



# **The National Transportation Safety Board Bar Association**

[www.ntsbbbar.org](http://www.ntsbbbar.org)

**Fall 2008**

## **Greetings from the Bar Association President**

I'm pleased to report that the 2008 Annual Conference in May was a success. The topics were lively, the presenters were excellent, and the time spent with colleagues was exceptional. The venue was easy to access, and the Old Town Alexandria Hilton Hotel provided us a wonderful locale close to Washington, D.C. I'd like to express my personal thanks to our Executive Director, Karen Griggs, for the great job that she did in attending to the many details of coordinating such a major event. Although not as well attended as previous conferences, probably due to the economy, we nevertheless had solid participation.

I'd like to personally thank Cliff

Robertson for attending our 2008 Annual Conference and receiving our award for being a Great Ambassador of Good Will for Aviation. Cliff is the quintessential aviator and gentleman, and his comments about his life and career were interesting and entertaining.

We're already making plans for the 2009 Annual Conference. Many of you may already know that Past-President Tony Jobe is leading the Event Committee in preparation for what looks to be another extraordinary Blue Angels Seminar in September of NEXT YEAR, at Virginia Beach. Tony led Karen and I on an overnight trip there, following the 2008 conference, for the purposes of finalizing our



Cliff Robertson receives the Great Ambassador of Good Will for Aviation plaque from NTSB Bar President J. Michael Loomis

## **A Look Inside...**

### **5 Future Responsibilities and Current Resources**

Jeremy E. Juenger

### **6 Office of the General Counsel**

Robert V. Combs

### **8 The Incoming Lawyer-Pilot Bar President**

Susan Hofer

### **9 Recent Developments in FAA Enforcement**

John S. Yodice

### **11 FAA Ordered to Pay Attorney Fees and Expenses**

Gregory S. Winton, Esq.

### **12 FAA's Craft and Craftiness**

Hays Hettinger and  
Chris Kilgore

### **16 Delta Disputes MAG Agreement**

J. Michael Loomis

### **17 NTSB Bar Welcomes 22 New Members**

### **19 NTSB Bar Membership Application**

reservations and exploring the area for some extracurricular activities. It should suffice to say that "you won't want to miss this one!"

*continued on page 2*

### *The FAA's Regulatory Craft—and Crafty Regulators: A Culture of “Coziness” or Effective Problem Solving?*

CRAFT: “skill in planning, making or executing”;

CRAFTY: “adept in the use of subtlety and cunning”

Merriam-Webster's Collegiate Dictionary  
Eleventh Edition, 2006

This article introduces a book that every member of this Bar Association, as well as every government enforcement attorney, inspector and program manager, should read.

Consider the following:

At a hearing on April 3, 2008 before the U.S. House Committee on Transportation and Infrastructure on “Critical Lapses in FAA Safety Oversight of Airlines: Abuses of Regulatory ‘Partnership Programs’”, Nick Sabatini, the FAA's Associate Administrator for Safety, expressed his “disappointment and, frankly, outrage and shock at the actions of Southwest Airlines and the FAA PMI (Principal Maintenance Inspector)” over the recent debacle involving non-compliance.<sup>1</sup> He reviewed three major partnership programs that voluntarily disclose information to the FAA: the VDRP (Voluntary Disclosure Reporting Program); the ASAP (Aviation Safety Action Program); and the FOQA (Flight Operational Quality Assurance Program). The VDRP was involved in this incident.

At a meeting on May 13, 2008 before the RTCA (Radio Technical Commission for Aeronautics) Symposium, Mr. Sabatini spoke on the role of the regulator and Aviation Safety in the 21<sup>st</sup> century. In doing so, he introduced the

ASIAS (Aviation Safety Information & Analysis Sharing) program, which he described as “ensuring that we get smarter—much smarter—about having the right information to make important safety decisions.” He said:

As Malcolm Sparrow, author of *The Regulatory Craft* puts it, with ASIAS we can do what we are supposed to do as safety professionals. With data, we can “pick important problems.” And we can “fix them.”

Chairman Oberstar of the House Committee, later said: “The FAA would have us believe this {Southwest Airlines penalty} was an isolated incident and that the damage is contained, that it was attributable to a rogue individual.” Instead, he said, the congressional investigation shows a “systematic breakdown” in the FAA's culture, resulting in “misfeasance, malfeasance, bordering on corruption.” If the Committee's investigation had been “a grand jury proceeding”, he said, “I think it would result in an indictment.”

On May 23, 2008, Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, addressed the graduating class of 2008<sup>2</sup> at the U.S. Naval Academy in Annapolis, and emphasized three points for the new ensigns and second lieutenants: (1) Learn from your mistakes; (2)



**Hays V. Hettinger** career as legal counsel with the Federal Aviation Agency/Administration spanned 33 years until his retirement in 1994 as Assistant Chief Counsel for the Enforcement Division, FAA WDC. Mr. Hays currently serves as a consultant to Winstead's Aviation Law Practice.



**Chris Kilgore** is a graduate of the University of Houston Law Center (1986). He is a Cdr., USCGR, Ret. and former Army and Coast Guard aviator. He holds FAA ATP and CFII certificates. He is an adjunct faculty member of Embry-Riddle Aeronautical University's Fort Worth Center and Of Counsel for the Winstead, PC law firm in Dallas.

Don't be afraid to question your seniors; and (3) If you are wrong, admit it; if you have erred, correct  
*continued on page 13*

*Continued from page 12*

it; hold yourselves accountable for your actions.

On June 5, 2008, Defense Secretary Robert Gates ousted the Air Force's top military and civilian leaders, holding them to account in an historic Pentagon shake-up after embarrassing nuclear mix-ups. The Secretary said his decision was based mainly on the damning conclusions of an internal report that explained that the Air Force's nuclear standards have been in a long decline, a "problem that has been identified but not effectively addressed for over a decade." {Over a decade?—Sir, you must be kidding!}

On June 30, 2008, the Inspector General of the Department of Transportation issued a "Review of FAA's Oversight of Airlines and Use of Regulatory Partnership Programs" {report No. AV-2008-057}, concluding that "the events at (Southwest Airlines) demonstrated serious lapses in FAA's air carrier oversight. We found that FAA's inspection office overseeing (Southwest's certificate) developed an overly collaborative relationship with the air carrier, which allowed repeated self-disclosures of AD violation through its partnership program. We also found significant weaknesses in the Agency's ATOS (Air Transportation Oversight System) program, which allowed AD non-compliance issues within (Southwest's) maintenance program to go undetected for years". The FAA responded on July 2 as follows: "We at the FAA find the IG's most recent report extremely helpful. We welcome the IG's recommendations and take them very seriously as we continue our constant work to improve the safety of the flying public."

These anecdotes—many in recent news headlines—have the following common denominator: responsible governmental officials fail to timely identify "important problems" and "fix them". The book mentioned by Mr. Sabatini, *The Regulatory Craft:—Controlling Risks, Solving Problems, and Managing Compliance*, Brookings Institution Press, 2000, tackles this important policy issue and offers a creative solution. It is written by Malcolm K. Sparrow, Professor at Harvard's John F. Kennedy School of Government, or more pedantically, Professor of the Practice of Public Management, Faculty Chair of the MPP Program, and Faculty Chair of the Executive Program on Strategic Management of Regulatory and Enforcement Agencies. He served ten years with the British Police Service, rising to the rank of Detective Chief Inspector. He holds an MA in mathematics from Cambridge University, an MPA from the Kennedy School, and a PhD in applied mathematics.

So then, just how do we "get smarter" in order to avoid a "systematic breakdown" or an "overly collaborative relationship"? It's in the book; but for busy attorneys, here is a teaser.

The central contention of the book "is that while apparently simple ideas about risk control and problem solving remain for the most part very poorly understood, they represent the opportunity for profound changes in regulatory practice and should be adopted as foundations for reform."

We love the way Prof Sparrow introduces his essay: he applies "the Babylonian Test", recommending the strategy employed by King Nebuchadnezzar who "had dreams, and his spirit was troubled and his

sleep left him." {Daniel 2:1}

Because the King could never get a clear interpretation for a troubling dream (cp. counsel trying to explain an ambiguous answer to a complex legal question from a program manager), his strategy was to seek out soothsayer priests who had to first recount the dream and then interpret it. The penalty for "getting it wrong" was to be "torn limb from limb and your houses will be made a dunghill." {Daniel 2: 5} Then they were priests; today they are lawyers. Ouch!

Follow along with the "dream" proposed by Prof Sparrow and before reading his interpretation, ask yourself, "How closely does this track with where we have been—and are today—in federal aviation"?

1. "There are too many laws to enforce and not enough resources."
2. "In embracing new tools (of voluntary compliance—education, outreach, partnership, customer service, negotiation, consensus building) you thought senior management had adopted and communicated a well-balanced approach to compliance, but sometime within the last seven years, enforcement numbers or judicial referrals dropped precipitously."
3. "When your agency hit this bean dip phenomenon, howls of protest were heard from your traditional allies and advocates, imploring you to return to your old ways, they argued that nothing works like enforcement and demanded an explanation for your agency's apparent inactivity."

4. "To justify agency funding, you now had to demonstrate the connection between specific activities and specific outcomes."

5. "The enforcement chief complained this was not fair. For no one

*continued on page 14*

*Continued from page 13*

knew how to measure the broader deterrent effect of specific enforcement actions.”

6. “Other enforcement managers explained that the reason the agency should maintain its commitment to enforcement was that without a credible deterrent, none of the other new-fangled methods would work.”

7. “The focus on the ‘customers’, a term imported from the private sector and pressed on you by the reinvention gurus, turned the developing crack in your organization into a fissure. Camps developed. The voluntary compliance camp, populated by younger, newer, and sweeter people, regarded the enforcement crew as dinosaurs, remnants of a bygone era.”

8. “Using *quality circles*, you even saw hitherto separate parts of your organization working together. *Participative management* wafted through, until middle management realized how it undermined their authority.”

9. “An assortment of consultants (new political appointees?) came and went... experts on ‘change’ but had no idea what changes were needed, because none of them had any experience with enforcement or compliance work.”

10. “But still the drum beat for results, results, results.”

11. Then—“Individuals or small groups acting on their own initiative identified some important issue, problem, risk, or pattern of non-compliance; had invented a solution and implemented it; and it had worked.”

12. “You rewarded these....heroes and heroines—‘good people locked in bad systems’. It was your job to mend the system.”

13. “When you tried to promote such activity by diffusing innovations, your efforts were met with the depressing refrain, ‘It won’t work here!’”

Now, please read the next two segments of the “dream” very carefully.

14. “You realized how *precious* it would be if staff throughout your agency *routinely* identified and tackled important problems, artfully picking the right combination of tools for the job, using enforcement judiciously and sparingly, designing solutions that worked; and how *precious* if you were able to demonstrate that your agency’s *normal* operation (as opposed to these isolated exceptions) demonstrably made the world a better place—eliminated hazards, mitigated hazards, decreased exposures, reduced death rates, reduced injury rates, reduced accident rates, or increased compliance.”

15. “You wondered which pieces of the existing organizational or managerial apparatus you could use to make such creative behavior the *routine* rather than the *exception*.”

At this point, you wake up in a cold sweat. The Prof then begins to interpret, particularly in Chapters Two and Three, the Emergence of Regulatory Craftsmanship and the Elusive Art of Risk Control.

The authors for this Newsletter article represent over 33 years experience in FAA enforcement by one of them, and over 16 years as a professional aviator by the other. We both wish Mr. Sabatini and his colleagues the best and hope that the ASIS program indeed will “ensure that {FAA} gets smarter—much smarter—about having the right information to make important safety decisions.” We also hope that this managerial apparatus is just the

beginning of using effective risk control and problem solving techniques that become the *ROUTINE* rather than the *EXCEPTION*. In doing so, we offer the following closing thoughts, drawing upon Prof Sparrow’s outstanding book.

The Prof, in discussing strategies—“Reactive”, “Preventive”, and “Proactive”—, emphasizes that “problem solving is not an alternative to enforcement, nor does any mature problem-solving strategy eschew enforcement.” He explains as follows:

Another reason for making sure regulatory policy transcends these simplistic and misleading dichotomies—hard versus soft, reaction versus prevention, enforcement versus compliance—is the practical damage that those dichotomies have wrought over the last ten years. These dichotomies split agencies in two, rendering them dysfunctional. This is how it happens. Investigators and enforcement officers perceive the singular emphasis on prevention as a threat to their own role and status. They remain skeptical about the language and tools of voluntary compliance, mindful of the bad actors with whom they deal.

Squander the enforcement capacity, they say, and lawbreaking will run rampant. Besides, however good the prevention programs, accidents will still happen, people will still cheat... because it is in their own short-term economic or selfish interests to do so. Human nature will not be transformed. Therefore it is as foolish to invest everything in prevention or up-front education as it is to invest everything in enforcement. Realizing that, executives resolve to do some of each. There follows a bitter and destructive internal battle, manifesting an ideo-

*continued on page 15*

*Continued from page 14*

logical conflict. Staff join either the “hard equals reactive equals enforcement” camp or the “soft equals preventive equals voluntary compliance” camp, depending on their functional loyalties. The different functions fight for resources, attention, and status.

Prof then says that “comparatively few agencies have so far found their way out of this uncomfortable predicament”. How sad! We hope this is not true for the FAA. So, what’s the “fix”? Read on:

Those whose reforms do progress pass this point discover that the internal battle is actually a battle over tools, not ideologies, nor goals. Both camps can eventually be persuaded that their common goal is broad compliance; the remaining argument is about the comparative effectiveness of different tools. A clear focus on the task of risk reduction, problem solving, or compliance management provides the escape route from these destructive tensions. The risk reduction mindset dismisses the inward-looking focus on tools and replaces it with an outward-looking focus on important risks. By picking important problems and organizing resources around each one, these strategies demand that the complete range of tools be available and considered with respect to each problem. The objective is to fashion an intervention that works, preferable for good, without any *a priori* preference over tools, style, or time of intervention. In designing a solution for a particular problem, enforcement should always be available but should never be assumed to be the most effective or the most resource efficient. Problem solving,

recognizing the scarcity of the enforcement resource, will use enforcement surgically, incisively, and in the context of coherent control strategies.

We think it would be difficult to pose this issue any better than what the Prof has said.

In Table 14-1, he distinguishes the characteristics of a “Balanced Strategy” from an “Integrated Strategy”, explaining that “an integrated compliance strategy (problem solving approach) organizes the tools around the work, rather than *vice versa*. It identifies important risks and then it develops coordinated, multifunctional responses. Often, it invents new tools, techniques, or solutions tailor made for the problem in hand. Almost every problem-solving success story reveals this: effective solutions to identified risks involve either artfully crafted, properly coordinated combinations of actions or the design of something new. Such solutions could never be created by moving resources between existing functions or programs and allowing them to operate in isolation.”

You can easily see from this that, for example, while cyber/digital technology has replaced many FAA “tire kicking” inspectors on the Tarmac with “virtual” inspectors hidden with computers in remote locations, that “tool” mechanism alone cannot ever be considered as the final solution to solve every safety of flight problem. The emphasis must always be on artfully picking and organizing the tools around the specific risks that are identified as important.

One final word from the Prof:

At the field level, inspectors, auditors, and enforcement officers hold considerable power to do good or evil, to dispense justice or injus-

tice. Police patrol officers and regulatory inspectors work mostly alone or in pairs and far out of sight of supervisors. The enforcement myth, which has so often saved regulators from having to account for their uses of discretion, is that they enforce the law uniformly, across the board, without fear or favor. It is not, and was never, true. They choose not to enforce laws for many reasons, some good, some bad: they did not have time, they were on their way to something more important, there were too many violators and no sensible way of choosing between them, it was a silly law...the offender had political connections or was a friend ....

Regulatory agencies, by their conduct, can take perfectly reasonable law and produce oppressive regimes. Similarly, by choosing wisely what to enforce, when, and how, regulatory agencies can take an unmanageable accumulation of laws, many of which might be obsolete, and deliver perfectly reasonable regulatory protection. ■

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### Get This Book, Read It and Use It!

“He who has ears to hear, let him hear”. (While he still has ears, and is not “torn limb from limb”!)

<sup>1</sup> On March 6, 2008, the FAA issued a \$10.2 M proposed civil penalty to Southwest Airlines for continuing to fly noncompliant aircraft in commercial operations. The FAA PMI who had accepted a VDRP report in violation of existing FAA standards and policies and who essentially permitted the unsafe flights to continue was reassigned and is the subject of pending personnel action and an IG investigation. While the FAA office manager had begun a review of the situation and asked for support from the Regional Office, it was not fully investigated until another inspector reported it to the Administrator’s hotline and the DOT IG hotline.

<sup>2</sup> Including one of Hays’ granddaughters.