



MEMORANDUM

July 12, 2011

To: House Committee on Transportation and Infrastructure

From: Robert Meltz
Legislative Attorney

Subject: Takings issues raised by discussion draft of Amtrak bill

You have asked CRS to discuss in broad terms the takings issues raised by certain provisions in the June 15, 2011 discussion draft of a House bill titled “Competition for Intercity Passenger Rail in America Act of 2011.”¹ Your focus is on section 103 of the draft bill, which provides that “Amtrak shall ... transfer to the Secretary of Transportation” (1) specified portions of the Northeast Corridor between Boston and the District of Columbia owned or leased by Amtrak (including certain tributary routes), plus improvements made to those assets and all other assets owned or leased by Amtrak between Boston and the District of Columbia, and (2) all rolling stock and other equipment necessary to support intercity rail passenger service on the foregoing properties. As the discussion here shows, this section 103 provision would appear to effect a taking of Amtrak’s assets and require just compensation.

The Takings Clause Is Implicated by Section 103

The Takings Clause of the Fifth Amendment states: “nor shall private property be taken for public use, without just compensation.” The terms of the Clause make plain that if the proposed bill were enacted, Amtrak would be able to invoke the Clause’s protections if (1) Amtrak may be regarded as an entity outside the federal government for Takings Clause purposes (an entity *within* the federal government cannot claim a taking by the very same government); (2) the Amtrak assets to be transferred to the Secretary are “property” under the Clause; and (3) the transfer is a “tak[ing]” under the Clause. There is little doubt that all three of these prerequisites for invoking the Takings Clause are satisfied by section 103 of the draft bill, as follows.

First, Amtrak would likely be seen by the courts to be outside the federal government, despite its federal charter and continued financial dependency on the federal government. Though many details of its corporate structure and purpose are prescribed by the federal statute creating it in 1970, that same statute declares in the most unequivocal terms that “Amtrak ... shall be operated and managed as a for-profit corporation; and ... is not a department, agency, or instrumentality of the United States Government”²

¹ This memorandum was prepared with the assistance of Todd Tatelman, CRS American Law Division.

² 49 U.S.C. § 24301(a).

Later, in 1985, the Supreme Court echoed this view: "Congress established the National Railroad Passenger Corporation, a private, for-profit corporation that has come to be known as Amtrak. The corporation is not 'an agency or establishment' of the Government"³ Still further buttressing of Amtrak's non-government status came in 1987. Then, a federal circuit held that when Amtrak exercises its power of eminent domain it is entitled to less deferential review than would be owed a government agency, since "Amtrak is not a governmental body; it is the creature of a statute which specifically provides that Amtrak shall not be an agency or establishment of the federal government."⁴

To be sure, this absolute view of Amtrak's status was rejected by the Supreme Court in 1995. In *Lebron v. National Railroad Passenger Corp.*,⁵ the Court confronted the question whether a First Amendment freedom of speech claim could be made against Amtrak based on its rejection of a political advertisement proposed to be displayed on a giant screen at Penn Station, NYC. This required the Court to make a government versus non-government determination as to Amtrak, since the freedom of speech protection in the federal constitution restricts only government or entities functioning as extensions of government. The Court had little difficulty finding that the Constitution trumped the statutory labeling of Amtrak as non-governmental —

[The statute] is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control — for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities, such as the Administrative Procedure Act But it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions.

Lebron then concluded that because Amtrak was created to further federal government objectives, and because that government retained permanent authority to appoint a majority of Amtrak's directors, "the corporation is part of the Government for purposes of the First Amendment."⁶

Despite *Lebron*, it would seem that with regard to Amtrak's rights under the Takings Clause, that entity likely would be viewed in line with its organic statute as non-governmental. The concern underlying *Lebron* was that allowing statutory labels to conclusively fix an entity's status in all cases would permit government to achieve through entities labeled by statute as corporate what government could not constitutionally achieve directly. That fear is simply not present in connection with Amtrak's rights against the government, rather than the rights of citizens against Amtrak. There simply is no concern here that Congress might be using the corporate form to circumvent a constitutional constraint on federal action. In the absence of such concern, the clear and explicit statement in the statute creating Amtrak that it is not a government agency or instrumentality would appear to govern.

Second, the assets to be transferred under section 103 are classic, well-established forms of Takings Clause property. As famously stated by the Supreme Court, the Takings Clause "is addressed to every sort of interest [in property] the citizen may possess."⁷ As for real property, this plainly includes easements and leaseholds in addition to fee interests.⁸ Regarding personal property, both tangible and

³ *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 454 (1985).

⁴ *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264 (2d Cir. 1987).

⁵ 513 U.S. 374 (1995).

⁶ *Id.* at 400. Elsewhere in its opinion, the Court stated its holding more broadly, going well beyond the First Amendment: "we conclude that [Amtrak] is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* at 394.

⁷ *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

⁸ *See, e.g., United States v. Welch*, 217 U.S. 333 (1910) (easements), and *General Motors*, 323 U.S. 373 (leaseholds).

intangible interests (such as contract rights and intellectual property) are embraced.⁹ Nor does it seem that federal controls over Amtrak and federal subsidies thereto are sufficient to ground an argument that Amtrak's property is effectively owned by the United States¹⁰ — or that Amtrak has effectively consented to transfers of its property to the United States. Either of these arguments, in the unlikely event of their success, would remove any taking issue raised by section 103.

Third, the transfer of Amtrak assets mandated by section 103 is a paradigmatic taking: prior to the transfer Amtrak owns the property, and after the transfer it does not. No close question as to whether a taking occurred — as often arises when the government merely restricts the use of property but does not physically take it — exists in the case of an outright ownership transfer. The only argument of which CRS is aware that the Takings Clause does not apply would be a contention that notwithstanding the mandatory language in section 103(a) (“Amtrak *shall* ... transfer to the Secretary of Transportation ...”),¹¹ the transfer is not genuinely coercive, since the draft bill appears to contain no enforcement or condemnation mechanism.¹² If the assets transfer is viewed by a court as occurring with Amtrak's consent, the Takings Clause promise of compensation does not apply.¹³ This not-truly-coercive argument seems unlikely to succeed.

In sum, it is very probable that the asset transfer in section 103 of the draft bill effects a taking of private property, implicating Takings Clause protections.

“Public Use” and “Just Compensation”

There is no constitutional transgression in Congress' enacting a bill that takes private property. The federal government's power of eminent domain assumes that the sovereign will regularly have to take private property for public uses. All that the Takings Clause requires is that takings, when they occur, be for a “public use” with the former property owner receiving “just compensation.”¹⁴ It is highly likely that courts would discern a public use in the draft bill. The Supreme Court has long read “public use” expansively — indeed, as long as Congress is acting within its constitutional powers, the Supreme Court deems the public use condition for taking property satisfied.¹⁵ That Congress would be acting within such

⁹ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (“That intangible property rights protected by state law are deserving of the protection of the Takings Clause has long been implicit in the thinking of this Court.”).

¹⁰ See, e.g., *South Carolina State Education Assistance Auth. v. Cavazos*, 897 F.2d 1272 (4th Cir. 1990). There, the court dealt with a federal statute mandating that excess funds received from the United States and held by state agencies under the Guaranteed Student Loan Program be returned to the United States. Three states claimed that the return requirement effected a taking of the state-held money. The federal defendant argued, however, and the Fourth Circuit agreed, that the state-held money still belonged to the United States, so there was no taking. Quoting with approval one of the district courts below, the Fourth Circuit said: “[i]f property comes within the control of the United States to such an extent that its use is ultimately under the direction of the United States, then it loses its character as ‘private’ property and becomes public to such an extent that it is not subject to a takings prohibition under the Fifth Amendment.” *Id.* at 1276. To repeat, CRS is not aware that Amtrak property is subject to a comparable degree of federal control, even in the United States' capacity as Amtrak's mortgagee.

¹¹ Emphasis added.

¹² The condemnation authority vested by the draft bill in the Northeast Corridor Executive Committee does not appear to be available to the Secretary for his/her use in effectuating the section 103 transfer of assets in the event of Amtrak intransigence. Draft bill section 104, adding a new 49 U.S.C. § 24903(b)(2). However, CRS has not researched whether the Secretary of Transportation might already possess such condemnation authority.

¹³ *Yee v. City of Escondido*, 503 U.S. 519 (1992).

¹⁴ “As its text makes plain, the Takings Clause ‘does not prohibit the taking of private property, but instead places a condition on the exercise of that power.’” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), *internal quote from* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

¹⁵ See, e.g., *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (public use requirement is “coterminous with the scope (continued...)”).

a constitutional power if the draft bill were enacted cannot be gainsaid: the draft bill addresses an instrumentality of interstate commerce, bringing it squarely under the Constitution's Commerce Clause.¹⁶ Thus, the conclusion that section 103 furthers a public use is well-nigh inescapable.

The more interesting question is whether Amtrak will receive the constitutionally required "just compensation" under the draft bill. Section 103(c) of the draft bill states that in consideration for the assets transferred to the Secretary, the Secretary shall "(1) deliver to Amtrak all but one share of the preferred stock of Amtrak held by the Secretary ... and (2) release Amtrak from all mortgages and liens held by the Secretary." It is beyond the scope of this memorandum to determine whether the value of these items meets (or exceeds) the constitutionally demanded minimum. Suffice it to say that section 103(c)'s formula for compensation cannot foreclose a judicial inquiry, should Amtrak seek it, as to what the Constitution requires. The measure of compensation under the Takings Clause is "a judicial and not a legislative question."¹⁷ Congress may, of course, *suggest* a measure of compensation when it takes property, as it has in the past, but the final say in the matter lies with the courts and how they read the Takings Clause.

It is not only the *amount* of compensation provided by section 103(c) that raises a constitutional issue, but the *form* of the compensation as well. Section 103(c) offers Amtrak as recompense for its assets stock shares, forgiveness of Amtrak's dividend-paying obligations, and release of Amtrak from certain mortgages and liens. It is not authoritatively settled, however, whether the "just compensation" mandated by the Constitution may be paid in other than money — or if in forms other than money, which ones. This is an old issue, but one that is rarely addressed and still with us today. Briefly, the Supreme Court and multiple federal circuits have affirmed that an eminent domain condemnee must be put in "as good a position *pecuniarily*" as he or she would have been in had the property not been taken.¹⁸ Despite these statements — all of them arguably dicta — the Supreme Court stated in 1974, in *Regional Rail Reorganization Act Cases*, that "no decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes."¹⁹ *Regional Rail*, however, involved Congress' bankruptcy power, not condemnation power, and thus its broader application has been questioned. State courts, interpreting state constitutions, have more consistently found that money is the only legally adequate compensation.²⁰

In short, Amtrak may have a constitutional right to compensation in money or something more nearly the equivalent of money than what section 103(c) offers. The federal case law is not clear. It is a separate question altogether, of course, whether it would be in Amtrak's political best interest to sue its federal funding source on this point.

(...continued)

of a sovereign's police powers"; thus "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear").

¹⁶ *Gonzales v. Raich*, 545 U.S. 1, 16 (2005).

¹⁷ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

¹⁸ See, e.g., *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979); *Olson v. United States*, 292 U.S. 246, 255 (1934); *Seaboard Air Line Railway Co.*, 261 U.S. 299, 304 (1923). Emphasis added in each instance.

¹⁹ 419 U.S. 102, 150 (1974).

²⁰ See 3 Julius L. Sackman, *NICHOLS ON EMINENT DOMAIN* § 8.02[1] (3d ed. 2009 supplement).

How Amtrak Might Assert a Taking Claim

Because there is no constitutional infirmity in the United States' taking property — only in taking property without just compensation — Amtrak could not assert the prospect of a taking as a reason for not transferring its assets. Nor could it seek to establish that the section 103(c) compensation is below the constitutional minimum and assert that as a justification for not transferring assets. The Constitution does not require that the just compensation be paid before or contemporaneously with the actual taking.²¹ All that is demanded is that a “reasonable, certain, and adequate provision for obtaining compensation” be available to the property owner at the time of the taking.²²

That “reasonable, certain, and adequate provision” is available for almost all takings claims against the United States through the Tucker Act.²³ The Tucker Act waives federal sovereign immunity to such claims and vests jurisdiction over them in the U.S. Court of Federal Claims.²⁴ Appeal is to the U.S. Court of Appeals for the Federal Circuit, thence to the Supreme Court. Moreover, it is well-settled that the Tucker Act remedy is available unless Congress expressly withdraws it. That is, a statute (such as the draft bill) need not affirmatively state the availability of the Tucker Act remedy for actions under the statute believed to work a taking.²⁵

²¹ *Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990).

²² *Id.*

²³ 28 U.S.C. § 1491(a).

²⁴ Tucker Act cases in the Court of Federal Claims may be for any amount of money. For takings cases against the United States seeking \$10,000 or less, the Little Tucker Act vests concurrent jurisdiction in the federal district courts. 28 U.S.C. § 1346(a).

²⁵ *Preseault*, 494 U.S. at 12.
