



So, When Might a Toll be A Tax? ... And When Might a Toll-Tax be Invalid?

Philip Sunderland

In recent years, several lawsuits have challenged the tolls charged users of the Dulles Toll Road, a toll facility in northern Virginia. A substantial portion of the revenues produced by these tolls is used to fund construction of a new transit line in the same corridor as the toll road. Claims in these suits have asserted that the tolls amount to “taxes” and, as a result and for different reasons, are unlawful. Both state and federal courts have rejected these claims.

Background

The Metropolitan Washington Airports Authority (Authority) is a creation of a 1985 interstate compact between the Commonwealth of Virginia and the District of Columbia. The Authority was established to operate two federally owned airports, Ronald Reagan Washington National and Washington Dulles International. The Authority is governed by a 13-member board of directors whose members are appointed, not elected—three members appointed by the President, five by the governor of Virginia, three by the mayor of the District of Columbia, and two by the governor of Maryland.

In 1986, Congress consented to the Virginia-District of Columbia compact, and authorized the Secretary of Transportation to lease the two federal airports to the Authority, along with the “Dulles Access Right-of-Way,” a

400-foot wide, 14-mile long corridor of land in northern Virginia running between Dulles Airport and Interstate 66. Within most of this right-of-way run two parallel roadways: the Dulles Access Highway, the use of which is restricted to those traveling to and from Dulles Airport, and the Dulles Toll Road (DTR), a toll facility constructed and operated until recently by Virginia. In 1987, the secretary and the Authority executed a lease covering the two airports and the Dulles Access Right-of-Way.

In the late 1990s, Virginia proposed construction of an extension of the Washington, D.C., regional Metrorail transit system. The extension would be a new 23-mile line traveling largely along the median of the Dulles Access Right-of-Way to Dulles Airport and beyond into Loudoun County, Va. The extension was to be funded by a combination of federal and state grants, contributions from two counties in Northern Virginia, and revenues from the DTR.

In 2006, Virginia reached an agreement with the Authority that addressed the building of this Metrorail exten-



Tunnel underneath Route 123 and Route 7 is nearing completion with track work scheduled early 2012.

sion. The Authority agreed to assume responsibility for the construction and financing of the extension; in return, Virginia agreed to turn over operational control of the DTR to the Authority for a 50-year period, including sole authority to set toll rates and to use toll revenues to help finance construction of the rail extension.

In November 2008, Virginia formally transferred operational control of the DTR to the Authority. In late 2009, the Authority, through a regulation adopted by its board of directors, increased toll rates on the DTR.¹ The new rates were based upon a plan of

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Chair's Corner

Amy Cassidy, Immediate Past Chair and Hector O. Huezo, Chair

Friends and Colleagues:

In the wake of our section's annual meeting, it is time for me to bid you a fond farewell. It has been a privilege to serve you as chair of the Transportation and Transportation Security Law Section, and I look forward to remaining active in our future events and activities.

This year, we've had many great achievements. To highlight just a few, we continued our long-standing brown bag lunch series, focusing on broadening awareness of the exciting legal activities in the many modal administrations of the Department of Transportation; held an outstanding security symposium with the support of the Transportation Security Administration; and spearheaded the publication of the first Transportation-themed issue of *The Federal Lawyer* in over a decade.

More recently, it was wonderful to see so many of you at our annual Counsels' Reception in October and our brown bag lunch legislative update in November. At our Counsels' Reception,

we awarded Gillian Flory of the Transportation Security Administration with our Transportation Lawyer of the Year Award and recognized past chair, Nancy Kessler, for her skilled and devoted leadership of the section. We have had a great year, and I know next year, under the leadership of our new chair, Hector Huezo, will be another successful one.

Finally, I wish to thank our board members for their hard work and exceptional dedication to the success of our section. Without them, this year's activities and milestones would not have been possible. I am grateful for their interest in remaining with the board for another year and am confident that our section is in good hands. ❖

As we welcome in 2012, I thank you for your involvement, encouragement and support. I would also like to take this opportunity to thank Amy Cassidy, the former chair, for her outstanding leadership and dedication to the Transportation and Transportation

Security Law Section during her tenure as chair. Because of Amy, our section had yet another successful year.

Our section is getting off to a great start. Last month, we held our Annual Legislative Update at the Department of Transportation. We are now in the planning stage for hosting a half-day forum on pressing legal issues in aviation security at the Transportation Security Administration (TSA) headquarters in February. Last year's forum was very successful and included dignitaries such as Hon. Norman Mineta and senior TSA officials.

We hope that you continue to support and be involved in the section in 2012. Please note that the FBA and the Transportation and Transportation Security Law Section have begun a campaign to recruit new members. Please encourage your colleagues, both within and outside of the government, to join us and become active members in the Transportation and Transportation Security Law Section. I wish you and yours a very happy new year. ❖

Letter From the Editor

David F. Rifkind

Welcome to the Winter 2012 edition of *TransLaw*. Recently, I had the privilege of sitting down with Robert Rivkin, the general counsel for the Department of Transportation, to learn what it means to be the nation's top transportation attorney. In our interview featured in this issue, Rivkin shares his perspective on the position and the lessons that he has learned, and he provides important advice for others seeking to follow in his footsteps. I hope you enjoy reading the interview as much as I enjoyed conducting it.

Also in this issue, Phil Sunderland, vice president and general counsel of the Metropolitan Washington Airports Authority (MWAA), discusses three recent court decisions upholding MWAA's ability to fund the expansion

of Metrorail to Dulles International Airport through tolls collected from the Dulles Toll Road. The cases raise interesting state and federal constitutional issues. Read Phil's article and find out whether a "toll" is a "tax."

In September, the section held an excellent brown bag lunch program on pipeline disaster emergency response. Alice Koethe, who moderated the panel, summarizes the event for *TransLaw*.

I urge you to mark your calendars for February 28, 2012 for a half-day forum at the TSA on legal issues facing TSA's risk-based security program and on first amendment rights at airport checkpoints. Despite an ice storm, the 2011 forum was well attended. The intrepid attendees were not disappointed. Based on the preliminary

plans, the 2012 program promises to be at least as good if not, dare I say, better than the last. The forum

is a terrific opportunity to learn about what's hot in transportation security law from the people at the very heart of the issues. I look forward to seeing you there, if not before. However, I make no promises on the weather.

Lastly, a big thank you to all the contributors and to the section board for their help during my tenure as editor as *TransLaw*, and a big congratulations to Alice Koethe, who takes over as editor on the next issue. Please start sending articles her way! ❖



Perspectives from the General Counsel's Office: An Interview with DOT General Counsel, Robert S. Rivkin



Robert Rivkin is the 21st general counsel (GC) of the U.S. Department of Transportation. He was sworn in as GC on May 18, 2009, after unanimous Senate confirmation.

In his role, as GC, which he elaborates on in the interview below, Rivkin is counsel to Secretary Ray LaHood and serves as the department's chief legal officer of a federal department that has 10 operating agencies and employs more than 55,000 employees, including more than 500 lawyers.

Rivkin has an enviable resume. Prior to becoming DOT's GC, he held positions in both the private and public sectors. In the private sector, Rivkin was the vice president and deputy general counsel of Aon Corporation and was a partner in the law firm now known as Schiff Hardin L.L.P. In the public sector, Rivkin served as general counsel of the Chicago Transit Authority, as director of programs and policy for the City of Chicago's Law Department, and as an assistant U.S. attorney for the Northern District of Illinois. Rivkin also has worked at the British Parliament and at the European Commission in Brussels, Belgium. He graduated magna cum laude from Harvard College, received his J.D. from Stanford Law School,

where he was an associate editor of the Stanford Law Review, and clerked for Judge Joel M. Flaum of the U.S. Court of Appeals for the Seventh Circuit.

TransLaw: So you have now been here 2 ½ years, which makes you somewhat of a seasoned veteran by Washington standards. Before coming here, you were in private practice with a law firm, and at AON, among other things. How would you compare this job to your time in the private sector?

Rivkin: I find public service overall simply a more compelling challenge than the private sector. Even though I enjoy private sector challenges, in the end, they are fundamentally about making more profit. That is our system and that is what our companies are supposed to do, but I find public policy ultimately more compelling, more interesting, and more satisfying.

TransLaw: Do you miss anything about the private sector ... besides the paycheck?

Rivkin: I have had good days in the private sector too. You do make a sacrifice to come to work for the government, which has real consequences. And the longer I spend here the more long term those consequences may be!

The private sector is more efficient and so, to the extent that you are, as I am, interested in efficient use of resources, timely decision making, and minimizing process beyond that which is necessary, those things happen more in the private sector. On the other hand, although process can be painful, sometimes you realize that it was necessary to achieve fair, balanced, and correct results. So I complain loudly sometimes internally about all the process we have to go through, but I am compelled to admit that in many cases it was worth going through.

TransLaw: What would you describe as your biggest frustration in this job?

Rivkin: Process. I think that people often mistake government for what is really a generic, bureaucratic problem. There seems to be a law of large organizations and the way they function, especially when they are diversified and multi-matrixed, that makes it a real challenge to be efficient in how you operate. I liken working in the federal government to working in a corporation like Aon where I was based at corporate headquarters. Aon operates in 120 different countries. It has three major pillars of its business but hundreds of actual corporate entities operating all over the U.S. and abroad. There are country managers, there are business unit managers, and there are corporate functions that spread across the company. All those organizational gaps have to be bridged. There are authority questions about who gets to make the decision and who has to be consulted.

The same thing that is true in a company like that is true here. An issue might involve PHMSA—the Pipeline Hazardous Materials Safety Administration—or it might involve PHMSA and FAA together, which requires the Office of the Secretary to get involved. And then, depending on how significant the issue, OMB and perhaps other offices within the White House might also be involved. There is a series of processes that have to be engaged in before you can actually get something done, in many cases.

TransLaw: My father was a doctor at the National Institutes of Health. He would tell people who came to work for him that, in the government, if you are patient you can do big things.

Rivkin: Patience is a virtue in most endeavors, and it is not my greatest asset. But impatience can also be a virtue. Many leaders get things done because they are impatient with bureaucracy.

TransLaw: Obviously you look to the secretary and to the President for policy guidance. When you think about historical leaders, is there anyone in particular with whom you identify and look to as a role model?

Rivkin: I would say along the lines that we were just discussing, former Chicago Mayor Richard M. Daley was a person who had no tolerance for bureaucracy. If he wanted to get something done, he simply would not accede to the notion that it could not be done or it would take years to get it done. Now, you could view that as impetuous, or even as being in a state of denial, but I have seen in Chicago city government, in the private sector and in Washington, that when you challenge the experts on how long it takes something to get done, you can often make a difference and force concessions and speed up timelines. I see Secretary LaHood do that all the time.

One of, I think, the formative experiences for Secretary LaHood as secretary and certainly a formative experience for me was when the Congress gave the department the Cash-for-Clunkers program, and gave the department just 30 days to establish the program. Now, as you know, normally standing up a program can take years, or at least many, many months. This happened in 30 days. So, within 30 days there was a program, and then it took only another 30 days to spend \$3 billion.

The secretary, I think, sometimes asks himself when he is presented with progress reports, “why are they taking 18 months? We did Cash-for-Clunkers in 60 days.” And he has a point! When you have to, when you really push it, when you have no other choice, you can get things done quickly. So why take all that time when you do not have to?

TransLaw: How much of your role as DOT general counsel is law and how much is policy?

Rivkin: Everything is informed by policy. Determining how much of what you do is law and how much is policy is one of the key challenges of being a general counsel in any organization.

What I think is, a lawyer should be clear about a legal issue when discussing a legal issue but should not necessarily shy away from policy issues. In my experience, what clients want from lawyers is their best judgment. Some of the most frustrating lawyers that I run into are lawyers who say “well that’s a policy question. Don’t ask me that. I can respond to a legal question, you know, but don’t ask me a policy question.”

Most clients want a lawyer to answer the question, “What do you think I should do?” and then explain the basis for the advice or opinion. The main component may be a legal risk assessment but there are many other factors that go into a decision. So, I think it is a mixed issue. You cannot really separate policy and legal issues when you are making the ultimate decision, but a lawyer should try to be clear about what portion of the advice is based strictly on a legal interpretation.

TransLaw: Did you get any advice coming into this job from your predecessors?

Rivkin: I spoke with my three or four immediate predecessors, and I won’t say they crystallized specific advice but they did talk to me about the challenges of the job. They were uniformly enthusiastic about their tenure here and said they loved the job. They were helpful in trying to give me a perspective on what it means to be the general counsel here.

TransLaw: What is the most useful piece of advice for a general counsel?

Rivkin: I think it goes back to the general counsel’s role in any organi-

zation. Conceptually, you have three main areas among which you have to allocate your time. One is in counseling the CEO and board of directors, in this case the secretary and perhaps the White House, and in building a relationship of trust and anticipating needs and understanding priorities. In some ways, I have a lot of flexibility in terms of meetings I attend or issues that I get involved with, but what I try to do is prioritize matters that are important to the secretary and in which I anticipate I will need to weigh in at some point.

The second area is helping to advance the secretary’s priorities across the department. I deal with counterparts in the DOT modes and the agencies as a whole. I also deal with the assistant secretaries and the administrators their key challenges, and that takes a lot of time.

The third area, of course, is being the chief legal officer of the department and supervising the legal function.

You have to always be calibrating—am I spending too little time on one thing or too much time on something else? Keeping an eye on those three areas and striking the right balance is the foundational challenge.

TransLaw: When you think long term, what do you want your legacy to be from this job?

Rivkin: Well, I think that it is a combination of helping the President and the secretary achieve their priorities, and helping my colleagues to function at the highest level. Some of those priorities have included programs for which I was directly responsible, like Cash-for-Clunkers or aviation consumer protection—from which very strong consumer rights for air travelers have come, such as the three-hour tarmac delay rule—and protections for the disabled. We have tried to push forward an agenda of things that were sometimes stuck in prior

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DOT and EPA Panel Discuss Pipeline Incidents

Alice Koethe

On Sept. 13, 2011, the section held a lawyers' brownbag lunch on the topic of "Pipeline Incidents: Perspectives from EPA and DOT" at the DOT Conference Center. Panelists included Jim Pates, assistant chief counsel for pipeline safety, Pipeline and Hazardous Materials Safety Administration (PHMSA), and Cheryl T. Rose, senior attorney, Water Enforcement Division, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency (EPA).

Pates and Rose presented fascinating accounts of each agency's authority and methods for responding to pipeline spills. Their presentations provided insight into the similarities and differences between the two agencies and their respective response roles in the event of an oil pipeline incident/spill.

After brief introductions from Amy Cassidy, chair of the Transportation Security and Transportation Law Section, and moderator Alice Koethe,

Pates led off with the PHMSA perspective and noted that PHMSA regulates 2.5 million miles of oil and gas pipelines in the United States. Much of the pipeline enforcement is delegated to state authorities that have adopted PHMSA's regulations. He discussed the nature of PHMSA's business, and the need to encourage a strong safety culture among pipeline owners and operators. Finally, Pates provided an insight into his day-to-day duties by discussing the general facts of two recent cases; a Sept. 9, 2010, gas transmission line rupture in San Bruno, Calif., and the July 26, 2010, rupture of a crude oil transmission pipeline operated by Enbridge Pipeline. Overall, Jim Pates provided an excellent summary of the topic and demonstrated the expertise of someone who has been heavily involved with pipeline issues for years.

Cheryl Rose gave a comprehensive discussion of the major statutes enforced by her office within EPA,

including the Clean Water Act. In contrast to PHMSA, EPA's jurisdiction over pipeline spills is predicated upon the release of a pollutant into a water supply, because EPA regulates the oil itself rather than the pipeline. EPA's statutory definitions have been subject to extensive litigation, and many phrases such as "navigable waters" have judicially determined definitions. Rose discussed the bifurcation of EPA activities into the Emergency Response function, in which an EPA on-scene coordinator oversees clean-up efforts, and the enforcement function, which is the responsibility of the Office of Enforcement and Compliance Assurance. She also presented several case studies, including serious pipeline spills in Knoxville, Tenn., and Bellingham, Wash. Cheryl Rose's description of the grateful response victims of these accidents toward EPA gave attendees a warm reminder of the rewarding side of public service. ♦

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administrations. We have moved them forward and, I think, made a difference in the lives of air travelers. I have handled or helped negotiate resolutions to controversies like the Toyota unintended acceleration problem, New Jersey's cancellation of its ARC tunnel project under the Hudson, and O'Hare airport's modernization dispute.

And then there have been other secretarial priorities such as distracted driving, the successor to the drunk driving campaigns and the seat belt campaigns that have been so successful, and high speed rail.

All of the department's priorities are really my priorities. If you are in the FAA or in FMCSA, or NHTSA, you get the satisfaction of knowing that you have worked on a portion of the department's key agenda items. The privilege of this job is that I get to be

involved in the whole agenda.

TransLaw: Do you have such a thing as a typical day in your job?

Rivkin: I do not think so. It is a lucky day when there is not some external crisis that turns everything upside down or requires immediate responses. In other words, you start everyday thinking you are going to be proactive in pursuing the agenda, but then you get knocked off course and you just have to try to get back to pursuing the agenda.

One thing that guided me in my early days in this job is the conviction that there is nobody qualified to do this job. There are a lot of lawyers who are subject matter experts in aviation for example, or auto safety, or fuel economy. There are lawyers who are experts

in maritime, truck safety or transit. But, I am not aware of anyone who is an expert in all of these areas and, frankly, you would be hard pressed to find someone who is an expert in more than a couple of them. Every day issues of planes, trains, cars, trucks, buses, boats, infrastructure and finance all come through this office. You realize that you cannot be an expert on everything, but you can work with a team of people internally in the department who are the true experts in these areas. You get to draw on their expertise and essentially try to synthesize what you learn in order to make decisions that support the secretary and the President's agenda. You are in the privileged position of being able to try to help steer the ocean liner.

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TransLaw: What message would you want young lawyers who are working in far reaches of the DOT and other federal government agencies to take away from this interview?

Rivkin: That public service is really a great honor and that they should be proud of it. Especially in times when government employees are coming under attack from a variety of quarters, they should keep their focus on what brought them into the government which, in most cases, was a desire to lend all their skills and enthusiasms towards making a difference in the life of the nation. I think that is

the highest calling of citizenship. They should keep that in the forefront of their minds as they face the frustrations and their everyday tasks.

TransLaw: Is there anything you want to add?

Rivkin: One thing that I regret is that I have not found the time to continue involvement in things like the FBA and pro bono activities and interests. What I try to do, however, is create an atmosphere here where DOT lawyers are aware of those opportunities and take advantage of them. I have tried to ensure that lawyers here have

training, development, mentoring and other opportunities available to them.

TransLaw: Thank you for your time. ❖



SAVE THE DATE

February 28, 2012 | 9:00am – 12:00pm

Transportation Security Law Forum

The Transportation Security Administration and the FBA Transportation and Transportation Security Law Section will be hosting a legal forum at TSA HQ that will explore the legal issues surrounding risk-based security initiatives including TSA PreV™. The program will also feature speakers on first amendment issues at airport checkpoints.

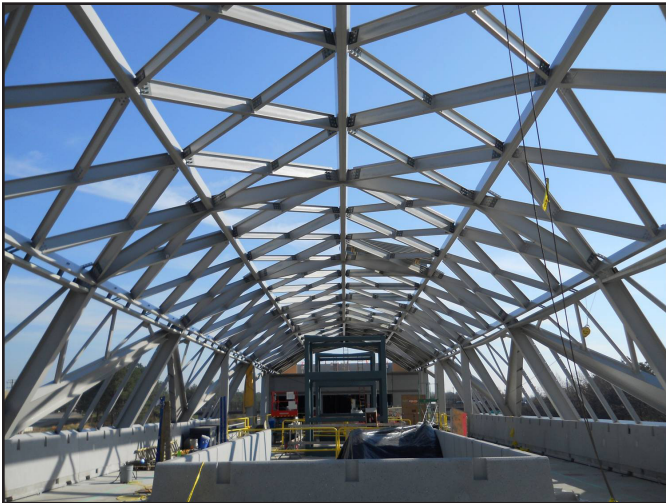
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The aerial guideway between the future Tysons Central 7 and Tysons West metro stations is nearing completion in the median of Leesburg Pike.



Dulles Corridor Metrorail Project crews have been working on tying in the new system with Metro's existing Orange Line.

finance for the Metrorail line extension that projected (i) the portion of the line's construction cost to be funded by the DTR,² (ii) the toll road revenue bonds to be issued over time to raise these construction funds, and (iii) the toll rates needed to produce annual revenues to meet both the debt service on these bonds and the toll road's operating costs.

Lawsuits

These new toll rates prompted three lawsuits challenging the lawfulness of the rates, and seeking to prevent DTR revenues from being used to finance the Metrorail line extension.

The first suit rested on Virginia law claims, focused on the lack of power of the executive branch of the commonwealth to transfer the DTR without legislative approval, and included a claim that DTR tolls, set at a level to produce revenues to fund the rail line extension, constituted an illegal tax under Virginia law. *Gray, et al. v. Virginia Secretary of Transp., et al.*, Civil No. CL-07-203, Richmond Cir. Ct.; reversed and remanded (on sovereignty immunity grounds), 276 Va. 93 (2008); dismissed (Richmond Cir. Ct.

Oct. 20, 2008) (*Gray*).

A second suit brought a smorgasbord of federal and state claims against federal and state agencies, as well as the Authority, all designed to invalidate the transfer of the DTR and the use of toll road revenues to fund the rail line extension, and included the claim that the new tolls constituted taxes that violated the Virginia Constitution. *Parkridge 6, LLC, et al. v. U.S. Dep't of Transp., et al.*, 2010 WL 1404421 (E.D. Va. April 6, 2010), *aff'd* (on standing grounds), 2011 WL 971530 (4th Cir. March 21, 2011) (*Parkridge 6*).

A third suit, filed solely against the Authority, asserted a variety of federal constitutional theories why the tolls set by the Authority were invalid. *Corr v. Metropolitan Washington Airports Authority*, _ F. Supp. 2d _, 2011 WL 2680471 (E.D. Va. July 7, 2011), appeal pending (*Corr*).

Each of these "toll" challenges is grounded in one way or another on the assertion that, because the toll rates set by the Authority were at levels designed to produce revenues to fund the rail extension—that is, revenues above those required merely to operate the toll road—the resulting tolls

constituted a "tax." From that premise follows two primary theories, and corresponding claims, why the Authority-imposed tolls are unlawful:

- The tolls violate the federal Constitution's Due Process Clause because they conflict with the fundamental principle that no citizen shall be subject to "taxation without representation" and the corollary principle that no tax may be levied on citizens by a body that they are unable to hold accountable via the ballot box; and
- The tolls violate the Virginia Constitution that allows "taxes" to be imposed on Virginia citizens *only* by bodies comprised of elected officials.

Each of these challenges to the DTR tolls has been rejected.

Tolls are not Taxes

In *Corr*, the federal district court ruled that the DTR tolls imposed by the Authority did not constitute a "tax."

[T]he Court cannot conclude, as Plaintiffs contend, that the

challenged tolls in this case constitute a “tax,” as opposed to a user fee. Plaintiffs’ decision to use the Toll Road is optional, not compulsory; [and] the toll collected is not used for unrelated general purposes, but rather for transportation improvements within the same Right-of-way. ...

(2011 WL 2680471, at *10). In *Gray*, the Richmond Circuit Court of Virginia, on remand from the Virginia Supreme Court, similarly found that the tolls challenged were “neither taxes nor revenues of the Commonwealth.”

The conclusion that the tolls are not a tax is based on Virginia case law that defines a “tax” as an “enforced contribution imposed by the government for governmental purposes or public needs. It is *not founded upon contract or agreement.*” *Westbrook Inc. v. Town of Falls Church*, 185 Va. 577, 582 (1946) (emphases added) (holding that fee for voluntary sewer connection is not a tax). See *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419 (2008) (invalidating mandatory vehicle registration, repair and other fees). Further, this conclusion is consistent with Virginia case law holding that a unit of government does

not impose a “tax” when, in the course of operating a utility system or similar enterprise, it imposes fees in one part of the system to fund improvements to the system as a whole. See, e.g., *Eagle Harbor, LLC v. Isle of Wight County*, 271 Va. 603 (2006) (holding that connection fee to water and sewer system which exceeded benefit conferred on individual users is not a tax where fee raised funds to establish a “self-sufficient utility system”).

Tolls that Amount to Taxes do not Violate Federal Due Process

Even if the Authority’s DTR tolls were deemed a “tax,” *Corr* rejected the contention that because they are assessed by the Authority’s *unelected* board of directors, they violate the federal Due Process Clause. The court concluded that there is no individual right, protected by Due Process or otherwise by the federal Constitution, to be free from “taxation without representation”:

There is no doubt that historically, protests against “taxation without representation” motivated the founding generation and certain values expressed in the United States Constitution.

Without disagreeing with the broad sentiments expressed in Plaintiffs’ position, the Court must also acknowledge that such a principle [taxation without representation], as such, was not adopted in the federal Constitution and has not been enforced as such. ... [I]n *Heald v. District of Columbia*, the Supreme Court

rejected the claim that a congressional tax on intangible personal property of persons residing or doing business in the District was unconstitutional because it subject[ed] the residents of the District to taxation without representation. The Court concluded “[t] here is no constitutional provision which limits the power of Congress that taxes can be imposed only upon those who have political representation.” Lower courts have likewise refused to recognize a federal constitutional right against “taxation without representation” with respect to a variety of issues.

(2011 WL 2680471, at * 11) (citations omitted). Thus, even if the DTR tolls established by the Authority were deemed a “tax,” they would not, by virtue of having been assessed by an unelected body, violate any individual rights guaranteed by the federal Constitution’s Due Process Clause.

Tolls Assessed by the Authority that Amount to Taxes do not Violate the Virginia Constitution

Under the Virginia Constitution, taxes may to be imposed on Virginia citizens only when assessed by a body of elected officials; any tax levied by an unelected body is invalid. See *Marshall v. N. Va. Transp. Auth.*, *supra* (invalidating taxes established by unelected regional transportation authority). Nevertheless, both *Parkridge 6* and *Corr* rejected the argument that DTR tolls are taxes imposed by the Authority’s *unelected* board of directors and are, therefore, unlawful by the Virginia Constitution.

In each case, the ruling is grounded in the nature of interstate compacts and the entities they establish, and in the key principle that interstate compacts, once consented to by Congress, become federal law and, as such, become subject to the Supremacy



One of the two giant blue and yellow trusses is approaching the future Tysons West station causing overnight closures at Spring Hill Road through December. Closures will be announced as they are scheduled

Clause of the U.S. Constitution. Thus, *Parkridge 6* and *Corr* each held that powers given to the Authority by the Virginia-District of Columbia Compact could not be negated by conflicting state statutory or constitutional law. As a result, even if the Authority-levied DTR tolls were deemed a “tax,” so long as the tolls were authorized by the compact, they would not be rendered invalid by Virginia law that makes unlawful any “tax” levied by an unelected body. As the federal district court in *Parkridge 6* explained,

[the Authority] was created under an interstate compact between the Commonwealth of Virginia and the District of Columbia approved by the United States Congress pursuant to the Compact Clause of the United States Constitution. ... The [Authority’s] Compact is therefore considered a “law of the United States.” [The Authority’s] Compact gives it broad authority to “fix, revise,

charge, and collect rates, fees ... and other charges for the use of the airports[,] ... [which] are defined to include the “Dulles ... Right-of-way” on which the [Dulles] toll road was built. ... The [Authority] is therefore authorized to levy tolls on the roadway, and any Virginia law or provision of the Virginia Constitution that conflicts with that authority is preempted under the Supremacy Clause of the United States Constitution.

Parkridge, (2010 WL1404421, at *6) (citations omitted); see also *Corr* (2011 WL 2680471, at *13-14).

Conclusion

To date, tolls established by the Metropolitan Washington Airports Authority for use of the Dulles Toll Road—set at levels designed to produce revenues to fund a portion of the construction of a transit line in the same transportation corridor—have

withstood challenges asserting their invalidity based on a variety of federal and state constitutional theories. Consequently, the Metrorail extension to Dulles International remains on track for completion. ❖

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Endnotes

¹The toll rates were increased in three phases over a three-year period starting in 2010, with each increase effective on the first of the calendar year.

²At the time of the rate increases, the rail extension’s construction cost was estimated at \$5.255 billion, and the DTR was projected to fund \$2.766 billion, or 52.6 percent, of this amount. Contributions from the federal government, Virginia, two local counties and the Authority were to fund the remainder of the cost.