

Amtrak was created by Congress to provide passenger rail service, thus relieving the railroads of their common-carrier obligations to carry passengers and allowing them to concentrate on providing freight-rail services. In most parts of the country, Amtrak does not own its own railroad tracks but instead has a right under federal law to use tracks owned by the freight railroads; by law, Amtrak's trains receive preference over other trains in the use of those tracks. Section 207 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA") authorizes Amtrak and the Federal Railroad Administration to work together to enact regulatory standards for on-time passenger-rail service, which then affect the freight railroads' obligations to give Amtrak priority in using the tracks to allow Amtrak to meet the requirements for on-time service. When the Federal Railroad Administration and Amtrak disagree about what the regulatory standards should be, the PRIIA provides that an arbitrator will break the tie.

The Association of American Railroads is a trade association whose members own railroad tracks that Amtrak uses and whose trains must sometimes be delayed in order to afford priority track usage to Amtrak trains. The Association challenged the standards that Amtrak and the Federal Railroad Administration imposed, claiming, among other things, that Congress established Amtrak as a private entity and therefore that Section 207 of the PRIIA unconstitutionally delegates the government's regulatory authority to a private entity. The Association also claimed that Amtrak improperly regulates both itself and its competitors for use of the tracks, giving it an unfair advantage over other rail operators. The district court rejected the Association's claims, but the D.C. Circuit reversed, agreeing with the Association that Amtrak is a private entity that cannot exercise the government's regulatory authority.

Today, in *Department of Transportation v. Association of American Railroads*, No. 13-1080, the Supreme Court vacated that decision, holding that Amtrak is a governmental entity for purposes of establishing standards under Section 207 of the PRIIA and therefore that Congress did not impermissibly delegate the government's lawmaking authority to a private party.

Writing for eight members of the Court, Justice Kennedy explained that although Congress had by statute declared Amtrak to be a private entity, (i) the Executive and Legislative Branches both exercise substantial supervisory powers over Amtrak, and (ii) Amtrak acts as the government when it establishes regulations jointly with the Federal Railroad Administration under Section 207. Thus, the Court held that Amtrak acts as the government, not a private party, when it formulates regulatory standards for rail service. The Court vacated and remanded the case to the lower courts to resolve the Association's other constitutional challenges.

In a concurring opinion, Justice Alito spoke directly to those other claims. Justice Alito forcefully argued that it is unconstitutional for Congress to have required arbitration of disputes between Amtrak and the Federal Railroad Administration over what the regulatory standards for on-time passenger service should be, because if the arbitrator is a private individual, that *would* constitute an unconstitutional delegation of the government's legislative authority to a private party (since the arbitrator would have the final say in what the standards are); and even if the arbitrator were a government official, that still would be improper because the arbitrator could not determine final regulatory standards unless he or she was appointed by the President and confirmed by the Senate—which the PRIIA does not require. Justice Alito also suggested that Amtrak's governing structure might be unconstitutional because although Amtrak's Board is appointed by the President and confirmed by the Senate, Amtrak's president is not, thus violating the Appointments Clause of the Constitution. Justice Thomas concurred in the judgment, agreeing that the D.C. Circuit's decision should be vacated and remanded but expressing the view that even Congress's delegation of rulemaking authority to the Executive Branch is constitutionally suspect.

The case will be important to all railroads that either own tracks that Amtrak uses for passenger service or carry freight or passengers on those tracks, because it directly affects Amtrak's ability to set the standards that give it priority access to tracks over other trains. Because of the substantial constitutional questions that remain over the regulatory authority conferred by Section 207, this case will likely continue to be hotly disputed, and another trip to the Supreme Court is quite possible before the matter is ultimately resolved.

Any questions about this case should be directed to [Richard B. Katskee](#) (+1 202 263 3222) in our Washington office or [Lauren R. Goldman](#) (+1 212 506 2647) in our New York office.