Legislative Considerations for Long Term Policy Change

Mortimer L. Downey III

Introduction

The goal of the Pocantico roundtable is to develop a strategy for national surface transportation policy in America that can respond effectively to the long term trends. The development of this country over the next several decades will be shaped by rapid population growth as America moves toward the 400 million mark, by the emergence of "megaregions" as our growing population concentrates in areas of economic relevance, and by the rise in international trade and shift in goods movement patterns as the world economy integrates more fully and America relies to an increasing degree on imported goods. At the same time, national and world attention must be placed on climate change, reducing our carbon footprint to minimize the impact of development on our fragile global eco-systems.

The way our transportation systems develop must be a key element in arriving at the outcomes we desire. Transportation investment could help shape the new America or it could continue to contribute to a pattern of development and energy use that exacerbates our problems. While transportation development is in some ways a response to consumer demand, it is also a response to the governmental policies that provide the framework for transportation investment.

Those governmental policies have traditionally been expressed in national transportation legislation. While implemented through a variety of governmental institutions and levels, they are responsive to the vision and the policy direction embodied in national legislation. If we hope to change transportation policy and programs to move in a supportive direction, we must make appropriate change in federal policy, and the first opportunity to express such policy change will come with the enactment of a new surface transportation program in 2008 or soon thereafter. The challenge is not only to identify what kind of policy we would like to see but to create the climate in which such change becomes possible.

Historical Perspective

Federal surface transportation policy is embedded into legislation on a cyclical basis, with consideration of new bills occurring every few years. This cycle used to be two years, and then lengthened to four or six year intervals, responding to the need for greater funding predictability in order to support state and local transportation plans and investments in multi-year capital projects. Thus, the opportunities for change in policy are infrequent, and the differences from bill to bill are typically at the margins. In particular, the question of appropriate funding and tax levels is taken up very infrequently. Nevertheless, there are long term trends and cycles that we see by looking back over the history, and it is just such a long term change that we need to support the development we seek.

Looking back over more than a century of federal transportation policy change, one can see three past waves of legislation, each with its own vision, its own outcomes and its own set of policies and institutions. Each wave plays out over a period of decades, with evolutionary change followed by a period of implementation and then evaluation of results and resetting of direction. Changing the course of transportation development will, in all likelihood, mean the encouragement of a fourth wave with its own vision and implementation strategies. If it is true that changing the direction of this massive program always takes many years, then all the more reason to begin now if we want to shape a better outcome for the mid-century.

The Era of "Good Roads"

While national support for transportation investment goes back to the beginnings of the republic and the era when Hamilton's policies of internal improvement spurred public and private investments like the National Road or the Erie Canal, the roots of a surface transportation program (more broad than just project investments) go back to the end of the 19th century. The Good Roads program, begun by bicyclists even before the widespread adoption of automobiles, led to the establishment of the Office of Highway Inquiry under General Roy Stone in the early 1890s, with its program of research and demonstration. More than 20 years elapsed before a full-fledged program of federal investment was enacted in 1916 and codified in the Federal Highway Act of 1921. Parenthetically, if the next reauthorization bill follows the recent pattern of six year funding, its final year will mark the completion of a century of federal investment in our transportation system.

Under that 1916 legislation and its many successors, the federal government provided limited assistance to states for the construction of an initial road network to provide for local mobility. The central vision could be expressed as "get the farmers out of the mud," with the product essentially the first generation of paved roads. The federal role was a constrained one, with the states evolving into the primary role of planning, designing and constructing the network. This vision and program continued with only limited change well into the 1950s. Investment levels rose and fell in periods such as wars and depression but the basic nature of the program remained steady.

The Era of Interstate Construction

As early as the mid-1930s, there was consideration of a new and more active federal role in surface transportation, or more accurately put, highway construction. Sketches and studies for a national network were put on paper during the Great Depression, with encouragement from President Franklin D. Roosevelt. But, as in the case of the Good Roads era, two decades intervened before the policy thinking emerged as legislation and program implementation. The enactment of the Federal Aid Highway Act of 1956 set in motion the construction of the Interstate and Defense Highway System, with its vision of an interconnected America—"coast to coast without a red light."

Having defined both the vision and an implementing mechanism through a Highway Trust Fund dedicated to the task at hand, the country embarked on building that national network, one which was planned to take 20 years to complete, although it ultimately required 40. In this period, the Bureau of Public Roads, later renamed the Federal Highway Administration, emerged as the key agency, setting standards, coordinating routings and overseeing the quality of construction. With the ultimate power inherent in a "cost-to-complete" funding mechanism, the BPR/FHWA was central to transportation policy and development in an era that ran into the early 1990s.

The Post-Interstate or "SAFE-T" Era

Just as the thinking about the Interstate Era began well before a new vision emerged, policy about a post-Interstate era evolved over a few decades. Concerns about the impacts of highway investment were expressed in the early 1960s and federal policy moved towards a multi-modal approach. Congress created a parallel program for mass transit in the mid-60s, one which has grown into today's Federal Transit Administration. That program was rooted in federal concern for housing and urban development and the implications of that fact continue to drive some of the complexity of federal legislation.

In the late 1970s, the Administration and the Congress began the practice of more comprehensive surface transportation bills with the enactment of the 1978 Surface Transportation Authorization Act. Committee jurisdiction reform in the House of Representatives made this combined approach possible for the first time. Going forward from that point, interrupted by a period of budget battles during the Reagan Administration, the new era began to take shape with the enactment of ISTEA—the 1991 Intermodal Surface Transportation Efficiency Act.

The new vision embodied in ISTEA was carried forward in its two successors, TEA-21 and SAFETEA-LU, enacted in 1998 and 2005 respectively. Its hallmarks include **S**ecure **a**nd **F**lexible funding, with a strong degree of **E**nvironmentally **T**argeted investment, hence the descriptor of this as the SAFE-T era. Provisions such as the TEA-21 budget firewalls gave greater assurance that funds collected for transportation would be spent. Flexibility in funding, which had begun as early as 1970, was greatly enhanced in this era. Provisions such as Congestion Management and Air Quality (CMAQ) funding program and the conformity requirements that knitted transportation and clear air programs together provided the idea of environmental targeting.

In terms of institutions, the era saw the development of greater powers and responsibilities for Metropolitan Planning Organizations (MPOs), although within a framework that continued a strong state role and allowed for wide variation in the form of the MPOs. Federal policy was oriented much more towards enabling local determinations within a framework of process rules, in contrast to the strong vision of the Interstate Era.

On the negative side, this era was also marked by severe disputes over funding allocation, almost to the point that could threaten a future federal role. Concern over respective shares of gasoline tax receipts drove towards ever more complex mechanisms for funding distribution, coupled with a drive towards "earmarking" of specific local projects that achieved epidemic proportions in the 2005 legislation.

The Fourth Wave

If we seek different outcomes for future transportation investment, it is important to design a policy framework that will encourage the directions we seek. An America of megaregions doesn't match either the state or the metropolitan boundaries that define current program implementation. A future that is increasingly multi-modal, both for travel within and between these regions, will need even greater flexibility in supporting investments of all types. An economy that is dependent on international trade as well as on continent-wide distribution of goods must design and implement freight systems at that scale. And such systems must take into account the mixed public-private nature of freight transportation.

Financial support for transportation systems into the future is also becoming more complex. While no one expects an overnight collapse of our current gasoline tax supported system, the strains are evident. Marginal changes in revenues over the SAFETEA-LU period have put the Highway Trust Fund's highway account in a position of being overdrawn before the end of 2009. Longer term, the growth of alternative fuels and the continued positive trend toward fuel economy act as a restraint on revenue growth. A trend towards public-private partnerships with equity shares in our infrastructure suggests the promise of new resources, but requires considerable institutional change to become a reliable part of our investment strategy.

Figure 1. **Evolution of National Transportation Policy 1800s - 2000s**

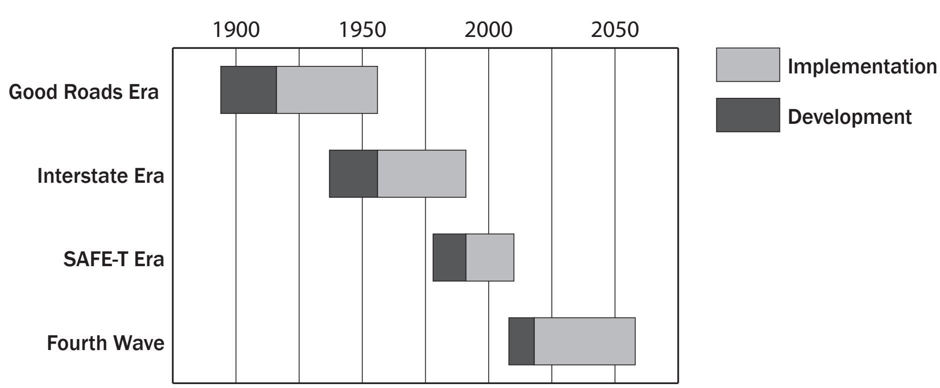

Figure 2. **Earmarks in Highway Reauthorization Bills 1982-2005**

Year of Bill	Earmarks
1982	10
1987	152
1991	538
1998	1,850
2005	6,371
Source: Heritage Foundation Backgrounder #1924	

Prospects for Change

Recognizing the magnitude of change needed to bring about a redirection of surface transportation legislation and policy, what are the prospects and strategies for effecting such change, beginning with the consideration of "T-4" in 2009? History tells us that such major change in direction will take time to implement, and must be accompanied by a vision of the outcomes it seeks to accomplish. At the same time, the enactment of new legislation is in many ways an incremental process. Each new bill builds on the successes and failures of its predecessors, and must be managed within the political context and institutions of the times. This will be the case in the upcoming cycle. Enactment of a successor bill to SAFETEA-LU may well be on a "forced-march" scenario. The current bill was enacted to cover the period ending September 30, 2009, although it is uncertain whether there will be sufficient revenues in place to carry through that date. If nothing is done to fill that revenue gap, the need for legislation, perhaps of a stopgap nature, becomes even more urgent. While some debate and consideration of a new bill will take place during 2008, possibly drawing on the report and recommendations of the National Surface Transportation Policy and Revenue Study Commission created by SAFETEA-LU, the realistic expectation is that actual legislation will fall to the President and Congress who will be elected in November 2008 to take office in January 2009. We cannot predict who will hold those offices, except to note that the new President will be taking national office for the first time, since neither the incumbent President nor Vice President will be seeking reelection. While Democrats now control both Houses of Congress, their narrow margins in one or both Houses could be overturned. While the need for reauthorization will be there, it may be overshadowed by the work underway to organize and staff both branches. If new ideas and issues are to be inserted into the reauthorization debate, it is important that they be surfaced now, rather than waiting until 2009.

Programmatic Inertia

Bringing about change will require that the vision for change overwhelm the natural tendency to model a new piece of legislation on its predecessors. In the case of surface transportation, this has meant a renewed effort to rebalance revenues and expenditures to further close the gap between "donor" and "donee" states—an exercise that is both difficult and time-consuming, even as it stifles the potential for new investments or initiatives at a national scale.

Inertia has also meant that more and more attention has been placed on so-called "earmarks," the specific named projects whose numbers have grown exponentially in recent legislation. While once prohibited by the rules of the House of Representatives as constituting specific items on a general authorization bill, they had come by SAFETEA-LU to be a dominant component of the legislative exercise, almost driving out consideration of programs and policies while lobbyists and legislators sorted out the pork. The table below shows the growth in highway project earmarks alone; recognizing that legislation also carries specific items for transit, railroad corridors, research programs and other categories.

Potentially, the negative public reaction to earmarks of all kinds that permeated the electoral debate in 2006 may have a tempering effect of this phenomenon, but only time will tell. Leaders of the Congressional committees who need support for their bills have set the pattern in the past that raises expectations of future earmarks, and the very large projects that those leaders include in the bill are masked by the many small projects doled out to the rank-and-file membership.

Programmatic inertia will also be reflected in the positions brought to the debate by interests groups of all types. Those whose current interests are served by the status quo will be reluctant to entertain change. These interests range from the construction interests who understand how they are benefited by current programs, to environmentalists who want to retain current planning and review processes, to state and local agencies who hope to hold their place in the current constellation of programs.

Institutional Inertia

Paralleling the tendency to revisit the same issues that were in past bills is the fact that legislation must be maneuvered through the same institutions that brought us past bills. Within the Administration, the Department of Transportation, sometimes balancing the views of its constituent agencies, carries the primary responsibility for developing and defending legislation. Introducing the broader perspective of national and regional development calls into play the views of many other federal agencies—EPA, Energy, Commerce, Treasury and others—and requires strong coordinating intervention at the level of White House agencies like the OMB, CEQ and various policy councils. Focus on this legislation competes with many other international and domestic priorities.

A similar lack of focus exists within the Congress, particularly in the United States Senate. Committee jurisdictions have a very strong influence on legislative outcomes, yet the jurisdictions are often shrouded in ancient history and past controversies. Successive realignments in the House of Representatives have brought most transportation issues under one roof within the House Committee on Transportation and Infrastructure, although there are still sharp modal boundaries at the subcommittee level. One subcommittee does manage what has become the traditional "surface transportation legislation" that authorizes highway and transit programs, but other key transportation elements, like intercity passenger and freight railroads, aviation and airports, and water transportation are in separate subcommittees and therefore in separate legislative vehicles. If policies for these various modes need to be optimized to support a vision for regional development, new institutional paradigms will be needed. And if other topics such as energy, climate change or urban development are part of the process, even greater institutional barriers must be overcome. As a case in point, the new Democratic House Speaker, Nancy Pelosi, is finding it difficult to pull together the strands of policy and program involved in climate change into even a special, non-legislating, select committee.

In the United States Senate, the situation is both more complex but potentially more easily resolved. Traditional patterns of jurisdiction keep the modes of transportation and their programs in separate bundles. Highways, waterways and environmental issues are managed within the Senate Committee on Environment and Public Works. Because the transit programs were originally part of the national commitment to housing and urban development, they fall in the jurisdiction of the Senate Banking Committee. And the balance of the transportation modes—railways, aviation and maritime transportation, as well as highway safety—are the province of the Senate Commerce and Transportation Committee. Within both House and Senate, programs once authorized are then funded by, or at least constrained by, the respective Appropriations Committees and their strong Transportation and Urban Development subcommittees, as well as by the tax and trust fund measures overseen by the House Ways and Means and the Senate Finance Committees.

One potential for coordinated action in the Senate rests with the possibility of the entrepreneurial individual Senator or Senators whose interests span across committees. While in the larger House of Representatives, individual members, by rule or custom are limited to a small number of committee assignments, the smaller Senate affords far more opportunity for overlapping memberships with the opportunity to influence issues across boundaries, both in terms of authorizations and appropriations.

Developing an Action Agenda

If the goal is make the national surface transportation investments more relevant to the style of development we hope to see in 21st century America, we need a specific action agenda—elements that could be proposed for inclusion in a 2009 legislative vehicle. Even if these are only interim actions in the evolutionary tradition that has marked prior eras, they can help set the stage for future legislation and programs. Where total reform may not be practical, incremental change in the right direction is a way to change the ultimate course. At least seven areas, as described below, would be priorities for development of a new focus. The extent to which the next bill deals successfully with these issues will determine whether there is hope for a strong federal role in the future.

While overcoming inertia is a difficult challenge, some of the policy debates within and outside the transportation arena may help set the stage. In the coming years, it is likely that the U.S. Government will come to grips with climate change and its implications. At the state and local levels, voters are showing greater frustration with the impact of congestion on their daily lives. Analysts and pundits are pointing to new solutions and new policies, and we are seeing some tentative steps to test out ideas like toll financing or value pricing. Spokesmen for industry are beginning to ask what government will do to avert the gridlock that will retard economic growth by reversing the decades-long trend towards more efficient freight transport and logistics. The combined impact of these and other concerns could be the springboard for a serious debate about our current transportation policies and institutions and how they can better serve our future needs.

Institutions – First, it is clear that existing institutions and boundaries do not match up to the scale of the regional issues. Just as Metropolitan Planning Organizations, enacted as a requirement of federal funding for plans and programs, have been an imperfect but essential element of the "SAFE-T" era, we need to design a basis for multi state "Megapolitan Planning Organizations" to begin the development of plans and programs that can address 21st century challenges. This suggestion does not imply that our current MPO's have been fully effective. In fact, we know that they are flawed, but at least some have overcome their constraints and brought a degree of rationality to the debate. If we look to develop institutions of broader geographic and political scope, we need to consider what has and hasn't worked in our current metropolitan area. A step in this direction, either as a mandate or on a voluntary basis, could begin to develop appropriate relationships. Over the past few years, the lack of such institutions has hindered the development of passenger rail corridors and new interstate highway alignments, and new agencies might be structured along those lines. Existing agencies, such as the long-standing Appalachian Regional Commission or the relatively new Delta Commission could set the pattern. With a flexibility to bring together the levels of government and the agencies that cover areas of economic and social interaction, but without a mandate to become "super-governments," such institutions well have to have access to or control over funding to make them more than debating clubs or rubberstamp organizations.

Funding Flexibility – Building on the history of the "SAFE-T" era, additional steps in funding flexibility would help build a basis of future investment. The mix of modal investments varies now by state and metropolitan area and is similarly likely to vary in the future megaregions. Now may be the time to incorporate what is now viewed as intercity transportation—Amtrak and buses—more directly into the planning and funding environment so that developing regions are not constrained in their transportation investment choices by rigid modal and programmatic categories.

Earmark Control – Getting serious attention to the issues of the future means that the transportation legislation has to be taken seriously, and the recent explosion of earmarks has contributed to diminishing its stature. When the editorial cartoonists can have the easy target of a "bridge to nowhere," it is hard to refocus on the broad policy issues. But at the same time, we cannot totally move away from a project focus. There are areas where federal action is needed to authorize specific investments. What we need to create is a process whereby these are rationalized and justified programmatic decisions that are endorsed and given weight by legislative endorsement.

Adequate Resources – Meeting the challenge of future needs will without question strain our resources. A very important challenge for 2009 will be the establishment of realistic funding levels and mechanisms. Funding needs must be addressed not only at the national but at the regional, state and local levels, with the objective of meeting both the needs of maintaining the performance of our existing assets and the opportunities for future investment to support effective and efficient growth. To the extent that future development cuts across traditional jurisdictions and boundaries, this balance of need and resources will become even more difficult. Inclusion of new mechanisms such as public-private partnerships will help with the resource issues, but only if they can operate within the institutional framework. It will be important as well that the recent actions to provide for solid funding guarantees are continued. Major new investments, especially ones that cross boundary lines, need solid assurances of funding availability over a multi-year project development cycle. Annual appropriations review is important for on-going governmental activities, but capital investments need a different form of legislative oversight.

Sustainability – One aspect of the vision for future development will be its contribution to sustainability. A key element in the legislative program for 2009 will be to create means to make this vision an operational reality. One of the success factors for the 1991 ISTEA bill was the linkage it created to Clean Air programs through careful dovetailing of transportation and environmental legislation. Now is the time for a similar effort to tie together our climate change concerns with our transportation plans and developments. Perhaps it is as simple as including greenhouse gases in the equation for consideration of conformity, making the reduction or mitigation of such gases a prime factor in system and project planning. Such a step would bring about far more ingenuity in policy and technology development, including the potential for inclusion of transportation projects and operations in comprehensive "cap and trade" mechanisms.

Goods Movement – Special attention to goods movement will be a necessity for both short and long term transportation progress. As our economy becomes more international in its focus, efficient goods movement is an essential element, but one which is constrained by the geography and politics of the system. We have seen how the key elements of the freight system are constrained by local funding or impact issues, even though they serve the requirements of broad areas of the nations. National intervention may be needed if all regions are to share in the benefits of the developing world economy.

Research and Technology – Finally, we can work towards a much stronger federal commitment to policy and technological research as well as technological development. Managing the investments to support 21st century America calls for innovation in all these realms. Past generation of transportation and development rested on a strong framework of federal support—encouraging new thinking about how we develop and new tools to support that development. The coming shape of regional development, with people interacting across greater distances, may require technologies or services beyond what exists today. Meeting financial needs and providing direction in sound investment must be based on a sound body of knowledge. Re-establishing a strong federal role in these areas will pay important dividends over the next 50 years and this should be among our top legislative priorities.

Breaking Through

Past waves of transportation legislation have occurred when there was consensus on need and a new vision that met the issues surrounding that need. If we seek to introduce a new set of policies and programs to serve the changes coming to America over the next several decades, it is important that we establish firmly that current policies will not take us where we want to go, that the consequences of moving in such directions are necessary and that new paradigms offer the tools that are needed. That is what brought us from era to era in the past. It is the message we need to bring to the upcoming debate about the future.