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## Amtrak: The Failure of Passenger Preference and Politics of Nonenforcement

David J. Konarske

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# Amtrak: The Failure of Passenger Preference and Politics of Nonenforcement

David Konarske Jr\*

*America’s modern passenger rail system was born from a bargain between the federal government and the private railroad industry: The government would relieve the private railroads of their responsibility to provide passenger rail services, and in exchange, those companies would give preference to passenger-carrying Amtrak trains on their tracks. This was codified in federal statute. Yet, almost fifty years later, this preference is unenforced, Amtrak trains are routinely sidelined in favor of freight trains, and Amtrak struggles with on-time performance and financial sustainability. Even modest improvements in the percentage of passenger trains arriving on time would result in substantial savings for Amtrak and boost consumer confidence, yet since Amtrak’s creation, the Department of Justice has filed only one enforcement action claiming violation of the corporation’s passenger-preference rights. This Article will review the history of the Amtrak passenger preference and examine Amtrak’s options, including DOJ enforcement, the recent shift to the Surface Transportation Board, and Amtrak’s request that Congress grant it independent enforcement authority. Given the current ecosystem of federal litigating authority and Amtrak’s particular needs, the Article will conclude that Congress should give Amtrak a private right of action to enforce its passenger preference.*

INTRODUCTION .....	584
II. TRACK BULLETIN: THE STATE OF AMTRAK’S PASSENGER PREFERENCE .....	587
A. <i>Outbound Train: Government Undertaking Passenger Rail; Amtrak’s Founding Era</i> .....	588
B. <i>Waiting for a Light: Amtrak’s Long Wait for Its Preferred Track Usage</i> .....	590
1. Continued Sabotage Through Denying Amtrak’s Preferred Track Rights.....	591

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\* Law Clerk, Michigan Supreme Court; J.D., Michigan State University College of Law (2021); MPP, Michigan State University (2021); B.S., Eastern Michigan University (2016). The opinions in the piece are those of the author, and do not represent those of his current or former employers.

2. A Possible Solution in the Surface Transportation Board?	593
.....	593
III. BLOCKED CROSSING: ENFORCEMENT DECISIONS IN THE DOJ AND STB	596
A. <i>Decision-Making at the Department of Justice</i>	597
B. <i>Regulatory Capture and the STB</i>	599
IV. TRACK WARRANT: INDEPENDENT AGENCY LITIGATION AUTHORITY	601
A. <i>Advancing Public Policy: Why Agency Litigation Authority?</i>	602
1. Agency Independence from Politics and the Executive	603
.....	603
2. A Need for Specialized Litigators and Enforcers	605
B. <i>Fighting and Fiefdoms: Drawbacks to Decentralized Litigation Authority</i>	607
1. Unifying the Fiefdoms: Coordinating Among the Agencies	607
.....	607
2. Transparency Through Centralization: Executive Supervision of Litigation	608
.....	608
3. Expertise Through Specialization: Centralization for Better Results	609
.....	609
V. EXTENDED AUTHORITY: SOLVING THE ENFORCEMENT BLOCKADE THROUGH SELF-HELP	611
A. <i>The Current Solution to Passenger-Preference Nonenforcement Is Insufficient</i>	612
B. <i>Giving Amtrak Enforcement Powers Fits into the Current Litigation Authority Landscape</i>	615
CONCLUSION	620

#### INTRODUCTION

Amtrak excitement reached a high recently with the election of “Amtrak Joe” Biden as President of the United States.<sup>1</sup> President Biden

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1. See Curtis Tate, *Buttigieg, Transportation Secretary Nominee and ‘Second Biggest Passenger Rail Enthusiast’*, TRAINS (Jan. 21, 2021), <https://tm.trains.com/news/news-wire/2021/01/20-buttigieg-transportation-secretary-nominee-and-second-biggest-passenger-rail-enthusiast-begins-confirmation-process> [https://perma.cc/N4BG-XCFP] (“I’m only the second biggest passenger rail enthusiast in this particular administration,” [Pete] Buttigieg [said], referring to President Joe Biden, a longtime Amtrak rider.”); see also Simon Calder, *Could Joe Biden Reverse Amtrak’s Railroad Disaster?*, INDEPENDENT (Jan. 22, 2021, 3:22 PM), <https://www.independent.co.uk/travel/news-and-advice/joe-biden-us-railroad-train-b1791268.html> [https://perma.cc/RFD4-MYGC] (noting President Biden’s popular nickname, “Amtrak Joe”).

has signaled a significant commitment to expanding passenger rail,<sup>2</sup> working with Congress to pass \$66 billion in funding to massively expand Amtrak's service, and update outdated and crumbling passenger-rail infrastructure.<sup>3</sup> The Biden administration and the framers of the Green New Deal have recognized that passenger rail will take cars off the road and reduce carbon emissions.<sup>4</sup> Furthermore, because the transportation sector makes up the largest source of American carbon emissions, doing passenger rail right will go a long way toward fighting climate change.<sup>5</sup> This will also ease congestion and enhance transportation opportunities as a growing number of people forego car ownership and take advantage of newly emerging transportation modes.<sup>6</sup>

However, Amtrak, the nation's intercity passenger-rail provider, has suffered from numerous issues over the years.<sup>7</sup> Amtrak has lost money every year since its establishment, requiring congressional appropriations

2. See, e.g., *The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future*, BIDEN FOR PRESIDENT, <https://joebiden.com/clean-energy/> [<https://perma.cc/3RLP-5BML>] (last visited Feb. 21, 2021) (mentioning Amtrak specifically as a part of a "second great railroad revolution" of freight and passenger transportation).

3. Deon J. Hampton, *Amtrak CEO Outlines Plans for Spending \$66 Billion from Infrastructure Funding*, NBC NEWS (Nov. 8, 2021, 11:10 AM), <https://www.nbcnews.com/news/us-news/amtrak-ceo-outlines-plans-spending-66-billion-infrastructure-funding-rcna4786> [<https://perma.cc/K2EZ-HUFN>].

4. See *id.* (noting Amtrak expansion would help combat climate change); Umair Irfan, *America's Trains Are a Drag. The Green New Deal Wants to Fix That.*, VOX (Feb. 13, 2019, 3:22 PM), <https://www.vox.com/2019/2/8/18215774/green-new-deal-high-speed-train-air-travel> [<https://perma.cc/SL8U-HYXG>] (describing passenger rail's contribution to the Green New Deal); see also Josh Glasser, *America's High-Speed Rail Off to a Slow Start*, FORTUNE (Aug. 6, 2009, 10:23 AM), [https://archive.fortune.com/2009/08/05/news/obama\\_high\\_speed\\_rail.fortune/index.htm?postversion=2009080609](https://archive.fortune.com/2009/08/05/news/obama_high_speed_rail.fortune/index.htm?postversion=2009080609) [<https://perma.cc/N4V2-EY4C>] (describing Obama Administration's efforts to promote passenger and high-speed rail).

5. See Irfan, *supra* note 4 (explaining that increase in demand for air transportation has helped fuel United States' rise in carbon emissions and alternatives to flying look to be better for the environment at present); see also Andreas Hoffrichter, *Rail Travel Is Cleaner Than Driving or Flying, but Will Americans Buy In?*, THE CONVERSATION (Apr. 1, 2019, 6:38 AM), <https://theconversation.com/rail-travel-is-cleaner-than-driving-or-flying-but-will-americans-buy-in-112128> [<https://perma.cc/C4V4-WD5K>] (describing advancements in passenger-rail technology and how Europe and Japan are taking advantage of them).

6. See Christopher R. Boll, *Ride Sharing Is Already Reducing Car Ownership and Public Transportation Usage*, FOLEY & LARDNER LLP (Feb. 22, 2018), <https://www.foley.com/en/insights/publications/2018/02/ride-sharing-is-already-reducing-car-ownership-and> [<https://perma.cc/LX5U-AUEE>] (describing decreasing rate of car ownership and increasing usage of ride-sharing apps).

7. See Joseph Guzman, *Newly Minted Transportation Secretary Pete Buttigieg Wants US to Lead World in High-Speed Rail*, THE HILL (Feb 5, 2021), <https://thehill.com/changing-america/sustainability/infrastructure/537571-newly-minted-transportation-secretary-pete> [<https://perma.cc/GGL2-RTJG>] ("We've been asked to settle for less in this country, and I just don't know why people in other countries ought to have better train service . . . than Americans do."); see also, e.g., Bill Laitner, *Amtrak Blames Freight Trains for Passenger Delays Getting Worse*, DET. FREE PRESS (Feb 24, 2020, 11:06 AM), <https://www.freep.com/story/news/local/michigan/oakland/2020/02/24/amtrak-blames-freight-trains-passenger-delays-getting-worse/4851468002> [<https://perma.cc/T28N-BUFL>] (highlighting Amtrak's notorious on-time record based on 2019 data).

to cover operating and maintenance expenses.<sup>8</sup> Amtrak's operating losses alone totaled \$29.8 million in 2019 and \$170.6 million in 2018 despite carrying record numbers of passengers.<sup>9</sup> The railroad's combined capital and operating subsidies totaled nearly \$1.9 billion in the year 2019.<sup>10</sup> Further, Amtrak has well-known struggles keeping the trains running on time.<sup>11</sup> Amtrak's chronic lateness is widespread: thirty-four out of forty-two Amtrak services failed to meet the statutory minimum of eighty percent on time, and many even failed to exceed an on-time percentage of forty percent.<sup>12</sup> The lack of cooperation from the freight railroads hosting the service makes any improvement unlikely.<sup>13</sup> These conditions have resulted in a severely degraded passenger rail service.<sup>14</sup> More importantly, however, Amtrak's operating conditions leave it with little credibility and deficient equipment and infrastructure.<sup>15</sup>

To serve the public interest and grow to fit its purpose, Amtrak needs help. It must be given some way to enforce its statutory right to preferred track usage to improve its trip times.<sup>16</sup> Although standards and

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8. See DAVID C. NICE, *AMTRAK: THE HISTORY AND POLITICS OF A NATIONAL RAILROAD* 17–26 (1998) (illustrating Amtrak's history of losses).

9. Luz Lazo, *Amtrak Touts Record Ridership, Revenue for Fiscal 2019*, WASH. POST (Nov. 8, 2019), <https://www.washingtonpost.com/transportation/2019/11/08/amtrak-touts-record-ridership-revenue-fiscal/> [<https://perma.cc/N9FS-9D4K>] (describing Amtrak's revenues and ridership in 2019 and 2018). Amtrak was seeking to run an operating profit in 2020 until the coronavirus pandemic began in the United States. *Id.*; Rachel Sandler, *Amtrak CEO Pleads for Federal Funding as COVID-19 Decimates Ridership*, FORBES (Oct. 21, 2020, 1:19 PM), <https://www.forbes.com/sites/rachelsandler/2020/10/21/amtrak-ceo-pleads-for-federal-funding-as-covid-decimates-ridership/?sh=7a2a06682da2> [<https://perma.cc/P9DP-MY2A>] (explaining how coronavirus pandemic has impacted Amtrak's financial position).

10. Lazo, *supra* note 9.

11. See Laitner, *supra* note 7 (describing on-time record of Amtrak's routes).

12. AMTRAK, *AMTRAK HOST RAILROAD REPORT CARD 2019*, at 2 (2019) [hereinafter *HOST RAILROAD REPORT CARD*] <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/HostRailroadReports/Amtrak-2019-Host-Railroad-Report-Card-FAQs.pdf> [<https://perma.cc/UPE3-WB7A>] (evaluating on-time performance for each of Amtrak's routes).

13. See *id.* at 3–4 (describing relationship between Amtrak and railroads whose track passenger trains run on).

14. See, e.g., David Peter Alan, *Amtrak's Traditional Dining Service Disappearing*, RY. AGE (Oct. 17, 2019), <https://www.railwayage.com/passenger/amtraks-disappearing-dining-cars/> [<https://perma.cc/2HJ2-DFRC>] (noting the once popular dining car train service is slowly being replaced or eliminated all together).

15. See *Amtrak State of Good Repair Backlog Tops \$33.3 Billion*, R.R. TRACK & STRUCTURES (Apr. 1, 2019), <https://www.rtands.com/passenger/intercity/amtrak-sogr-backlog-tops-33-3-billion> [<https://perma.cc/3P2Z-WKZL>] (describing deficient condition of Amtrak's infrastructure); see also AMTRAK, *AMTRAK FIVE YEAR EQUIPMENT ASSET LINE PLAN 3* (2018), <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/businessplanning/Amtrak-Equipment-Asset-Line-Plan-FY20-24.pdf> [<https://perma.cc/4EBE-WQTV>] (describing Amtrak's aging locomotive and railcar fleets); see also NICE, *supra* note 8, at 15 (explaining Amtrak's inability to gain credibility with public).

16. See FED. R.R. ADMIN., *CR-2008-076, ROOT CAUSES OF AMTRAK DELAYS*, at ii-v (2008) (describing role that freight railroads play in Amtrak delays and Amtrak's problems enforcing its preference rights).

enforcement by the Surface Transportation Board (STB) were both mandated by the Passenger Rail Investment and Improvement Act in 2008,<sup>17</sup> providing Amtrak a private right of action is the best alternative.<sup>18</sup> Without the ability to prioritize its usage of the tracks over that of freight trains, passenger trains are left waiting for slower freight trains.<sup>19</sup>

Part I will discuss the history and current state of Amtrak and the passenger preference, including why it has gone unenforced since 1973.<sup>20</sup> Part II will consider enforcement decision-making at the Department of Justice (DOJ) and in agencies like the STB.<sup>21</sup> Part III will examine the independent litigation authority that is normally given to agencies to solve DOJ nonenforcement problems to determine whether it would apply here.<sup>22</sup> Part IV will argue that Congress should grant Amtrak a private right of action to enforce its preference.<sup>23</sup>

## II. TRACK BULLETIN: THE STATE OF AMTRAK'S PASSENGER PREFERENCE

Congress created Amtrak in 1970 to take over intercity passenger-rail service from the ailing private railroad industry.<sup>24</sup> After years of financial losses on passenger services, railroads were allowed to shed their

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17. Passenger Rail Investment and Improvement Act of 2008, Pub. L. 110-432, §§ 207–09, 122 Stat. 4907, 4916–18 (requiring Federal Railroad Administration and Amtrak to set standards and metrics to measure performance and service quality of its trains); *see* Metrics and Minimum Standards for Intercity Passenger Rail Services, 85 Fed. Reg. 72,971, 73,000–02 (Nov. 16, 2020) (describing finalized metrics and minimum standards for performance measurement). The final rules are set forth at 49 C.F.R. §§ 273.1–273.11 (2020).

18. *See* discussion *infra* Part IV (asserting that Congress needs to adopt this alternative and laying out supporting rationale).

19. *See* discussion *infra* Section I.A (describing DOJ's historical failures to enforce Amtrak's right of way and its impact on Amtrak's on-time performance).

20. *See* discussion *infra* Part I (exploring Amtrak's history, origins of its passenger preference, and current systemic issues).

21. *See* discussion *infra* Part II (reviewing politics within decision-making process of DOJ and agencies).

22. *See* discussion *infra* Part III (explaining when Congress grants independent litigating authority and why it does so).

23. *See* discussion *infra* Part IV.

24. BEN GOLDMAN, CONG. RSCH. SERV., R45942, ISSUES IN THE REAUTHORIZATION OF AMTRAK 1 (2021), [https://www.everycrsreport.com/files/2021-01-05\\_R45942\\_e480db33b2ccf54fac85ba22587c82cc8b886a01.pdf](https://www.everycrsreport.com/files/2021-01-05_R45942_e480db33b2ccf54fac85ba22587c82cc8b886a01.pdf) [<https://perma.cc/3KFH-ZD7R>] (describing Amtrak's initial formation under Rail Passenger Service Act of 1970).

common-carrier<sup>25</sup> obligation to provide intercity passenger service.<sup>26</sup> In exchange, the railroads were obligated only to donate their passenger equipment to the endeavor and provide Amtrak's trains access to their rail lines.<sup>27</sup> Through this process, the railroads could avoid the lengthy abandonment procedures required by the Interstate Commerce Commission (ICC) and retain absolute control over the underlying rail infrastructure.<sup>28</sup> This compromise would be expanded a few years later to include preference rights for Amtrak trains on private rails—the very same preference rights at issue to this day.<sup>29</sup> The bleeding of these historical factors into Amtrak's present-day circumstances necessitates an examination of both periods.<sup>30</sup>

*A. Outbound Train: Government Undertaking Passenger Rail;  
Amtrak's Founding Era*

By the time Amtrak was formed in the 1970s, the railroad industry had

25. A common carrier is a company that

holds [itself] out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering [its] services to the public generally. The distinctive characteristic of a common carrier is that [it] undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant.

*Kieronski v. Wyandotte Terminal R.R. Co.*, 806 F.2d 107, 108 (6th Cir. 1986) (quoting *Kelly v. Gen. Elec. Co.*, 110 F. Supp. 4, 6 (E.D. Pa. 1953)). A common carrier is required to provide members of the public "transportation or service upon reasonable request." *GS Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998) (quoting 49 U.S.C. § 11101(a)). This duty holds railroads to "a higher standard of responsibility" than other businesses such that they cannot decline to provide services that are merely inconvenient or unprofitable. *Id.* (quoting *Gen. Foods Corp. v. Baker*, 451 F. Supp. 873, 875 (D. Md. 1978)). This is because the history of railroads in the United States makes them "quasi-public" in nature. *Ethan Allen, Inc. v. Me. Cent. R.R. Co.*, 431 F. Supp. 740, 742–43 (D. Vt. 1977). See 49 U.S.C. § 11101 (explaining statutory duties of a common-carrier railroad). See generally CONG. RSCH. SERV., R42512, PASSENGER TRAIN ACCESS TO FREIGHT RAILROAD TRACK 2–6 (2012), [https://www.everycrsreport.com/files/20120502\\_R42512\\_f4b70271c4824b20cce53d174112e2d7ff4b8163.pdf](https://www.everycrsreport.com/files/20120502_R42512_f4b70271c4824b20cce53d174112e2d7ff4b8163.pdf) [<https://perma.cc/MF66-KUT4>] for more information in this area.

26. See Charles A. Spitulnik & Jamie Palter Rennert, *Use of Freight Rail Lines for Commuter Operations: Public Interest, Private Property*, 26 TRANSP. L.J. 319, 321–25 (1999) (describing private railroads' common-carrier obligations and conditions of Amtrak's formation in context of those obligations and mounting financial losses).

27. See *id.* at 323 (documenting Congress's passage of Rail Passenger Service Act of 1970 that addressed railroads' unwillingness or inability to operate passenger services).

28. See *id.* at 323–25; Bradon J. Smith, Comment, *Changing Signals: A New Approach to the Enforcement of Rail Passenger Traffic Preference in Response to the Passenger Rail Investment and Improvement Act of 2008*, 38 J. CORP. L. 441, 447–48 (2013) (describing circumstances behind "break up" of passenger and freight services).

29. See FED. R.R. ADMIN., *supra* note 16, at 43 ("[T]he preference concept and the ability of the freight carriers to appeal to the Secretary [of Transportation] to address preference concerns was added by Congress in 1973, evidently in response to issues Amtrak faced in the first years of operations."); 49 U.S.C. §§ 24308(c), (f)(2) (providing Amtrak's statutory preference over freight traffic and for standards by which to judge freight railroads' honoring of that performance).

30. See *infra* Sections I.A, B (examining Amtrak's founding period and the historical and present circumstances of its preference rights, respectively).

been going through trying times for decades.<sup>31</sup> The rapidly changing landscape in American transportation led to marketplace upheaval and countless railroad bankruptcies.<sup>32</sup> Railroads began abandoning their passenger services whenever they could convince the ICC to allow a route's discontinuance.<sup>33</sup> The railroads became so eager to ditch passenger rail that they sabotaged the comfort and reliability of their own passenger services to discourage use, hoping to make a case to discontinue services based on the resulting passenger exodus.<sup>34</sup> These circumstances left U.S. passenger rail on its last legs and made clear the railroad's hostility to the service by the time of Amtrak's formation.<sup>35</sup>

When it created Amtrak, Congress recognized that continuing intercity passenger service was in the public interest.<sup>36</sup> In fact, Congress continues to recognize that Amtrak can help relieve traffic congestion, pollution, and fuel consumption.<sup>37</sup> However, Congress also recognized that the railroads, too, were gaining significant benefits from the arrangement and were highly unlikely to ever resume providing passenger service again.<sup>38</sup> As a result, the railroads were required to contribute money, equipment, and access to trackage in the bargain.<sup>39</sup> Furthermore, Amtrak was given the right to rail access for possible expansion in the future, so long as it came to an agreement with the host railroad or provided it with "just and reasonable" compensation.<sup>40</sup> Balancing the costs and the benefits, the bargain seemed fair enough to both sides and was soon signed into law.<sup>41</sup> Passenger preference was eventually added, giving Amtrak's passenger trains the right to preferred access to the tracks and to sideline freight

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31. See DONALD M. ITZKOFF, *OFF THE TRACK* 21, 28–29 (1985) (describing passenger rail's collapsing market share alongside mainstreaming of automobile and airline travel in United States).

32. See NICE, *supra* note 8, at 3–4 (noting that technological improvement to air transport and governmental spending focused on road travel showed rail travel as obsolete).

33. See ITZKOFF, *supra* note 31, at 79, 86–87 (describing rash of discontinuance petitions submitted to ICC).

34. See *id.* at 82–85 (explaining measures railroads took to self-sabotage, including reducing responsiveness to customers; stopping advertising and travel agents' commissions; neglecting facilities and equipment; and making passenger trains inconvenient by rescheduling them, causing delays, and splitting them into multiple connections).

35. See Spitulnik & Rennert, *supra* note 26, at 323 (explaining that only federal intervention saved passenger rail from complete dissolution).

36. See *id.* (explaining that Congress was concerned about losing passenger rail while grappling with congested airports and highways).

37. See 49 U.S.C. § 24101(a) (describing why Amtrak's existence is in the "[p]ublic convenience and necessity" of United States).

38. See Spitulnik & Rennert, *supra* note 26, at 324–25 (describing benefits to private railroads).

39. See *id.* at 324 (describing payments and trackage access provided at Amtrak's founding); Smith, *supra* note 28, at 447–48 (describing contributions of equipment to Amtrak's founding fleet).

40. Spitulnik & Rennert, *supra* note 26, at 324–25 (outlining ICC's determination that "just and reasonable" compensation "can not be greater than 'the incremental costs' of Amtrak's use of the railroad's facilities").

41. See *id.* at 325 ("This, to Congress and the railroads at the time, as well, was a fair trade.").



trains in its way.<sup>42</sup> Amtrak, however, was not given the ability to directly enforce their new right.<sup>43</sup>

To implement this compromise, Congress created a government corporation legally known as the National Railroad Passenger Corporation—doing business as Amtrak.<sup>44</sup> Thus, Amtrak is structured and operated as a private, for-profit corporation whose board of directors is appointed by the president of the United States and confirmed by the United States Senate.<sup>45</sup> Congress uses this system, here and elsewhere, due to the perception that corporations are more efficient than government and more effective at providing consumer goods and services.<sup>46</sup> Further, it is seen as a way to discipline government via the free market and protect from political interference the organization’s pursuit of the public interest.<sup>47</sup> Further, Amtrak cannot participate in regulating the freight railroads<sup>48</sup> and can generally represent itself in the courts.<sup>49</sup> Thus, the stage was set for Amtrak’s operation and continued sputtering along into the present day.<sup>50</sup>

### B. *Waiting for a Light: Amtrak’s Long Wait for Its Preferred Track*

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42. See 49 U.S.C. § 24308 (governing Amtrak’s access to private rail infrastructure, including the passenger preference).

43. See 49 U.S.C. § 24103(a)(1) (“[O]nly the Attorney General may bring a civil action for equitable relief in a district court of the United States when Amtrak or a rail carrier [violates or threatens to violate this part.]”).

44. See Goldman, *supra* note 24, at 1 (“Amtrak—legally the National Railroad Passenger Corporation—was created by the Rail Passenger Service Act of 1970[, Pub. L. No. 91-518, 84 Stat. 1327.] and began operating in 1971 . . . .”); see also 49 U.S.C. §§ 24301, 24302 (establishing Amtrak as a government-controlled corporation).

45. §§ 24301, 24302.

46. See A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 UNIV. ILL. L. REV. 543, 578–79 (discussing comparative advantage of using corporate form, particularly where program to be implemented is primarily commercial, potentially self-sustaining, and involves many commercial transactions with general public).

47. See Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 UNIV. PA. L. REV. 841, 888–89 (2014) (explaining that there may be additional efficiencies to corporate form coming from “market pressure or other factors,” including ability to shield organization from special-interest lobbying and influence).

48. *Compare* Ass’n of Am. R.R. v. U.S. Dep’t of Transp., 821 F.3d 19, 31–34 (D.C. Cir. 2016) (holding that Amtrak was self-interested and, thus, could not regulate other participants in railroad industry), *with* Lebron v. Nat’l R.R. Passenger Corp., 513 U.S. 374, 394 (1995) (holding that Amtrak is a government actor for constitutional purposes).

49. See, e.g., *Am. Premier Underwriters v. Nat’l R.R. Passenger Corp.*, 709 F.3d 584, 585 (6th Cir. 2013) (exemplifying Amtrak’s ability to represent itself in court); *VBR Tours, LLC v. Nat’l R.R. Passenger Corp.*, No. 14-cv-00804, 2015 WL 5693735 (N.D. Ill. Sept. 28, 2015) (illustrating Amtrak representing itself as a party in a court).

50. See Matthew Yglesias, *Amtrak Turns 45 Today. Here’s Why American Passenger Trains Are So Bad.*, VOX (May 1, 2016, 9:00 AM), <https://www.vox.com/2016/5/1/11539966/amtrak-45-anniversary> [<https://perma.cc/25Z3-6TAB>] (“The second question . . . is why passenger rail *outside* of the Northeast Corridor is so unimaginably awful.”); see also Guzman, *supra* note 7 (“We’ve been asked to settle for less in this country . . .”).

### *Usage*

Today's Amtrak is considered anything but successful.<sup>51</sup> Its services often run late.<sup>52</sup> It is unable to break even on costs, let alone make money.<sup>53</sup> And it lags far behind the passenger rail available in other developed nations.<sup>54</sup> Despite record ridership numbers,<sup>55</sup> there is consensus that Amtrak's performance needs significant improvement to meaningfully contribute to the American transportation ecosystem.<sup>56</sup> In addressing these issues, we must examine: (1) the failure of Amtrak's preference rights and its impact on the railroad<sup>57</sup> and (2) why recent steps taken to correct the problem fall short of a solution.<sup>58</sup>

#### 1. Continued Sabotage Through Denying Amtrak's Preferred Track Rights

Whether purposeful or not, the failure to enforce Amtrak's track preference over freight traffic is a significant impediment to its operations.<sup>59</sup> The lateness of Amtrak trains is well known to the general public, with Amtrak posting deficient on-time records despite having a significantly more generous standard than the airlines.<sup>60</sup> In 2019, nineteen of twenty-seven state-supported trains failed to meet an eighty percent on-time standard; all fifteen long-distance trains failed to meet the standard as

51. See Yglesias, *supra* note 50 (“[P]assenger rail *outside* of the Northeast Corridor is so unimaginably awful.”).

52. See HOST RAILROAD REPORT CARD, *supra* note 12, at 2 (showing Amtrak's abysmal on-time performance on most routes).

53. See Lazo, *supra* note 9 (reporting Amtrak operating losses of \$29.8 million in 2019 and \$170.6 million in 2018).

54. See Yglesias, *supra* note 50 (explaining why Amtrak service is “so unimaginably awful” in comparison to railroad systems in other countries such as France, Spain, China, and Japan).

55. See Lazo, *supra* note 9 (“Amtrak carried a record 32.5 million passengers in the 2019 fiscal year with record growth on the Northeast Corridor and state supporter lines . . .”).

56. See, e.g., Yglesias, *supra* note 50 (“It's not just that [Amtrak] services aren't the best in the world and don't deploy the most cutting-edge technology available. They are often truly abysmal, with travel times worse than what was possible 100 years ago.”); Guzman, *supra* note 7 (“[T]he nation needs to step it up as it lags behind Europe and China in rail safety and speed.”). See generally, e.g., Mike Pearl, *Could “Amtrak Joe” Revolutionize Public Transport?*, NEW REPUBLIC (Feb. 4, 2021), <https://newrepublic.com/article/161233/amtrak-joe-revolutionize-public-transport> [<https://perma.cc/M4JD-QCWS>].

57. See discussion *infra* Section II.B.1.

58. See discussion *infra* Section II.B.2.

59. See generally OFF. OF INSPECTOR GEN., NAT'L R.R. PASSENGER CORP., OIG-A-2020-001, TRAIN OPERATIONS: BETTER ESTIMATES NEEDED OF THE FINANCIAL IMPACTS OF POOR ON-TIME PERFORMANCE 3–4 (2019) [hereinafter OIG REPORT] <https://amtrakoig.gov/sites/default/files/reports/OIG-A-2020-001%20OTP%20mandate.pdf> [<https://perma.cc/HV6U-J55Q>] (explaining pattern of nonenforcement of Amtrak's preferred trackage rights and its impacts).

60. See Laitner, *supra* note 7 (“Across the country, Amtrak trains last year were on-time only 60% to 70% of the time . . . . In Michigan, the on-time rate was only 43%. . . . In air travel, a plane is considered ‘late’ . . . if it arrives 15 minutes or more after its scheduled time. Amtrak stretches that to 29 minutes.”).

well.<sup>61</sup> First, improving Amtrak's on-time percentage by five percent on each route would save the railroad \$12.1 million in operating costs in the first year.<sup>62</sup> Next, improving Amtrak's on-time percentage to seventy-five percent would save Amtrak \$41.9 million in operations costs annually and \$336 million in one-time capital expenditures.<sup>63</sup> Finally, an improvement in system reliability will cause Amtrak to regain credibility and increase ridership.<sup>64</sup>

Amtrak has been very clear in communicating this problem to the press, ridership, and freight railroads themselves.<sup>65</sup> Because of freight railroad dispatching practices and reductions in capacity, Amtrak is routinely sidelined in favor of slower freight trains.<sup>66</sup> The dynamic has poisoned the railroad's relationships with its host railroads, even causing arguments between lawyers about Twitter posts warning of train delays.<sup>67</sup>

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61. HOST RAILROAD REPORT CARD, *supra* note 12, at 2. There is some data available for 2020, but COVID-19 and a lack of 2020 report card prevents valid analysis. See *Reports and Documents*, AMTRAK, <https://www.amtrak.com/reports-documents> [<https://perma.cc/ZC97-ANJH>] (last visited Feb. 23, 2020) (hosting Amtrak's monthly and annual reports on host railroad performance); see also Sandler, *supra* note 9 (explaining the impact of COVID-19 on Amtrak's ridership, finances, and route schedule).

62. See OIG REPORT, *supra* note 59, at 5 ("This level of improvement would reduce operating costs by about \$8.2 million and increase ticket revenue by about \$3.9 million.")

63. *Id.* at 9. The on-time improvement produces these savings by reducing the number of on-call crew and crew bases needed, eliminating excess train equipment used to make up for systemic delays, minimizing overtime and crew penalties caused by poor on-time performance, and selling additional tickets by (1) opening up sales in areas currently not served and (2) increasing demand due to service improvement. *Id.* at 8–14.

64. See *id.* at 6, 14 (explaining that improved performance will increase revenues through increased popularity and service expansions); see also, e.g., Laitner, *supra* note 7 (serving as an example of Amtrak's poor reputation).

65. See, e.g., Laitner, *supra* note 7 ("Officials with [Amtrak] say that, if enough Americans contact their Congress members – and Amtrak's web site explains how to do that – that speedy passenger trains could regain the historic priority they once wielded over creeping freight trains . . . ."); OIG REPORT, *supra* note 59, at 1 ("On-time performance (OTP) of Amtrak's . . . trains has been a longstanding challenge for the company, which identifies poor OTP as a key factor driving its annual operating loss . . . ."); *Why Are Amtrak Trains Delayed by Freight Trains?*, AMTRAK NEWS, <http://blog.amtrak.com/2019/05/why-are-amtrak-trains-delayed-by-freight-trains/> [<https://perma.cc/BFT7-WSNF>] (last visited Feb. 23, 2021) (encouraging riders to call their congressperson about the problem).

66. See FED. R.R. ADMIN., *supra* note 16, at 3–9 (explaining impacts of freight railroad dispatching practices on Amtrak delays). While some of these causes are unintentional, such as inexperienced dispatchers or track maintenance, many others—such as preserving "network fluidity" and corporate cultures poisoned against Amtrak—are at least willful if not intentional. *Id.*

67. See Smith, *supra* note 28, at 449 ("Meanwhile, as Amtrak's relationship to the federal government took on an obligatory quality, the service's relationship with the new freight-only private railroads was hardly peaceful."); Letter from Garrett Urban, Gen. Att'y, Norfolk S. Corp., to William H. Herrmann, Senior Managing Deputy Gen. Counsel, Nat'l R.R. Passenger Corp. (Feb. 22, 2019), [https://www.wsj.com/public/resources/documents/NorfolkSouthernLettertoAmtrak2019.pdf?mod=article\\_inline](https://www.wsj.com/public/resources/documents/NorfolkSouthernLettertoAmtrak2019.pdf?mod=article_inline) [<https://perma.cc/KGA9-A3GD>] (demanding Amtrak remove Twitter posts blaming Norfolk Southern for train delays and cease future posting); Letter from William H. Herrmann, Senior Managing Deputy Gen. Counsel, Nat'l R.R. Passenger Corp., to Garrett Urban, Gen. Att'y, Norfolk S. Corp. (Mar. 6, 2019),

Amtrak's significant reliance on host railroads to operate most of its services makes this conflict existential for passenger rail, despite the beneficial role Amtrak plays by shouldering private railroads' common-carrier duty to provide passenger service.<sup>68</sup>

Despite this raging conflict, the passenger preference codified in Amtrak's authorizing statute has remained largely dormant.<sup>69</sup> Only the DOJ can enforce the passenger preference in court.<sup>70</sup> The DOJ initiated one enforcement action to protect Amtrak's rights in the 1979 case *United States v. Southern Pacific Transportation Co.*,<sup>71</sup> but even that case is unhelpful to any analysis because it settled before trial.<sup>72</sup> Further, there is some evidence that the prosecution was motivated by congressional interest.<sup>73</sup> This nonenforcement has been so extensive that Amtrak stopped collecting data on the cost impact of the delays because it demoralized the agency.<sup>74</sup> Because the DOJ has not enforced the law, Amtrak has requested independent litigating authority, and others have recommended placing jurisdiction elsewhere in the Department of Transportation.<sup>75</sup>

## 2. A Possible Solution in the Surface Transportation Board?

Amtrak can, in theory, enforce its passenger preference through the Surface Transportation Board.<sup>76</sup> Sections 207 and 213 of the Passenger

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[https://www.wsj.com/public/resources/documents/AmtrakResponsetoNorfolkSouthern2019.pdf?mod=article\\_inline](https://www.wsj.com/public/resources/documents/AmtrakResponsetoNorfolkSouthern2019.pdf?mod=article_inline) [<https://perma.cc/8YE5-NPJ8>] (responding to Norfolk Southern letter and refusing to remove posts).

68. See HOST RAILROAD REPORT CARD, *supra* note 12, at 3 (“Amtrak owns only 3% of the 21,400 route-miles traveled by Amtrak trains, primarily on the Northeast Corridor. The rest are mostly owned by freight railroads.”); see also Smith, *supra* note 28, at 451 (“Amtrak ha[s] previously acted more as a convenience for the freight companies, carrying a burden they had previously borne.”).

69. See FED. R.R. ADMIN., *supra* note 16, at 3–4 (noting that DOJ only brought an enforcement action once in preference law's entire history).

70. See 49 U.S.C. § 24103(a)(1) (vesting sole enforcement authority in Attorney General).

71. FED. R.R. ADMIN., *supra* note 16, at 3–4, 4 n.13.

72. *Id.* at 4 n.13. There is no judicial interpretation; thus, the railroads violate the law and claim to merely “interpret it differently.” *Id.* at 3–4, 4 n.13.

73. See, e.g., *Department of Transportation and Related Agencies Appropriations for 1981: Hearings Before the Subcomm. on the Dep't of Transp. & Related Agencies Appropriations of the H. Comm. on Appropriations*, 96th Cong. 656–57 (1980) (testimony on behalf of National Railroad Passenger Corporation).

74. See OIG REPORT, *supra* note 59, at 15 (“Executives and managers told us they have not updated the models because they do not think that the financial estimates alone are useful in improving OTP.”).

75. See Goldman, *supra* note 24, at 16 (“Amtrak has requested that a similar enforcement power be granted statutorily to Amtrak, going so far as to recommend specific bill language that would allow Amtrak to sue host railroads.”); FED. R.R. ADMIN., *supra* note 16, at 24 (“We recommend that the FRA Administrator [s]eek a legislative change that would provide Amtrak with the same right to appeal to the Secretary of Transportation to enforce its preference rights . . . [and s]eek a legislative change to expand the personal liability [of] dispatchers . . .”).

76. See Smith, *supra* note 28, at 450–51 (explaining new law's effects, particularly sections 207 and 213, which created standards and enforcement of the preference right).

Rail Reform and Improvement Act of 2008 (PRIIA) require the Federal Railroad Administration (FRA) to develop on-time standards for STB enforcement of the passenger preference.<sup>77</sup> Thus, the STB should be able to initiate an investigation on its own initiative or if it receives a request from Amtrak.<sup>78</sup> This would allow the STB to award Amtrak damages or other appropriate relief when a freight railroad is at fault.<sup>79</sup>

However, PRIIA has been largely ineffective since its passage as sustained litigation and industry hostility has rendered it unenforceable.<sup>80</sup> First, the freight railroads fought the rulemaking fiercely in its original notice-and-comment period in 2010.<sup>81</sup> Then, the railroads brought a constitutional claim that kept the law and its implementing regulations in court for nearly a decade, stalling enforcement.<sup>82</sup> As a result, the 2010 Metrics and Standards were vacated, and enforcement was delayed further while the FRA rewrote the rule and completed another round of notice and comment, causing Amtrak's then-pending claims before the STB

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77. Passenger Rail Investment and Improvement Act of 2008, Pub. L. 110-432, § 207, 122 Stat. 4848, 4916-17 (codified at 49 U.S.C. § 24101); § 213(a), 122 Stat. at 4925-26 (codified at 49 U.S.C. § 24308(f)(1)) (establishing passenger train performance standards).

78. See 49 U.S.C. § 24308(f)(1):

If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of the Passenger Rail Investment and Improvement Act of 2008 fails to meet those standards for 2 consecutive calendar quarters, the [STB] may initiate an investigation[. U]pon the filing of a complaint by Amtrak, . . . the Board shall initiate such an investigation . . .

The final rule sets the measurement of the on-time standard as “the percentage of all customers . . . who arrive at their detaining point no later than 15 minutes after their published scheduled arrival time, reported by train and by route.” 49 C.F.R. § 273.5(a)(1). This and other data, including the number of “certified schedules” between the railroads, station-based performance, train delays and running time, and other customer service and financial metrics, must be collected and reported. §§ 273.5, 273.7, 273.9.

79. See §§ 24308(f)(2), (f)(3) (describing STB's authority to award damages and other “reasonable and appropriate” relief upon a preference violation).

80. See, e.g., Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. 72,971, 72,973 (“[T]he 2010 Metrics and Standards were subject to a legal challenge on the basis that section 207 of PRIIA was unconstitutional. . . . As a result, in July 2019, FRA and Amtrak once again began the process of developing [them].”).

81. See Smith, *supra* note 28, at 452-53 (describing extensive comments submitted by freight railroad trade organization, Association of American Railroads (AAR)).

82. See *id.* at 454 (providing a basic explanation of AAR's claims); see generally *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43 (2015); *Ass'n of Am. R.R. v. Dep't of Transp.*, 896 F.3d 539 (D.C. Cir. 2018); *Ass'n of Am. R.R. v. Dep't of Transp.*, 821 F.3d 19 (D.C. Cir. 2016); *Ass'n of Am. R.R. v. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013), *vacated*, 575 U.S. 43 (2015); *Ass'n of Am. R.R. v. Dep't of Transp.*, No. 11-1499, 2017 WL 6209642 (D.D.C. Mar. 23, 2017), *rev'd* 896 F.3d 539 (D.C. Cir. 2018); *Ass'n of Am. R.R. v. Dep't of Transp.*, 865 F. Supp. 2d 22 (D.D.C. 2012), *rev'd* 821 F.3d 19 (D.C. Cir. 2016). Eventually, the U.S. Court of Appeals for the D.C. Circuit held that Amtrak's role in the rulemaking would be limited since it is a “self-interested party” that was tasked with regulating “competitors.” *Ass'n of Am. R.R.*, 821 F.3d at 34-36.

to be dismissed.<sup>83</sup> The final rule was issued on November 16, 2020, despite continued bickering among Amtrak and other interested parties.<sup>84</sup> The rule did take effect, however, and the established metrics began to apply in July 2021.<sup>85</sup>

For its part, Amtrak remains pessimistic about its ability to improve on-time performance without the authority to enforce its track preference in court. Amtrak's behavior makes this apparent upon even a cursory inspection. First, Amtrak has continued to push for litigating authority to allow it to enforce passenger preference on its own, resulting in a bill being introduced in 2019.<sup>86</sup> Second, Amtrak stopped tracking the financial impact of substandard on-time performance, believing it to be a threat to morale and ineffective at persuading stakeholders to cooperate.<sup>87</sup> Finally, Amtrak has continued fighting freight railroads in the rulemaking process, in court, in the press, and in federal reports.<sup>88</sup> Thus, despite enforcement authority in the DOJ and STB, the issues with on-time

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83. *Ass'n of Am. R.R.*, 896 F.3d at 551 (vacating on-time standards and severing offending clause from the PRIIA). *See generally* Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. 72,971, 72,971–73,002 (Nov. 16, 2020) (to be codified at 49 C.F.R. § 273) (explaining breadth of interested states, railroads, and other parties consulted in rulemaking process and addressing comments submitted to FRA); Nat'l R.R. Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd., Docket No. NOR 42141, Dec. ID 46360 (S.T.B. Apr. 13, 2018), <https://dcms-external.s3.amazonaws.com/MPD/62491/B823D813B68A924A8525826E004E40A2/46360.pdf> [<https://perma.cc/QTE3-RY7T>] (dismissing Amtrak's first-ever attempt to enforce its preference rights at the Surface Transportation Board without prejudice due to lack of on-time metrics); Nat'l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Co., Docket No. NOR 42134, Dec. ID 46382 (S.T.B. Apr. 13, 2018), <https://dcms-external.s3.amazonaws.com/MPD/62491/0447EE574F2B03DF8525826E004D8B39/46382.pdf> [<https://perma.cc/6YU6-SHJU>] (dismissing Amtrak's second attempt to enforce its preference rights without prejudice).

84. *See* Metrics and Minimum Standards, 85 Fed. Reg. at 73,000–02 (issuing final rules on passenger-preference metrics and standards); *see, e.g.*, Jim Blaze, *Amtrak vs. Freight Railroads: Shippers, You Are Impacted!*, RY. AGE (Nov. 26, 2019), <https://www.railwayage.com/regulatory/amtrak-vs-freight-railroads-shippers-you-are-impacted/?RAchannel=home> [<https://perma.cc/E8PY-Y3BU>] (attacking legislative attempts to buttress Amtrak's preference rights through additional legislation); Stephen Gardner, *Amtrak's Preference Rights Are Not New—Or Reason For Alarm*, RY. AGE (Dec. 16, 2019), <https://www.railwayage.com/passenger/intercity/amtraks-preference-rights-are-not-new-or-reason-for-alarm/> [<https://perma.cc/2LLM-F3G8>] (responding to concerns levied on behalf of shippers regarding passenger-preference enforcement).

85. *See* Metrics and Minimum Standards, 85 Fed. Reg. at 72,971, 72,979, 73,001 (addressing timeline for applying rules).

86. *See* GOLDMAN, *supra* note 24, at 16 (noting Amtrak's repeated requests for independent litigating authority); Rail Passenger Fairness Act, S. 2922, 116th Cong. (2019) (“A Bill [t]o permit Amtrak to bring civil actions in Federal district court to enforce the right . . . [of] rail passenger transportation preference over freight transportation in using a rail line . . .”).

87. OIG REPORT, *supra* note 59, at 15.

88. *See id.* (discussing Amtrak's efforts to persuade railroads to reduce delays for Amtrak trains); FED. R.R. ADMIN., *supra* note 16, at 3–19 (describing freight railroads' practices that contribute to Amtrak's issues and railroads' knowledge of them); Blaze, *supra* note 84 (discussing Amtrak's legislative efforts); Gardner, *supra* note 84 (responding to criticisms of Amtrak's legislative efforts); Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 45–46 (2015) (considering railroads' challenge to Amtrak's performance metrics and standards).

performance that have long contributed to Amtrak's stagnation are likely far from over—continuing to cause financial and credibility losses for U.S. intercity passenger rail.<sup>89</sup>

### III. BLOCKED CROSSING: ENFORCEMENT DECISIONS IN THE DOJ AND STB

Generally, there is no right to DOJ enforcement of federal law.<sup>90</sup> Further, the U.S. Supreme Court has said that an agency's decision not to prosecute a crime or regulatory violation is "committed to [its] absolute discretion" and is beyond judicial review.<sup>91</sup> An agency is expected to balance numerous factors when making enforcement decisions, using its expertise and accounting of its own resources to come to a proper conclusion.<sup>92</sup> As a result, the Court recognizes that the decision to take enforcement action is not adequately reviewable for judicial action.<sup>93</sup> The Court is even more hesitant to intervene where an agency decides not to use its coercive powers, finding that addressing an agency's lack of prosecutorial vigor is within the purview of Congress.<sup>94</sup> Agency decision-making on whether to enforce a statute is of paramount importance to policymakers and impacted members of the public.<sup>95</sup> Thus, this note addresses the factors impacting enforcement decisions at the DOJ and STB, respectively.<sup>96</sup>

89. See discussion *supra* Section I.B (describing Amtrak's chronic performance issues).

90. See *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Mich. v. Ashcroft*, 360 F. Supp. 2d 64, 68 n.5 (D.D.C. 2004) (first citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), then citing *Swift & Co. v. United States*, 276 U.S. 311, 331–32 (1928)) (discussing administrative prosecutorial discretion).

91. See *Heckler*, 470 U.S. at 831 ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

92. See *id.* at 831–32 (discussing considerations agencies weigh before deciding to enforce).

93. See *id.* at 831 ("This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement."). An agency is even able to decide to cease operating or enforcing a program should it determine that the action contradicts the intention of Congress in the relevant provision's passage. See *Pennsylvania v. Lynn*, 501 F.2d 848, 850–56 (D.C. Cir. 1974) (affirming discretion of Secretary of Housing and Urban Development to discontinue accepting, processing, and approving applications for federal subsidies under three different housing programs).

94. [W]e note that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review . . . . The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance.

*Heckler*, 470 U.S. at 832, 834.

95. See discussion *supra* Sections II.0, 0 (addressing different considerations impacting enforcement at DOJ and STB, respectively).

96. See *id.*

### A. Decision-Making at the Department of Justice

The DOJ has the same discretion as other federal agencies in deciding whether to bring an enforcement action under a federal statute.<sup>97</sup> This is undeniably a political issue.<sup>98</sup> Although this issue gained visibility in the last fifteen years of partisan warfare,<sup>99</sup> presidential administrations have used nonenforcement to accomplish political priorities predating President Obama's time in office.<sup>100</sup> In fact, agency architects have been concerned about political patronage in enforcement decisions for some time; in some cases, this has prompted the creation of independent agencies.<sup>101</sup> This concern is well-placed; much of federal regulatory enforcement will tend to disproportionately affect politically connected parties.<sup>102</sup> Thus, nonenforcement has clearly been recognized as a tool to reward political

97. See *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Mich. v. Ashcroft*, 360 F. Supp. 2d 64, 68 n.5 (D.D.C. 2004) (“Plaintiff’s request for a permanent injunction preventing in effect the Department of Justice from bringing an enforcement action is similarly an inappropriate pre-enforcement action.”).

98. See, e.g., Keith Ridler, *GOP Idaho Lawmakers Aim to Defund Party’s Attorney General*, ABC NEWS (Mar. 9, 2021, 12:19 PM), <https://abcnews.go.com/Politics/wireStory/gop-idaho-lawmakers-aim-defund-partys-attorney-general-76343273> [<https://perma.cc/F8JF-P9VR>] (explaining Idaho legislature’s decision to defund their AG and decentralize litigating authority because AG was attempting to “call balls and strikes” as opposed to taking political positions in litigation).

99. See, e.g., Zachary D. Clopton & David L. Noll, *How States Can Step In When Trump Doesn’t Enforce Laws*, POLITICO (June 18, 2019, 5:04 AM), <https://www.politico.com/agenda/story/2019/06/18/forced-arbitration-trump-administration-000925/> [<https://perma.cc/C9BY-ELFW>] (“It’s no secret that the Trump administration wants to ‘deconstruct’ the administrative state, in part by refusing to enforce federal laws designed to protect workers and the environment.”); Steve Friess, *Obama’s Policy Strategy: Ignore Laws*, POLITICO (June 16, 2012, 7:02 AM), <https://www.politico.com/story/2012/06/obamas-policy-strategy-ignore-laws-077486> [<https://perma.cc/8GFB-HE8Q>] (“Rather than pushing new laws through a divided Congress to enact his agenda, Obama is relying on federal agencies to ignore . . . laws that some of his important supporters . . . don’t like.”).

100. See, e.g., Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 280 (1993) (“The Bush and Reagan administrations, especially in challenging EPA authority to sue federal facilities, took issue with some preexisting decentralization arrangements. These arrangements were challenged as improper limitations on executive branch policy coordination . . . .”); Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 L. & CONTEMP. PROBS. 205, 217 (1998) (“[I]n response to the perceived failure of DOJ to represent [the] Federal Trade Commission . . . adequately, Congress granted the FTC independent litigating authority . . . .”).

101. See *Fed. Election Comm’n v. NRA Pol. Victory Fund*, 513 U.S. 88, 95–96 (1994) (first citing *Fed. Election Reform, 1973: Hearings Before the Subcomm. on Privileges and Elections and the S. Comm. on Rules and Admin.*, 93d Cong. 17, 177, 186 (1973); then citing *Fed. Election Campaign Act of 1973: Hearings before the Subcomm. on Comm’ns of the S. Comm. on Com.*, 93d Cong. 70–71 (1973)) (explaining Congress granted FEC independent status due to concerns that a president might not enforce election laws against his own party).

102. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 774 (1999) (“Yet a considerable amount of legislative activity potentially affects constituencies with real political clout (not to mention the legislators themselves).” “Powerful interest groups might indeed have important advantages when dealing with . . . centralized rule making or even adjudicatory authority.” *Id.* at 779.



constituencies or further policy priorities.<sup>103</sup>

However, there are nonpolitical concerns regarding nonenforcement of federal law as well.<sup>104</sup> For instance, some raise concerns that prosecutors may use their discretion to bring claims that are not meritorious or should not be resolved under a criminal statute if the law is too broad or vague.<sup>105</sup> On the other end of the spectrum, prosecutorial discretion has also been cited as a defense of the mechanical application of the law where the statute is vague and overbroad, or where the relevant conduct is not a substantial violation of the law.<sup>106</sup> A third concern, however, lies in the middle: prosecutorial discretion can result in a lack of meritorious enforcement of valid laws.<sup>107</sup> Among these sometimes-theoretical and sometimes-practical concerns, government attorneys are left to use their discretion to prioritize the government's allocation of prosecutorial resources.<sup>108</sup>

Because the executive branch has limited resources, the more relevant consideration is whether the enforcement decision is faithful to congressional intent in passage of the law.<sup>109</sup> It is true that the executive branch will often decide not to enforce the law in order to promote its own policy

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103. Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1121–22 (2015) (“Officials in the Reagan and Bush Administrations reduced enforcement in key areas of concern to their core constituents . . . . In several areas of core concern to his own constituents, President Obama has continued this pattern . . . .”). There can also be seemingly random differences in enforcement. See, e.g., R. Brent Wisner, *Politics of Enforcement: How the Department of Justice Enforces the Civil False Claims Act*, 17 GEO. PUB. POL’Y REV. 43, 58 (2012) (finding that Democrats pursue more cases against those defrauding the federal government than Republicans pursue).

104. See, e.g., Michael Kades, *Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin Department of Justice*, 25 AM. J. CRIM. L. 115, 115–116 (1997) (expressing concern that overzealous prosecutors could use vague laws to criminalize legal conduct or conduct best handled through the civil law).

105. See, e.g., *id.* (“Some fear that overaggressive prosecutors will use broadly worded statutes to turn ordinary, law-abiding citizens into criminals.”).

106. See, e.g., David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV’T L. REV. 159, 162–63 (2014) (discussing benefits of prosecutorial discretion when mechanical application of criminal statutes would result in punishments not commensurate with guilt).

107. See Kades, *supra* note 104, at 115–16 (describing concern that, because of prosecutorial discretion, white-collar crime could be “a forgotten stepchild” that is “ignored and underprosecuted, despite its threat”).

108. See *id.* at 117 (“In a world of limited resources, prosecutors must choose which violations to pursue; not every violation leads to prosecution.”); see also J. Richard Broughton, *Politics, Prosecutors, and the Presidency in the Shadows of Watergate*, 16 CHAP. L. REV. 161, 175–76 (2012) (explaining that ever-expanding universe of federal criminal law requires DOJ to prioritize which laws to enforce and which cases to press in court).

109. See Broughton, *supra* note 108, at 175–76 (noting continued expansion of federal law relative to resources available to enforce it); Price, *supra* note 103, at 1136–43 (acquiescing to presence of nonenforcement going forward but discussing underlying policy justification’s need to be consistent with congressional intent); see generally Peter M. Shane, *Faithful Nonexecution*, 29 CORNELL J.L. & PUB. POL’Y 405 (2019) (discussing faithful nonexecution of the law by executive branch agencies).

preferences or other values.<sup>110</sup> However, it is also a tool that can serve a variety of other purposes.<sup>111</sup> For example, an agency may not enforce the law where it believes the law is constitutionally suspect or that it may lack statutory authority.<sup>112</sup> It may also use nonenforcement to prioritize its use of limited resources or to increase overall effectiveness, given the ever-expanding United States Code.<sup>113</sup> However, obvious or blatant nonenforcement can backfire by incentivizing regulated entities or persons to flout the law because they know prosecution is unlikely.<sup>114</sup> Furthermore, the line between faithful and unfaithful nonenforcement is thin, hinging on hazy concepts such as transparency, clarity, and fidelity to legislative intent.<sup>115</sup> Thus, limited resources and the presence of other policy and political factors guarantee that the DOJ either cannot or will not enforce every federal statute.

### B. Regulatory Capture and the STB

Concerns regarding STB regulation of the railroad industry and passenger rail can be traced back to Interstate Commerce Commission (ICC).<sup>116</sup> The STB was created in 1996 by the Interstate Commerce Commission Termination Act of 1995, which abolished the ICC, the nation's original independent regulatory agency.<sup>117</sup> Congress abolished the agency after passing a string of new laws deregulating the transportation

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110. See Shane, *supra* note 109, at 423–27 (describing nonenforcement rationales of “Policy Resistance” and “Non-Program Values”); see also Rena Steinzor, *Regulatory Review, Biden Style*, REGUL. REV. (Feb. 15, 2021), <https://www.theregreview.org/2021/02/15/steinzor-regulatory-review-biden-style/> [<https://perma.cc/E3UK-6AUE>] (describing political and policy implications of regulatory review process throughout last three presidential administrations).

111. See, e.g., Shane, *supra* note 109, at 416–23 (describing nonenforcement decision due to doubts about a law's constitutionality, agency's legal authority, statutory waivers, or pragmatic resource and mission considerations).

112. *Id.* at 416–18.

113. *Id.* at 420–23.

114. See Price, *supra* note 103, at 1138 (“[T]he more public the nonenforcement policy, the stronger the signal to regulated parties that they may organize their behavior around the enforcement policy rather than the statute or regulation.”).

115. See *id.* at 1137–38 (describing how transparency, clarity, and central direction are “vices” for enforcement but “virtues” in other administrative contexts, illustrating these concepts' complexity).

116. See generally Anthony Johnstone, *Captive Regulators, Captive Shippers: The Legacy of McCarty Farms*, 70 MONT. L. REV. 239 (2009) (expressing concerns about regulatory capture of the STB in light of the ICC's history).

117. *Legal Resources*, SURFACE TRANSP. BD., <https://prod.stb.gov/resources/legal-resources/#legislation> [<https://perma.cc/SHH3-UZ3C>] (last visited Feb. 5, 2022) (“The STB is the successor agency to the Interstate Commerce Commission (ICC). Effective January 1, 1996, the ICC was abolished pursuant to the ICC Termination Act of 1995 (ICCTA).”). The ICC was the original agency regulating safety and economic issues regarding intercity buses, interstate trucking, and railroads. Scott Mall, *Flashback: The Story Behind the Once-Mighty Interstate Commerce Commission*, FREIGHTWAVES (Jan. 25, 2019), <https://www.freightwaves.com/news/economic/flashback-friday-interstate-commerce-commission-1> [<https://perma.cc/78R8-C5YZ>].

sector with the support of pro-deregulation commissioners.<sup>118</sup> By this point, however, the railroad industry had already captured the ICC.<sup>119</sup>

The ICC was created to regulate railroads at a time when farmers and other shippers were leveraging their political power to combat abuses in the marketplace.<sup>120</sup> However, the railroad industry started to support ICC regulation as the Commission began to serve as its protector and the attention of shippers began to wane.<sup>121</sup> Railroads and railroad industry publications eventually began to praise the commission and the cooperation between it and the industry.<sup>122</sup> The “bargain” was that the ICC would protect the railroads from competition and pricing reforms, in exchange for the industry protecting the ICC’s independence and advocating for its empowerment.<sup>123</sup> In this way, protecting the railroads and ensuring revenue adequacy displaced the ICC’s original goal of protecting shippers and the traveling public.<sup>124</sup>

More than twenty years after its creation, the STB may be showing indications of regulatory capture reminiscent of the problems at the ICC.<sup>125</sup> Some argue that shippers, which rely on the STB for rate

118. See Mall, *supra* note 117 (noting passage of Railroad Revitalization and Regulatory Reform Act of 1976, Motor Carrier Act of 1980, Staggers Rail Act of 1980, Bus Regulatory Reform Act of 1982, Trucking Industry Regulatory Reform Act of 1994, and other laws along with deregulatory actions by numerous presidents and “pro-deregulation ICC commissioners”).

119. See, e.g., Johnstone, *supra* note 116, at 266 (internal citation omitted) (“[S]o many economists . . . have denounced the ICC for its pro-railroad policies that this has become a cliché of literature.”); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 472 (1952) (“The present marasmus of the ICC is due to continued dependence upon railroad support.”). Regulatory capture, simply, can be defined as “when regulatory agencies become dominated by the very industries they were charged with regulating . . . .” John B. Taylor, *The Danger of Regulatory Capture*, POLICYED (Oct. 11, 2018), <https://www.policyed.org/intellections/danger-regulatory-capture/video> [https://perma.cc/BR2S-GXB6].

120. See Huntington, *supra* note 119, at 470–71 (describing early efforts in railroad regulation and formation of ICC).

121. See *id.* at 471–72 (“Continued reliance upon the old sources of support would have resulted in decreasing viability. Therefore[,] the Commission turned more and more to the railroad industry itself, particularly the railroad management group.”).

122. *Id.* at 473–74.

123. See *id.* at 474, 477, 481 (explaining railroads’ actions in support of ICC and resulting benefits they gained).

124. See Johnstone, *supra* note 116, at 266–67 (“[T]he Commission . . . assumed a duty to protect railroad interests . . .”).

125. See generally *id.*; see also ROSLYN LAYTON, THE SIGNS AND SYMPTOMS OF REGULATORY OBSOLESCENCE IN NETWORK INDUSTRIES 6–8 (2019), <http://www.aei.org/wp-content/uploads/2019/10/The-Signs-and-Symptoms-of-Regulatory-Obsolescence-in-Network-Industries.pdf> [https://perma.cc/6S23-L58L] (addressing regulatory capture in STB and Federal Communications Commission); see, e.g., Jennifer Pucci, Antitrust Law or ‘Public Interest’ Standard?: An Analysis of the Surface Transportation Board’s Approval of the Union Pacific-Southern Pacific Merger 2 (2006) (unpublished manuscript), [https://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/regulated\\_pdf/060518\\_Pucci\\_student\\_paper\\_Regulated.pdf](https://govinfo.library.unt.edu/amc/public_studies_fr28902/regulated_pdf/060518_Pucci_student_paper_Regulated.pdf) [https://perma.cc/7S8N-DFHY] (claiming that “political capture” caused STB to approve Union Pacific-Southern Pacific merger in violation of its public-interest mandate).

regulation, have captured the agency; others argue that it is the railroad who captured it.<sup>126</sup> Even others claim that there is no such capture.<sup>127</sup> The concern is that the relevant corporate interests and interest groups may gain control over the process due to its incredibly “sector-specific nature,” arcane processes, and lack of attention from scholars, policymakers, and the public.<sup>128</sup> Specifically, the deck may be stacked against shippers and in favor of freight railroads due to changes in the law and the probability that blame will fall to the STB should any railroad fail.<sup>129</sup>

Surface Transportation Board members are term-limited political appointees of the sole agency with the authority to economically regulate railroads.<sup>130</sup> Further, the STB’s responsibility for freight rail success or failure is cemented firmly by the requirement that it take the railroads’ “revenue adequacy” into account when making regulatory decisions.<sup>131</sup> To be sure, there are questions as to whether this purported trend has impacted Amtrak’s current relationship with host railroads and the STB.<sup>132</sup> However, the STB certainly has incentives to regulate the nation’s rails in a way that prioritizes freight railroad profits and shipper expenses over the public interest.<sup>133</sup> Therefore, both DOJ and STB enforcement create multiple ways in which politics and private interests can interfere with the enforcement of the law and attainment of Amtrak’s policy goals.

#### IV. TRACK WARRANT: INDEPENDENT AGENCY LITIGATION AUTHORITY

Agency control of federal litigation can often lead to intense political

126. See LAYTON, *supra* note 125, at 5 (arguing that railroad customers have sought increased influence over railroad ratemaking); Johnstone, *supra* note 116, at 266–72 (expressing concern that railroads have captured STB at the expense of captive shippers).

127. See Frank N. Wilner, *STB No Place for Transactional Decision-Making*, RY. AGE (Oct. 29, 2019), <https://www.railwayage.com/news/stb-no-place-for-transactional-decision-making/> [<https://perma.cc/CR9V-UYX5>] (claiming that shippers want to dissolve the STB because STB is more friendly to railroad mergers than DOJ could be).

128. See LAYTON, *supra* note 125, at 6–7 (explaining dynamics of railroad regulation that foster capture).

129. See Johnstone, *supra* note 116, at 266–68 (“The Commission’s and Board’s institutional tendency toward regulatory capture is exacerbated not only by an ambivalent mission to protect railroads alongside shippers, but also by the complexity of the regulatory structure put in place to execute that mission.”).

130. See 49 U.S.C. §§ 1301(b)(1), (b)(3) (describing appointment of board members and their terms of service); see also 49 U.S.C. § 10501 (laying out STB’s jurisdiction regarding railroads).

131. 49 U.S.C. §§ 10701, 10704 (establishing criteria for economic regulation of railroads subject to STB jurisdiction).

132. See, e.g., Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Can. Nat’l Ry. Co., Docket No. FD 35743, Dec. ID 46869, at 7–25 (S.T.B. Aug. 19, 2019), <https://dems-external.s3.amazonaws.com/MPD/62491/E47A735A456867418525845100545A39/46869.pdf> [<https://perma.cc/VL4C-6MFS>] (providing fair and equal treatment to Amtrak and Canadian National’s claims in a contractual dispute over on-time and other performance terms without indicating a bias).

133. See generally Johnstone, *supra* note 116.

fighters with significant consequences.<sup>134</sup> Such tension can be seen in the DOJ, where centralizing supervision in Washington, D.C., serves to increase the influence of the president's political and policy priorities on enforcement decisions.<sup>135</sup> Thus, Congress has worked to keep the DOJ decentralized despite executive attempts to rein in control.<sup>136</sup>

The political implications of centralized litigation authority also exist in the dynamic between the DOJ and other federal agencies.<sup>137</sup> The DOJ, by default, handles all litigation involving the federal government and its constituent agencies unless Congress specifically decides otherwise.<sup>138</sup> The DOJ has fought hard to retain as much of this centralization as possible, claiming it is necessary to coordinate the government's litigation positions, assure presidential oversight, and allow objective lawyers to make filing decisions.<sup>139</sup> The executive branch's zealotry in defense of this centralization has far outstripped congressional desires to lessen presidential control via independent litigating authority.<sup>140</sup> However, Congress has still found it necessary to award independent litigating authority where DOJ enforcement was lacking.<sup>141</sup> With this background, the following sections will discuss the motivations for congressional grants of independent litigating authority and the costs and benefits of granting agencies such authority.<sup>142</sup>

#### A. *Advancing Public Policy: Why Agency Litigation Authority?*

Over the years, Congress has given a handful of agencies independent

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134. See generally Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087 (2008) (discussing battle between legislative and executive branches regarding centralized control of DOJ litigation).

135. See *id.* at 2094 (explaining that legislative efforts to increase DOJ centralization would increase presidential and attorney-general influence).

136. See *id.* at 2107–09 (“Indeed, the interesting part is not the reaction of a newly elected Democratic Congress to the Bush administration’s centralization efforts but the prior acquiescence of Republican legislators.”).

137. See generally Devins & Herz, *supra* note 100 (describing dynamic between executive branch’s desire for centralized control and Congress’s occasional desire to grant other agencies litigating authority).

138. See 5 U.S.C. § 3106 (“[T]he head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation, . . . but shall refer the matter to the Department of Justice.”); 28 U.S.C. § 516 (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice . . .”).

139. See *The Attorney General’s Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 54 (1982) [hereinafter *The Attorney General’s Role*].

140. See Devins & Herz, *supra* note 100, at 218–22 (discussing differences in intensity between presidential preferences and congressional preferences).

141. See *id.* at 217–18 (explaining Federal Trade Commission’s acquisition of independent litigating authority in 1975 through FTC Improvements Act).

142. See discussion *infra* Section III.A (discussing motivations and benefits for granting agencies independent litigating authority); see also discussion *infra* Section III.B (discussing costs and disadvantages of granting agencies independent litigating authority).

litigating authority to enforce some or all of their statutes.<sup>143</sup> Agencies where independence is seen as having some value—such as the Federal Trade Commission, the Consumer Financial Protection Bureau, the Federal Communication Commission, and the United States Postal Service—received statutory authority to represent themselves in court to varying degrees.<sup>144</sup> Often, this litigation authority stems from a specific battle in an agency’s history.<sup>145</sup> The primary benefits are: (1) a desire to limit the role that politics plays in policy-making, and (2) valuing litigators with greater subject-matter expertise.<sup>146</sup>

### 1. Agency Independence from Politics and the Executive

The most obvious reason Congress grants agencies litigating authority is to insulate them from presidential or, more broadly, executive control.<sup>147</sup> Congress can do this for a variety of reasons. Congress may desire a greater role in oversight of the agency’s actions or areas of expertise for itself.<sup>148</sup> Congress could wish to reduce the influence of politics on enforcement of the agency’s statutory or regulatory program.<sup>149</sup> Finally, Congress could want to ensure that the policy preferences of the executive do not override those of Congress at the time or when the relevant

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143. See Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 920–21 (2014) (describing how independent litigating authority fits into construction of boundary agencies).

144. See *id.* (discussing differences in litigating authority for boundary agencies). For instance, some agencies have complete authority to litigate independently, while others may only do so until a case reaches the U.S. Supreme Court. See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 278 (1994) (describing boundaries between agency and solicitor-general authority in independent-agency litigation).

145. See, e.g., O’Connell, *supra* note 143, at 921 (describing how the USPS received independent litigation authority).

146. See discussion *infra* Sections II.A.1, A.2 (surveying these advantages).

147. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 801–02 (2013) (“The effect of independent litigation authority is a degree of insulation from executive control.”). *But cf.* KTVB Staff & Keith Ridler, *House Oks Bill to Let Agencies Bypass Idaho Attorney General*, KTVB7 (updated Feb. 25, 2021, 3:45 PM), <https://www.ktvb.com/article/news/local/208/bill-to-bypass-attorney-generals-lawyers-advances-to-idaho-house/277-72b19c50-5a65-4a92-aebe-fe392800b4ac> [<https://perma.cc/S9YU-BC3X>] (“The bill removes a requirement that outside attorneys be screened by the attorney general and a board of statewide-elected officials . . . . Supporters of the legislation contend the attorney general’s office frequently interprets the law contrary to the opinion lawmakers want to hear, and agencies should be able to shop around for lawyers.”).

148. See Datla & Revesz, *supra* note 147, at 801 (“Centralized litigation control increases agency independence from Congress . . . [which has] little control over the DOJ’s budget or decision making.”).

149. See Fed. Election Comm’n v. NRA Pol. Victory Fund, 513 U.S. 88, 95–96 (1994) (“Congress’ decision . . . to charge [the FEC] with the civil enforcement of the FECA was undoubtedly influenced by Congress’ belief that the Justice Department, headed by a Presidential appointee, might choose to ignore infractions committed by members of the President’s own political party.”); see, e.g., Devins, *supra* note 144, at 276–77 (describing how solicitor general contorted government’s position in *Bob Jones University v. United States* based on politics).

statute was enacted.<sup>150</sup>

The Environmental Protection Agency (EPA) is one example illustrative of this concern.<sup>151</sup> The saga began with the EPA's formation in the 1970s, when Congress provided the agency with authority to litigate if the DOJ was unable or unwilling to represent it under the Clean Air, Clean Water, or Safe Drinking Water Acts.<sup>152</sup> As the decade wore on, however, the DOJ gained a reputation for dragging its feet on environmental cases outside those arenas, refusing to consult with the EPA and creating bad caselaw.<sup>153</sup> In contrast, the EPA had shown itself a competent enforcer and capable of independence amidst consistent congressional expansion of its role.<sup>154</sup> Congress, thus, became concerned that DOJ was providing poor representation and lacked "sufficient enforcement enthusiasm."<sup>155</sup> However, disagreement between the agencies and an intra-congressional turf battle led to inaction.<sup>156</sup>

These problems have continued since—through the 1980s and 1990s and into the present day.<sup>157</sup> The 1980s saw renewed proposals for general EPA litigating authority because the DOJ earned a reputation for pressuring the EPA to invoke executive privilege before Congress and failing to act in prominent cases.<sup>158</sup> These efforts, however, stalled due to Congress's suspicion of the Reagan administration's good faith in control of the agency.<sup>159</sup> In the 1990s, Congress worried that Main Justice was stifling local U.S. Attorneys' attempts to prosecute environmental

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150. See, e.g., Devins, *supra* note 100, at 280–81 (explaining the Reagan and Bush administrations' battles regarding EPA's authority to police federal agencies' facilities and their impact on environment). It should be noted, however, that Congress still needs to be invested in the Agency's mission and willing to police the boundaries it draws for the strategy to work. See *id.* at 285–96 (discussing how Congress failed to prevent Equal Employment Opportunity Commission from becoming politically subservient to DOJ).

151. See Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1349–60 (2000) (recounting history of negative relations between EPA and DOJ dating back to 1970s).

152. See *id.* at 1350–51 (discussing EPA's litigating authority under respective laws passed in 1970, 1972, and 1974).

153. See *id.* at 1352–54 (describing attacks on DOJ environmental litigation during consideration of the Clean Air Act's 1977 Amendments).

154. See *id.* at 1353–54 (discussing how EPA attorneys and experts had superior knowledge allowing them to successfully litigate).

155. See *id.* ("In short, the backers of this provision were concerned about two recurrent issues: (1) they felt that poor DOJ representation was resulting in court losses, and (2) they felt that a lack of sufficient enforcement enthusiasm was resulting in important, winnable cases simply not being brought.").

156. See *id.* at 1354 ("[R]esistance came from the Senate Judiciary Committee, which did not want to reduce its oversight responsibilities by narrowing DOJ control of litigation.").

157. See *id.* at 1355–59 (describing continued battles about EPA's enforcement authority).

158. See *id.* at 1355–57 (discussing Congress's efforts to confer litigating authority to EPA with Resource Conservation and Recovery Act).

159. See *id.* at 1355–56 ("[B]ad blood between the Congress and the EPA helped force Burford, Lavelle, and twenty other Reagan appointees to leave the EPA in disgrace.").

crimes.<sup>160</sup> Thus, there was a concern that the EPA's lack of litigating authority could undermine its regulatory program.<sup>161</sup> This concern and the realities behind it have artificially limited the EPA to administrative enforcement and remedies in order to avoid political interference and the DOJ's inadequate representation and plain refusal to bring winnable cases.<sup>162</sup> The dynamic can make the case for providing EPA with independent litigating authority in future legislation.<sup>163</sup>

## 2. A Need for Specialized Litigators and Enforcers

Lawyers in a government agency generally have different views from those on the outside.<sup>164</sup> In this way, requiring an agency to have outside counsel puts it in a vulnerable position: making the agency dependent on the DOJ to represent it in court.<sup>165</sup> The DOJ's own priorities in an area or on a topic can cause the agency's subject-matter priorities to take a back seat.<sup>166</sup> However, the subject matter can, in itself, cause problems in DOJ representation.

An agency's own attorneys—who both write the regulations and work under them and the relevant statutes every day—certainly have more subject-matter knowledge than a DOJ attorney unfamiliar with the area.<sup>167</sup>

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160. *See id.* at 1357–58 (“The subcommittee’s essential concern was that political pressures to go easy on polluters were being applied to officials in Main Justice, who in turn were undermining the enforcement efforts of line attorneys and the U.S. Attorneys’ Offices. . . . There followed almost three years of hearings, investigatory interviews, exchanges of letters, reports, subpoenas, threats, and bluster.”).

161. *See id.* at 1359–61 (“Let us start with a strong hypothesis: DOJ representation actually does harm to the agency’s program. DOJ attorneys will decline to pursue winnable cases, will make litigating errors, and will disrupt agency decision-making in ways that will predictably weaken and dilute agency initiatives.”). Further, the impression continues that politics is playing a role in the stifling EPA enforcement priorities. *See id.* at 1359 (“Except for the Carter and Clinton Administrations, the EPA has for its entire history been implementing essentially Democratic statutes for a Republican president.”).

162. *See id.* at 1361–71 (discussing impacts of DOJ’s hesitance to enforce environmental laws in many cases).

163. *See generally id.* Though it should be noted that the authors stop short of this recommendation and claim that “careful consideration of context and the importance of effective and mutually considerate working relationships” are the more-important takeaways. *Id.* at 1374–75.

164. *See, e.g.,* Devins & Herz, *supra* note 100, at 205–06 (“For agency lawyers, our project was a breath of fresh air—a chance to extol their underutilized litigation skills and vent frustration at DOJ. For some DOJ officials, our project was an invitation to disaster. . . . In the halls of Congress, however, staffers . . . wondered why two law professors would invest so much energy in a project that held so little interest.”).

165. *See* Devins, *supra* note 144, at 317 (“Supporters of Solicitor General control of government Supreme Court litigation most commonly argue that the Solicitor General’s screening of governmental cases ‘guard[s] the door to the Supreme Court, to make sure that only the most important cases are appealed.’”).

166. *See, e.g., id.* at 270–71 (explaining differences between DOJ’s and FTC’s position in specific cases and how division of litigation authority caused it to play out).

167. *See* Proceedings of the Fortieth Annual Judicial Conference of the District of Columbia Circuit, 85 F.R.D. 155, 171–72 (1979) (“[A]n agency lawyer who has worked on a regulation since



They know why a regulation exists, the real-world situations in which it is applied, and the reasoning of their own agency with much greater certainty.<sup>168</sup> Thus, the desire to leave certain, specific subjects to the experts has resulted in the creation of specialized courts and special litigation authority in agencies like the Internal Revenue Service.<sup>169</sup> Indeed, agency attorneys will go so far as to say the DOJ does not understand the needs of their agency clients.<sup>170</sup> Further, the agencies are unable to remedy the issues they see because they are captive clients with nowhere else to go.<sup>171</sup>

Others claim that the agencies are not receiving deficient representation.<sup>172</sup> This can mean the agencies are simply frustrated at the inability to pursue their selfish or parochial interests—e.g., tunnel vision,<sup>173</sup>—or that any deficiencies are not significant enough to actually impact the result of any individual case.<sup>174</sup> In a similar vein, the lack of subject-matter expertise could simply be a trade-off for the net positive of having a “firm” of litigation specialists handling your case.<sup>175</sup> However, those who think this lack of technical expertise has little practical impact still acknowledge its existence.<sup>176</sup> Thus, desires to insulate programs from political influence and emphasize agency expertise in regulatory enforcement are the motives and benefits that overcome the costs of decentralization when an agency is granted its own independent litigating authority.

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its inception or has worked on a program for a number of years simply knows more about it and knows more about the needs that gave rise to it, the policies that it reflects, and the practical problems that arise in its implementation, than does his counterpart in the Department of Justice.”).

168. *See id.* (noting agency lawyers’ advantage over those from DOJ).

169. *See* Devins, *supra* note 144, at 269 (identifying limits on DOJ’s litigating authority).

170. *See* Barbara Allen Babcock, *Defending the Government: Justice and the Civil Division*, 23 J. MARSHALL L. REV. 181, 185–86 (1990) (“Agency lawyers charged that Justice Department lawyers did not understand the programs and needs of the clients.”).

171. *See id.* at 185 (“The Civil Division lawyers, however, almost always *do* have an identifiable client . . . an agency whose programs are at issue in litigation . . . Civil Division clients differ from individual and corporate clients, however, because they are captives.”).

172. *See* Herz & Devins, *supra* note 151, at 1361–63 (“Our own concededly impressionistic sense is that agency losses, when they occur, are rarely the consequence of a lawyer’s error of a sort that a DOJ lawyer would make and an agency lawyer would avoid.”).

173. *See* Babcock, *supra* note 170, at 185 (“Like private clients, they require soothing and hand-holding, expect miracles from their lawyers, and are often totally selfish in their outlook.”). Babcock further claimed that her tenure at the DOJ “was not an ideal [time] to urge the idea that the government lawyer should represent interests beyond the immediate goals of the client agency.” *Id.* at 187.

174. *See* Herz & Devins, *supra* note 151, at 1362 (“But are the agencies losing cases they should not be? In fact, probably not.”).

175. *See id.* at 1362 (“After all, DOJ attorneys are pretty good and the government wins most of its cases. And while DOJ may not seek the help of agency attorneys as often as it should, it can and does seek such assistance.”); Babcock, *supra* note 170, at 186 (“I found myself often arguing that litigators are better at translating the technical concerns of the agencies to the fact-finders precisely because they are *not* experts in the programs.”).

176. *See* Herz & Devins, *supra* note 151, at 1362 (acknowledging DOJ’s lack of subject-matter expertise but claiming that it likely has little practical impact).

*B. Fighting and Fiefdoms: Drawbacks to Decentralized Litigation Authority*

As explained above, the DOJ is the default litigating agency for the United States.<sup>177</sup> Congress enacted statutes creating this state of affairs—implying Congress presumably saw value in concentrating litigation authority.<sup>178</sup> The most frequently cited benefits to centralized litigating authority are: (1) coordination of the government’s proceedings and litigating positions, (2) facilitation of executive supervision, and (3) specialization of the government’s litigation function.<sup>179</sup> These principal benefits are discussed below.

1. Unifying the Fiefdoms: Coordinating Among the Agencies

The first benefit to centralization is that it allows the attorney general to coordinate the litigation of client agencies.<sup>180</sup> This allows the attorney general, through the DOJ, to consider legal issues in light of the best interests of the federal government as a whole, rather than merely in relation to the interests of an individual agency.<sup>181</sup> The DOJ can reconcile disagreements between the agencies and ensure the federal government has uniform positions on issues recurring in numerous contexts.<sup>182</sup> Further, the DOJ uses this consistency to assure equal protection to parties subject to regulation and provide the government credibility in litigation.<sup>183</sup> Thus, the DOJ and its supporters argue that there is a need for

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177. *See generally* The Attorney General’s Role, *supra* note 139 (describing and defending DOJ’s historic status).

178. *See id.* at 51–53 (outlining statutory basis for DOJ’s position as default litigator, primarily under 5 U.S.C. § 3106 and 28 U.S.C. §§ 515–16, 519).

179. *See id.* at 54–55 (“The policy considerations which support the centralization of federal litigating authority in the Department of Justice, under the supervision of the Attorney General, are many.”).

180. *See id.* at 54 (“In this way, the Attorney General is better able to coordinate the legal involvements of each ‘client’ agency with those of other ‘client’ agencies, as well as with the broader legal interests of the United States overall.”).

181. *See id.* (“It is [DOJ’s] responsibility to ensure that the interests of the United States as a whole . . . are given a paramount position over potentially conflicting interests between subordinate segments of the government . . .”).

182. *See* Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 192–94 (“The potential for conflict is most obvious when two or more agencies disagree on a particular legal or policy question. . . . A similar type of conflict can arise when an agency adopts a position on a legal issue that will recur in many different contexts—e.g., a procedural rule involving the requirements for pleading.”); *see, e.g.*, Devins, *supra* note 144, at 270–71 (describing conflicts between Federal Trade Commission, the DOJ Antitrust Division, and Solicitor General).

183. *See* Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 572–73, 575–76 (2003) (describing possibility that different agencies may regulate same problem differently without coordination and government’s resulting loss of credibility before the courts).

centralized litigating authority for consistency's sake.<sup>184</sup>

## 2. Transparency Through Centralization: Executive Supervision of Litigation

The next frequently cited benefit to DOJ control over most or all federal litigating authority is that it centralizes the responsibility in a place closer to the president.<sup>185</sup> Since Franklin Roosevelt, presidents have recognized the importance of centralized litigation authority in their control over the administrative state.<sup>186</sup> The president receives numerous benefits from this control.<sup>187</sup> First, this control allows the president to intervene in disputes between executive agencies to ensure that the administration puts forward the president's view of the public good.<sup>188</sup> This allows the president to ensure some level of coordination among agency heads.<sup>189</sup> Second, the universal, or near-universal, nature of the control allows a measure of executive power over independent agencies.<sup>190</sup> Although a president would be unable to control the decisions of an independent agency or remove its officials, he retains influence through his ability to direct the DOJ's representation of the agency.<sup>191</sup> Thus, DOJ control allows the president to better exercise policy preferences as the nation's elected executive.<sup>192</sup>

The common relationship between the president and the attorney

184. See The Attorney General's Role, *supra* note 139, at 54–55 (justifying centralization of litigating authority in DOJ based on policy considerations).

185. See *id.* at 54 (“[T]he centralization of authority and supervision over federal litigation in the Department of Justice [allows] . . . the facilitation of presidential supervision, through the Attorney General, over Executive Branch policies that are implicated in litigation . . .”). However, it should be noted that litigation before the Supreme Court may be the exception at times due to the traditional independence of the Solicitor General from presidential and DOJ control. See Lemos, *supra* note 182, at 213–22 (explaining Solicitor General's accountability to and independence from head of executive branch); but see Devins, *supra* note 144, at 260 (“However, the Solicitor General is the Executive Branch's advocate before the Supreme Court, and his loyalty properly belongs to the Attorney General and the President.”).

186. See Devins & Herz, *supra* note 100, at 219 (“By centralizing litigation authority in a single department, Roosevelt sought to strengthen his hold on the burgeoning administrative state.”).

187. See *id.* (“In part, just as decentralized arrangements bolster congressional power, the President benefits from centralization.”).

188. See *id.* (“These individuals have different visions of the social good, serve different constituencies, and are subject to different oversight committees.”).

189. See *id.* (“Departmental and executive agency heads . . . are rarely appointed to help put into place a coordinated White House-driven vision of some public policy objective.”).

190. See Devins, *supra* note 100, at 278 (“Intuitively, administrators and commissioners, secure in their offices, are better able to defy Executive wishes and assert independent authority.”).

191. See Devins, *supra* note 144, at 287–88 (“The President apparently lacks the power to remove commissioners of whose conclusions he disapproves, but he is free to tell the commissioners' lawyer, the Solicitor General, whether the agencies' cases shall be pursued before the Supreme Court and how they shall be presented before the Court.”).

192. See Devins & Herz, *supra* note 183, at 577–79 (explaining how DOJ control of litigation can be used as a “perverse” method for controlling agency policymaking, though expressing doubts as to its relative significance as opposed to other means of control).

general likely bears out the DOJ's importance to presidential control.<sup>193</sup> In most administrations, the attorney general is considered "a close confidante" of the president, serving as both a policy and a legal advisor.<sup>194</sup> The DOJ has gone on the offensive to contest agencies' independent litigating authority where possible.<sup>195</sup> Further, the DOJ has made decisions in defending its "client" agencies that serve to save the presidential administration embarrassment where public reaction is fiercely hostile.<sup>196</sup> Reframed, these observations can be said to demonstrate the added democratic accountability resulting from DOJ control of litigation and resulting responsiveness to public concerns.<sup>197</sup> Thus, the phenomenon of DOJ centralization is said to promote transparency, accountability, and responsiveness in the administrative state.<sup>198</sup>

### 3. Expertise Through Specialization: Centralization for Better Results

The final benefit often cited is the expertise the DOJ gains through its status as the primary federal litigator and the advantages that accrue to agencies utilizing the DOJ's expertise.<sup>199</sup> This has been expressed in a number of ways. First, some say that the impact comes from the DOJ's function as a fresh set of eyes that can see new approaches and screen out bad cases.<sup>200</sup> Second, the DOJ is said to possess significantly better litigation skills resulting from its expertise, benefitting client agencies

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193. See, e.g., Devins, *supra* note 144, at 266–67 (describing efforts of Carter and Reagan Justice Departments to control federal litigation, including the Reagan DOJ's fight against Equal Employment Opportunity Commission).

194. See *id.* at 282–83 (discussing Attorney General's role as "a legal and policy advisor to the President"); Devins & Herz, *supra* note 100, at 219 ("Unlike most agency and department heads, the Attorney General is usually a close confidante of the President, in many cases someone who was active in the President's political campaign and possesses deep personal loyalty to the President.").

195. See generally Devins, *supra* note 100 (describing numerous conflicts between DOJ and independent agencies regarding litigation authority).

196. See Devins, *supra* note 144, at 276 (describing DOJ and Treasury Department decision-making in *Bob Jones University v. United States*, 461 U.S. 574 (1983)).

197. See, e.g., *id.* (explaining that DOJ asked that an adverse attorney be appointed to argue *Bob Jones University* due to public outcry at federal government's refusal to defend the nondiscrimination provision at issue).

198. See *The Attorney General's Role*, *supra* note 139, at 54–55 (defending DOJ's centralized litigation authority).

199. See Lemos, *supra* note 182, at 188 ("In part because of its repeat-player status, and in part because of the talent and expertise of its staff, the Office of the Solicitor General enjoys tremendous success before the Supreme Court. The SG is far more successful than other litigants . . .").

200. See Babcock, *supra* note 170, at 186 ("[L]itigators are better at translating the technical concerns of the agencies to the fact-finders precisely because they are *not* experts in the programs. A fresh eye, independent look, the ability to ask and answer the basic questions—these are the skills of the Department of Justice . . ."); Herz & Devins, *supra* note 151, at 1366–67 ("The fact that the EPA is not always as careful or workmanlike in its referrals as it might be can be offered as a reason for DOJ supervision and control of litigation; stated in the extreme, the EPA has shown that it lacks the self-discipline and professionalism to litigate on its own.").

through its litigation prowess.<sup>201</sup> Finally, the DOJ is said to attract more talented and qualified attorneys than other agencies due to its prestige and the amount of interesting, varied legal work.<sup>202</sup> Supporters of DOJ control of agency litigation will say that the DOJ simply has numerous practical advantages over its “clients” attorneys.<sup>203</sup>

There are detractors from this view of centralization’s advantages.<sup>204</sup> For example, it can be said that the DOJ’s prestige, talent, and expertise could be acquired by other agencies if they were allowed to litigate their entire caseload regularly and build a litigation division.<sup>205</sup> Agencies may refer borderline cases because they know the DOJ will vet them again regardless of their efforts.<sup>206</sup> Nonetheless, there is insufficient experience or study to say with certainty whether the DOJ supporters or detractors are correct.<sup>207</sup>

Scholars and practitioners have weighed DOJ-controlled and agency-controlled litigation systems for some time.<sup>208</sup> There are numerous points in favor of agency control, including promoting agency independence and the subject-matter specialization of litigators.<sup>209</sup> However, DOJ control also has advantages, including development of expertise in litigation, promoting transparency, and presenting a unified governmental voice in court.<sup>210</sup> As a result, there are a number of considerations that go into granting government entities their own litigating authority. These will be discussed in the context of Amtrak and its passenger-preference

201. See Michael Herz, *Structures of Environmental Criminal Enforcement*, 7 FORDHAM ENV’T L.J. 679, 715 (1996) (“There are separate litigation skills, wholly independent of the particular substantive law violated, in criminal prosecutions—more so than in any other area of litigation . . . . Technical [subject-matter] expertise is much less important [at trial].”).

202. See Devins & Herz, *supra* note 183, at 584–85 (“[I]t is often said that DOJ is a more prestigious position that does more interesting work and therefore attracts and can pick from a more talented applicant pool. Since it has better lawyers, it should handle the high-stakes, difficult work of litigation.”).

203. See *id.* (identifying additional alleged practical advantages afforded to DOJ lawyers over agency lawyers).

204. See *generally id.* at 583–95 (weighing merits of above-mentioned benefits with related drawbacks and realities of current status quo).

205. See *id.* at 583–86 (“To be sure, we must to some extent take the world as we find it. In a sense, all characteristics of an agency are ‘acquired’ rather than ‘inherent,’ because the agency is an artificial creation that can be eliminated or remade.”).

206. See *id.* at 585–89 (citation omitted) (“There is no reason to assume that ‘[i]f the DOJ monopoly were removed . . .’ agencies would ‘press weak arguments, in perhaps insignificant cases, leading to a system-wide loss in credibility’ and, with it, ‘a reduction in success’ . . . . Instead, it seems more likely that agencies will screen cases with some care.”).

207. See *id.* at 586 (“To be sure, we must to some extent take the world as we find it.”).

208. See *generally, e.g.*, The Attorney General’s Role, *supra* note 139 (analyzing the issue from DOJ’s perspective); Devins & Herz, *supra* note 183 (analyzing from academic perspective); Babcock, *supra* note 170 (analyzing from perspective of a DOJ-attorney-turned-academic).

209. See discussion *supra* Section III.A (discussing advantages of agency-controlled litigation authority).

210. See discussion *supra* Section III.B (discussing disadvantages of agency-controlled litigation authority).

enforcement problem in the next Part.<sup>211</sup>

#### V. EXTENDED AUTHORITY: SOLVING THE ENFORCEMENT BLOCKADE THROUGH SELF-HELP

It is clear that Amtrak needs help to improve service quality and increase ridership.<sup>212</sup> Observers agree that Amtrak's inability to run on time and its lack of reliability damage its reputation and makes some routes nearly unusable.<sup>213</sup> Objective standards confirm this point.<sup>214</sup> Further, Amtrak has been unable to enforce its rights to preferential track usage on its own and cannot obtain cooperation from the DOJ or its host railroads.<sup>215</sup> Thus, despite consistent ridership and monetary gains, American passenger rail has been demoralized and lacks credibility.<sup>216</sup> This lack of credibility and morale hampers Amtrak's ability to effectively provide its current services, plan for the future, and expand its capacity and geographic coverage. Many passengers continue to prefer high-emitting transportation options due to their consistency and relative speed.<sup>217</sup> Further, a common refrain from opponents to expansion or continued funding of the railroad is its failure to provide a credible transportation alternative.<sup>218</sup>

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211. See discussion *infra* Part IV (proposing that Amtrak be granted litigating authority to enforce its preference rights on host-railroad track networks).

212. See discussion *supra* Section I.B (discussing neglect of Amtrak's passenger-preference rights and shortcomings of current approaches to this problem).

213. See, e.g., Guzman, *supra* note 7 (quoting Transportation Secretary Pete Buttigieg, who said, "[w]e've been asked to settle for less in this country" from American passenger rail relative to other countries); Yglesias, *supra* note 50 ("The second question . . . is why passenger rail outside of the Northeast Corridor is so unimaginably awful."); Laitner, *supra* note 7 (demonstrating Amtrak's notoriously poor public reputation).

214. See HOST RAILROAD REPORT CARD, *supra* note 12 (demonstrating that thirty-four of forty-two Amtrak routes run more than fifteen minutes late greater than twenty percent of the time, with many of those running late in sixty percent or more of trips).

215. See FED. R.R. ADMIN., *supra* note 16, at 3–4 (explaining Amtrak's inability to enforce its own preference rights in court and DOJ's lack of action); OIG Report, *supra* note 59, at 15 (explaining that freight railroads, DOJ, and Congress have not taken action despite lobbying from Amtrak). Further, the consistency of the DOJ's nonenforcement of the passenger preference since the late 1970s suggests that legitimate ends are responsible. See FED. R.R. ADMIN., *supra* note 16, at 3–4 (illustrating history of passenger-preference enforcement); cf. Price, *supra* note 103, at 1138 (explaining that such obvious, consistent nonenforcement can send a "strong[] signal to regulated parties that they can [act based on] the enforcement policy rather than the statute").

216. See OIG REPORT, *supra* note 59, at 15 (describing Amtrak executives' loss of faith in attempts to persuade partners and opponents to address its concerns); NICE, *supra* note 8, at 15 (describing lack of credibility Amtrak's consistent performance and organizational issues have caused).

217. Cf. Laitner, *supra* note 7 (noting Amtrak's persistent on-time challenges and lack of reliability, causing many passengers frustration even while enjoying train travel generally).

218. See, e.g., Steven Rattner, *Why 'Amtrak Joe' Should Pull Back on Train Funding*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/biden-amtrak-infrastructure.html> (discussing difficulty of expanding and investing in American rail-service infrastructure given more efficient and profitable travel infrastructure in the U.S. such as next-generation air travel and securing updates to American roads and bridges).

To address this concern, Amtrak needs the authority to defend its preference rights in court—which is a solution the railroad itself has advocated for.<sup>219</sup> The legal change to implement this reform would be simple, requiring the addition of only one line of text to the current statute.<sup>220</sup> Therefore, the decision of whether to make this reform rests primarily on two considerations: (1) whether recent changes provide sufficient recourse to make this change redundant, and (2) whether the policy rationale justifies the change in light of the structural landscape. These will be discussed below.<sup>221</sup>

*A. The Current Solution to Passenger-Preference Nonenforcement Is Insufficient*

The most recent solution to passenger-preference nonenforcement—placing additional authority with the STB<sup>222</sup>—is insufficient. Giving the STB ultimate enforcement power is insufficient, because doing so both fails to solve existing problems and creates new ones.<sup>223</sup> First, the decade of litigation preceding the adoption of a final on-time rule has rendered the STB’s newfound regulatory authority ineffectual.<sup>224</sup> Second, it merely shifted the same problems from one political actor, the DOJ, to another, the STB.<sup>225</sup> Third, it placed Amtrak’s future in the hands of an entity

219. See GOLDMAN, *supra* note 24, at 16 (expressing Amtrak’s desire for independent litigating authority to enforce its preference rights).

220. See, e.g., Rail Passenger Fairness Act, S. 2922, 116th Cong. (2019) (proposing amendment to 49 U.S.C. § 24308(c), stating: “[n]otwithstanding sections 24103(a) and 24308(f), Amtrak shall have the right to bring an action for equitable or other relief . . . to enforce the preference rights granted under this subsection”).

221. See discussion *infra* Sections IV.A, B (arguing that the change is not redundant and is justified based on current legal and policy landscape).

222. See, e.g., Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. 72,971, 73,000–02 (Nov. 16, 2020) (to be codified at 49 C.F.R. § 273 (describing recent rule-making and the semi-automatic enforcement that FRA-developed standards are supposed to trigger).

223. See 49 U.S.C. § 24101 (allowing for creation of the standard that STB can use to initiate an investigation); see also 49 U.S.C. § 24308(f)(1) (describing instances in which STB can investigate Amtrak on-time issues).

224. See, e.g., Nat’l R.R. Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd., Docket No. NOR 42141, Dec. ID 46360 (S.T.B. Apr. 13, 2018) (dismissing Amtrak’s attempts to enforce on-time standards due to litigation delaying rule-making process, after continuing the case numerous times in anticipation that litigation would conclude). See generally *Ass’n of Am. R.R. v. Dep’t of Transp.*, 865 F. Supp. 2d 22 (D.D.C. 2012) (first merits ruling in the litigation); *Ass’n of Am. R.R. v. U.S. Dep’t of Transp.*, 896 F.3d 539 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 2665 (2019) (ending the litigation).

225. See discussion *supra* Section I.B (discussing DOJ’s failure to enforce Amtrak’s preference rights and its effects on service); compare discussion *supra* Section II.A (describing decision-making process and trends of nonenforcement at DOJ), with discussion *supra* Section II.B (describing some concerns regarding decision-making at STB).

incentivized to rule against it.<sup>226</sup> Therefore, this reform needs to be supplemented. The first challenge is self-explanatory, so we will move on to the latter two.

The second and third challenges of the existing reform effort, in tandem, create an insurmountable barrier to effective enforcement of Amtrak's passenger-preference rights. At the outset, it is clear that the freight railroads have significant lobbying power in Washington,<sup>227</sup> particularly compared to Amtrak.<sup>228</sup> In fact, the freight railroads spend significant money on federal campaign contributions and lobbying efforts.<sup>229</sup> This political engagement is a likely cause of the lack of enforcement by the DOJ, an organization designed (to some extent) to shape federal litigation to the president's policy and political preferences.<sup>230</sup> Political influence on behalf of the regulated group, in particular, is a long-recognized influence on both lawmakers and law enforcers.<sup>231</sup>

Expanding enforcement authority to the STB does not address the issue of political influence, however, because control by the politically

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226. See, e.g., LAYTON, *supra* note 125, at 6–8 (illustrating case for shippers' capture of STB); see also Johnstone, *supra* note 116, at 266–72 (making the case for freight railroads' capture of STB). Although it could be said that the debate regarding who a captured STB favors indicates a lack of regulatory capture, both entities' interests would be best served by prioritizing freight service over passenger service. See Blaze, *supra* note 84 (suggesting that prioritizing Amtrak's existing right to track preference could lead to increased prices for rail shippers); see also FED. R.R. ADMIN., *supra* note 16, at 3–9 (explaining host railroads' prioritization of their business interests, suggesting passenger-preference enforcement would be adverse to railroads' bottom lines).

227. See, e.g., *About Us*, ASS'N AM. R.R., <https://www.aar.org/about-us/> [<https://perma.cc/TU8C-M3NY>] (last visited Mar. 22, 2021) (“AAR is the world's leading railroad policy, research, standard setting and technology organization that focuses on the safety and productivity of the U.S. freight rail industry. . . . Policy Making: Working with elected officials and leaders in Washington, DC, AAR advances sound public policy that supports the interests of the freight rail industry.”).

228. See, e.g., OIG REPORT, *supra* note 59, at 15 (explaining that Amtrak stopped tracking certain metrics due to its ineffectiveness in persuading freight railroads and policymakers).

229. See *Railroads*, OPENSECRETS, <https://www.opensecrets.org/industries/indus.php?ind=m04> [<https://perma.cc/G74R-77QX>] (last visited Mar. 22, 2021) [hereinafter OPENSECRETS] (demonstrating that four of the Class 1 railroads spent a combined \$5.1 million on campaign contributions and more than \$7.6 million on lobbying in 2020). Amtrak did spend \$341,000 on campaign contributions in 2020. *Id.* This was far less than the contributions of the four high-spending Class 1 railroads and only slightly higher than Watco (one of the leading shortline railroad conglomerates), however. *Id.*

230. See FED. R.R. ADMIN., *supra* note 16, 3–4, 4 n.13 (explaining that DOJ has only attempted to enforce passenger preference once in the law's history); see also Devins, *supra* note 100, at 280 (explaining that presidents use control of DOJ to further political and policy goals through nonenforcement).

231. See Richman, *supra* note 102, at 774–75, 779 (analogizing possible influences well-connected parties have on centralized prosecution and rulemaking authorities to those the same parties exercise in legislative branch).



appointed board still introduces it.<sup>232</sup> First, there are concerns that the STB has been “captured” by freight interests in a way similar to the ICC in its later years.<sup>233</sup> This capture results from freight interests gaining political power on the board through its procedure or insulation from public scrutiny—allowing it or its allies on the board to get an edge.<sup>234</sup> This ability is strengthened by the aforementioned political activity of the major railroads and the influence it could have on the political appointees placed on the STB board.<sup>235</sup> Although the existence of such capture is debated,<sup>236</sup> the significant possibility of industry or political hostility undercutting Amtrak interests makes the current state of affairs less than ideal.<sup>237</sup>

In addition to this political influence, however, the STB has other reasons to favor the freight railroads.<sup>238</sup> Specifically, the STB has a statutory duty to ensure the freight railroads’ health and to take it into account when making regulatory decisions.<sup>239</sup> Railroad deregulation took away the board’s regulatory neutrality and made it hostile, or at least indifferent, to non-freight-railroad interests.<sup>240</sup> This tendency is particularly hard to

232. See 49 U.S.C. §§ 1301(b)(1), (b)(3) (describing appointment and term limits of political appointees to STB). In fact, the agency design seems to have these things in mind based on the inclusion of term limits and a requirement that no more than three board members be of the same party. 49 U.S.C. §§ 1301(b)(1), (b)(3)–(4).

233. See LAYTON, *supra* note 125, at 6–8 (describing regulatory capture of ICC and concerns that STB is facing a similar fate).

234. See, e.g., Huntington, *supra* note 119, at 470–81 (describing railroads’ regulatory capture of ICC in the mid-twentieth century); *STB to Review CSX, CP-KCS Cases ‘Expediently,’ Chair Says*, PROGRESSIVE RAILROADING (Mar. 24, 2021) [hereinafter PROGRESSIVE RAILROADING], [https://www.progressiverailroading.com/federal\\_legislation\\_regulation/news/STB-to-review-CSX-CP-KCS-cases-expeditiously-chair-says--63044?oly\\_enc\\_id=4913J2568489H2X&utm\\_medium=email&utm\\_source=prdailynews&utm\\_campaign=prnewsletter-2021](https://www.progressiverailroading.com/federal_legislation_regulation/news/STB-to-review-CSX-CP-KCS-cases-expeditiously-chair-says--63044?oly_enc_id=4913J2568489H2X&utm_medium=email&utm_source=prdailynews&utm_campaign=prnewsletter-2021) [https://perma.cc/ZD8Y-8KXM] (announcing appointment of a railroad insider with ties to Association of American Railroads as STB’s chief economist).

235. See, e.g., OPENSECRETS, *supra* note 229 (describing political activity of America’s major railroads and industry as a whole); ASS’N AM. R.R., *supra* note 227 (comprising policy arm of freight-railroad industry); see also Devins, *supra* note 100, at 280 (explaining use of enforcement and nonenforcement to achieve policy and political ends). The STB’s signaling an intent to act “expeditiously” in deciding cases related to recent significant railroad mergers may serve as an example of this capture depending on how it plays out going forward. See PROGRESSIVE RAILROADING, *supra* note 234.

236. See, e.g., Wilner, *supra* note 127 (claiming that concerns about regulatory capture are “irrational” and merely reflect the result of a board statutorily required to balance multiple competing interests in decision-making).

237. Cf. Huntington, *supra* note 119, at 471–74 (recounting negative impacts analogous regulatory capture had on freight-rail market and industry under ICC regulation).

238. See Johnstone, *supra* note 116, at 266–69 (describing ICC and STB tendency toward industry influence).

239. See, e.g., 49 U.S.C. §§ 10701, 10704 (providing criteria for STB’s economic regulation of railroad industry such as requiring determinations of which railroads have “revenue adequacy”).

240. See Johnstone, *supra* note 116, at 266 (“What is novel about the post-Staggers Act regime is that the Commission and Board assumed a duty to protect railroad interests and that this duty of ensuring revenue adequacy expressly constrains the original rate-regulation duty of the Commission. . . . [T]he Board [still] works within a regulatory model built to save the American railroad industry.”).

prevent or excise due to the narrow, specialized nature of railroad economic regulation.<sup>241</sup> Further, the STB's responsibilities, its creation in the shadow of the railroad industry's near-collapse, and the blame that would follow for any railroad failure color STB decision-making with a certain level of risk aversion.<sup>242</sup> As a non-freight railroad with a negative reputation,<sup>243</sup> Amtrak will certainly be disadvantaged by the STB's aversion to act against the interests of the freight railroads.<sup>244</sup> To be sure, the DOJ has set a very low standard when it comes to enforcing Amtrak's preference rights.<sup>245</sup> The STB's characteristics, however, show that charging the latter agency with enforcement merely reallocates authority without improving the situation. As such, providing Amtrak its own enforcement authority is necessary.

*B. Giving Amtrak Enforcement Powers Fits into the Current Litigation Authority Landscape*

Giving Amtrak independent litigation authority with which to enforce its passenger preference is the proper solution to the current enforcement deadlock. As established above, independent litigating authority in federal agencies is the exception rather than the rule.<sup>246</sup> This independent authority is common, however, where Congress believes that the relevant agency needs either additional independence from politics or a team of specialized attorneys to effectively enforce the statutes for which it is responsible.<sup>247</sup> Either way, the purpose of this reallocation of authority

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241. See *id.* at 268 (“The . . . Board’s institutional tendency toward regulatory capture is exacerbated . . . by the complexity of the regulatory structure put in place to execute that mission. Regulatory simplicity can limit this tendency by promoting a more focused and transparent agency mission . . .”).

242. See *id.* at 267 (“The Board’s aversion to the risk of railroad failure . . . may reflect the traumatic birth of its regulatory model in the railroad crisis of the 1970s. Thirty years later, however, that historic aversion persists despite the railroads’ success under the Staggers Act . . .”).

243. See Guzman, *supra* note 7 (explaining woeful state of American passenger-rail system). Honestly, Amtrak’s history of poor performance, both in a practical and a financial sense, likely means Amtrak would continue to take the blame for its own future failures at the hands of STB neglect.

244. See Johnstone, *supra* note 116, at 266–68 (discussing STB’s tendency toward favoring freight railroads).

245. See, e.g., FED. R.R. ADMIN., *supra* note 16, 3–4 (outlining history of DOJ’s lack of enforcement or even attempts to bring cases over nearly fifty-year history of passenger-preference law).

246. See O’Connell, *supra* note 143, at 920–21 (explaining place of independent litigating authority in federal administrative scheme, particularly its use in independent agencies); 5 U.S.C. § 3106 (requiring all agency heads to refer any litigation to DOJ); 28 U.S.C. § 516 (vesting DOJ with sole authority to litigate on behalf of federal government where statute is otherwise silent).

247. See O’Connell, *supra* note 143, at 920–21 (noting Congress’s occasional delegation of independent litigating authority to agencies); Proceedings of the Fortieth Annual Judicial Conference of the District of Columbia Circuit, 85 F.R.D. 155, 171–72 (1979) (explaining that working regularly on an issue and writing very regulations defended or enforced in court gives agency attorneys additional knowledge or expertise that can increase effectiveness in litigation).

away from the DOJ is to correct for DOJ interference in or nonenforcement of the agency's regulatory scheme.<sup>248</sup>

Nonenforcement of Amtrak's passenger preference fits the category of enforcement situations that counsel independent litigating authority. Amtrak's status as a government corporation marks the agency as one meant to pursue its policy objectives without political interference.<sup>249</sup> However, Amtrak has long been plagued by DOJ nonenforcement that has undercut the agency's core mission—much like other agencies that request independent litigating authority.<sup>250</sup> To wit, the DOJ's refusal to enforce the passenger preference costs the agency needed credibility and tens of millions of dollars every year.<sup>251</sup> Further, railroad economic regulation is a narrow, unique area of law that overlaps with little other law—meaning Amtrak would benefit from its own specialized representation.<sup>252</sup> This consideration also comports with the current practice of vesting railroad regulation in a specialized agency and allowing Amtrak to hire its own outside attorneys for much of its litigation.<sup>253</sup> Thus,

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248. See, e.g., *Fed. Election Comm'n v. NRA Pol. Victory Fund*, 513 U.S. 88, 95–96 (1994) (recognizing that Congress's purpose in repartitioning litigation authority when creating the FEC was likely out of a desire to promote enforcement of federal election law); Devins, *supra* note 100, at 280–81 (explaining Reagan and Bush administrations' efforts to change federal environmental policy by refusing to enforce or defend certain federal laws).

249. Compare *Fed. Election Comm'n*, 513 U.S. at 95–96 (explaining that FEC has independent litigating authority to insulate it from political interference), with O'Connell, *supra* note 47, at 888–89 (explaining that government corporations such as Amtrak are meant to be free from political interference and, instead, should be disciplined by the free market).

250. Compare *FED. R.R. ADMIN.*, *supra* note 16, at 3–9 (illustrating DOJ's refusal to enforce passenger-preference laws against freight railroads despite freight railroads' flagrant refusal to respect Amtrak's rights), with Herz & Devins, *supra* note 151, at 1349–60 (describing DOJ's consistent attempts to undermine EPA programs and authority through nonenforcement and resulting attempts by members of Congress to grant EPA independent litigating authority), and Elliott Karr, *Independent Litigation Authority and Calls for the Views of the Attorney General*, 77 GEO. WASH. L. REV. 1080, 1090–93 (2009) (explaining Congress's grant of litigation authority to Federal Trade Commission through Magnuson-Moss Warranty—Federal Trade Commission Improvement Act as a result of DOJ refusal to represent agency's positions adequately at trial and appellate levels).

251. See *OIG REPORT*, *supra* note 59, at 8–9 (totaling annual savings of a properly enforced preference right at \$41.9 million along with \$336 million in one-time savings); see also NICE, *supra* note 8, at 15 (expressing lack of credibility resulting from Amtrak's poor performance history).

252. See LAYTON, *supra* note 125, at 6–7 (describing railroad regulation as an arcane area of law that is particularly sector-specific); Proceedings of the Fortieth Annual Judicial Conference of the District of Columbia Circuit, 85 F.R.D. 155, 171–72 (1979) (expressing tendency of agency lawyers to have a significant advantage in subject-matter knowledge compared to DOJ lawyers placed on many cases).

253. See, e.g., *About STB*, SURFACE TRANSP. BD., <https://prod.stb.gov/about-stb/> [<https://perma.cc/N4VS-NB3N>] (last visited Mar. 24, 2021) (“The Surface Transportation Board is an independent federal agency that is charged with the economic regulation of various modes of surface transportation, primarily freight rail.”); see also *Rail Network Development*, FED. R.R. ADMIN., <https://railroads.dot.gov/rail-network-development/rail-network-development> [<https://perma.cc/X93H-6ACX>] (last visited Mar. 24, 2021) (“FRA accomplishes [its] mission primarily through issuance, implementation, and enforcement of safety regulations; selective investment to develop the rail network across the country; and research and technology development.”); Am.

providing Amtrak with enforcement authority through independent litigating authority in passenger-preference cases would be appropriate insofar as it fits within the current conception of such authority elsewhere in the federal system.

Although there are drawbacks to independent litigating authority, these, for the most part, do not apply to Amtrak's situation. The first common concern is a breakdown in governance due to conflicts between agencies' legal positions.<sup>254</sup> This is inapplicable because Amtrak, by law, is to be treated as a private entity and is regulated as a market participant.<sup>255</sup> This is similar to the United States Postal Service (USPS), an entity allowed its own representation where the DOJ refuses to advocate for its position in court, as the USPS is also a business organization that is regulated by an independent regulator, the Postal Regulatory Commission (PRC).<sup>256</sup> That Amtrak, unlike the USPS, is regulated by an agency that also regulates its private counterparts underscores its treatment as a private entity.<sup>257</sup> Moreover, the proposed expansion of Amtrak's

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Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp., 709 F.3d 584, 585 (6th Cir. 2013) (serving as an example of Amtrak hiring outside counsel to defend it in federal court). In fact, the inability of Amtrak to file suit to enforce its statutory rights under its authorizing legislation is the outlier in this situation. *Compare Am. Premier Underwriters*, 709 F.3d at 585 (hiring outside counsel to defend against action), with 49 U.S.C. § 24103(a)(1) (requiring any enforcement of Amtrak's authorizing legislation to originate solely from DOJ).

254. See *The Attorney General's Role*, *supra* note 139, at 54 (explaining that DOJ primacy in federal litigation is necessary to coordinate litigating positions among different departments and ensure government's litigating positions reflect best interests of federal government as a whole).

255. See *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 821 F.3d 19, 36 (D.C. Cir. 2016) (holding that Amtrak could not be too involved in setting on-time performance metrics because it would violate freight railroads' due-process rights by allowing a "market competitor" with its own "economic self-interest" to regulate them); see also 49 U.S.C. § 24301(a) (defining Amtrak as a (1) for-profit (2) railroad carrier that (3) is not to be treated as "a department, agency, or instrumentality of the United States Government").

256. *Compare* 49 U.S.C. §§ 24308, 24311(c) (granting STB authority to mediate a variety of disputes between Amtrak and freight railroads), with *About the Postal Regulatory Commission*, POSTAL REGUL. COMM'N, <https://www.prc.gov/about> [<https://perma.cc/BL6G-7P9V>] (last visited Mar. 25, 2021) (explaining PRC's role as "an independent agency" which exercises "regulatory oversight over the Postal Service[']s" operations); see *Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 986 F.2d 509, 515 (D.C. Cir. 1993) ("[First,] when the Postal Service seeks judicial review under [the statute], it may do so on its own if the [DOJ] has declined to represent its fundamental positions or to consent to its self-representation; [second,] when a private party challenges a Postal Service order under [the statute], the Postal Service is entitled to appear and be represented by its own counsel when its position is inconsistent with that of the [DOJ]."). Though it would be fair to say that PRC oversight of the USPS is greater than the STB's oversight of Amtrak, it is significant to note that regulation by the STB means that Amtrak is policed by the same regulator as other public and private railroads. See also *SURFACE TRANSP. BD.*, *supra* note 253.

257. *Compare SURFACE TRANSP. BD.*, *supra* note 253 (explaining that STB is responsible for economic regulation of the entire railroad industry and other transportation modes), with *POSTAL REGUL. COMM'N*, *supra* note 256 (explaining that PRC regulates USPS). Further, the current concurrent jurisdiction of the federal courts and the STB over rail transportation shows that Congress is perfectly willing to allow some inconsistency or play in the joints of rail regulation as it stands. See *Order at 3–4*, *Union Pac. R.R. Co. v. Reg'l Transp. Auth.*, 2021 WL 4318106 (N.D. Ill. Aug.

litigating authority will impact only the passenger-preference statute—a right that is only enjoyed by Amtrak.<sup>258</sup> Thus, the concern about depriving the DOJ of litigation in this area in favor of Amtrak is of little force as it relates to the necessity of a common federal litigating position.<sup>259</sup>

The common concerns<sup>260</sup> about executive-branch control and a desire for specialized litigators are inapposite. Amtrak is already intended to be an entity insulated from direct political control and disciplined by the market rather than the executive.<sup>261</sup> Further, Amtrak does not exercise its own regulatory control over other persons or entities.<sup>262</sup> The concern about specialization and skill is also misplaced here. First, Amtrak derives no benefit from the DOJ's specialization if these skilled litigators refuse to answer its calls.<sup>263</sup> Second, Amtrak already uses outside counsel,

27, 2020) (No. 19-cv-7957), ECF 62 (denying defendant's motion to dismiss and refusing to cede jurisdiction over dispute regarding extent of common-carriage obligations to STB due to its own concurrent jurisdiction); Commuter Rail Div. of the Reg'l Transp. Auth.—Pet. for Declaratory Order, Docket No. FD 36420, Dec. ID 50364 (S.T.B. Aug. 6, 2020) (holding STB proceeding corresponding to *Union Pac. R.R. Co. v. Reg'l Transp. Auth.* in abeyance due to district court's earlier exercise of its own jurisdiction over case). Thus, any inconsistency this could cause in the railroad regulation landscape would likely be minimal or at least within the range already tolerated by Congress in other matters of railroad regulation.

258. See Rail Passenger Fairness Act, S. 2922, 116th Cong. (2019) (proposing that Congress codify request to provide litigating authority only for provision of Amtrak's authorizing statute related to passenger preference); see also 49 U.S.C. § 24308(c) (limiting passenger-preference rights, by its terms, only to "intercity and commuter rail passenger transportation provided by or for Amtrak").

259. See *The Attorney General's Role*, *supra* note 139, at 54 (stating an expression of this concern).

260. See *The Attorney General's Role*, *supra* note 139, at 54 (stating that centralization is necessary to promote supervision of the administrative state by an elected official—the president); Lemos, *supra* note 182, at 188–89 (claiming that the need for specialized litigation professionals in federal government necessitates centralization of federal litigators in the DOJ).

261. Compare Devins, *supra* note 144, at 287–88 (explaining how president can use his influence over attorneys representing independent agencies to allow for some democratic accountability in that corner of the regulatory state), with O'Connell, *supra* note 47, at 888–89 (explaining that corporate form is seen as a way to shield provision of services to the public from lobbying and political influence and promote decision-making based on free market); see also Froomkin, *supra* note 46, at 578–79 (emphasizing government corporation's ability to better-provide a service that is commercial in nature, possibly self-sustaining, and involving regular commercial transactions with general public).

262. See *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 821 F.3d 19, 36 (D.C. Cir. 2016) (holding that providing Amtrak with regulatory authority over privately held railroads is a due-process violation).

263. Compare *FED. R.R. ADMIN.*, *supra* note 16, at 3–8 (describing total lack of enforcement of Amtrak's preference rights despite host freight railroads' flagrant violations), with Herz, *supra* note 201, at 715 (claiming that agencies are advantaged by representation of highly skilled attorneys due to specialization and centralization), and Devins & Herz, *supra* note 183, at 584–85 (claiming that agencies are advantaged by specialization because they are represented by highly skilled attorneys more likely to be attracted to prestige of DOJ); cf. Babcock, *supra* note 170, at 185–86 (noting complaints by agency lawyers that DOJ does not understand other agencies' programs and needs). In fact, Amtrak could be said to derive a loss because it would save money and be more effective were it allowed to make its own passenger-preference enforcement decisions. See *OIG REPORT*,

rather than the DOJ, for many cases.<sup>264</sup> Third, railroad regulation is a sufficiently specialized and narrow area of law such that subject-matter expertise likely outweighs the DOJ's trial expertise.<sup>265</sup> Thus, the executive control and specialization concerns are not particularly applicable in Amtrak's passenger-preference situation. On the whole, then, it is apparent that Amtrak would benefit from the requested passenger-preference litigation authority and that it fits the typical circumstances in which Congress often provides that relief.<sup>266</sup>

It is clear that something needs to be done to promote the enforcement of Amtrak's passenger-preference rights. The DOJ has refused to enforce the statute for nearly the entirety of its history,<sup>267</sup> and recent steps through the STB are insufficient and rely on an agency with significant incentives to rule against Amtrak in any event.<sup>268</sup> Providing Amtrak independent litigating authority to enforce its preference rights will make the indifference of other agencies irrelevant and is particularly appropriate in this highly specialized area of law.<sup>269</sup> Such authority would put the situation in the hands of the people who know what the agency and its programs need to be successful in the more practical sense.<sup>270</sup> Thus, providing Amtrak with its own independent litigation authority, allowing it to enforce its passenger-preference rights on host railroad tracks, is the more effective solution to the problem and is congruent with the ecosystem of federal litigation authority.

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*supra* note 59, at 2–3 (explaining that Amtrak's abysmal on-time performance costs railroad more than \$40 million annually); *see also* FED. R.R. ADMIN., *supra* note 16, at 3–8 (explaining delays caused by host freight railroads amidst DOJ nonenforcement).

264. *See, e.g.,* Am. Premier Underwriters v. Nat'l R.R. Passenger Corp., 709 F.3d 584, 585 (6th Cir. 2013); *see also* VBR Tours, LLC v. Nat'l R.R. Passenger Corp., No. 14-cv-00804, 2015 WL 5693735 (N.D. Ill. Sept. 28, 2015) (noting outside counsel representing Amtrak as defendant in actions).

265. *See* Johnstone, *supra* note 116, at 268 (describing narrow, specialized nature of railroad regulation); *see also* *Our History*, FLETCHER & SIPPEL LLC, <https://www.fletcher-sippel.com/about-fletcher-sippel> [<https://perma.cc/4J7V-FWAV>] (last visited Mar. 25, 2021) (demonstrating specialized and narrow nature of railroad regulation through its existence as a firm catering specifically to railroad-industry clients).

266. *See* Laitner, *supra* note 7 (explaining consequences of Amtrak's inability to enforce its preference rights in court); *compare* Karr, *supra* note 250, at 1090–93 (explaining DOJ's refusal to represent FTC's positions in court and resulting litigation authority provided by Congress as a result), *with* FED. R.R. ADMIN., *supra* note 16, at 3–4, 4 n.13 (expressing DOJ's total failure to advocate for enforcement of Amtrak's statutory preference rights in court despite on-time issues).

267. *See* FED. R.R. ADMIN., *supra* note 16, at 3–4, 4 n.13 (noting that court in *United States v. Southern Pacific Transportation Co* neither endorsed nor rejected DOJ's legal interpretation of preference statute).

268. *See* discussion *supra* Section IV.A (discussing insufficiency of current attempts to promote passenger-preference enforcement).

269. *See* discussion *supra* Section IV.B (discussing where Amtrak passenger-preference non-enforcement situation fits within the broader context of federal litigation authority as a policy and legal matter).

270. *See* Babcock, *supra* note 170, at 185–86 (expressing that many agencies believe DOJ does not understand other agencies' programs and needs as well as the agencies' own attorneys).

## CONCLUSION

It is well known that Amtrak has on-time performance issues that mar its reputation and the quality of its service, often making it unusable for many.<sup>271</sup> As America begins to emphasize transportation modes that are more sustainable and less automobile-focused, the benefits passenger rail can provide will be more valuable than ever.<sup>272</sup> As a result, advocates and government officials have taken steps to raise Amtrak's credibility and expand its services to take advantage of its promise.<sup>273</sup> However, Amtrak must improve its on-time metrics in order to become a larger part of American transportation and increase its financial sustainability.<sup>274</sup> Thus, reform is needed.

Amtrak's performance is hopelessly hobbled by its reliance on others to enforce its preferred trackage rights.<sup>275</sup> The DOJ has refused to enforce these statutory rights, despite host railroad noncompliance dating back to the late 1970s.<sup>276</sup> Further, the STB—the most recent vehicle for passenger-preference enforcement—is inherently incentivized to favor the health of freight railroads and interests of shippers over Amtrak's rights and effectiveness.<sup>277</sup> Because enforcement is insufficient, Amtrak is continuously undercut by the railroads whose common-carrier burdens it was created to alleviate.<sup>278</sup> Thus, Congress needs to grant Amtrak's request

271. See Guzman, *supra* note 7 (“We’ve been asked to settle for less in this country. . . .”); see also, e.g., Laitner, *supra* note 7 (explaining Amtrak's on-time performance issues and their effect on the service's usefulness to and credibility with the general traveling public).

272. See Irfan, *supra* note 4 (expressing importance of American passenger rail in the Green New Deal); see also BIDEN FOR PRESIDENT, *supra* note 2 (advocating for new investment to kick-start “second great railroad revolution” to revitalize American transportation infrastructure).

273. See, e.g., BIDEN FOR PRESIDENT, *supra* note 2; see also Marybeth Luczak, *Amtrak Playing Hardball With CSX, NS on Gulf Coast Service (Updated)*, RY. AGE (Mar. 16, 2021), [https://www.railwayage.com/passenger/intercity/amtrak-playing-hardball-with-ns-csx-on-gulf-coast-service/?utm\\_source=email&utm\\_medium=email&utm\\_campaign=23445](https://www.railwayage.com/passenger/intercity/amtrak-playing-hardball-with-ns-csx-on-gulf-coast-service/?utm_source=email&utm_medium=email&utm_campaign=23445) [https://perma.cc/WDX2-YYQY] (chronicling efforts of Amtrak, state and local officials, and Southern Rail Commission to restore long-abandoned passenger service through Alabama, Louisiana, and Mississippi).

274. See OIG REPORT, *supra* note 59, at 5–6, 8–14 (explaining the myriad operational benefits from either a modest or substantial improvement in Amtrak's on-time performance and how that can lead to increased ridership and greater financial sustainability).

275. See generally FED. R.R. ADMIN., *supra* note 16 (explaining total lack of enforcement of Amtrak's passenger-preference rights in context of significant non-compliance of host freight railroads).

276. See FED. R.R. ADMIN., *supra* note 16, at 3–4, n.13 (illustrating DOJ's lack of passenger-preference enforcement).

277. See discussion *supra* Section IV.A (discussing STB's inherent conflicts of interest when asked to defend Amtrak's interests against freight railroad industry and railroad shippers it is tasked with protecting).

278. See, e.g., Luczak, *supra* note 273 (internal citation omitted) (“[T]hroughout this process, [the Southern Rail Commission] has maintained that . . . service along the Gulf Coast should work for both freight and passenger rail interests. However, CSX has failed to reciprocate this sentiment and their actions demonstrate . . . an unwillingness to negotiate in good faith and an opposition to bringing back passenger rail service to communities along the Gulf Coast.”).

for independent litigating authority to enforce its passenger-preference rights.<sup>279</sup>

Allowing Amtrak to unshackle itself in this way fits into the ecosystem of federal litigating authority as it stands today.<sup>280</sup> Amtrak's status as an independent, market-disciplined agency in a specialized legal arena counsels in favor of granting it this additional power.<sup>281</sup> Furthermore, downsides such as decreased political control and conflicts with other government agencies seem out of place considering Amtrak's status.<sup>282</sup> Congress's grants of independent litigating authority to the USPS and FTC, among other agencies, provide persuasive precedent for allowing such authority in Amtrak's case.<sup>283</sup> Thus, due to the compelling nature of the circumstances, Congress needs to revise the legal landscape on this issue by providing Amtrak its own right of action in the enforcement of its passenger-preference rights.<sup>284</sup> This will allow Amtrak's expansion to pick up steam and make the railroad a leader in sustainable transportation in the United States.<sup>285</sup>

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279. See GOLDMAN, *supra* note 24, at 16 (describing Amtrak's repeated requests that it be given its own enforcement or litigating authority with which to assert its passenger preference); *supra* Part IV (arguing that Congress needs to grant Amtrak independent litigating authority pursuant to its statutory passenger preference).

280. See discussion *supra* Section IV.B (explaining that Amtrak's passenger-preference trouble fits Congress's criteria for granting independent litigating authority to federal agencies).

281. Compare *Fed. Election Comm'n v. NRA Pol. Victory Fund*, 513 U.S. 88, 95–96 (1994) (explaining that FEC has independent litigating authority to insulate it from political interference), with *O'Connell*, *supra* note 47, at 888–89 (explaining that government corporations like Amtrak are to be free from political interference and disciplined by free market).

282. See, e.g., *The Attorney General's Role*, *supra* note 139, at 54 (describing need for uniform legal positions across executive branch and presidential supervision, and role DOJ plays in those priorities); Lemos, *supra* note 182, at 188 (describing skills-based advantages of having an agency specializing in federal litigation). For the reasons discussed above, primarily an inability to regulate others and Amtrak's intended role as a politically independent commercial enterprise, these concerns are largely inapplicable to providing Amtrak with the narrow litigating authority it desires. See discussion *supra* Section IV.B.

283. See *O'Connell*, *supra* note 143, at 921 (describing USPS's path to independent litigating authority); Karr, *supra* note 250, at 1090–93 (describing Congress's provision of independent litigating authority to FTC due to DOJ's unfaithful representation).

284. See, e.g., *Rail Passenger Fairness Act*, S. 2922, 116th Cong. (2019) (proposing reform of passenger preference by granting Amtrak's request for an independent right of action).

285. See Hoffrichter, *supra* note 5 (explaining passenger rail's sustainability advantages over other passenger transportation modes and how other nations have taken advantage of this through continued technological advancement).