



TransLaw

Chair's Corner

Lisa A. Harig, Chair of the Transportation and Transportation Security Law Section



I am happy to report that the Transportation & Transportation Security Law Section was selected to receive a 2018 Section and Division Recognition Award at the FBA Annual Meeting and Convention in New York! Thank you to all who participate in the Section and its activities!

I'd like to take this opportunity to welcome the Section officers for 2018-19:

- Chair – David Y. Bannard
- Chair Elect – Steven Osit
- Deputy Chair – Samuel Negatu
- Secretary – Sarah Nural
- Treasurer – John C. Wood
- Newsletter Editor – Shakira Mack
- Membership Chair – Tristan Brown

Brief biographies of Sarah Nural, Shakira Mack and Tristan Brown follow. I look forward to another great year!

In this issue of TransLaw, we feature an article about a recent case before the U.S. Court of Appeals for the D.C. Circuit regarding privacy challenges to the FAA's Small Unmanned Aircraft Systems (UAS) rule. In addition, we have a review of the Section's annual speed mentoring summer event for DOT interns and other law students that took place in July.

Upcoming events include our annual Chief Counsels' Reception on October 30 from 6:00 – 8:00 pm in Room 2168 of the Rayburn House Office Building. The Section will be presenting the John T. Stewart, Jr. Transportation Lawyer of the Year award to Craig Keats, General Counsel of STB, and the John T. Stewart, Jr. Transportation Security Lawyer of the Year award to Jennifer Ellison, Assistant Chief Counsel for Employment, Civil Rights & Labor Policy at TSA. We hope to see

you there!

As always, I encourage each of our members to actively participate in the Section by attending an event and/or authoring an article for TransLaw. If you have an idea for a program or article that you'd like to see, please contact one of the TTSL officers.

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Consulting Editor, FBA: Cathy Barrie

We are pleased to introduce the following new Board Members:

Secretary

Sarah Nural is an associate at the law firm of Steptoe & Johnson LLP. Her practice covers a broad range of transportation and environmental regulatory matters. Sarah's transportation practice focuses on the rail, aviation, and pipeline industries. She advises clients on compliance and enforcement issues under a variety of federal statutory and regulatory regimes, including the Interstate Commerce Commission Termination Act (ICCTA) regulating railroads, FAA's regulations for unmanned aircraft, and DOT's tarmac delay rules. Sarah also assists clients in matters involving preemption under the major railroad and aviation laws. In addition, Sarah has experience with federal and state infrastructure permitting matters, including the National Environmental Policy Act (NEPA) process.

Sarah graduated from Georgetown University Law Center in 2015. Prior to law school, she served as a legislative assistant to U.S. Senator Saxby Chambliss, and she advised him on transportation matters.

Sarah has been a member of the FBA's TTSL section since 2016. She has enjoyed serving on the TTSL Board and getting to know other transportation practitioners through TTSL events. She looks forward to continuing her involvement with the section.

Newsletter Editor

Shakira Mack is a 2012 graduate of The George Washington University Law School. While in law school, she interned with the Department of Justice working on Presidential initiatives such as a Department-wide initiative to enhance public safety in Indian Country. Shakira started her permanent career with the federal government in 2012 as a Presidential Management Fellow with the Pipeline and Hazardous Materials Safety Administration (PHMSA). During her fellowship, she completed a detail assignment with the Department of Justice as a civil rights trial attorney. After completing her fellowship, she was promoted to a Senior Analyst position with PHMSA.

In 2016, she started a new detail assignment with the Denali Commission, an independent federal agency based in Anchorage, Alaska. Serving as the Commission's D.C. Representative and Attorney-Advisor, Shakira has sat on various subcommittees of the White House Council for Native American Affairs and currently co-chairs the White House's Arctic Executive Steering Committee's Coastal Resilience Working Group. Additionally, she has gained extensive experience with Indian law by working directly with a number of Native American and Alaska Native tribes. Shakira was recently promoted to Chief of Grants and Registration for the Office of Hazardous Materials Safety at PHMSA.

Shakira is an active member of the Department of

Transportation's (DOT) Arctic Working Group and DOT's Tribal Affairs Working Group. In her free time, she enjoys spending time with her dog and family and moonlighting as a mediocre genealogist.

Membership Chair

Tristan Brown is an associate at Stinson Leonard Street LLP in Washington, D.C. where he is part of the firm's Energy, Environmental, Mining and Transportation Division. Tristan's practice focusses on regulatory, transactional, and litigation matters relating to the transportation and public utilities sectors as well as international trade. Tristan previously served as Deputy Associate Administrator for Congressional Affairs at the U.S. Environmental Protection Agency where he was responsible for managing an office of fifteen career staff, advising and staffing the Administrator, developing and implementing legislative strategies, and managing daily interactions with 541 congressional offices. Tristan also previously served as legislative assistant to U.S. Senator Amy Klobuchar where he advised the Senator on matters related to NASA, energy, the environment, agriculture and Native American issues. In that capacity he represented the Senator in negotiations of major legislation including the Waxman-Markey American Clean Energy and Security Act, amendments to the Renewable Fuel Standard, Clean Air Act (CAA), Clean Water Act (CWA), Water Resources Development Act (WRDA), National Aeronautics and Space Administration Authorization Act of 2010, Oil Pollution Act, among others. Tristan earned a Juris Doctor degree from the University of California Berkeley School of Law, a Master's of Philosophy degree from the University of Cambridge, and a Bachelor's of Science degree from the Lee Honors College, Western Michigan University.❖

D.C. Circuit Dismisses Privacy Challenges to FAA's Small Drone Rules

Tristan H. Brown*

Elec. Privacy Info. Ctr. v. Fed. Aviation Admin., 892 F.3d 1249 (D.C. Cir. 2018).

In June, the U.S. Court of Appeals for the District of Columbia (“D.C. Circuit”) dismissed a petition for review by the Electronic Privacy Information Center (“EPIC”) of the Federal Aviation Administration’s (“FAA”) rule on Operation and Certification of Small Unmanned Aircraft Systems (“Small UAS Rule”).¹ The rule at issue created regulations for certain classes of nonrecreational small drone operations pursuant to the FAA Modernization and Reform Act of 2012 (“Modernization Act”).² EPIC brought suit alleging the FAA failed to consider privacy concerns—from a safety perspective—in its rulemaking. The FAA responded that privacy concerns were beyond the scope of the rulemaking and were outside the mandate of the Modernization Act.

In its opinion, the D.C. Circuit³ noted that the small drone regulations were prompted by Congress’ charge that the FAA determine “which types of unmanned aircraft systems, if any, as a result of their size, weight, speed, operational capability, proximity to airports and populated areas, and operation within visual line of sight do not create a hazard to users of the national airspace systems or the public or pose a threat to national security.”⁴ The court found unconvincing the arguments of EPIC that “testing of delivery and reconnaissance drones . . . will pose an increasing loss of privacy . . . and freedom to travel free of constant monitoring will be disturbed” The court noted that such arguments rely on an unfounded premise because testing of drone delivery services would “appear to be largely excluded from the operations authorized under these rules.”⁵ The court also noted that EPIC failed to articulate why United Parcel Service’s (“UPS”) potential activities would not be otherwise regulated under 14 C.F.R. § 107.1(b)(1) given that UPS would “seem to qualify as an ‘air carrier’ due to the fact that ‘[a]ir transportation includes interstate . . . air transportation,’ which in turn is defined as ‘the carriage by aircraft of persons or property as a common carrier for compensation or hire. . . [w]hether that commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.’”⁶ Ultimately, the court did not find EPIC’s articulation of potential harm to meet the standing threshold—either on an associational or organizational basis.

Taylor v. Fed. Aviation Admin., 895 F.3d 56 (D.C. Cir. 2018).

In *Taylor v. FAA*,⁷ the D.C. Circuit dismissed a petition from model aircraft hobbyist, John Taylor,⁸ who sought review of the Small UAS Rule based on a theory that the FAA violated the Modernization Act’s prohibition on regulation of model aircraft by subjecting such aircraft to the Small UAS Rule as

well as to existing aircraft regulations.⁹ Taylor also argued that due to the FAA’s preexisting statutory authorities, it did not have the authority to regulate model aircraft that fell outside the scope of the updated definition of model aircraft under the Modernization Act.¹⁰ The court found that the new 14 C.F.R. § 107 established by the Small UAS Rule did not “regulate” model aircraft—rather it simply established a definition of model aircraft that mirrored the statute’s definition.¹¹ Moreover, the court declined to consider the FAA’s preexisting authorities prior to the Modernization Act because it concluded that Congress clearly granted FAA authority to regulate aircraft that fell outside the specific definition of model aircraft in section 336 of the Modernization Act.

To support his case, Taylor argued that recreational model aircraft “are neither ‘public’ nor ‘civil’ aircraft,” and hence “not aircraft at all” with respect to the FAA’s regulations and authorities.¹² The D.C. Circuit found that argument unpersuasive, concluding that Congress’s prohibition on the regulation of recreational model aircraft is limited to model aircraft that fit within the specific criteria of such aircraft established by Congress.¹³ Citing the *expressio unius est exclusio alterius* canon—“the expression of one thing implies the exclusion of others”—the court asked rhetorically “why would Congress go to the trouble of defining (by listing five criteria) a protected subcategory of ‘model aircraft’ if it thought the FAA had no authority to regulate model aircraft after all?”¹⁴

Though the court held that the FAA has authority to apply the Part 107 requirements to recreational aircraft that fall outside Congress’ safe harbor definition, the court declined to interpret whether the FAA may apply any other regulations to such model aircraft—noting that the FAA offered that other preexisting regulatory provisions would not apply to model aircraft.¹⁵

In rejecting Taylor’s argument that the FAA’s rule was arbitrary and capricious, the court echoed the FAA’s point that unmanned aircraft—whether recreational or not—pose the same types of hazards and no data indicate “that a small UAS operation whose [] parameters raise the safety risks addressed by part 107 would become safer simply as a result of being conducted for recreational [] purposes.”¹⁶

Endnotes:

*Stinson Leonard Street, LLP (Washington, DC)

¹81 Fed. Reg. 42,064 (June 28, 2016).

² Pub. Law 112-95, 126 Stat. 11.

³Senior Circuit Judges Sentelle, Randolph, and Chief Judge Garland heard the case. Judge Sentelle filed the opinion for the court.

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TTSL's Summer Speed Mentoring Event



Aviation Security Legal Framework Panel from Left to Right: Christopher Bidwell, Kathleen Connon, Roy Goldberg, Kelly Wheaton, and George Brown.

The Transportation & Transportation Security Law Section held its annual Speed Mentoring Event on July 19, 2018. This year's event was held at the offices of Stinson Leonard Street LLP and coordinated with the FBA's Summer Law Clerk Program. The evening was designed to connect law students with legal leaders from various modes of transportation and transportation security law practice, including federal and local government, airlines, airports, railroads, industry associations, and private practice.

The law students in attendance included summer clerks at DOT and Ability One. Each student was able to meet and

talk with every practicing attorney at the event and learn about his or her career path and interest in transportation or transportation security law. ❖



Aviation Security Legal Framework Panel from Left to Right: Christopher Bidwell, Kathleen Connon, Roy Goldberg, Kelly Wheaton, and George Brown.

SMALL DRONES *continued from page 4*

⁴892 F.3d at 1251-52 (quoting Pub. Law 112-95, 126 Stat. 11 § 333(b)).

⁵*Id.* at 1253.

⁶*Id.* at 1254 (internal citations omitted).

⁷Chief Judge Garland file the opinion for the court; Senior Circuit Judges Sentelle and Randaloph also heard the case.

⁸Famous/infamous for his previous successful challenge of the FAA's 2015 small unmanned aircraft rule in the D.C. Circuit. *See Taylor v. Huerta*, 856 F.3d 1089 (D.C. Cir. 2017).

⁹*Id.* at 62.

¹⁰*Id.* at 62-63.

¹¹*Id.* at 62, 67-68.

¹²*Id.* at 64.

¹³*Id.* at 64-65.

¹⁴*Id.* at 65.

¹⁵*Id.* at 63-64.

¹⁶*Id.* at 66 (citing 81 Fed. Reg at 42,081).

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