

DISSENTING VIEWS

Although many provisions of H.R. 4441, the “Aviation Innovation, Reauthorization, and Reform Act” (AIRR Act), are products of bipartisan negotiation and compromise, we strongly object to the bill’s controversial, flawed proposal to privatize the Nation’s air traffic control (ATC) system. The privatization plan will disrupt major Federal Aviation Administration (FAA) safety and modernization programs, hand over Federal property and other assets free of charge to a private corporation, allow for reduced access to small and rural communities, and likely drive up the cost of air travel.

It will also significantly delay enactment of H.R. 4441, leaving critical provisions, such as reforms to the FAA’s certification processes and new requirements for the safe, responsible integration of unmanned aircraft into the Nation’s airspace, in an indefinite holding pattern as proponents pursue an ideological effort to privatize air traffic control.

Title II of the bill, as reported by the Committee:

- **Splits the FAA in two**, separating up to 33,000 hardworking employees from Federal service and placing them in the employ of a private corporation called the ATC Corporation.
- **Disrupts all FAA programs and fails to solve the most significant problems facing the aviation system.** By splitting the FAA in two, the bill jeopardizes safety oversight and leaves critical FAA safety programs, including programs to certify new aircraft and equipment, and more than 7,400 FAA inspectors and other safety-critical employees subject to the vagaries of the annual Congressional appropriations and budget processes. These safety programs would be reliant exclusively on the General Fund of the Treasury for funding.
- **Conveys free of charge, to a private corporation, billions of dollars’ worth of property and other assets that American taxpayers have bought and paid for.** Over the past 20 years alone, taxpayers have invested approximately \$50 billion in these assets. In an unprecedented step, the bill hands over these taxpayer-purchased air traffic control facilities and equipment to a private company for free. The only two other governments in the world that have privatized their air traffic control systems – Canada and the United Kingdom – were paid \$1.5 billion and \$1.3 billion, respectively, when they transferred public assets to a private corporation. Other governments, even those that have separated their air traffic control systems from safety regulators, maintain ownership of air traffic control assets.
- **Places air traffic control under the effective control of industry, reducing access to the aviation system.** Four of the corporation’s 13 directors are appointed unilaterally by an airline trade association, creating the strong possibility that the corporation’s strategic decisions could be designed to benefit the industry to the potential disadvantage of other users. On February 10, 2016, the Government Accountability Office (GAO) reported that aviation experts are concerned that “small and rural communities could be negatively affected by a restructured [air traffic control system]” and that “it is possible that general and

business aviation might see their contribution to the cost of ATC services rise and that this increase could reduce the use of the airspace by these users.”¹

- **Gives the private ATC Corporation the power to tax the flying public** to pay for the ATC system. America’s air traffic control system is a natural monopoly. This legislation would give a private corporation control of that monopoly and provide it with unprecedented power to unilaterally decide the cost of access to our public system without the ability for Congress to intervene. A longtime proponent of privatization and expert witness, Robert Poole, acknowledged during testimony in the Committee’s February 10, 2016, hearing that “[c]ustomers would have to pay more” if the corporation became insolvent.

A Controversial Plan

The Committee held a single three-hour hearing, with only four witnesses testifying, regarding the bill’s ATC privatization plan. Astonishingly, the Committee marked up the bill a mere 24 hours later.

Steadfast opposition to H.R. 4441’s privatization plan includes the bipartisan leadership of the House and Senate Appropriations Committees,² as well as a growing list of aviation stakeholders, including Delta Air Lines, the world’s second-largest carrier; the Air Line Pilots Association; the National Business Aviation Association; regional airlines, which operate more than 60 percent of flights each day; the Professional Aviation Safety Specialists union, which represents FAA safety inspectors and technicians; numerous other Federal labor and construction unions; the National Air Transportation Association; the Experimental Aircraft Association; the National Consumers League; and a coalition of Americans Against Air Traffic Privatization, among others.

Although some countries have separated air traffic control systems from aviation safety regulators, only two – Canada and the United Kingdom – have privatized their systems. But neither government handed over air traffic control assets free of charge, as H.R. 4441 specifically requires, and neither the Canadian nor the British aviation system is remotely comparable to that of the United States in geographic size, complexity, number of facilities, number of general aviation aircraft, or number of airports.³ The Department of Transportation Inspector General concluded in a 2015 report that “[t]here are significant differences between FAA and the foreign [air traffic control providers].”⁴

We agree with numerous aviation stakeholders who base a strong case for reform on Congress’s inability to provide stable, predictable funding for aviation programs and the FAA’s acknowledged missteps in implementing the Next Generation Air Transportation System

¹ U.S. Gov’t Accountability Office, *Potential Air Traffic Control Transition Issues* 8, Rpt. No. GAO-16-386R (2016).

² The bipartisan leadership of the House and Senate Appropriations Committees registered their opposition to the privatization plan in separate letters to House leadership and Senate Commerce Committee leadership, respectively, on February 1, 2016, and January 27, 2016.

³ Dep’t of Transp. Office of the Inspector General, *There Are Significant Differences Between FAA and Foreign Countries’ Processes for Operating Air Navigation Systems* 3, Rpt. No. AV-2015-084 (2014).

⁴ *Id.*

(NextGen). And we agree that the FAA needs secure, continuous funding to embark on major capital investment programs, to operate the air traffic control system, and to vigorously oversee the safety of the flying public without the threat of disruption due to sequestration and government shutdowns.

But we disagree that only the air traffic control system should be protected from these harms. The entire agency, especially aviation safety functions, should be insulated from political dysfunction to keep the flying public safe and prevent harm to our country's economy. The GAO reported last year that budget uncertainty compromised the FAA's ability to make long-term capital investment decisions and rely on the assurance of stable funding.⁵

A Solution in Search of Problems

To the extent H.R. 4441 seeks to deliver predictability and stability for the air traffic control system, it fails its essential purpose. Because delegation of a regulatory function such as air traffic control to a private entity is unconstitutional under the non-delegation doctrine,⁶ the Republican bill requires the Secretary of Transportation to approve or disapprove numerous important decisions of the ATC Corporation. Because Congress annually appropriates funds for the Office of the Secretary, the bill's complex process for Secretarial approval guarantees continued Congressional involvement in airspace modernization programs. And because the ATC Corporation is authorized to bring an action in U.S. District Court challenging the Secretary's decisions,⁷ major projects could face years of delay in litigation.

The bill is also likely to drive up the cost of air travel. Richard Anderson, CEO of Delta Air Lines, posited in a recent letter to Committee Chairman Shuster and Ranking Member DeFazio that "[p]rivatization may increase consumer costs" and asked, "[W]ho will look out for the public interest after privatization?"⁸ Moreover, the ATC Corporation would be too big – and too critical – to fail. The U.K. government was forced to bail out the privatized British air traffic services provider in 2002, and Canada's provider was forced to take special measures to continue operating during the post-2001 crisis.⁹

⁵ Gov't Accountability Office, *Aviation Finance: Observations on the Effects of Budget Uncertainty on FAA*, Rpt. No. GAO-16-198R (2015).

⁶ See, e.g., *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) ("Federal lawmakers cannot delegate regulatory authority to a private entity."), *vacated, on other grounds, Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. ___ (2015); see also Cong. Rsch. Serv., *Memorandum to the Hon. Peter A. DeFazio on Analysis of Constitutional Issues Arising from a Proposal to Authorize a Federally Chartered Private Corporation to Provide Air Traffic Control Services* (April 10, 2015).

⁷ *Id.*

⁸ Ltr. from Richard Anderson to The Hon. Bill Shuster and The Hon. Peter A. DeFazio, Feb. 2, 2016 (on file).

⁹ Gov't Accountability Office, *Characteristics and Performance of Selected International Air Navigation Service Providers and Lessons Learned from Their Commercialization* 25, Rpt. No. GAO-05-769 (2005); See Nav Canada, "Details and Principles Regarding Proposed Revised Service Charges" (Oct. 15, 2001), *available at* <http://www.navcanada.ca/EN/media/Publications/Service%20Charge%20Announcements/SCA-2001-Details-EN.pdf>; Nav Canada, "Notice of Revised Service Charges" (Oct. 2, 2002), *available at* <http://www.navcanada.ca/EN/media/Publications/Service%20Charge%20Announcements/SCA-2002-Notice-Revised-EN.pdf>.

Targeted Solutions

Instead of privatization, we support targeted solutions: taking the Airport and Airway Trust Fund (which funds the FAA) off budget, to ensure that passenger ticket taxes and other fees are invested in our aviation system. We also support serious, top-to-bottom reform of the FAA's cumbersome personnel and procurement rules. A package of carefully thought-out financial and management reforms would solve all the problems H.R. 4441 purports to solve, while avoiding the tremendous harms that privatization would visit on our aviation system.

Aviation Safety

While we concur with most other provisions of H.R. 4441 not related to air traffic control privatization, we strongly oppose the bill's reaffirmation of the "tombstone rule" prohibiting the Department of Transportation from conducting any rulemaking regarding air transportation of lithium batteries if the rulemaking is more stringent than internationally-set minimum standards, unless an accident has occurred.¹⁰ We continue to urge that Congress repeal this ill-advised and dangerous prohibition.

Trucking Pre-emption

Finally, H.R. 4441 also includes a highly controversial provision regarding pre-emption of state worker protection laws as applicable to truck drivers. Language identical to Section 611 was rejected just three months ago by the House-Senate Conference Committee during consideration of the "Fixing America's Surface Transportation" Act (FAST Act) (P.L. 114-94).

Section 611 pre-empts existing state meal or rest break laws in 21 States and territories. Although proponents claim that this provision eliminates a patchwork of regulations for truck drivers operating in multiple States, this language also strips wage and hour protections from drivers who work exclusively within a single State. Section 611 is a veiled attempt at shielding trucking companies from liability for not complying with State wage and hours laws and represents a sweeping expansion of Federal pre-emption that Congress enacted in 1994. Finally, Section 611 allows trucking companies to disregard state laws that require hourly tracking of wages by allowing piece-rate pay or "pay by the load". It will exacerbate a problem in the trucking industry that continues to put the squeeze on drivers as they fight to deliver loads through increasing congestion on our roads.

Section 611 is opposed by owner-operator independent drivers – which represent more than 90 percent of the companies in the trucking industry. It is also opposed by the International Brotherhood of Teamsters, the American Association for Justice, the Transportation Trades Department of the AFL-CIO, Advocates for Highway and Auto Safety, the Truck Safety Coalition, and other safety groups.

We strongly oppose this provision.

¹⁰ *Federal Aviation Administration Modernization and Reform Act of 2012*, P.L. 112-95, § 828 (2012).

Conclusion

While we support many bipartisan provisions of the bill, we oppose the privatization of air traffic control as a risky science experiment that threatens to jeopardize safety, delay modernization programs, reduce access, and drive up the cost of air travel.

During Committee consideration, we joined every Democratic Member and two of our Republican colleagues in opposing this bill. We urge the Majority to reconsider and work with us to develop targeted, bipartisan solutions to reform the FAA's financial, personnel, and procurement systems. In this way, we can work together to put a bill on the President's desk before the peak summer travel season.

Peter A. DeFazio, *Ranking Member*
Committee on Transportation and Infrastructure

Rick Larsen, *Ranking Member*
Subcommittee on Aviation