



Three Perspectives on Federal Advisory Committees Involving Transportation

John E. Anderson, Sr., Co-Chair of the Surface Transportation Section

Federal Advisory Committees (FACs) are designed to provide advice and recommendations to the Executive Branch. They play an important role in shaping programs and policies of the federal government. On Monday, May 16, 2016, the Surface Transportation Committee of the FBA’s Transportation and Transportation Security Law section presented a program titled, “Federal Advisory Committees Involving Transportation.” Panelists included Jill Laptosky, Attorney-Advisor, Office of Regulation, Office of the General Counsel of the United States Department of Transportation (DOT); Michael Higgins, Deputy Director, Rail Customer and Public Assistance Program, Surface Transportation Board (STB), and Jeff Wiese, former Associate Administrator for Pipeline Safety, Pipeline and Hazardous Materials Safety Administration (PHMSA). The program was moderated by Kathryn Gainey, Co-Chair of the Surface Transportation Section.

Jill Laptosky spoke first for the panel. She described her presentation as a review of the Federal Advisory Committee Act (FACA) - 101. Initially, Laptosky explained that in drafting FACA, legislators wanted to ensure that advice on the various advisory committees was objective and acces-

sible to the public by formalizing the process for establishing, operating, overseeing and terminating the committees. Three overriding concerns of the legislators in drafting FACA were the issues of secrecy, necessity / efficiency, and special interests groups.

Laptosky explained that FACA governs the creation, management, operation and termination of advisory committees within the executive branch. The major requirements of FACs include document retention, including minutes and public inspection; designation of a Committee Management Officer; designation of Federal Officers and Reporting and Termination. Additionally, FACs must be chartered every two years; the Committees must have fairly balanced membership; the meetings must be open to the public; and the meetings must be noticed in the Federal Register.

Finally, Laptosky discussed how FACA relates to rulemaking. She explained how communications with the public may implicate FACA, how negotiated rulemakings can help enhance the standard notice-and-comment rulemaking process, and how FACs can assist rulemaking through information collections.

Michael Higgins next addressed the group. He provided an overview

of the STB, explaining that the STB came into being in 1996 as the successor to the Interstate Commerce Commission (ICC). The STB became an entirely independent agency under the STB Reauthorization Act of 2015. The STB initially had three Board members, each of whom are appointed by the President and confirmed by the Senate. The Board members serve staggered five year terms. The 2015 legislation expanded the agency’s board from three to five members, although there are no nominees for the two vacancies at this time. The STB has approximately 140 employees and has a budget of approximately \$30-33 million.

The STB is an economic regulatory agency with oversight over U.S. freight railroads and with limited oversight of motor carriers, non-energy pipelines (such as fertilizer and chemicals), water carriers in the noncontiguous domestic trade, and Amtrak involving disputes with freight carriers and interstate passenger matters. Railroad issues within the Board’s jurisdiction include the reasonableness of rates, services and practices; acquisition, ownership or lease of rail lines; construction and

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Chair's Corner

Alice Koethe, Chair of the Transportation and Transportation Security Law Section

We had a busy summer at the Transportation and Transportation Security Law Section of the Federal Bar Association!

We enjoyed two of DC's honored traditions—welcoming interns and enduring the subway in the heat.

First, metro: the Safetrack initiative impacted commutes and traffic around the region. In response to safety incidents and a work backlog, the metro authority unveiled an ambitious plan to squeeze three years' worth of repairs into one year. This means short-term station closings and reduced service, and has shifted metro riders onto other modes of transport. It reminds us of the need for consistent investment in infrastructure, and presents a vivid example of the impact that transportation has on us all.

And on to the interns: TTSL held a "speed mentoring" reception for interns who are participating in the Federal Bar Association's Summer Law Clerk

Program program. Hosted by the law firm of Foley & Lardner LLP in their offices by the Potomac, it was an awesome event. Summer interns matched up with a stellar group of transportation attorneys for short sets of one-on-one networking and career advice. The event was a lot of fun, thanks to our generous mentors and enthusiastic students. Special thanks to everyone who participated, and especially to Foley & Lardner, Board Secretary Dave Bannard, former Chair Monica Hargrove, and Maria Conticelli of the FBA.

The FBA Summer Law Clerk Program is run by the Younger Lawyers Division, and it provides a fantastic opportunity for law students to see government legal practice. It gives law clerks the chance to meet experienced attorneys and other interns, and is a really great resource for DC interns. Our section participates by hosting an event focused on careers in transportation law

and transportation security law.

I am thrilled to welcome our incoming chair, Kathy Gainey! Kathy is an accomplished transportation lawyer, and the Section will be in good hands. At the T&TSL Section, we are dedicated to building connections and knowledge in the fields of transportation and transportation security law. Our strong DC base enables us to provide benefits to members across the nation. We are always open to ideas for events, especially outside of the beltway. ❖

Cheers,
Alice Koethe
Chair, Transportation and
Transportation Security Law Section



Message from the Editor

Steven L. Osit

The Transportation and Transportation Security Law Section has had a great year so far, and we're excited to bring you this update on some of our programming and the insights our distinguished panelists have brought to our members.

In this issue, John Anderson, Co-Chair of the Section's Surface Transportation Committee, discusses the role of Federal Advisory Committees in shaping Federal policies and programs. Michael Tien, an attorney in the U.S. Department of Transportation, Office of the General Counsel, Office

of Legislation, has contributed an article recapping the Section's popular Legislative Update panel. Owing to the flurry of legislative activity in the transportation industry this year, much of the panelists discussion has been overtaken by more recent developments. However, Michael's article provides valuable insight into the legislative process, and what we might expect to see as we approach the expiration of the short-term extension of the FAA's authority next year. Finally, Timothy Weston, an attorney with the Transportation Security Administration, covers the

Section's Transportation Security Law Forum. This year, the Forum focused on insider threats within the aviation industry, and the intersection of open carry laws with major transportation centers.

I am also pleased to announce that Samuel Negatu, Legislative Counsel to Congressman Cartwright, has been elected as the new chair of *Translaw*, and will be taking the reins from me after this issue. If you are interested in contributing an article, please contact Samuel at Samuel.negatu@mail.house.gov, or at (202) 225-5546. ❖

Transportation in 2016: A Legislative Update with Congressional Staff

Michael Tien

NOTE FROM THE EDITOR: In the time since this Article was drafted, Congress enacted the FAA Extension, Safety, and Security Act of 2016, extending the FAA's authorization through September 2017. The following article nevertheless conveys important insight into the legislative process and the issues likely to be on the table as a more long-term reauthorization is debated in the next Congress, and we very much thank the author for his contribution.

On January 21, 2016, the Transportation and Transportation Security Law Section hosted "The 2016 Legislative Update," a lawyers' lunch session at the U.S. Department of Transportation's Headquarters in Washington, DC. The program welcomed lawyers from around the transportation world to hear from key congressional transportation committee staffers on major legislative efforts for the new calendar year. The seasoned panelists included: Mike Reynolds, counsel for the Senate Committee on Commerce, Science, and Transportation (Senate Commerce); Brian Turbyfill, senior professional staff member for the Senate Committee on Homeland Security and Governmental Affairs (Senate HSGAC); and Holly Woodruff-Lyons, Deputy General Counsel for the House Transportation & Infrastructure Committee (House T&I).

After brief introductions by section chair Alice Koethe—Pipeline and Hazardous Materials Safety Administration attorney—and panel moderator John Wood—Federal Aviation Administration (FAA) attorney—the panelists were asked to describe their respective committee's jurisdiction, to discuss significant committee accomplishments in 2015, and to opine on what 2016 has in store for transportation.

Despite any accounts to the contrary, the panelists shared a similar view: 2015 was a productive year for their

committees. For Senate Commerce and House T&I, passage of the five-year surface transportation reauthorization legislation—the Fixing America's Surface Transportation (FAST) Act—was a huge win. This bipartisan effort resulted in the first long-term reauthorization of America's surface transportation programs in more than a decade. Senate HSGAC had successes of its own with the passage of a customs and border bill and the wrapping of various cybersecurity provisions into the 2015 omnibus spending bill. All panelists expressed their hope for this trend to continue into 2016, with Senate Commerce and House T&I focused on FAA reauthorization,¹ and Senate HSGAC tending to the Department of Homeland Security's (DHS) reauthorization, which Turbyfill reported may result in a single or multiple bills.

Right away, Reynolds and Woodruff-Lyons's accounts highlighted the key differences between their respective committees, with Senate Commerce's jurisdiction over transportation broader than House T&I's. For example, a Senate Commerce FAA reauthorization proposal would likely be more robust and far-reaching than House T&I's, covering topics beyond safety, such as privacy in the context of unmanned aerial systems (UAS). For Senate HSGAC, Turbyfill described the breadth of his committee's jurisdiction, from oversight of government-wide reform and activities to oversight of DHS, a large undertaking by itself.

With these bases covered, moderator Wood asked a question on everyone's mind: will the presidential election in 2016 impact the committees' legislative efforts?

While it is still early, Reynolds expects the election to have no real impact on Senate Commerce's efforts, even with the committee's roster including current and past 2016 presidential candidates: Senators Ted Cruz and Marco Rubio, respectively.

Transportation, according to Reynolds, is less-partisan of an issue, receiving generally good cooperation amongst committee members from both parties. He did mention, however, that the FAA reauthorization may be one of the last big policy (not spending) bills we will see in 2016, making it an attractive target for lawmakers to tack on miscellaneous provisions of interest. Nevertheless, Reynolds stressed that for any bill to get through the Senate, there will need to be bipartisan support to surmount procedural hurdles, such as cloture. Woodruff-Lyons added that less work in Congress will occur in the summer months, so in her opinion, it is better to move early on bills because it may become difficult later in 2016. She believes the FAA reauthorization bill, for example, will move quickly through House T&I to the chamber at-large. Turbyfill echoed the difficulty at times in moving even smaller bills through the Senate due to procedural obstacles. Because DHS reauthorization is a large bill, he could not predict its fate once it leaves Senate HSGAC.

The panel turned next to FAA reauthorization, a topic worth covering more closely because many lawyers present work in or have interest in aviation. Woodruff-Lyons spoke to House T&I Chairman Bill Shuster's interest in getting a bill passed this year. She spoke about Chairman Shuster's strong feelings on the subject matter, especially as it relates to moving air traffic control (ATC) out of the federal government. She described the Chairman's plan to create a federally-chartered not-for-profit entity to oversee ATC, while the FAA will continue to regulate safety. During difficult times of sequestration and extension, Woodruff-Lyons believes now is the best time to achieve this, wrapping it into the FAA reauthorization bill. House T&I will continue conducting extensive outreach on the Chairman's

plan with labor groups, airports, and potentially impacted users.²

Beyond ATC—a topic of great interest to those on the inside—moderator Wood asked Reynolds and Woodruff-Lyons about the regulatory divide between hobby or recreational and commercial use of UAS and how their committees plan to address the issue. Reynolds admitted that Senate Commerce is still wrestling with UAS issues, looking at them through all lenses, from the perspectives of toy to aeronautic enthusiasts. He is unsure how the committee will come down. Woodruff-Lyons confessed that in FAA's 2012 reauthorization bill, House T&I did not want FAA to regulate UAS. Now, however, Congress must consider how the FAA should regulate and to what extent.

In Woodruff-Lyons's opinion, this change in thought results from effective lobbying and the "push-pull" issues surrounding UAS-use, such as technology, innovation, and balancing the growth of commerce with safety and privacy.

With only 60 minutes to update participants on what to anticipate in 2016, the panelists did not disappoint. Now we will wait eagerly to see how the year pans out in transportation.

Endnotes

¹The FAA's current short-term reauthorization is set to expire on July 15, 2016.

²Since the January lunch session, there has been legislative activity in both chambers related to the FAA reauthorization. On April 19, 2016, the

Senate approved (by an overwhelming 95-3 vote) H.R. 636, the Federal Aviation Administration Reauthorization Act of 2016. This bipartisan bill (introduced by Commerce Chairman John Thune (R-SD) and Ranking Member Bill Nelson (D-FL)) seeks to authorize FAA's programs through September 30, 2017. The House has not had as much success. The House T&I proposal, H.R. 4441, the Aviation Innovation, Reform, and Reauthorization (AIRR) Act of 2016 (introduced by T&I Chairman Shuster (R-PA)), was reported out of committee, but is now at a standstill. House leadership has shelved the bill due to the controversial and contentious provisions related to moving ATC operations out of the FAA. The AIRR Act would reauthorize FAA programs through fiscal year 2022. ❖

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abandonment of rail lines; mergers and acquisitions of rail carriers.

Higgins described two STB committees. The Rail Energy Transportation Advisory Committee (RETAC) was established in July 2007 in response to rail service issues affecting the transportation of ethanol and coal in 2005-2006. RETAC provides advice to the Board. It also serves as a forum for discussion of emerging issues regarding the transportation by rail of energy resources, including coal, crude oil, ethanol, and other biofuels.

RETAC is comprised of 25 voting members, representing a balance of stakeholders with an interest in energy transportation by rail, including: large and small railroads, coal producers, electric utilities, the biofuels industry, the petroleum industry and the private railcar industry. Higgins explained that meetings are held twice per year and generally last 4-5 hours and are fairly well-attended by the public.

Higgins next discussed the National Grain Car Council (NGCC), a committee formed in 1994 by the

ICC and continued by the Board today. NGCC is intended to address transportation issues in a manner balancing the need of the various stakeholders. It conducts a continuing dialog to provide advice and guidance to the Board and provides a forum for the resolution of disputes and controversies regarding transportation of grain. On request, it suggests appropriate policies or regulations with regard to grain car supply and distribution.

The NGCC has membership of not less than 40, including 14 Class I RR members; 14 grain shippers/receivers; 7 members of Class II and III RR's; and 5 members of private car owners/manufacturers. The Chairman of the Board solicits nominations for and selects members from the appropriate groups. The members of the Board serve as ex officio members of the NGCC, and the VC of the Board is designated as Council Co-chairman. Officers of the NGCC are elected for a two-year term. The NGCC is directed to meet at least once per year. In the recent past, the

meeting has taken place in conjunction with the fall symposium of the Transportation, Elevator, and Grain Merchants Association (TEGMA).

Finally, Jeff Wiese addressed the audience as the third panel member. Wiese initially provided a background of PHMSA, explaining that it is responsible for regulating and ensuring the safe and secure movement of hazardous materials to industry and consumers by all modes of transportation, including pipelines. PHMSA develops regulations and standards for the classifying, handling and packaging of over 1 million daily shipments of hazardous materials within the United States to minimize threats to life, property or the environment due to incidents related to hazardous materials.

Prior to his recent retirement, Wiese worked for PHMSA for 17 years. He discussed the two advisory committees for PHMSA - the Technical Pipeline Safety Standards Committee (TPSSC) and the Technical Hazardous Liquid Pipeline Safety Standards Committee (THLPSSC), both of which

are established by Section 60115 of Title 49 of the United States Code. PHMSA refers to the committees as the Gas Pipeline Advisory Committee (GPAC) and the Liquid Pipeline Advisory Committee (LPAC). When referenced together, the two are known as the Pipeline Advisory Committee (PAC). Each committee has 15 members with equal representation from Government,

industry and the public.

The GPAC and the LPAC review PHMSA's proposed regulatory initiatives to assure the technical feasibility, reasonableness, cost-effectiveness and practicability of each proposal. The committees also evaluate the cost-benefit analyses and risk assessment information of the proposals. Wiese explained that federal advisory com-

mittees can be a useful tool to develop consensus in support of regulatory initiatives. ♦

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Security Law Forum

On April 11, 2016, the Federal Bar Association's Transportation and Transportation Security Law Section, in conjunction with the District of Columbia Chapter, presented the Section's Annual Transportation Security Law Forum, which was hosted by the Transportation Security Administration. This year's forum focused on insider threats and state open carry laws. The forum drew over ninety attendees and approximately 60 additional participants from across the country through phone and video connectivity. Thomas Bush, the Assistant Administrator for the Office of Intelligence and Analysis at TSA, delivered the keynote address and focused on the threats presented by various terror networks from around the world and the use of insiders as a vector of attack for those networks. Assistant Administrator Bush's address presented the perfect backdrop for the forum and the panel discussions that followed.

The first panel, moderated by Susan Prosnitz, Deputy Chief Counsel for Regulations and Security Standards

for TSA, addressed the insider threat issue faced by airports, the airlines, and the government. The panel featured Darby LaJoye, Deputy Assistant Administrator for the Office of Security Operations; Ron Phifer, Deputy Division Director for Security Services and Assessments for TSA's Office of Law Enforcement/Federal Air Marshal Service; Supervisory Special Agent Vincent Chambers from the Federal Bureau of Investigation; Jim Casey, Deputy General Counsel for Security Matters with Airlines for America; and Cedric Johnson, who serves as the Director of Airport Security at Baltimore/Washington International Thurgood Marshall Airport. The panel discussion defined the insider threat in the aviation context, and identified challenges in detecting and combating the threat.

Deputy Assistant Administrator LaJoye provided the crowded TSA Town Hall with a summary of the agency's efforts to curb the insider threat posed by airport and aviation workers. Supervisory Special Agent Chambers and Deputy Division Director Phifer

discussed the history and evolution of the insider threat from its origins in narcotics trafficking and gun smuggling to the recent terrorist attacks in Egypt and Somalia that are believed to have been conducted with help from individuals within the airports. The panel concluded that the state of security operations within the U.S. aviation sector benefitted from the cooperation between the stakeholders on addressing all threats presented to the aviation industry. As and was summed up by Cedric Johnson "We are safer now than ever before because of the level of cooperation between the organizations represented at this table."

The forum's second panel focused on the relatively new issue of open carry laws and the impact of individuals openly carrying their firearms in and around transportation centers. The audience was regaled with stories of individuals openly carrying AR-15's on their backs while walking through the public portions of the airport, as well as the tales of seemingly law abiding travelers being ensnared by local firearms regulations when

their flights make unexpected stops in states with more restrictive firearms laws. The panel featured Kimberly Patrick from the City of Atlanta; Theo Stamos, the Commonwealth Attorney for Arlington County; Larry Thomas, Ph.D. of the Thomas Law Office, Tom Schlegel, the Deputy Chief Counsel for Field Operations at TSA, and was moderated by Professor Robert Cottrol from the George Washington University

Law School. Professor Cottrol provided the crowd with the historical basis for the open carry of firearms and guided the panel through the thorny Second Amendment and Preemption issues associated with firearms regulation.

The panel members called for more engagement with gun clubs and firearms advocates to educate individuals about the laws and regulations concerning the open carrying of firearms at airports,

bus terminals and train stations. Deputy Chief Counsel Schlegel, and Dr. Larry Thomas provided the participants with the federal legal framework for regulating firearms at airports. Additionally, Theo Stamos and Kimberly Patrick provided the forum participants with a lively overview of the respective state laws and potential for prosecution of those who bring their firearms into the public areas of an airport. ❖