

# Backgrounder

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## A Note to House and Senate Conferees About the Highway Reauthorization Bill

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The House leadership, fiscally responsible Members, and the President are to be commended for successfully cutting \$100 billion from the earlier highway bill (H.R. 3550) introduced by Transportation Committee Chairman Don Young (R-AK). If Chairman Young's plan—which would have spent \$375 billion over six years, compared to President George W. Bush's \$256 billion proposal—had been passed, that extra spending would have required a substantial increase in the highly regressive federal fuel tax at a time when gas prices are approaching record levels.

Though far from perfect, and still subject to a presidential veto threat because it would increase the deficit, the House-passed bill demonstrates that Congress can act in a fiscally responsible manner when determined to do so—and when the leadership and the President draw a deep line in the sand, making it clear that they are prepared to defend it.

Now that the House of Representatives has passed its version of the highway bill, the next step is a House-Senate conference, in which appointed representatives from each body will attempt to work out a compromise between two very different—and imperfect—bills. Whereas the House bill reduced its six-year spending levels to \$284 billion, the Senate's bill would spend \$318 billion by further expanding the already bloated budget deficit beyond the limit proposed in the House bill.

To date, the conflict between the President's plan and those passed by the Senate and the House has been limited largely to how much each would spend over the

### Talking Points

- The federal highway program has evolved into a national spoils system that allows influential constituencies to fund wasteful projects and frivolous diversions.
- The current highway reauthorization bill takes the unfortunate approach that capitalism and decentralization are risky concepts to be used in an experimental form under the supervision of federal employees.
- When considering the Transportation Equity Act (H.R. 3550), the following priority areas will require conferees' attention: earmarks, tolling restrictions, private-activity bonds, performance accountability, and the reopening trigger.
- Conferees should carefully consider the implications of these priority areas and whether they allow or disallow greater state spending flexibility.

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next six years. The President's proposal would spend no more than \$256 billion, compared to the House's \$284 billion and the Senate's \$318 billion. Conferees should accede to the President's spending target, and the President should veto any highway bill that spends more than this.

Yet excessive total spending is just one of many problems with the congressional proposals. Neither goes very far, either in allowing or encouraging innovative reforms or in eliminating wasteful programs.

The House–Senate conferees should rectify those deficiencies by including a broader tolling proposal, allowing for private-activity bonds, and encouraging more effective performance standards in exchange for greater state flexibility. Additionally, if the September 2005 reopening trigger remains in the final version, both Congress and the President should use the intervening year and a half to craft a better bill than any of the ones now on the table.

Although achieving a lower spending level is important to maintaining a modicum of fiscal hygiene, neither one of these bills would do much to alleviate the congestion and deteriorating road conditions that the motorists and truckers who fund the program with their fuel taxes confront each day. The real difference between these two bills is that one proposes to misspend *more* than a quarter of a trillion dollars, while the other proposes to misspend *less* than a third of a trillion dollars.

As analysts at The Heritage Foundation and elsewhere<sup>1</sup> have frequently noted, the federal highway program is more about spending than about transportation. Each year, about 35 percent (or more) of federal fuel tax revenues is siphoned off to purposes that do not benefit the average motorist or trucker.<sup>2</sup>

Since completion of the interstate highway system in the early 1980s, the federal highway pro-

gram has evolved into a grand, national spoils system that trendy and influential constituencies can tap to fund their pet projects. During the current reauthorization process, the House and Senate bills added new programs to divert millions of transportation dollars for bike paths, battlefield preservation, water runoff, and adolescent obesity.

Perhaps nothing better encapsulates the absurdity of this fact than the recent report that a museum (sponsored by a wealthy Fredericksburg, Virginia, developer in partnership with a local college) is seeking more than \$4 million in federal highway program grants to build a replica of a slave ship.<sup>3</sup> The slave ship would be housed in a museum that is planned as part of a 2,600-acre for-profit tourist and entertainment complex. According to the museum's application to the Virginia Department of Transportation justifying the request as a "transportation" project, officials of the museum-to-be actually wrote that "Ships played a vital role in the slave trade. Without ships there would have been no way to transport slaves to America."<sup>4</sup>

### Areas in Need of Repair by Conferees

Although the two bills' deficiencies are legion, the following priority areas will require the conferees' attention: earmarks, tolling restrictions, private-activity bonds, performance accountability, the proposed September 2005 statute-reopening trigger, and the implications that each of these has to allow greater flexibility for states.

### Earmarks

The House bill's large number of earmarks—euphemistically referred to as "high priority" projects by committee members and staff—is simply unprecedented. The bill was introduced with a record-breaking 2,800 earmarks, but Chairman Young later offered an amendment to add several

1. Ronald D. Utt, "Yes, Mr. President, Veto the Highway Bill," Heritage Foundation *Background* No. 1725, February 13, 2004.
2. Ronald D. Utt, "Reauthorization of TEA–21: A Primer on Reforming the Federal Highway and Transit Programs," Heritage Foundation *Background* No. 1643, April 7, 2003.
3. Elizabeth Pezzullo, "Museum Eyes Va. Grant," Fredericksburg *Free Lance–Star*, March 13, 2004, p. A1.
4. National Slavery Museum, application titled "National Slavery Museum: *Dos Amigos* Slave Ship Replica Project and Phase Breakdown," submitted to the Virginia Department of Transportation, Winter 2003–04, p. 2.

hundred more earmarks to the bill while it was on the floor of the House awaiting a final vote.

Of the more than \$1 billion these additional earmarks would cost taxpayers, nearly half that amount (\$440 million) was dedicated to Young's home state of Alaska.<sup>5</sup> Alaska, under the current law, already receives back from the trust fund about five times more than its motorists pay in.

Of course, once in conference, the Senate will add in its own earmarks to the final bill. As a consequence, the number of earmarks ultimately is likely to exceed 4,000. This is more than twice the number in the 1998 reauthorization—which itself had more than three times the number in the 1991 highway bill.

Congressional apologists contend that these earmarks are the axle grease that allows the great wheel of democracy to turn. They conveniently forget, however, that in 1981, when America was (by all reports) still a thriving democracy, the required lubrication for final passage of that year's highway bill amounted to only *ten* earmarks.

In past years, a Heritage report such as this one would have encouraged conferees to do the right thing and roll back the earmarks. This time, however, conferees should keep the faith with those special-interest groups seeking favors from the highway trust fund and accommodate their most outlandish demands. By doing so, they could set in motion a dynamic that would cause the program to collapse under the weight of public ridicule.

Would this work to keep down wasteful spending? Keep in mind that the only thing that brought about the development of a fiscally responsible highway bill was Chairman Young's extremist tax-and-spend proposal. By pushing a tax-and-spend agenda for most of 2003, the chairman unwittingly unleashed a public outcry. The White House, congressional leadership, media, fiscal conservatives, and even many members of his own committee were inspired to reject the original bill.

The spending totals in Young's final bill amounted to a surrender, the magnitude of which is seldom seen in the U.S. Congress.

Because Congress now provides more and more highway money for frivolous non-transportation purposes, motorists may soon reach a level of anger and mistrust toward the federal government that they have heretofore directed at their state Departments of Transportation (DOTs) by rejecting referendum after referendum to raise state fuel taxes.

While there is no prospect that conferees will reduce the number of earmarks in the final bill, they do have an opportunity to alter the law so that earmarks for one state do not come at the expense of highway money available for another. Under recent practice, earmarks received by a state came from a separate "earmark" account and were in addition to the state's formula allocation. By this mechanism, influential Members of Congress were able to disguise the fact that their states received more than others and that the losing states were shortchanged in comparison to the share of fuel taxes paid by their motorists.

Representative Jeff Flake (R-AZ) proposed that a state's earmarks count against the formula allocation so that no state lost funds to another because one had more influence than another. Representative Flake attempted to amend the House version of the highway bill to include this reform, but failed to get the necessary votes. Conferees should reconsider the Flake proposal and include it in the final bill in order to lessen the harm caused by the record level of earmarks the final bill is certain to contain.

### Tolling Restrictions

Fiscally responsible members of the House and Senate were successful in beating back Chairman Young's tax increase proposal. However, their revolution neglected to alter the fact that America's state and federal highway program still remains one of the world's largest socialist enterprises. As such, it will still require mountains of public funds and subsidies to stay in operation. Although America's socialist novelty act may be fascinating for business school case studies and junior high political science projects, the fact remains that tens of millions of taxpaying motorists remain locked in the maw of this Stalin-era enterprise.

5. *Congress Daily*, April 2, 2003.

Now that tax increases have been successfully defeated, many of the participants involved in the process (i.e., the White House, the Senate, the House, and organizations like The Heritage Foundation) have proposed that tolls be charged on some congested and/or deteriorated highways to add capacity and reconstruct roads. Some of these plans, in fact, were included in the original House version of the bill. Such tolls would be a user fee that could be levied as a supplement to the gas tax and serve as a more effective way to channel financial resources—paid by the road users—to pressing infrastructure needs.

The bill proposed by the Bush Administration, and the one passed by the Senate, included a number of tolling proposals and concessions that could have significantly increased the revenues flowing into the road investment system. In the House, several similar tolling provisions and demonstration projects were included in the bill sent to the floor, but an amendment to H.R. 3550 offered by Representative Mark Kennedy (R-MN)—and adopted by a majority in the House—either eliminated or circumscribed all but one of these toll provisions.<sup>6</sup> In their place, it added language similar to the Congressman's tolling proposal of May 2003, introduced as H.R. 1767.<sup>7</sup>

As currently written, this amendment limits tolling to existing interstates for new capacity and allows it only when a free option remains on the same corridor for use by those not wanting to pay the toll.<sup>8</sup> With the exception of rehabilitation pilots, the current version of the House bill, if enacted, would limit tolls to those interstate projects that meet these and other criteria. Many toll advocates and transportation officials believe that inclusion of this amendment in the final legislation would greatly limit the number of interstate expansion and renovation projects that could be accomplished over the next six years. By so doing, it also would limit the opportunity to bring addi-

tional funds into the system at a time when revenues generated by the unchanged federal fuel tax are likely to grow slowly.

Representative Kennedy's amendment reflects a legitimate concern about whether public officials would treat toll revenues as simply another tax to be diverted to non-transportation uses or to roads other than the ones charging the tolls. Such concerns are valid, and there is every likelihood that some tolls would be diverted to extraneous purposes or low-priority uses (such as transit). These diversions could occur in much the same way that a substantial portion of federal and state fuel tax revenues—allegedly a user fee spent in service of motorists—are diverted to bicycle paths, light rail projects, historic train stations, flower gardens, National Parks, replica slave ships, and various museum projects.

As the House and Senate conferees meet to settle the differences between the House's tolling restrictions and the Senate's more expansive provisions, a compromise solution would be addressing the potential leakage/diversion problem to require that all newly tolled facilities be legally restructured as independent not-for-profit corporations or as chartered for-profit partnerships. Each of these entities would be limited to only one highway in order to prevent inter-regional shifts; each could issue tax-exempt bonds to finance expansions and improvements; each would have an independent board; and each would operate under a legal charter mandating that all toll revenues raised on that highway remain on that highway.

Examples of such existing arrangements include the "63-20" not-for-profit corporation organized by the public-private partnership that built the Pocahontas Parkway in the Richmond, Virginia, area and the wholly private corporation that owns and operates the Dulles Greenway—a toll road operating in the Virginia suburbs of Washington, D.C. Transportation consultant Alan Pisarski has proposed similar

6. The remaining original provision—Section 1216(b)—allows for three pilot projects to test tolling as a way to finance the rehabilitation of existing interstates.
7. See Ronald D. Utt, "New Highway Proposal Fights Congestion with Fee-Based Express Lanes," Heritage Foundation *Executive Memorandum* No. 882, May 22, 2003.
8. There are other restrictions as well. See *ibid.*

institutional arrangements, called “Interstate Reconstruction Authorities,” that would fund such projects and protect the integrity of the revenue stream.<sup>9</sup>

While these arrangements might take care of one of Representative Kennedy’s concerns, they would not address his requirements that a free option also be available and that tolls be limited primarily to the provision of premium service in a corridor that offers both options—fee or free. Such conditions could be accommodated on some corridors—the existing partnership toll express lane proposals for Virginia’s I-495 and I-95 would meet these criteria—but many others would not, either because of space limitations or because of economic concerns about maintaining two parallel facilities servicing the same area.

### Private-Activity Bonds

In its original highway reauthorization proposal, the Administration proposed that Congress extend the privilege to issue up to \$15 billion of tax-exempt private-activity bonds to a limited number of highway projects involving private-sector partnerships.<sup>10</sup> The Senate’s bill included that provision, but the House failed to add a similar provision to its version of the bill. Conferees should make sure that either version of this proposal is included in the final compromise, and should also consider substantially increasing the allowable volume limits to more than the \$15 billion now proposed.

Over the past several years, several proposals have been advanced that would allow private investors and developers access to tax-exempt borrowing privileges. This would permit them to compete, or partner, more effectively with state and local governments to provide traditional public infrastructure such as roads, schools, and wastewater treatment.

In 1999, former Senator John Chafee (R-RI) introduced the Highway Innovation and Cost Savings Act (S. 470). This act would have allowed \$15 billion in tax-exempt private-activity bonds to be issued by private investors in a national demon-

stration project to build private toll roads, thereby easing traffic congestion by supplementing revenue from the federal fuel tax. Although the Senate passed it, Senator Chafee’s bill was not enacted.

In May 2003, the Bush Administration included in its highway bill a proposal to expand the use of private-activity bonds for highways and related infrastructure. The Administration proposed that as much as \$15 billion of such debt be made available for private toll road projects throughout the nation. The President’s proposals would allow private investors to use tax-exempt private-activity bonds to raise investment funds with which private or public-private partnerships could build new toll roads or toll express lanes.

In effect, roads could be built with borrowed funds at low interest rates, and the tolls collected on the roads would be used to service the debt and maintain the road. By using debt whose interest payments are exempt from federal income taxes, the private sector could participate more readily in highway investments and partnerships and compete more effectively with the public sector by eliminating the 30 percent borrowing cost disadvantage.

### Establishing Standards of Performance and Accountability

As with most other federal programs, the requirements imposed on states that receive federal transportation money focus on adherence to a complicated process of rules and regulations. This process-driven approach gives little thought to achieving any particular objective, such as reducing pollution, improving mobility, and/or reducing congestion. As a result, most states and the U.S. Department of Transportation have little incentive to spend this money in ways that make the biggest improvements or to direct it to areas where the need is greatest.

In effect, as long as the process-oriented rules are carefully followed, it makes little difference whether the end result provides substantial or trivial benefits to motorists. As a result, federal, state,

9. E-mail correspondence with the author, April 13, 2004.

10. See Ronald D. Utt, “Closing the Spending Gap Between Contending Transportation Reauthorization Proposals,” Heritage Foundation *Background* No. 1688, September 1, 2003.

and local politics—rather than legitimate mobility needs—often take precedence in determining both project-specific and regional fund allocation.

Because most of the common performance standards related to air quality and congestion mitigation can be independently quantified, an attractive alternative to the present system of allocating money would be to give the states more freedom and flexibility regarding how to spend federal highway funds. In return for greater freedom, states must make measurable improvements toward quantifiable objectives. Such quantifiable goals could include, for example, reductions in fatalities, reduction of average delays, reduction of daily road-congestion hours, or road surface quality.

Section 1801 of the Administration's plan included a provision to allow up to five states to conduct pilot projects under a new Surface Transportation System Performance Pilot Program. Under this program, states would be given more freedom to spend their federal apportionments in return for agreeing to meet a series of measurable performance standards.

Unfortunately, the Senate's version substantially limited the effectiveness of the Administration's performance proposals. Meanwhile, the House version of the bill includes no such provisions at all. Conferees should consider restoring performance language—similar to the Administration's original proposal—to the compromise bill.

The conferees should also consider making the pilot projects more expansive and allowing more than five states to participate. While some might view such a proposal as a risky change in the status quo, it would not be the first major federal program to be restructured that offered more freedom in return for measurable performance accomplishments and standards.

For example, President Bush's No Child Left Behind initiative, which was passed by Congress with large majorities and signed into law in early 2002, includes a flexible demonstration program that would allow a number of states and districts leeway in how they spent their federal education

money—provided that students' standardized test performance showed measurable improvement. If such standards can be applied to federal education programs, they can certainly be made an integral part of the highway program.

### **The Mandatory Reopening Trigger**

As written, the House version of the highway reauthorization bill includes the requirement that the legislation be reopened in September 2005—ostensibly for the purpose of resolving the donor-donee inequities that now pervade the federal highway program.<sup>11</sup> The current version of the House bill essentially holds donor states—primarily those in the South and Great Lakes region—hostage to such an event by underfunding them while allowing the recipient states—mostly in the Northeast—to continue receiving a disproportionate share of trust fund revenues.

The purpose of the mandatory reopening is to allow Congress to revisit the opportunity to raise highway spending either by increasing the federal fuel tax or by increasing deficit spending. Regardless of whether this provision survives, its inclusion presents both great risks and great opportunities for those who believe the current socialist model needs to be replaced by market processes, private-sector participation, and greater state discretion regarding how and where money is spent.

While the Senate bill takes some hesitant steps in the direction of reform, it is still too timid to be of much benefit—relying as it does on pilot projects and studies to advance innovation. Yet, in fairness to the Senate, its bill largely follows the “boldness parameters” established by the equally timid proposal submitted by the Administration. As experience reveals, Congress seldom makes a bold plan better. More often than not, Congress will make a timid plan even more cautious because it is reluctant to leave the warm embrace of the status quo (and all of the privileged and influential constituencies who benefit from that embrace).

Should there be a mandated reopening provision in whatever bill Congress passes, the Administration must counter that prospect—and the related

11. See Utt, “Reauthorization of TEA-21: A Primer on Reforming the Federal Highway and Transit Programs,” pp. 14–17.

threat of a gas tax increase—by putting forth a better bill than the one they offered in 2003.

### Conclusion

The current highway reauthorization bill takes the regrettable approach that capitalism and decentralization are risky concepts to be used in an experimental form under the supervision of federal employees. The American motorist

deserves better than that, and a new Administration proposal must include substantial and far-reaching improvements such as those described above and elsewhere.<sup>12</sup>

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12. See Utt, “Yes, Mr. President, Veto the Highway Bill.”