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From right of way to no way: the General Railroad Right-of-Way Act

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Over the course of 101 years, from 1875 to 1976, the federal government granted railroad companies rights of way across the United States under the General Railroad Right-of-Way Act of 1875. Stretching thousands of miles and connecting the coasts, these rights of way served an integral role in the country's economic development and westward expansion. Later, as railroad use dwindled, railroad companies frequently abandoned these rights of way. When this occurs, what happens to the right of way? Does it revert back to the United States to repurpose it – for example, as a recreational trail? Or does the abandoned right of way go to the private party who acquired the land underneath it? If it goes to the private party, use by the federal government might constitute a taking under the Fifth Amendment. The Supreme Court had not squarely addressed this question until *Marvin M. Brandt Revocable Trust et al. v. United States*, decided March 10, 2014. In an 8-1 decision, *Marvin* held the right of way goes to the party who owns the land underneath it.

Marvin involved the owners of 31 parcels of land crossed by the abandoned right of way. The right of way was granted under the 1875 act to a railroad company in 1908. In 1996, the owner of the right of way notified the Surface Transportation Board that it intended to abandon the right of way. The tracks and ties were removed, and, after receiving board approval, abandonment was completed in 2004. Two years later the United States filed suit seeking a judicial declaration of abandonment and an order quieting title to the right of way. The government settled with or obtained a default judgment against every owner except Marvin Brandt. Brandt disputed the government's claim and filed a counterclaim. He asserted that the right of way was merely an easement that was extinguished upon abandonment. Under common law property rules, then, his land was now unburdened from the easement. The United States maintained that the 1875 act granted railroads a limited fee with an implied reversionary interest such that, upon abandonment, the right of way returned to the United States.

The dispute hinged on the nature of the interest conveyed to the railroad company in 1908 pursuant to the 1875 act. The Supreme Court addressed this question in 1942. In *Great Northern Railway Co. v. United States*, the court held that, unlike pre-1871 statutes that granted railroads "a limited fee, made on an implied condition of reverter," the 1875 act "clearly grants only an easement, and not a fee." Ironically, this was the position the United States took in *Great Northern*. Because the patent to Brandt's contained no language reserving an interest in the right of way to the government, the court concluded that, "[u]nder *Great Northern*, the railroad thus has an easement in its right of way over the land owned by the Brands." The court then found that, under common law property principles, the right of way terminated when it was abandoned, leaving Brandt's land unencumbered by the right of way. That the government argued in *Great Northern* that the 1875 Act granted mere easements was not lost on the court in *Marvin:* "[t]he Government loses [its] argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago, . . ."

Marvin could have significant implications for the federal government and private landowners. Large swaths of land are impacted by the 1875 act, as the rights of way were up to 200 feet wide and stretched for miles. In *Marvin*, for example, the portion on Brandt's property alone was 200 feet wide, one-half mile long, and part of a 66-mile right of way. The federal government has repurposed many of these rights of way – most notably as recreational trails pursuant to the National Trails Systems Act, more commonly known as the Rails-to-Trails Act. But under *Marvin*, the federal government might not be not entitled to do so because the 1875 Act rights of way extinguish upon abandonment. As a result, a private landowner whose land underlies these areas may have a takings claim under the Fifth Amendment. Justice Sotomayor notes in her dissent that the aggregate amount of takings claims related to Rails-to-Trail Act conversions alone is estimated to be "hundreds of millions of dollars."

Before filing suit, however, an owner of land underlying a railroad track that he or she perceived to be abandoned should consider a numbers of factors because the success of a takings claim brought on the basis of *Marvin* is no certainty. The right of way may have been granted under a pre-1871 statute, which means the United States likely retained an interest in it. A railroad may also have pre-patent rights granted by settlers. Unlike in *Marvin*, a patent may contain language reserving an interest in the right of way to the United States. It is also conceivable that a landowner could have previously entered into an agreement concerning the right of way that would preclude or defeat such a claim. And the right of way might not be "abandoned" under the law, despite the absence of passing trains or the presence of a recreational trail. In this vein, it is worth noting that a right of way that was "railbanked" by a railroad and converted to a trail pursuant to the Rails-to-Trails Act is not considered abandoned.

Nevertheless, *Marvin* has great import. It implicitly affirms the critical distinction identified in *Great Northern* between the interests granted to railroads pursuant to pre-1871 statutes and the 1875 act. Additionally, provided the constellation of facts align in the landowner's favor, *Marvin* no doubt makes way for Fifth Amendment takings claims. ▲