Week of October 2, 2017

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Senate Commerce Advances Automated Vehicle Bill, "AV START"

By Greg Rogers

October 04, 2017

October 4, 2017 – 5:00 p.m.

On Wednesday, October 4, the Senate Commerce, Science and Transportation Committee voted to advance S. 1885, the AV START Act. The bill was drafted in a bipartisan process led by John Thune (R-SD) and Senator Gary Peters (D-MI), who have been working in earnest with committee members and stakeholders throughout this year.

Thune, Peters, and Sens. Roy Blunt (R-MO) and Debbie Stabenow (D-MI) introduced the bill last Friday, September 29. Its passage follows a lengthy and at times contentious drafting process in which the two parties butted heads over everything from preemption of state and local laws to cyber security to whether autonomous trucks should be included.

But, despite some ongoing concerns from both parties, the highly anticipated markup was rather anticlimactic – AV START passed with bipartisan support and glowing reviews from both sides of the aisle.

"Sen. Peters and the members of the Commerce Committee deserve credit for working together to move this bill forward toward Senate floor consideration and collaboration with our colleagues in the House of Representatives," said Thune in a joint press release with Peters following the hearing.

"I appreciate the hard work of Chairman Thune and Ranking Member Nelson to craft this important legislation that will help advance these lifesaving and life-changing self-driving technologies and ensure that the United States remains at the forefront of vehicle innovation," Peters said.

During the markup, the committee agreed by voice vote on an *en bloc* package of 26 amendments from both parties, which are summarized below.

As *ETW* reported yesterday, over 64 amendments to the bill were originally filed – most of which were either withdrawn or rolled into other amendments.

After the bill and package of amendments were approved by voice vote, Sen. Jim Inhofe (R-OK) offered his amendment to include automated vehicles weighing over 10,000 pounds (e.g., trucks and buses) in the bill.

"Treating cars and trucks differently… will hinder efforts to adopt safe technology," he said.

Democrats and labor unions vehemently opposed the inclusion of trucks in the bill. Thune made a concerted effort to build support among committee members and stakeholders throughout the process, even going so far as to hold a hearing on the merits of including automated trucks in the bill last month – but to no avail.

But before the amendment was brought to a vote, Inhofe acknowledged that the amendment would not pass and withdrew it.

"If there's one thing I know to do, it's how to count votes," Inhofe quipped.

Speaking after Inhofe, Sen. Todd Young (R-IN) bemoaned the exclusion of trucks with an apt transportation metaphor: "By not including large trucks, I think we're really missing the boat here."

Young acknowledged concerns about the displacement of human workers, but said the opposition to automated trucks was driven by "misguided anxieties." He argued that the incorporation of advanced driving technologies in trucks "could *elevate* the status of transportation jobs."

Sen. Richard Blumenthal (D-CT) shared his own fears about AVs before making a futile attempt to advance one of his amendments (Blumenthal #3). He pointed to a Motherboard article from this February, titled Why Self-Driving Cars Could Be a Dream Come True for Car Thieves, as an example of the dangers of automated vehicles.

Blumenthal's amendment would have required highly automated vehicles (HAVs) at SAE Levels 3-5 to have a human behind the wheel and a manual override control in each HAV at all times.

Thune and Nelson, who both railed against this proposal, did not miss the irony of requiring human drivers in "driverless cars."

Thune retorted that the headlines in the newspapers the next day would ridicule Congress for advancing a bill that defeated its own purpose.

Nelson was more forceful. Citing his experience as a pilot, Nelson said that "having an override… that's one thing. But this is not autopilot. This is *autonomous*… a much further step where the entire car is sensitized to what's going on around it."

Blumenthal ultimately withdrew the amendment, ceding that it could – and perhaps should – be modified.

The AV START Act will next move to the Senate floor. But even if it passes the Senate, there is still a long road ahead.

In early September the House passed its own AV bill, the SELF DRIVE Act (HR 3388). While it covers many of the same issues as AV START, there are significant conflicts around preemption of state laws, exemptions to Federal Motor Vehicle Safety Standards (FMVSS), and other topics that would need to be resolved.

To start, the SELF DRIVE covers all vehicles with automated driving systems from SAE Level 2-5 driving automation, while AV START is focused exclusively on highly automated vehicles (HAVs) at levels 3-5.

The House's inclusion of Level 2 vehicles would impact a number of vehicles on the market today with features that enable partial driving automation, including Tesla models equipped with its signature Autopilot system.

But the most contentious battle will be around federal preemption of state and local laws around HAVs. As introduced, AV START initially used the same language as the SELF DRIVE Act to preempt states and localities from enacting policies that place an "unreasonable restriction" on the design, construction, and performance of HAVs.

However, the committee adopted an amendment that struck this language and established a different method of preemption, which is tied to the subject areas of reports that manufacturers would be required to submit to NHTSA, called the safety evaluation report (SER).

AV START, as introduced, can be accessed [here].

Below are links for the 26 adopted amendments and *ETW*'s analysis of each. *ETW* has compiled all of the amendments into a single PDF, which can be accessed here. Amendments that are particularly notable have double asterisks (**) before and after.

Adopted Amendments to AV START During October 4 Markup

Blumenthal 1 (modified): Requires that the Secretary issue a final rule within 2 years requiring rear-occupant alert systems that would warn parents if they leave their children behind in the backseat. This is similar to Rep. Jan Schakowsky's (D-IL) HOT CARS language that was included in the SELF DRIVE Act.

****Blumenthal 4 (modified):** Limits FMVSS exemptions for HAVs to: 15,000 vehicles per manufacturer in the first year; 40,000 in the second year; 80,000 in the third year. After the exemption has been in place for 4 years, the manufacturer may petition the Secretary for an exemption for more than 80,000 vehicles. When a manufacturer applies for a renewal of their exemption, the Secretary is required to first evaluate the safety equivalence of vehicles under the previous exemption compared to compliant vehicles.**

Blumenthal 6: Modifies the sunset clause for manufacturers' eligibility for exemption to be either (a) when a standard related to that exemption is enacted or (b) "the earlier of the date that is 10 years after the date of enactment of this Act."

Blumenthal 9: Consumer education working group would be required to develop voluntary marketing strategies for manufacturers to inform consumers about the comparative safety of HAVs versus non-HAVs in terms of crashes, fatalities, and other injuries (if known).

Blumenthal 10 (modified): In the Safety Evaluation Report (SER), manufacturers would be required to provide aggregate results comparing the safety level of their HAV with a vehicle that is not highly automated and that is driven by a human driver. *(Note: This is a slight change from the amendment as it was originally filed – the previous version would have created a new section in the SER for comparing HAVs with non-HAVs.)*

Blumenthal 11: The Secretary must make SERs publicly available within 60 days, rather than "as soon as practicable."

****Blumenthal 19 (modified):** Narrows Section 7 to specify the types of controls that can be made inoperable while the automated driving system is engaged. The bill as introduced used broad language – this is now tightened to "steering wheel, brake or accelerator pedals, a gear shift, or other feature or element of design related to the performance of the dynamic driving task by a human operator."**

Booker 3 (modified): When the Secretary reviews an SER, they will be required to verify the manufacturer's SAE level designation for the vehicle's level of automation. The process by which the Secretary (or the manufacturer, for that matter) will do so is not clearly defined. This could be a major point of contention – and potentially confusion – as the bill moves forward.

Duckworth 4 **(modified):** Creates a new section of the bill requiring the Secretary of Transportation to begin a study within 60 days of enactment that will cover potential impacts of AVs on everything but the kitchen sink: infrastructure, environment, fuel economy, public transit use, and so on. The Secretary must submit this report to Congress within 18 months of enactment.

Duckworth 5 **(modified):** Instructs consumer education working group to "identify recommended education programs and responsible marketing strategies and programs." (Added language is underlined)

Duckworth 6 **(modified):** Expands the membership of the consumer education working group to include safety organizations and organizations with experience in drivers' education.

Duckworth 8 **(modified):** Expands the scope of the HAV Technical Committee to include "any other issue the Secretary considers appropriate, including safeguards against misuse." (Added language is underlined)

Gardner 1: To include in the safety evaluation report matters relating to avoidance of risk caused by a malfunction of a component of the automated driving system.

Gardner 2: To include employee training among the requirements to be included in manufacturers' cybersecurity plans.

Hassan 4 **(modified):** Inserts language in the cybersecurity issue area of the SER to have manufacturers examine elements of the supply chain (e.g., motor vehicle equipment and its manufacturers) that could be vulnerable to cybersecurity incidents. Also adds a section to the manufacturer cybersecurity plan (see Sec. 14) to require manufacturers to describe how they will evaluate elements of the supply chain to identify and address cybersecurity vulnerabilities.

Inhofe 2 **(modified):** Instructs the Secretary to establish an HAV Data Access Advisory Committee within 180 days of passage. The Committee will provide Congress with recommendations on cybersecurity issues relating to highly automated vehicles. Prohibits federal agencies from enacting regulations pertaining to ownership of, control of, or access to, information or data stored by an HAV until the committee submits its report to Congress (within 2 years). The committee will be comprised of the USDOT Secretary (or designee) and the FTC Chairman (or designee), as well as one representative each for 17 different types of public and private entities. The committee will meet at least 4 times a year.

Also mandates a GAO study on technologies that are currently available for removing personal data from vehicles before they are sold to a new owner, leased, or rented. The report must be submitted to Congress within 1 year that has recommendations for legislative action to facilitate consistent removal of personal data.

Klobuchar 1 **(modified):** Adds a new section on HAV interaction with roadway and infrastructure assets (pavement markings, signage, and traffic signals) to list of topics that would be studied by HAV

Technical Committee.

Klobuchar 2 (modified): Requires manufacturers' SERs to describe how they will inform vehicle occupants about cybersecurity vulnerabilities.

Markey 1 (modified): Adds a new section to the bill on consumer privacy protections. Requires the establishment of a motor vehicle privacy database within one year of enactment. This database will describe the personally identifiable information (PII) collected about individuals during the operation of motor vehicles (note: *not* just HAVs). It will also contain each manufacturer's privacy policy, as well as details about how PII will be handled, stored, protected, and/or destroyed.

Markey 2 (modified): In section 12, requires a new rulemaking to determine what clear and concise information on an AVs' capabilities and limitations must be given to consumers at the point of sale and in the owner's manual. The Secretary must promulgate a rule within 3 years.

** **Nelson 1 (modified):** This is a notable shift – the amendment erases most of the preemption language in Section 3 and replaces it with entirely new language.

- States and cities are preempted from adopting laws, regulations, and standards that regulate the design, construction, or performance of HAVs with respect to the subject areas of the SER.
- Once NHTSA establishes a standard that addresses a particular subject matter area, state and local laws will no longer be preempted.
- Laws and regulations established by states and their political subdivision on the sale, distribution, repair, or service of HAVs are not preempted.
- On liability: simply complying with FMVSS does not exempt a person from liability at common law.
- Preserves the language that would prevent states from issuing motor vehicle operator licenses for dedicated HAVs (which are designed to be exclusively driven by the autonomous system) that would discriminate on a basis of disability.
- Adds a provision to the SER section indicating that SERs are open to discovery, subpoena, court orders, and other judicial processes under federal and state law.**

Schatz 2: To require manufacturers of highly automated vehicles or automated driving systems to publish summaries of their plans to identify and reduce cybersecurity risks to the motor vehicle safety of such vehicles and systems.

Schatz 3 (modified): Expands the consumer education working group's scope to require the working group to consider topics pertaining to consumer data collection, privacy, and data ownership.

Schatz 4 (modified): Requires that the Highly Automated Vehicles Technical Committee is comprised of at least one representative from each of the groups listed in Sec. 10(b)(1)(A)(ii) – currently, the bill does not say how many of each should be included, which leaves it to the Secretary's discretion. Also adds "national organizations that represent individuals with disabilities and older adults" to the list of committee members.

Udall 1 (modified): Creates a new section that requires the Secretary to conduct a study on ways to encourage manufacturing of HAVs and related components in the United States. Secretary is then instructed to develop recommendations for methods to incentivize manufacturing HAVs in the U.S.

Wicker 2 (modified): Adds a new section, “Cybersecurity Consumer Education Information,” that requires the Secretary to develop educational cybersecurity resources to make consumers aware of motor vehicle cybersecurity risks and how to minimize them. These resources must be available to the public on NHTSA’s website. When developing these resources, the Secretary is instructed to consult with industry, safety organizations, state and local governments, security researchers, and the National Institute of Standards and Technology. Manufacturers are required to include information that refers consumers to this cybersecurity resource website in owners’ manuals or on their website.

Another False Alarm: FAA Reform Bill Not On Next Week's House Schedule, Either

By Jeff Davis

October 05, 2017

October 5, 2017 (expanded October 6)

House Majority Leader Kevin McCarthy (R-CA) once again today did not mention the stalled Federal Aviation Administration reauthorization bill (H.R. 2997) when announcing next week's floor schedule for the House of Representatives. This despite an announcement earlier this week from the chairman of the House Rules Committee saying that the panel was "likely to meet the week of October 9th to grant a rule that may provide a structured amendment process" for the bill.

This is the second time that the Rules Committee has announced it will be meeting on the FAA bill and asked House members to submit amendments, only to see the Rules meeting postponed indefinitely. There is no indication of when the bill will resurface – behind the scenes, staffers refuse to pronounce it dead, but also are not able to definitively state when (or if) it is moving forward.

The legislation sponsored by Transportation and Infrastructure chairman Bill Shuster (R-PA) would fundamentally restructure the FAA and turn air traffic control operations over to a new non-profit, non-governmental corporation. But such radical reforms have divided aviation stakeholders (and Congressional power centers), making it difficult for Shuster to get the vote count for his bill to the magic number of 218 (the bare-minimum majority). Shuster's allies say they are close to the number, but the postponement of floor time for the bill indicates that they aren't quite there yet.

Several sources indicate that the last holdup is a small number of Republican "no" votes from strong pro-Trump areas who might be convinced by direct lobbying from the President, which has not happened yet. The President has not mentioned air traffic control in public since the big White House event on June 5.

However, personal involvement by the President would also have a cost. Supporters of the bill have been trying to get a few more House Democrats to commit to support the legislation (beyond the three formal cosponsors of the legislation, Colleen Hanabusa (D-HI), Krysten Sinema (D-AZ) and Vicente Gonzalez (D-TX)). But the polarizing nature of this President means that any Republican votes added by public pressure from the White House in support of the bill could also scare away potential Democratic "yes" votes.

(*Ed. Note:* If corporatizing air traffic control were easy, it would have been accomplished one of the other half-dozen times the idea has been seriously proposed since the mid-1970s.)

Instead of considering the FAA bill this week, McCarthy announced that the House will consider a Department of Veterans Affairs whistleblower protection bill and another round of hurricane relief assistance next week, based on a letter sent to Congress last night by the Office of Management and Budget. The letter requests an additional appropriation of $12.77 billion for the FEMA Disaster Relief Fund, an appropriation of $576.5 million for the Forest Service to fight wildfires, and the cancelation of $16 billion of debt from the National Flood Insurance Program (instead of raising the NFIP debt ceiling from the current $30.4 billion to $46.4 billion). Canceling the debt has the same budget score as providing new money.

The new request from OMB does not include specifics for things like highway and transit emergency relief, Corps of Engineers projects, etc. The letter said that "It can take up to 90 days after a major hurricane to finalize recovery cost estimates, and the Administration is committed to properly quantifying the costs ofthe necessary permanent repair work as quickly as possible." (The Obama Administration did not submit the detailed request for response to Hurricane Sandy until December 7, 2012, almost six weeks after the storm's October 29 landfall.)

The House is not in session the following week, then will be in session for four weeks in a row leading up to Thanksgiving week. If the FAA bill is not deal with during that time period, the December session will be crowded with appropriations and other year-end wrap-up issues (the fiscal 2018 continuing resolution expires December 9).

Meanwhile, Senate Commerce, Science and Transportation chairman John Thune (R-SD) told reporters yesterday the the House had an "ample amount of time…to work their bill and see what they can do and get it to the floor." He indicated that he wanted to have his own bill (S. 1405) in motion by the end of the year whether or not the House acts.

Budget Blueprints Belatedly Move in House, Senate

By Jeff Davis

October 06, 2017

October 6, 2017

Fiscal year 2018 began six days ago, and both chambers of Congress are finally getting around to addressing a budget blueprint for the ongoing year. Yesterday, the House of Representatives passed its 2018 budget resolution (H. Con. Res. 71) by a vote of 219 to 206 (18 Republican defections, no Democratic "yes" votes). Also yesterday, the Senate Budget Committee approved a draft budget resolution by a party-line vote of 12 to 11.

The House passed the Budget Committee's reported plan as-is, with no amendments. Four alternatives were offered, and none came close to the necessary 218 "yes" votes for adoption: plans from the Progressive Caucus (108 votes), the Black Caucus (130 votes), the Democratic Caucus (156 votes), and the Republican Study Committee (139 votes). Accordingly, *ETW's* write-up of the House plan from July 19 is still valid. The remainder of this article deals with the Senate blueprint and how it will be reconciled with the very different House plan.

Discretionary spending. The Senate budget assumes $1.7 trillion in reduced spending vs the Congressional Budget Office's inflation-adjusted baseline in discretionary accounts over ten years. Neither the numbers after 2018 nor the function-by-function assumptions here mean very much – all a budget resolution really does with discretionary spending is give one very large (trillion dollar range) lump sum to the Appropriations Committees for the upcoming year and let them spend it however they want.

When it comes to 2018 – the only year that matters, for discretionary spending in the budget resolution – the Senate resolution sticks to the spending cap levels written in the Budget Control Act ($549.1 billion in defense spending and $515.7 billion in non-defense spending, excluding things like overseas wars, emergencies and disaster relief). Interestingly, these levels are slightly lower than the [levels that the Senate Appropriations Committee has been using] to draft its bills – the BCA caps actually shrink slightly in 2018 versus 2017, but Appropriations is writing bills to last year's levels ($551.1 billion for defense and $518.5 billion for non-defense).

The Senate plan does diverge from the BCA levels starting *next* year, assuming $40+ billion per year in non-defense cuts while holding defense harmless.And the Senate plan differs drastically from the House plan, which provides a huge boost in defense spending starting immediately and which assumes a $5 billion cut in non-defense this year (before larger cuts start next year).

Discretionary Spending Caps Assumed in the FY18 Budget Resolutions

Billions of dollars of discretionary budget authority. Does not include Overseas Contingency Operations, emergencies, disaster relief or program integrity adjustments.

	2014	2015	2016	2017	2018	2019	2020	2021
Current Law Caps								
Defense	520.5	521.3	548.1	551.1	**549.1**	562.0	576.0	590.0
Non-Defense	491.8	492.4	518.5	518.5	**515.7**	529.5	542.5	555.6
Total	1,012.2	1,013.6	1,066.6	1,069.6	**1,064.8**	1,091.6	1,118.6	1,145.7
Proposed Caps Under Trump FY 2018 Budget								
Defense	520.5	521.3	548.1	551.1	**603.0**	616.0	629.0	642.0
Non-Defense	491.8	492.4	518.5	518.5	**462.0**	453.0	444.0	435.0
Total	1,012.2	1,013.6	1,066.6	1,069.6	**1,065.0**	1,069.0	1,073.0	1,077.0
Proposed Caps under House FY 2018 Budget								
Defense	520.5	521.3	548.1	551.1	**621.5**	652.6	685.2	719.5
Non-Defense	491.8	492.4	518.5	518.5	**510.7**	508.7	465.0	437.7
Total	1,012.2	1,013.6	1,066.6	1,069.6	**1,132.2**	1,161.2	1,150.2	1,157.1
Proposed Caps under Senate FY 2018 Budget								
Defense	520.5	521.3	548.1	551.1	**549.1**	562.0	576.0	590.0
Non-Defense	491.8	492.4	518.5	518.5	**515.7**	487.0	495.0	503.0
Total	1,012.2	1,013.6	1,066.6	1,069.6	**1,064.8**	1,049.0	1,071.0	1,093.0
House Budget vs. Current Law								
Defense					**+72.4**	+90.5	+109.2	+129.4
Non-Defense					**-5.0**	-20.9	-77.6	-117.9
Total					**+67.4**	69.7	31.6	11.5
Senate Budget vs. Current Law								
Defense					**+0.0**	+0.0	+0.0	+0.0
Non-Defense					**+0.0**	-42.5	-47.5	-52.6
Total					**+0.0**	-42.6	-47.6	-52.6
House Budget vs. Senate Budget								
Defense					**+72.4**	+90.6	+109.2	+129.4
Non-Defense					**-5.0**	+21.7	-30.0	-65.3
Total					**+67.5**	+112.2	+79.1	+64.1
Memo: Overseas Contingency Operations/GWOT (Exempt from Cap)								
House Budget					86.6	60.0	43.0	26.0
Senate Budget					76.6	50.0	25.0	12.0

Transportation assumptions. Budget function 400 is transportation, which includes all of the Department of Transportation plus the Transportation Security Administration, all of the Coast Guard except its defense activities, and the aeronautics research at NASA (plus odds and ends). The Senate plan assumes that, over the next 10 years, total spending for this budget function will be $222 billion below the CBO baseline. In particular: the Senate budget assumes a complete shutdown of new Highway Trust Fund spending commitments for one year, in fiscal 2021, in order to allow the Trust Fund time to get its excise tax receipts aligned with its outlays.

How do we know this? The full table showing all the budget spending assumptions for the transportation budget function can be downloaded here, but in fiscal 2021 (the year after the FAST Act authorizations expire), the CBO baseline for mandatory budget authority for the transportation is $55.125 billion. This consists of $51.2 billion in Highway Trust Fund contract authority (the 2020 FAST Act total, post-rescission), $3.4 billion in Airport Improvement Program contract authority, $1.9 billion in Coast Guard pensions, and a couple of hundred million dollars in odds and ends, all offset slightly by $1.4 billion in aviation security fees.

While the baseline for mandatory transportation BA in 2021 is $55.1 billion, the Senate budget only assumes $3.9 billion. The only way to cut from $55.1 to $3.9 is to basically eliminate new Highway Trust Fund contract authority for one year. (Total transportation mandatory BA rises back to $33.9 billion in 2022.)

The good news is that these assumptions (which are even more drastic than those in the House budget) are toothless, for two reasons. First, because the FAST Act isn't up for reauthorization for three more years, no authorization action is necessary in the 2018 budget cycle, so the functional spending assumptions won't come up (because they are only enforced after being translated into allocations of spending by committee jurisdiction lines, and those only apply when committees are trying to move bills through Congress).

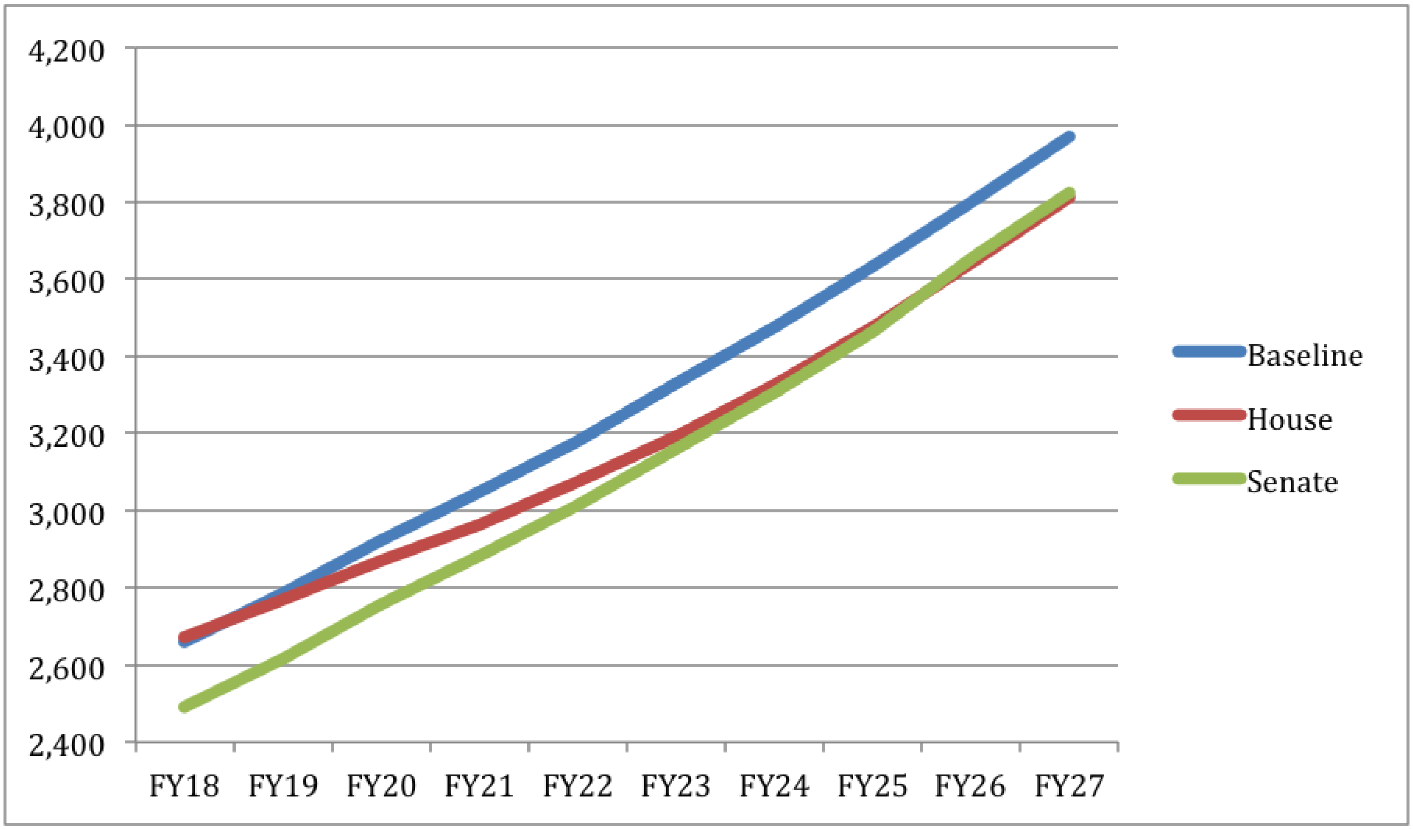
The other reason that these assumptions are toothless is because neither the Senate budget nor the House budget requires the transportation committees to produce new legislation cutting their programs through the reconciliation process (more below).

Other mandatory spending. The Senate budget assumes $4.7 trillion in cuts in mandatory spending below projected baseline levels over the next decade. $1.8 trillion of the cuts would come from Medicare and other health care programs, $653 billion from "income security" (welfare, food stamps, etc.), and $199 billion from the "education, training, employment and social services" function. A staggering $1.2 trillion of the assumed cuts are in the "allowances" category, which is budget-speak for "cuts to be named later." The budget also assumes $217 billion in reduced interest payments on the national debt due to decreased borrowing over the next ten years.

Reconciliation. The biggest difference between the House budget and the Senate budget is in section 2001 of the Senate resolution, which says: "The Committee on Finance of the Senate shall report changes in laws within its jurisdiction that increase the deficit by not more than $1,500,000,000,000 for the period of fiscal years 2018 through 2027." Yes, you read that right. "Increase the deficit….$1.5 trillion." Similar language directs the House Ways and Means Committee to do the same. This will use the budget reconciliation process to move $1.5 trillion in tax cuts, accompanied by other tax reforms, through the Senate using only 51 votes instead of 60.

The underlying revenue assumptions in the House and Senate budgets are not $1.5 trillion apart. The House assumes ten-year revenues $1.0 trillion lower than the June CBO baseline, while the Senate assumes revenues $1.6 trillion below baseline, and the difference are largely in the first 5 years.

Assumed Federal On-Budget Tax Receipts (Excludes Social Security)



But the House resolution does not include reconciliation directives for tax reform. Instead, the House budget orders eleven committees (the Transportation and Infrastructure Committee not among them) to produce a total of $205 billion in mandatory spending cuts over ten years.

Reserve funds. Enforcement of the Congressional budget process is mostly based around giving spending allocations to committees. The process is not set up to allow committees to cooperate and trade money around. To do that, you have to establish a "reserve fund" in the budget resolution that allows one committee to raise money and another committee to spend it. When it comes to reserve funds, section 3008 of the Senate resolution is a one-stop shop:

> The Chairman of the Committee on the Budget of the Senate may revise the allocations of a committee or committees, aggregates, and other appropriate levels in this resolution, and

make adjustments to the pay-as-you- go ledger, for one or more bills, joint resolutions, amend- ments, amendments between the Houses, motions, or con- ference reports relating to—

(1) the Farm Bill;

(2) American energy policies;

(3) the Nuclear Regulatory Commission;

(4) North American energy development;

(5) infrastructure, transportation, and water development;

(6) the Federal Aviation Administration;

(7) the National Flood Insurance Program;

(8) State mineral royalty revenues; or

(9) soda ash royalties,

by the amounts provided in such legislation for those pur- poses, provided that such legislation would not increase the deficit over either the period of the total of fiscal years 2018 through 2022 or the period of the total of fiscal years 2018 through 2027.

Endgame? It is by no means certain that the Senate will cobble together 50 Republican votes to pass the budget resolution that was reported from committee this week. If they do, then the Senate resolution will have to be negotiated with the House version in a conference committee. Reconciliation instructions only work if both chambers of Congress pass the same version of the budget. Setting the issue of tax reform and reconciliation aside, the major discrepancy between the two is discretionary spending, and the assumptions in the budget resolution are irrelevant if they call for spending more than is in the Budget Control Act spending caps for 2018. Fixing the caps will require a change in law, not a non-binding budget resolution, and it is a law that will require 60 votes in the Senate.

When Cycling Philosophies Collide: Furth Versus Forrester

By Alice Grossman

October 06, 2017

October 6, 2017

There are two well-established camps when it comes to infrastructure for bicycles.

On one side, there are those who follow John Forrester, a leader in cycling advocacy and a major influence in national cycling guidelines and policy since the 1960s. Forrester believes that cyclists should be treated as vehicles on the road, and adding additional cycling infrastructure actually leads to safety risks and inequity, since the presence of cycling infrastructure may suggest that bicycles do not belong in lanes with cars. This group is commonly known as vehicular cyclists.

The other group is commonly associated with Peter Furth – one of today's academic leaders from the other camp. They believe in the Dutch model of providing separated, protected infrastructure for cyclists while ensuring equal prioritization between modes when it comes to funding, signal timing, maintenance, education, and enforcement.

The International Cycling Safety Conference (ICSC) last month in Davis, California recently played host to a clash between these two philosophies. Dr. Furth's keynote questioned the problematic experimental design and statistics behind the claims of vehicular cyclists. Using direct quotes and numbers from Mr. Forrester, Dr. Furth debunked a series of "fake truths" and unraveled studies that have consistently conflated sidewalks with off-street paths, bike lanes, and cycle tracks.

While this focus on precise terminology may come across as splitting hairs, it is important that the definitions for transportation infrastructure reflect the true safety implications of design choices.

Dr. Furth suggested that cycling against traffic at high speeds on a sidewalk designed for pedestrians is indeed a dangerous act. However, when studies combine this type of activity with cycling in any environment that is not in traffic taking the lane and acting as a vehicle, much information is lost. Furth showed how the influence on policy has remained in engineering guidelines – so much that, even in 2017, the AASHTO Guide for the Development of Bicycle Facilities has 14 cautions against designing separated bicycle paths.

When accounting for sidewalk riding, normalized risk along road segments and intersections, and riding in the opposite direction of traffic, the results of studies arguing for shared vehicle and bicycle infrastructure suggest that dedicating right-of-way to bicycles may, in fact, improve roadway safety. There are additional, more recent studies designed to assess safety differences between mixed traffic, bike lanes, buffered bike lanes, and separated paths that show safety in separation.

Mr. Forrester sat in the front row for Dr. Furth's talk. He was offered the microphone afterwards so that he could defend his vehicular cyclist arguments.

Suddenly, the attendees of the conference were witness to a Furth versus Forrester debate – where the new generation challenged long-held ideas with facts and disputed statistics that are still lacking in redundancy (and have only recently become available, to boot).

The afternoon keynote from Bill Schultheiss addressed additional concerns of the relationship between research, advocacy, and policy in the 1970s in regards to cycling infrastructure. The talk put the AASHTO guide in the spotlight as a policy document – influenced by advocates and yet billed as engineering guidelines.

While the AASHTO guide provides research-backed roadway design guidelines for engineers, much of the text devoted to non-motorized transportation uses mushy reasoning, at best. This is emblematic of the larger issue in policymaking around bicycle and pedestrian infrastructure: we have neither sufficient studies nor data to make recommendations. For this reason, until agencies prioritize collecting quality exposure and crash data for bicycles and pedestrians, there will be few studies and many shaky results – especially in comparison to what informs vehicular infrastructure practices.

National roadway engineering guidelines are developed by governmental organizations and are inextricably tied to policy. Even when policy is informed by academic research, best practices are constantly evolving, and some papers reach the desks of Congress and DOTs more quickly and easily than others. The recommendation of the 1974 AASHTO guide to integrate bicycles with vehicles on the roadway is a prime example of why we need to make sure that policy is informed by sound, peer reviewed research. This would help to prevent undue influence from a small group of people who want to see public infrastructure built according to their own travel preferences.

Forrester’s studies were some of the first to examine cycling safety. His recommendations were easily adopted by roadway engineers, as he called for no additional infrastructure, safety measures, or funding. As cyclists continue to be struck – often fatally – by vehicles on the road, researchers have begun to re-examine what infrastructure keeps vulnerable non-motorized road users safe.

Hopefully those who develop the nation’s policy and guidance for transportation infrastructure will take note.

PHMSA Administrator Confirmed As Nominations Backlog Grows

By Jeff Davis

October 06, 2017

October 6, 2017

The Senate yesterday evening confirmed Howard Elliott to be Administrator of the Pipeline and Hazardous Materials Safety Administration by unanimous consent. The confirmation by the full body followed a vote in the Senate Commerce, Science and Transportation Committee earlier in the day recommending approval.

However, the backlog of transportation-related nominations still got bigger this week (see table here), as the White House sent three new nominees to the Hill.

Economist **Diana Furchgott-Roth** has been nominated to be **Assistant Secretary of Transportation for Research and Technology.** Currently a senior fellow at the Manhattan Institute and head of their Economics21 project, Furchgott-Roth served on the staff of the White House Council of Economic Advisers under President Reagan and on the Domestic Policy Council under George H.W. Bush. After sitting out the Clinton years at the American Enterprise Institute, she went back to the CEA as chief of staff under George W. Bush in 2001-2003 and then went to be chief economist of the Labor Department in 2003-2005 under Secretary Elaine Chao, who of course is now Transportation Secretary. Furchgott-Roth also served on the Trump transition team for the Labor Department. She received her BA in Economics from Swarthmore College and her M.Phil. in Economics from Oxford University.

(*Ed. Note:* There is a family connection to transportation economics specifically – Diana Furchgott-Roth is the daughter of transportation economist Gabriel Roth, who wrote an article for the Eno Foundation's *Traffic Quarterly* called "Traffic Congestion as a Source of Revenue" all the way back in April 1970 and who has been a fixture at DC-area transportation seminars ever since.)

Rickey Dale "R.D." James has been selected to run the civil works (a.k.a. water resources) program of the U.S. Army Corps of Engineers as the **Assistant Secretary of the Army (Civil Works).** James has a dual background that is particularly apt for the job. He has been a civil engineer who worked on water resources projects for the Commonwealth of Kentucky and later served 27 years (three nine-year terms) on the Corps' Mississippi River Commission. But he also has experience on the shipping side of things, managing cotton gins and grain elevators in his home of New Madrid, Missouri. He was president of the Southern Cotton Ginners Association and he served on the board of directors and executive committee of the Southern Cotton Ginners Association and the Cotton Producers of Missouri.

Lynn Westmoreland, former Republican Congressman from Georgia, has been nominated to be a member of the **Amtrak Board of Directors.** Westmoreland served in the House for 12 years (2005-2017) and for the first six of those years, he was on the Transportation and Infrastructure Committee and its railroad subcommittee. Westmoreland was on T&I when the 2008 Amtrak authorization was legislation debated and enacted, and during the floor debate he voted for an amendment by Rep. Pete Sessions (R-TX) to cut off operating subsidies for Amtrak's most subsidized line, the Sunset Limited.

(*Ed. Note:* The same May 22, 2008 full committee markup at which T&I approved the Amtrak bill (H.R. 6003, 110th Congress) was also the markup where the panel approved the bill that wound up letting Donald Trump convert the Old Post Office in downtown D.C. into a hotel (H.R. 5001, 110th Congress). Small world.)

Nomination backlog. The speed with which Congress confirmed Elliott to PHMSA (24 days from the Senate receipt of the formal nomination paperwork to the confirmation vote, with a committee hearing and markup in between) serves to draw attention to the transportation nominees who have been pending the longest. The following four nominees have all been approved by committee (or, in one instance, allowed to bypass committee consideration per S. Res. 116 without objection) but have been held up on the way to the Senate floor:

- Derek Kan – Under Secretary of Transportation for Policy – sitting on the calendar since June 29.
- Steven Bradbury – General Counsel, Department of Transportation – sitting on the calendar since August 2.
- Ronald Batory – Administrator, Federal Railroad Administration – sitting on the calendar since August 2.
- Adam Sullivan – Assistant Secretary of Transportation for Governmental Affairs – sitting on the calendar since June 21.

In the case of Bradbury, a formal "hold" has been placed on the nomination by Sen. Tammy Duckworth (D-IL) (see the "Notice of Intent to Object" section in the Senate Executive Calendar). This relates to actions taken by Bradbury while at the Justice Department Office of Legal Counsel relating to "enhanced interrogation" techniques, not anything to do with transportation. This means that the Senate will almost certainly have to go through the formal cloture process to get Bradbury confirmed. Although cloture for non-Supreme Court nominees now only requires a simple majority, not 60 votes (thanks, Leader Reid!), it requires the better part of two full calendar days per nominee, so Leader McConnell has to be judicious in how many nominees he chooses to move this way (there aren't that many more session days ’til Christmas).

The other three nominees are apparently being held hostage by Senators Chuck Schumer (D-NY) and Cory Booker (D-NJ) as leverage over Administration support for the $30 billion “Gateway Program” of mass transit and intercity passenger rail projects in New York and New Jersey. The Senators basically confirmed to the *Wall Street Journal* on August 5 that they had kept Kan, Batory and Sullivan out of the massive package of nominees that the Senate cleared before embarking on the August recess. And the nominees haven’t moved since, which means that an informal “hold” has been placed on the nominations, presumably from the NY/NJ delegations.

The biggest part of the Gateway Program is a new Amtrak/transit tunnel under the Hudson River, anticipated to cost $11.1 billion (together with another $1.8 billion to rehab the existing tunnel once the new tunnel is complete). Senator Joni Ernst (R-IA) made reference to the nominees during the Environment and Public Works Committee’s hearing on Federal Highway Administration nominee Paul Trombino this week (see the 50 minute and 30 second mark of the video, were Ernst refers to nominees being held up over funding for “a certain project in the Northeast Untied States.”)

(*Ed. Note:* The total cost of the tunnel project is estimated at $12.9 billion. Assuming a federal share of 50 percent of the cost (which is what Schumer and the other Senators want), this works out to a ransom demand of almost $2.2 billion per nominee for Kan, Batory and Sullivan.)

FHWA Gives States FY18 Highway Funding; Indicates Record High Allocated Withholding

By Jeff Davis

October 06, 2017

October 6, 2017

This week, the Federal Highway Administration formally gave states $41.4 billion in highway contract authority via formula for fiscal year 2018. However, a temporary placement of obligation limitation on that contract authority reveals that the amount of "usable" money kept back from states for the first 11 months of the fiscal year will rise to $6.7 billion in 2018.

FHWA issued a formal notice on October 2 distributing $41,420.520,075 in contract authority to the 50 states and the District of Columbia. This was accompanied by another notice canceling $42,174,000 of that amount because of budget sequestration. This leaves $40.78 billion in contract authority subject to the annual obligation limitation in the transportation appropriations act (the limitation does not apply to a part of the National Highway Performance Program funding).

An email from FHWA to state DOTs reveals that Texas has once again triggered the 95 percent "donor state" rate of return redistribution:

> The State-by-State apportionment calculations for FY 2018 are required to be adjusted so that each State receives at least 95% of the dollar amount of its contributions to the Highway Account of the Highway Trust Fund (HTF). Texas triggered an adjustment in FY 2018 based on HTF contributions data updated in August. As such, the apportionments for Texas were adjusted upward accordingly and the apportionments for all other States were required to be adjusted proportionally downward equal to the amount of the total upward adjustment in order to not exceed the total funds authorized for apportionments. The result is that the apportionments for Texas were adjusted upward by about 4.96 percent, while the apportionments for all other States were adjusted downward by about 0.48 percent each.

> This adjustment is the reason that the apportionments in this Notice differ from the estimated apportionments shown in the Advance Notification of Federal-aid Highway Funds to be Apportioned on October 1, 2017 (N4510.815) that was issued on June 28, 2017.

(The Lone Star State's FY 2018 formula take is about $180 million higher than was originally projected when the FAST Act was passed by Congress, thanks to the gas-guzzling habits of its denizens. Still, this year Texas fell back behind California slightly for the prize of most highway formula money, having edged out the Golden State narrowly in the 2017 apportionment.)

A one-page table showing each state's apportionment, by program, can be downloaded here.

FHWA also issued a notice distributing obligation limitation under the 69-day continuing resolution enacted last month (October 1 – December 8, 2017). 69 days is 18.9 percent of a 365-day year, so the fiscal 2017 enacted obligation limitation of $43,256.1 million (further reduced by a smidgen as part of the temporary across-the-board rescission in the CR to keep its spending totals below the Budget Control Act spending cap levels) was multiplied by 0.189 to get $8,121.8 million. Of that amount, $6,778.4 million was distributed to states so the states can obligate any prior year formula balances as well as any part of the new $40.78 billion in 2018 formula funding.

That $6,778.4 million annualizes out to a full-year amount of $36,198.6 million – but that is based on an the 2017 annual total of $43,266.1 million. The FAST Act, and the pending House and Senate transportation appropriations bills for 2018, all call for an increase in the obligation limitation to $44,234.3 million – an increase of $968 million. Almost all of that increase should be given to states for formula funding obligation (a few million will be moved around for safety penalties). This gives a ballpark total formula obligation distribution for 2018 of $37.075 billion, which is 90.9 percent of the total new contract authority subject to limitation.

Total Post-Sequestration Apportionment	41,378.3
Minus NHPP Exempt From Limitation	-596.8
Total New FY 2018 Apport. CA Subect. to Limit.	40,781.5
Ballpark Estimate of FY 2018 Formula Ob. Limit.	37,075.0
Formula Ob. Limit. As Percentage of New CA	90.9%

Annualizing the temporary obligation limitation also reveals that the amount of obligation limitation that is reserved "off the top" for allocated, or non-formula, programs has risen to $6.700 billion in 2018, almost $500 million more than last year. This total includes FHWA overhead and research activities as well as roads on public lands and Indian reservations. But it also includes unspent contract authority from prior years, particularly for the TIFIA program and the new FASTLANE program, which are why the initial allocated reservation has increased from $4.1 billion in 2012 (the year before MAP-21 started throwing $1 billion per year at the TIFIA program) to today's $6.7 billion.

Much of the $6.7 billion won't be obligated in fiscal 2018 and will be given to states for a last-minute surge of formula funding obligation in the "August redistribution" around Labor Day of next year. In FY 2017, the initial allocated reserve 2as $6.2 billion, and half that amount ($3.1 billion) stayed unspent and was given to states in the redistribution on August 31, 2017. Since the initial allocated reservation for 2018 is significantly higher than 2017, the August 2018 redistribution will probably set another all-time high as well.

If one excludes the FY 2009 earmarks from the calculation (so as to make it apples-to-apples), this how the initial reservation of highway obligation limitation for allocated programs has increased over the last decade.

Fiscal Year	Allocated Reserve	Is This Pct. Of	Total Ob. Limit
FY 2018	6,700.5	15.1%	44,234
FY 2017	6,205.0	14.3%	43,266
FY 2016	5,250.6	12.4%	42,361
FY 2015	5,220.7	13.0%	40,256
FY 2014	4,995.8	12.4%	40,256
FY 2013	4,367.0	11.0%	39,620
FY 2012	4,128.6	10.5%	39,144
FY 2011	4,396.2	10.7%	41,107
FY 2010	4,119.9	10.0%	41,107
FY 2009	3,713.0	9.1%	40,700

Side-by-Side Comparison of House and Senate Autonomous Vehicle Bills

By Greg Rogers

October 06, 2017

October 6, 2017

The *ETW* staff have completed a 22-page side-by-side analysis of our summary of the House autonomous vehicle regulation bill (H.R. 3388, the SELF DRIVE Act) as passed by the House last month and the Senate bill (S. 1885, the AV START Act) as amended and then approved in the Senate Commerce Committee earlier this week.

The document can be viewed and downloaded in the Eno Transportation Library **here**.

Capitol Hill Events – Week of October 9, 2017

By Jeff Davis

October 05, 2017

Wednesday, October 11 – House Transportation and Infrastructure – Subcommittee on Highways and Transit – subcommittee hearing on **stakeholder perspectives on highway and transit infrastructure needs** (witness list here) – 10:00 a.m., 2167 Rayburn.

Status of Transportation Legislation and Nominations – October 6, 2017

By Jeff Davis

October 06, 2017

October 6, 2017

For an updated calendar of major transportation and public works legislation of the 115th Congress, click here.

For an updated calendar of pending transportation-related Presidential nominations, click here.

For an updated table showing how the pace of transportation nominations in 2017 compares to that of other recent first-year Administrations, click here.