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The Department of Transportation

In the Department of Transportation (DOT) the Project examined two major legislative proposals enacted during the Second Session of the 91st Congress: The Airport Airways Development Act of 1970⁵⁵ and The Federal Railroad Safety Act of 1970.⁵⁶ The Airways bill, although initially developed by the FAA, was drafted principally by the departmental legislation office attached to DOT's Office of General Counsel.⁵⁷ In contrast, the Railroad Safety bill followed a unique task force approach that was almost entirely under the direction of the Federal Railroad Administration.⁵⁸ The distinctions presented by the two bills enabled the Project to evaluate and compare two agencies within DOT that, while similar in statutory authority⁵⁹ and operational purpose,⁶⁰ used quite different techniques of processing and drafting legislation.

55. Identical bills in the House and Senate, H.R. 12374 and S. 2437, became Public Law 91-258 on Oct. 27, 1970. *See* text accompanying footnotes 92-130 *infra*, for an analysis of the airway bill's legislative process.

56. The administration bills on railroad safety were S. 3061 and H.R. 14419. Both the Senate and the House enacted the Hartke measure, S. 1933, as amended. S. 1933 became Public Law 91-458 on October 7, 1970. *See* text accompanying footnotes 157-240 *infra*, for an outline and evaluation of the FRA's processing of the rail safety legislation.

57. *See* text accompanying footnotes 92-130 *infra*, pertaining to the drafting of the airway legislation and text accompanying footnotes 240-243 for the Project's critique of the FRA's legislative process.

58. *See* text accompanying footnotes 183-205.

59. The statutory authority of the two Administrations is of a fragmented origin. The FAA, for example, administers a number of laws enacted at varied intervals applying to specific problems in aviation control. These are for the most part in Title 49, although a few are included in Titles 33 and 40. All of them are in an uncodified format. The FRA, prior to the passage of the Railroad Safety Act of 1970, administered laws incorporated in Titles 49 and 45 that were also the result of fragmented and piecemeal action.

However, from a legislative standpoint, the operation of the two agencies are structurally similar. For example, the purpose and duties of their respective General Counsel's Office, legislative sections and Congressional Relations Offices are nearly identical. *cf.* text accompanying footnotes 85-90 & 152-54.

The scope of the two administrations' activities generally conforms to the principal task of transportation control and regulation. The FAA, for example, implements the rules and regulations pertaining to aviation safety, while the FRA has comparable responsibilities in the railroad area. Each of the administrations has specially assigned tasks relating to their particular expertise. The FAA is charged with providing guarantees of private loans for the purchase of aircraft, 49 U.S.C. §§ 1324, 1655(a)(3)(A) and (B) (1970), while the FRA has the authority to operate and administer the Alaska Railroad and Executive Order No. 11,107, 28 F.R. 4225 (1963).

Of the two agencies, the FAA has more encompassing and detailed responsibilities. The federal government regulates virtually every activity relating to civilian and military air transport and development, while the FRA is just now beginning broad operations in safety regulation and, except in two specific areas, High Speed Ground Transportation and the Alaska Railroad, is only indirectly involved in the development and control of railroads. Purposes and operations, however, remain to a large extent similar.

60. DOT Organization Manual 1100.23 at I-4, 5 (1970) [hereinafter cited as DOT Manual].

The Department is also engaged in a codification project involving Titles 49 and 46, which is complicated by the fragmented origins of the Department.⁶¹

The DOT Drafting Process

The Secretary of Transportation has final responsibility for the submission of proposals or recommendations for legislation, Executive orders, Proclamations or Reorganization Plans or other presidential action.⁶² Such proposals or reports to the Congress are reviewed and approved by the OMB, acting on behalf of the President. There are two offices which have primary responsibility for departmental legislation. First, the Office of the General Counsel coordinates the drafting and processing of all legislation originating within the Department and all inter-departmental and congressional comments on legislative proposals.⁶³ Second, the Office of Congressional Relations, which "participates" in the planning and review of legislative proposals and reports, acts as a reviewing agency for legislation originating outside of the Department, and arranges for the transmission of legislation to the Congress.⁶⁴ The two offices have comparable duties after a measure is introduced. At that time, the General Counsel's Office coordinates the drafting and processing of testimony and all other briefing materials appropriate to committee and congressional action, while the Congressional Relations Office handles all committee requests, including post-committee hearing requirements. Department spokesmen noted that the two offices have complementary functions and that their operations, while necessarily overlapping in some instances, are designed to provide distinguishable services—one principally legal and substantive; the other, the servicing and promotion of departmental relations with Congress.⁶⁵

This manual is a statement of the structural organization of the department, respective duties and a description of the Department's legislative process in general terms. It is to be distinguished from findings of the legislative process made in the tracing procedure and the project's evaluation section.

61. Interview with Mr. Thomas Tidd, General Counsel, DOT, Jan. 10, 1972 [hereinafter referred to as Tidd Interview]; DOT Manual, *supra* footnote 60, at I-12.

62. *Id.* at I-4 to I-8.

63. *Id.* at II-253 to II-260. Two other technical functions of the General Counsel should be noted; first, he serves as DOT legal office in relation to the Coast Guard and the Uniform Code of Military Justice in accordance with 10 U.S.C. § 6(b)(3) (1970); secondly, he provides staff advice and assistance relating to the Secretary's authority in uniform time matters. Perhaps most important is the General Counsel's general charge to perform such other duties as the Secretary assigns. *Id.*

64. *Id.* at I-6.

65. Mr. Thomas Tidd stated that the legislation section's primary duty was the drafting and processing of departmental legislation. He stated that supportive duties, such as preparing legislative materials, would, however, account for "much more, perhaps 90 percent of the draftsman's time," as compared to the actual writing of the legislation. Tidd Interview, *supra* footnote 61.

The DOT General Counsel's Office

The General Counsel, as the chief legal officer of the Department and the legal adviser to the Secretary, has five charges:

- (1) professional responsibility and final authority for all legal services performed within and involving the department;
- (2) supervision, coordination, and review of all legal work in the department;
- (3) responsibility for the legal aspects of legislative matters arising in or referred to the department, "including the drafting of legislation;"
- (4) the efficient promotion, use, and coordination of the department's legal resources; and
- (5) the recommendation, in conjunction with the Assistant Secretary for Administration, of legal career development programs.⁶⁶

To implement these functions, the office is divided into four units: The Office of Operations and Legal Counsel; The Office of Regulation; The Office of Litigation; and the Office of Legislation. It is the latter section, under the executive direction of the General Counsel, that provides the full range of legal services required for the Department's legislation program.

The Legislation Office's chief activity is its coordination of the drafting and processing of departmental legislation. All of its other identifiable legal functions further in varying degrees, the office's primary purpose of writing and helping enact legislative proposals.⁶⁷

Staff attorneys noted that the Congressional Relation's Office participates in the review of major legislative proposals on a continual basis with the Legislation Office. In this manner, the dissemination of legislative materials, primar-

66. GSA U.S. Government Organization Manual 376 (1970-71).

67. These functions include:

- (1) coordinating the preparation and clearance of the annual legislative program;
- (2) providing legal counsel in the formulation of program proposals;
- (3) drafting proposed legislation;
- (4) preparing supporting materials for legislative proposals and testimony and briefing memoranda for departmental witnesses;
- (5) analyzing and preparing comments on legislative proposals from outside the department;
- (6) providing drafting and other legislative services to Congressional Committees;
- (7) preparing and circulating for comment status reports and analyses of the department's legislative program; and
- (8) maintaining central legislative files.

DOT Manual, *supra* footnote 60, at I-24.

ily a matter of administration, is augmented by a substantive policy function. As it was stated, "the Congressional Relations people best further their multiple functions—to the department, the Congress, and competing outside interest groups, as an informed, policy-making unit."⁶⁸

The DOT Sub-Agencies

Proposed legislation in the Department, in the great majority of cases,⁶⁹ is initiated and drafted in one of seven Administrations directly responsible to the Secretary.⁷⁰ Each of these Administrations contains a general counsel's office with a legislative section comparable to the organizational framework of DOT itself.⁷¹ Actual packaging of legislative proposals normally begins at this level. Persons responsible for policy within the particular administration and draftsmen in the legislation section formulate the proposal.⁷² Once tentatively approved at this level, or if the measure is the result of a departmental directive, the general counsel's office of the initiating office will solicit written opinions as to the measure's substance and draftsmanship from affected units within the Department.⁷³ The opinion solicitation is channeled through the Legislation

68. Interview with Mr. Patrick O'Driscoll, legislative attorney, Office of General Counsel, FRA, August, 1972 [hereinafter cited as O'Driscoll Interview].

69. During the congressional sessions, department spokesman indicated that it was rare that one of the Administrations did not at least initially formulate the proposal. The Airways Bill, however, indicated that the General Counsel's Office has substantial control over at least some of the legislation. See text accompanying footnotes 92-137 *infra*, for discussion of the processing of the Airways legislation and the General Counsel's function.

70. The seven administrations in DOT are: U.S. Coast Guard, Federal Aviation Administration, Federal Highway Administration, National Highway Traffic Safety Administration, Federal Railroad Administration, Urban Mass Transportation Administration, and the Saint Lawrence Seaway Development Corporation. DOT Manual, *supra* footnote 60, at I-4.

71. See text accompanying footnotes 152-154 *infra*, for discussion of the FRA General Counsel's Office.

72. See DOT-FRA note 9, which contains an outline of the Railroad Safety bill's testimony. As the comment indicates, bill testimony and the great proportion of the legislative drafting is done in the General Counsel's Office in conjunction with policymakers in the FRA. This process holds true as a general statement for the other administrations in DOT. See footnote 51, *supra*, for instructions on how to use this shorthand citation system.

73. Although the files of the Rail Safety proposal do not reveal continual examples of this intra-departmental commenting procedure, the drafting process shows that a limited contact was established throughout the Department. For example, Mr. MacAnanny, the Ass't Secretary for Policy and International Affairs, outlined the idea of establishing a tripartite task force to study and formulate recommendations in the area of rail safety. Departmental spokesmen indicated that the Secretary depends primarily on the General Counsel and Ass't Secretary MacAnanny's office for comments and preparation on an administration proposal, particularly where there is no other Ass't Secretary's Office directly above the initiating office. DOT-FRA note 22.

In the Airways bill there is ample evidence of repeated intra-departmental comments on drafts of the proposed legislation: DOT-FAA notes 2, 7-12, 18, 19, 25, 27, 28, 29, 31. The number of intra-departmental communications rose first, because the General Counsel's Office was assigned

Office of the Department to interested assistant secretaries and administrations. For example, two or three responsible units within the Office of the Assistant Secretary for Environment and Urban Systems may comment on an amendment proposed by the Urban Mass Transportation Administration. Responses are then returned through the Legislation Office to the initiating agency.

On almost all proposals, whether it is an amendment to an existing program or new legislation, a number of units will be involved. At an early stage, the initiating office with the assistance and supervision of a representative of the Legislation Office, will confer with those units and a determination will be made as to the process the initiating office will follow on the measure.⁷⁴ For a major piece of legislation, the Legislation Office will form a task force to draft the proposal either through the Department's General Counsel's Office or the legislative section of the Administration.⁷⁵ On a minor legislative matter the Legislation Office may not become actively involved, except as a conduit, until the proposal has been drafted and approved by the originating agency. When statutory authority governing other executive departments is affected, the Legislation Office will confer at an early stage with the interested executive department or include the proposal as a part of DOT's legislative program and at that level circulate the measure for comment.

the task of drafting and coordinating the legislation; and, secondly, because the breadth and complexity of the proposal affected many separate offices within DOT. See text accompanying footnotes 92-137 *infra*, for an outline of the processing of the Airways legislation.

74. The FRA was assigned the task of processing the rail safety legislation; the Airways bill, on the other hand, was initially the responsibility of the FAA, see DOT-FAA notes 1-5, but during the Second Session of the 90th Congress was transferred to DOT General Counsel. DOT-FAA note 6.

75. Tidd Interview, *supra* footnote 61.