MEMORANDUM

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To: Metropolitan Washington Airports Authority

From: Jenner & Block LLP

Subject: Assessment of Recent MWAA Legislation

EXECUTIVE SUMMARY

You asked us to assess whether the recently enacted federal legislation ("the Legislation") concerning the structure and terms of MWAA's Board of Directors was intended to be immediately operable, and if so, whether the Legislation is constitutional. Our opinion is that the better view of the Legislation is that it is not immediately operable, and that it likely would be unconstitutional if it were. As we explain, the Board is a creature of the interstate compact between Virginia and the District of Columbia, and its structure and terms may be modified only if Virginia and the District of Columbia enact legislation amending their compact.

Before we discuss the text of the Legislation itself, there are three background principles that are especially relevant to the analysis.

First, although there is no controlling authority directly on point, the substantial weight of the case law indicates that it would be unconstitutional if Congress attempted to unilaterally amend an interstate compact, or to condition the compact's continued existence on amendments by the states. Accordingly, because Congress is presumed not to have acted unconstitutionally, there is a heavy weight against reading the Legislation to have that effect.

One strand of constitutional concern comes from the Compact Clause precedents themselves. In an opinion that has been cited multiple times, the D.C. Circuit stated that it had serious doubts that Congress could "alter, amend, or repeal" a compact once Congress had given its approval to it under the Compact Clause. *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962). And the Third Circuit found more recently that "the power of Congress to 'alter, amend or repeal' is not currently part of the federal tradition" and that "[o]ur research has revealed no case holding that Congress possesses such a power." *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939, 948 (3d Cir. 1985). *See also Koterba v. Pennsylvania Department of Transportation*, 736 A.2d 761, 764 (Pa. Commw. Ct. 1999) (citing *Tobin* and *Mineo*); *U.S. v. Jones*, 2008 WL 4279963, at *5 (W.D. Va. 2008) (same); *Riverside Irrigation District v. Andrews*, 568 F. Supp. 583 (D. Colo. 1983) (same). While the discussion in these cases is limited to dicta, *Tobin* and *Mineo* offer a thoughtful and persuasive analysis. Moreover, there is only one case that we have found that has suggested a contrary result, and it is distinguishable. *Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 892 (D.D.C. 1996) (suggesting that a Congress might have the authority to rescind a compact where, unlike here, the states agreed in the compact that Congress had "the right to amend or rescind this interstate compact at any time").

Another constitutional obstacle comes from Tenth Amendment, which bars Congress from "commandeering" a state to participate in a program against its will. That is, if the Legislation were interpreted as requiring Virginia and the District of Columbia to appoint Board members to run the Authority on terms the states did not consent to, it would run afoul of the principle that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York v.*

United States, 505 US 144, 161 (1992). *See also Printz v. United States*, 521 U.S. 898, 904 (1997) (holding unconstitutional portions of the Brady Act "purporting to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.").

Second, and related, we are unaware of a *single* instance in which Congress has ever attempted to unilaterally amend an interstate compact without the consent of the states. That such legislation would be unprecedented is reason alone to suspect it is not what Congress intended. Moreover, there are extra indicia here that make that interpretation even more unlikely. The Legislation contains no hint that Congress understood itself as doing something extraordinary. To the contrary, it consists of a series of small amendments attached to appropriations legislation. Because Congress is unlikely to "hide elephants in mouseholes," *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001), we doubt that the Legislation represents Congress's first attempt to change terms of an interstate compact.

Third, the history of this particular compact indicates that the relevant parties have always understood that the terms of the compact do not change until Virginia and the District of Columbia amend the compact. There have been at least two prior occasions where Congress has passed legislation that spoke to the composition and powers of the Board: when Congress created the Board of Review, and then when it removed that Board and increased the number of presidential appointments to the Board of Directors. We understand that in both cases, there was no immediate change to MWAA upon the passage of the federal legislation. Instead, Virginia and the District of Columbia passed enabling legislation the following year, and only *after* that state legislation was enacted were the new appointees nominated. That course of conduct informs what Congress intended in the analogous situation today. *See Oklahoma v. New Mexico*,

501 U.S. 221, 236 n.5 (1991); *Alabama v. North Carolina*, 130 S. Ct. 2295, 2309 (2010) (where compact is ambiguous, the parties' "negotiating history" and "course of performance" are relevant).

Taken together, these three factors – the stark specter of unconstitutionality, the absence of any prior similar legislation, and the past specific practices under the compact itself – create a strong presumption that Congress did not intend to make the Legislation immediately operable. The Legislation itself does not lend itself to a contrary view. Instead, the Legislation on its face does not purport to supersede the right of Virginia and the District of Columbia to determine the terms of their compact. That is, although the Legislation provides for changes to MWAA's Board, it leaves in place a long-standing federal provision that MWAA has the "powers and jurisdiction conferred upon it" by Virginia and the District of Columbia. 49 U.S.C. §49106(a). That provision thus suggests that Congress did not intend to depart from the principle that MWAA's powers are those that Virginia and the District of Columbia bestowed upon it, and that the Legislation merely allows the compacting parties to make that change without creating an inconsistency with federal law. To be sure, §49106(a) *also* states that the Board has powers and jurisdiction that "at least" conform to federal law. But that provision is most plausibly read (especially in light of the considerations discussed above) as confirming that Virginia and the District of Columbia cannot bestow powers on the Board that are *inconsistent* with what the federal government has allowed, including through legislation and the parties' lease.

Our confidence in this view is strengthened by the relatively weak arguments on the other side. The best counterargument that Congress could and did make the amendments immediately operable is that the compact, once approved, has the status of federal law. And because Congress normally has the right to amend federal law (the argument goes) it has the power to

change the terms of the compact. This argument, however, runs into the constitutional precedents described above, which limit Congress's compact powers to those of approval. Put another way, if the "compact as federal law" argument were correct, Congress would always be free to change the terms of a compact, a result that is inconsistent with the cases that have addressed the question, as well as the fact that Congress, to our knowledge, has never tried to amend a compact in that way.

This raises two additional topics that are discussed below. First, we believe that the better view of the law is that Virginia and the District of Columbia are not free to amend the compact to enact some, but not all, of what Congress has proposed in the Legislation. We believe that the better view is that absent a clear statement from Congress, a state may not choose to enact only some of what Congress has approved. If nothing else, such an enactment might be inconsistent with the parties' lease, which requires conformance with the Transfer Act. Second, we also explore whether the Board would breach its lease with the United States if it failed to immediately comply with the Legislation. We do not believe that there is a persuasive argument for breach because compliance with the new Legislation is not a term of the lease.

BACKGROUND

Article I, Section 10 of the Constitution permits the states to enter into an interstate "compact" provided that Congress consents to the compact. U.S. Const. art. I, §10 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another States."). An interstate compact is thus "an agreement among sovereign States, to which the political branches consented." *Alabama v. North Carolina*, 130 S. Ct. 2295, 2313 (2010). *See Int'l Union of Operating Eng'rs, Local 542 v. Del. River Joint Toll Bridge Comm'n*, 331 F.3d

273, 276 (3d Cir. 2002) ("By compacting together . . . , [the compact's signatory states] have each surrendered a portion of their sovereignty . . . in order to better serve the regional interest.").

The Metropolitan Washington Airport Authority ("MWAA" or "Authority") is "an independent regional authority . . . created by a compact between the commonwealth of Virginia and the District of Columbia."[1] *Hechinger v. MWAA*, 36 F.3d 97, 98 (D.C. Cir. 1994). MWAA "operates the Washington National and Dulles International Airports under lease from the Federal Government." *Id.* The compact arose out of a 1984 study commissioned by the Secretary of Transportation that concluded that it would be advisable for the federal government to lease the two airports to "a regional authority with power to raise money by selling tax-exempt bonds." *MWAA v. Citizens for Abatement of Airport Noise, Inc.*, 501 U.S. 252, 257 (1991). In 1985, the District of Columbia and Virginia enacted legislation that created MWAA. *See* 1985 Va. Acts, ch. 598; 1985 D.C. Law 647.

In October 1986, Congress passed the Metropolitan Washington Airports Act of 1986 ("Transfer Act"). Although the Transfer Act clearly envisions MWAA's existence, it contains no express consent for the compact. Instead, express consent was provided, to the extent that was necessary, in an earlier provision then set forth at 49 U.S.C. §1743 (1986), which stated:

> The consent of the congress is given to each of the several States to enter into any agreement or compact, not in conflict with any law of the United States, with any other State of States for the purpose of developing or operating airport facilities. The right to alter, amend, or repeal this section is expressly reserved.[2]

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[1] Throughout this memorandum we refer to the District of Columbia as a state. The District, however, is different from a state in that Congress has the authority to enact legislation on its behalf. *See United States v. Comstock*, 130 S. Ct. 1949, 1978 n.10 (2010) ("The Constitution grants Congress plenary authority over certain jurisdictions where no other sovereign exists, including the District of Columbia"). Congress, however, typically provides a clear statement when it is intending to directly amend the laws of the District of Columbia, and no such indication is given here. *Barry v. Bush*, 581 A.2d 308, 314 (D.C. 1990).

[2] Section 1743 is currently codified at 49 U.S.C. 40124, but no longer includes the final sentence stating that the "right to alter, amend, or repeal this section is expressly reserved."

The Transfer Act authorized the Secretary of Transportation to enter into a long-term lease ("Lease") with MWAA on behalf of the United States, which it did in March 1987. *MWAA*, 501 U.S. at 261. Along with the United States and the Authority, both Virginia and the District of Columbia are signatories to the Lease. That Lease, as amended, provides that the MWAA "agrees to comply with the conditions imposed by the [Transfer] Act." Lease, Amendment 1, §2, amending §11.A. The Transfer Act also contained provisions describing the powers and responsibility of MWAA's Board of Directors. The Transfer Act provided that the MWAA is defined as follows:

> (1) a public body corporate and politic with the powers and jurisdiction--
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> (A) conferred upon it jointly by the legislative authority of Virginia and the District of Columbia or by either of them and concurred in by the legislative authority of the other jurisdiction; and
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> (B) that at least meet the specifications of this section and section 49108 of this title."
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> 49 U.S.C. §49106(a).

Both the MWAA compact and the Transfer Act originally defined MWAA as having a Board of Directors consisting of five members appointed by Virginia, three by the District of Columbia, two by Maryland, and one presidential appointee.

The Transfer Act also originally provided for a "Board of Review" consisting of nine members of Congress to oversee the actions of MWAA's Board of Directors. *Citizens for Abatement*, 501 U.S. at 257-60. After the passage of the Transfer Act in 1986, Virginia and the District of Columbia amended their interstate compact to provide for the Board of Review. 1987 Va.Acts, ch. 665; 1987 D.C. Law 7-18. After two variations of the "Board of Review" were held to be unconstitutional, *see Citizens for Abatement*, 501 U.S. at 277; *Hechinger*, 36 F.3d at 105,

Congress amended the Transfer Act to eliminate the Board of Review and provided for two more presidential appointees to the Board of Directors. Metropolitan Washington Airports Amendments Act of 1996, 104 P.L. 264, 110 Stat. 3213, 3275 (Oct. 9, 1996). Virginia and the District of Columbia again amended their interstate compact to reflect the changes in the Transfer Act as amended. 1997 Va. Acts, ch. 661; 1997 D.C. Law 12-8.

On November 18, 2011, the President signed into law H.R. 2112, the Consolidated and Further Continuing Appropriations Act, 2012 ("the Legislation"). Section 191 of that Act amended 49 U.S.C. §49106(c), the statute setting forth the composition of the MWAA's board. Section 191(a) increased Virginia's membership to seven, the District of Columbia's membership to four, and Maryland's membership to three. Section 191(b) provided that members were eligible for reappointment for one additional term, but were not permitted to serve beyond the expiration of their terms. Section 191(c) provided that members appointed by the District of Columbia, Maryland, or Virginia were removable only for cause.

ANALYSIS

You had asked us whether the provisions set forth in the Legislation should be understood as being immediately operable, and if so, whether the Legislation would be constitutionally valid. Our view is that these two questions are best answered together. That is, because the better view of the law is that the Legislation would be unconstitutional if it were interpreted as being immediately operable, the Legislation should not be understood as immediately changing the compact. *See DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the

statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

In particular, consistent with the case law and practice under previous MWAA legislation, the Legislation should not be considered operative unless and until Virginia and the District of Columbia enact legislation conforming the compact to the Legislation. At the same time, were Virginia and the District of Columbia to enact amendments to the compact that were *inconsistent* with the Legislation, we believe that those amendments would not be operative unless and until Congress approved those amendments. We further conclude that the Lease between the Authority and the United States does not require the Authority to immediately comply with the Legislation.

I. IT WOULD LIKELY BE UNCONSTITUTIONAL IF CONGRESS ATTEMPTED TO UNILATERALLY AMEND THE TERMS OF THE MWAA COMPACT.

There would be serious constitutional problems if the Legislation were interpreted as unilaterally and immediately changing the composition of the Board and the conditions under which members may serve. "[A] compact is, after all, a contract." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal quotation marks omitted). It is "an agreement among sovereign States, to which the political branches consented." *Alabama v. North Carolina*, 130 S. Ct. 2295, 2313 (2010). By definition, a contract between two parties requires the parties to agree to its terms. *See Int'l Union of Operating Eng'rs, Local 542 v. Del. River Joint Toll Bridge Comm'n*, 331 F.3d 273, 276 (3d Cir. 2002) ("Our role in interpreting the Compact is . . . to effectuate the clear intent of both sovereign states"). If States submit a compact to Congress for approval, Congress can impose conditions on its consent to the compact. But the states must accept those conditions for the compact to be binding. *See, e.g.*, *Petty v. Tennessee-Missouri Comm'n*, 359

U.S. 275, 281-82 (1959) ("The States who are parties to the compact *by accepting it* and acting under it assume the conditions that Congress under the Constitution attached") (emphasis added).

In this case, Virginia and District of Columbia agreed to a compact that defines MWAA's Board of Directors in a certain way, including the number of directors each state may appoint, and the terms on which they may be removed from the Board. At least two different constitutional doctrines suggest that Congress may not force Virginia and the District to accept new terms for their compact. *First*, although Congress's approval is necessary to create an interstate compact, the law suggests that Congress may not later add new requirements as a condition of continuing to allow the compact to exist. Rather, such a threat of compact "impermanency" is inconsistent with Congress's limited power only to approve compacts under the Constitution. *Second*, the law is even clearer that Congress cannot simply directly compel states to carry out federal initiatives. Under the Tenth Amendment's "anti-commandeering" doctrine, a state must consent to such a directive before it is valid. As a result, legislation that purports to make a state participate in an entity like MWAA on terms to which it did not agree would likely violate the Constitution.

Compact Precedent. Although there is no controlling authority in this area, the weight of the authority has cited grave doubt about Congress's authority under the Constitution to unilaterally amend a compact to which it has consented. One leading case is *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962), in which the compact in question actually authorized Congress to "alter, amend, or repeal" the compact. *Id*. at 273. The appellant challenged the constitutionality of that provision, and the D.C. Circuit observed that "[t]he compact clause of the Constitution does not specifically confer such power upon Congress" and that "the suspicion of even *potential impermanency* would be damaging to the very concept of interstate compacts."

Id. (emphasis added). The Court went on to suggest that once Congress authorized a compact, it was in effect granting the compacting states sovereignty under the terms of the compact, such that those terms could not be changed or rescinded by federal action alone. *Id.* Although the D.C. Circuit ultimately resolved the case on other grounds in view of the "gravity . . . of the constitutional questions," *id.*, *Tobin*'s suspicion of Congressional power in this area has been echoed by other courts.

For example, the Third Circuit found more recently that "the power of Congress to 'alter, amend or repeal' is not currently part of the federal tradition" and that "[o]ur research has revealed no case holding that Congress possesses such a power," although it ultimately declined to resolve the issue as well. *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939, 948 (3d Cir. 1985). *See also Koterba v. Pennsylvania Department of Transportation*, 736 A.2d 761, 764 (Pa. Commw. Ct. 1999) (citing *Tobin* and *Mineo* and observing that "[t]he power of Congress to subsequently alter, amend or repeal its consent to an interstate compact is far from clear"); *U.S. v. Jones*, 2008 WL 4279963, at *5 (W.D. Va. 2008) (also citing *Mineo* and *Tobin* and noting uncertainty on point); *Riverside Irrigation District v. Andrews*, 568 F. Supp. 583 (D. Colo. 1983) (reviewing case law and concluding in dicta that "it is true that congress cannot unilaterally reserve the right to amend or repeal an interstate compact."[3]

[3] *Riverside* does hold, consistent with Supreme Court precedent, that Congress may pass generally applicable legislation even if it affects a compact. There, the court held that Congress was entitled to enact the Clean Water Act notwithstanding that it was incompatible with the terms of a previously-approved interstate compact. *Id.* at 589-90. The court quoted *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433 (1855), which stated: "The question here is whether or not the compact can operate as a restriction upon the power of Congress under the Constitution to regulate commerce among the several states? Clearly not. Otherwise Congress and two states would possess the power to modify and alter the Constitution itself." *Accord Arizona v. California*, 373 U.S. 546, 565 (1963). But that principle does not suggest that Congress may withdraw or modify its consent to a compact that it has previously approved.

The only authority that we have found suggesting a contrary result is *Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 892 (D.D.C. 1996), which noted in dicta that Congress "may well have the authority to rescind or amend the Compact" that was in question there. *Milk* is likely of limited persuasiveness here however. In the first place, it is in tension with the D.C. Circuit's earlier decision in *Tobin*, which *Milk* itself noted as contrary authority. *Id.* More important, *Milk* concerned a compact in which the party states gave Congress "the right to amend or rescind this interstate compact at any time." *Id.* No such provision exists in the MWAA compact.[4]

The weight of the case law is also consistent with certain practical considerations. The particular amendments enacted by Congress in this case do not particularly invoke a specter of compact "impermanency." But if Congress had the power to alter the membership of interstate compacts at will, it could easily use that power to assume complete federal control over interstate compacts. For instance, it could approve an interstate compact composed entirely of members appointed by the signatory states, and then immediately remove all those members and replace them with presidential appointees, or appointees of a single state. This would have the effect of effectively transferring the sovereign powers of the states (as transferred to the compact) to the federal government or to a single state.[5] It is difficult to imagine that a state would enter into a compact if Congress could make such changes through unilateral legislation.

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[4] As noted above, the provision that generally authorized the creation of interstate compacts relating to airports provided at the time of the Transfer Act that "[t]he right to alter, amend, or repeal this section [i.e., the section allowing compacts] is expressly reserved." 49 U.S.C. §1743 (1986). The Legislation, however, does not purport to "alter, amend, or repeal" that section. Nor does the MWAA compact give Congress the general right to "alter, amend, or repeal" its terms.

[5] These hypotheticals indicate why Congress likely does not have more leeway to change the terms of the presidential appointees as compared to those of the state appointees. Ultimately, the states agreed to a system that gave the presidential appointees a certain amount of power. It would be equally offensive to that agreement to change the amount of federal power as it would to shift the balance of power between the party states.

Thus, given that the weight of the case law finds it doubtful that Congress has the authority to "alter, amend, or repeal" a compact, we believe that such an interpretation would raise at least serious doubts about the Legislation's constitutionality.

Commandeering Precedents. Those doubts are deepened by a second line of cases forbidding Congress from "commandeering" states to carry out federal programs. If the Legislation were construed as requiring Virginia and the District of Columbia to appoint members to serve on a Board to operate the Airport Authority on terms to which they did not consent, it would run afoul of the precept that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York v. United States*, 505 US 144, 161 (1992) (holding that Congress could not require New York to take title to waste as part of a federal environmental program) (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 288 (1981)). For "while Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* *See also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994) ("The constitution . . . confers upon Congress the power to regulate individuals, not States [and thus] [t]he allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."); *Printz v. United States*, 521 U.S. 898, 904 (1997) (holding unconstitutional portions of the Brady Act "purporting to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.").

To be sure, the MWAA compact is not a "federal regulatory program," it is an agreement between the states, ratified by Congress, but it would arguably cease to be an interstate compact and become a "federal regulatory program," if Congress were free to impose additional federal conditions on the states. Those new, unconsented terms would by definition be imposing a federal obligation on the states to operate the Authority in a manner chosen by the federal government. Thus, under that understanding, Virginia and the District of Columbia would be obligated to appoint additional board members to a Board whose composition they had not agreed to, and on terms they had not agreed to, in order to operate the Authority. While Virginia and the District of Columbia surely *could* consent to the terms of the Legislation if they wished to do so, there is at minimum a reasonable argument that they may not be compelled to do so under the Supreme Court's anti-commandeering case law.

Federal law. We note one potential counterargument to the above discussion which is that it is settled law that interstate compacts, once approved by Congress, become "federal law." *E.g.*, *New Jersey v. New York*, 523 U.S. 767, 811 (1998) ("[C]ongressional consent transforms an interstate compact within the Compact Clause into a law of the United States," and a court must interpret it "[j]ust as if a court were addressing a federal statute") (quotation marks, citations and alterations omitted). Thus, there is at least a facially plausible argument that because Congress has the authority to amend federal law as it chooses, it has the authority to amend the MWAA compact. We think that this argument is likely not persuasive. As the above discussion indicates, the only power granted to Congress concerning compacts in the Constitution is the power to approve them. We have not found persuasive authority indicating that Congress has a freewheeling power under the Constitution to amend interstate compacts even though they are federal law. In this regard it is notable that although it has long been settled that approved

compacts are federal law, we are aware of no instance in which Congress sought to amend a compact as it might other types of federal law.[6] *See Virginia Office of Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011) ("Lack of historical precedent can indicate a constitutional infirmity"); *id.* at 1641 n.7 (reserving question of whether federal law requiring state to create child-services agency as condition for receiving federal funds "is a proper exercise of Congress's enumerated powers"); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3159 (2010) ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity") (internal quotation marks and citation omitted). Accordingly, we do not think that the compact's status as federal law removes the constitutional doubt that would apply if Congress attempted to unilaterally amend it.

II. THE BEST VIEW OF THE LEGISLATION IS THAT IT DOES NOT UNILATERALLY AMEND THE COMPACT.

With these principles in mind, we now turn to the proper interpretation of the Legislation, which amends §49106 in a variety of ways concerning the composition of the Board and the terms of its members. As set forth below, we conclude the best reading of the Legislation is not that it makes its terms immediately operable, but rather allows the states to amend the compact while remaining consistent with federal law. Although there are non-negligible counterarguments to this view, we believe it best conforms to prior case law, the text of the Legislation, and past practice.

[6] Instead, the characterization of a compact as federal law "serves not to allow Congress to sidestep the Tenth Amendment but rather to give the federal courts federal question jurisdiction and makes available the doctrine of preemption to prevent states from avoiding their compact obligations by citing contrary state law." *Mineo*, 779 F.2d at 948 (citation omitted).

We begin by noting that because there would be serious constitutional questions raised if the Legislation were interpreted as unilaterally amending the compact, there is a strong presumption that Congress did not intend to legislate in that manner. *See DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

That presumption is particularly warranted here because in the entire history of interstate compacts, we are unaware of a single instance in which Congress purported to amend or rescind a compact that it had approved. Had Congress intended such path-breaking legislation, it likely would have provided some sign in the legislation or its accompanying materials indicating as such. *See Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes."). No such sign is present. Instead, the Legislation consists of a series of small changes in §49106 that were adopted as part of larger appropriations legislation and that contain no explanatory language indicating an intent to change the terms of the Authority substantially. Moreover, the Legislation makes no reference to the authorization for interstate compacts concerning airports set out at 49 U.S.C. §40124 (previously, 49 U.S.C. §1743). If Congress were purporting to take action that would limit that express authorization, one would expect it to have said so expressly.

In that vein, we believe the better view of the Legislation is not to construe it as immediately changing the terms of the Board's membership or premising the continued authorization of the compact on such changes. Although the Legislation does purport to amend

§49106(c) to grant additional Board seats and to change the terms of removal, it leaves unchanged a separate provision of §49106 that states that MWAA is defined as follows:

> (1) a public body corporate and politic with the powers and jurisdiction--
>
> (A) conferred upon it jointly by the legislative authority of Virginia and the District of Columbia or by either of them and concurred in by the legislative authority of the other jurisdiction; and
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> (B) that at least meet the specifications of this section and section 49108 of this title."

49 U.S.C. §49106(a).

By its terms, this provision states that MWAA has the "powers and jurisdiction" that Virginia and the District of Columbia have "jointly" conferred upon it. We think that Board's composition and conditions of service can fairly be described as integral to MWAA's "powers and jurisdiction" such that those aspects of the Board cannot be adopted without Virginia and the District of Columbia jointly agreeing to them.[7] Put another way, the provision gives no indication that Congress can alter the MWAA in a manner contrary to "the legislative authority of Virginia and the District of Columbia." This interpretation also has the benefit of being consistent with the general understanding of a compact as a contract between two states. The Board is a key feature of the compact, and the compact would no longer be an agreement between the states if the Board was defined in a manner the states had not agreed to.

To be sure, 49 U.S.C. §49106(a) *also* states that Board is to have powers "that at least meet the specifications of this section [i.e., §49106]," which now includes the amended provisions of the Legislation. Theoretically, one could interpret the two criteria for the Board

[7] Even if one thought that the structure of the MWAA's Board was distinct from its "powers and jurisdiction," one would likely reach the same result under 49 U.S.C. §49103(1) which defines MWAA as "a public authority created by Virginia and the District of Columbia consistent with the requirements of section 49106 of this title." This definition suggests that MWAA has the attributes accorded by state law that are consistent with the Transfer Act.

(powers conferred by the states plus compliance with §49106's terms) as mandatory in the sense that if the Board does not comply with both, then Congress can be presumed to have withdrawn its consent for the compact. That reading, however, runs into all of the constitutional difficulties described above, and is inconsistent with the absence of any indication from Congress that it intended for the first time in any legislation that we are aware of to unilaterally change the terms of a compact.

We think the better view is that the Legislation allows the states to amend their compact in a manner that is not inconsistent with the federal legislation, which itself could be unlawful.[8] This interpretation avoids the constitutional difficulties discussed above and is textually plausible in that the provision can be read to mean that *both* conditions (state approval and compliance with the Legislation) must be satisfied to change the Board. In other words, two conditions of §49106 mean that the MWAA has "at least" the powers that the states confer and that Congress specifies, an interpretation that is perfectly consistent with how compacts work. Accordingly, the Legislation does not effect a change in the compact unless and until Virginia and the District of Columbia each pass or concur in such legislation, but rather ensures that were the states to make such a change, it would be consistent with the Transfer Act. And if Virginia and the District of Columbia did not "jointly" amend the compact in this way, then the Board would continue to have its current constitution.

Notably, this view is also consistent with the history of the MWAA compact, which reflects the view that the parties must agree to a congressionally-imposed change to the compact. *See Oklahoma*, 501 U.S. at 236 n.5; *Alabama*, 130 S. Ct. at 2309 (where compact is ambiguous, the parties' "negotiating history" and "course of performance" are relevant). In each case where

[8] For example, action inconsistent with the Transfer Act could amount to a breach of the Lease, which requires MWAA to comply with the Transfer Act. Lease, §11.A.

Congress set forth a structural element for MWAA that differed from the provisions in the compact itself, Virginia and the District of Columbia amended the compact to reflect that change before MWAA carried out. As noted above, when Congress provided for a Board of Review in the original Transfer Act, Virginia and the District of Columbia amended the compact the following year to allow for the Board. Only after those amendments were made was the Board of Review selected. *Citizens for Noise Abatement*, 501 U.S. at 261; *see also id.* at 279 (White, J., dissenting) ("[T]he Board could not come into existence until the state-created Authority adopted bylaws establishing it. To allay any doubt about the Board's provenance, both Virginia and the District amended their enabling legislation to make explicit the Authority's power to establish the Board under state law") (citation omitted).

Likewise, in the Metropolitan Washington Airports Amendments Act of 1996, 104 P.L. 264, 110 Stat. 3213, 3275 (Oct. 9, 1996), when Congress increased the number of presidentially-appointed MWAA members from one to three, it does not appear that anyone at that time understood the 1996 Act to take immediate effect. Instead, both Virginia and the District of Columbia amended their own statutes the following year to reflect this change, and the President did not nominate candidates for the two additional seats until after those amendments.[9] The parties' course of conduct is therefore consistent with the view that the parties' consent is required for the changes to the Compact to be operable.

We believe that this history of cooperation between Virginia, the District, and Congress makes application of the constitutional avoidance doctrine particularly appealing. Each time Congress has amended the Transfer Act, Virginia and the District of Columbia have amended

[9] Virginia amended its statute effective March 21, 1997. *See* 1997 Va. Acts, ch. 661. The District of Columbia amended its statute effective August 1, 1997. 1997 D.C. Law 12-8. John Paul Hammerschmidt was then nominated by the President on November 5, 1997, and Norman Mineta was nominated on May 4, 1998.

their statutes to conform to Congress's changes. If Virginia and the District of Columbia were to amend their statutes once again, then the new members could indisputably be appointed to the MWAA in conformance with §49106. We think Congress assumed that this history of cooperation would continue, and that it enacted the amendments to §49106 under that assumption. In contrast, it is far less likely that Congress intended to take the unprecedented and constitutionally problematic step of amending the compact unilaterally.

One final corollary of this view concerns what would happen if Virginia and the District of Columbia were to attempt to amend the compact by enacting only some, but not all, of the terms of the Legislation. Because such an enactment probably is not "consistent" with §49106, which states that the Board shall "at least" comply with the specifications of that section, we think that it probably would be improper, especially given that the such an amendment to the compact would be in conflict with the Lease, which requires the Board to comply with the Transfer Act.[10]

III. THE LEASE DOES NOT REQUIRE THE AUTHORITY TO IMMEDIATELY COMPLY WITH THE LEGISLATION.

There is a further set of questions concerning the interaction of the Legislation and the Authority's Lease with the United States. In particular, there is the question of whether the Authority would breach its Lease if it does not comply with the Legislation. And there is a

[10] One could argue that consistency with §49106 is irrelevant because 49 U.S.C. §40124 already provides blanket authorization for states "to enter into any agreement or compact, not in conflict with any law of the United States, with any other State of States for the purpose of developing or operating airport facilities." Whatever authorization that provision might provide in other contexts, we do not think it would allow the states to unilaterally revise the MWAA compact to be inconsistent with §49106. Because Congress has provided such detailed guidance about what it will allow concerning MWAA, we think the better view is that the states do not have authority to amend the MWAA compact inconsistent with federal law. Indeed, such an amendment could be considered "in conflict with [a] law of the United States" and thus beyond the scope of §40124 even on its own terms, assuming that section applies to compact changes made in the future.

further question of whether the Legislation should be understood as conditioning the Lease on compliance with its terms. We believe that the answer to both these questions is no. Indeed, there is an argument that the Board would be in violation of its Lease if it complied with the Legislation under the current terms of the Lease.

As described above, the Lease is a long-term agreement allowing the Authority to operate the Washington Metropolitan Airports. Although the Lease is styled as being between the United States and the Authority, it is also signed by Virginia and the District of Columbia, and all subsequent amendments to the Lease have been signed by all four entities. The Lease states that the "Airports Authority is a public body corporate and politic that meets the requirements of section 6007 of the [Transfer] Act [and] agrees to refrain from action that would alter such status and to use its best efforts to maintain this status." Lease §11.A (as amended now §11.B). Section 6007 of the Transfer Act includes the language codified at 49 U.S.C. §49106 concerning the composition of the Board. A December 1991 amendment to the lease also provides that the "Airports Authority agrees to comply with the conditions imposed by the Act." Lease, Amendment 1, §2, amending §11.A.

The Lease, however, defines the "Act" as the Transfer Act itself, Lease §1.A, and the practice has been that as the Act has been amended, the parties to the Lease have amended the Lease itself to include those amendments within the definition of the "Act." *See, e.g.*, Lease, Amendment 1, §1, amending §1.A. Thus, the better reading of the Lease is that it requires the Board to comply with the Transfer Act as previously amended, *not* including the Legislation, because the parties have not yet amended the Lease to so include the Legislation. Such an amendment would require the approval of United States, the Authority, Virginia and the District

of Columbia. Thus, to summarize: the Lease does not require the Board to comply with the Legislation; if it were to do so, it would in fact be in violation of the Lease.

One could also conceivably understand the Legislation as stating that the United States will not lease the airports to the Authority if it is not constituted consistent with §49106. We do not believe that this is the better view of the Legislation. Nothing in the Transfer Act or any of its amendments expressly conditions the lease on the Board having a particular structure. And were the United States to attempt to rescind the lease, that would likely be unlawful. *See, e.g.*, *Del-Rio Drilling Programs v. United States*, 146 F.3d 1358, 1367 (Fed. Cir. 1998) ("[L]eases are contractual undertakings by the government upon which citizens are entitled to sue in the Court of Federal Claims"). Because Congress is assumed not to take unlawful actions, we do not believe that is a persuasive reading of the Legislation.

CONCLUSION

We hope this assessment of the Legislation is useful and look forward to discussing any questions you may have.