Congressional Research Service

MEMORANDUM June 21, 2011

To: House Committee on Transportation & Infrastructure, Subcommittee on Railroads, Pipelines, & Hazardous Materials

From: Vivian S. Chu, Legislative Attorney,

Subject: **Discussion Draft Bill- Northeast Corridor Executive Committee**

Pursuant to our discussion, this memorandum addresses whether there are constitutional concerns regarding the appointment structure of members to the Northeast Corridor Executive Committee (NE Corridor Committee), which would be established by the Competition for Intercity Passenger Rail in America Act of 2011 (Draft Bill).[1] Based on a review of the proposed NE Corridor Committee, the relevant constitutional provisions, and general separation of powers case law, it appears that, as currently proposed, the structure of the NE Corridor Committee would not be found in compliance with the principles of separation of powers enshrined by the Appointments Clause.

Proposed NE Corridor Committee

Section 104 of the Draft Bill would require the Secretary of Transportation to establish a NE Corridor Committee, which would consist of 5 members: (1) the Secretary of Transportation; (2) one member designated by a majority vote of the Governors representing the Northeast Corridor states and the Mayor of the District of Columbia; (3) one member appointed by the Speaker of the House of Representatives; (4) one member appointed by the majority leader of the Senate; and (5) one member selected by a majority of the voting members of the Northeast Corridor Infrastructure and Operating Advisory Commission.

The NE Corridor Committee would be given the authority to: (1) acquire, maintain, and dispose of any interest in property used to improve high-speed rail transportation; (2) acquire, by condemnation or otherwise, any interest in real property that the NE Committee considers necessary to carry out its specified goals; (3) provide for rail freight, intercity passenger rail, and commuter passenger rail transportation over property acquired under this section; (4) improve rail rights of way along the northeast corridor; (5) acquire, build, improve, and install passenger stations, communications and electric power facilities and equipment, and other facilities; and (6) make agreement with other carriers and commuter

[1] This memorandum relies upon a draft version of the bill as provided by the requestor. *See* http://republicans.transportation.house.gov/Media/file/112th/Railroads/Rail_Competition_Bill_Discussion_Draft.pdf.

authorities to grant, acquire, or make arrangements for rail freight or commuter rail passenger transportation over, rights of way and facilities on the Northeast Corridor.

Appointments Clause of the U.S. Constitution

The Appointments Clause establishes that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[2]

While the Supreme Court has stated that "[t]he principle of separation of powers is embedded in the Appointments Clause,"[3] and that the Clause is "among the significant structural safeguards of the constitutional scheme,"[4] Congress has been given wide latitude to use its legislative power to structure the modern administrative state by creating and locating offices, determining qualifications for officeholders, prescribing their appointment, and establishing general standards for the operation of the offices under the Necessary and Proper Clause.[5] The judiciary generally will interfere with this legislative power only in cases where such an exercise clearly constitutes an attempt by Congress at aggrandizement or encroachment.[6] Accordingly, this means that Congress must ensure that it adheres to the strictures of the Appointments Clause when prescribing the appointment for certain offices.

Thus, within the context of the Appointments Clause, a key question is whether the officeholders in question qualify as officers of the United States. In the event that that the officeholders qualify as such, Congress must comply with the express terms of the Appointments Clause by making the appointment subject to Senate confirmation if it is a principal officer, or by vesting the appointment with the President, in the courts, or in heads of departments if it is an inferior officer.[7] Otherwise, Congress may deviate from the strictures of the Clause.

---

[2] U.S. Const., art. II, § 2, cl. 2.

[3] *Freytag v. Comm'r of the Internal Revenue Service*, 501 U.S. 868, 882 (1991).

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

[5] U.S. Const., art. I, § 8, cl. 18. *See Myers v. United States*, 272 U.S. 52, 129 (1926) ("To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed ... all except as otherwise provided by the Constitution."); *Buckley v. Valeo*, 424 U.S. 1, 134-35 (1976); *Morrison v. Olson*, 487 U.S. 654, 685-93 (1988); *Mistretta v. United States*, 488 U.S. 361 (1989).

[6] *See e.g.*, *Buckley*, 424 U.S. 1 (Congress may not appoint executive officials performing substantial functions under the law); *Bowsher v. Synar*, 478 U.S. 714, 732 (1986) (Congress may not retain removal power over an officer performing executive functions); *INS v. Chadha*, 462 U.S. 919 (1983) (Congress may not exercise legislative power without conforming to the constitutionally prescribed lawmaking procedures); *Metropolitan Washington Airports Authority v. CAAN*, 501 U.S. 252 (1991) (Board of Review composed of Members of Congress could not exercise veto power over operational decisions of Airports Authority); *Hechinger v. Metropolitan Washington Airports Authority Board of Review*, 36 F.3d 97 (D.C. Cir 1994), *cert denied*, 513 U.S. 1126 (1995) (Board of Review which could only recommend and delay, but not veto, the operational decisions of the Airports Authority held to be unconstitutional direct exercise of congressional influence); *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir 1993), *cert. denied for want of jurisdiction*, 513 U.S. 88 (1994) (congressional appointment of two of its agents as non-voting members of the commission who could attend all business meetings of the agency held unconstitutional).

[7] If it so desires, Congress can make the appointment of inferior officers also subject Senate confirmation.

To a certain extent, the standard for such determinations was delineated by the Supreme Court in *Buckley v. Valeo*. There, the Supreme Court analyzed provisions of the Federal Election Campaign Act of 1971 (Act), which established an eight member Federal Election Commission (FEC or Commission) to oversee federal elections. Specifically at issue was the congressionally mandated composition of the Commission, which was to consist of two *ex-officio* members and six voting members. According to the Act, each of the six voting members were required to be confirmed by the majority of both Houses of Congress, with two members being appointed by the President *pro tempore* of the Senate, two members by the Speaker of the House of Representatives, and two by the President.[8] The Court described the powers and duties of the Commission as falling into three general categories: (1) functions relating to the flow of information—receipt, dissemination, and investigation; (2) functions with respect to the promoting the goals of the Act—rulemaking and advisory opinions; and (3) functions necessary to ensure compliance with the statute—informal procedures, administrative determinations and hearings, and civil suits.[9] Given the nature of the duties assigned by law to the Commission, the Court concluded that the Commission was exercising executive power as it found that the Commission's enforcement power "is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress."[10] Through its analysis of the Commission's powers, the Court established that the Appointments Clause applies to agencies that have even a tangential connection to the Executive Branch.[11] Thus, the Court held that the method of appointment prescribed in the Act violated the Appointments Clause because certain powers of the Commission could only be discharged by "Officers of the United States," who must be appointed in conformity with the Appointments Clause.

In reaching this conclusion, the Court held the term "Officers of the United States," to mean "any appointee exercising *significant authority* pursuant to the laws of the United States"(emphasis added).[12] Such officers, whether principal or inferior, must be appointed in conformity with the Appointments Clause. The Court in *Buckley* did not engage in a substantive analysis of the meaning of "significant authority" to distinguish principal officers from inferior officers in order to determine what mode of appointment would be appropriate for FEC Commissioners. Instead, the Court compared the office of FEC Commissioner with lower level positions that had been identified as "inferior officers" in earlier cases. It determined that the FEC Commissioners, at a minimum, were inferior officers whose appointment would be subject to Senate confirmation or vested in either the President, the courts of law, or heads of department as prescribed by the Appointments Clause.[13]

Justice White, in his concurring opinion, explored further the idea of what constitutes "significant authority" by expounding upon the duties and powers of the Commission, stating that it "is evident from the breadth of their assigned duties and the nature and importance of their assigned functions ... [that] members of the FEC are plainly 'Officers of the United States' as that term is used in Art. II, § 2, cl. 2."[14] The Court later declared in *Edmond v. United States* that the exercise of "significant authority pursuant to the laws of the United States marks, not the line between principal and inferior officer for Appointments

[8] *Buckley*, 424 U.S. at 113.

[9] *Id.* at 137.

[10] *Id.* at 138.

[11] *Id.* at 127. (*See also* Justice White's concurrence where he noted that the Court had previously recognized that so-called independent agencies intended to be independent of executive authority are not independent of the Executive with respect to their appointments. *Id.* at 277 (J. White concurring)).

[12] *Id.* at 126.

[13] *Id.* Subsequent to the decision in *Buckley*, Congress in 1976 amended the appointments of the six voting members so that they are appointed by the President, with the advice and consent of the Senate. P.L. 94-283; 90 Stat. 475 (1976).

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

Clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer."[15] Additionally, a Department of Justice Office of Legal Counsel opinion concluded that any position having two essential characteristics of a federal "office" is subject to the Appointments Clause. In its view, "any position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is 'continuing'."[16]

Currently, the responsibilities of overseeing the Northeast Corridor Improvement Program lie with the National Railroad Passenger Corporation (Amtrak).[17] Although Amtrak is "not a department, agency, or instrumentality of the United States, and [not] subject to title 31,"[18] the Supreme Court in *Lebron v. National Passenger Railroad Corp.* held that the "corporation is part of the Government for purposes of the First Amendment."[19] It has been argued that, although this decision decided Amtrak's constitutional status under a First Amendment claim, it cannot be confined solely to this context. Specifically, the Department of Justice Office of Legal Counsel has stated, "we 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."[20] A corresponding argument could be made that the appointments to the NE Corridor Committee must follow the strictures of the Appointments Clause, as they would be assuming the Northeast Corridor responsibilities from Amtrak.[21]

Furthermore, applying the separation of powers principles to the case at hand, it seems likely that the members of the NE Corridor Committee would be considered officers of the United States. As illustrated above, the Committee would be vested with the legal authority to, among other things, acquire, by condemnation or otherwise, any interest in real property; improve rail rights of way along the northeast corridor; and acquire, build, improve, and install passenger stations, communications and electric power facilities and equipment, and other facilities. The Committee also appears to be the final decision-maker in overseeing and implementing the Northeast Corridor project. This factor, coupled with the considerable legal authority the Committee would be able to exercise in carrying out its duties, would be a strong indication to a reviewing court that the Committee members are exercising significant authority pursuant to the laws of the United States, arguably rendering the proposed appointments scheme unconstitutional. If Congress desires the Committee to exercise such authorities, then it may accordingly require the members to be principal officers, appointed by the President with the advice and consent of the Senate.

---

[15] 520 U.S. at 651, 663 (1997) (citing *Buckley*, 424 U.S. at 126) (internal quotations omitted).

[16] Officers of the United States Within the Meaning of the Appointments Clause, 2007 WL 1405459 (OLC) (2007). An earlier OLC opinion also discussed the officer/non-officer distinction, stating that only "[a]n appointee (1) to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States is required to be an 'Officer of the United States.'" Each of these three conditions is independent, and all three must be met in order for the position to be subject to the requirements of the Appointments Clause. *See* The Constitutional Separation of Powers Between the President and Congress, 20 Op. Att'y Gen. 124 (1996).

[17] 49 U.S.C. § 24901-24910.

[18] 49 U.S.C. § 24301(a)(3).

[19] 513 U.S. 374, 400 (1995) ("[W]here, as [in the case of Amtrak], the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.").

[20] The Constitutional Separation of Powers Between the President and Congress, 20 Op. Att'y Gen. 124, 148 n.70 (1996) (citation omitted); Status of National Veterans Business Development Corporation, 2004 WL 3554703 *2 (Op. Off. Leg. Counsel) (2004).

[21] Amtrak's Board of Directors are appointed by the President and confirmed by the Senate. 49 U.S.C. § 24302.

Alternatively, it may deem them as inferior officers, and Congress may vest such appointment, "as they think proper, in the President alone, in the Courts of Law, or in Heads of Departments."[22]

[22] U.S. Const., art II, § 2, cl. 2. If Congress makes the members of the Committee inferior officers, then the structure of the Committee would need to be adjusted accordingly to include some oversight by an agency head. Although the Supreme Court has observed that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear," *Morrison v. Olson*, 487 U.S. 654, 671 (1988) it stated in *Edmond v. United States*, "[g]enerally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President ... [and] 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." 520 U.S. 651, 661 (1997).