ORIGINAL

In the

Supreme Court of the United States

ROBERT W. BIANCHETTE et al,
AS TRUSTEES OF THE PROPERTY
OF PENN CENTRAL TRANSPORTATION
COMPANY,

APPELLANTS

V.

CONNECTICUT GENERAL INSURANCE
CORPORATION et al;

No. 74-165, et al

Washington, D. C.
October 23, 1974

Pages 1 thru 124

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT W. BLANCHETTE ET AL, AS TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, Appellants v. CONNECTICUT GENERAL INSURANCE CORPORATION ET AL;	No. 74-165
RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY OF NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Appellant v. UNITED STATES ET AL	No. 74-166
UNITED STATES RAILWAY ASSOCIATION, Appellant v. CONNECTICUT GENERAL INSURANCE CORPORATION ET AL; and	No. 74-167
UNITED STATES ET AL., Appellants v. CONNECTICUT GENERAL INSURANCE CORPORATION ET AL	No. 74-168

Washington, D. C.

Wednesday, October 23, 1974

The above-entitled matter came on for argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERK H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.
For U.S. et al

CONGRESSMAN BROCKMAN ADAMS, Washington, D.C.
For certain U.S. Representatives, as amicus curiae

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LOUIS A. CRACO, ESQ., 1 Chase Manhattan Plaza, New York, New York
For Connecticut General Insurance Corporation, et al

DAVID BERGER, ESQ., 1622 Locust Street, Philadelphia, Pennsylvania
For Penn Central Company

JOSEPH AUERBACH, ESQ., 225 Franklin Street, Boston, Massachusetts
For Richard Joyce Smith, Trustee, et cetera

LLOYD N. CUTLER, ESQ., 1666 K Street, N.W., Washington, D. C.
For United States Railway Association

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 74-165 and the related cases of Blanchette against Connecticut and the Insurance Corporation is the first.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF UNITED STATES ET AL

MR. BORK: Mr. Chief Justice and may it please the Court:

This is a direct appeal by the United States, other federal parties, United States Rail Association and the Trustees of the property of the Penn Central Transportation Company.

A three-judge district court determined that the Regional Rail Reorganization Act of 1973 is constitutionally deficient in significant aspects and the United States supports the constitutionality of that Act.

There is also a cross-appeal here by the trustee of the New Haven Railroad to have the Act declared unconstitutional on grounds rejected by the district court.

The Appellees here on our appeal comprise the sole shareholder and the major creditors of the Penn Central Transportation Company, a railroad that will be important in

any reorganization effected under the Rail Act.

The time for argument is divided equally between the supporters of the Act and the opponents of the Act.

The supporters have divided our time as follows:

Mr. Cutler, who represents the Rail Association and I will divide an hour and 13 minutes, though we hope to reserve some of it for rebuttal.

Mr. Cutler will deal with the issues raised by the cross-appeal. I will deal with the issues raised by our appeal.

The Congressman Adams has been ceded five minutes to support the Act on somewhat different grounds from those advanced by Mr. Cutler and myself.

Mr. Horsky, for the Penn Central trustees, who supports our position in part and opposes it in part -- perhaps now supports it -- will use the remainder of our time plus some of the other side's time. He is, in effect, a bridge between the two sides.

This litigation is crucial to the success or failure of Congress' plan to reorganize and to make viable the rail network in the northeast and the case bears -- I think, as you look at the brief -- a surface appearance of enormous complexity but I think it is quite simple in its basic concepts.

The core issue before us is whether the Rail Act

will work an uncompensated taking of the shareholders' and the creditors' property in violation of thePifth Amendment to the Constitution.

The three-judge district court thought that it would.

The three-judge special court, created by the Rail Act itself, has more recently held that it would not, and that the statute was, therefore, constitutional.

It will be useful to sketch, I think, the rail crisis in the Northeastern United States, the main features of the Act, that is, Congress' response to that crisis, and the holding of the district court which emasculates Congress' effort.

By 1973, seven major railroads in the northeast were attempting to reorganize under Section 77 of the Bankruptcy Act. Those proceedings were proving unsuccessful due to the seemingly insoluble financial difficulties of the roads.

The imminence of financial collapse and of possible liquidation of this northeast rail network threatened immeasurable damage to the economy and to the national defense.

Congress responded with the Rail Reorganization Act we have before us. The primary purpose of that Act is to create a new, profitable, privately-owned rail system

in the northeast and, most importantly, to do that rapidly, much more rapidly than is the custom under reorganizations under Section 77 of the Bankruptcy Act.

Within 180 days of the statute's enactment, each court having jurisdiction over a railroading reorganization was required to order that the reorganization proceed under the new Rail Act, unless it first:

One, found that the railroad was reorganizable on an income basis within a reasonable time and that the public interest would be better served by that form of reorganization or,

Two, found that the Rail Act does not provide a process which will be fair and equitable to the estate of the railroad in reorganization, in which case the reorganization is to be dismissed.

Appeal from this 180-day decision by the reorganization courts lies to a special court created by the Act and that court is composed now of Judges Friendly, McGowan and Thompson.

Five of the reorganization courts found that the Act did not provide a fair and equitable process.

Two found that it did.

Appeals were taken and the special court has now found that the Reorganization Act does provide a fair and equitable process and that decision explicitly includes a

determination that the Act will not work an uncompensated taking.

The Act also establishes the United States Rail Association which is a public, nonprofit corporation and it is required to formulate a final system plan that will establish and maintain a financially self-sustaining rail system adequate to the needs of the northeast.

The centerpiece of this final system plan is to be a new for-profit corporation, the Consolidated Rail Corporation, Con Rail.

The bulk of the rail properties will go to Con RAil, although some may be sold under the final system plan to profitable railroads in the area, to AMTRAK and to state and local transportation authorities.

This plan is to be laid before Congress within 450 days of the passage of the Rail Act, although the Rail Association has now requested of Congress a 120-day extension of that deadline.

The final system plan becomes effective if it is not disapproved by either House within 60 session days. Within 90 days after that, the plan is to be certified to the special court. The special court will then order the transfer of the rail property from the bankrupt estate to Con Rail and have the securities and obligations and benefits of Con Rail transferred back to the bankrupt estate.

subsequently, it will determine the fairness and the equity of the consideration given in return to these estates and that consideration, the package of securities and benefits given, is not to exceed the constitutional minimum.

Now, that consideration given to the bankrupt estate, the rail estates, is to consist of stock and securities of Con Rail and up to $500 million of the Association's obligations which are held by Con Rail and which are federally-guaranteed and other benefits under the Act such as some payments for labor determination and so forth.

If this consideration exceeds the constitutional minimum, the court must order the excess returned. It may reallocate the consideration among the transferor rail estates and, if necessary, it may enter a deficiency judgment in the estate's favor against Con RAil or against profitable railroads that receive property from the bankrupt estates.

The entire judgment of the special court on the valuation issue is then reviewable by this Court.

Now, although the constitutionality of this statutory scheme was being litigated in various reorganization courts, these cases were brought in district courts, not reorganization courts, by the Penn Central shareholder and by the major creditors.

They were consolidated by the judicial panel on multidistrict litigation in the three-judge district court.

Now, that court, from which we appeal, determined as follows:

It said, first, that the question whether the final transfer of rail properties from the rail estates to Con Rail would effect an unconstitutional taking, was not yet ripe for adjudication.

QUESTION: There is nothing here for that special court.

MR. BORK: Nothing here. The special court opinion is available.

QUESTION: Yes.

MR. BORK: Right. I believe the briefs now refer to it. But there is no appeal here from the special court.

QUESTION: It is not appealable.

MR. BORK: Under the statute, it is not considered appealable.

QUESTION: Well, that is another question.

MR. BORK: That could be another question, Mr. Justice Douglas. I trust it will not become one in this case.

Second, there is the problem of interim erosion which the three-judge district court of the bankrupt estates - the three-judge district court said, the interim erosion

that is, the losses incurred by these railroads in continuing service prior to the final tansfer date might amount to a taking in the Fifth Amendment sense.

They thought that that taking may have occurred or may soon occur -- at least, it was a possibility and, therefore, that issue of interim erosion is ripe for adjudication.

The court therefore enjoined the Rail Association from acting under Section 304(F) of the Rail Act to prohibit any reduction of service that is requested and that may be determined by a court to be necessary to prevent an unconstitutional taking of property.

Third, the court enjoined the enforcement of Section 20(B), which requires the dismissal of a reorganization proceeding under certain circumstances. That stage of the case has passed and I think that ruling has now essentially become irrelevant.

QUESTION: Although you, the federal parties did appeal that, didn't they?

MR. BORK: They did appeal it and the special court has held that the Act was fair and equitable, so we are past the stage at which a dismissal of a reorganization pursuant to 207(B) is a possibility.

QUESTION: I see. What was the point of that provision of the statute? Making that -- providing for

dismissal of the 77?

MR. BORK: That is not entirely clear to me, the particular point of dismissing the reorganization in the event that this Act did not provide a fair and equitable process.

QUESTION: So that had a kind of a non sequitur or something.

MR. BORK: The court --

QUESTION: One wonders about its purpose. Is there any legislative history showing what the reasons are?

MR. BORK: If there is, Mr. Justice Stewart, I do not have it. Perhaps Mr. Cutler may be able to answer the question of that.

But in any event, I think 207(B) is effectively behind us because no such dismissal has occurred and under the ruling, the special court would not and could not.

QUESTION: I see.

MR. BORK: Finally, the court, without particularly stating any reasons, enjoined the association from certifying a final system plan for judicial review under the provisions of Section 209(C).

Now, this injunction, again certifying a final system plan to the special court, effectively prevents the consummation of the congressional plan for creating this new Con Rail and that means, in effect, that the statute is

at that stage at a standstill and cannot go into effect.

Now, there have been many contentions here and I think for most of them we are going to have to rely upon the briefs, the briefs being, perhaps, some 10 to 12 inches thick.

But I wish to say at the outset that, after further analysis, since we have submitted our briefs, and after considering the special court opinion, we have modified the position taken in our brief.

We now think that this appeal turns almost entirely upon the Tucker Act question, the ability of persons whose property is taken to go into the court of claims to get compensation.

QUESTION: I take it, then, you think it is absolutely essential that that issue be decided?

MR. BORK: I do, Mr. Justice White.

QUESTION: Does that mean that you, in effect, concede the constitutional invalidity of the statute in the absence of that remedy?

MR. BORK: In effect, we say, Mr. Justice Stewart, that we don't think there will be an unconstitutional erosion

I think the special court is quite persuasive about the unlikelihood of an interim erosion amounting to a constitutional taking.

We also think that the Con Rail is likely to be a

financially viable railroad and that will be no unconstitutional taking at the final transfer, but we must concede that we give no absolute guarantee on either of those points and, therefore --

QUESTION: It's the absence of a Tucker Act remedy in the event of such unconstitutional taking.

MR. BORK: Yes, and I would not put it, Mr. Justice Stewart, that the Act would then become unconstitutional at large. I think a better result would be to continue the injunctions as to 304(F) and as to 303, the final transfer provision so that Congress could then -- if there were no Tucker Act remedy available -- Congress could then consider whether it wanted to provide a Tucker Act remedy or whether it wanted, in some other way, to deal with the statute in order to keep this reorganization plan -- which is really an heroic effort -- on its timetable.

I beg your pardon?

QUESTION: I didn't hear what you just said.

MR. BORK: Well, I was referring to the enormous complexity --

QUESTION: Well, I didn't catch your words.

MR. BORK: "An heroic effort."

QUESTION: I beg your pardon.

QUESTION: Would this change in position be traceable to the fact that this is a corporation as a

federal instrumentality?

MR. BORK: No.

QUESTION: In your judgment.

MR. BORK: Mr. Justice Douglas, it is not. It is simply that -- oh, oh, you mean you thought that the change of position is not due to that. No, because we thought that there -- before, we admitted the possibility, the conceptual possibility of a taking but we thought it factually so unlikely as not to be in the case, given the financial situation.

QUESTION: Well, do you agree with the three-judge court that the question of whether to transfer the properties as such was a taking that is not right?

MR. BORK: The question --

QUESTION: Or you are focusing wholly on the erosion --

MR. BORK: No, I'm not.

QUESTION: -- point in terms of the necessity to decide the Tucker Act question?

MR. BORK: No, I am not, Mr. Justice White. I think that we cannot tell now whether or not the final transfer will effect -- will, in fact, effect a taking.

QUESTION: And that is true, without even assuming no erosion?

MR. BORK: That is true. Yes, that is true.

QUESTION: So the three-judge court, you are suggesting, is wrong in saying that wasn't right?

MR. BORK: I really have a distinction between this. The three-judge court is right to the extent it says, we cannot tell now whether or not there will, in fact, be a taking at the final transfer.

However, I think we tell now.

QUESTION: You say that same is true with erosion, with respect to erosion.

MR. BORK: We cannot tell for a fact that there will be erosion. However, we can tell that it is -- we cannot guarantee that there will not be a taking and I think it would be legally difficult to say that creditors must gamble and go down to the wire with no possibility of compensation if they lose and discover, after the final transfer date, that there had been a taking and that no compensation was available.

QUESTION: In a sense, this is sort of the absence of an issue that is justitiable at this time, the rightness issue, isn't it? Because you simply cannot ascertain, as of today, whether or not there will be unconstitutional erosion or whether or not the Con Rail securities will be adequate.

MR. BORK: That is correct. That issue is not ripe. However it is, I think, not premature to decide that

that possibility exists.

QUESTION: Yes.

MR. BORK: And that, therefore, the Tucker Act issue is the pivotal issue in this case.

QUESTION: Yes.

QUESTION: Mr. Bork, what if the government -- what if Congress passed a law saying that five years from now we are going to build such and such a reclamation project and described the lands that were going to be taken and said that instead of paying these people for the land in money, we are going to pay them in Con Rail stock.

Could they come in now rather than five years from now and get some sort of adjudication as to the constitutionality of that plan?

MR. BORK: Only if one assumes that the Con Rail stock -- if one has reason to know that the Con Rail stock would, in fact, be an adequate compensation for what they gave up. I would think they could not.

QUESTION: Well, wouldn't a typical answer to this Court be that it will be time enough to decide that when the government actually takes your property?

MR. BORK: Well, I think not, Mr. Justice Rehnquist, if there was also a contention that there was no Tucker Act remedy available so that deciding it then will do no good because there is no way you can be compensated.

QUESTION: They may end up by never taking the property.

MR. BORK: That is correct. But here, it is quite likely --

QUESTION: Well, what is the compulsion to decide it now, rather than when the property is taken? Under Mr. Justice Rehnquist's example.

MR. BORK: Oh, well, in this case, this Act provides that this property will be transferred from the rail estates to the Con Rail, to other profitable railroads, to AMTRAK, to state and local transportation authorities and then some years will pass while they litigate the issue of whether what those rail estates brought back was adequate compensation.

Should it prove not to be adequate compensation, at that point there is no way -- there may be no way these creditors can be made whole.

QUESTION: Well, are you suggesting, Mr. Solicitor General, that if the worst happens -- if the worst happens, that three or four or five years from now, there is no judicial remedy, if it were then judicially determined that there had been a taking and that it was uncompensated or would be adequately compensated.

MR. BORK: There would be -- if Section 303 of the Act, Mr. Chief Justice, does not turn out to provide

adequate compensation and if it should turn out that they have no Tucker Act remedy available, there would have been an uncompensated taking in violation of the Fifth Amendment.

QUESTION: And could there be a judicial remedy for that when that point was reached?

MR. BORK: No, there could not, because the Section 303 specifically limits the special court in what it can do and it can add nothing to the benefits provided by the Act, the stock and securities of Con Rail and a deficiency judgment.

QUESTION: Do you think that would have something to do with the appealability provision, the reviewability of the special court's actions?

MR. BORK: Well, the Act specifically provides that that valuation decision is appealable to this Court. There is no problem about appealability of that.

QUESTION: But again, we can't -- on appeal, we couldn't appropriate money.

MR. BORK: That is quite true, Mr. Justice Stewart.

QUESTION: And my brother Rehnquist's question really should be -- to be an analog, I should suppose, a legislation passed by Congress that would definitely appropriate certain property and say that the payment for this property would be X shares of Con Rail stock and that there will be no Tucker Act remedy, no other thing given

for the property, and that is the analog which you have.

MR. BORK: That is quite right.

QUESTION: But if that -- supposing, following up my brother Stewart's question, why couldn't the presumed victims or the nonbeneficiaries, if you want to call it that, provision -- if they can go into a three-judge district court now and seek injunction of the Act, why can't they also wait until the property is actually taken and go into a three-judge district court?

MR. BORK: Because, Mr. Justice Stewart, it is, in effect, raising the analogy of a statute which said, at the end of five years we will flip a coin. If it is heads, you get paid off in full. If it is tails, you get nothing. If you get nothing, there is no Tucker Act remedy and you are just out of your property.

QUESTION: Okay, and the question is --

MR. BORK: If you wait.

QUESTION: -- whether you must wait under that statute and go into -- until your property is taken -- and go into a three-judge district court and enjoin on constitutional grounds or whether you can do it five years in advance.

MR. BORK: Well, Mr. Justice Rehnquist, it would seem to me a trifle at odds with our jurisprudence to tell a man that there is a 50/50 chance his property will be

taken under the statute and that if it is, he will have no remedy and he may not try to enjoin that statute in advance but must go forward and take his 50/50 chance.

QUESTION: Well, I can conceive of a statute which would be totally at odds with our jurisprudence, but if it doesn't go into effect till five years from now, that does not mean you can come into court now and enjoin its operation.

MR. BORK: Well, the statute is in effect now and the mechanism leading towards its result is in full swing.

QUESTION: Is in process.

MR. BORK: And if these parties -- I hate to be making their case, but if these parties have to wait until that date, they are without remedy. And I don't think that -

QUESTION: Well, if they had a three-judge district court remedy now, why won't they have it then?

MR. BORK: Because a three-judge district court remedy then will do them no good.

QUESTION: Why can't they enjoin the taking at that time?

MR. BORK: Oh, you mean, why don't we wait until -- Mr. Justice Rehnquist, we will be in no better position at that time to know anything about this case.

QUESTION: But at least the taking will be much

more imminent.

MR. BORK: The taking will be imminent, but we will not know whether the compensation to be paid is adequate or not because this statute provides that the property will be taken before the valuation proceedings begins and it will be some years after -- this is an enormously complex valuation proceeding, or at least a lengthy one.

QUESTION: Yes.

MR. BORK: It will be some years after the taking occurs before anybody knows whether they are to be compensated.

QUESTION: Well, it is going to be years whether the Tucker Act applies or not.

MR. BORK: That is true but at least we will know, with the Tucker Act, that compensation will be there.

QUESTION: You'll feel happy while you are waiting.

MR. BORK: They may not feel happy while they are waiting, Mr. Justice White, but their constitutional rights will not have been infringed, which should induce some degree of --

QUESTION: Well, they won't be infringed, either, if they get paid without resorting to the Tucker Act.

MR. BORK: That is true, but we can't be sure they

will.

QUESTION: Well, you can't be sure they won't. So I guess it is just a question of -- we are just arguing, as my brother Powell says, about when is something ripe for decision?

MR. BORK: Yes, but I think -- I think we are but I think the ripeness issue will not change in this case until it is too late.

QUESTION: Well, it changed for you.

MR. BORK: I have always thought the Tucker Act was right.

QUESTION: Yes.

MR. BORK: We never argued that. I do not think the question of whether a taking will, in fact, occur can be known now and it isn't ripe. But the possibility it will occur is clearly present and therefore, it seems to me the Tucker Act issue is clearly ripe.

The -- if the Tucker Act has been limited so that there can be no compensations, either for interim erosion, point of erosion, then we would agree that if the injunction under -- about Section 304 would prevent the Rail Association from denying abandonments when a taking point has occurred, should either remain in effect or, preferably, the statute should be read to deny the Rail Association the power to refuse abandonments at a point

when the courts hold an unconstitutional taking is occurring.

And if the Tucker Act has been limited, we agree that an injunction against certification of a final system plan for the special report should remain in effect. I think that is preferable to striking down the entire Rail Act on a theory of unconstitutionality because leaving those injunctions in effect would give Congress time to reconsider the Tucker Act issue and time to reconsider the possiblity of making changes in the Rail Act to obviate the difficulties.

Because it is an enormous effort by the Congress and I think it ought not to be tossed aside wholesale without giving Congress time.

QUESTION: Suppose we agree that the issue of constitutionality can't be resloved here with any view to even the probability that Congress would remedy any defects in the future?

MR. BORK: No, Mr. Chief Justice, but I think these two injunctions, or reading the statute in those ways would effectively protect the creditor interest against an unconstitutional taking and also give Congress the option to reconsider what it wishes to do.

But we agree that a taking is unlikely in the constitutional sense in having made those concessions and I

put myself on the wrong side of counsel table for this period of time.

I now would like to address our case.

We think that the judgment of the three-judge court ought to be reversed, nonetheless, because we think it is perfectly plain that the Tucker Act remedy is available and was not repealed by the Rail Act.

There is, therefore, no basis for the injunctions requiring abandonments when erosion reaches the point of a taking or for an injunction against certification of the final system plan.

The Tucker Act provides in pertinent part the court of claims shall have jurisdiction to render judgment upon any claim against the United States founded upon the Constitution.

Now, that is a general grant of jurisdiction in the court of claims and it is available for any taking under the Fifth Amendment, unless it is withdrawn by Congress.

The three-judge district court, we think, misstated the issue as to whether Congress intended to grant a Tucker Act remedy.

I don't think Congress did deliberately intend to grant a Tucker Act remedy in the Rail Act.

The special court correctly posed the issue as whether Congress, in the Rail Act, intentionally barred the

Tucker Act remedy.

The rule is that the Tucker Act is available for a taking under the Constitution unless it is removed, not unless it is sought out and granted.

United States Causby is a case of taking of an easement over a chicken farm by a low-flying aircraft. It is a case where Congress did not intend a taking. It is a case where Congress did not intend compensation. Those factors were irrelevant. The Tucker Act was available because a taking had occurred by lawful authorized action of the government.

It seems to me perfectly palin, therefore, that these Appellees have a Tucker Act remedy unless the Rail Act specifically withdraws it. There is no explicit limitation of the Tucker Act anywhere in this enormously detailed 39-page printed statute.

The Tucker Act isn't even mentioned in this statute and that would seem surely to be a very peculiar oversight if repeal was intended.

I think we must therefore examine the Act to see if there is a clearly-implied repealor and, in doing so, we have employed two canons of construction.

Now, Appellees' counsel have had some fun with the use of these canons of construction, as I would, if I had their side of the case, but these are canons long known to

the law and they are as binding upon Congress in drafting statutes because that is how they know how the statute will be interpreted, as they are indispensable to courts in interpreting statutes.

I cite just two. The first is a repeal by implication and not favored in our law.

The second was that when there are two admissible constructions of a statute, that construction which will save the constitutionality of the statute is favored over that which condemns the Act.

There is no doubt that the opponents of the Rail Act here are asking for a partial repeal of the Tucker Act by implication.

They also urge a construction of the Rail Act that they say does result in its unconstitutionality. They have their own canons of construction and they are precisely the opposite of those that the law recognizes.

Now, the strength of this presumption against implied repeals I think is much greater in the Tucker Act area than perhaps it is elsewhere and that is shown, I think, by two cases that I would like to mention.

The first is Hurley against Kincaid and the second is Lynch against the United States.

Now, if those decisions of this Court retain their vitality, as I think they do, then I think they are

completely dispositive of the Tucker Act question here.

The special court, in Judge Friendly's opinion, said that Hurley against Kincaid did not support our position as strongly as we had urged it but he went on to note that there was a case called Lynch which we had not cited which did support our position.

We blush as we accept the gift of Lynch, but we continue to believe that Hurley against Kincaid has pertinence here as well.

In that case, the Plaintiff, Kincaid, sued to enjoin the construction of a floodway that threatened his land and Section 3 of the Flood Control Act, under which the Government was proceeding, stated that no liability of any kind shall attach to or rest upon the United States for any damage from or by floods.

Section 4 of the Act provided for advance compensation for the taking of land by condemnation, necessary lands and easements.

Now, the parties advanced as here a wide variety of factual and legal contentions but the Supreme Court held simply that the injunction should not issue because in the event a taking occurred, the complainant can recover just compensation under the Tucker Act in compensation at law, in an action at law.

Hurley against Kincaid thus stands at a minimum

for two propositions, that a statutory program may not be enjoined in anticipation of a taking where the Tucker Act is available.

And this is a case, I suppose, that goes to the question of whether the ripeness of the Tucker Act issue is clear.

A statutory program may not be enjoined in anticipation of a taking where a Tucker Act remedy is available.

And, secondly, that the repeal of the Tucker Act is not to be implied from the presence in the programmed statute of an alternative method of compensating those whose property is taken.

These propositions are highly relevant here. Those who seek to enjoin the operation of the Rail Act argue that the implied repeal of the Tucker Act is to be found in Section 303 of the Rail Act, among other places. Section 303 provides mode of compensating the bankrupt estate for rail properties transferred under the final system plan and they say that the existence in the Rail Act of alternative modes of compensation implies the absence of any other form of compensation.

I think that would be a thin argument for a repeal of the Tucker Act, at best.

The Court is asked to find an implied repeal for

the purpose of destroying the constitutionality of the very statute to which the repeal is attributed.

So far as we know, no case has ever found an implied repeal in order to impute to the statute itself an intention to commit suicide.

Now, if there is any doubt on this issue, I think Hurley against Kincaid lays it to rest.

The Flood Control Act provided its own means of property acquistion and compensation for taking.

Defined and implied repeal in Hurley against Kincaid would have been much easier because all that would have happened would have been that an injunction would have been issued and slowed the progress of the work until a condemnation occurred so that only inconvenience was involved in finding an implied repeal there.

Here, defined and implied repeal is to find the Act unconstitutional in major aspects and bring the program to a complete halt.

Lynch against the United States, the case found by Judge Friendly, reinforces rather than replaces Kincaid in our argument.

In that case, actions were brought for proceeds of government insurance policies. The insured in each case had become totally disabled while the policies were in force, under the policies' terms. In such circumstances,

compensation was to be given to pay the premiums of the policies.

The compensation was not given and the insured died.

United States demurred to this lawsuit on the ground that Section 7 of the Economy Act -- Section 17 of the Economy Act of 1933 -- stated specifically, "All laws granting or pertaining to yearly renewable term insurance are hereby repealsed," a much more explicit and clear repealor than anything to be found in this case.

This Supreme Court held that, as applied to contract rights, that repealor was a taking of property forbidden by the Fifth Amendment but the Congress, of course, did have the power to withdraw its consent to suit against the United States and the Government argued here that it was obvious that when Congress took away the right, it should be presumed to have intended to take away the remedy, which seemed to be a rather plausible argument.

Nevertheless, this Court refused to read the statute as taking away the remedy in the absence of a most explicit direction. It said, "There is no separate provisision in Section 17 dealing with the remedy and it does not appear that Congress wished to deny the remedy if the repeal of the contractual right was held void under the Fifth Amendment."

Now, Judge Friendly points out the exact application of this reasoning to our case by saying, "Translated into the terms of this case, there is no separate provision in the Rail Reorganization Act dealing with the Tucker Act remedy and it does not appear that Congress wished to deny this remedy if the Act should be held to involve a possible taking that would require the award of a just compensation under the Fifth Amendment.

So Lynch demonstrates, I think, that the court is not willing to find the repeal of the Tucker Act remedy unless Congress specifically states that that is what it wants. There is a much stronger indication in the Economy Act than there is here.

Now, these conclusions from Hurley and Lynch, which I think are dispositive of this case, are strengthened by examining the Rail Act, its text, its structure and its legislative history and, finally, the views now pressed upon us -- or pressed upon you by some members of the House of REpresentatives.

The text of the Rail Act, I submit, yields only one plausible explanation. The Tucker Act is not mentioned and yet there are 13 provisions in the RAil Act which deal with the relationship of other statutes to the RAil Act.

Congress went through quite specifically repealing in part, modifying in part and dealing with the

relationships of other statutes in 13 places and I refer you to Section 601 which deals with major statutes and is specifically entitled, "Relationship to other statutes," and it seems quite peculiar to say that Congress took meticulous care to spell out the repeal of advertising requirements having to do with the entry of Government contracts but didn't think it was worth mentioning that it was contemplating the uncompensated taking of property.

That is not just improper statutory construction, I think it is bizarre statutory construction.

If we look to the structure of the Act, we see the same thing. Section 304(F) shows that very few abandonments are to be permitted, even though there are steady losses because these lines must be preserved for inclusion in the final system plan.

QUESTION: Is that the same sort of an argument you would use if you were asked why the three-judge court had any power at all in this case?

MR. BORK: Well, I am not quite sure about is it the same kind of argument I would use. I think the three -- if you are referring to the fact that --

QUESTION: Well, that the special court apparently thought it had and perhaps does, the power to consider these same questions that we are talking about now.

MR. BORK: Umn hmn.

QUESTION: And perhaps Congress intended that to be the exclusive avenue for review of the question.

MR. BORK: It may -- that question of Congress' intent there is unclear, but I think there are separate reasons for saying that the three-judge district court did have jurisdiction and therefore that this Court has jurisdiction and I'd be willing to address myself to that.

I beg your pardon?

QUESTION: The issue isn't raised by anyone in the case, is it?

MR. BORK: Not that I know of, your Honor.

QUESTION: Well, pass it by, then, please.

MR. BORK: In order to find a repeal of the Tucker Act, we have to be asked to believe that they -- Congress knowingly insisted upon continued operations, knew that they might cause losses and for that reason, repealed the Tucker Act because it didn't want to compensate.

The same thing is true of the final transfer provisions in Section 303. We are asked to believe that Congress knowingly required a transfer it knew might conceivably fall short of just compensation and yet intended, if that should occur, not to compensate.

Indeed, there is no reason here to impute any implied repeal of the Tucker Act to Congress, except to impute to Congress the desire not to pay if it turned out

that there was an unconstitutional taking and I don't think that kind of intent ever ought to be imputed to Congress unless Congress makes that imputation unavoidable by specific language.

It may be that Congress never even thought about the Tucker Act. I think that is quite likely. But if it mandated a course of behavior that results in a taking, that is enough to make the Tucker Act remedy available.

I won't dwell on the legislative history because the legislative history shows no more than that Congress was not thinking about the Tucker Act and Congress thought that Section 303 would provide adequate compensation.

But if they are wrong, we think the Tucker Act is available.

Now, I want to spend a moment addressing myself -- because there is nothing left to this case, it seems to me, on the Tucker Act point except we are offered the views of a number of Congressmen as to what they intended when they passed the Tucker Act and Congressman Brock Adams will speak for them here.

I have no doubt whatever of the sincerity of their views and I have no doubt whatever as to the accuracy of their statement of their intentions.

But I object to their consideration, the consideration of statement of intention on the grounds that,

to give it weight, would work a radical reconstruction in the constitutional relationship between Congress and this Court.

This Court discerns legislative intent from the statutes, from the debates, from the records. It should not look to what individual Congressmen say they intended afterwards, when those intentions were never expressed to the Senate and to the House that adopted the bill, or to the President who signed it into law.

We don't know what the results would have been, if the Tucker Act issue had been explored in Congress or if it had been laid before the President.

But even if there were a brief here from a majority of both Houses, my argument would be the same. The Constitution provides for a legislative process and perhaps, if the minority -- if these views and issues had been aired, perhaps the minority would have convinced the others on this issue and it is simply wrong to take views expressed afterwards which never went through the legislative process envisaged by the Constitution.

If a present statement of prior legislative intent were given effect, I think we might have to have a different kind of trial when we went into legislative history. We might have to examine or take affidavits from Congressmen as to what they thought about issues back when

they voted on the law.

As to many statutes, that would be impossible. I suggest to you that in all it would be improper. We are becoming -- getting dangerously close at that stage to the method of statutory analysis which was rejected by this Court and by Chief Justice Marshall in Fletcher against Peck in the Yazoo Land Fraud case.

Now, I make this argument solely out of concern for the law and the proper processes of interpreting statutes. If I am wrong, if my submission is rejected, I would be sorry for the law but I would be quite glad for my position in this case because I think Congressman Adams brief, if we are to consider his statement of what Congress intended, supports the position I have been arguing.

He says, on page 17, the"Tucker Act was not considered by the Congress in creating the Rail Act. It is a jurisdictional statute often used to settle private claims that was neither repealed nor engrafted onto the Act to create a possible deficiency judgment against the Government."

That seems to me, if you consider this ex post facto statement of legislative intent to be precisely in line with our contention that when Congress doesn't consider the Tucker Act but does something that effects a taking, the Tucker Act remains an available remedy.

Now, Congressman Adams and others expressed the fear that we are, as they put it, "Giving the rail estates the key to the Treasury."

There is no basis for that concern. The Congress and not the Department of Justice controls the purse and should this Court agree that the Tucker Act remedy remains available here, Congress may, if it wishes, the following day repeal the Tucker Act as it applies to this case or make any other amendments to the Rail Act that it wishes.

The final disposition of this entire matter is for Congress. Whichever way this case goes, our only function is to discern the legal situation as Congress has left it so far.

I'd like to close on a hypothetical that I think illustrates the strength of our position.

Suppose our positions were reversed on the Tucker Act issue? Because -- let's suppose this litigation did not occur now but we went down the road for five years and discovered that a taking had occurred, these creditors sued us in the court of claims and the Government comes in and demurs on the grounds that the Rail Act has impliedly repealed the Tucker Act.

It is true they have taken your property and we are terribly sorry, but there is nothing that can be done about it because we can find an implied repeal of the

Tucker Act in the Rail Act.

I submit to you that that argument would not stand a chance in the court of claims or in this Court. The case for an implied repealor under those circumstances would be seen to be artificial, thin, unjust and wholly unpersuasive. But the legal issues are precisely the same in that case as they are in this case and we submit that they should be decided the same way.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Cutler.

ORAL ARGUMENT OF LLOYD N. CUTLER, ESQ.,

ON BEHALF OF UNITED STATES RAILWAY ASSOCIATION

MR. CUTLER: Mr. Chief Justice and may it please the Court:

The New Haven Trustee, the cross-Appellant, attacks the procedures of the Rail Act for the final transfers of properties pursuant to the final system plan and he argues that these procedures are unconstitutional under the Fifth Amendment.

In our brief as Appellee, we argue that the court below correctly rejected this attack as premature.

Now that the special court has rejected the same attack on its merits and the statute purports to bar direct review of that decision, we agree with the Solicitor

General and with Mr. Horsky, who will argue the point in more detail, that it would be an appropriate exercise of this Court's discretion to reach and decide these issues on this appeal.

As to the Tucker Act issues, it seems to us it is really an academic point, anyway, because if you reach the Tucker Act issues on erosion, whatever you decide as to that will necessarily, we believe, decide the availability of the Tucker Act as to the final transfer.

While it is quite true that the other issues, as Mr. Justice White suggested, could be raised at some later date in another three-judge court proceedings, some of the damage would already have been done.

Congress and the bankruptcy courts are now proceeding to carry out their responsibility in resolving the eastern rail crisis under the tight timetables of the Act.

There would be a critical waste of time and resources, it now seems to us, and a possible danger of large claims against the United States for whatever erosion beyond constitutional limits might have occurred in the interim.

If the final transfer provisions of this Act are later -- at some later date held unconstitutional by this Court.

Now, the New Haven Trustee argues that these provisions are unconstitutional on numerous grounds, of which I have time to take up only three.

The first is that the Act requires the transfers to occur before the adequacy of the consideration is judicially valued, while the resources provided by the Act provide the consideration and their view may be inadequate, so that the constitutional minimum may never be received.

The provision for transfer first and for judicial valuation later is the critical genius of the Rail Act in our view because in that way, Congress broke the procedural log jam for devising and approving a railroad reorganization plan that has plagued the ICC and the Judiciary for decades, some procedure that took so much time, some 15 years in the Missouri Pacific case that even if a solution could be evolved, it would no longer be relevant to the problems to which it was addressed.

But by this method of transfer first, Congress made it possible for the new rail entity to start business within some two years after the passage of the Act, for the railroad estates to be relieved of this so-called "erosion burden" of providing rail service at that time and for the time-consuming process of adjudicating valuations and distributing proceeds, first to the rail estates and then among the various creditor classes in each state could take

its course after, rather than before, the new entity starts business.

Now, transfer first, followed by valuation judicially later was, of course, the last-ditch procedure finally adopted by Judge Anderson in the New Haven case and noone found constitutional fault with that procedure since an adequate judicial assurance of compensation was thought to be available from Penn Central.

Here, we say there is much more solid assurance in the Rail Act and the Tucker Act.

If the special court cannot itself provide the constitutional minimum out of the over $2 billion of resources that are provided under this Act, an adequate remedy under the Tucker Act remains available for the reasons given by the Solicitor General and approved by Judge Friendly in his special court opinion.

Now, the New Haven Trustee, unlike his co-plaintiff, Connecticut General, concedes that the RAil Act did not bar a suit under the Tucker Act. What he argues is that under the Youngstown case, the steel seizure case, a Tucker Act suit, if he brought one, or the rail estate brought one, would not succeed on its merits because the statute requiring the transfer is the Rail Act and his view is unconstitutional.

But there can't be any doubt that those required

transfers first are precisely what Congress has authorized and if the right to sue under the Tucker Act is left intact by the Rail Act, as the New Haven Trustee concedes, there is just no basis for calling the Rail Act itself unconstitutional and the transfers that it requires, unauthorized.

Youngstown is very different, as Judge Friendly points out at page 102 of his opinion, because there the President's seizure of the steel plants had not been authorized, let alone been commanded by the Congress.

The New Haven Trustee's second point is that the Rail Act is not a valid exercise of the bankruptcy power but is a condemnation wolf masquerading in bankruptcy sheep's clothing.

He urges that the so-called "cram down power" previously upheld by this Court under Section 77 cannot constitutionally be invoked to cram down on all creditor classes as distinguished from only one or two but as the Rock Island case suggests, and as the special court ruled, Section 77 doesn't exhaust the limits of the bankruptcy power and there doesn't seem to be any constitutional reason why Congress cannot cram down still further, if it deems that this is the only way of assuring continued rail service by a viable private firm, particularly whereas here, in the east, viability requires a consolidation into one new system of properties from several bankrupt railroads,

each with their own myriad classes of creditors.

So long as the constitutional minimum consideration is assured, rail creditors have no constitutional right, merely by withholding their consent to a plan, to insist on condemnation and public ownership instead.

Third, the New Haven Trustee argues that Congress cannot constitutionally exercise its bankruptcy and commerce powers in combination so as to require rail estates to accept the securities of the reorganized firm as part of this fair and equitable constitutional minimum and if any balance is required, to accept government-guaranteed USRA obligations which are provided in this Act up to at least $500 million, perhaps more, and other benefits under the Rail Act and, if still needed, a claim under the Tucker Act itself.

He argues that if there is any possible need for government compensation, then the entire transaction is a taking of property for public use and entitles the rail estates to payment entirely in cash.

But, as the special court held, the Constitution, we say, does not bar Congress from exercising its powers in combinations so as to minimize the drain on the federal treasury.

Section 77 itself is an exercise of both the bankruptcy and the commerce powers.

As the special court put it, Congress is not required to steer the ship of state into the Scylla of a nationalization for cash or the Charybdis of a rail shutdown. Congress can steer in between if a viable, reorganized entity with significant earning power can be created. There is no taking of property for public use to the extent that valuable securities of the new entity are given in exchange for the rail properties transfer.

Now, if the fair value of those properties is judicially-determined to be less than the fair value of the securities -- is judicially determined to be less than the fair value of the properties transferred and the transfer of the properties is still congressionally and judicially compelled, then there may be occasion to the extent of the shortfall, but only to that extent.

At this point, of course, we don't know whether there will be a shortfall but if one is judicially determined Congress has provided that, as I said, at least $500 million of Government-guaranteed securities for direct transfer to the rail estates, preserved the power to provide more and is going to review this final system plan before it gets to a court and it is also providing other benefits under the Act and it has left, we say, the Tucker Act remedy available for any balance.

I should take a moment on Mr. Justice Douglas'

question about Con Rail as a federal instrumentality and we would say, Mr. Justice Douglas, that it is not. It is a private corporation and while it is true that so long as the majority of its debt has been advanced or guaranteed by the Government, that a majority of the directors may be named by the President, those directors will have the same duty as any other directors to all of the shareholders, namely these creditors and other estates, in the duty to make a profit.

QUESTION: Mr. Cutler, do the obligations of the association that are issued to Con Rail, and that may be issued to the railroads in exchange for their properties, do those obligations represent loans from the association to Con Rail?

MR. CUTLER: They do represent loans to the association, Mr. Justice White. The terms of the loans are within the discretion of USRA and the Congress when it approved the plan and they can be soft, subordinated loans, far behind the claims of these creditors.

QUESTION: But they would be superior to any stock interests that Con Rail issued to the railroads?

MR. CUTLER: They would, presumably, have to be at least slightly superior to any stock that is issued, but, of course, Con Rail is not confined to issuing stocks. It is, of course, able to issue debt securities which can be

handed to these creditors secured by liens on the very properties on which they now --

QUESTION: Well, to the extent, then, that the Association securities are issued, then the stock that has been issued is less valuable?

MR. CUTLER: Not necessarily, sir, because the obligations of USRA, federally-guaranteed $500 million of them, can be turned over directly to the rail estates, of course.

QUESTION: Without being assured or guaranteed?

MR. CUTLER: There would be a debt obligation from Con Rail, but it could be a 100-year debt at 2 percent, as far as the statute goes.

Moreover, another $500 billion of those obligations could be turned over to ConRail for direct expenditure by Con Rail to approve its properties in a way that would enhance the value of the entire estate and finally, a third $500 million could be used to enable AMTRAK to buy part of the Northeast Corridor which Con Rail would have had in its hands and Con Rail would receive that cash.

In closing, I just want to say that the real issue here is whether Congress can combine these powers to reduce the drain on the Federal Treasury.

That is what Congress has tried to do in order to make payment, at least in part, in securities of the

reorganized entity while the creditors, of course, are trying to force nationalization, in which case they believe, although we would dispute it, that they would be entitled not only to cash, but to some higher value than either the going concern value of these securities or liquidation value, if that is more.

And that is why you find the government parties arguing as some think, contrary to their interests, that this statute is constitutional because the Tucker Act remedy is available and why the creditors are arguing, obviously contrary to their interest, that it is unconstitutional because no Tucker Act remedy is available for them.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cutler.

Mr. Adams.

ORAL ARGUMENT OF CONGRESSMAN BROCKMAN ADAMS

AS AMICUS CURIAE

MR. ADAMS: Thank you, Mr. Chief Justice.

May it please the Court:

The reason that I am here this morning is that the primary intent of this statute was, contrary to some of the statements of government counsel, not ever to be a taking.

The properties are never taken from the individuals but, instead, we have tried logically to extend the powers

of the reorganization statute as set forth and interpreted by this Court in the New Haven inclusion cases.

The whole history of this statute was for us to try to create a buyer where none existed, make an offer to these reorganization courts, give all of the stock in exchange for the assets that are transferred so that the original creditors are crammed down, yes, but they receive full interest in this corporation plus $2 billion worth of Government advantages and, when they are finished with this and the court values at some later time, if there has been a mistake in the manner in which the process operated, then these parties can sue.

As Justice White was asking in his question, is there a right to sue for some failure -- maybe we hold a party too long, then they could.

But the two primary issues are this:

How long can you hold these parties? That was what concerned the lower court in this case. We think they can be held during this limited period of time and if they can be held during that period of time, and you adjust what they receive in terms of stocks or you set a different date for transfer, then their erosion problems are taken care of in that fashion.

The second problem, however, and one we are concerned about with the so-called "Tucker Act argument,"

which I think is a red herring, is whether or not this statute, in its process, provides for a deficiency judgment against the United States and our problem very simply in Congress, and it is stated in our brief in the Appendix, and it runs through all of the other briefs -- this was discussed at great length in Congress and the Congress wanted to go only so far in granting funds to reorganize this process and they did that.

Now, as far as the Causby case is concerned, Hurley versus Kincaid and the other Tucker Act cases, we did not try to repeal the Fifth Amendment or certainly repeal the Tucker Act jurisdictional statements.

That issue will depend upon the facts after this process is over, whether an individual party has been injured by a lawful act of the United States.

But the key issue before the Court this morning is, is this process lawful? Can we use the reorganization process? Can we, under the logical extension of this Court's ruling in the Denver Rio Grande case and in the New Haven inclusion cases, go through this process with these people?

We think that the Congress did this properly and we hope this Court will hold that the statute, its process, is constitutional, that the cram-down of stock for assets is valid.

QUESTION: And you would say that we shouldn't reach the Tucker Act matter or say that we should reach it and say it is unavailable?

MR. ADAMS: I think you should say that if the Tucker Act requires a deficiency judgment as part of its process to make it constitutional, then we have reached the Tucker Act and this act does not provide that.

If you decide, however, that there may be, some place along the line, in the lawful process, a mistake, then you reach and say the Tucker Act case will have to be decided when and if some party can decide that they have created a case on the merits.

Now, that position is what we consider --

QUESTION: So you do anticipate a situation where the Tucker Act would be available?

MR. ADAMS: Oh, yes. Let's say, for example, that after this is all over -- and this is the three-judge court's problem -- that if a party comes in and says, you held us beyond the constitutional limit on erosion and at that point we are of the opinion that it went just too long, it was unreasonable, but that is a specific individual case at that point.

QUESTION: And so the Tucker Act, you think, would be available in that situation?

MR. ADAMS: Of course. We did not repeal the

Tucker Act.

I thank the Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Adams.

Mr. Horsky.

ORAL ARGUMENT OF CHARLES A. HORSKY, ESQ.,

ON BEHALF OF ROBERT W. BLANCHETTE ET AL

MR. HORSKY: Mr. Chief Justice and may it please the Court:

I appear, as the Solicitor General has stated, for the trustees of the property of the Penn Central Transportation Company, the debtor.

We are here before the Court as Appellants because we agree that the Act, with a minor exception that I'll come to, is valid and we disagree, basically, with the Appellee on that issue.

We are closer, I think, today, this morning, to agreeing with the position of the Solicitor General and the Government parties than we were a week ago but there may still be some difference and, in some respects, we agree with the Appellees.

QUESTION: Who has made the --

MR. HORSKY: Let me explain.

QUESTION: Who has made the move, Mr. Horsky?

MR. HORSKY: The Solicitor General.

The reply brief filed a few days ago, in which

the Solicitor General took the position that the issues were available and before the Court, has made a vast difference in our position.

First, let me say a few things in general.

The trustees believe that the basic concept of this Act is a sound concept. As the Solicitor General has said, the rail crisis of the northeast railroads created a situation which was clearly beyond the power of the trustees or the reorganization courts or Section 77 to resolve.

The compulsory restructuring of all of these bankrupt railroads in the northeast under the Act is certainly a potential solution to a very serious national problem.

There are a good many imponderables in the Act which have to be resolved in the months and in the years that are coming down the road and there remains, as I think everyone would concede, the possibility that the quite disparate goals that the Act requires -- that is, that there be a profitable Con Rail created and that it be adequate to serve the rail needs of the northeast, are not both realizable.

But the effort certainly is worthwhile and should be continued.

Second, and particularly important is the agreement we have now with the Solicitor General that the issue

before the Court as to the constitutionality of the Act is properly before the Court and should be resolved.

Let me take the "should be resolved" part of it first, because I cannot overestimate, cannot overstate the importance of having a decision in these cases on the constitutional questions.

Unless and until this Court decides whether the process, whether this scheme is constitutional, the plain fact is that the situation, the rail situation in the northeast is going to get worse.

On the Penn Central alone, there are thousands of miles of track that are so badly in need of repair that trains can move over them only at reduced speeds, 10 miles an hour. And there are many thousands of cars and many thousands of locomotives that are not usable because there is no money to repair them.

The Act, in Section 215, purports to provide $150 million of temporary money for improvement while this planning process is going on.

As a practical matter, that $150 million will continue to be unavailable until the constitutional doubts about the Act have been resolved. Moreover, and particularly important from the point of view of my clients, the trustees, they, themselves are unable, so long as constitutional doubts exist, to know how they should use the

limited cash resources that they have in connection with the operation and maintenance and repair of this railroad.

If the estate -- if the Penn Central estate has no reasonable chance of -- reasonable prospect of compensation for interim erosion, common prudence on the part of the trustees would suggest that the cash they do have be used to the maximum extent possible to prevent the continuing accrual of administration claims, such as taxes.

A decision on the constitutional issue will really relieve both the public and the trustees of the burden of the present situation.

I agree fully with what Mr. Cutler has said about it, but I would like to emphasize it in spades. It is terribly important.

Third, we agree with the Solicitor General as to what the constitutional issue is. Is the Tucker Act available?

Now, I appreciate the fact that we all say that you ought to decide the case doesn't mean that you will. You have got to be persuaded that the issue is ripe for decision and that it is appropriate that you decide it now.

I think it is and let me say a few words briefly on that.

There are, as the Solicitor General has indicated to you, two quite discrete Fifth Amendment problems.

[whether]
One is/the compensation available under the Act for the rail properties which will be compelled -- which Penn Central will be compelled to convey to Con Rail will be adequate.

The second is whether there will be, because of the extent, the length of time that the planning process takes, an unconstitutional taking by way of interim erosion of the Penn Central estate because it will continue to operate, as it does now, at huge -- huge annual losses.

On the first of these issues, the court below said the issue was premature. We have set out in our brief, pages 48 to 54, the reasons why we think the lower court was in error as to its reasons for believing it premature and the Government parties have adopted our argument as theirs in their reply brief.

But without going into the details of that argument, let me emphasize this point. Under the doctrines, as I understand them, of cases like the Ashwander case, of Poe v. Ullman, this issue is ripe for decision.

There isn't any doubt but that there will be, under this statute, a conveyance of properties from Penn Central's estate to Con Rail.

There was a suggestion, which hasn't been mentioned here but perhaps will just confuse you, but there has been a suggestion that you could litigate this question

before the special court, just before the transfer took place, after the plan had been finally approved.

The special court said in its opinion that that wasn't possible. In the time that they have, which might be as little as ten days, they certainly could not undertake to decide whether or not there was constitutional consideration provided in the plan for the properties that were to be conveyed.

The fact is that this conveyance is going to happen and that there is no other course, no other procedure by which we can find out whether or not the process is constitutional, whether the Tucker Act applies.

Now, the other point, which I think is even more important, it perhaps sounds a little bit like blackmail, but it is important nonetheless. The special court has ruled, as you will find if you read its opinion, that the mandatory conveyance features -- the ones I am talking about-are constitutional not standing alone, but only because there is a Tucker Act remedy.

Consequently, if this Court -- and it indicated that there wasn't a Tucker Act remedy, it would be forced to operate under the statute to remove the estates from the operation of the Act because it would find that the process of the Act was not fair and equitable.

Consequently, if this Court does not provide the

assurance -- well, let me go back.

The special court also said it was holding its final decision in abeyance pending the decision of this Court, as it was entirely proper for it to do.

But if this Court, therefore, doesn't provide the assurance that the Tucker Act remedy is available, the special court has very strongly intimated that what it will do will be to decide that the process of the Act is not fair and equitable and that it will, therefore, discharge all the railroads, including Penn Central, from the operation of the Act and the Act will abort.

So for practical reasons, and, I think, for very good legal reasons, we strongly urge that you come to the question of the Tucker Act and decide it.

Now, I don't think you have to get into as much trouble with respect to the interim erosion problem. That is the second of these problems that are raised by Fifth Amendment.

The court below reached it on that basis by holding that there was such a likelihood that there would be a point reached where the continued, compulsory operation of the estate at a loss would be unconstitutional, that they ought to decide whether it was appropriate to do that and whether there was a Tucker Act remedy.

Now, the conclusion of the court as to whether

that is likely is the subject of a vast amount of writing in these briefs. There is controversy over what constitutes erosion. There is controversy over how to measure erosion. There is controversy over what the various measurements show as to what the erosion has been in the past and what it will be in the future.

There is uncertainty, to be sure, as to how long the planning process will last. The timetable itself, as the Solicitor General has indicated, has been extended once, by four months, by a Senate Joint Resolution 250, which is on the President's desk now for signature, having passed both Houses and I have no doubt will be signed by President Ford shortly.

And there is the possibility, under the Act, that Congress may reject the plan provided by USRA. It has 60 days within which it can veto -- either House can veto the plan.

At that point, although there is a tight time schedule up to that point -- at that point there is no time schedule for the USRA to submit the next one. It has to do it, but it can take its sweet time about it.

The next one and the next one after that.

So that nobody can be sure how long Penn Central will be continuing to operate its rail property.

All of this means that there is disagreement, to a

degree, over the likelihood or the degree of likelihood, that there will be a point of unconstitutionality. But everybody agrees that it will be -- that there is some possibility of it and in that event, only a Tucker Act would save the statute.

And I further agree with what Mr. Cutler said. If you find that the Tucker Act is available on either, the unconstitutional erosion or on the improper taking, you have answered the question because nobody has suggested that the Tucker Act is available for some of the takings under the statute, but not for all of them.

Well, so much for the Tucker Act.

I don't believe that I need to add anything to what the Solicitor General has said about the nature of the argument on that question, but I would like to make a couple of comments which I think the Solicitor General did not make and which I think are relevant.

I, perhaps, do not correctly read Judge Aldeser's opinion below, but I sense, in this comment -- he said, that if he found that there were a court of claims remedy, it would be "Judicial legislation on a grand, if not arrogant, scale."

I think I sense in that a feeling that what he was afraid of was that possibility of a court of claims judgment, if there were jurisdiction in the court of claims,

would be huge. Why, it would be hundreds of millions of dollars or even more than that. And that that was one of the reasons why he thought that he could not appropriately say that the court of claims judgment was available.

If that is true, if there is any relevance to the question of availability of the Tucker Act as to the size of the potential judgment against the United States, [there are further
[they are full of considerations which the Court should have in mind.

The first is, that a decision now by the Court that a court of claims remedy would be available to remedy any inadequate compensation in the taking by the compulsory transfer, is in no sense, as the Solicitor General has said, an ex post facto argument.

The Congress can deal with that in two ways.

In the first place, it has to look at the plans that come from USRA. If it gets the first plan and the financial viability of Con Rail looks pretty shaky or they are not sure that it is going to be adequately funded or adequately profitable, they can send USRA back to the drawing board because they would say, we don't want to take the chance. This one might cause a very large court of claims judgment and they can continue to do that until they are satisfied that what the plan provides will either minimize or eliminate the possibility of a Tucker Act

judgment of any substantial size.

And, secondly, of course, as the Solicitor General says, they can repeal or amend the statute.

But I think that this is a fair comment. I believe that it is probaoly true that this statute, with the combination of the power of the Congress to reject the plans it doesn't like so that it gets the plans it wants, combined with the sort of combination reorganization-condemnation features of the plan, with the Tucker Act remedy at the end, is probably the least expensive way for Congress to preserve an important national asset which is now no longer able to preserve itself.

Or, to put it baldly, I think Congress would prefer a Tucker Act remedy to the requirement that it nationalize these railroads.

Let me make one other comment which is important to us in terms of the Tucker Act and which the Solicitor General has not mentioned.

In the court below and in this Court, the Appellees say -- as Mr. Cutler has pointed out -- that even if you had a Tucker Act remedy, it really is not adequate. It is not enough.

We disagree basically with the Appellees on that point but we do have some concern that if the Court finds that there is a Tucker Act -- that we can maintain suit in

the court of claims -- that we have an adequate remedy in the court of claims and not a chintzy one.

We set out the whole argument at pages 63 to 67 in our brief, but let me illustrate the problem.

In the court below, in the argument before the three-judge court, I expressed some concern that the Government did not recognize that we had to have an adequate court of claims remedy.

For example, that the Government did not recognize the fact that the trustees were trying to accommodate to the public interest and were trying to accommodate to the statute by keeping the railroad running rather than trying to stop it.

It would not be urged against them in the court of claims as a waiver of their right to have remedy for an unconstitutional erosion if that occurred.

In response, counsel for the Government gave me that assurance and we have quoted the language of that assurance in our brief.

In the briefs in this court, both in the briefs of the Government parties and in the briefs of the United States Railway Association, there is a suggestion now that, well, trustees may forfeit any right to unconstitutional erosion because they are not diligent in applying for permission to stop and they cite Section 304(F) which

permits interim erosion with permission of the USRA.

The theory apparently is that unless we apply to stop the whole system and the USRA denies us that right, we may have waived our right of compensation.

Just -- it seems to me so patent that Section 304(F), which I will not burden the Court with a dissertation on, does not contemplate that USRA would be permitted, pending the preparation of a final system plan, to authorize the abandonment or the termination of operations and the liquidation of the entire Penn Central system.

Indeed, as the special court noted, USRA doesn't really have the power all by itself to do that anyway, because any reasonable objection by a state, local, or regional transit authority will inhibit USRA's permission to make any abandonments and, plainly, it seems to me, no application by Penn Central trustees to stop operations on the whole system would be entertained by USRA and it would be futile to make the application.

If the Solicitor General and Mr. Cutler still share the view that we are subject to that obligation before we can protect our rights to interim erosion, I hope the Court will disabuse them of that position and their opinion.

Now, let me turn to another point. As I have indicated, the trustees do agree with the Appellees here

that, absent a Tucker Act remedy, this statute cannot be sustained.

I don't propose to argue that position in detail because it is adequately argued in our briefs and it is adequately taken care of in Judge Friendly's opinion in the special court but I do have a few comments on the appropriate relief, if the Court determines that there is no Tucker Act remedy and that the statute, therefore, should not be sustained.

I think, under those circumstances --

QUESTION: Well, it would be conceivable that the court could determine that there is no Tucker Act remedy and that, nonetheless the statute --

MR. HORSKY: Is constitutional.

QUESTION: -- could be sustained.

MR. HORSKY: I am going to rely on the Appellees to convince you that that is not the case.

QUESTION: All right.

MR. HORSKY: I am assuming -- I'd like to talk, just for a moment, as to the remedy in the event you determine that the statute is not constitutional because there is no Tucker Act remedy.

QUESTION: It is also conceivable, of course, that the Court could hold that the Act is not constitutional despite a Tucker Act remedy. I mean, there are other attacks

on the constitutionality.

MR. HORSKY: That's right. That's right.

QUESTION: There is cram down and the payment in securities rather than cash and all sorts of things.

MR. HORSKY: I have one point like that myself, but let me take, on my premise, what I think the appropriate relief should be.

I think the lower court, in essence, structured it correctly. As the Solicitor General said, the first paragraph of the order just enjoins USRA from certifying the final system plan with respect to the special court.

That doesn't stop the planning process. It permits it, indeed, to go on right to the conclusion so that the Congress will have, whenever it has to deal with the statute again, the completed plan before it.

What it does is to interpose the court order, the stop order at the last possible point before the inexorable process of the Act would transfer the property from the Penn Central estate.

Paragraph two of the order dealt with the Section 304(f) problem and I think it appropriately said, don't have any inhibitions on the power of the reorganization court to take whatever actions are necessary to protect the constitutional rights of the creditors.

But let me come to the third one on which I

disagree with the Solicitor General. This is the paragraph of the order that you inquired about, Mr. Justice Stewart, Section 207(B) of the Act, which requires the reorganization court, in the event that it finds that the process of the Act is not fair and equitable, to dismiss the proceeding.

It is possible that that section will never come into operation but it is also possible, as I have indicated, that if this Court finds that there is no Tucker Act remedy, the special court will affirm the decision of Judge Fulham, who found that the process was not fair and equitable and the question will be, does Judge Fulham have to dismiss the Section 77 proceedings?

Now, it is a very curious bit of -- piece of the statute. We suggested in the Court below that the only possible rational basis for it -- and it has no legislative history, I hasten to add -- was as an interorum device to add a really quite unpleasant consequence to the decision by the reorganization court that --

QUESTION: Well, would it really make all that difference? It would be an equity receivership, I guess, then.

MR. HORSKY: It would presumably be an equity receiver. We can live under an equity receivership.

But all the problems, all of the ancient lore that you have to go back to, to find out exactly how you operate

under an equity receivership would be -- have to be brought to the surface and explored and I frankly, do not know the extent --

QUESTION: The only thing you would be deprived of is a liquidation-type reorganization plan?

MR. HORSKY: Deprived of the power, apparently, of Section 77, whatever we do.

QUESTION: In order to carry out a liquidation.

MR. HORSKY: In order to carry out a reorganization or a liquidation, a New Haven type reorganization or a sale in pieces or various other kinds.

QUESTION: Yes, but you don't reach this unless you find the railroad isn't reorganizable as a profitable railroad.

MR. HORSKY: Well, it is not reorganizable as a profitable railroad. That has been decided by Judge Fullam in the so-called "120-day hearings" and nobody disputes that. But reorganization on an income basis is not the only basis upon which we can organize a railroad.

QUESTION: I understand that.

MR. HORSKY: And all the statute does is to say, look, Mr. Reorganization Court, if you find the process of this Act not fair and equitable, you have got to get rid of Section 77 proceedings.

Let me -- it is not part of the statute. The

USRA wouldn't even appeal that part of the order. They don't care whether this operates or not.

We do, but we are operating under Section 77 and it would just be inconvenient and perhaps worse than that if we had to transfer to an equity receivership.

It might be all right, but it raises problems that we would rather not face if we don't have to.

Now, the basis upon which the lower court entered that part of the order held this Act unconstitutional -- this Section unconstitutional -- was that it violated the uniformity clause of the Constitution.

The Appellees have a general attack on this statute on that basis that a good many sections, indeed, probably the whole act ought to be thrown out on the ground that it is not uniform because it applies only in a region.

We don't agree with that but on this particular one, this particular section, I think it is a valid one, as the two judges in the court below did. This is simply a statement that these particular bankrupt railroads in this particular part of the United States must be denied the advantages of Section 77 under particular circumstances.

If a railroad on the west coast, tomorrow, files a Section 77 petition, that petition is not defeasible under the circumstances of this Act because of any circumstances like this.

The Penn Central position -- petition -- is defeasible under this Act.

QUESTION: Judge FRiendly speaks of sustaining that by the court of special appeals as in effect, conduct including all presently bankrupt railroads and it seems to me that if you make that argument with respect to your point, Mr. Horsky, that Judge Friendly would rule against you.

MR. HORSKY: Well, I'm not sure because it seems to me that you have here a situation where the problem is imminent as between debtors. You have a debtor on the west coast whose Section 77 petition is not going to be dismissed because of this condition.

You have Penn Central where it may be dismissed because of this.

The two railroads are treated differently.

Now, perhaps you can treat debtors -- a debtor on the west coast different than a debtor on the east coast but you can't do it under the Bankruptcy Act, under the Uniformity Act, I should say.

And this is certainly not the Commerce Clause.

In any event, we hope that you will sustain the --

QUESTION: Do you agree that if the constitutionality of these provisions of the Act now at issue are upheld in this litigation and in view of what the special

court has done, then this point wouldn't arise?

MR. HORSKY: This point would be moot.

QUESTION: That is correct, isn't it?

MR. HORSKY: Yes. The special court will then finally and definitively reverse Judge Fullam and hold that the process of the Act is fair and equitable and under those circumstances, the section just doesn't come into operation.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Horsky.

Mr. Craco.

ORAL ARGUMENT OF LOUIS A. CRACO, ESQ.,
ON BEHALF OF CONNECTICUT GENERAL INSURANCE CORP. ET AL

MR. CRACO: Mr. Chief Justice, and may it please the Court:

I regret the necessity of disturbing the congenial set of agreements and concessions with which previous counsel have approached this rostrum and to take issue with virtually all counsel who have appeared before me.

I represent the Appellant -- or the Appellees in Connecticut General, the secured creditors of the Penn Central Transportation Corporation and we appear in support of the injunction issued below and the declaratory relief of which it was coer$_3$ive relief declaring the Act, in significant part, to be unconstitutional.

I open by taking immediate issue with the notion that the task of the creditors or, for that matter, the stockholders represented by my brother, Mr. BErger, or the New Haven trustee, here again, represented by Mr. Auerbach, is to force a nationalization on the Penn Central Transportation Company or to impose a collision with either Scylla or Charybdis.

It is our task, it seems to me, to suggest that this particular remedy, fashioned by this particular Congress, or this particular set of problems, represents a reach in excess of the constitutional grasp of the Congress and we do not mean to suggest that a proper solution to these problems is beyond the wit or wisdom of the national legislature.

The root position that we take -- and I take it that this, now, is conceded to be the issue -- is that if the Tucker Act be not available, the RAil Act is unconstitutional in that it furnishes no assurance that the bankruptcy estates will receive fair compensation either for the rail properties ultimately conveyed or for the interim erosion sustained until such conveyance.

We argue that the Tucker Act is not available on a fair reading of the statute and that the Rail Act in this respect was properly enjoined below.

Let me take up, initially, the proposition raised

by Mr. Justice Rehnquist as to whether all these troublesome questions need to be reached now or whether "sufficient to the day is the evil thereof."

We submit that these questions are ripe now, Mr. Justice Rehnquist, for a number of reasons that I would like to touch on quickly and lightly.

First of all, as other counsel and particularly the Solicitor General have observed, the Act is enforced now and there is nothing whatsoever contingent about the inexorable operations of the Act between now and the date of conveyance.

Secondly, not withstanding the provisions of Section 303 with regard to ultimate compensation, erosion in the interim will be sustained and that is occurring now.

The court below found it likely that that interim erosion would arise to the level of unconstitutionality during the interim period and the protection that we require and the assurance that we require for compensation as to those matters, it seems to us, matures daily on a recurring basis.

QUESTION: Do you have any basis for attack in the abandonment, though, the antiabandonment provisions? Why would that afford a basis for attacking the ultimate compensation, the fact that interim erosion occurred?

MR. CRACO: By itself, it might not. We take it

together, however, with the contention made here that the ultimate conveyance and compensation mechanisms are sufficient unto themselves to compensate for the erosion which is being endured. And if they are not, then the impact of the interim erosion argues for a consideration of the adequacy of the compensatory mechanism now.

Furthermore, however, under Section 209 of the Act and under Section 303(B)(2) of the Act, the last sentence, the Act specifically excludes futher review of the compensatory mechanisms by injunctive procedures so that the remedy that Mr. Justice Rehnquist suggested as possibly being available on some future date is attempted to be precluded by those provisions of the Act and most particularly, the special court is given no discretion under the Act but to order the conveyances upon the certification of the final system plan.

If there is any doubt about the statutory intent in that, the Senate report at page 33 says it one little word after the other that the special court is given no discretion to withhold those conveyances.

The fifth point I would make on the question of rightness, Mr. Justice Rehnquist, is that all the objectionable features to which I'll allude in a moment of the Act are known and knowable now and nothing implicit in the passage of time or what might transpire during the passage

of time can change the legal characteristics of those features of the Act.

And, finally, we would contend that -- and this is close to the heart of our case -- that the constitutional vice of the Act is that it imposes upon the private sector, the criditors, the stockholders, the unsecured creditors, the entire risk of the success or failure of this operation during the interim, the entire risk of losses in the interim, the entire risk of inadequacy of compensation in the end, the entire risk of the difficulties of obtaining a final system plan that can work, the entire risk of Congressional rejection or impasse.

And it is our proposition that when our property, or the property of the estate in which we have claim, is requisitioned in the public interest for continued or final operation for a public purpose, it is constitutionally impermissible to impose those risks upon us without just compensation.

And all those risks are discernable now. The absence of assurance is discernable now and we think the issue which that risk presents is ripe now.

I have said that the Act precludes assurance of fair value and I would like to tell the Court that I propose to address two issues.

First, touching lightly -- in the light of the

Solicitor General's concession, on why we believe the Act is constitutionally vicious in the absence of Tucker Act remedy and then touching somewhat more heavily, I hope, on the question of whether the Tucker Act is there to rescue the Act.

I say I'll touch lightly on these questions, recognizing the possibility that Mr. Justice Stewart raised, that the Act could be conceivably considered by this Court sustainable in the absence of a Tucker Act because I think the Solicitor General's argument on the point as a quasi-Appellee for the moment, was persuasive and perhaps sufficient to the occasion that in the absence of a Tucker Act, the show is substantially over.

But let me touch on four characteristics of the Act that it seems to me condemn it as a constitutional enactment.

First, there are no provisions in the Act, I mean, literally none at all, that provide for payment of the interim erosion sustained by the estate until such time as the conveyances occur and we submit that that imposes upon the estates both the risk and, indeed, the very likely certainty of unconstitutional erosion of the estate and of the claims against the estate as their interests might appear.

The second consideration -- and I think this is --

it is important to frame this in terms of the avowed intention, to frame this Act like unto the New Haven Inclusion precedent.

The second consideration in that context is that there are no provisions in the Act, literally none, which create what the New Haven Inclusion case characterized as an intrinsic value for the Con Rail stock.

In the New Haven Inclusion case, Judge Anderson had, after negotiation, endorsed an $87.50 per share value for the stock of the Penn Central.

Nothing establishes such a value here will be gotten, though that assurance was there.

We have, in this situation, substantial evidence in the record with regard to the liquidation values of the Penn Central estate and we have maximum obligational authorities which fall measurably short of that amount and so we are left with consideration in the form of a package of securities as to which, as I say, there is no intrinsic value supplied by the Act.

The third feature -- and this, I take it, to be conceded as a constitutionally impermissible feature of the Act in the absence of the Tucker Act on page 39 of the federal Appellees' brief -- is that there is no judicial determination of the fairness and equitableness of the consideration prior to the irrevocable execution of the

conveyance.

As I say, the Solicitor General has conceded that that constitutional entitlement exists. The special court has rejected the invitation of the Solicitor General to extract such an opportunity in the short time between certification of the final system plan and the maturing of its obligation to convey and that is at the special court's opinion on page 68.

. Not only does this absence of an opportunity to determine in advance whether the consideration is going to be fair and equitable to the estates constitute in itself a constitutionally-impermissible feature of the Act, but I think it radically distinguishes this case from all the cram down precedents, most particularly the Rio Grande case and the dissertation on the cram down provision which I happen to think is best laid out in Mr. Justice Douglas' dissent in the St. Joe Paper case.

The heart and soul of the cram down provision is that prior to the imposition of a plan of reorganization upon dissenting interests of shareholders, the Court, upon its informed discussion, with the aid of the Interstate Commerce Commission, shall determine that the plan i s fair and equitable.

That is, shall determine that consideration at a time when it has the power to do something about it and the

Vice-Versa Act. And the distinction from all prior considerations of cram down is that there is no judicial intervention to ensure that result.

And, finally, and fatally, there is no underwriting provision in this Act.

The New Haven plan, as you will all undoubtedly recall, included a deep pocket in which the Penn Central had undertaken to make good any excess of value that might judicially be found, in excess of the intrinsic value of the stock or the marketable value of the stock at the time that the stock was received.

And at 399 U.S., particularly at pages 486 and following, the opinion of the court lays heavy emphasis on the importance of that underwriting provision.

What that meant was that there stood behind the commitment of the plan that was presented to you, an irrevocable contractual commitment to make good on any consideration that might be required in excess of that provided by the immediate features of the plan.

And it is our position that that underwriting provision is utterly absent, deliberately absent from this Act. Section 303(C), which is the compensatory provision of the Act provides for the exhaustion of the constitutional minimum of one's rights in a deficiency judgment against Con Rail, a point that I will come back to in my discussion

of the Tucker Act.

But most particularly, the conference report, which is set out in the legislative materials furnished to you by the Solicitor General, at page 56, makes clear, if any further clarity were necessary from the statutory language, that the provisions of the Act with respect to the terms and conditions of the securities issue, "Shall not include any form of federal guarantee of the value of the corporation stock."

In other words, the underwriting provision which this Court found to be essential to the survival of the New Haven plan is explicitly precluded by the conference report and fairly excluded by the statutory scheme here.

So those positions taken separately -- and most particularly those positions taken in the aggregate -- lead us to the conclusion that this Act is violative of the Fifth Amendment.

I speak now, not of the questions of uniformity. I am not going to address myself to the questions of due process. It seems to me that those have been adequately briefed or will be adequately dealt with by my brethren.

But the point of the fundamental unfairness of the Act in acquiring private property for a public purpose without an assured compensation upon the hypothetical allegation that it tracks the experience of the New Haven,

is something wrong as a matter of law and wrong as a matter of history.

Now, that underwriting which the statute does not intend to provide, and the constitutional deficiency which the Act thus suffers, is sought to be repaired here by the introduction into the mix of the Tucker Act.

The reason why the Solicitor General and the trustee of the Penn Central both acknowledge to you, quite candidly, I think, that the Act is unconstitutional in the absence of the Tucker Act is because they recognize the necessity for that character of underwriting which the New Haven found essential and which the Act does not appear to provide.

QUESTION: That was found essential in the context of whether or not it was a fair and equitable plan, wasn't it?

MR. CRACO: That's right, sir.

QUESTION: And not whether or not it was constitutional. Is there a difference in tests?

MR. CRACO: No, I --

QUESTION: Is one higher and one lower or are they equivalent?

MR. CRACO: I think for these purposes they are the same. The position that you took in that case dealt with the fairness and equitableness of the plan in the 77

sense because it was an entirely voluntary arrangement.

We say that the same standards, at minimum, apply to a situation where there is no voluntary character to the arrangement but where it is entirely an exaction of statute.

Nobody has negotiated, in terms of Section 303(C). They are there but I think the constitutional obligation of fairness is at least as onerous in this case as the fairness and equitableness found there.

As your opinion indicated in that Court, at page 488,"It would be unfair to require the conveyance of the New Haven assets for what might turn out to be a fraction of their worth."

And that unfairness, we think, is the heart of the political ethic of the Fifth Amendment and is applicable here.

When we say -- when we talk about the availability of the Tucker Act, it seems to me we are in peril of a certain ambiguity and I want to try, before the recess, to indicate what we think that ambiguity might be and the nature of the analysis that I will, hopefully, address after lunch.

There are two aspects to the availability of the Tucker Act.

The first is a legal availability as a substitute for assurances lacking under the Act, a true constitutional

panacea, as the Solicitor General would see it.

And the second question arising under the rubric of the availability of the Tucker Act, is whether, as a matter of law of remedies, it is available as an adequate remedy at law sufficient to have required the court below to stay its hand from injunctive relief and that raises some different considerations from the issue of pure legal availability.

It will be my contention when we return -- and I see that we are about to leave -- that the availability of the Tucker Act is ephemeral on both considerations, that the remedial structures of Section 303 of the Act do not impliably repeal the Tucker Act. They simply displace the Tucker Act in regard to these circumstances.

QUESTION: That amounts to a repealor, does it not, in your terms?

MR. CRACCO: No, sir, I think what it does --

QUESTION: Preemption sort of?

MR. CRACCO: We can get into a semantic discourse here but I think that there is a difference between repealor, which is not lightly to be implied, which is not to be implied, and to strike down an act on the one hand and a preclusive effect of an exhaustive and complete remedial section which while not repealing the Tucker Act, simply exhausts the remedies that the Tucker Act would

otherwise be available for. We think, as I say, Section 303 is so complete on its terms and so utterly consistent with the purpose and policy of the Act that it be complete on its terms, that the Tucker Act is not fairly understood to be available here as a matter of law.

QUESTION: Of course, that was true in the flooding case.

MR. CRACO: I don't think it was true in the same sense and it seems to us that in that case there were radical distinctions which I propose to address -- both the flooding cases, the Lynch case and the Hurley and Kincaid.

QUESTION: Of course, it holds that the Tucker Act is not repealed and controls. What does that do to your position in this respect?

MR. CRACO: Well, you have to reach the second question as to whether or not the putative existence of a Tucker Act remedy here provides a remedy which is sufficiently certain and clear as to have required abstention from the injunction below.

MR. CHIEF JUSTICE BURGER: You may want to pursue that after lunch.

MR. CRACO: I will, thank you.

[Whereupon, at 12:00 o'clock noon, a recess was taken for luncheon.]

AFTERNOON SESSION 1:02pm

MR. CHIEF JUSTICE BURGER: Mr. Craco, you may continue. You have -- well, I don't know exactly how much time.

MR. CRACO: I think I have about ten minutes and modest encroaching rights on my brothers.

MR. CHIEF JUSTICE BURGER: Very well.

MR. CRACO: Mr. Chief Justice and may it please the Court:

In dealing with the Tucker Act, let me go directly to the cases in which our adversaries find solace, which are Hurley and Lynch. I'll touch on them briefly because I think in the distinction between those two cases -- which I think is a cardinal distinction -- lies a material insight into the character of this case.

First of all, let me say that I would like to rely on the erudition and the analysis of Judge Friendly in special court's opinion beginning at about page 94 in footnote 101 on the Hurley case.

Plainly, that is a case in which Congress evidenced an indisposition to be beset by damages for -- liability for consequential damages arising from floods incident to a flood control program.

It says nothing on the question of what remedy it would or would not afford for a taking if, in fact, a

taking occurred and the court goes no further than to say that upon the discovery of an actual taking, the by-the-way indisposition of the court to entertain -- of the Congress to entertain claims for consequential flood damage is not meant to cut off the recourse to the courts under the Tucker Act for clear and present taking.

In common with the Lynch case -- and this is the key, it seems to me, distinction between those cases and this -- in common with the Lynch case, Hurley had no provision in the Act with respect to remedial characteristics of the statutory scheme.

The Solicitor General quoted to you language which I think is at the heart of the matter from Lynch. It is at 292 U.S. 586 and there the court, in identifying why the abrogation, constitutional or not, of contractual rights did not infer an abrogation of the remedies, said this: "There is no separate provision in Section 17 referring to the Economy Act dealing with the remedy. Now, those cases --

QUESTION: That was the insurance case.

MR. CRACO: The insurance case.

QUESTION: Right.

MR. CRACO: Now, both of those cases, it seems t o me, proceed in the absence of a remedial provision. This case proceeds in the presence of an exhaustive remedial provision and that is the distinction that I want

to emphasize.

It brings me to the first of the two twin arguments that I indicated I would make that, as a matter of law, the Tucker Act is not available here because there are remedial mechanisms provided for in Section 303(C) of the Act which are, on their face and by any fair construction in the interplay sections, preclusive of recourse to any other remedy.

The remedies provided by Section 303(C) are supposed to provide the estates with everything that they are entitled to get. The statutory language is that they are to provide for the recovery of the constitutional minimum which I take it to be stingy rhetoric for that which just compensation requires.

They command further -- and this is of importance -- regurgitation by the estates of any excess over the minimum constitutional value.

Their exclusivity is hedged about by two other provisions of the Act. Section 209 of the Act, which prevents any injunctive recourse by any other court and Section 303(B)(2) which provides that no other court may enjoin the conveyances so that this Court -- that is, the special court -- is invested with the entire scope of the remediation under the Act and that remediation is weighed by the terms of the Act coextensive with the constitutional

entitlement of the estate.

In other words, it is not contemplated by the remedial provisions of the Act that there be anything left over to which an estate might be entitled, but it could go any place else to recover and the catchall, the bag at the end of the remediation provision, the place where you get everything that you are entitled to -- if you don't get it from the stock, if you don't get it from the USRA bonds, is in a deficiency judgment against Con Rail and nowhere else.

As I indicated to you this morning, the language of the statute which turns your face towards Con Rail for the full remediation of your rights is buttressed by the language of the conference committee report which indicated in as many words that there was to be no federal guarantee of the value of the stock and precludes, by inference, that which the statute precludes in return.

This arises from no elaborate canon of construction. This arises from a fair reading of the statutory terms and the interplay of the statutory structure itself and we suggest that the recourse to the canons of construction advanced to you by the Solicitor General today is designed to avoid the plain meaning of the provisions of the Act and to -- rather than to elucidate an obscure meaning.

QUESTION: On such an important question, Mr. Craco, it would have been very simple for Congress to have made that clear in one sentence that the Tucker Act is out of the picture, would it not?

MR. CRACOW: I think it would have and, obviously, this issue would not be here if they had done so.

Justice Frankfurter indicated that statutory interpretations tend to come to this Court with some patent on both sides of the question but we think that they did not, for one clear reason. They didn't think of the issue in those terms. They were trying to construct a reorganization statute and it is not the common learning of reorganization cases that you look to the Tucker Act for your ultimate recourse.

QUESTION: Are you suggesting indirectly that if there was some hypothetical way to take a poll with all the 435 members of the House and all the members of the Senate, that the majority of them never gave this subject any thought one way or the other?

MR. CRACOW: I think that is very likely so and for two reasons.

If you look at what they did do, they were talking the language of reorganization and they were talking it in the context of warnings from the Secretary of Transportation that if they started talking about takings,

they might very well run into an interpretation in this Court or some other that they had, in fact, effected an imminent domain statute. So I think they so assidulously disciplined themselves to the language of reorganization and so carefully tried to track the experience of the New Haven, but they avoided any of the rhetoric that might have implied in any way that a right might accrue under the Tucker Act for which they were precluding a remedy.

I think that is the only fair construction of the purpose and policy of the Act taken at large, apart from the provisions of the Act themselves.

If you look at Section 101 sub-six of the Act, it is the last of the purpose provisions of the Act and it is very clear, what they said about to do -- and let's be very clear about this because it governs both arguments I have -- what they said about to do was to try to find out whether they could effect a rescue of the northeast rail system by a modest investment of federal funds"at the least cost to the taxpayer," was the language that they used.

And it seems to us that what they did, in fact, was ration the amount of funds that were to be available. That is instinct in the legislative history --

QUESTION: I'm assuming they didn't intend to do anything with the Tucker Act. The Tucker Act is still there.

MR. CRACO: The Tucker Act is still there unless they precluded its application by another remedial statute which they did, in fact, enact and it is our position that they did that in this case.

QUESTION: Well, I thought your argument was that the remedy provided here was different from the remedies provided in the Tucker Act.

MR. CRACO: That's right, different and exhaustive.

QUESTION: So how could they be precluding the Tucker Act if they differed?

MR. CRACO: It is different, it is exclusive and it is exhaustive.

QUESTION: Well, what do you have to say that is exclusive?

MR. CRACO: The inference from the language of Section 303(C) that says that if the provisions of the Act do not provide the constitutional minimum to the estates, then the court shall enter a deficiency judgment against Con Rail.

Now, the constitutional minimum is presumably the content of the present action you would have under the Tucker Act.

QUESTION: And if there is any other provision in Congress, it wouldn't apply.

MR. CRACO: I'm sorry, sir?

QUESTION: Any other provision of Congress as action wouldn't apply. Is that your position?

MR. CRACO: I think they intended -- and did -- turn you away from other provisions of Congress that would provide a remedy in the absence of the remedial legislation that they enacted here and told the estates to have their complete constitutional desserts from Con Rail.

QUESTION: You say that what they did was to say that the Tucker Act does not apply.

MR. CRACO: In effect, yes.

QUESTION: How can you say that? With the Act of Congress just, without mentioning it, they repeal it.

MR. CRACO: Because, as I said before --

QUESTION: Or limit it.

MR. CRACO: — I don't think that they were talking language of condemnation at all. They were talking language of reorganization and in so talking, did not mention the Tucker Act. The things that they did mention, by the way, the other repealors that they have, are all directly related to the implementation of the final system plan. They have nothing to do with the remedial features of the Act at all.

But I think it is important to understand the question of adequacy as well as availability and if I may turn to --

QUESTION: Before you go on, Mr. Craco, what is your view of what would happen if Con Rail could not pay the deficiency judgment?

MR. CRACO: That puts me to adequacy right away, right. The simple answer to that, your Honor, is that the practical consideration underlying this entire discussion of the availability of the Tucker Act has a surreal quality about it because you get to the deficiency judgment under the Tucker Act only if your deficiency judgment against Con Rail has been exhausted and returned unsatisfied.

The hypothesis which necessarily assumes that the security packages which you have been afforded prior to that time have been exhausted and are substantially without value, the notion that a Tucker Act remedy arises at all for a sliver of value on top of a package of given values belies the fact that it arises as a deficiency at all only when Con Rail can't respond to its own judgment and at that juncture, I suggest to you you are into a situation where the Con Rail situation has collapsed. This remedy --

QUESTION: That is what a lot of people are concerned about, isn't it?

MR. CRACO: Yes, it is.

QUESTION: And I am curious as to why you characterize that as a "sliver -- sliver of value."

MR. CRACO: Because at that point the stock will

be without value if Con Rail can't respond to a judgment for no more than the asset value of its operating assets, the bonds, which are secured by its assets, will not be of substantial value and at that point, the deficiency which will ensue will be greater than the -- than any hypothetical difference between the existing value and what the special court awards.

The point is that much more likely, in any real world than a Tucker Act remedy in the court of claims is that Con Rail, Section 77 and going to the question of whether the Tucker Act remedy can ever be adequate, it assumes an acquiescence, a protracted acquiescence by the Congress in the on-going process of this Act at a time when they have indicated that they want their investment to be limited and that protracted acquiescence, I suggest to you, they have evinced no disposition to entertain.

We think that the Act, the Tucker Act is not a plain remedy. It is not a certain remedy. It doesn't even get reached until after all the processes of the Rail Act are exhausted and until Con Rail has collapsed and those, we say, in addition to the reasons why, under the structure of the Act, the remedy is unavailable at all make the putative remedy inadequate as a matter of the law of remedies and on those grounds perhaps, surprisingly, we suggest that it is unavailable and argue that the court below quite

properly rejected its availability.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Craco.

Mr. Berger.

ORAL ARGUMENT OF DAVID BERGER, ESQ.,

ON BEHALF OF PENN CENTRAL COMPANY

MR. BERGER: Mr. Chief Justice, and may it please the Court:

I represent the Penn Central Company, which is the sole stockholder of the railroad in reorganization here.

We agree with Mr. Craco's analysis of the Act and we also agree that under the statutory scheme, the entire risk here is being imposed upon the claimants in the reorganization proceedings.

Now, Mr. Cutler has stated that Congress can steer the ship of state in between Scylla and Charybdis, but the stockholders and the creditors in this reorganization proceedings should not, we submit, take the risk of being torpedoed during that extremely precarious voyage and this points up the uniquely precarious position of the Penn Central Company.

As the sole stockholder, it represents 160,000 shareholders, a significant portion of whom, in Judge Fulham's words, "do not readily fit the image of

sophisticated investors."

Moreover, Penn Central Company has a massive unsecured claim, exceeding $41 million and as such, under the absolute priority rule, Penn Central Company is at the bottom of the totem pole.

I would suggest that if the term "erosion" may hurt some of the claimants, an interim and continuing erosion must hurt my client, Penn Central Company.

In short, Penn Central Company is hurt the first and is hurt the worst.

Now, noone in this litigation has contended that Penn Central Company had or has no equity. The trustees' figures reveal that the book value at the date of reorganization was some $1,600 and 66 million dollars of the equity, that as of the date when the Act took effect, this had dropped to $684 million.

QUESTION: What was the first date, the date of merger?

MR. BERGER: No, the date of the petition for reorganization, your Honor, 6/21/1970.

QUESTION: Right.

MR. BERGER: And on the date when the Act took effect, it had already dropped to $684 million and using the Solicitor General's figures coming from his brief, he says that the current liquidation value of the estate apparently

exceeds the valid claims against it by a minimum amount of $1.3 billion, which he contends is adequate to cushion the secured creditors.

The secured creditors don't agree and it certainly is not adequate to secure -- to constitute a cushion with respect to the unsecured creditors or the stockholders.

Now, dealing with the past erosion, the briefs -- and there are many, many pages on this point -- I think this comment is warranted, may it please the Court:

The facts are undisputed. Only the interpretations differ. We think the Government's interpretation mistakenly minimizes the past erosion and we would prefer, and we think it is correct, to rely upon the trustee's figures. After all, the trustees are officers of the Court and they certainly have no motive to misinterpret the figures.

Moreover, looking at the history of the reorganization for the past four years, the trustees have supported in the public interest the continued rail operations of Penn Central even at these huge losses and, indeed, they have steadfastly resisted Claimants' attempts to terminate the reorganization proceedings under Section 77(J).

QUESTION: Has that been the position of your client in the reorganization court, Mr. BErger, that the operation ought to be terminated?

MR. BERGER: We have so petitioned the court to

terminate the rail operations, yes, your Honor.

Now, their figures show that the accumulation of post-bankruptcy priority claims, at the minimum, amount to $745 million, to which they add a very conservative figure of $40 million for the physical decline in the value of the assets for making a total of $785 million.

Now, we submit, for the purposes of this case, it is not necessary at this time for the Court to quantify past erosion to the penny. The secured creditors say that this past erosion exceeds $785 million and we agree.

The undisputed fact stipulated in this record, may it please the Court, is that $851 million was lost in the Penn Central rail operations from the date of reorganization to the date of the enactment of this Act.

Now, I resubmit that, clearly, there is enough in this record to warrant the finding of the Court below -- and the reorganization court that the point of constitutionally impermisaible erosion has either been reached or will soon be reached and, thus, the case in this juncture and in this posture presents a question very like that presented in Chicago Rock Island, 294 U.S. 648 677 cited, with approval, by Mr. Justice Stewart in the New Haven Inclusion cases.

That it presents a question addressed not to the power of the Court but to its discretion and a matter, I

submit, peculiarly within the discretion of the lower court and a matter, in the words of Rock Island quoted by this Court, "Not subject to the interference of an Appellate Court unless discretion be improvidently exercised," and there is certainly no evidence of that.

Now, I would say that an erosion in the order of $785 to $800 million, in the language of Government Attorney Dausch, obviously has eaten into the stockholders' account and unchecked, this continued erosion will not only eat into the stockholders' account, but it will devour it.

Clearly, this record justifies what the reorganization court said and it said that, and I quote, "The creditors and stockholders of the Penn Central have exhibited commendable patience and restraint in supporting the continued operation of the railroad during reorganization at a cost of nearly $1 billion."

My duty, representing the stockholders, I submit, is to try to prevent the wound arising from this massive erosion from having fatal consequences, to prevent the Government from conducting this railroad experiment at Penn Central Company's expense with the result of fiscally killing Penn Central.

Now, a word about future erosion, and I think that is a misnomer. We use that phrase in the brief.

Right now it is happening as we argue the case.

This erosion is continuing right now. The enforcement of Section 304(F) inexorably will cause continued erosion -- as a trustee characterized it today, "Huge losses during the planning period from January 2, 1974 until the consummation of a final system plan, if that should ever happen."

Now, how long will this be?

Well, we now know that it can't be for a period less than two years because of the 120-day extension.

Realistically, I think we are talking about three to five years and I would point out that there is no limit to the number of final plans Congress may reject. Indeed, there is no assurance that Congress will ever approve a final plan.

It seems to me that unless there is clear, explicit protection against these huge, ongoing losses which the lower court estimated --- the organization court estimated would run from between $200 million per year, for one year, $400 for two years. And if we take in 1976 as part of the planning process, $600 million that unless there is clear, explicit protection against those huge, ongoing losses, resulting from the continued, mandated Penn Central rail operations as mandated by 304(F) that the Act must be declared unconstitutional.

Now, in looking at the Act, I would say that the

suggestion in the Government brief that there is some protection against this interim erosion is just unsupportable.

As the special court has held, Section 303 just doesn't provide any compensation whatsoever for interim loss and I find no support for the contention that there is any kind of protection or provision for compensation for the interim losses.

Reference is made in the briefs to Section 213 but I would point out that this grant provision of the statute provides for a total of $85 million for all railroads, not merely Penn Central. The Department of Transportation, as shown by the letter Mr. Barnum attached to the trustees' brief in Annex A definitively takes the position that these funds cannot be used to stem further erosion.

In order to get grants, the railroads must agree to maintain the service at present levels, so no abandonments or discontinuances are at all possible to come under Section 213. So that is clearly of no help.

And that brings us, then, to Section 215. As we look at that, we find that Section 215 provides only for loans, not for grants and these loans are restricted in their use for acquisition, maintenance and rehabilitation of rail properties in the final system plan.

No one knows, no one can know -- it is totally unknowable now or in the near future what rail properties will be in this final system plan.

The total authorization under 215 for the loans is $150 million for all railroads and I think, to use the vernacular, the clincher is that the law explicitly provides that any loan under Section 215 is and will be a charge against the estate so that any compensation that might be given to the estate for the ultimate taking will have to be reduced by the amount of the loan.

I submit, in summary, that Penn Central Company interests already have been terribly eroded. About a billion dollars up to the first of the year and being eroded at the rate of about $200 million a year.

It seems to me that it is unconscionable to put the burden of further interim losses on the estate during the two, three, four, five-year period until the final system plan will have been consummated.

In the words of Judge Anderson, paraphrasing him in the New Haven case, the public has had its bite from June 21st, 1970 to December 31, 1973, a huge bite, $851 million of rail losses.

I submit that the public is not entitled to another huge bite of $400 to $600 million. This would bring the total close to a billion and a half and it seems

to me, again paraphrasing Judge Anderson, Penn Central's duty to the public has been more than amply fulfilled. If these huge losses from mandated, coerced rail operations must be continued, that can only be done at the public expense as mandated by the Fifth Amendment.

We associate ourselves with Mr. Craco and with the argument which my brother, Mr. Auerbach, will make and we say that not to decide the constitutional question is really to decide it, and to decide it wrongly.

In conclusion, I would address myself to this question. Would not a definitive, decisive holding by this Court that the Tucker Act remedy exists be a sufficient answer as to my fears about interim and continuing erosion?

I think not.

This Court, as Mr. Justice Stewart suggested, cannot provide a real response to a money judgment of the court of claims.

We concede that whether Congress undertook, by this Act, to provide that the Tucker Act remained as a remedy, is a matter clearly within the province of this Court. It would therefore be appropriate for the Court to determine that the Claimants have, in effect, been subjected to an eminent domain taking for which there must be just compensation under the Fifth Amendment.

But, with deference, this Court cannot provide

the money. If the estimates of continuing and interim erosion are anywhere near correct -- and we submit they are -- in three years this would alone amount to $600 million

Would the existence of a Tucker Act remedy afford that kind of assurance the Fifth Amendment mandates, of just compensation?

QUESTION: Well, on your theory, Mr. Berger, then an individual against whom there was an inverse condemnation ought to have a right to enjoin that, rather than simply suing in the court of claims because you can't be sure that Congress will appropriate the money.

MR. BERGER: I think that this becomes a matter of degree, Mr. Justice Rehnquist. If we are talking about a $10,000 piece of property that is being flooded or some chickens, like the Causby case where planes flew too low, there is no reason to believe that Congress won't appropriate the money but, realistically speaking, and I don't want to repeat what Mr. Craco has urged on the Court, it seems to me in the light of the legislative history here, that we are going to have some difficulties.

In fact, I would quote the language of Mr. Adams. Speaking of movements, I think there has been a mass movement of some kind.

Here is what he says in his brief. "If this Court should decide at this time that a mechanism of a

deficiency judgment against the United States under the Tucker Act is necessary to make this Act constitutional, the Act must fall, since the legislative history and the language of the Act are clear, that no deficiency judgment against the U.S. is authorized by the Act."

Now, that is this case. Therefore, in some other case, where you don't have this kind of situation, where you don't have this kind of legislative history, where you don't have this kind of potential very large claim arising from admittedly huge losses, there would be no problem about an appropriation by the Congress.

But I submit, in this instance, there is a very serious loss and therefore, the only real, practical way to remedy this is to send it back to Congress to give Congress an opportunity to correct the constitutional defect.

Thank you, Mr. Chief Justice.

QUESTION: Mr. Berger --

MR. BERGER: Excuse me, Mr. Chief Justice.

QUESTION: Is there ever any assurance that a judgment in the court of claims will be provided for by the Congress when, let's say, an Indian tribe gets a $50 or a $100 million judgment or someone else gets a $50 million judgment?

MR. BERGER: I wish all my clients were Indians today. They seem to fare very well. But they are not. All

the stockholders are not Indians here. That is number one.

Secondly, the largest -- our research indicates the largest judgment of the court of claims that has been appropriated -- for which an appropriation has been made -- is $40 million. We are talking about vastly larger sums here and my fear is, as expressed by Mr. Craco, that the total statutory scheme excludes any greater federal fiscal intervention than that provided for in the law.

Mr. Justice Powell?

QUESTION: Your position, I take it, is that there is no assurance --

MR. BERGER: There is --

QUESTION: -- that Congress will provide the money to pay any judgment in the court of claims.

MR. BERGER: Except a realistic one, sir. History shows that where the judgment is of that nature that your Honor indicated, Congress does normally appropriate.

QUESTION: Mr. Berger, I was simply going to ask you if you would tick off what you regard realistically as the possible alternatives here. I think we all assume that there is no single course of action that appeals to everyone but there seems to be a consensus that an income reorganization in the normal sense is not feasible.

I take it that you would not really be eager for liquidation under the hammer. You suggest going back to

Congress but there is no assurance that Congress will come forth with what you might regard as more generous proposal.

What are the alternatives, realistically?

MR. BERGER: Realistically, may it please your Honor, Mr. Justice Powell, it was stated by the Government counsel in the court below that Penn Central, and I quote, is an "Irreplaceable national asset."

But that does not give the Government the right to treat it as though it belongs to the Government or the national Government, as such, right now and I would suggest that if the dislocation that would occur if the rail operations would be terminated is so great that Congress should have an opportunity to decide what it wishes to do.

Now, if Congress says that it just does not care and let that dislocation occur, then there are a number of practical alternatives including dismembering of the railroads, selling off parts to different railroads, making transactions with regions, if not with the United States by way of a regional authority, which would include the 17 states through which the railroad runs and ultimately, and finally, dismembering those parts which cannot, practically, be continued to be operated as rail operations.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Auerbach.

ORAL ARGUMENT OF JOSEPH AUERBACH, ESQ.,

ON BEHALF OF RICHARD JOYCE SMITH, TRUSTEE, ETC.

MR. AUERBACH: Mr. Chief Justice and may it please the Court:

It has fallen to my lot, among my brethren, to discuss with the Court the questions of the significance of the New Haven Inclusion cases as they bear upon the issues here and the cross-appeal which the New Haven Trustee took in this matter with respect to the effect of the ultimate conveyances required by the Act which the lower court considered premature.

Before addressing myself to those two points, however, I would like to mention briefly some matters which have arisen during the course of the day as to which I think the Court would want to be advised.

First, the question was asked whether the opinion of the special court was appealable and could come before this Court.

As we stated in our reply brief, here at page 48, we intend to file with the Court as soon as possible -- and that will be very shortly -- a petition for a writ of certiorari under the Allrich Act. We hope to raise some of the questions.

We think the special court did deal with certain matters in an unconstitutional way.

Now, obviously, the decision of the Court here in the issues now before it might moot that entirely but the fact is we do intend to try to raise those issues with this Court notwithstanding the last sentence of Section 207(B).

Another question that was asked this morning requires comment. The question was whether dismissal of the reorganization is a possibility.

The New Haven Trustee filed a petition and motion under Section 77(G), which is the prescribed method under the Reorganization Statute, for dismissal of reorganization and for the appointment of the Penn Central Trustees as receivors on October 9, 1973, something over a year ago.

That motion and petition were not heard until May, 1974. They were reheard again by Judge Fullam in September of this year but before -- but he has not yet acted. But he can't act now because the special court has enjoined a dismissal another ground for our petition for certiorari.

The third point to which I would like to refer of this nature is a question with respect to Section 207(B) by one of the Justices this morning to which the Solicitor General replied,"I think Section 207(B) is effectively behind us."

The fact is, the New Haven Trustee now has pending

in the Third Circuit appeals from both the 120-day findings and the 180-day findings entered by Judge Fullam which are the triggering sections for the action by the special court in which we argue that an Article 3 court, such as the special court is, could not enter the kinds of opinions which we call "advisory opinions" in the absence of any record as to what the final system plan would be or knowing now what the consdieration of the other issues which they dealt with would ever be.

The Third Circuit Court, and Judge Hasty sat as the chief judge in that court, have notified the parties they would reserve their decision, again pending decision of this Court because if this Court, in fact, reverses the lower court in its holding that it was premature to consider the constitutionality, that would moot those issues as well, or could moot those issues as well.

So we do have three separate things pending which depend on how the Court acts here.

Going now to the questions which I wish to address myself principally, namely, the significance of the New Haven Inclusion cases and why the Court should grant our request on the cross-appeal.

I think it is clear from the legislative history -- I can refer, for example, to the Congressional Record of the House for November 8, 1973 where it states in the debate

and it is Mr. Adams, "This is a constitutional reorganization proceeding and not a condemnation." And he speaks in that same section, "The statutory reorganization used in this bill follows that adopted by the Supreme Court in the New Haven Inclusion cases."

Now, we think Congress, even in attempting to carry out what has been described here today as an heroic measure, was wrong. They did not understand the New Haven Inclusion cases. It is a decision of this Court. It is a case in which my client has a long history.

We think the Congress, if it had understood the New Haven Inclusion cases, could not have enacted this statute, could not have provided what it did and we would not be faced with the constitutional issues that we are now faced [with] because the intent could not be more clear, whether it be in the 104-member motion that was filed with the Court last week to make oral argument here as amici curiae, that Congress did not intend to seize this property.

Now, in fact, they may have, whether they intended it or not but if that is the case, we rely on Youngstown as the basis for the decision here that you can't say the Tucker Act applies.

And there is an anomaly here that Judge Friendly was amused by. We have the Government saying there is a good cause of action against the United States. We have the

creditors saying there isn't a cause of action against the United States and it comes down, I think, to the question asked a few moments ago by Mr. Rehnquist.

We think -- and it is a fact that we may be wrong-- but we think we are talking about billions and the very idea that the Indian case, which was some $40 million could be a precedent for relying on the fact of Congress' honoring its obligations, many, many years down the road and we may be speaking of a dozen years down the road, is something which as creditors, we think, the Court should not impose upon us and which we could not consent to as being the best interest of those people whom we represent as fiduciaries.

Because of this melding of these issues, I would like the Court's indulgence to review in some length the history of the New Haven Inclusion case, both before it reached this Court and in this Court.

The New Haven reorganization proceedings commenced in 1961. Mr. Smith, the Appellant -- cross-Appellant-Appellee here, is the sole remaining trustee of that reorganization.

In 1967, barely six years which in reorganization terms is pretty rapid, we were before this Court on the question whether -- and this is the title of the case is the Penn Central Merger cases -- whether in the

Penn Central Merger cases certain New Haven bondholders were entitled to insist that their consideration be determined before the merger could be carried out and it was Mr. Justice Brennan, as I recall that argument, who turned to counsel for Penn Central and he said, "Is Penn Central willing to pay whatever is finally judicially determined?"

I may, at this point, point out, the ICC had already made a determination which the creditors were objecting to and when Mr. Justice Brennan asked that question, counsel for Penn Central said, "Yes, we will pay whatever the Court determines finally."

Thus, in colloquial terms, we had an open-end transaction and the Court refused to grant the request of the New Haven bondholders that the merger be held up. It said the merger can go ahead.

Now, there is the first mistake Congress made.

Congress thought because the Court in the Penn Central Merger cases, as the foundation for the New Haven Inclusion cases, permitted the conveyance could be made -- required it to be made, as a matter of fact, but before the consideration was finally determined that they could do the same under this statute, the statute clearly does that.

We don't even know what the plan is, when the conveyance is until the very moment when the conveyances are

made.

But the New Haven Inclusion cases don't say that, nor do the Penn Central Merger cases.

What they say is that where the consideration must be paid and the parties agree to be bound to pay them, whatever the Court determines, it may proceed.

That is not the case under the statute.

The next phase that came before the Court --the phase I mentioned was 1967 -- the Penn Central merger was carried out on February 1, 1968 and the next phase to come before the Court was the consideration in the New Haven case and that is the opinion called the "New Haven Inclusion cases."

And in that case, Mr. Justice Stewart wrote the opinion just eight days after the Penn Central had itself filed for reorganization.

Now, this opinion --

QUESTION: I promise you I didn't write the opinion in a day.

MR. AUERBACH: Well, I regret to hear that, Mr. Justice, because I thought it was a masterful opinion.

But the opinion eight days after the Penn Central went into reorganization made note of the fact of reorganization and then had to deal with the consideration question in the light of the issues created by that reorganization.

And what had happened was, the case as it came to the Court, based upon the ICC findings that had earlier been objected to by the bondholders and with the approval of Judge Anderson, had had a sharp turn in its form of consideration.

Judge Anderson said, I won't disagree that the stock, indeed may be worth $87.50 a share, but I cannot agree that constitutionally, the creditors are obliged now to assume that it will be worth $87.50 a share for an indefinite period. Therefore, I will require an underwriting for ten years that stock must at some point reach $87.50 so the shareholders can get out of it -- it would be the New Haven shareholders then holding that stock -- can get out.

And the court in the New Haven Inclusion cases said, that is not good enough. It is not good enough. It just doesn't give the assurance that creditors have in order to be paid properly or to know they are going to be paid properly for their property.

And the Court remanded the case. That specific question to be determined, which was to fashion a payment which, in the words of the opinion, "Would produce the prepossile liquidation value of the properties which had been conveyed."

Now, the next phase of that case from this point

on, it is an academic thing because we don't have any further decisions.

The next phase after that decision, which occurred in June -- June 29, 1970 -- the next phase was Judge Anderson promptly entered orders which he thought would tell the Interstate Commerce Commission how he expected them to proceed on the remand.

That was appealed by the Penn Central Trustees. The court of appeals for the Second Circuit reversed Judge Anderson, indicated that the entire matter had to be taken up in connection with the Penn Central merger because of its bearing upon that and ought to go back to the Commission.

Mr. Smith promptly went back to the Commission. That would have been in the spring of 1971. And at this time we still have never had a hearing before the Commission. We have entered an order saying, we can't do this until we know what is going to happen to Penn Central.

This brings us, therefore, right up to what is happening with this new statute.

The New Haven bondholders have now waited 13 years since they were enjoined by Judge Anderson from foreclosing on their liens. They have waited more than six years since the property was required to be conveyed by the Commission and approved by this Court.

They have waited more than four years since the

Court determined the final consideration. That is not at issue, the value of the property in that New Haven Inclusion cases determination has never been questioned. That is the value of the property, $175 million.

But they have waited more than four years to be paid for it.

If the Rail Act is constitutional, this is what they must cope with. They will not know until 1976 -- let me interject for a moment -- the New Haven Trustee has a lien on the properties which he conveyed to Penn Central.

We have a legal lien. In addition -- and are enjoined from foreclosing it -- in addition, Judge Fullam granted what he called an indeterminate lien, indeterminate as to amount. So the question would remain open whether the New Haven Trustee is entitled to more than just a bond which he holds on the eventual payment.

We conceive that to be an aid of the remand from this Court.

But if the Rail Act is constitutional, as I say, they won't know till 1976 whether the property which they have the lien on is going to be required to be conveyed to Con Rail. And if it is required to be conveyed to Con Rail, it gets conveyed free of the New Haven Trustee's lien and he must then just look to the Penn Central estate without a lien for the payment, for the very property which this

Court said, in 1970, the bondholders were entitled to have the prepossile liquidation value for.

QUESTION: Under the Act, the lien doesn't follow the proceeds.

MR. AUERBACH: No, Mr. Justice Douglas, it does not follow it.

QUESTION: You mean, the new Act.

MR. AUERBACH: The new Act? No. The consideration which Con Rail pays as fixed by USRA goes into the general pot of the debtor whose property it was that was taken.

QUESTION: But the various claimants to that pot will be -- still have some rank on some priority basis.

MR. AUERBACH: Well, Mr. Justice White, the problems of --

QUESTION: The reorganization proceeding is not going to be dismissed.

MR. AUERBACH: I wish I could answer that easily. The problems are not so easy and the reason is, the concept of the statute is to bring together five railroads, the pieces of five and to illustrate, if a piece of railroad area which went in, namely Penn Central, is combined with a piece of the Central New Jersey, which is subject to it, too, and each of those pieces were subject to a lien and now you come to the old problems of the severance evaluations We just don't know what would stand and our liens don't

follow except in an equitable sense --

QUESTION: But the special court is going to have to decide what the value of the various pieces that the various estates convey --

MR. AUERBACH: Yes. Yes, they would. They would.

QUESTION: So that there is going to be some securities directed in the direction of the Penn Central estate.

MR. AUERBACH: Bound to be.

QUESTION: For which you have a prior claim, I suppose.

MR. AUERBACH: Well, I don't know if you have a prior claim. There are bound to be securities.

QUESTION: Well, I know, but you are going to be -- you all aren't just made into unsecured creditors.

MR. AUERBACH: We are all -- we all remain as secured creditors of Penn Central whose security has been conveyed out free of lien and that is what happens on the conveyance case.

QUESTION: But you retain your position in the estate, I suppose.

MR. AUERBACH: Yes, but we know now what our value is in Penn Central. We don't know what our value is to the Con Rail system for the reason --

QUESTION: You don't know yet but you will know.

MR. AUERBACH: I beg your pardon, sir?

QUESTION: You don't know now.

MR. AUERBACH: No. And we don't know, you see, the conveyance occurs presumably something after two years but the valuation may not occur for another ten. And that is why I would point out to you that when we talk about time, we have had 13 years. I think we have to assume in New Haven that 20 years in total would be --

QUESTION: Let's assume it were absolutely certain, no question whatsoever, that sooner or later there would be enough money or value in the Penn Central estate to pay you off, at least. But nobody else.

MR. AUERBACH: Yes, Mr. Justice.

QUESTION: Would you have some claim that was not being satisfied?

MR. AUERBACH: No, of course not. Of course not. If the Penn Central Trustees came to us today with a check --

QUESTION: What I mean is, you weren't -- your claim isn't displaced. You still have as much of a prior claim of the proceeds as you had to the property.

MR. AUERBACH: Before I answer that directly, let illustrate --

QUESTION: Maybe the Rail Act may not say so, but that is the Bankruptcy Law.

MR. AUERBACH: Well, yes, your Honor, but

the question of whether the Bankruptcy Law applies is one which I can illustrate for you under this very case in what I would call bizarre and I know the Solicitor General used that word this morning, but I think I am entitled to use it too.

In this very case, we have this situation. The New Haven properties, which are owned by Penn Central, are essentially the Boston to New York -- or a large part of the Boston to New York portion of the Northeast Corridor, the balance being the New York to Washington portion.

The statute, the Rail Act, in no less than three places, talks about creating or conveying to AMTRAK properties in that Northeast Corridor.

The statute provides, in Section 211(A) that USRA may make loans to AMTRAK which would buy the properties from Con Rail.

Now, the very properties which we would have conveyed -- have been required to convey free of lien to Con Rail would be sold for cash by Con Rail to AMTRAK under the statute.

Now, the question I have in trying to answer your question, Mr. Justice, is, can we impose a lien on that cash?

I would be very much surprised if, under Bankruptcy Law, we could.

QUESTION: Well, whatever is given to the New Haven estate in exchange for the properties, you are going to have your appropriate claim to and, assuming that there is enough money there to pay at least you -- or at least to -- I suppose that there are some people who have claims to the Penn Central estate prior to you and I suppose the administration expenses are ahead of you.

MR. AUERBACH: Oh, indeed they are.

QUESTION: Or are they?

MR. AUERBACH: Well, indeed they are, your Honor. They are ahead of all the secured creditors. The United States is a creditor who is ahead of us. All the taxing authorities. The payments have not been made on rentals.

These mount up. We are well over a half a billion now in these administration claims.

I can't really answer your question except hypothetically. If there is enough there for us, then there is enough there for us, but whether there will be, I can't answer.

QUESTION: But your relative position isn't going to be dissipated by the Rail Act.

MR. AUERBACH: Well, the Rail Act is not protected. I'd have to say that to you.

QUESTION: Yes.

MR. AUERBACH: I can't answer how Judge Fullam

in a contest among creditors for what we think would be a very sharply-reduced pot.

QUESTION: Well, the Rail Act may not protect you and the Bankruptcy Act may not protect you any more than it ever did.

MR. AUERBACH: Well, the Bankruptcy Act right now would protect us if Section 77 were being carried out. For example, we have a Section 77(G), this motion that has been pending. If, in fact -- and it seems to me that the findings that have been made by the special court establish this -- that if, in fact, we've passed the stage where there can be any reorganization of Penn Central, then there is a constitutional right to have the 77(G) motion granted and if there is that constitutional right and it goes into liquidation, the equity receivers must keep those properties intact and liquidate -- whether they do it en masse or separately, they would have to protect us then under the Bankruptcy Act.

QUESTION: The special court decided against you.

MR. AUERBACH: Well, to be sure. The special court decided against us only on the concept, Mr. Justice White, that the Tucker Act applies.

QUESTION: I agree with that.

MR. AUERBACH: It didn't decide against us otherwise.

QUESTION: That's right.

MR. AUERBACH: Now, as it happens, we think constitutionally the Court must consider the statute but without the Tucker Act. Is this a constitutional statute?

And I won't argue -- the details are in my brief. We think it is unconstitutional. You don't even reach the Tucker Act, as we see it, till you have passed the point of constitutionality and Judge Friendly, I think, did. We think he was incorrect in that respect.

If I may, in the few minutes I have left, I'd like to turn to the reasons why, particularly in view of some of the questions asked by Justices this morning. It is not premature now to rule on the questions raised with respect to constitutionality of the ultimate conveyance, not just the interim erosion and, very briefly, the Court now knows the Rail Act compels a conveyance of that property free of lien.

The properties would be included without notice or opportunity for hearing on the part of the owners or the judges who supervise the Trustees in the Section 77 proceedings.

The Congress, under Section 208, has an absolute right of determination of what will go into that final system plan by rejecting the plans that are put to it.

Fourth, the special court is required without

notice or opportunity for hearing to order the conveyances provided in the final plan.

Fifth, the trustees are required, are ordered by the statute to convey those properties free of lien, without any choice.

Sixth, the Rail Act forbids specifically -- and I think that was mentioned in response to a question from Mr. Justice Rehnquist, forbids specifically any enjoining of those conveyances.

Seventh, the amounts provided under the statute are now wholly known to the Court. You know what it is Congress says could be paid, and no more.

Eighth, the review of Congress as to any court-ordered revision under Section 206(I) of the Act gives it the right to reject all structures that a special court or a reorganization court would deem necessary in the premises.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Auerbach.

Mr. Solicitor General, anything further?

MR. BORK: Mr. Chief Justice, I have nothing further unless there are some questions.

MR. CHIEF JUSTICE BURGER: I observe that there are none.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:57 o'clock p.m., the case was submitted.]