

DISSENTING VIEWS

Although many provisions of H.R. 2997, the “21st Century Aviation Innovation, Reform, and Reauthorization Act” (21st Century AIRR Act), are products of bipartisan negotiation and compromise, we strongly object to the bill’s main focus: a controversial and flawed plan to privatize the Nation’s air traffic control system. This privatization plan will disrupt major Federal Aviation Administration (FAA) safety and modernization programs, hand over Federal assets free of charge to a private corporation, threaten access to small, rural, and mid-sized communities, and likely drive up the cost of air travel.

The air traffic control privatization plan (title II of the bill):

- **Splits the FAA in two**, separating up to 35,000 hardworking employees from Federal service and placing them in the employ of a private corporation called the American Air Navigation Services Corporation.
- **Disrupts all FAA programs and fails to solve the most significant problems facing the aviation system.** By splitting the FAA in two, the plan leaves critical FAA safety programs, including programs to certify new aircraft and equipment and to conduct robust safety oversight of the airline industry, subject to year-to-year funding uncertainty. These safety programs, primarily funded by the Airport and Airway Trust Fund under current law, are shifted to funding exclusively from the General Fund of the Treasury, together with all the budget uncertainty that it provides.
- **Conveys free of charge, to a private corporation, billions of dollars’ worth of assets that American taxpayers have bought and paid for.** Taxpayers have invested approximately \$50 billion in these assets since 1996. The plan hands over taxpayer-purchased air traffic control facilities and equipment to a private company. The only two other governments in the world that have privatized their air traffic control systems—Canada and the United Kingdom—received compensation when they transferred public assets. Other governments, even those that have separated their air traffic control systems from safety regulators, own air traffic control assets.
- **Places air traffic control under the effective control of airlines, placing access to the aviation system at risk.** Under the bill, three of the corporation’s 13 directors are appointed by airlines, with the possibility of four additional appointments of directors friendly to airline interests through two Secretarial appointments and two appointments decided by the members of the board. Thus, the airlines may control a majority of the board and the corporation’s strategic decisions could be designed to benefit airlines, an industry that is under serious criticism for anticompetitive practices. The Government Accountability Office (GAO) reported on February 10, 2016, on aviation experts’ concern that “small and rural communities could be negatively affected by a restructured [air traffic control system].”¹

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

A Controversial Plan

Steadfast opposition to H.R. 2997's privatization plan includes bipartisan Senate appropriators as well as a growing list of aviation stakeholders including the Aircraft Owners and Pilots Association; the National Business Aviation Association; the Regional Airline Association; the Professional Aviation Safety Specialists union, which represents FAA safety inspectors and technicians; numerous other FAA labor groups; the United Steel Workers union; the National Air Transportation Association; the Experimental Aircraft Association; the National Consumers League; hundreds of mayors, and even NASCAR, among others. More than 30 general aviation groups criticized the privatization scheme in H.R. 2997 as a "fundamentally flawed" plan that "will produce uncertainty and unintended consequences without achieving the desired outcomes."²

Although some countries have separated air traffic control systems from aviation safety regulators, only two—Canada and the United Kingdom (U.K.)—have privatized their systems. But neither government handed over air traffic control assets free of charge, as H.R. 2997 requires, and neither the Canadian nor the U.K. aviation system is remotely comparable to that of the United States in geographic size, complexity, number of facilities, number of general aviation aircraft, number of airports, or even approaches to air traffic control modernization. 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]."³

We agree with numerous aviation stakeholders who are concerned about Congress's inability to promise stable, predictable funding for aviation programs and the need for the swiftest possible implementation of the FAA's Next Generation Air Transportation System (NextGen), which the FAA has already begun delivering. 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, is just as deserving of insulation from political dysfunction, if not more so. The GAO reported in 2015 that budget uncertainty compromised the FAA's ability to make long-term capital investment decisions that rely on the assurance of stable funding.⁴

A Solution in Search of Problems

To the extent H.R. 2997 seeks to deliver predictability and stability for the air traffic control system, it fails to fulfill its essential purpose. For instance, because delegation of a regulatory function such as air traffic control to a private entity is unconstitutional under the non-delegation

² Aircraft Owners and Pilots Assoc., et al., "Statement of 30 General Aviation Groups United In Opposition to H.R. 2997" (2017).

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

doctrine,⁵ the Republican plan requires the Secretary of Transportation to approve or disapprove numerous important decisions of the American Air Navigation Services Corporation. For example, the Secretary must review regulations and standards proposed by the Corporation; must prescribe performance-based safety regulations and standards; and must specifically review proposals for airspace modifications and procedure changes in busy areas.⁶ The Secretary also reviews proposals to decommission air traffic control facilities.⁷ This labyrinthine process of Secretarial approval guarantees delays as the Secretary's decisions are challenged in Federal court, and major projects could face years of delay in litigation.⁸

The bill could also drive up the cost of air travel. Last year, Richard Anderson, then-CEO of Delta Air Lines, posited in a 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?”⁹ Moreover, the Corporation would be too big, and too critical to fail. A longtime proponent of privatization, 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. 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.¹⁰

Targeted Solutions

Instead of privatization, we support targeted solutions: removing the FAA from the budget process and the vicissitudes of annual appropriations, and making serious, top-to-bottom reforms of the FAA's cumbersome personnel and procurement rules. These carefully constructed financial and management reforms solve all of the problems that H.R. 2997 purports to solve, while avoiding the tremendous harms that privatization would impose on our aviation system. During Committee consideration of H.R. 2997, we offered an amendment to strike the air traffic control privatization title and insert H.R. 2800, the “Aviation Funding Stability Act”, which provides such targeted reforms as off-budget, long-term funding for FAA programs, streamlined and more flexible personnel and procurement regulations, and modernization of air traffic control facilities and equipment. Regrettably, the amendment failed on a party-line vote.

⁵ 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).

⁶ 21st Century AIRR Act, § 211 (codifying 49 U.S.C. § 90501).

⁷ *Id.* (codifying 49 U.S.C. § 90705).

⁸ *Id.*

⁹ Ltr. from Richard Anderson to The Hon. Bill Shuster and The Hon. Peter A. DeFazio, Feb. 2, 2016 (on file).

¹⁰ 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>.

Conclusion

While we support bipartisan provisions of the bill reforming the FAA's certification processes, advancing the safe, responsible integration of unmanned aircraft into the National Airspace System, updating rules on flight attendant minimum rest, and others, we object to privatization of air traffic control as a risky experiment that threatens to delay modernization programs, reduce access, and drive up the cost of air travel.

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