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Week of August 17, 2009

The House and Senate are in recess for the August District Work Period. They will return to Washington after Labor Day, in September.

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The History of Transportation Trust Funds, Pt. 1

As has become traditional over the long August and November-December Congressional recesses, Transportation Weekly becomes Transportation Bi-Weekly. And since almost no news of any value is made in Washington over these recesses, we take this opportunity to publish long, multi-part feature pieces. The last two in this series dealt with two of the three reasons why federal spending on highway, transit and airport programs is unique in the federal budget — the use of contract authority as their form of budget authority, and the use of annual limitations on the obligation of that contract authority. There is a third factor making these programs unique — they are all draw their financial support from federal trust fund accounts. This article examines the nature of federal trust fund accounts and how the transportation trust funds got started.

In particular, the recent proposal by House Transportation and Infrastructure chairman James Oberstar (D-MN) to the House Ways and Means Committee — that among the options Ways and Means should consider for financing the next surface transportation authorization bill should be a $60 billion bond issuance to be repaid by future tax collections — is eerily reminiscent of a failed proposal of 54 years ago that led to the creation of the Highway Trust Fund...

(Opening acknowledgement: The parts of this article dealing with the nature of federal trust funds in general draws heavily on the one book ever written on the subject: *Putting Trust in the U.S. Budget: Federal Trust Funds and the Politics of Commitment,* by Prof. Eric M. Patashnik.[1] This article tries to summarize without plagiarizing, but everyone interested in the topic is strongly urged to check out the book.)

Accounts in the federal budget that collect tax revenues from specific sources and reserves those funds for the use of specific federal spending programs are often (but not always) referred to as trust funds. In totality, the budget has six different types of account: the "Federal Funds" group which includes the general fund, special funds, public enterprise funds, and intragovernmental funds, and the "Trust Funds" group which contains nonrevolving and revolving trust funds. The distinctions between types of account are not always obvious, but in the annual *Appendix* to the President's budget, each account is given a specific numerical code by the Treasury in the following format: xx-xxxx-x-x-xxx. For example, the federal-aid highway program's code is 69-8083-0-7-401. The first two digits are the agency ID code (DOT is 69), the second four digits are the unique identifier of that account within the agency, the next digit identifies the timing of the budget estimates (zero means the regular annual budget submission), and the next digit represents the type of fund. The number seven indicates a nonrevolving trust fund (the general fund is number one, naturally). The last three digits are the budget subfunction code in which the account is classified (401 is ground transportation).

This article ignores revolving trust funds and their Federal Funds counterpart, public enterprise funds, because those are simply holding mechanisms for the funds flowing in and out of business-like transactions (transportation examples are aviation war risk insurance and TIFIA). Most federal trust funds that come to mind when one thinks of the term are the non-revolving kind. Social Security is by far the most prominent federal trust fund, but the table on the following page identifies the twelve major federal trust fund accounts that currently exist and sums up the finances of the 100+ minor ones.

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The History of Transportation Trust Funds, Pt. 1—Continued

But what are these accounts, really?

What federal trust fund accounts are not. To begin with, it is important to understand just what a trust fund represents in the "real world" (the private sector) versus what a federal trust fund account represents. Patashnik says that in the real world "…a trust is a fiduciary relationship in which one person (the trustee) holds property for the benefit of another (the beneficiary). The trustee's obligation under trust law is to manage the assets of the trust property 'solely in the interests of the beneficiary.'"[2] Patashnik does not emphasize another inherent part of the real world fiduciary obligation – that the trustee must avoid comingling the beneficiary's moneys with his own. For example, were a trustee to loan the entirety of a beneficiary's trust fund moneys to himself to cover a personal debt, or invest the entirety of the trust fund in the trustee's own business or purchase the trustee's company's own corporate debt, these would be strict violations of the trustee's fiduciary obligation.

FEDERAL TRUST FUND ACCOUNTS IN FISCAL YEAR 2008

(Billions of Dollars)

Trust Fund Account	10/1/2007 Balance	Surplus/ Deficit	Interest Credited	9/30/2008 Balance
Airport and Airway	10.1	(0.8)	0.4	9.7
Civil Service Retirement and Disability	701.7	(10.0)	37.2	728.9
Federal Employees Health Benefits	15.8	(0.9)	0.6	15.5
Foreign Military Sales	9.5	4.7	-	14.2
Highway	15.4	1.4	-	16.8
Medicare (Hospital Insurance)	310.9	(7.9)	15.9	318.9
Medicare (SMI)	47.6	8.4	3.2	59.1
Military Retirement	216.0	19.4	15.5	250.9
Railroad Retirement	30.7	(7.5)	0.1	23.3
Social Security (OASDI)	2,180.8	71.9	113.7	2,366.4
Unemployment	76.9	(6.5)	3.6	73.5
Veterans Life Insurance	11.9	(1.1)	0.7	11.5
All Other Trust Funds	60.3	1.7	2.4	64.4
Total, Trust Funds Group	**3,867.0**	**72.7**	**193.3**	**3,953.1**

Source: Budget of the United States, Analytical Perspectives, FY 2010.

By contrast, none of the major federal trust fund accounts work this way. A 1988 GAO report said that: "In the federal sector, the Congress creates a federal trust fund in law and designates a funding source to benefit stated groups or individuals. However, in contrast to a private trust fund, the federal government does not have a fiduciary responsibility to the trust beneficiaries, and it can raise or lower trust fund collections and payments or change the purposes for which the collections are used by changing existing laws."[3]

Furthermore, under the current practice, once money is deposited in the U.S. Treasury and then credited to a trust fund account within the Treasury, all of the balances held in federal trust fund accounts must, by law, be invested in debt issued by the Treasury, which means that whenever the federal government is running an annual deficit, the balances of the various trust fund accounts are automatically used to finance the deficit. This means that for federal trust fund accounts, the federal government acts simultaneously as the trustee, the financial institution in which the moneys held in trust are deposited, the issuer of the securities in which the trust fund moneys are invested, and the backer of the currency in which the transaction is being conducted. And, of course, the federal government is the collective embodiment of "We, the People of the United States," so in any federal trust fund account supported by the tax payments of U.S. citizens (be they flesh-and-blood or corporate), the beneficiaries and the trustee are one and the same.

There are a few instances where the federal government manages something analogous to a real world trust fund. In the federal Thrift Savings Plan, the federal government is technically the custodian of the federal employees' TSP (basically similar to a 401(k) plan) assets, but does not have any ownership of, or control over, the assets. And the oldest federal trust fund accounts (Indian tribal trust funds) contain non-federal assets, and the federal government's management of those tribal trust funds comes with a legal fiduciary obligation. So neither the TSP nor the tribal trust funds (since 2000) are part of the federal budget in any way (they are now called "deposit funds" to distinguish them from trust fund accounts).

While some of the differences between real world trust funds and federal trust fund accounts do not matter much in the day-to-day operations of the funds, there is one crucial distinction: return on investment. Real world trust funds involve the trustee investing the beneficiary's money in something that will provide a return on investment. If the money is invested in a security, that return on investment takes the form of interest payments. Those interest payments are made by some third party who is neither the beneficiary nor the trustee – the receipt of interest on the trust fund investment increases the net combined wealth of the beneficiary and the trustee.

By contrast, when federal trust fund accounts invest their money in U.S. Treasury securities, if those securities bear interest (as they do for almost all trust fund accounts except the Highway Trust Fund), any interest paid comes from the general fund of the U.S. Treasury. The interest "payment" is a simple ledger entry moving money from the general fund to a trust fund account. The interest received by the trust fund account is paid by the trustee, not a third party (and remember, the trustee is actually We, the People, so the trust fund account beneficiaries are paying part of the interest, as well). Interest payments on federal trust fund accounts do not increase the net combined wealth of the beneficiaries and the trustee.

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The History of Transportation Trust Funds, Pt. 1—Continued

By way of analogy: assume that I walk to the nearest ATM machine, withdraw $100, and put it all in my right front pants pocket. A moment later, I take $20 from my right pocket and move it to my left front pants pocket. At the end of the day, I take that $20 and put it back in my right pocket. Does my left pocket then owe my right pocket interest on that $20? And if it does, where does the money to pay that interest come from? How would a pocket-to-pocket interest payment generate any "real" money for anyone?

What federal trust fund accounts <u>are</u>. A federal trust fund account *should* be any account in the Treasury to which certain specific tax receipts, user fees, or other revenues are dedicated, but it's not that simple. At its heart, a federal trust fund account is whatever Congress says it is. A 1988 GAO report said that "The deciding factor in determining budgetary designation as a trust fund is whether the law that earmarks receipts to a program also identifies the account as a 'trust fund' account…Because there are no generally accepted governmental definitions to guide the Congress in designating an account a trust fund account, the Congress approaches the matter on a case-by-case basis. This results in statutory trust fund designations at variance with customary trust fund concepts and usages in the general public. Also, federal programs similar to one another are inconsistently designated."[4]

One example of the latter listed in the FY 2010 federal budget: "For example, the National Service Life Insurance Fund is a trust fund, but the Servicemen's Group Life Insurance Fund is a Federal fund, even though both receive dedicated collections from veterans and both provide life insurance payments to veterans' beneficiaries."[5]

While we have established that federal trust fund accounts are not "trust funds' in any meaningful real world sense, they do serve several important purposes.

Patashnik mentioned the "politics of commitment" in his book's title, and the primary purpose of federal trust fund accounts seems to be to attempt to bind the hands of future Congresses and future Presidents with respect to certain tax and spending decisions – as Patashnik says, federal trust fund accounts are "consciously crafted political mechanisms intended by their designers to bind the government to its promises to the public, its constituents."[6]

Legally, the Supreme Court has declared repeatedly that one Congress cannot bind the hands of a subsequent Congress except by constitutional amendment. Any law passed by one Congress can be repealed by a subsequent Congress. Any internal rule change in the House or Senate can be repealed in the subsequent Congress. And any budgetary promise made today by Congress can (and often is) reneged upon by a subsequent Congress when the bills come due.

Specifically, Patashnik notes that trust funds try to give some federal programs a privileged status above, and resistant to the restraints of, the annual budget process: "The trust fund device has been an important mediating factor at the level of individual programs. Trust fund financing clearly does not eliminate the impact of other political forces, such as struggles among contending interest groups. But trust funds *do* influence how these struggles play out by distributing procedural advantages, reinforcing symbols of moral deservedness and blame, and affecting perceptions of political fidelity and defection. A striking finding is just how much attention is paid by politicians and interest groups to trust fund accounting, and how the legislative dynamics of program like Social Security and Medicare are affected by seemingly 'artificial' changes in trust fund forecasts. "[7]

Recent history demonstrates the truth of this – one simply has to look at all of the news coverage given each year to the reports of the Social Security and Medicare Trustees projecting the long-term insolvency of those trust funds (and all of the ink this publication has given to the insolvency of the Highway Trust Fund), even though none of those issues relate to the ability of the federal government to pay its bills (only which Treasury account the bills are paid from). Contrast that with the almost total lack of news attention given to the recent Congressional Budget Office long-term budget outlook report, which paints a frightening picture of a federal government becoming unable to pay any of its bills without deflating the currency and destroying national savings.

In essence, a trust fund account offers a way of correlating and tracking certain tax payments with

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Establishment of Major Federal Trust Funds

Year	Fund
1919	Government Life Insurance
1920	Civil Service Retirement and Disability
1935	Unemployment
1939	Social Security
1940	National Service Life Insurance
1954	Employees Life Insurance
1956	Disability Insurance
1956	Highway
1960	Retired Employee Health Benefits
1965	Medicare (HI and SMI)
1970	Airport and Airway
1977	Abandoned Mine Reclamation
1977	Black Lung Disability
1978	Inland Waterway
1979	Deep Seabed Revenue Sharing
1980	Superfund
1984	Aquatic Resources
1986	Harbor Maintenance
1986	Leaking Underground Storage Tank (LUST)
1987	Vaccine Injury Compensation
1989	Oil Spill Liability
1990	Radiation Injury Exposure Compensation
1991	National Recreational Trails

The History of Transportation Trust Funds, Pt. 1—Continued

certain federal expenditures over a long-term period. While a trust fund account by itself does not guarantee that Congress will live up to budgetary promises, it does provide heightened visibility for those promises, which increases political pressure on Congress to live up to those promises.

Patashnik lists several other purposes Congress has tried to serve by establishing trust fund accounts (aside from the aforementioned reducing uncertainty in future funding decisions by binding future decisionmakers to present-day commitments). The most compelling is making users pay for the government benefits they are receiving. Patashnik cites many federal trust fund accounts as being based on the "benefit taxation" model, whereby the taxes are levied based on the usage that the taxpayer gets out of the program funded by the tax (in direct opposition to the "progressive taxation" model that bases taxes on the ability of the taxpayer to afford higher taxes). After citing the Highway Trust Fund as a prime example, he then says that "Taxpayers will only demand an increase in services if they perceive the benefits of the service increment to exceed the cost."[8]

While the above explains what present-day federal trust fund accounts do and do not represent, it is important to realize that things were not always this way.

The earliest federal "trust funds." Comparing modern budgetary and finance techniques with those in the early days of the Republic is always tricky, and it is especially difficult when dealing with the deposit of moneys within the Treasury. In the first place, prior to the Civil War, U.S. currency meant gold and silver coins, not paper banknotes, and a bank was, first and foremost, a place to physically store gold and silver. Second, prior to the founding of the Second Bank of the United States in 1816, depositing money in the U.S. Treasury did not mean what it means today:

"In the beginning, the public money was kept in several banks, thus continuing the usage established by the Confederation. The treasurer himself never actually had any public money in his possession. It was, in fact, in a bank from the moment of receiving it until disbursed."[9] After the Second Bank expired in 1836, it was not until 1846 that Congress authorized the Treasury to become fully independent, passing a law that not only required all federal funds to be deposited in the Treasury but which also made the necessary provisions "for the supply of vaults and safes in the new treasury building at Washington and at the mints and custom-houses ; New York, Philadelphia, Washington, Charlestown, New Orleans, and St. Louis were the principal centres of deposit ; four receivers -general and two keepers of mints, with the treasurer of the United States, were appointed public custodians."[10]

With that in mind, the first federal trust fund our research could find was a trust fund in the real world sense. A treaty between the Chickasaw Indians and the United States in 1832 declared that "The Chickasaw nation have determined to create a perpetual fund, for the use of the nation forever, out of the proceeds of the country now ceded away. And for that purpose they propose to invest a large proportion of the money arising from the sale of the land, in some safe and valuable stocks, which shall bring them in an annual interest or dividend, to be used for all national purposes, leaving the principal untouched, intending to use the interest alone. It is therefore proposed by the Chickasaws, and agreed to, that the sum to be laid out in stocks as above mentioned, shall be left with the government of the United States…" (found at 7 Stat. 32.)

Four years later, the President signed into law the Act of April 20, 1836, requiring the proceeds from the Chickasaw land sales to be paid into the Treasury and that then, "all investments of stock, required by the said treaty shall be made under the direction of the President; and a special account of the funds under the said treaty, shall be kept at the Treasury, and a statement thereof shall be annually laid before Congress…" (found at 5 Stat. 10.)

The fund for the Chickasaw, as well as the various other Indian trust funds established at around this time, survive to this day, and they bear two distinctive marks of real world trust funds – a fiduciary duty borne by the federal government, and principal that stems from a non-federal source. And it is important to note that the original federal trust fund accounts did not require that the balances be invested in Treasury securities – private stocks and bonds were acceptable as well.

Another example of a federal trust fund account established at about this time was the Navy pension fund established in 1832. While the pension was required to be invested in "registered securities of the United States" set at an interest rate of 3 percent, and the payment of those pensions was subject to appropriation, some of the money in the pension fund came from the sale of prize ships captured by the U.S. Navy, not from taxes or other traditional revenue sources. (See title 38 U.S.C. (as published in 1926) secs. 224-228.)

But the first major wave in the establishment of modern federal trust fund accounts came in the aftermath of the huge expansion of the federal government related to World War I. In 1919, Congress enacted the United States Government Life Insurance Fund to coordinate and manage all the special life insurance policies the government sold during the war to soldiers, sailors and marines who otherwise could not afford coverage. (This was a temporary program for WWI policies only and has since been phased out.)

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The first permanent trust fund account of this era came in 1920 with the regularization of federal civil service pensions. (Before 1920 there were no pensions, so there was a habit of keeping elderly employees at their jobs until they died, which led to inefficiencies in the workplace.) The law (41 Stat. 614) established a "special fund to be known as 'the civil-service retirement and disability fund'" and required the Treasury Secretary to "invest from time to time, in interest-bearing securities of the United States, such portions of the [fund] as in his judgment may not be immediately required."

However, neither the WWI life insurance fund nor the civil service fund were formally labeled a "trust fund". That would wait until the next (New Deal) wave of funds. In 1935, section 904 the original Social Security Act (49 Stat. 620) created the Unemployment Trust Fund. The law did not name any specific trustees, but the Secretary of the Treasury was directed to invest the balances of the trust fund in either Treasury securities or "obligations guaranteed to both principal and interest by the United States." Interest from, and sale of obligations to, the Fund were to be credited to and form part of the fund.

It is now little remembered that the original 1935 Social Security Act did not create a Social Security Trust Fund. Rather, title II of the law created "an account in the Treasury of the United States to be known as the 'Old-Age Reserve Account'". The Account received automatic appropriations each year sufficient to pay required premiums, plus an actuarial reserve and three percent interest. The Secretary was authorized to invest balances in Treasury securities or federally guaranteed securities bearing three percent interest. Then, title VIII of the law levied the payroll taxes to finance the Social Security program – but those taxes were simply deposited in the general fund, not transferred to the Old-Age Reserve Account.

Why separate the taxes from the benefits? Patashnik quotes Thomas Eliot, the attorney who drafted the law, as saying that the Roosevelt Administration was worried about a lawsuit working its way up to the Supreme Court at the time the Social Security Act was being considered by Congress.[11] That case, *United States v. Butler*, sought to declare the Agricultural Adjustment Act of 1933 unconstitutional because it taxed the processing of agricultural commodities and then use the proceeds of that tax to pay certain farmers not to produce so much, thereby increasing the market price of those commodities.

The Supreme Court decided the case in January 1936 (297 U.S. 1) and indeed struck down the tax, but the opinion had some internal inconsistencies that would bear fruit the next year, when the Court decided a different case (*Helvering v. Davis*, 301 U.S. 619) which held that since the Social Security benefits provided under title II of the Act were constitutional, there was no need to question whether or not the payroll taxes levied under title VIII were constitutional.

Once that hurdle had been cleared, a bipartisan advisory commission recommended in 1938 that "The old-age insurance fund should specifically be made a trust fund, with designated trustees acting on the behalf of the prospective beneficiaries of the program. The trust fund should be dedicated exclusively to the payment of the benefits provided under the program and, in limited part, to the costs necessary to the administration of the program… Since the taxes levied are essentially contributions intended to finance the benefit program, it is not only logical but expedient to provide for automatic crediting of tax proceeds to the old age insurance fund. It is believed by the Council that such a procedure would enhance public understanding of the contributory insurance system. Since the tax proceeds thus credited are intended for payment of benefits, it is recommended that they be deposited in a trust fund under the control of designated trustees in accordance with appropriate legal provisions. The trust fund should be dedicated to the payment of benefits and, to a restricted amount, to the costs necessary to the administration of the program. It is recommended that these funds should continue to be invested in securities of the Federal government as at present."[12]

Congress followed suit as part of the Social Security Act Amendments of 1939 (53 Stat. 1360), which rewrote title II of the SSA to eliminate the Account and put in its place the Federal Old-Age and Survivors Insurance Trust Fund, to be overseen by a Board of Trustees (the Secretaries of Treasury and Labor and the Chairman of the Social Security Board). The Board was not only to oversee the Trust Fund and make the existing reports to Congress but also to "Report immediately to the Congress whenever the Board of Trustees is of the opinion that during the ensuing five fiscal years the Trust Fund will exceed three times the highest annual expenditures anticipated during that five-fiscal-year period, and whenever the Board of Trustees is of the opinion that the amount of the Trust fund is unduly small."

After the establishment of the Social Security Trust Fund, with the exception of two refinements in federal life insurance funding, no new federal trust fund accounts were established by 1955. And all of the trust fund accounts established to date fell under the general rubric of "social insurance" to define benefits for individuals. This would change with the establishment of the Highway Trust Fund in 1956, but that legislation did not start off to be a trust fund at all.

The Clay Commission. President Eisenhower's blue-ribbon panel on a national highway program, headed by his friend, former Army General Lucius Clay, transmitted its report the President

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The History of Transportation Trust Funds, Pt. 1—Continued

in January 1955. The panel recommended maintaining the existing federal-aid highway program at its existing spending levels and adding a $25 billion, ten-year federal commitment towards building the planned 37,600-mile Interstate highway system (with a $2 billion state and local government share for a $27 billion program total).

However, the way in which the Clay Commission proposed to finance the system was very different than what wound up getting enacted in 1956. The best account of the development of the Eisenhower Administration's plan, as embodied in the Clay report, is in chapter 6 of Mark H. Rose's book *Interstate: Express Highway Politics, 1939-1989.*[13] Rose describes how various factions of the Administration worked on a highway plan during the spring of 1954, with economic adviser John Bragdon favoring a federally centralized plan, but with powerful White House chief of staff Sherman Adams recruiting legendary New York urban planner Robert Moses and others to support a plan that provided stronger federal financial support but kept the tradition of letting the states run their own programs.

When his advisers could not agree, Eisenhower appointed the Clay Commission to work with outside groups and also appointed a formal Interagency Committee of Cabinet secretaries and others to work on a financing plan for submission to the Clay Commission.[14] (The appointment of the commissions delayed Congressional action on a highway plan from 1954 to 1955, which was a pivotal delay, as the Republicans lost control of both chambers of Congress in the 1954 elections.) Rose describes a process whereby Clay ignored many of the recommendations of the Interagency Committee and formed his own plan: "Few in the government besides Clay himself, Eisenhower, and Adams approved each feature of Clay's plan…but in meetings with Interagency Committee members, Clay remainder adamant; modifications were bad politics…As far as Clay was concerned, sufficient incentives were built into his program to guarantee support. Unless members of the interagency group affirmed his financing proposals, he preferred that they not forward his plan at all."[15]

Ike backed Clay and submitted the plan to Congress on February 22 (House Doc. 93, 84th Congress, 1st Session), but the internal disputes had caused the submission of the plan to Congress to slip, from the planned January 27 date to almost a month later.

The Clay plan would have maintained the existing federal-aid programs at a total of $623 million in contract authority per year, and established a federally chartered Federal Highway Corporation to oversee construction of the Interstate system. All receipts from the federal taxes on gasoline and special fuels in excess of $623 million per year would be appropriated to the Corporation, which would use a most of that money to pay directly for Interstate construction. But the Corporation would also issue $20.2 billion in bonds over ten years to supplement the estimated $4.8 billion in appropriations for a total ten-year (1956-1965) federal commitment of $25 billion towards Interstate. However, the Clay plan would then require that all gas tax proceeds in excess of $623 million per year from 1966 to 1987 be dedicated towards repaying the bond principal and interest, with no further use of that money for highway construction allowed.

By the time the Commission's report was formally submitted to Congress, the key feature of the plan – issuing $20.2 billion in bonds and tying up most federal gas and diesel tax revenues until 1987 in order to pay back the bonds and their interest costs – were already under fire on Capitol Hill. In particular, Senate Finance Committee chairman Harry F. Byrd, Jr. (I-VA) was extremely critical of the debt service costs and other elements of the plan in a speech he gave in January 1955 – before the plan had even been submitted to Congress.

Senate action. In the Senate, the chairman of the Subcommittee on Roads, Albert Gore, Sr. (D-TN), had already introduced his own plan as S. 1048 on February 11 and had begun holding hearings on the legislation. The day after the Clay Commission's report was submitted and legislation implementing the plan was introduced (by request) as S. 1160, several Senators at one of Gore's hearings complained of being unfamiliar with the contents of the Senate bill. One scholar later wrote that "These comments cast further light on what was evidently the complete failure of the administration to consult, in a genuine manner, with influential members of the Senate on the program which it expected them to espouse."[16]

Hearings were extensive, and towards the end, Gore pulled the plug and called for a subcommittee vote on his bill, which the subcommittee approved 6 to 3. Then, the full Public Works Committee rejected the Clay Commission's approach by a 9 to 4 vote and then approved an amended version of the Gore bill, 8 to 5.[17] Gore's bill, as approved by the panel, did not allow bonding, did not create an independent corporation to oversee the program, and only provided five years worth of contract authority for the Interstate program (totaling $7.75 billion). However, the Gore bill did increase spending for the regular federal-aid program from $700 million per year to $900 million per year.

It should be noted that the Gore bill did not include any assumption of any tax increase, in large part because the Senate lacks no power to originate tax measures (and the Public Works Committee within the Senate has no power to draft them, even if they are not intended to pass the constitutional test to become law). Moreover, it bears repeating that prior to passage of the 1956 law there was no connection whatsoever

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The History of Transportation Trust Funds, Pt. 1—Continued

THE INTERSTATE HIGHWAY FINANCE PLAN OF THE CLAY COMMISSION (1955)

Part One: Non-Interstate

The Clay Commission proposed to maintain the existing federal tax rate on gasoline and special fuels, which had been set at two cents per gallon in 1951. From that amount, the Commission proposed to maintain most of the existing federal-aid highway system at the current spending levels (less some urban spending that would be covered by the Interstate program). The proposed spending levels for those programs were:

Federal-aid primary system	$315 million/yr.	Federal-aid secondary system	$210 million/yr.
Urban extensions (non-Int.)	$75 million/yr.	Forest highways	$23 million/yr.
		TOTAL, NON-INTERSTATE	**$623 million/yr.**

Part Two: Interstate

After subtracting the $623 million per year for the non-Interstate federal-aid program from the projectd annual receipts of the existing fuel taxes, the Commission proposed to use the remaining tax revenues (which they presumed would increase substantially since the better roads would increase automobile traffic) to pay for Interstate spending, support a $20.2 billion bond issue, and pay debt service on that bond issue through 1987, as shown below (dollar amounts in millions).

Year	2 cpg Fed. Gas Tax Revenues -623m/yr	Construction Expenditures Total	From Revenues	From Bond Proceeds	Bond Maturity. (Years)	Annual Debt Service Interest At 3%	Principal Repay.	Total	Annual Excess Tax Revs.	Balance
1956	527	1,000	500	500	11	0	0	0	27	27
1957	567	2,000	500	1,500	13	15	0	15	52	79
1958	611	2,500	600	1,900	15	60	0	60	-49	30
1959	652	2,700	500	2,200	17	117	0	117	35	65
1960	694	2,900	500	2,400	19	183	0	183	11	76
1961	734	2,900	500	2,400	20	255	0	255	-21	55
1962	777	2,900	500	2,400	21	327	0	327	-50	5
1963	818	2,900	400	2,500	21	399	0	399	19	24
1964	860	2,700	400	2,300	22	474	0	474	-14	10
1965	898	2,500	365	2,135	22	543	0	543	-10	0
1966	943					607	0	607	336	336
1967	983					607	500	1,107	-124	212
1968	1,024					592	0	592	432	644
1969	1,063					592	0	592	471	1,115
1970	1,099					592	1,500	2,092	-993	122
1971	1,141					547	0	547	594	716
1972	1,171					547	0	547	624	1,340
1973	1,218					547	1,900	2,447	-1,229	111
1974	1,257					490	0	490	767	878
1975	1,294					490	0	490	804	1,682
1976	1,339					490	2,200	2,690	-1,351	331
1977	1,381					424	0	424	957	1,288
1978	1,422					424	0	424	998	2,286
1979	1,465					424	2,400	2,824	-1,359	927
1980	1,504					352	0	352	1,152	2,079
1981	1,550					352	2,400	2,752	-1,202	877
1982	1,588					280	0	280	1,308	2,185
1983	1,631					280	2,400	2,680	-1,049	1,136
1984	1,671					208	2,500	2,708	-1,037	99
1985	1,706					133	0	133	1,573	1,672
1986	1,745					133	2,300	2,433	-688	984
1987	1,785					64	2,135	2,199	-414	570
Total	**37,118**	**25,000**	**4,765**	**20,235**		**11,548**	**20,235**	**31,783**		

The History of Transportation Trust Funds, Pt. 1—Continued

between fuel tax revenues and highway spending levels, and all highway spending was drawn from the general fund of the Treasury. So while there was a widespread belief that the higher spending levels under the Gore bill might someday require higher tax rates, there were no visible taxes in the bill.

The tension on taxes was made obvious in the minority views filed in the Public Works committee report by the three senior Republican members of the panel, "Not only do the majority fail to directly tackle our greatest needs, but they blindly refuse to be concerned with the fact that the people of this country have been taxed, and taxes, and taxed, and that the public debt has mounted to staggering proportions. They ignore the administration's solution of building the Interstate System without any increase in taxes and on a sound debt-liquidating basis (pay-as-you-use). They refuse to take into account the fact that roads are a capital asset which generate their own revenues."[18]

It is important to note that the minority views condemned increases in the "public debt" at the same time they proposed paying for the Interstate System by issuing debt. This seeming contradiction was made possible b y the Clay Committee's too-clever attempt to "split the baby" with the nature of the $20.2 billion in debt to be issued. The Clay plan would create a Federal Highway Corporation with the authority to issue up to $21 billion in debt. Section 105 of the bill specified that "the obligations, together with the interest thereon, are not guaranteed by the United States and do not constitute a debt of or obligation of the United States."[19] The debt of the Corporation was thus not technically part of the "public debt" and would not be subject to the statutory debt ceiling.

Chavez Bill, 1955 (S. 1048)

(Assumes no new taxes, no bonding, no Trust Fund)

(Millions of dollars)

Year	Interstate	F-Aid Primary	F-Aid 2ndary	F-Aid Urban
1957	1,000	400	300	200
1958	1,250	400	300	200
1959	1,500	400	300	200
1960	2,000	400	300	200
1961	2,000	400	300	200
Total	**7,750**	**2,000**	**1,500**	**1,000**

However, the Corporation would be performing a governmental function and would receive automatic appropriations of all federal gasoline and special fuel taxes in excess of $622.5 million per year under the terms of the Clay plan. So even though the debt of the Corporation would not technically be part of the federal books, it would have the same nod-and-wink status that now pertains to Tennessee Valley Authority debt and which until last year pertained to Fannie Mae and Freddie Mac debt – Wall Street was essentially told "Sure, these bonds are not *technically* guaranteed by Uncle Sam, but if anything bad happens, Congress will step in and cover the debt. We just can't put it in writing." And in case Wall Street did not get the message, the Clay proposal would have allowed the Social Security Trust Fund and other federal trust fund accounts to invest in the Corporation's bonds.

These sophistries were not enough to mollify the most influential Senator on tax and debt issues, Finance chairman Byrd, who took to the Senate floor during debate on S. 1048 on May 25, 1955, exceedingly prepared. (By this point in the debate, Public Works ranking Republican member Edward Martin (R-PA) had offered a substitute amendment to the Gore bill consisting of the Clay Commission proposal.)

Harry Byrd did not like debt. A biographer wrote that "He had an almost pathological abhorrence for borrowing that went beyond reason to the realm of deep emotion."[20] Byrd first told the Senate that "The interest, estimated by the Clay Committee at 3 percent would be $11.5 billion. In other words interest would cost an amount equal to 55 percent of the bond issue…As an advocate of more and better roads, I am opposed to spending 55 percent of the cost for interest which will never build a foot of road – good or bad."[21]

But Byrd's biggest ire was saved for the Clay plan's intention to tie up 32 years worth of gas tax receipts to pay for the first ten years worth of spending: "All of the funds would be expended in the first 10 years, and in the next 22 years no funds would be available from the Federal gasoline tax. All the receipts from this tax for that 22-year period would be required for repayment of bonds with interest. In other words, the gasoline tax would be dried up for 22 years – from 1966 to 1987 inclusive.

"It is obvious, of course, that the need for road construction and improvement will be just as essential during that 22-year period as it is now…In fact, no Congress can obligate a subsequent Congress to a dedication of taxes."[22] (Byrd then cited the opinion of the Senate Legislative Counsel that future Congresses would be free to use gasoline tax receipts for other purposes.) Byrd had also received an opinion from the Comptroller General of the United States summing up the nature of the bonds to be issued by the Corporation: "We feel that the proposed method of financing is objectionable because the result would be that the borrowings would not be included in the public debt obligations of the United States…While the obligations would specifically provide that they are not guaranteed by the Government, it is highly improbable that the Congress would allow such obligations to go into default when one considers that the credit standing of the Federal Government would be involved."[23]

Byrd summed up by saying, "…it is by the devious methods I have mentioned that this debt would be created, and its advocates claim it would not be a Federal debt. We must remember that we

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cannot avoid financial responsibility by legerdemain, nor can we evade debt by definition. If, by some hollow words in a bill passed by Congress, we could declare public debt not to be the Government's solemn promise to repay what it has borrowed, we could by the same process wipe out the $280 billion of Federal obligations we owe to citizens, trust funds, banks, insurance companies, and so forth."[24]

Towards the end of the debate, Sen. Prescott Bush (R-CT) (father of George H.W. Bush and grandfather of George W. Bush), the ranking member on the Roads Subcommittee, was swayed by Byrd's words and offered an amendment to the Clay Commission substitute clarifying that the Corporation's bonds had federal backing and would be subject to the statutory federal debt ceiling, but pressure from supporters of the President's plan made Bush withdraw his amendment. The Senate then defeated the substitute amendment containing the Clay Commission plan by a vote of 31 yeas, 60 nays.

Shortly thereafter, the Senate passed the Gore bill (S. 1048), as amended on the floor, by voice vote. But by limiting funding authorizations to five years and entirely avoiding the question of whether and how to raise taxes to pay for the additional Interstate spending, the Gore bill was an easy vote. The House would have a harder time.

House action. In the House of Representatives, the chairman of the Roads Subcommittee was George Fallon (D-NV), who by this point had recovered from being shot in the hindquarters by the Puerto Rican separatists who shot up the House chamber in March 1954. In winter and spring 1955, Fallon held a long series of hearings on various versions of the Clay Commission bill. At one point, the chairman of the House Appropriations Committee (and former House Parliamentarian) Clarence Cannon (D-MO) went to the House floor and moved that the legislation implementing the Clay Commission bill be removed from Public Works Committee jurisdiction and re-referred to the Appropriations Committee. Cannon lost on a non-record vote of 87 yeas, 131 nays, and when Cannon asked for a recorded vote, he could not get the constitutionally required one-fifth of the members present in the chamber to agree to a recorded vote, so the jurisdiction over the future of the highway program stayed with Public Works.

Fallon's hearings were thorough: "In some areas, the House hearing was much more searching than on the Senate side. Moreover, it appeared obvious from the outset that the House committee was determined to embark eventually on a course of its own with respect to this matter, that is, to write its own bill." Fallon introduced his own bill (H.R. 7072) without Republican support on June 28. On the spending side, the Fallon bill was very similar to what wound up being enacted in 1956 -- $24 billion in contract authority over 12 years for Interstate construction, and an immediate boost in spending for the regular federal-aid program to $725 million per year in 1957. But the remarkable thing about the Fallon bill was that it contained significant tax increases ($24 billion over 12 years) on gasoline, diesel fuel, and truck tires – and that the Speaker then referred the bill to the Public Works Committee, *not* the Ways and Means Committee.

This part bears emphasis – before the Committee Reform Amendments of 1974, House rules did not permit committees to share jurisdiction over a bill. Upon introduction, the Speaker referred a bill to one committee only, no matter how many other committees' jurisdiction the bill touched, and that committee had sole power over whether the bill lived or died. Due to the primacy of the Ways and Means panel in the House, it was traditional that even an off-hand reference to the Internal Revenue Code would cause the Speaker to refer a bill to Ways and Means, despite the vast preponderance of the bill's subject matter dealing with non-tax issues. For the Speaker to refer a bill containing significant taxes to Public Works, rather than to Ways and Means, was very unusual.

Fallon Bill, 1955 (H.R. 7474)

(Assumes new taxes, no bonding, no Trust Fund)

(Millions of dollars)

Year	Interstate	F-Aid Primary	F-Aid 2ndary	F-Aid Urban
1957	1,200	326	218	181
1958	1,500	0	0	0
1959	1,700	0	0	0
1960	2,000	0	0	0
1961	2,000	0	0	0
1962	2,200	0	0	0
1963	2,200	0	0	0
1964	2,300	0	0	0
1965	2,300	0	0	0
1966	2,200	0	0	0
1967	2,000	0	0	0
1968	2,300	0	0	0
1969	1,200	0	0	0
Total	**25,100**	**326**	**218**	**181**

The original Fallon will would have increased the gasoline tax by 50 percent (from two cents per gallon to three cents) but its other tax increases would have fallen disproportionately on truckers – a tripling of the diesel fuel tax (from two cpg to six) and a new tax on truck tires and inner tubes that the truckers said would be equivalent to a ten-fold increase in the existing tax.

A contemporaneous account says that "From the day of introduction of H.R. 7072, there occurred one of the most intense pressure campaigns observed on Capitol Hill for many years. The trucking, oil, rubber, and certain allied interests, it appeared, worked unceasingly to arouse sentiment against the tax provisions…It has been estimated that more telegrams and letters were received by members of Congress during this period than at any

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time since the dismissal of General MacArthur, which was supposed to have set a record."[26]

While Fallon and Public Works were the experts on highway policy, and they probably had a good handle on which highway interests should be taxed in order to pay for the Interstate system, they were newcomers to tax politics, or in how to work with outside interests when raising their taxes, and it showed. At a July 6 executive session, the Public Works panel could not agree on a bill, so they delegated a nine-member ad hoc subcommittee (also headed by Fallon) to deliberate further, and the ad hoc group revised the tire taxes somewhat. It was then decided to hold further hearings on the bill, and five members of Ways and Means were delegated to sit with Public Works during the hearings, which quickly grew too large to be held in the Ways and Means hearing room, and which then had to be moved to what is now the Cannon Caucus Room, during which all manner of industries complained mightily about the taxes in the bill.[27]

The Public Works markup of H.R. 7072 lasted almost six full days and resulted in a "clean bill" (H.R. 7474) incorporating all amendments adopted to that point being introduced on July 19 and reported without amendment on July 20. The reported bill cut the increase in the diesel tax in half, further restructured the new taxes on tires and tubes, and added an excise tax on truck, trailer and bus sales.

On the way to the House floor, the Rules Committee granted a special rule (H. Res. 314) which prevented members from offering any amendments on the floor to the tax portion of the bill (a reflection of the "closed rule" process which had characterized House consideration of Ways and Means tax bills since World War II). But the rule did allow Republicans to offer the Clay Commission bill as a substitute. The rule passed by a vote of 274-129-1, despite some objections during debate on the rule (including one by Rules Chairman Howard Smith (D-VA), who said "Here we are in the last 5 days of the session being asked to deal with this tremendous proposition. What are you thinking about? This should not be considered at this time and none of these bills ought to be passed."[28]

During the debate on the bill, the rule allowed Public Works ranking minority member George Dondero (R-MI) to offer an amendment on the floor substituting the Clay Commission's plan for the Fallon plan, and the amendment failed on a non-recorded teller vote of 178 to 184 on July 26. However, the House amended the Dondero amendment on the floor to add Davis-Bacon prevailing wage applicability for Interstate projects (which the Fallon bill already had), meaning that the first vote was not on a "clean" version. At the end of debate on July 27, another member offered the original text of the Clay Commission proposal as a motion to recommit the bill with amendatory instructions. That motion lost by a recorded vote of 193 to 221, setting the stage for the final passage of H.R. 7474.

However, a funny thing happened on the way to the House-Senate conference committee – the House overwhelmingly defeated the Fallon bill on final passage. The vote was 123 yeas to 292 yeas, meaning that more than two-thirds of the House voted against the bill. With only days remaining in the session, no further action was taken, and the first session of the 84th Congress adjourned *sine die* on August 2.

Some of Eisenhower's advisers proposed to recall the Congress into a special session solely for consideration of the highway proposal, but Eisenhower wrote in his memoirs "There was no sense in spending money to call them back when I knew advance that the result would be zero."[29]

Blame for the collapse of the bill was widespread. The head of the American Association of State Highway Officials told his membership that "…the bill was the biggest public works program ever proposed, and early in the session it took on a political flavor, and it was also so big that special interests became involved, and it was no longer the consideration of a conventional Federal-aid road bill. When certain interests in the Congress insisted on a pay-as-you-go feature, additional taxes were required, and you might sum it up by saying that the Democrats defeated the Republicans' bond bill, and the special interests defeated the increased taxation proposed by the Democrats."[30] A contemporary scholar quoted the House Majority Whip as saying that the truckers were "the ones who killed the bill" and quoted the House Majority Leader as saying that "I have a sneaky idea that the truckers of this country played an important part in what happened."[31]

A historian at the Federal Highway Administration quotes a statement made by Frank Turner, the legendary former FHWA Administrator who had earlier worked with Fallon as a kind of detailee to help draft his 1955 bill, in an oral history 32 years later as attributing the failure to the internal committee politics of the House: "It was very, very obvious what was happening. You have to know that at the time, the Ways and Means Committee not only was the committee on finances and taxes for the House, but it was also the committee on committees. And no member of the Congress could get on any committee in the Congress without being approved by that committee on committees…The Ways and Means Committee, wearing its finance hat, tax hat, was teed off at the Public Works Committee, treading on their turf in taxes. Even though they had had this informal arrangement, they didn't like it, period. And they passed the word that they didn't like it and they didn't want the bill passed because of this jurisdictional question… all 435 members of Congress realized, recognizing that they owed their commit-

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tee assignments to these guys on the Ways and Means Committee, they did what the Ways and Means Committee wanted. And they passed the word, appropriately, that they didn't want that bill passed, and so it didn't pass."[32]

Turner's retrospective analysis has two problems. First, while the Democratic caucus of the Ways and Means Committee also served as the Democratic Committee on Committees, this was not true for Republicans, who had a separate Committee on Committees making appointments. Second, if the Democratic leaders of the Ways and Means Committee were opposed to the Fallon bill and wanted it defeated, they were extraordinarily stealthy and subtle about it, as twelve of the fifteen Democratic members of the panel voted "yes" on H.R. 7474 on final passage, including the chairman and the next nine voting members in order of seniority.

How the Members of the House Ways and Means Committee Voted on Final Passage of the Fallon Bill, July 27, 1955

Democrats (15)		Republicans (10)	
Cooper	Yes	Reed (NY)	DNV
Dingell	DNV	Jenkins	No
Mills	Yes	Simpson (PA)	No
Gregory	Yes	Kean	Yes
Forand	Yes	Mason	No
Eberharter	Yes	Holmes	Yes
King (CA)	Yes	Byrnes	No
O'Brien (IL)	Yes	Sadlak	No
Boggs	Yes	Baker	No
Keogh	Yes	Curtis (MO)	No
Harrison (VA)	No		
Karsten	Yes		
Herlong	No		
McCarthy	Yes		
Ikard	Yes		

A better explanation of the relationship between turf politics and the final vote came five months after the vote from a rank-and-file member of the Roads Subcommittee, Clifford Davis (D-TN), who said that "I felt that a better job could have been done on any increase in tax provisions to pay as we go, and pay as we use, if the Committee on the House Ways and Means had been given the responsibility which rightly belonged to that committee. They have career staff experts on duty the year around. They have the benefit of the advice of the Department of the Treasury…Not being an experienced member of the tax-writing committee, and with only 12 hours to be informed on the tax provisions, I was not willing to vote for a bill so important…"[33]

Rose summed it up by saying, "But finally, legislative ineptitude killed the Clay plan…Beginning in February, reports that Clay's bill would not survive in Congress – brought in by men with years of experience counting votes – were discounted. Surely, Eisenhower's aides must have reasoned, with such strong support from state governors, men who were playing politics would succumb to political pressure. Thus Eisenhower, Clay, and Adams, also men with strong convictions about good highway legislation, stuck to their original plan."[34]

Regrouping. After the adjournment, Congress, the White House, and stakeholders had time to regroup. It was obvious to all that no proposal to finance the Interstate system via the issuance of bonds would pass Congress. Yet it was equally obvious that tax increases on transportation stakeholders were not viable – unless some mechanism could be found to reassure the stakeholders that their money would bring them enough tangible and direct benefits to make the tax increases worth their while.

The creation of that mechanism – the Highway Trust Fund – in the following year will be the focus of part two of this article.

-***Jeff Davis***

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STATUS OF PENDING TRANSPORTATION-RELATED NOMINATIONS

Agency	Nominee	Position	Senate Committee	Latest Action
Department of Transportation	Chris Bertram	Assistant Secretary for Budget and Programs	Commerce, Science and Transportation	Nomination confirmed 8/7/09
Department of Transportation	Susan Kurland	Assistant Secretary for Aviation and Int'l Affairs	Commerce, Science and Transportation	Nomination confirmed 8/7/09
DOT-Federal Motor Carrier Safety Admin.	Anne Ferro	Administrator	Commerce, Science and Transportation	Nomination transmitted 7/16/09
DOT-National Highway Traffic Safety Admin.	Charles Hurley	Administrator	Commerce, Science and Transportation	Nomination reportedly will be withdrawn
National Transport. Safety Board	Christopher Hart	Member for a term expiring 12/31/2012	Commerce, Science and Transportation	Nomination confirmed 8/7/09
Surface Transportation Board	Daniel Elliott	Chairman	Commerce, Science and Transportation	Nomination confirmed 8/7/09
Department of the Army	Jo-Ellen Darcy	Assistant Secretary for Civil Works	Armed Services *and* Enviro. & Public Works	Nomination confirmed 8/7/09

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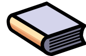

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THIS WEEK IN COMMITTEE

Congress is currently in recess for the August District Work Period and will not return until after September 8. No transportation-related committee meetings are planned.

Over the August recess, Transportation Weekly becomes Transportation Bi-Weekly, as very little of newsworthiness ever happens in Washington over the recess.

STATUS OF MAJOR TRANSPORTATION BILLS — 111th CONGRESS

BILL	HOUSE ACTION	SENATE ACTION	RESOLUTION
Economic Stimulus Appropriations & Tax Cuts	H.R. 1 conference report passed House 2/13/09 by 246-183-1	H.R. 1 conference report passed Senate 2/13/09 by a vote of 60-38	Public Law 111-5 2/17/09
FY 2010 Congressional budget resolution	H. Con. Res. 85 passed House 4/2/09 by vote of 233-196	S. Con. Res. 13 passed Senate 4/2/09 by vote of 55-43	Conference report (H. Rept. 111-89) agreed to 4/29/09
FY 2010 Transportation-HUD Appropriations	H.R. 3288 passed House 7/23/09 by a vote of 256-168	H.R. 3288 reported 8/5/09 S. Rept. 111-69	
FY 2010 Energy and Water Appropriations	H.R. 3183 passed House 7/17/09 by a vote of 320-97	H.R. 3183 passed Senate 7/29/09 by a vote of 85-9	
FY 2010 Homeland Security Appropriations	H.R. 2892 passed House 6/24/09 by a vote of 389-37	H.R. 2892 passed Senate amended 7/9/09 by a vote of 84-6	
Federal Aviation Admin. Reauthorization Bill	H.R. 915 passed House 5/22/09 by a vote of 277-136	S. 1451 ordered reported 7/21/09 by Senate Commerce Committee	
Surface Transportation Reauthorization Bill	Subcommittee marked up draft bill on 6/24/09		
Short-Term Extension of Surface Transportation Laws		S. 1498 reported 7/22/09 S. Rept. 111-59	
Water Resources Development Act			
FY 2010 Coast Guard Authorization		S. 1194 ordered reported 7/8/09 by Senate Commerce Committee	
Transportation Security Admin. Reauthorization	H.R. 2200 passed House 6/4/09 by a vote of 397-25		