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*Department of Transportation v. Association of American Railroads*, No. 13-1080

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.