

## COMMENTS

### THE CONSTITUTIONAL PROBLEMS WITH THE ELECTION OF AMTRAK'S PRESIDENT

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#### INTRODUCTION

In 2015, the Supreme Court determined that Amtrak—the corporation created by federal statute and authorized to preserve passenger rail service—is a governmental entity for separation of powers purposes.<sup>1</sup> In his concurrence, Justice Alito wrote that while Amtrak should be considered a governmental entity, it did not necessarily follow that Amtrak's corporate structure was constitutionally sufficient.<sup>2</sup> He had a particular problem with the President of Amtrak and the way he was elected.<sup>3</sup>

At the time the opinion was written, Amtrak's board consisted of nine members.<sup>4</sup> Eight of these members, including the Secretary of Transportation, were appointed by the President of the United States and confirmed by the Senate.<sup>5</sup> Those eight members, in turn, elected the President of Amtrak as the ninth member of the board.<sup>6</sup> The President of Amtrak had voting power, just like the rest of the board, and was able to sway decisions one way or another.<sup>7</sup> Justice Alito took issue with this provision. If Amtrak is a federal entity and the President of Amtrak has sway over the board's decisions, Justice Alito reasoned, he should be considered a principal officer of the United States and should be appointed by the President of the

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<sup>1</sup> *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015).

<sup>2</sup> *Id.* at 1240 (Alito, J., concurring).

<sup>3</sup> *Id.* at 1239.

<sup>4</sup> See 49 U.S.C. § 24302(a)(1) (2008) (amended 2012); *Dep't of Transp.*, 135 S. Ct. at 1231.

<sup>5</sup> See 49 U.S.C. § 24302(a)(1); *Dep't of Transp.*, 135 S. Ct. at 1231.

<sup>6</sup> See 49 U.S.C. § 24302(a)(1)(B); 49 U.S.C. § 24303(a); *Dep't of Transp.*, 135 S. Ct. at 1231.

<sup>7</sup> See *Dep't of Transp.*, 135 S. Ct. at 1239 (Alito, J., concurring).

United States and confirmed by the Senate.<sup>8</sup>

Since the Court's decision, Congress passed the Fixing America's Surface Transportation ("FAST") Act in December 2015.<sup>9</sup> The FAST Act, *inter alia*, slightly modified Amtrak's board structure. Specifically, it made the President of Amtrak a nonvoting board member, and added another, Amtrak-specific board member to be appointed by the President and confirmed by the Senate. This brought the total number of board members to ten while retaining the same number of voting members.<sup>10</sup> The FAST Act was a massive piece of legislation that covered a wide range of issues, and there is no indication in the legislative history that Congress changed the board composition in response to Justice Alito's concerns. However, by taking the President's voting power out of play, Congress had removed a significant roadblock in determining whether the President of Amtrak is constitutionally elected.

This does not mean, however, that Amtrak's board structure is now constitutional. To answer this question, this Comment proceeds in three Parts. First, it confirms that Amtrak is in fact a regulatory body that is subjected to the Appointments Clause. Second, it determines that while the President of Amtrak wields enough authority to be considered an officer of the United States, he is subordinate to the rest of the board and should be considered an inferior officer of the United States. Third, this Comment ascertains that Amtrak is a "Department" whose "Head" may appoint inferior officers because it is independent from other government agencies.

Ultimately, I will make the argument that Congress's actions in the FAST Act fixed the constitutional problems with Amtrak's board, rendering Justice Alito's concerns moot.

## I. AMTRAK'S RELATIONSHIP TO THE FEDERAL GOVERNMENT

Amtrak is a unique corporation that was conceived as a private service with public support. The Supreme Court has twice heard cases relating to Amtrak's status as a governmental entity, holding that for both constitutional rights and separation of powers purposes, Amtrak should be considered part of the federal government. The Court of Appeals for the D.C. Circuit has further held that Amtrak possesses regulatory power. Thus, Amtrak is required to follow the constraints of the Appointments Clause.

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<sup>8</sup> *Id.*

<sup>9</sup> Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 11205, 129 Stat. 1312, 1637 (2015).

<sup>10</sup> *Id.*; 49 U.S.C. § 24302(a)(1)(C).

### A. Creation and Statutory Status of Amtrak

In 1970, President Richard Nixon signed into law the Rail Passenger Service Act of 1970 (“RPSA”), which created the National Railroad Passenger Corporation, popularly known as Amtrak.<sup>11</sup> Amtrak was formed in response to the decline in passenger ridership in order to preserve intercity passenger train service.<sup>12</sup> Although Amtrak was originally conceived as a for-profit corporation, Congress later amended the relevant statute to read that Amtrak should be “*managed* as a for-profit corporation.”<sup>13</sup> Importantly, Congress explicitly states that Amtrak is not a “department, agency, or instrumentality of the [United States] Government.”<sup>14</sup>

Congress’s disavowal of an agency relationship between the United States Government and Amtrak has significant implications. For example, Congress has the authority to remove regulatory agencies from the constraints of the Administrative Procedure Act (“APA”).<sup>15</sup> Regardless of Amtrak’s posture as a federal agency, there is no question that it would be exempt from the APA and its requirements.<sup>16</sup> Congress, through this pronouncement, has also deprived Amtrak of sovereign immunity typically afforded to the federal government<sup>17</sup> and of the power to pledge the credit of the United States on its debt obligations.<sup>18</sup>

However, Congress cannot override the Constitution. By simply labeling Amtrak a corporation and by disclaiming any agency relationship, Congress does not relieve Amtrak of its constitutional obligations if it is, in fact, an agent of the government.<sup>19</sup> In two cases, the Supreme Court held that

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<sup>11</sup> Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330.

<sup>12</sup> *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 383–84 (1995).

<sup>13</sup> 49 U.S.C. § 24301(a)(2) (emphasis added); *Lebron*, 513 U.S. at 384–85 (emphasis added).

<sup>14</sup> 49 U.S.C. § 24301(a)(3).

<sup>15</sup> 5 U.S.C. § 559 (2012); *see, e.g.*, *Marcello v. Bonds*, 349 U.S. 302, 308–09 (1955) (holding that because the Immigration and Nationality Act of 1952 included procedures distinct from those required by the APA, Congress acted to exempt the deportation process from the APA’s requirements).

<sup>16</sup> *See Lebron*, 513 U.S. at 392.

<sup>17</sup> *Id.*; *see, e.g.*, *Sentner v. Amtrak*, 540 F. Supp. 557, 557–58 (D.N.J. 1982) (demonstrating that Amtrak can be sued for damages).

<sup>18</sup> *Lebron*, 513 U.S. at 392.

<sup>19</sup> *See Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1231 (2015) (“Congressional pronouncements, though instructive as to matters within Congress’s authority to address are not dispositive of Amtrak’s status as a governmental entity for purposes of separation of powers analysis under the Constitution.” (internal citation omitted) (citing *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 491 (D.C. Cir. 2004) (Roberts, J.)); *Lebron*, 513 U.S. at 397 (“On that thesis, *Plessy v. Ferguson*, 163 U.S. 537 (1896) can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak.”).

Amtrak was a government actor based on this principle.<sup>20</sup>

*B. Amtrak's Status as a Governmental Entity*

In *Lebron v. National Railroad Passenger Corp.*, the Court determined that Amtrak is an “agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution.”<sup>21</sup> In that case, the petitioner wanted to display a political advertisement on the billboard leading into the entrance of Amtrak’s Pennsylvania Station in New York City.<sup>22</sup> Amtrak disapproved of the advertisement based on its political nature and refused to display it.<sup>23</sup> The petitioner proceeded to file suit, alleging that Amtrak, acting as a government actor, violated his First Amendment rights.<sup>24</sup>

The Court viewed two factors as pertinent when designating Amtrak as a government actor. First, Amtrak was created “explicitly for the furtherance of federal governmental goals.”<sup>25</sup> Second, the government controls the board of Amtrak through appointment by the President.<sup>26</sup> Amtrak was thus essentially the same as “so called independent regulatory agencies” because the government could control Amtrak to do its specific federal governmental goals.<sup>27</sup> The Court had spoken: Amtrak was the federal government for purposes of individual constitutional rights.

Twenty years later, the Court took a step further in deciding that Amtrak is a governmental entity for separation of powers purposes in *Department of Transportation v. Ass’n of American Railroads*.<sup>28</sup> The issue in that case concerned the Passenger Rail Investment and Improvement Act (“PRIIA”), which directed the Federal Railroad Administration (“FRA”) and Amtrak to jointly create “metrics and standards” of measuring “performance and service

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<sup>20</sup> See *Dep’t of Transp.*, 135 S. Ct. at 1232–33; *Lebron*, 513 U.S. at 397.

<sup>21</sup> *Lebron*, 513 U.S. at 394.

<sup>22</sup> *Id.* at 376.

<sup>23</sup> *Id.* at 377.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 397.

<sup>26</sup> *Id.* at 397–98. At the time the case was written, Congress had imposed more restrictions over whom the President could appoint than exist currently. However, the Court found these to be “restriction[s] imposed by one of the political branches upon the other” rather than “an absence of control by the Government.” *Id.*

<sup>27</sup> See *id.* at 398 (referring to the Federal Communications Commission and the Securities Exchange Commission as agencies which are “so-called independent” but under the “direction and control” of the federal government).

<sup>28</sup> 135 S. Ct. 1225, 1232–33 (2015).

quality of intercity passenger train operations.”<sup>29</sup> The metrics and standards were used, among other things, to determine whether delays to Amtrak’s scheduled ridership were caused in part by host railroads’ freight transportation.<sup>30</sup> If the Surface Transportation Board (“STB”) determined this to be the case, it could award Amtrak damages from those host rail carriers.<sup>31</sup> The Association of American Railroads (“AAR”), the freight railroad industry group, sued the Department of Transportation and Amtrak, alleging that PRIIA was unconstitutional based on the violations of the nondelegation doctrine and on Fifth Amendment due process grounds.<sup>32</sup> Specifically, AAR alleged that the separation of powers doctrine was violated “by placing legislative and rulemaking authority in the hands of a private entity . . . that participates in the very industry it is supposed to regulate.”<sup>33</sup> More still, AAR insisted it had not received due process because “the coercive power of the government” had been placed in the hands of an interested private party.<sup>34</sup> Like Amtrak itself had done in *Lebron*, AAR contended that Amtrak could not have been a government actor because of Congress’s specificity that it “is not a department, agency, or instrumentality of the United States Government.”<sup>35</sup>

The district court granted summary judgment to Amtrak, holding that the political branches “exercise[] sufficient control over promulgation and enforcement of the metrics and standards,” so the relevant part of PRIIA was constitutional.<sup>36</sup> AAR appealed, and the Court of Appeals for the District of Columbia Circuit reversed the district court, holding that Amtrak is a “private corporation with respect to Congress’s power to delegate . . . authority,” so Amtrak cannot be constitutionally granted “the regulatory power prescribed in [PRIIA].”<sup>37</sup>

The Supreme Court reversed the D.C. Circuit, holding that for separation of powers purposes, Amtrak was a governmental entity.<sup>38</sup> The Court used similar factors when designating Amtrak a governmental entity as it did in *Lebron*. It noted that the government created and controlled

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<sup>29</sup> *Id.* at 1229.

<sup>30</sup> *Id.* at 1230.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (internal quotation marks and citation omitted).

<sup>35</sup> *Id.* at 1233 (internal quotation marks and citation omitted).

<sup>36</sup> *Id.* at 1230; *see also* Ass’n of Am. R.Rs. v. Dep’t of Transp., 865 F. Supp. 2d 22, 29 (D.D.C. 2012).

<sup>37</sup> Ass’n of Am. R.Rs. v. Dep’t of Transp., 721 F.3d 666, 677 (D.C. Cir. 2013).

<sup>38</sup> *Dep’t of Transp.*, 135 S. Ct. at 1233.

Amtrak and “specif[ied] many of its day-to-day operations.”<sup>39</sup> Further, the government subsidizes Amtrak, sets its policy goals, and demands accountability and transparency.<sup>40</sup> Justice Alito’s concurrence suggested that Amtrak held regulatory power, a point confirmed by Judge Brown on remand.<sup>41</sup> Judge Brown continued that since the metrics and standards that Amtrak helped create needed to be incorporated into the operating agreements of freight rail carriers “to the extent practicable,” Amtrak was exerting regulatory power over private actors.<sup>42</sup> Noncompliance may put the carriers at “heightened risk of disadvantageous terms or rates,” which encourage railroads to obey, signifying regulatory power.<sup>43</sup>

As far as the courts have spoken, Amtrak has regulatory power, should be treated as a regulatory body, and is a governmental entity for separation of powers purposes.<sup>44</sup> As a part of the federal government, Congress did not err in delegating regulatory authority to Amtrak. Amtrak is thus subject to the Appointments Clause of the Constitution because of its ability to perform executive functions.<sup>45</sup>

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<sup>39</sup> *Id.* at 1234 (internal quotation marks and citation omitted).

<sup>40</sup> *Id.* at 1233.

<sup>41</sup> *Id.* at 1236 (Alito, J., concurring) (“Because obedience to the metrics and standards materially reduces the risk of liability, railroads face powerful incentives to obey. That is regulatory power.”); *Ass’n of Am. R.Rs. v. Dep’t of Transp.*, 821 F.3d 19, 33–34 (D.C. Cir. 2016).

<sup>42</sup> *Ass’n of Am. R.Rs.*, 821 F.3d at 33 (internal quotation marks and citation omitted).

<sup>43</sup> *Id.*

<sup>44</sup> On remand, the D.C. Circuit determined that Congress had violated the Fifth Amendment Due Process Clause by allowing “an entity to make law when, economically speaking, it has skin in the game.” *Ass’n of Am. R.Rs.*, 821 F.3d at 23. The court reasoned that even with its “governmental entity” status, Amtrak was a “self-interested entity” that holds “regulatory authority over its competitors.” *Id.* at 31–34. Judge Brown, writing for the court, held that Amtrak was a self-interested entity despite the Supreme Court’s designation that Amtrak was “not an autonomous private enterprise.” *Id.* at 32 (citing *Dep’t of Transp.*, 135 S. Ct. at 1232). Amtrak’s statutory mandate to be operated and managed as a for-profit corporation, to interact with the private sector, and to minimize the need for government subsidies all contributed to the indication that Amtrak is a self-interested entity. *Id.* Further, Congress provided Amtrak with incentives to maximize profits by allowing their officers to be paid higher than market rate if the organization did not receive federal subsidies. *Id.*; see also 49 U.S.C. § 24303(b) (2012). There are arguments to be made that Amtrak is not a self-interested entity because its statutory command to act “as a for-profit corporation” is nothing more than a mandate to run efficiently within the government, but it does not affect the following analysis. The significant portion of the court’s opinion is that Congress is able to give Amtrak regulatory power in some capacity, subjecting it to the Appointments Clause.

<sup>45</sup> *Dep’t of Transp.*, 135 S. Ct. at 1239 (“[A]ccountability demands that principal officers be appointed by the President. The President, after all, must have ‘the general administrative control of those executing the laws,’ and this principle applies with special force to those who can ‘[e]xercise significant authority’ without direct supervision.” (alteration in original) (internal citations omitted) (citing U.S. CONST. art. II, § 2, cl. 2; then quoting *Myers v. United States*, 272 U.S. 52, 164 (1926); and then quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

## II. PRINCIPAL OFFICERS, INFERIOR OFFICERS, AND GOVERNMENT EMPLOYEES

Now that the Supreme Court has determined Amtrak to be a governmental entity with regulatory power for separation of powers purposes, the next step in determining the constitutionality of Amtrak's structure is determining the status of Amtrak's board members, particularly its President.

The Appointments Clause of the Constitution gives the President of the United States the power to appoint officers of the United States with the advice and consent of the Senate.<sup>46</sup> This power extends to what we now call principal officers, distinguished from what the Constitution calls "inferior Officers."<sup>47</sup> Inferior officers can be appointed, with congressional authorization, by the President alone, Courts of Law, or Heads of Departments.<sup>48</sup>

While the Appointments Clause discusses principal and inferior officers, it is not true that all federal workers fall into one of those two categories.<sup>49</sup> Workers who are not officers, therefore, must fall within a third category, one we will label "government employees."

When determining whether the President of Amtrak is constitutionally elected, one must consider what type of official he is. If he is a principal officer, he is surely unconstitutionally elected, since he would need to be appointed by the President and confirmed by the Senate. If he is an inferior officer, he may be unconstitutionally elected, depending on whether Amtrak as an agency is considered a "Department" and its board members are considered its "Head."<sup>50</sup> If he is a mere government employee, then there is no problem with his election, since the Constitution imposes no obligations on appointing (or hiring) government employees.

This Article makes the argument that the President of Amtrak is an inferior officer because while he holds significant authority, he is subordinate to and subject to the control of principal officers.

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<sup>46</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See generally Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 452 (2018) (analyzing the dividing line between inferior officers and "lower-level, non-Article II officials known as employees").

<sup>50</sup> See *infra* Part III.

### A. *Officers Versus Government Employees*

The President of Amtrak cannot be considered a mere government employee because he clearly has some discretion in his decision-making and performs his duties with “significant authority.”

#### 1. *The Law*

Besides the phrase “established by Law,” the Constitution does not clearly speak to what constitutes an officer versus an employee.<sup>51</sup> This distinction may have large implications. For example, as of 2017, the Environmental Protection Agency (“EPA”) alone had over 15,000 employees,<sup>52</sup> and no one would contend that each of them needed to be appointed by the Administrator of the EPA. To hold otherwise would have huge ramifications for the entire administrative state, requiring everyone from office administrators to aides to custodial workers to be hired by the head of whatever department they are tied to. So, the question persists: how important must a government worker be to be considered at least an inferior officer? What would their duties look like? To answer these questions, we can turn to three sources: Framers’ intent, case law, and policy.<sup>53</sup>

Framers’ intent does not help too much in answering the question because the Framers did not seem concerned with the question of who would be an officer, only with who would be able to appoint those officers.<sup>54</sup> However, the Court in *Buckley v. Valeo* opined that in describing the “Officers of the United States, . . . the drafters had a less frivolous purpose in mind” than mere “etiquette or protocol” and believed the term was “intended to have substantive meaning.”<sup>55</sup>

With that alleged intent in mind, the Court held that a person who “exercis[es] significant authority pursuant to the laws of the United States” is an officer.<sup>56</sup> Labeling “significant authority” as the deciding factor for an officer ruled out the circular argument used previously that officers are officers *because* they are appointed.<sup>57</sup> However, this distinction did not make

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<sup>51</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>52</sup> *EPA’s Budget and Spending*, EPA, <https://www.epa.gov/planandbudget/budget> (last visited Jan. 11, 2019).

<sup>53</sup> For a greater discussion on many factors that help define the difference between “officer” and “employee,” see generally Edward Susolik, Note, *Separation of Powers and Liberty: The Appointments Clause, Morrison v. Olson, and Rule of Law*, 63 S. CAL. L. REV. 1515, 1543–46 (1990).

<sup>54</sup> *Id.* at 1544.

<sup>55</sup> 424 U.S. 1, 125–26 (1976) (internal quotation marks omitted); Susolik, *supra* note 53, at 1544–45.

<sup>56</sup> *Buckley*, 424 U.S. at 126.

<sup>57</sup> *See, e.g., Burnap v. United States*, 252 U.S. 512, 516 (1920) (“Whether the incumbent is an officer

answering the question significantly easier because it did little work in defining what counted as “significant authority.”<sup>58</sup> The only examples of this authority it provided were “rulemaking, [and writing] advisory opinions.”<sup>59</sup>

Fifteen years later, the Court in *Freytag v. Commissioner* determined that Special Trial Judges (“STJs”) were officers rather than mere employees because they performed “more than ministerial tasks” such as taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders.<sup>60</sup> The Court emphasized that the duties required the “exercise [of] significant discretion,”<sup>61</sup> a point relied on in a 2000 D.C. Circuit case, *Landry v. FDIC*, which held that “final decisionmaking power” was critical to the officer-employee distinction.<sup>62</sup> The Supreme Court’s most recent writing on this question came in *Lucia v. SEC*.<sup>63</sup> The case asked whether Administrative Law Judges (“ALJs”) of the Securities and Exchange Commission (“SEC” or the “Commission”) should be considered officers or not. Comparing ALJs to *Freytag*’s STJs, the Court ruled that ALJs were officers because their position was created by statute and because their authority was significant.<sup>64</sup> As in *Freytag*, Justice Kagan cited their ability to “[r]eceive[e] evidence[,]” “[e]xamine witnesses[,]” and “conduct trials.”<sup>65</sup>

The undeveloped test outlined by the courts can be further clarified by looking at the policy goals of the Appointments Clause. The Appointments Clause provides accountability and transparency to the public. Mandating that officers are appointed by individuals ensures that the people know who appointed them and can hold the individual accountable if the officers make poor decisions.<sup>66</sup> If accountability is a goal, then the officers must be doing

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or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto.”); *United States v. Germaine*, 99 U.S. 508, 509–10 (1878); see also Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers are Constitutionally Required to Be Appointed*, 76 MO. L. REV. 1143, 1151 (2011) (“Several early Appointments Clause cases took cursory looks at the officer-employee distinction, sometimes relying entirely on whether the person had been appointed to determine if a person was an officer.”).

<sup>58</sup> See Susolik, *supra* note 53, at 1545.

<sup>59</sup> *Buckley*, 424 U.S. at 140.

<sup>60</sup> 501 U.S. 868, 881–82 (1991).

<sup>61</sup> *Id.* at 882.

<sup>62</sup> 204 F.3d 1125, 1134 (D.C. Cir. 2000).

<sup>63</sup> 138 S. Ct. 2044 (2018).

<sup>64</sup> *Id.* at 2053 (finding that ALJs conduct similar vital functions as STJs).

<sup>65</sup> *Id.* (internal quotation marks and citations omitted).

<sup>66</sup> See E. Garrett West, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 YALE L.J. FORUM 42, 55 (2017) (“The President, then, always depends on Congress to provide for the appointment of his officers, and the public will know that he (or the ‘Heads of Department’ or

something important enough that accountability matters.<sup>67</sup> This would suggest that finality in decision-making is important as well as the power to compel action.<sup>68</sup>

Thus, it is still unclear exactly what “significant authority” entails. The best understanding we have involves some sort of discretionary power that includes more than simple ministerial tasks. In accordance with the goals of the Appointments Clause, the power should be significant enough that the individual’s appointers should be held accountable for poor decisions.

## 2. *The President of Amtrak is Not a Government Employee*

The President of Amtrak must be considered an officer and not a mere government employee because he acts as the leader of Amtrak and is able to make important decisions regarding how to run the corporation.

Statutorily, the President of Amtrak only has one specified duty: to designate a panel of members that reviews maintenance and rehabilitation plans.<sup>69</sup> However, to say that this is his only role would be a mischaracterization of what he actually does. Nor do his statutorily defined duties designate him as an officer or not. We would otherwise fall into the same circular trap of defining an officer as someone who Congress says is an officer. This would allow Congress to circumvent the Constitution’s separation of powers doctrine by failing to list the duties of personnel who are in practice principal or inferior officers, but who were not appointed according to the Constitution.

The President of Amtrak is the administrative leader of the railroad.<sup>70</sup> In an interview with National Public Radio (“NPR”), the current President of Amtrak, Richard H. Anderson, acknowledged that his duties comprised mostly of “day-to-day management[,] and persuading the government to do more to continue support of the system.”<sup>71</sup> He serves as the public face of

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the ‘Courts of Law’) is to blame when those officers fail in their duties.”).

67 Some scholars disagree, maintaining that the original meaning of “officers” is much broader than that. See, e.g., Mascott, *supra* note 49, at 454 (arguing that the proper test for determining who an officer is to ask if he is “one whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance”).

68 See West, *supra* note 66, at 44 (proposing a test to determine who officers are by asking whether they have the ability to “alter legal rights and obligations on behalf of the United States”).

69 49 U.S.C. § 24305(b)(1) (2008) (amended (2012)) (assigning the President of Amtrak the power to select members of the review panel).

70 *Amtrak President Joseph Boardman, 2000s.*, AMTRAK, <https://history.amtrak.com/archives/amtrak-president-joseph-boardman-2000s> (last visited Jan. 11, 2019) (expounding on initiatives lead by the ninth president of Amtrak).

71 *New CEO Richard Anderson Outlines His Vision for Amtrak*, NPR: ALL THINGS CONSIDERED (Sept. 5,

the corporation by outlining his vision for the future of Amtrak<sup>72</sup> and by responding to major accidents.<sup>73</sup> The President of Amtrak also serves as the representative of the corporation to Congress, and is “summoned to hearings” to answer questions about Amtrak’s funding problems.<sup>74</sup>

A look at the bylaws of Amtrak shines more light on his responsibilities and powers. The President is able to call special meetings of shareholders or board members.<sup>75</sup> He is to be consulted and asked for a recommendation if the board wishes to remove any other officers.<sup>76</sup> By default, the President is the Chief Executive Officer of Amtrak, a title that carries numerous responsibilities, including “general supervision of the affairs of the Corporation” and the supervision of all employees and officers.<sup>77</sup> The President also has the power to approve and execute indemnification agreements with third parties.<sup>78</sup>

Lastly, the President of Amtrak sits on the board of directors for Amtrak with the other nine members as a nonvoting member.<sup>79</sup> Although he cannot vote to make significant decisions, his inclusion on the board indicates that he holds some significance and may contribute to ideas discussed at board meetings.

From these responsibilities, there is every indication that the President of Amtrak has “significant authority” as used in the legal sense. As the head and face of the organization, he decides what to focus on and how to respond

2017, 4:29 PM) <https://www.npr.org/2017/09/05/548715358/new-ceo-richard-anderson-outlines-his-vision-for-amtrak>.

<sup>72</sup> *Amtrak's CEO Shares His Vision for Rail's Future*, CBS NEWS (Sept. 5, 2017, 12:44 PM), <https://www.cbsnews.com/news/amtrak-ceo-outlines-vision-for-rail-system> (discussing initiatives to improve Amtrak such as increasing train speeds and providing more options for nonstop service).

<sup>73</sup> Mark Matousek, *Amtrak CEO Responds to Deadly Accident: 'We Are Deeply Saddened by All That Has Happened Today.'* BUS. INSIDER (Dec. 18, 2017, 5:58 PM), <http://www.businessinsider.com/amtrak-ceo-responds-to-deadly-accident-2017-12> (noting that one role of the President of Amtrak is expressing condolences after rail accidents).

<sup>74</sup> Ashley Halsey III, *Amtrak President Joseph Boardman Says He Plans to Step Down Next Year*, WASH. POST (Dec. 11, 2015), [https://www.washingtonpost.com/news/federal-eye/wp/2015/12/11/amtrak-president-joseph-boardman-says-he-plans-to-step-down-next-year/?utm\\_term=.22d33908dee8](https://www.washingtonpost.com/news/federal-eye/wp/2015/12/11/amtrak-president-joseph-boardman-says-he-plans-to-step-down-next-year/?utm_term=.22d33908dee8).

<sup>75</sup> NAT'L R.R. PASSENGER CORP., AMENDED & RESTATED BYLAWS § 3.03 (2016) (on file with author) (describing the procedure for calling a special meeting of the shareholders).

<sup>76</sup> *Id.* § 6.03 (describing the procedure for officer removal by the Amtrak board).

<sup>77</sup> *Id.* § 6.06; *see also Amtrak Names Former Delta Executive Richard Anderson as New CEO*, FORTUNE (June 26, 2017), <http://fortune.com/2017/06/26/amtrak-richard-anderson-ceo/>. While the President and CEO are often the same person, this is not necessarily always the case. For example, when the current President of Amtrak was named, the previous President and CEO decided to be co-CEOs with the new President for approximately six months. *Id.*

<sup>78</sup> NAT'L R.R. PASSENGER CORP., *supra* note 75, § 9.01(d)(2); *see also id.* § 9.03 (assigning the execution of indemnification agreements to the President or General Counsel of Amtrak).

<sup>79</sup> 49 U.S.C. § 24302 (2008) (amended (2012)).

to the public. His duties are not “mere ministerial tasks” but to lead the organization through challenges and to make major decisions of policy. He is surely, therefore, an officer of the United States and must be appointed according to the Constitution.

*B. Distinguishing Between Principal and Inferior Officers*

Since we can safely assume that the President of Amtrak is some sort of officer, the next step in this analysis is determining whether he is an inferior officer or principal officer. This Article argues that the President of Amtrak should be considered an inferior officer because he is subordinate to and subject to control by the rest of the board, who are all principal officers.

*1. The Law*

In *Morrison v. Olsen*, Chief Justice Rehnquist outlined a four-part balancing test that determined whether an officer is inferior or principal.<sup>80</sup> The case centered around the Ethics in Government Act of 1978 and whether the Attorney General’s appointment of the Independent Counsel was constitutional. The first part of the test determined whether the officer is “to some degree ‘inferior’ in rank and authority,” holding that an officer is inferior in this sense if they can be removed by a higher Executive Branch official who is not the President.<sup>81</sup> The second part of the test regarded whether the officer had “certain, limited duties” or not.<sup>82</sup> Duties are “limited” when the official performing them cannot set policy on behalf of the government or is restricted to working on assigned tasks.<sup>83</sup> The third part of the test concerned the limited jurisdiction of the officer.<sup>84</sup> Lastly, the shorter the duration of the officer’s tenure, the stronger the case the officer is inferior.<sup>85</sup>

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<sup>80</sup> 487 U.S. 654, 670–73 (1988).

<sup>81</sup> *Id.* at 671; *see also id.* at 672–73 (noting that the independent counsel was a “subordinate officer” because he could be removed by the Attorney General).

<sup>82</sup> *Id.* at 671.

<sup>83</sup> *Id.* at 671–72.

<sup>84</sup> *Id.* at 672.

<sup>85</sup> *Id.*

Justice Scalia wrote a widely celebrated<sup>86</sup> dissent in *Morrison* that claimed the majority missed a necessary condition for defining an inferior officer: subordination.<sup>87</sup> An officer can only be subordinate if he or she is “subject to supervision” and to some sort of control by a superior officer.<sup>88</sup> Because the Independent Counsel could only be removed by the Attorney General “for cause,” Justice Scalia argued, there was not a sufficient level of superiority and control.

Nine years after *Morrison*, Justice Scalia penned an opinion in *Edmond v. United States* that concerned whether judges of the Coast Guard Court of Criminal Appeals (“CGCCA”) were inferior or principal officers.<sup>89</sup> The Court, while applying the *Morrison* test, focused on the first factor: whether the officers had a superior.<sup>90</sup> Although the Court found that CGCCA judges had failed two of the factors (limited jurisdiction and tenure) and did not discuss limited duties, they still held them to be inferior officers.<sup>91</sup> It is not clear that the *Morrison* test was applied as evenly as it had been nine years prior.<sup>92</sup> Although *Morrison* was technically applied, there is good reason to believe its four-factor test had been practically overruled by *Edmond*.<sup>93</sup> Thus, the most important factor when determining whether an officer is inferior or principal officer is whether the officer is subject to some sort of supervision and control by a principal officer.

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<sup>86</sup> *Id.* at 697–734 (Scalia, J., dissenting); see Terry Eastland, *Scalia's Finest Opinion*, WKLY. STANDARD (Mar. 11, 2016, 12:40 AM), <http://www.weeklystandard.com/scalias-finest-opinion/article/2001510> (explaining Scalia's dissent in *Morrison* and its popularity); Justice Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench, STAN. L. SCH. (May 30, 2015), <https://law.stanford.edu/stanford-lawyer/articles/justice-kagan-and-judges-srinivasan-and-kethledge-offer-views-from-the-bench/> (describing an event at which Justice Elena Kagan described Justice Scalia's lone dissent in *Morrison* as “one of the greatest dissents ever written and every year it gets better” (internal quotation marks omitted)).

<sup>87</sup> *Morrison*, 487 U.S. at 719 (Scalia, J., dissenting).

<sup>88</sup> *Id.* at 720–21 (discussing that inferior officers would “by chain of command still be under the direct control of the President”).

<sup>89</sup> 520 U.S. 651, 653, 660–61 (1997).

<sup>90</sup> *Id.* at 663 (arguing that political accountability requires an officer's work to be directly supervised by a person appointed by the President and approved by the Senate).

<sup>91</sup> *Id.* at 661.

<sup>92</sup> See *id.* at 667 (Souter, J., concurring in part and concurring in the judgment) (“It does not follow, however, that if one is subject to some supervision and control, one is an inferior officer. Accordingly, in *Morrison*, the Court's determination that the independent counsel was ‘to some degree inferior’ to the Attorney General did not end the enquiry.” (internal citations omitted) (citing *Morrison*, 487 U.S. at 671–72 (Scalia, J., dissenting))).

<sup>93</sup> See generally Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998) (arguing that the balancing test applied in *Morrison* was supplanted by a bright-line rule put forth in *Edmond* hinging on whether the purportedly inferior officer has a superior).

## 2. *The President of Amtrak Should Be Considered an Inferior Officer*

The President of Amtrak should be considered an inferior officer because he is clearly subordinate to the board that appointed him. Since he no longer has voting power, he is unable to affect decisions at the highest level and is only able to make management decisions. Although the President of Amtrak's power is significant, some entity other than the President of the United States—namely, the board of Amtrak—can replace him. Therefore, the President of Amtrak is subordinate to the board, whose members are principal officers of the United States.

In his concurrence in *Department of Transportation v. Association of American Railroads*, Justice Alito lays out his argument for why the President of Amtrak is a principal officer in the following manner: 1) multimember bodies may head an agency; 2) those who head agencies must be principal officers; and 3) every member of a multimember body heading an agency must be a principal officer, since every member of a multimember body could cast the deciding vote with respect to a particular decision.<sup>94</sup> Although Justice Alito's logic determines that casting a deciding vote with respect to a particular decision is a sufficient condition, not a necessary condition, it is safe to assume that this was his main issue with the board's arrangement, considering this is the only point he raised. Although the President of Amtrak sits on the board, the FAST Act removed his voting power.<sup>95</sup> Thus, he is unable to "cast [a] deciding vote with respect to a particular decision,"<sup>96</sup> mooting Justice Alito's argument.

Further, the modern test outlined by the Supreme Court supports the contention that the President of Amtrak is an inferior officer. The President of Amtrak is an officer who "serve[s] at the pleasure of the board," meaning that the board has authority to remove the officer at will.<sup>97</sup> Since he is able to be removed by an entity that is not the President of the United States, the first and most important factor of *Morrison*, and the only significant factor in *Edmond*, is satisfied.

Comparing the scope of the President of Amtrak's duties to the scope of the duties assigned to the Independent Counsel in *Morrison*, we can conclude that they are similar in dimension. The President of Amtrak is granted a wide range of duties that all pertain to a particular organization and mission,

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<sup>94</sup> 135 S. Ct. 1225, 1239 (Alito, J., concurring) (explaining that, given that multimember bodies may head agencies, and those who head agencies must be principal officers, it follows that every member of a multimember body heading an agency must be a principal officer).

<sup>95</sup> See Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 11205, 129 Stat. 1312, 1637 (2015).

<sup>96</sup> *Dep't of Transp.*, 135 S. Ct. at 1239 (Alito, J., concurring).

<sup>97</sup> 49 U.S.C. § 24303(a) (2008) (amended (2012)).

just as the Independent Counsel was granted duties for a specific goal in mind. Both of their jurisdictions are similarly restricted to one organization or goal.

Although the President of Amtrak does not have a limited tenure, his subordination to the board without any primary decision-making power in the form of a board vote renders him an inferior officer.

### III. AMTRAK AS A DEPARTMENT

In *Department of Transportation v. Ass'n of American Railroads*, Justice Alito argued that even if the government was correct in its assertion that the President of Amtrak was an inferior officer, that President still may be unconstitutionally elected.<sup>98</sup> Inferior officers can only be appointed by the President of the United States alone, Courts of Law, or Heads of Departments.<sup>99</sup> Justice Alito contended that it is not clear that Amtrak is a Department. However, case law and policy both indicate that Amtrak is a Department and its multimember board is its Head for Appointment Clause purposes.

#### A. *Defining a Department*

For Appointments Clause purposes, a “Department” does not have to be what is traditionally referred to as an “executive department.” This issue was first tackled in *Freytag v. Commissioner* when the Court was confronted with the constitutionality of a United States Tax Court judge appointing STJs.<sup>100</sup> After establishing that the STJs were inferior officers, the Court set out to answer whether the tax court should (or could) be considered a “Court of Law” or “Head[] of Department[]” according to the Appointments Clause.<sup>101</sup> After discussing the historical reasons for the Appointments Clause, the majority rejected the tax court as a “Department,” instead holding that “Head[] of Department[]” should be confined to “executive divisions like the Cabinet-level departments.”<sup>102</sup> It reasoned that the Appointments Clause is primarily concerned with accountability and Cabinet members are readily identifiable and directly accountable to the President.<sup>103</sup> The spirit of the Appointments Clause, the majority reasoned,

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<sup>98</sup> *Dep't of Transp.*, 135 S. Ct. at 1239 (Alito, J., concurring).

<sup>99</sup> U.S. CONST. art II, § 2, cl. 2.

<sup>100</sup> 501 U.S. 868, 870 (1991).

<sup>101</sup> *Id.* at 884, 886.

<sup>102</sup> *Id.* at 887–88.

<sup>103</sup> *Id.* at 886.

would be too diluted if the number of “actors eligible to appoint” were enlarged so much.<sup>104</sup> While emphatically declaring that the tax court is “not a Departmen[t],”<sup>105</sup> the Court, in a footnote, stated that it “[does] not address here any question involving an appointment of an inferior officer by the head of one of the principal agencies, such as . . . the Securities and Exchange Commission.”<sup>106</sup> The majority ultimately held that the scheme was nevertheless constitutional because the Article I courts could be considered “Courts of Law” for Appointments Clause purposes.<sup>107</sup>

A concurrence written by Justice Scalia and joined by three other members of the Court agreed that the STJs were inferior officers and that the Chief Judge of the tax court had the constitutional authority to appoint them, but as a Head of Department, not as a Court of Law.<sup>108</sup> Heads of Departments include “the heads of all agencies immediately below the President in the organizational structure of the Executive Branch,” Justice Scalia said.<sup>109</sup> The departments in the Appointments Clause are the same as the departments in the Opinions Clause, and surely the President is able to solicit opinions from principal officers in non-Cabinet departments, Justice Scalia reasoned.<sup>110</sup>

The Court wrestled with the issue again in 2010 in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (“PCAOB”).<sup>111</sup> In *PCAOB*, an accounting firm and the Free Enterprise Fund sued the titular PCAOB seeking declaratory judgment that the board was unconstitutional.<sup>112</sup> The board was created as part of the Sarbanes-Oxley Act of 2002 in response to several accounting scandals and its board members were appointed by the SEC.<sup>113</sup> Among its other arguments, the Free Enterprise Fund argued that the SEC had no authority to appoint the board members because they were not a “Department,” further alleging that departments referred only to “Executive departments,” such as the State, Treasury, or Defense Departments.<sup>114</sup> The majority, led by Chief Justice Roberts, was tasked with

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<sup>104</sup> *Id.* at 885.

<sup>105</sup> *Id.* at 888 (internal quotation marks omitted).

<sup>106</sup> *Id.* at 887 n.4.

<sup>107</sup> *Id.* at 890–91.

<sup>108</sup> *Id.* at 901 (Scalia, J., concurring in part and concurring in the judgment).

<sup>109</sup> *Id.* at 918.

<sup>110</sup> *Id.* at 918–19.

<sup>111</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (PCAOB)*, 561 U.S. 477, 487 (2010).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 510 (internal quotation marks omitted).

answering the issue left in the footnote in *Freitag*.<sup>115</sup> Ultimately, the Court sided with Justice Scalia, who “would have concluded that the Commission is indeed such a ‘Department,’ because it is a ‘free-standing, self-contained entity in the Executive Branch.’”<sup>116</sup> Chief Justice Roberts further adopted Justice Scalia’s historical precedent, in which Congress authorized the Postmaster General to appoint assistants and deputies—surely inferior officers—without being in the President’s Cabinet.<sup>117</sup> Ultimately, because the SEC was a “freestanding component of the Executive Branch, not subordinate to or contained within any other such component,” it satisfied the requirements of “Department” for Appointments Clause purposes.<sup>118</sup>

*PCAOB* offered the last word on what constitutes a Department. A Department does not need to be one traditionally recognized as within the President’s Cabinet and should be a freestanding component of the Executive Branch, not subordinate to or within any other government agency.

### B. *Multimember Boards*

A Department may be composed of a multimember board and its members may collectively act as the Head of the Department to appoint inferior officers.<sup>119</sup> In *PCAOB*, the Free Enterprise Fund alleged that: 1) PCAOB members were principal officers and thus had to be appointed by the President with the advice and consent of the Senate; 2) even if PCAOB members were inferior officers, they were not constitutionally appointed because the SEC could not have properly been regarded as a Department in the constitutional sense; and 3) even if the SEC could be considered a Department, the several Commissioners of the Commission could not be considered its “Head.”<sup>120</sup> The Court first concluded, under *Edmond*, that the board members were inferior officers.<sup>121</sup> Next, the Court determined the

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<sup>115</sup> See *id.* (“In *Freitag*, we specifically reserved the question whether a ‘principal agency, such as . . . the Securities and Exchange Commission,’ is a ‘Department’ under the Appointments Clause.” (internal citations omitted); *Freitag*, 501 U.S. at 887 n.4.

<sup>116</sup> *PCAOB*, 561 U.S. at 510–11 (internal citations omitted).

<sup>117</sup> *Id.* at 511.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 511–12.

<sup>120</sup> *Id.* at 487–88 (internal quotation marks omitted). The Free Enterprise Fund made additional arguments, some of which succeeded, unlike its Appointment Clause arguments. Ultimately, the Court held that two layers of “for cause” removal (one for the SEC and one for the PCAOB), subverted the Executive’s ability to ensure that the laws are faithfully executed. *Id.* at 498.

<sup>121</sup> *PCAOB*, 561 U.S. at 510.

SEC is a “Department.”<sup>122</sup> Lastly, the Court saw no reason “why a multimember body may not be the ‘Head’ of a ‘Department.’”<sup>123</sup> The Court found support for this proposition in earlier statutory practice, case law, and constitutional interpretation.<sup>124</sup> Specifically, the Court held that the Appointments Clause permits collective appointments by the Courts of Law and allows the Houses of Congress to collectively appoint its own officers, so multimember bodies were commonplace among agencies.<sup>125</sup>

*C. Amtrak Is a Department Because it Is Independent of Other Agencies*

Amtrak is a Department for Appointments Clause purposes because it is independent within the Executive Branch and is not subject to substantial control by other departments. Justice Alito’s main concern with labeling Amtrak as a Department was its subordinate status to another component of the Executive Branch.<sup>126</sup> Justice Alito read the conditions outlined in *PCAOB*—freestanding component and lack of subordination—as necessary rather than sufficient, and cursorily determined that Amtrak was not a “Department.”<sup>127</sup> However, even when reading the conditions as necessary, Justice Alito was incorrect on this issue. First, Amtrak is formally not a part of any other government agency. Second, Amtrak is not substantially controlled by another government agency. Thus, Amtrak is a Department whose multimember board may appoint inferior officers.

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<sup>122</sup> *Id.* at 512 (internal quotation marks omitted).

<sup>123</sup> *Id.* (internal quotation marks omitted).

<sup>124</sup> *Id.* at 512–13 (emphasizing the textual support that the Constitution lends to this proposition).

<sup>125</sup> *Id.*; see also U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 5; *id.* art II, § 2, cl. 2.

<sup>126</sup> See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1240 (2015) (“A ‘Department’ may not be ‘subordinate to or contained within any other such component’ of the Executive Branch.” (quoting *PCAOB*, 561 U.S. at 511)).

<sup>127</sup> See *id.*

*1. Amtrak is Formally Independent of Any Other Government Agency*

Formally, Amtrak is not a part of any other government agency. The Department of Transportation houses eleven sub-departments, one of which is the Federal Railroad Administration (“FRA”).<sup>128</sup> Amtrak is not considered one of the FRA’s subsidiaries and as a formal matter is totally divested from the FRA. In the entire subchapter within the United States Code on the Department of Transportation, Amtrak is only mentioned once, and only to be included in a study to be done by the Secretary on the feasibility of constructing high speed ground transportation systems in the United States due in 1995.<sup>129</sup> Rather, Amtrak exists by independent statutory authorization and exists in a separate section of the United States Code from the Department of Transportation (“DOT”).<sup>130</sup> This would suggest that Amtrak is a Department according to Justice Scalia and Chief Justice Roberts as a freestanding entity within the Executive Branch.

*2. Amtrak is Not Controlled by Any Other Department*

Further, Amtrak is not controlled by any other department and operates independently of other Departments. Justice Alito was concerned with Amtrak’s relation to other Departments, inferring that it may be “subordinate” to them. It could be inferred that an executive department who has substantial control over another formally independent department, is superior to that department. Namely, Justice Alito mentioned the DOT, the FRA, and the STB. Below, I discuss the ties these agencies have to Amtrak and why Justice Alito’s fears that Amtrak is subordinate to these agencies are ultimately unfounded.

Justice Alito discussed the DOT as potentially having control over Amtrak. The Secretary of Transportation has a permanent seat on Amtrak’s board and holds a vote which could be a crucial tiebreaker to deciding certain matters, such as electing Amtrak’s President.<sup>131</sup> Further, the Secretary of Transportation has statutory authority to exempt Amtrak from its mandate

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<sup>128</sup> *Our Administrations*, U.S. DEPT OF TRANSP., <https://www.transportation.gov/administrations> (last visited Jan. 11, 2019) (identifying the FRA as one of the eleven sub-department groups of the Department of Transportation).

<sup>129</sup> 49 U.S.C. § 309(d)(1)(C) (2012); *id.* § 309(d)(2)(K).

<sup>130</sup> *See* Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (financing and creating a “national rail passenger system”); *see also* 49 U.S.C. § 24301 (2008) (amended (2012)) (discussing Amtrak in a separate section of the United States Code concerning the DOT).

<sup>131</sup> 49 U.S.C. § 24302(a)(1)(A) (codifying the Secretary of Transportation as one of nine board directors); *id.* § 24303(a) (codifying that the President of Amtrak and its other officers are elected by the board of directors of Amtrak).

to buy articles, materials, and supplies mined, produced, or manufactured in the United States.<sup>132</sup> The FRA has been executing and overseeing grants to Amtrak with congressional funds since its creation, providing \$1.385 billion alone in 2016.<sup>133</sup> Amtrak's yearly expenses in 2016 were approximately \$4.3 billion, meaning that the federal government provides almost one third of Amtrak's budget per year.<sup>134</sup> This may suggest that the Secretary of Transportation and the FRA have substantial control over Amtrak and its activities. This would speak directly to Justice Alito's concerns that Amtrak is "subordinate to" another part of the Executive Branch.<sup>135</sup> This concern is ultimately unsupported. Amtrak has eight board members that are appointed independent of the DOT to counter the Secretary of Transportation that sits on the board. The FRA executes and oversees grants to Amtrak by the grace of Congress who appropriates the funds in the first place. The FRA's grants to Amtrak do not operate like federal grants to states, that is to say, on a conditional basis. They are simply a mechanism for Amtrak to receive the funds that Congress intended them to have.

Justice Alito's concurrence also mentioned Amtrak's relationship to the STB. In a passing comment, he wrote that Amtrak may be subordinate to the STB because in "jointly creating metrics and standards" with the FRA, it may have to defer to an arbitrator appointed by the STB.<sup>136</sup> He also suggested that the STB itself may be part of the DOT, further implying that Amtrak is within that Department.<sup>137</sup> While it is possible that at the time of writing a court would have held the view that the STB is a part of the DOT, Congress seems to have anticipated this problem and avoided it in December 2015, around the same time it instituted the changes to Amtrak's corporate board.<sup>138</sup> In its changes, the STB was moved out of the subchapter of "Department of Transportation" in the United States Code to "Other Government Agencies."<sup>139</sup> The board members of the STB are all appointed

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<sup>132</sup> 49 U.S.C. § 24305(f)(4) (codifying an exemption for Amtrak from having to comply with this statutory mandate).

<sup>133</sup> *Federal Grants to Amtrak*, U.S. DEP'T OF TRANSP.: FED. R.R. ADMIN., <https://www.fra.dot.gov/Page/P0249> (last visited Oct. 12, 2018).

<sup>134</sup> *National Fact Sheet FY 2016*, AMTRAK, <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/nationalfactsheets/National-Fact-Sheet-FY2016-0717.pdf>.

<sup>135</sup> *Dep't of Transp.*, 135 S. Ct. 1225, 1240 (2015) (internal quotation marks omitted) (discussing whether "Amtrak is 'subordinate to' the STB").

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See generally* Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228 (describing the purpose of the Act as "establish[ing] the Surface Transportation Board as an independent establishment").

<sup>139</sup> 49 U.S.C. § 701(a) (2012) (establishing the STB within the DOT); 49 U.S.C. § 1301(a) (2015)

by the President and confirmed by the Senate, implying that they are all independently principal officers.<sup>140</sup> Further, the statutory language was changed from “[t]here is hereby established within the Department of Transportation the Surface Transportation Board” to “[t]he Surface Transportation Board is an independent establishment of the United States Government.”<sup>141</sup> Although statutory language is not dispositive of the matter, there seems to be no current link between the STB to the DOT. Further, it would be logically inconsistent to classify Amtrak as subordinate to the STB if we were not willing to classify the FRA as subordinate to the STB, since the FRA is a partner with Amtrak in creating the metrics and standards. The FRA is a sub-department of the DOT, so classifying it under the STB would either imply that the entirety of the DOT was subordinate to the STB or would say that two departments can be superior to a sub-department, which would only complicate the aim of separation of powers even further. As a practical matter, devising the “metrics and standards” in conjunction with the FRA is one small part of what Amtrak does and is responsible for doing. If its requirement to defer to the STB for these matters indicates that it is subordinate to the STB, it would complicate all matters of inter-agency collaboration.<sup>142</sup>

Because Amtrak is for the most part independent from all other Departments of government and its board is directly accountable to the President of the United States, it should be considered a Department and its multimember board its Head for Appointments Clause purposes.

## CONCLUSION

Had Congress not been so quick to act with the aptly named FAST Act, Amtrak may have been vulnerable to any entity who had a claim against its regulatory power. In 2015, its President had voting power on the board and was not appointed by the President and confirmed by the Senate. However, there should be little cause for concern as amended. The President of Amtrak currently does not have voting power and is subject to the direct control of principal officers, which comfortably places him in the status of at

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(establishing the STB as an “independent establishment of the United States Government”).

<sup>140</sup> 49 U.S.C. § 1301(b)(1) (establishing the power to appoint members to the board of Amtrak rests with the President of the United States).

<sup>141</sup> See generally 49 U.S.C. § 1301 (noting the amendment instituted in 2015).

<sup>142</sup> See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1173 n.199 (2012) (describing the current practice of the Financial Stability Oversight Counsel in overseeing disputes between independent regulatory agencies).

least inferior officer. As an inferior officer, he can be appointed by a Head of Department. Amtrak is a Department because it is an agency independent of any other Department of the United States. The voting members of its multimember board are its Head who have the power to appoint their own inferior officers.

In *SEC v. Lucia*, a new trial was ordered because ALJs were considered inferior officers but were not appointed by the SEC board-members.<sup>143</sup> Due to Congress's actions, the next time a disgruntled regulated party has a problem with an Amtrak policy or regulation, it will have one fewer argument to use in court. The President of Amtrak can sleep well knowing his job is safe.

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<sup>143</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).