President Bush unwisely has transformed this nuclear cooperation agreement into the centerpiece of our bilateral relationship with New Delhi. In doing so, he has ignored the broad range of areas on which the United States and India can and should cooperate—ranging from science and technology to economic and business partnerships. In the security realm, our two nations should be doing more together on counterterrorism, especially in the wake of the devastating attacks in India over the past year.

I strongly believe in the promise of the future partnership between our two great nations. I am voting in favor of this agreement, despite its serious nonproliferation flaws, because I do not want to jeopardize that emerging alliance that can bring so many benefits to both of our peoples.

Mr. REED. Mr. President, I would like to take a few moments to discuss my vote against the India Nuclear Agreement.

In 2006, I voted in favor of the Henry J. Hyde United States and India Nuclear Cooperation Promotion Act, primarily because of the safeguards included in the act that would ensure that assistance to Indian's civilian nuclear program to meet its domestic energy needs, would not assist the Indian nuclear weapons program. Unfortunately, I do not believe that the United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act that we voted on last night has the full scope of necessary protections.

India is the largest democracy in the world. Its economy is growing by 8 percent annually. Their domestic energy needs are enormous and they simply do not have enough indigenous resources to meet them. India is an important ally and our nation has benefitted from a strong trade and defense relationship for decades. Furthermore, my State of Rhode Island has prospered because of a vibrant Indian community. I believe that the United States should do all that it can to assist India and further strengthen the partnership between the two countries.

However, our country's relationship with India must be balanced with concerns about nuclear proliferation and the stability of the Middle East and Asia.

I believe that proliferation of nuclear weapons and weapons material and technology is the greatest threat facing our country today. The most effective method of controlling such proliferation is a multilateral regime where all countries are subject to the same standards.

The agreement that was approved by the Senate last night establishes a separate and unique regime for India. This particular agreement would allow India to be treated like a nuclear weapons state but not impose upon India the responsibilities and commitments placed on other nuclear weapons states. As such I believe that this particular agreement is flawed. This agreement has the potential to actually weaken the carefully constructed, long-standing nuclear nonproliferation regime that the world depends on to prevent the spread of nuclear weapons.

This agreement does provide some benefits. Under this agreement India will put 14 of its nuclear reactors under safeguards agreements with the International Atomic Energy Agency, the IAEA. This will help to ensure that these reactors and the fuel supplied to them will be used only for the peaceful production of nuclear poser. In addition the IAEA will bring its expertise to help to improve the operational safety of the reactors.

On the other hand the rest of India's nuclear reactors will not come under the IAEA and these reactors can be used as India wishes to produce power or to produce more material for nuclear weapons. But it is troublesome to me that India retains the right to deny IAEA access to some or all of the reactors that it has now agreed will come under IAEA agreements.

While this agreement will help India with its energy needs, India is also now free to use its limited indigenous uranium for to support a build up of its nuclear weapons stockpile. India has specifically preserved its ability to increase the number of nuclear weapons in its arsenal, its ability to increase the amount of nuclear weapons materials that it produces and its right to conduct a test of a nuclear weapon.

While India has a voluntary moratorium on testing, India still refuses to sign the Comprehensive Test Ban Treaty and to support a fissile material cutoff treaty. Finally, I am greatly concerned about the effect this agreement will have on the region, particularly the reaction of Pakistan. Pakistan will undoubtedly seek a similar agreement if it perceives an increased threat from India. Pakistan may seek to partner with China—and the United States would have few grounds to protest. In such a case, Pakistan will have additional access to nuclear technology.

While I believe that the United States should help India with its urgent energy needs, I believe we missed an opportunity to provide assistance with adequate and necessary safeguards in place. For these reasons, I reluctantly decided to vote against this agreement. It is my hope that the United States and India continue to work together to make the world safer from nuclear proliferation.

IN MEMORIAM: PAUL NEWMAN

Mrs. BOXER. Mr. President, I am honored to remember a great American icon who was a renowned actor, activist, and philanthropist—Paul Newman, who passed away on September 26, 2008, at the age of 83.

Paul's movie career spanned five decades, acting in over 65 films. He captivated all of America with his natural on-screen talent and his off-screen ability to give to others. He was more than an incredibly gifted, Academy Award-winning actor; his zeal for life was evident through his remarkable charitable work and favorite pastimes.

Paul Leonard Newman was born in Shaker Heights, OH, on January 26, 1925, to Arthur and Theresa Newman. Though he hoped to be a professional athlete, his gift for the performing arts showed early as he acted in grade school and high school plays. After high school he served in the U.S. Navy Air Corps and eventually went on to study theatre at prestigious institutions such as the Yale School of Drama and the famous Actor's Studio in New York.

In the 1950s his acting career began in theatre and television. He moved to films and was eventually nominated for 10 Oscars—winning Best Actor for ''The Color of Money'' and also two honorary Oscars. He played many major roles in classic American films such as ''Exodus,'' ''Hud,'' ''Butch Cassidy and the Sundance Kid,'' ''The Verdict,'' ''The Sting,'' and ''Absence of Malice.'' His legendary performances will forever entertain and captivate the American imagination.

Paul was not only an iconic actor, but he also fervently cared about our Nation. He opposed the Vietnam war and ardently favored civil rights and equality. In addition he was a world-class race car driver, and a flourishing nonprofit entrepreneur. He founded the popular Newman's Own line of food products 25 years ago, and 100 percent of its profits are donated to charities around the world. Among those charities are the Hole in the Wall Camps that Paul helped to create over 20 years ago. These camps allow for a carefree experience for children with illnesses. Newman's Own has raised $250 million so far.

When his son, Scott, tragically passed away, Paul established the Scott Newman Center in 1980 to prevent drug abuse through educating children. He also helped to cofound the Committee Encouraging Corporate Philanthropy, a consortium of global CEOs in support of corporate giving. Paul Newman lived his life by giving to others and encouraging others to give.

He is survived by his wonderful wife of 50 years, award-winning actress Joanne Woodward; five daughters, Susan, Stephanie, Melissa, Nell, and Clea; two grandchildren; and his brother Arthur. I send my deepest condolences to them.

Our Nation lost an amazing talent and humanitarian with the passing of Paul Newman, but his legacy to the State of California and to all of America will live on.

GAO SLOT AUCTION RULING

Mrs. MURRAY. Mr. President, as chairman of the Appropriations Subcommittee on Transportation, Housing and Urban Development, and Related

Agencies, I rise with my ranking member, Senator BOND, as well as the bipartisan leadership of the Senate Commerce Committee, to address an important issue pertaining to the Federal Aviation Administration, FAA. That issue is the agency's plans to engage in the practice of auctioning off landing and takeoff slots at slot-controlled airports.

Controversial aviation issues do not always garner immediate agreement on the part of all committee and subcommittee leaders in the Senate. They often trigger disagreements fueled by regional interests or differing views on the appropriate role of the Department of Transportation, DOT, in regulating the market. But in this instance, it should be noted that all four Senators with authorizing and appropriating responsibilities for the FAA are in agreement that the FAA's plans are illegal. We do not come to that conclusion lightly. Just yesterday, the committee received an authoritative legal opinion from the General Counsel of the Government Accountability Office, GAO, that reached that same conclusion.

GAO's legal opinion should not come as a surprise to the FAA. Indeed, the FAA, as recently as 2 years ago, was of the same view as GAO and stated in the Federal Register that it did not have the authority to proceed with such slot auctions. More recently, however, the General Counsel at the DOT concocted what, in my view, is a new far-fetched legal argument for the purpose of evading the clear limitations imposed by the authorizing statute and appropriations law. The GAO reviewed the Department's new interpretations of the law and found that they don't hold water. Indeed, the GAO concluded that, if the FAA were to proceed with these auctions, the agency would be engaging in a blatant violation of the Antideficiency Act. This legal opinion matters not simply because it corroborates our collective bipartisan interpretation of the authorizing and appropriations laws. It matters because the GAO is statutorily charged with making determinations regarding violations of Appropriations law including the Antideficiency Act.

One would think that this opinion would bring an end to this debate. Since we now know, in advance, how the GAO would rule on this question, one would expect the DOT to abandon its interpretation and cancel its planned auctioning of slots. To do otherwise would signal the agency's intention to proceed with a process that will almost certainly be found to be illegal. Unfortunately, we are getting indications that this is precisely what the Department intends to do—proceed with these slot auctions whether they are legal or not. I find the Secretary's plans to be both startling and disappointing. In my view, agency heads should not be launching into actions that are likely to be found to be illegal. And equally important, political appointees should not be forcing non-political officials in their departments to participate in such acts.

So, Mr. President, I, along with my colleagues, am taking the time of the Senate to implore Secretary Peters to review the GAO's findings and abandon the Department's plans. To do otherwise will just subject the taxpayers to the costs both of litigating this matter while holding a losing hand. The taxpayers will also have to foot the bill for financing the operation of this slot auction process. This represents an expense potentially in the millions of dollars. Those funds would be much better spent addressing the long list of critical safety improvements that must be made by the FAA.

Mr. BOND. It is a rare occurrence in the Senate to get this level of strong bipartisan cooperation, and I thank the chair and our colleagues on the Commerce Committee, Senators INOUYE and HUTCHISON, for their support on this issue.

As you mentioned, I, too, am concerned that the administration will ignore the impartial legal opinion articulated by the GAO on slot auctions and proceed with their ill-conceived plan.

The flying public and taxpayers are not well served by carrying through on a plan that will only lead to increased delays and costly litigation. Our aviation system needs a comprehensive overhaul, operationally and technologically, to fix the problems of congestion. An untested scheme to further tax airlines and passengers is certainly not what is needed. The delayed and weary flying public deserves better.

Should the administration proceed with their illegal auction scheme, it will do nothing to reduce congestion and will only postpone needed reforms to the system. The problem of chronic congestion and delays in our aviation system deserves the full attention of all of the stakeholders involved in aviation—from the administration and Congress, the airlines, airports, customers, and the air traffic controllers and operational personnel that keep our system moving. With the GAO's legal ruling, it is my hope that we can move past this failed idea and work towards a real solution.

I look forward to working with you and our Commerce Committee colleagues in addressing the fundamental causes of delays and congestion throughout our system and thank you all again for your continued leadership and support on the issue.

Mr. INOUYE. Mr. President, as chairman of the Senate Commerce, Science, and Transportation Committee, I rise in support of the remarks made by my colleagues and would like to express my concern with moving forward on this proposal.

Clearly, such a profound change in aviation policy must be supported by Congress and the agency's underlying authorizing legislation. Congress, however, has consistently opposed the DOT's attempt to auction slots and explicitly prohibited such actions in P.L. 110–161. Just this week, the GAO reaffirmed the position of Congress when it issued an opinion which concluded DOT's proposed initiative to auction slots is illegal.

It is perplexing that the DOT continues to pursue this course of action in the face of such strong Congressional opposition. Further, I am astonished that they would continue down this road in the face of legislation that clearly prohibits them from taking such action. I, along with my colleagues, implore the DOT to abandon its efforts to auction slots. The administration should focus its energy on more important issues, such as modernizing the Air Traffic Control System and ensuring the safety of its passengers.

Mrs. HUTCHISON. Mr. President, I thank my friends from the Appropriations Committee along with Commerce Committee Chairman INOUYE for their leadership and agreement on this issue. In the absence of explicit authority and in response to the GAO determination, I join my colleagues in urging DOT to cease action on any current auction proposal.

I believe market based solutions should play a role in the future of our congested airports, but the path the Department has taken is shortsighted, untimely and according to the GAO, apparently illegal. Instead, the Department should further focus on mitigating delays through capacity enhancements at congested airports.

Mrs. MURRAY. Mr. President, I very much want to thank my colleagues for engaging in this discussion today. I ask unanimous consent to have the legal opinion sent to us by the GAO General Counsel printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

Subject: Federal Aviation Administration—Authority to Auction Airport Arrival and Departure Slots and to Retain and Use Auction Proceeds

GOVERNMENT ACCOUNTABILITY OFFICE
Washington, DC, September 30, 2008.

Hon. JAMES L. OBERSTAR,
Chairman, Committee on Transportation and Infrastructure, House of Representatives.
Hon. PATTY MURRAY,
Chairman, Subcommittee on Transportation, Housing, and Urban Development, and Related Agencies, Committee on Appropriations, U.S. Senate.
Hon. CHRISTOPHER S. BOND,
Ranking Minority Member, Subcommittee on Transportation, Housing, and Urban Development, and Related Agencies, Committee on Appropriations, U.S. Senate.
Hon. FRANK R. LAUTENBERG,
Hon. ROBERT MENENDEZ,
Hon. CHARLES E. SCHUMER,
Hon. HILLARY RODHAM CLINTON,
U.S. Senate.

This responds to your request for our legal opinion regarding the authority of the Federal Aviation Administration (FAA) to auction airport arrival and departure slots. As part of its efforts to reduce congestion in the national airspace, in April and May 2008, FAA issued proposed regulations to conduct such auctions at three New York-area airports—LaGuardia Airport (LaGuardia), John

F. Kennedy International Airport (JFK), and Newark Liberty International Airport (Newark) at some time in the future. In August 2008, FAA announced that it was proceeding to auction two specific slots at Newark on September 3, an action that has since been administratively stayed. On September 16, 2008, FAA announced that ''[i]n accordance with rulemaking activity that is not yet complete'' and ''if the rule is adopted,'' it may auction slots at Newark, LaGuardia, and JFK starting on January 12, 2009. As agreed with your staff, this opinion addresses whether FAA has authority to auction slots and if it does, whether it may retain and use funds obtained through such auctions.

We conclude that FAA currently lacks authority to auction arrival and departure slots, and thus also lacks authority to retain and use auction proceeds. For the first time since it began regulating U.S. navigable airspace nearly 40 years ago, FAA now asserts that it may assign the use of that airspace using its general property management authority. According to FAA, slots are intangible ''property'' that it ''constructs,'' owns, and may ''lease'' for ''adequate compensation'' under 49 U.S.C. §§106 (l)(6) and (n) and 40110(a)(2). An examination of those statutes read as a whole, however, makes clear that Congress was using the term ''property'' to refer to traditional forms of property. It was not referring to FAA's regulatory authority to assign airspace slots, no matter how valuable those slots may be in the hands of the regulated community. Related case law confirms our conclusion. The only other source of authority for FAA to raise funds in connection with its slot assignments is the Independent Offices Appropriations Act (IOAA), 31 U.S.C. §9701, commonly referred to as the ''user fee statute,'' but that authority is currently unavailable. Since 1998, Congress has, through annual appropriations restrictions, specifically prohibited FAA from imposing ''new aviation user fees,'' and we conclude that proceeds from FAA's proposed auctions would constitute such a fee. Accordingly, in our opinion, FAA lacks a legal basis to go forward with the Newark auction or any other auction, and if FAA were to go forward with auctioning slots without obtaining the necessary authority and retained and used the proceeds, GAO would raise exceptions under its account settlement authority for violations of the ''purpose statute,'' 31 U.S.C. §1301(a), and the Antideficiency Act, 31 U.S.C. §1341(a)(1)(A).

BACKGROUND

FAA's control of congestion in the national airspace by use of a ''reservation'' or ''slot'' system is not new. What is new is FAA's proposal to assign the slots by auction. FAA first instituted a slot control system nearly 40 years ago, in 1968, in the so-called High Density Rule. See 33 Fed. Reg. 17896, 17898 (Dec. 3, 1968); 14 C.F.R. §§93.121–93.129 (1969). Supplementing the traditional first-come, first-served traffic control system, the High Density Rule capped the number of hourly arrivals and departures permitted at five designated ''high density traffic airports''—LaGuardia, JFK, Newark, Washington National Airport (Washington National), and Chicago O'Hare International Airport—and required air carriers to obtain a ''reservation'' for these operations from Air Traffic Control (ATC). The number of reservations available for assignment varied by airport, time of day, and class of user.

In promulgating the High Density Rule, FAA acknowledged that it was acting pursuant to its regulatory authority to ensure the efficient use of the national airspace under sections 307(a) and (c) of the Federal Aviation Act of 1958. 33 Fed. Reg. at 17897, 17898. That act created FAA (as the Federal Aviation Agency) and directed the FAA Administrator to: ''assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required by the public interest. . . . [The Administrator also] is authorized to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace. . . .''

Federal Aviation Act of 1958, Pub. L. No. 85–726, §307(a), (c), 72 Stat. 731, 749–50, 49 U.S.C. §1348 (a), (c) (1968) (emphasis added). *See generally Northwest Airlines, Inc.* v. *Goldschmidt*, 645 F.2d 1309 (8th Cir. 1981) (upholding 1980 amendment to High Density Rule as exercise of FAA's section 307(a) and (c) authority to regulate efficient use of airspace).

Reservations under the High Density Rule initially were allocated by agreements between the airlines (acting through airport scheduling committees) and ATC and by rule, the vast majority of reservations were set aside for assignment to scheduled air carriers. See 14 C.F.R. §93.123(a) (1969). Because only a few carriers held certificates of public convenience and necessity for these airports, as required prior to deregulation of the airline industry in the early 1980's, there was only limited competition for the reservations. With deregulation, however, any licensed carrier could service any high density airport, with the result that airport scheduling committees could no longer reach agreements acceptable to prospective new entrants and incumbent airlines wishing to expand their operations.

To accommodate the resulting demand for reservations while ensuring continuity of operations for carriers providing regularly scheduled service, FAA amended the High Density Rule effective in 1986. See 50 Fed. Reg. 52180 (Dec. 20, 1985). It again acknowledged that it was acting pursuant to its regulatory authority under sections 307(a) and (c) of the Federal Aviation Act to ensure the efficient use of the national airspace. Id. at 52181. Under a ''grandfather'' policy, FAA initially assigned most reservations—now called ''slots''—to the carriers who already held them under scheduling committee agreements. For the first time, FAA also authorized carriers to sell, lease, or otherwise transfer the slots among themselves, subject to confirmation by FAA and to a determination by the Secretary of Transportation that transfer ''will not be injurious to the essential air service program.'' Slots could be withdrawn at any time for FAA operational needs, and under a ''use-or-lose'' provision, slots not used 65 percent of the time would be recalled. FAA made clear that ''[s]lots do not represent a property right but represent an operating privilege subject to absolute FAA control.''

In issuing the 1986 amendments, FAA noted that it had decided not to pursue a proposal it had made in 1980, to assign slots by means of an auction. It explained this was because ''legislation would be required for the collection and disposition of the proceeds.'' Id. at 52183. FAA noted that ''several unresolved legal questions'' had been raised by the Department of Justice which DOJ believed would make an auction ''impractical,'' citing the Independent Offices Appropriations Act (IOAA), 31 U.S.C. §9701, commonly referred to as the ''user fee statute.'' IOAA could be problematic, FAA noted, ''if these proceeds were to be applied for airport improvements . . . .'' *Id.* As FAA had explained in its earlier proposal, this is because ''in accordance with [IOAA], the money received as a result of any auction system will not be retained by DOT but will be paid into the Treasury of the United States. Other disposition of the revenues . . . [is] not now authorized by statute.'' 45 Fed. Reg. 71236, 71240, 71241 (Oct. 27, 1980).

Over time, Congress became concerned that the High Density Rule, particularly the 1986 amendments, hurt competition, unfairly favored incumbent airlines, and was not the best means to reduce congestion. After enacting several measures in the 1980s and 1990s requiring greater access for certain service providers, in 2000, Congress directed FAA to phase out the High Density Rule altogether, at LaGuardia, JFK, and O'Hare, no later than January 1, 2007. At about this same time, Congress also began to enact annual appropriations restrictions prohibiting FAA from promulgating any ''new aviation user fees'' unless specifically authorized by statute. The first of these restrictions was enacted in 1997 for fiscal year 1998, and the most recent was enacted in 2007 for fiscal year 2008.

As the 2007 High Density Rule phase-out deadline approached, FAA remained concerned about congestion. In August 2006, it therefore proposed to continue caps on hourly arrivals and departures at LaGuardia and to assign the majority of slots (now called ''operating authorizations'') to incumbent carriers. 71 Fed. Reg. 51360 (Aug. 29, 2006). FAA also now proposed to set expiration dates for most slots, with 10 percent of the slots each year to be redistributed, as they expired, using a market-based mechanism yet to be determined. FAA could not propose a specific market mechanism at that time, it explained, because it lacked authority to do so and would be seeking such authority from Congress: ''[FAA] will seek authority to utilize market-based mechanisms at LaGuardia in the future [to allocate capacity]. Such legislation would be necessary to employ market-based approaches such as auctions or congestion pricing at LaGuardia because the *FAA currently does not have the statutory authority to assess market-clearing charges for a landing or departure authorization.* If Congress approves the use of market-based mechanisms as we plan to propose, a new rulemaking would be necessary to implement such measures at LaGuardia.''

Id. at 51362 (emphasis added); *see also id.* at 51363. FAA subsequently requested such authority from Congress, but it has not been enacted. When FAA was unable to finalize its 2006 proposal before the January 1, 2007 phase-out deadline, it issued a series of temporary ''capping orders'' maintaining caps and slots at LaGuardia, JFK, and Newark.

Finally, as noted above, in April and May 2008, FAA issued its most recent proposals for a cap and slot system at LaGuardia, JFK, and Newark. FAA proposes to continue to assign the majority of slots to incumbent carriers and, as in its 2006 proposal, to withdraw a portion of the slots for re-distribution (along with unassigned slots). However, calling its 2006 legal analysis ''overly simplistic'' and ''incorrect,'' FAA now proposes to do what it previously stated it had no authority to do: assign the withdrawn slots by auctioning slot ''leaseholds'' to the highest bidder. The proceeds from the auctions would either be retained by FAA and used to mitigate congestion in the New York City area or, after deducting FAA's administrative costs, paid to the airline that previously held the auctioned slot. To impose caps on hourly arrival and departure slots, FAA continues to rely on its regulatory authority to ensure efficient use of the airspace, now codified at 49 U.S.C. §40103(b)(1), (2). See 73 Fed. Reg. at

20846, 29626. To assign the slots by auctioning slots leaseholds, FAA for the first time relies on its general authority to lease or otherwise dispose of ''property'' under 49 U.S.C. §§106 and 40110. See *id*. at 20853, 29631.

ANALYSIS

Whether FAA may raise funds in connection with its assignment of slots—by holding a slot auction, imposing a user fee, assessing a tax, or by some other mechanism—depends on whether it has the proper statutory authority. Congress has granted FAA explicit statutory authority to collect fees in several different situations, but no explicit authority exists for the imposition of fees related to the assignment of slots. We therefore look to whether FAA has any other authority that would permit it to auction slots.

I. FAA's authority to auction slots under its property disposition authority

In evaluating whether FAA may assign slots using its general property disposition authority, it is important to understand what a slot is. FAA has consistently characterized a slot as an ''operating authorization'' or ''operational authority'' to conduct one operation (arrival or departure) in the airspace during a specified time period. At the five high density airports, this authorization is in addition to the authorization or ''clearance'' that must be obtained from ATC to operate within the airspace at those facilities. 14 C.F.R. §§91.131(a)(1), 91.173. While these two authorizations differ in some respects—clearances are normally required of all users of this airspace, while slots, due to capacity demands, are issued only to some users—both constitute regulatory permission without which aircraft may not be operated. So understood, a slot is a regulatory license—a legal permission, revocable by FAA, to conduct an act that otherwise would not be permitted.

As FAA itself emphasizes, it is also important to understand that caps and slots are two interconnected parts of FAA's regulatory structure to ensure the efficient use of the airspace. 2008 FAA Letter at 1. Limiting aircraft traffic by capping the number of arrivals and departures reduces the amount of traffic that is airborne, but it does not avoid the backup of aircraft seeking access to the air traffic system or provide a mechanism for prioritizing traffic. Assigning slots accomplishes this objective; without slots, traffic will queue on a first-come-first-served basis (as it does at non-slot controlled airports), undermining scheduling. Whether the assignment system is called a reservation system, an operating authorization system, or a slot system, the use of an assignment mechanism is key to accomplishing what FAA believes is necessary to promote orderly and efficient traffic flow and use of airspace.

According to FAA, however, slots are not a license but ''property'' that it ''acquires'' or ''constructs'' and, as the property ''owner,'' may ''lease'' using its general property disposition and contracting authority in 49 U.S.C. §§106 (*l*)(6) and (n) and 40110(a)(2). Section 106(n)(1) authorizes FAA: ''(A) to *acquire* (by purchase, lease, condemnation, or otherwise), construct, improve, repair, operate, and maintain—(i) air traffic control facilities and equipment; (ii) research testing sites and facilities; and (iii) such other real and personal *property* (including office space and patents), or any interest therein . . . as the Administrator considers necessary; [and] (B) to *lease* to others such real and personal *property* . . . .''

Section 106(l)(6) authorizes FAA: ''[to enter into] such contracts, *leases*, cooperative agreements, or other transactions as may be necessary to carry out the functions of FAA.''

Section 40110(a)(2) authorizes FAA: ''[to] dispose of an interest in *property* for adequate compensation. . . .''

(All emphasis added.)

As evidence that these provisions authorize slots to be ''leased'' as ''property,'' FAA points to bankruptcy proceedings where slots subject to lease have been accorded some proprietary status. 2008 FAA Brief at 41–43. FAA asserts that it, too, has a property interest in slots subject to lease because: (1) FAA has sovereignty over U.S. navigable airspace; (2) airspace has been characterized as ''public property;'' (3) FAA regulates the use of navigable airspace; (4) as a ''product'' of its regulation, FAA has ''constructed'' slots as an ''intangible property interest'' in airspace use; and (5) as the slot ''constructor,'' FAA ''owns'' and may ''lease'' its ''intangible'' slots. FAA states further that it may—in fact, must—charge ''adequate compensation,'' and even ''market prices,'' for this ''property'' under 49 U.S.C. §40110. 2008 FAA Brief at 41, 50–53.

As discussed below, however, slots are not ''property'' subject to FAA's property disposition authority. Nor are they the mere ''product'' of FAA regulation; they are FAA regulation. Moreover, FAA's argument that slots are property proves too much—it suggests that the agency has been improperly giving away potentially millions of dollars of federal property, for no compensation, since it created the slot system in 1968.

A.

Parsing its property acquisition and disposition authorities under 49 U.S.C. §§106(n) and 40110(a)(2) and applying general dictionary definitions, FAA maintains that when it uses its regulatory authority to delineate a time period for authorized takeoff or landing—a slot—it ''constructs'' or ''acquires'' an intangible ''property'' interest in airspace use that it may ''lease'' to others for ''adequate compensation.'' 2008 FAA Letter at 2–3; 2008 FAA Brief at 47–48. ''Understanding Congressional will requires more than the mechanical application of dictionary definitions,'' however, *see Faircloth* v. *Lundy Packing Co*., 91 F.3d 648, 660 (4th Cir. 1996) (Michael, J., concurring and dissenting), and it is a cardinal rule of statutory construction that statutes must be read as a whole, ''since the meaning of statutory language, plain or not, depends on context.'' *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (citations omitted). When taken in context and read as a whole, the term ''property'' as used in FAA's statute clearly refers to traditional property, not to FAA's regulatory licensing authority over the use of navigable airspace. Almost all of the ''property'' examples listed in 49 U.S.C. §106(n)(1) are traditional tangible property—real estate, equipment, and infrastructure—and the legislative history repeats the same examples. See H. R. Conf. Rep. 104–848 (1996) at 107, 1996 U.S.C.C.A.N. 3703, 3729. The other example referenced in §106(n)—a patent— has long been recognized as intangible property. Other terminology used in §106(n)(1) reinforces that Congress was referring to traditional property. For example, the statute refers to property that is ''leased'' and ''condemned'' (applied to traditional real property) and ''constructed, improved, repaired, operated, and maintained'' (applied to traditional real and personal property). Under the statutory construction rule of ejusdem generis, ''such other . . . property . . . or any interest therein'' as used in §106(n)(1)(A) must mean property of a nature similar to the traditional real and personal property examples cited in the statute. This would not include FAA's regulatory authorizations for aircraft takeoffs and landings—that is, slots.

The structure of FAA's statutory authority and its legislative history support this conclusion. Congress has given FAA different authorities to carry out different responsibilities—it has regulatory authority in 49 U.S.C. §40103 to ensure the safe and efficient use of the navigable airspace, and property acquisition and disposition authority in 49 U.S.C. §§106 and 40110 to support FAA's mission and general operations. As relevant here, FAA has had these same basic authorities since its creation in 1958. The fact that Congress authorized FAA to carry out its regulatory responsibilities (including assignment of slots) under the strictures of §40103 undercuts FAA's argument that Congress simultaneously authorized FAA to carry out many of these same responsibilities under the very different strictures of §§106 and 40110. Congress has never suggested as much in the half-century of FAA's existence, nor, until 2008, has FAA. Thus FAA may not rely on its general property disposition authority to carry out its regulatory slot assignment functions. *See, e.g., American Petroleum Inst.* v. *EPA*, 52 F.3d 1113, 1119–20 (D.C. Cir. 1995) (EPA cannot rely on general rulemaking authority to regulate air pollutant in manner conflicting with authority specific to that pollutant and ''cannot uncouple the first sentence of [Clean Air Act provision] from the rest of the section in order to expand its authority beyond the aims and limits of the section as a whole.'').

Finally, FAA's reading of its property authority, particularly the purported significance of a 1996 amendment to that authority, is unavailing because it would interfere with Congress' constitutional prerogatives to set programmatic spending levels and oversee agency activities. U.S. Const. Art. I, Sec. 9, cl. 7. As noted above, in the past FAA has considered imposing a user fee under IOAA in connection with its assignment of slots. Congress also has considered FAA's imposition of user fees. In FAA's 1996 reauthorization legislation, for example, Congress authorized FAA to charge certain cost-based user fees, but called for further study of the agency's funding needs and funding mechanisms. See Air Traffic Management System Performance Improvement Act of 1996, Pub. L. No. 104–264, Title II, §§221(12), 273, 274. And in 1997, Congress enacted the first of its now-annual appropriations restrictions expressly prohibiting FAA from imposing any ''new aviation user fees'' without specific statutory authority. FAA nevertheless asserts that when Congress amended its property authority in the 1996 reauthorization act by enacting §106(n)—which clarified FAA's property acquisition authority to include personal as well as real property, and authority not just to ''acquire'' property but, as discussed above, to ''construct, improve, repair, operate, and maintain'' it, see Pub. L. No. 104–264, §228, codified at 49 U.S.C. 106(n)—this amendment granted FAA authority to ''construct'' and auction slots. 2008 FAA Brief at 47–48. Given Congress' substantial concerns about FAA's imposing user fees in 1996 and its outright ban on new FAA aviation user fees the following year, we find it highly unlikely that Congress at the same time authorized FAA to obtain non-appropriations funding through the ''back door'' of its general property disposition authority.

B.

Case law regarding the legal status of slots and regulatory licenses confirms our conclusion that slots are not ''property'' in the hands of FAA. To demonstrate that slots are property, FAA cites three bankruptcy cases—*In re McClain Airlines, Inc.*, 80 B.R. 175 (Bankr. D. Ariz. 1987); *In re American Central Airlines*, 52 B.R. 567 (Bankr. N.D. Iowa 1985); and *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir.

1989)—which considered whether an airline in bankruptcy had a sufficient proprietary interest in its slots to include them as ''property of the estate'' (or in McClain, an interest in a right to seek restoration of a withdrawn slot). 2008 FAA Brief at 42–43, 61; 2008 FAA Letter at 3. The courts in these cases focused in part on the fact that after FAA's 1986 amendments to the High Density Rule, carriers could sell, lease, or otherwise transfer slots among themselves.

The cases do not support FAA's position. At most, they recognize the undisputed fact that slots have value in the hands of carriers to whom they are assigned, at least when the slots are transferable to other carriers. The decisions do not address the issue we face here: the nature of slots when they are unassigned and ''held'' by FAA. In fact, the cases underscore the limited nature of slots even after they are assigned: they remain subject to FAA withdrawal at any time for operational reasons and to FAA recall for nonuse. In Gull Air, for example, the most recent, and the only appellate court, decision cited by FAA, FAA itself argued that slots were not the carrier's property but rather, as specified in FAA's regulations, ''operating privileges subject to absolute FAA control.'' 890 F.2d at 1258. The First Circuit Court of Appeals ruled only that slots' transferability under the High Density Rule created a ''limited proprietary interest in slots'' that is ''encumbered by conditions that FAA imposed in its regulations.'' Id. at 1260. The court declined to decide whether the slots constituted ''property of the estate'' because whatever that interest was, it was lost automatically under FAA's ''use or lose'' requirement when the airline ceased operations. Thus *Gull Air* stands only for the proposition that slots have one characteristic of property—transferability—which may qualify slots as ''property of the estate'' under the Bankruptcy Code when held by carriers. This is a far cry from finding that slots are FAA's ''property'' subject to its property disposition statute.

Furthermore, even if slots were not transferable, there is little doubt that they have value to carriers. Yet the U.S. Supreme Court has made clear that the fact that a government license is valuable to the license holder does not render the license ''property'' in the hands of the issuing agency. Rather, the license is ''no more and no less than [the agency's] sovereign power to regulate.'' *Cleveland* v. *United States*, 531 U.S. 12, 23 (2000). In *Cleveland*, the Supreme Court had to decide whether a Louisiana video poker machine license was ''property'' under the federal mail fraud statute, which makes it a felony to use the mail to further ''any scheme . . . to defraud, or for obtaining money or *property* by means of false or fraudulent pretenses . . . .'' 18 U.S.C. 1341 (emphasis added). Upholding the rulings of five circuit courts of appeals, the unanimous Supreme Court ruled that the licenses were not ''property'' when held by the issuing state agency:

''Without doubt, Louisiana has a substantial economic stake in the video poker industry. The State collects an upfront 'processing fee' for each new license application . . ., a separate 'processing fee' for each renewal application . . ., an 'annual fee' from each device owner . . ., an additional 'device operation' fee . . ., and, most importantly, a fixed percentage of net revenue from each video poker device . . . It is hardly evident, however, why these tolls should make video poker licenses 'property' in the hands of the State. The State receives the lion's share of its expected revenue not while the licenses remain in its own hands, but only after they have been issued to licensees. Licenses preissuance do not generate an ongoing stream of revenue. At most, they entitle the State to collect a processing fee from applicants for new licenses. *Were an entitlement of this order sufficient to establish a state property right, one could scarcely avoid the conclusion that States have property rights in any license or permit requiring an up front fee, including drivers' licenses, medical licenses, and fishing and hunting licenses. Such licenses, as the Government itself concedes, are 'purely regulatory*.'''

531 U.S. at 22 (second emphasis added).

FAA compares its proposed slot leases to patents, a type of intangible property it is authorized to dispose of under 49 U.S.C. 106(n)(1)(A)(ii). 2008§FAA Brief at 33, 51. But the *Cleveland* Court rejected this patent analogy, which had been made by the United States:

''[T]hese intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate. . . [T]he state's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor. *Such regulations are paradigmatic exercises of the States' traditional police powers*.

''The Government compares the State's interest in video poker licenses to a patent holder's interest in a patent that she has not yet licensed. Although it is true that both involve the right to exclude, we think the congruence ends there. Louisiana does not conduct gaming operations itself, it does not hold video poker licenses to reserve that prerogative, and it does not ''sell'' video poker licenses in the ordinary commercial sense. Furthermore, *while a patent holder may sell her patent . . ., the State may not sell its licensing authority*. Instead of a patent holder's interest in an unlicensed patent, the better analogy is to the Federal Government's interest in an *unissued* patent. That *interest, like the State's interest in licensing video poker operations, surely implicates the Government's role as sovereign, not as property holder*.''

531 U.S. at 23–24 (emphasis added).

Just as Louisiana did not run the video poker machines in *Cleveland*, so FAA does not operate commercial air carriers. Just as Louisiana regulated gaming as part of its police power to protect the public welfare, so FAA regulates air traffic as part of its responsibility to ensure efficient use of the national airspace. As in *Cleveland*, the fact that FAA's slots have value to slot holders does not transform them into alienable ''property'' in FAA's hands. FAA seeks to distinguish *Cleveland* because the licenses there were not transferable, and because a rule of leniency applicable to criminal statutes drove the Supreme Court's interpretation. As noted above regarding *Gull Air*, however, slot transferability is irrelevant to FAA's ''property'' rights because slots do not acquire this trait until *after* FAA assigns them. And while FAA's property disposition provisions are not criminal statutes, studied skepticism in defining their reach is also warranted. In this regard, there is an acute public interest in protecting Congress' exercise of its constitutional responsibility to set spending levels through the appropriations process, and as discussed above, this would be jeopardized if FAA could circumvent the appropriations process by obtaining funding through slot auctions.

II. FAA's authority to auction slots under its user fee authority

Because FAA may not auction slots under its property disposition authority and has no explicit authority to charge a fee for the assignment of slots, the only other arguable authority on which FAA could rely is IOAA. That authority is currently unavailable because as of fiscal year 1998, Congress has prohibited FAA's imposition of any new aviation user fees unless it obtains specific statutory authority. Because FAA lacks authority to collect such fees, if it nevertheless goes forward with an auction, it may not retain or use the proceeds.

To understand the impact of Congress' prohibition, some context and a brief history are helpful. FAA is funded from a combination of sources, which can be roughly divided into three types: excise tax revenue, General Fund appropriations, and reimbursements from services provided and user fees charged. FAA, Fiscal Year 2007 Performance and Accountability Report, at 121. For the last 10 years, Congress has annually prohibited FAA from implementing any ''new aviation user fees'' not authorized by Congress. The prohibition first appeared in the 1998 Department of Transportation and Related Agencies Appropriations Act and stated:

''[N]one of the funds in this Act shall be available for the Federal Aviation Administration to plan, finalize, or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of enactment of this Act.''

Pub. L. No. 105–66, 111 Stat. 1425, 1429 (1997). At the time, the Conference Committee expressed ''very serious concerns,'' ''on both technical and policy-related grounds,'' about new aviation user fees that FAA had proposed. The Committee made clear that the existing excise tax system, supplemented by appropriated funds, would provide sufficient revenue for FAA without new fees. H. R. Rep. No. 105–313 at 40–41 (Conf. Rep.) (1997). The Committee specifically acknowledged the authority that IOAA generally provides to agencies and made clear that it intended to restrict this authority in FAA's case:

''The conferees are aware of FAA's opinion that the agency has the legal authority to establish new user fees under the generic authority provided in the User Fee Statute, and do not wish to see FAA circumvent the legislative process and avoid the normal cost controls which apply to other federal agencies through the administrative implementation of new user fees. The conferees emphasize, however, that this provision does not prevent the FAA from implementing new user fees. It only provides that such fees must be specifically authorized by the Congress.''

Id. at 41. A slightly modified version of the restriction has been included in every subsequent yearly appropriation. The 2008 fiscal year prohibition states:

''[N]one of the funds in this [Appropriations] Act shall be available for the Federal Aviation Administration to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of the enactment of this Act.''

Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, 121 Stat. 1844, 2379 (2007).

In considering the fiscal year 2008 prohibition, the House Committee on Appropriations commented on its ''serious concerns about the impact of user fees,'' and the Senate Committee on Appropriations expressed its desire that ''any degradation in the Committee's ability to annually set programmatic spending levels and oversee the agency's spending habits as part of the reauthorization process should be strenuously resisted.''

This fiscal year 2008 prohibition precludes FAA's use of IOAA as authority to auction slots because FAA's slot auctions would amount to a ''new aviation user fee'' not specifically authorized by law. FAA has never previously imposed a fee for authorization to use navigable airspace at a specific time; thus FAA's slot auction would constitute exactly the type of ''new aviation user fee''

that Congress has prohibited. Indeed, FAA recognized that slot auctions would constitute a user fee when it proposed to institute such a fee in 1980, and again in 1986 when it decided not to do so. FAA also appeared to recognize that slot auctions would constitute a user fee in 2006 and 2007 when, in the face of the annual appropriations restrictions, it promised to and did seek legislation authorizing it to conduct the auctions. FAA's April 2008 proposal in fact acknowledges that because of the appropriations restriction, FAA ''continues to believe that it cannot rely on a market-based [slot] allocation method under a purely regulatory approach, which is why it explicitly sought legislation on this matter.'' 73 Fed. Reg. at 20846, 20852.

FAA suggests that because it will conduct the Newark auction by solicitation of bids for slot leases, rather than by issuance of a new regulation, the language of the 2008 Consolidated Appropriations Act—which prohibits ''any regulation'' imposing new aviation user fees—does not apply. 2008 FAA Brief at 61 n. 36. Contrary to FAA's suggestion, because the auction would, in effect, amount to a user fee under IOAA, and IOAA requires agencies to prescribe regulations to impose new user fees, see 31 U.S.C. §9701(b), implementation of the auction would require a new regulation. FAA cannot elude the requirements of otherwise applicable law simply by failing to follow the law's requirements. ''It is axiomatic that an agency cannot do indirectly what it is not permitted to do directly.'' Forest Products Laboratory Agreement with University of Wisconsin, 55 Comp. Gen. 1059 (1976).

FAA points to examples of other agencies auctioning or charging market-based fees for use of public lands or other public ''property.'' 2008 FAA Brief at 48–49. These are inapposite because unlike FAA, those agencies had specific statutory authority for their activities. See, e.g, 16 U.S.C. §472a (U.S. Department of Agriculture auction of timber rights on National Forest Service land); 43 U.S.C. §315b (U.S. Department of Interior issuance of grazing permits for public lands for ''reasonable fees''). FAA's most analogous example is the Federal Communications Commission's auction of license rights to the electromagnetic spectrum. Again, however, Congress has specifically authorized the FCC to conduct such auctions, including specifying the conditions necessary for auction, bidder qualifications, and treatment of auction proceeds. See 47 U.S.C. §309(j). As discussed above, despite FAA's specific requests, Congress has given FAA no comparable auction authority.

Finally, even if Congress were to remove the annual appropriations restriction that prohibits FAA from promulgating new aviation user fees, without other specific authority, it could impose only a cost-based fee, not the type of market-based fee it seeks to obtain by auctioning slots to the highest bidder. Under IOAA, when an agency is but one actor in the marketplace, it acts in a commercial, non-governmental capacity and may charge a fee based on the market price of the service provided. When instead an agency exercises its sovereign power and regulates activities based on public policy goals—as FAA would be acting, if it were to auction slots—it acts in a regulatory capacity, and user fees are limited to the agency's costs of providing the specific benefit to the individual recipient. If FAA's fee were based on market value and exceeded its cost of providing the slot to the recipient airline, the fee could rise to the level of a tax. A tax would be beyond IOAA's grant of authority and FAA would have to have some other Congressionally-delegated authority to impose it. *National Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336, 341 (1974); National Park Service—Special Park Use Fees, B–307319, Aug. 23, 2007.

CONCLUSION

We conclude that FAA may not auction slots under its property disposition authority, user fee authority, or any other authority, and thus also may not retain or use proceeds of any such auctions. Going forward with the planned Newark auction or any other auction would be without legal basis, and if FAA conducted an auction and retained and used the proceeds, GAO would raise significant exceptions, under its account settlement authority, 31 U.S.C. §3526, for violations of the ''purpose statute,'' 31 U.S.C. §1301(a), and the Antideficiency Act, 31 U.S.C. §1341(a)(1)(A).

If there are questions concerning these matters, please contact Managing Associate General Counsel Susan. D. Sawtelle at (202) 512–6417 or Managing Associate General Counsel Susan A. Poling at (202) 512–2667. Assistant General Counsels David Hooper and Thomas H. Armstrong, Senior Attorney Bert Japikse, and Staff Attorney James Murphy also participated in preparing this opinion.

Sincerely yours,

GARY L. KEPPLINGER,
General Counsel.

ETHOPIA

Mr. BROWNBACK. Mr. President, I would like to voice my support for the difficult work that Ethiopia is doing on the battlefield of the war on terror in the Horn of Africa. Ethiopia is a country of great importance to the United States, and is located in what some have called one of the roughest neighborhoods in the world. As one of our strongest allies in this complicated region, Ethiopia has shown promise in meeting both economic and security challenges.

Although Ethiopia remains one of the poorest countries in the world, it is developing a market-based economy which has experienced an impressive 10 percent annual growth since 2003. In addition, the Government of Ethiopia, in close collaboration with regional and international health organizations, has achieved some success in addressing global public health concerns, including the fight against HIV/AIDS, tuberculosis and malaria.

The US-Ethiopia bilateral relationship is strong and enduring. Ethiopia is a vital partner of the United States in the fight against terrorism, promoting regional stability and combating violent extremism. As a growing democracy, Ethiopia shares with the United States a common commitment to promoting freedom and human dignity.

With respect to Ethiopia's involvement in Somalia, it is important to understand that the U.S., U.N., E.U., and A.U., all have urged Ethiopia to remain in Somalia until replacement forces arrive or a stable government is formed. Ethiopian government officials have stated that while the Government of Ethiopia is anxious to remove their forces at the earliest possible time, it has delayed the withdrawal of troops from Somalia, at great political and economic cost, until replacement troops arrive to ensure the stability of Somalia's Transitional Federal Government.

Unfortunately, while several nations have pledged to send replacement troops under the auspices of the African Union, only a small fraction of those pledged have actually arrived. I am grateful that Ethiopia remains committed to securing stability and peace in Somalia, and hope that the full African Union contingent arrives soon to enable the safe withdrawal of Ethiopian forces.

Ethiopia faces a host of ongoing challenges both at home and abroad, and merits our support and assistance. I urge my colleagues to join me in recognizing the progress made by this Ethiopia in promoting the health and welfare of its people, and assisting in the war on terror in the Horn of Africa.

PATIENT SAFETY AND ABUSE PREVENTION ACT

Mr. KOHL. Mr. President, I speak today in support of the Patient Safety and Abuse Prevention Act, S. 1577. This bill takes needed, practical steps to protect seniors in nursing homes and other settings wherever long-term care services are delivered. The background check procedures used by most States today are inadequate to keep out thousands of criminals, who can and do take advantage of loopholes and gaps in State systems. This results in needless tragedies and terrible harm to seniors.

As chairman of the Senate Aging Committee, I have read and heard about too many of these stories. One young woman, Jennifer Coldren, testified earlier this year that her 90-year-old grandmother was brutally assaulted by a predator who had a criminal record that went unnoticed. If a more comprehensive background check had been done on this individual, he would not have been working in this nursing facility, and the course of Jennifer's life and her grandmother's life would not have been so horribly altered.

It is past time for the Federal Government to take the lead in asking States to improve their screening processes. To do so, States must improve their infrastructure. They must connect and coordinate their State registries, such as those established for sex offenders and child abusers. They must screen all long-term care workers, including those who work in private homes. They must require State police checks and checks against the FBI's national criminal history database.

We know that States will take these steps to improve their background check procedures if Congress incentivizes them to do so. Seven States did exactly that after we provided them with modest grants under a pilot program enacted as part of the Medicare Modernization Act of 2003. The dollar amounts required to get these States to expand and improve