied by the Commission’s structure and mission as well as the commissioners’ terms”); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (“[F]or purposes of this case, we accept appellants’ assertion in their brief, that it is commonly understood that the President may remove a commissioner [of the Securities and Exchange Commission] only for ‘inefficiency, neglect of duty, or malfeasance in office.’”). Even if the independent regulatory commissions are taken as a model, no tenure protection could be found here.

Nevertheless, in *Lebron*, the Supreme Court suggested that the President might not be able to remove Amtrak’s directors at all:

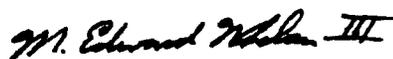
[Amtrak] is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees. It is in that respect no different from the so-called independent regulatory agencies such as the Federal Communications Commission and the Securities and Exchange Commission, which are run by Presidential appointees with fixed terms. It is true that the directors of Amtrak, unlike commissioners of the independent regulatory agencies, are not, by the explicit terms of the statute, removable by the President for cause, and are not impeachable by Congress. But any reduction in the immediate accountability for Amtrak directors vis-a-vis regulatory commissioners seems to us of minor consequence for present purposes – especially since, by the very terms of the chartering Act, Congress’s “right to repeal, alter, or amend this chapter at any time is expressly reserved.”

513 U.S. at 398 (citation omitted). The Court’s discussion of the President’s control over Amtrak’s directors, we believe, was dictum. It was not essential to the conclusion in *Lebron* because the Court found that the government exercises control over Amtrak *even if* the President

³ Furthermore, the President is authorized to appoint to the Reform Board the Secretary of Transportation, 49 U.S.C. § 24302(a)(2)(ii), an official who plainly may be removed by the President without cause, and we understand that, in the practical application of this provision, the Secretary is taken to serve on the Reform Board only as long as he holds the office of Secretary.

has less authority than over the independent regulatory agencies. Further, the passage starts from incorrect premises and arrives at an incorrect conclusion. The commissioners of the Federal Communications Commission and the Securities and Exchange Commission are not "by the explicit terms of the statute[s], removable by the President for cause." In each case the statute is silent on removal. See 15 U.S.C. § 78d(a) (2000); 47 U.S.C. §154(a), (c) (2000). Thus, in each case, the President's power follows from the general principles that we have set out above and not from an explicit statutory grant of power. The power of *Congress* to revoke Amtrak's charter, moreover, while relevant to whether Amtrak is part of the government for constitutional purposes, does not enable the *President* to carry out his constitutional responsibilities. To discharge those responsibilities, the President needs the power of removal, and he has that power even in the absence of a statutory provision that confers it upon him.

Please let us know if we may be of further assistance.



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