

STATEMENT OF ALAN B. MORRISON
BEFORE
COMMITTEE ON ENERGY & COMMERCE
UNITED STATE HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON DIGITAL COMMERCE AND CONSUMER PROTECTION
ON SELF-DRIVING VEHICLE LEGISLATION
JUNE 27, 2017

Mr. Chairman, Members of the Subcommittee:

I appreciate this opportunity to appear here today to discuss the legal and policy issues related to the testing and eventual deployment of highly automated vehicles (HAVs) also known as driverless cars. I am the Lerner Family Associate Dean for Public Interest & Public Service Law at George Washington University Law School, where I also teach civil procedure and constitutional law. For most of my career I was the director of the Public Citizen Litigation Group, which I co-founded with Ralph Nader in 1972. In that capacity, and continuing to date, I have been involved in a wide range of litigation and related administrative proceedings, including, but by no means limited to, those of the National Highway Traffic Safety Administration (NHTSA), the federal agency charged with assuring vehicle safety in the United States. My work has also involved issues of preemption, which are very much part of the debate over how to assure the safety of driverless cars, while also not unduly standing in the way of innovation. I am submitting a copy of my resume for the record.

Until six months ago, I knew very little about these issues, but then I was asked to organize and moderate a conference on the legal landscape surrounding driverless vehicles. The conference was held on June 14, 2017, and I am submitting a copy of the program with this statement. A video of the day's program is now on the GW Law School website, and it can be

accessed at <https://www.law.gwu.edu/driverless-cars-legal-landscape>.¹ As my background makes clear, I am not an engineer or a safety expert, nor do I have any detailed knowledge of the specifics of the relevant Federal Motor Vehicle Safety Standards (FMVSS) that NHTSA has issued. However, after working on these issues and running the conference, I think I have a solid understanding of the questions that need to be addressed by policy makers. I would also add that I do not have answers to most of them, although I do have some ideas as to where policymakers should and should not go.

Before turning to the issues relating to self-driving or driverless cars, I want to make a related point: driverless cars will require good roads, with freshly painted lines and fewer potholes and other obstructions. That means more infrastructure funding and continued maintenance. Perhaps it goes without saying, but I will say it anyway. There are many proposals before NHTSA that would enhance the safety of current vehicles (as well as driverless versions) and that are not receiving the attention they deserve. The focus on driverless cars and their potential for saving lives and money is not a green light to abandon all other safety related rules that NHTSA could issue now without any changes in its governing statutes.

If I can deliver one thought to you today, it is that these issues are extremely complicated and implicate interrelated legal, policy, and technical considerations. Significant choices will have to be made, and so simply telling NHTSA to do what is needed to bring on safe driverless cars will not suffice. More specific directions are needed. Let me illustrate.

The industry, regulators, and consumer safety advocates agree that the focus now should be on the testing of these vehicles in real world conditions. To be clear, I define the testing

¹ There are separate videos for each panel and for Ralph Nader's remarks.

phase, and any exemptions from it, to be limited to vehicles being operated (controlled/driven) by employees (agents/contractors) of the manufacturer, but not by the general public or even entities such as Uber & Lyft or car rental companies. Some automated safety features are now being installed in cars sold to the public, but those in vehicles coming within SAE categories 3, 4 & 5 should be regulated as test vehicles phase and should not be available to the public for some time. Some of the draft bills would allow large numbers of vehicles to be deployed outside their testing by manufacturers, and that should not be permitted.

Assuming a properly limited test phase, one question is whether there should be any regulation of the testing phase, or is society willing to allow manufacturers, including but not limited to traditional auto makers, to test these advanced HAVs with no check except the power of NHTSA to recall unsafe vehicles from the highways. As the Committee may know, California has enacted a law requiring its DMV to regulate driverless cars, and its DMV has proposed new more detailed rules for the testing of cars (but not vehicles over 10,000 pounds). Other States, concerned about the safety of their highways, may pass different laws, with different requirements. The proposed California rules make reference to NHTSA guidance and possible exemptions, but it is very unclear how that will operate in practice.

As the Committee is aware, if NHTSA has issued an FMVSS on a given aspect of vehicle safety, states are precluded (preempted) from issuing a different standard. There are no federal standards for many of the features designed for SAE's 3-5, but there are standards – such as those requiring a steering wheel, foot brakes, and an accelerator pedal – that are inconsistent with how vehicles in categories 4 & 5 would be configured. Thus, at the very least, even in the testing phase, NHTSA has to do something if tests are to go forward, as they clearly must so that the public has some assurances regarding the safety of these vehicles. States may be able to

supplement what NHTSA has done in areas where there is no FMVSS, but where there is none, NHTSA must act one way or another.

One or two of the draft bills included provisions for exemptions, but there appear to be no meaningful standards by which NHTSA can grant or deny an exemption. If there are to be exemptions, Congress or NHTSA must supply a standard, which is likely to be a challenging task since NHTSA does not appear to be ready even to propose FMVSS for any aspect of driverless cars. Plainly, there will be *some* risks from testing HAVs, but how much should be tolerated, and who will make the judgment about the level of such risk – and be held accountable for the harms that inevitably ensue – are open questions.

Even if there is agreement on the standard for approval of testing, or an exemption from an existing FMVSS, is NHTSA able to oversee the implementation of the testing? One significant problem is that there will be many different models and features because the manufacturers are not all taking the same approaches and offering the same innovations. Does NHTSA have the personnel and the field offices to oversee the testing phase, or should it deputize willing States to do that on its behalf for vehicles being tested within their borders?

There is another important open question regarding the testing phase: should localities have any power to say, “Not in my backyard,” or even just, “Not in that part of town where the schools are, or during these hours”? In the alternative, might localities require test vehicles to carry special warnings, or simply require notification when HAVs are being tested in a locality? In the first instance, that may be a matter of state law, but it also may be a matter over which Congress or NHTSA has or should have control.

Staying within the testing phase, although some of these issues will remain significant once deployment begins, there is the broad issue of federal preemption. There is no question that once Congress, or a federal agency, affirmatively acts on particular matter, States can be precluded from issuing a different rule. But one of the draft bills appeared to be a broad preemption provision, but with *no* federal action needed to support it. I know of no law in which Congress has attempted to preclude States from acting when neither it nor any federal agency has taken any action in that subject area. To be sure, there will always be questions about how much overlap there is between what the Federal Government has done and what the State wants to do, but that always assumes some federal action to support preemption.

An essential part of the testing phase is the gathering of data and its analysis. One draft bill that provided that any testing information (broadly defined) that was submitted to NHTSA was automatically exempt from disclosure under the Freedom of Information Act. As drafted, that restriction would not apply to submissions to state agencies, but there is a more fundamental objection to it. Federal regulators, with their limited budgets, will have serious difficulties reviewing all the data that comes to them. In addition, more eyes and brains focusing on accident and other performance data make it more likely that problems can be identified as early as possible. Last, in my admittedly limited discussions with others and from articles I have read, as well as surveys reported by the Auto Alliance, there is a considerable portion of the population that is very afraid of driverless cars and wants to stay as far away from them as possible. Many of those individuals may be willing to re-consider their positions, but if they learn that only NHTSA and the manufacturers will have access to the crash data and the reports of when the self-driving mechanisms require human intervention, their worst suspicions will be confirmed. In the end, the perception of safety is likely to be as important as the reality if

driverless cars are to penetrate the market and be acceptable to the population at large. There may be some legitimately confidential business information in some submissions to NHTSA, but not everything falls into that category.

Another draft bill dealt with both data privacy and cybersecurity. It would require NHTSA and the Federal Trade Commission to enter an agreement as to how those issues would be handled for HAVs. These are very important areas of concern, but I have my doubts that NHTSA should have any role in either, other than to implement what either Congress or another agency has mandated. On data privacy, the FTC should be given express authority to issue rules, to be implemented by NHTSA, on how to protect the vast amount of information that will be have to be collected by HAVs to perform their basic functions of getting from one place to another. Because there will be so much communication among HAVs, and between HAVs and the sources from which they take directions, the problems of assuring data privacy, in the actual operation of HAVS, is even more complicated than are the privacy problems we face today.

On the cybersecurity side, there are real dangers from hacking not only to individual vehicles and those in proximity with them, but to transportation within a city because hackers have the capability to disable all of a particular make of vehicle in a particular area, like Manhattan, and bring all of those vehicle to an instant stop. I cannot begin to explain or even understand all of the potential dangers, but experts make clear that the problems are very real and very dangerous. Plainly, NHTSA is not up to the task, especially because, like protecting data privacy, cybersecurity measures are always in need of updating. I do not know which agency or agencies should be brought it to perform a function like that the FTC will take on for data privacy, but surely NHTSA will need expert help from another part of the Government.

There are a number of problems that will become more significant in the deployment phase (as I define it), such as driver training for HAVs and advertising limits, but there is one area in which study should start now. As the NHTSA September 2016 Policy Statement observed on page 46:

“Rules and laws allocating tort liability could have a significant effect on both consumer acceptance of HAVs and their rate of deployment. Such rules also could have a substantial effect on the level and incidence of automobile liability insurance costs in jurisdictions in which HAVs operate.”

We all know that it is impossible to eliminate all error, human or computer, and so it is certain that, even if HAVs are much safer than our current vehicles, there will still be crashes, for which someone should be held liable.

Traditionally, auto accidents and product liability rules have been matters of state law, generally developed by state courts, on a case by case basis. Some scholars and others have suggested that this may be an area, like nuclear power was in the 1950s, in which liability laws, which form the basis for setting insurance premiums, require a uniform national liability answer, especially because HAVs, once they are deployed, will not stay within state boundaries. They argue that, in contrast to common law development, which can progress very slowly and depends on which cases reach the state’s highest court (and when), legislation can be acted on relatively quickly and comprehensively, without having to wait for the “right case” to establish the law. Moreover, HAVs will only become a majority of the vehicle fleet over a considerable period of time, and in the meantime, they will interact with more traditional vehicles in ways that create uncertainty, which may further slow down the deployment of HAVs unless the liability rules are clear.

I have no position on whether a national law is advisable, or what it would contain, but the issue of federal vs state liability law is already part of the discussion and it needs to be taken seriously. Because there are so many other HAV issues for this Committee to consider, perhaps the liability issue could be referred to the Judiciary Committee or to some other committee within the House. Because there are serious tradeoffs to make in this area, and because reaching consensus will not be easy, that is all the more reason why work on the liability issue should begin now, even though deployment is many years away.

From what I have learned, one of the first major areas in which HAVs will be deployed is the commercial transportation sector, which includes long distance trucks and buses. However, under the proposed California testing rules, vehicles over 10,000 pounds are precluded from testing, which almost certainly means that they will not be allowed to be sold/deployed until they are tested. I also noted that the draft bills precluded exemptions from being made available to large trucks. I understand that this exclusion may be because of the limits on this Committee's jurisdiction. Perhaps there should be some different restrictions on testing large HAVs, but it makes no sense to prevent them from being tested at all. On the other hand, it makes even less sense to allow them to be tested with no mandatory standards.

This brings me to another important issue: the impact of deployment of HAVs on workers, especially in the commercial transportation sector. If the supporters of HAVs are correct, potentially millions of drivers of trucks, busses, and taxis of all kinds may be put out of a job. While some will be able to be re-trained to be on the production or maintenance side of HAVs, many will not. Again, this is an issue on which long term thinking needs to start now and not when job displacement has its major impact.

My final point is directed to the Trump Administration and to Members of Congress who seem to take the position that all regulations, especially those from the Federal Government, are bad ideas. At GW's June 14th conference on driverless cars, there were many areas of disagreement, but on one point, there was convergence. Everyone agreed that, if there is to be a future for driverless cars in the United States, Congress and the NHTSA cannot sit on the sidelines opposing all new federal rules; nor should NHTSA simply issue voluntary guidance. Federal HAV standards are needed for sound public policy reasons, among other reasons because existing rules, which were written with a very different understanding of the roles of car and driver, will stand in the way of the deployment of driverless cars, even on a small scale and perhaps will even prevent advanced versions to be tested on the roads. But even if there were no federal regulatory barriers, federal standards directed at HAVs are essential, and far preferable to having fifty states and the District of Columbia all deciding how safe is safe enough to permit driverless cars to be deployed.

Thank you for your attention and I stand ready to answer any questions you may have.

SUMMARY OF
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The focus of legislation and regulation now should be on the testing phase for driverless cars, with testing to be limited to vehicles operated by the manufacturer. At this time, there should be no driverless vehicles operated by persons other than the manufacturer.

It is essential that Congress direct NHTSA to issue mandatory standards that apply to the testing of vehicles that have equipment in SAE categories 3-5.

If Congress does not step in, States will do what California is doing and regulate the testing and eventually the deployment of driverless cars. Doing nothing is not a viable option.

Preemption is permitted only when the federal government acts in an area, which it has not done for many of the features in driverless cars. Congress has no authority to preempt (forbid) States from regulating these vehicles unless there are federal laws in place.

There is a serious question of whether localities should be allowed to regulate the testing on driverless cars, such as by banning them entirely; restricting where and when they can be tested; and/or requiring warnings on those vehicles.

Crash and performance data for driverless cars should not be treated a confidential business information but should, with very limited exceptions, be available so that States, consumer groups, and the general public can have confidence that these cars are reasonably safe.

Data privacy and the dangers of hacking are very big concerns. The Federal Trade Commission should be given authority to issue privacy protection rules applicable to HAVs and other federal agencies should be directed to assist NHTSA in dealing with cybersecurity issues.

Liability questions need to be considered now, including whether there should be federal laws in this area.