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# **Public Transit: Looking Back and Moving Forward**

## **A Legislative History of Public Transportation in the United States and Analysis of Major Issues for the Authorization of the Surface Transportation Bill**

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INTRODUCTION: HUMBLE BEGINNINGS

In 1827, a 12-passenger horse drawn carriage began transporting passengers along Broadway in New York City, marking the debut of mass transportation in the United States.<sup>1</sup> The horse drawn carriages soon gave way to electric streetcars that were owned and operated by private entities. High operational costs and limitations imposed on streetcar operations by the communities in which they operated created obstacles for the operators. When the automobile arrived on the scene in the 1920's, transit operations continued to struggle as all levels of government devoted their transportation resources to the construction and improvement of highways.<sup>2</sup> At the start of the 1950's, the majority of the nation's transit systems were privately owned and operated and on the brink of fiscal and physical collapse.<sup>3</sup>

Despite the pressing needs of mass transportation, the federal government was slow to respond. The Housing Act of 1961<sup>4</sup> was the first federal legislation to address public transit. The most notable provision of the Act was the authorization of \$25 million for mass transportation demonstration projects.<sup>5</sup> The Act also authorized federal aid to encourage transportation planning as part of urban planning<sup>6</sup> and established a small low-interest loan program for mass transit systems.<sup>7</sup>

However, it was not until April 5, 1962, when President John F. Kennedy addressed Congress on the subject of transportation that the needs of public transportation were seriously addressed on the federal level. In his speech, President Kennedy proposed a \$500 million, 3-year program

1. JOHN ANDERSON MILLER, *FARES, PLEASE! A POPULAR HISTORY OF TROLLEYS, HORSE-CARS, STREET-CARS, BUSES, ELEVATEDS, AND SUBWAYS* 1-3 (1960).

2. GEORGE M. SMERK, *URBAN MASS TRANSPORTATION: A DOZEN YEARS OF FEDERAL POLICY* 12 (1974).

3. Daniel B. Hess & Peter A. Lombardi, *Governmental Subsidies for Public Transit: History, Current Issues, and Recent Evidence*, 10 PUB. WORKS MGMT & POL'Y 138, 139 (2005).

4. Housing Act of 1961, Pub. L. No. 87-70, 75 Stat. 149 (1961).

5. *Id.* § 303.

6. *Id.* § 310.

7. *Id.* § 501.

to revitalize and expand urban mass transportation systems.<sup>8</sup> His transportation message prompted a new era for mass transportation and led to the passage of the landmark Urban Mass Transportation Act of 1964.

## I. URBAN MASS TRANSPORTATION ACT OF 1964

The Urban Mass Transportation Act of 1964 provided a much anticipated federal response to metropolitan and urban areas that were both rapidly expanding and also deteriorating by authorizing \$375 million in capital assistance to be provided over three years in support of public transportation activities and \$50 million to extend the low-interest loan program created in the Housing Act of 1961.<sup>9</sup>

In signing the legislation into law, President Lyndon B. Johnson said:

Only a very short time ago, six out of ten Americans lived in rural areas. As we meet here today, seven out of ten live in urban areas. The change has come rapidly and has come dramatically, and today our urban congestion is an unpleasant fact of everyday life for too many millions of Americans. All of us recognize that the curses of congestion in commuting cannot be wiped away with the single stroke of a pen, or 50 pens that we have here. But we do know that this legislation that we are coming to grips with faces the realities of American life and attempts to put in motion a movement to do something about it.<sup>10</sup>

### A. GRANTS AND LOANS

The Act established two discretionary programs of matching grants as well as funds for research, development, and demonstration projects.

#### 1. *Long-Range Program:*

Under a long-range program, the Act authorized capital grants for up to two-thirds of the net project cost if the Administrator of the Housing and Home Financing Agency within the U.S. Department of Housing and Urban Development ("HUD") determined that assistance was needed to carry out a program for a unified or officially coordinated urban transportation system, which was part of the comprehensively planned development of the urban area. The term "net project cost" was defined as the portion of the total project cost that could not be reasonably financed from transit revenues.<sup>11</sup>

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8. President John F. Kennedy, Special Message to the Congress on Transportation (April 5, 1962), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=8587&st=&st1=>.

9. Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302 (1964).

10. President Lyndon B. Johnson, Remarks Upon Signing the Urban Mass Transportation Act (July 9, 1964), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=26369&st=transportation&st1=>.

11. Urban Mass Transportation Act of 1964 § 4.

## 2. *Emergency Program:*

The Act authorized an emergency program of grants to cover one-half of the net project costs in localities where planning was incomplete but an urgent need for the preservation or provision of mass transit facilities was demonstrated. Once planning was complete, the federal share could be increased to the full two-thirds allowed under the long-range program.<sup>12</sup>

## 3. *Research and Demonstration:*

The Act authorized the use of up to \$30 million of the \$375 million for 100 percent federal share grants for research, development, and demonstration projects.<sup>13</sup>

### B. LABOR STANDARDS

The Act directed the Administrator to take such action as may be necessary to ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed with the assistance of loans or grants under this Act were paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act.<sup>14</sup>

### C. AIR POLLUTION

The Act required the Administrator to "take into consideration" whether a federally-aided mass transportation system complied with criteria for air pollution control established by the Secretary for Health, Education, and Welfare.<sup>15</sup>

## II. URBAN MASS TRANSPORTATION ACT OF 1966

To fill in gaps and expand the programs established by the Urban Mass Transportation Act of 1964,<sup>16</sup> Congress passed the Urban Mass Transportation Act of 1966.<sup>17</sup> The 1966 Act authorized annual appropriations of \$150 million through 1969 for matching grants and loans to enable states and localities to construct and improve mass transit facilities. The bill also expanded the 1964 Act by authorizing use of two-thirds federal matching share for three new purposes: (1) planning, engineering,

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12. *Id.* § 5.

13. *Id.* § 6.

14. *Id.* § 10.

15. *Id.* § 11.

16. See Urban Mass Transportation Act of 1964, 78 Stat. 302.

17. Urban Mass Transportation Act of 1966, Pub. L. No. 89-562, 80 Stat. 715 (1966).

and technical studies; (2) training fellowships for personnel in the mass transportation field; and, (3) research on the problems of mass transportation and training of personnel for research and employment in transportation systems.<sup>18</sup> This last section resulted in a report to Congress in 1968 which highlighted many new systems, such as dial-a-bus, personal rapid transit, dual mode, etc.<sup>19</sup>

### III. THE DEPARTMENT OF TRANSPORTATION ACT OF 1966

The U.S. Department of Transportation ("DOT") was created with the enactment of the Department of Transportation Act of 1966 ("DOT Act").<sup>20</sup> The new department was established to coordinate and effectively manage transportation programs, provide leadership in the resolution of transportation problems, and develop national transportation policies and programs.<sup>21</sup> However, the DOT Act did not clarify the division of responsibility for urban mass transportation between the newly created DOT and HUD, where mass transit programs were housed.

Consequently, state and local governments that were developing comprehensive transportation plans had to coordinate with two separate federal agencies, DOT and HUD. In order to streamline services and programs, President Johnson transferred most of HUD's mass transit capacity to DOT, effective July 1, 1968. Responsibility for these programs was given to the newly established Urban Mass Transportation Administration (now the Federal Transit Administration).<sup>22</sup>

### IV. THE URBAN MASS TRANSPORTATION ASSISTANCE ACT OF 1970

The Urban Mass Transportation Assistance Act of 1970 was another landmark in federal funding of mass transportation, authorizing the first long-term commitment of federal funds for mass transportation. Prior acts had authorized funds for only a few years at a time. As a result, it was difficult for state and local governments and transit agencies to plan and implement mass transportation projects over several years due to the uncertainty of funds. The Act authorized a federal expenditure of \$10 billion over a 12-year period "to permit confident and continuing local planning, and greater flexibility in program administration."<sup>23</sup>

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18. *Id.* § 2(a)(2).

19. EDWARD WEINER, URBAN TRANSPORTATION PLANNING IN THE UNITED STATES: AN HISTORICAL OVERVIEW 33-34 (U.S. Department of Transportation 1997), available at <http://tmip.fhwa.dot.gov/resources/clearinghouse/docs/utp/utp.pdf>.

20. Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 935 (1966).

21. *Id.* § 2(b)(1).

22. Reorganization Plan No. 2, Pub. L. No. 90-623, 82 Stat. 1316 (1968).

23. Urban Mass Transportation Assistance Act of 1970, Pub. L. No. 91-453, 84 Stat. 962 (1970).

### A. GRANTS AND LOANS

The Act authorized the Secretary of Transportation to make direct grants or loans to assist states and local public bodies and agencies in financing the acquisition, construction, reconstruction, and improvement of facilities and equipment for use in mass transportation service in urban areas. The Act authorized \$3.1 billion for grants to state and local governments to meet up to two-thirds of the net cost of construction and improvement of mass transit systems and authorized aggregate totals of \$80 million in Fiscal Year ("FY") 1971, \$310 million in FY 1972, \$710 million in FY 1973, \$1.26 billion in FY 1974, \$1.86 billion in FY 1975, and \$3.1 billion thereafter.<sup>24</sup>

### B. PLANNING

The Act required state and local governments seeking loans or grants to hold public hearings on projects that "substantially affected communities or their mass transit systems" so that consideration was given to the social, economic, and environmental impacts of the project.<sup>25</sup>

### C. ELDERLY AND DISABLED

One of the most significant provisions in the Act was the requirement that "special efforts" be made in the planning and design of mass transportation facilities and services "so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal <sic> programs offering assistance in the field of mass transportation should contain provisions implementing this policy." The Act authorized the Secretary to make grants and loans for mass transportation services specifically in order to meet the special needs of elderly and handicapped persons. The Act also established a clear national policy that elderly and disabled persons have the same right as other persons to utilize mass transportation facilities and services.<sup>26</sup>

## V. NATIONAL MASS TRANSPORTATION ASSISTANCE ACT OF 1974

The National Mass Transportation Assistance Act of 1974 was passed in response to the high maintenance and operational costs experienced by aging transit agencies. The Act authorized \$11.8 billion over a six year period for capital and operating costs. The passage of the Act was a milestone in transit's history because it was the first time that fed-

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24. *Id.* § 3(b).

25. *Id.* § 2.

26. *Id.* § 8.



eral funds had been authorized for mass transit operating subsidies.<sup>27</sup>

#### A. FORMULA PROGRAM

The Act authorized \$4 billion to be allocated to urbanized areas by a formula based on population and population density. The funds could be used for either capital projects or operating assistance with a 50-percent federal matching share.<sup>28</sup> The Act authorized \$7.8 billion for capital assistance at the discretion of the Secretary. Up to \$500 million of the capital fund was reserved for rural areas. Funds used for capital projects were to have an 80 percent federal matching share.<sup>29</sup>

#### B. ELDERLY AND DISABLED

As a condition to receiving funds, transit agencies were required to charge elderly and disabled individuals no more than one-half the regular fare during off-peak hours.<sup>30</sup>

#### C. REPORTING SYSTEM

The Act also required the DOT to establish a data reporting system for financial and operating information and a uniform system of accounts and records. After July 1978, no grant could be made to any applicant unless they were reporting data under both systems.<sup>31</sup>

### VI. FEDERAL PUBLIC TRANSPORTATION ASSISTANCE ACT OF 1978

President Jimmy Carter sought to streamline and integrate federal transportation programs in order to make them more responsive to the needs of state and local governments. As a result, the Federal Public Transportation Act of 1978, Title III of the Surface Transportation Assistance Act, was the first federal act to combine highways, public transportation, and highway safety authorization into one piece of legislation. The Act authorized \$15.6 billion for mass transit aid over five years and established both discretionary and formula grant programs.<sup>32</sup>

#### A. DISCRETIONARY GRANT PROGRAM

The Act authorized \$7.48 billion for discretionary grants. The legis-

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27. National Mass Transportation Assistance Act of 1974, Pub. L. No. 93-503, 88 Stat. 1565 (1974).

28. *Id.* § 103.

29. *Id.*

30. *Id.*

31. *Id.* § 111.

32. Surface Transportation Assistance Act of 1978, tit. III, Pub. L. No. 95-599, § 303, 92 Stat. 2689, 2735-2737 (1978).

lation required that at least \$350 million of the total funds in the program be spent on reconstruction and improvement of existing public transit systems. Up to \$200 million annually was earmarked for urban development projects involving transit facilities, and \$45 million was earmarked for projects along the Northeast rail corridor.<sup>33</sup> The Act formalized the “letter of intent” process whereby the federal government committed funds for a transit project through the discretionary grant program.<sup>34</sup>

#### B. FORMULA GRANT PROGRAM

The Act expanded the formula grant program established in the National Mass Transportation Act of 1974 by increasing authorizations under the existing formula. In addition, the Act created a “second tier” formula program for the nation’s largest cities where funds for construction and operating assistance were to be split so that 85 percent went to urbanized areas over 750,000 in population and the remaining 15 percent to smaller areas.<sup>35</sup> The Act also authorized a formula program for the purchase of buses and bus facilities, and commuter rail and fixed guideway systems.<sup>36</sup> Additionally, the Act created a small formula grant program for non-urbanized areas for capital and operating assistance.<sup>37</sup>

#### C. PLANNING

The Act changed the planning requirements so that state and local officials needed to consider energy conservation and alternative transportation systems when formulating transportation plans and programs.<sup>38</sup> The Act also authorized local officials, through Metropolitan Planning Organizations (“MPOs”), to carry out the urbanized planning process.<sup>39</sup>

#### D. TRANSPORTATION RESEARCH CENTERS

The Act authorized \$10 million annually for grants to universities and colleges to establish transportation research centers.<sup>40</sup>

#### E. INTERCITY BUS

The Act authorized \$40 million annually for four years for the purchase, construction or improvement of intercity bus terminals, and an additional \$30 million annually for subsidies for the initiation, improve-

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33. *Id.* at 2735-2738.

34. *Id.* § 302(E)(4), 92 Stat. 2735-2737.

35. *Id.* § 304(a)(2)(A), 92 Stat. 2739-2741.

36. *Id.*

37. *Id.* § 313, 92 Stat. 2748-2749.

38. *Id.* § 305, 92 Stat. 2743-2744.

39. *Id.*

40. *Id.* § 307, 92 Stat. 2745.

ment or continuation of intercity bus service.<sup>41</sup>

#### F. BUY AMERICA

Title IV included a "Buy America" provision applying to all contracts over \$500,000. The provision could be waived if the application was inconsistent with the public interest, domestic supplies were not available or of unsatisfactory quality, or if the use of domestic products would increase the cost by over 10 percent.<sup>42</sup>

#### VII. FEDERAL PUBLIC TRANSPORTATION ACT OF 1982

When President Ronald Reagan took office, he expressed his disapproval of federal funding for public transit and was often quoted saying "Why should someone in Sioux Falls pay taxes so that a bureaucrat in Washington, D.C. can ride to work on transit?"<sup>43</sup> Leading the fight to reduce federal spending was David Stockman, the Director of the Office of Management and Budget ("OMB"), and one of his priorities was to phase out all transit operating subsidies by 1984. OMB also took a strong interest in eliminating operating subsidies because the outlays spend down very quickly, as opposed to funds for capital projects, which spend down at a slower pace.

Despite the Reagan Administration's best efforts, their attempts to phase out operating assistance were thwarted by the National Conference of Mayors, the American Public Transit Association, and the transit workers' unions. As a result, The Federal Public Transportation Act of 1982<sup>44</sup> included funds for operating assistance, although the subsidies were capped at 80% of the previous apportionment, depending on the size of the population served by the project. In addition, the Act only authorized operating assistance to come from the General Fund, not the Mass Transit Account of the Highway Trust Fund.<sup>45</sup>

The Act authorized \$16.5 billion for mass transit through 1986. In order to fund repairs to deteriorating roads and transit systems, the Act increased the gasoline tax for the first time since 1959. The five cent tax was expected to raise revenues of \$5.5 billion a year. The most notable provision of the Act was that one cent of the increased gas tax was earmarked for mass transit. This was the first substantial diversion of the Highway Trust Fund for public transportation purposes. Although transit

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41. *Id.* § 323, 92 Stat. 2754-2755.

42. *Id.* at tit. IV, 92 Stat. 2756.

43. JAMES DUNN, *DRIVING FORCES, THE AUTOMOBILE, ITS ENEMIES, AND THE POLITICS OF MOBILITY* 93 (The Brookings Institution Press) (1998).

44. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 at 2140 (1983).

45. *Id.*

was provided with a new and dedicated source of funds, this Act cut federal transit aid by 20 percent and established a trend that continued throughout the Reagan Administration.<sup>46</sup>

### VIII. FEDERAL MASS TRANSPORTATION ACT OF 1987

The Federal Mass Transportation Act of 1987, Title III of the Surface Transportation and Uniform Relocation Assistance Act of 1987, authorized \$17.8 billion for federal mass transit assistance for FY 1987 through FY 1991.<sup>47</sup> The Act was passed by overriding the veto of President Reagan, who in his veto message stated, "This bill is a textbook example of special interest, pork-barrel politics at work."<sup>48</sup> The Act codified a process for evaluating projects seeking funds for new or expanded rail systems, or "New Starts." The Act also created a new Rural Transit Assistance Program to provide funds and support services for nonurbanized areas.<sup>49</sup>

#### A. DISCRETIONARY GRANT PROGRAM

The Act authorized discretionary spending of \$6.25 billion through Fiscal Year 1991, funded from the Mass Transit Account of the Highway Trust Fund. Of that amount, 40 percent was allocated for new rail starts and extensions, 40 percent for rail modernization projects, 10 percent for bus needs, and 10 percent for allocation at the discretion of the Secretary of Transportation.<sup>50</sup> In order to receive funds for new starts, the project had to be: (1) based on alternatives analysis and preliminary engineering; (2) deemed cost effective; and, (3) supported by an acceptable degree of local financial commitment.<sup>51</sup>

#### B. FORMULA GRANT PROGRAM

The Act authorized \$10.4 billion through 1991 from the General Fund for the formula grant programs. The Act allowed a newly urbanized area with a population of 50,000 to use up to two-thirds of its formula grant apportionment during the first full year it received funds to help pay for transit operating expenses. The operating assistance cap for other urbanized areas with a population of less than 200,000 was in-

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46. *Id.* at 2140-2146.

47. Federal Mass Transportation Act of 1987, tit. III, Pub. L. No. 100-17, § 305, 101 Stat. 132 (1987).

48. President Ronald Reagan, Statement of Returning Without Approval the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Mar. 27, 1987), *available at* <http://www.reagan.utexas.edu/archives/speeches/1987/032787c.htm>.

49. Federal Mass Transportation Act of 1987 § 323.

50. *Id.* § 305.

51. *Id.* § 303.

creased by 32.2 percent.<sup>52</sup>

### C. PLANNING

The Act required the development of long-term financial plans for regional urban mass transit improvements and the revenue available from current and potential sources to implement such improvements.<sup>53</sup>

## IX. THE FEDERAL TRANSIT ACT AMENDMENTS OF 1991

The Federal Transit Act Amendments of 1991, Title II of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), authorized \$31.5 billion for mass transit over six years, resulting in the largest funding increase since the federal government first created funding programs for transit in 1964. Of this amount, \$18.2 billion came from the Mass Transit Account of the Highway Trust Fund, and the remaining \$13.3 billion came from the General Fund. ISTEA established "guaranteed" funding levels or "firewalls," so that \$36 billion of the \$41 billion authorized had to be spent on transit projects. Prior to the Transportation Equity Act for the 21st Century ("TEA-21"),<sup>54</sup> funding for surface transportation programs was one priority among many competing for federal budget dollars. The Act also changed the name of the Urban Mass Transportation Administration to the Federal Transit Administration in order to reflect the broader mandate of the agency.<sup>55</sup>

### A. DISCRETIONARY GRANT PROGRAM

The Act authorized \$12.4 billion over six years for discretionary grants. The funds were divided as follows: 40 percent for New Starts, 40 percent for rail and fixed-guideway modernization, and 20 percent for buses and bus facilities.<sup>56</sup> In order to make funding more predictable, authorizations for rail modernization were allocated by formula rather than on a discretionary basis as in the prior Act of 1987.

The Act established new criteria for New Starts projects. The project had to be (1) based on the results of alternative analysis and preliminary engineering; (2) justified based on mobility improvement, environmental benefit, cost effectiveness, and operating efficiency; and (3) supported by an acceptable degree of local financing. The alternative analysis requirement could be waived if a small portion of the total costs was sought from

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52. *Id.* § 312.

53. *Id.* § 310.

54. *See infra* Section X.

55. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991).

56. *Id.* §§ 3006-10.

the federal government or if the project was needed to help a state comply with their air quality plans.<sup>57</sup>

### B. FORMULA PROGRAM

The Act authorized \$17.4 billion over six years for formula grant programs. Of that amount, \$16.2 billion was authorized for capital and operating assistance and \$941.7 million for rural transit programs, an increase of 2.6 percent.<sup>58</sup> ISTEA added a provision requiring states to spend not less than 5 percent of their rural apportionment in 1992, 10 percent in 1993, and 15 percent in 1994 and thereafter to carry out a program for the development and support of intercity bus transportation.<sup>59</sup> ISTEA retained federal operating assistance for all mass transit systems, despite the Bush administration's proposal to eliminate operating assistance for urban areas of over a million. The Act retained the matching ratio for operating assistance of 50 percent of net operating costs.<sup>60</sup>

In addition, the Act permitted the discretionary transfer of capital formula funds to highway projects in Transportation Management Areas.<sup>61</sup> ISTEA also created a new Surface Transportation Program ("STP") and the Congestion Mitigation and Air Quality Improvement Program ("CMAQ"), which provided funds that could be transferred from highways to transit projects. These new programs were intended to realign the focus of transportation planning toward a more inclusive, environmentally-sensitive, and multimodal approach to addressing transportation problems.<sup>62</sup>

### C. TRANSIT PLANNING AND RESEARCH

ISTEA authorized \$478.4 million for national and state level research and planning of transportation programs. ISTEA established a Transit Cooperative Research Program, modeled after the National Cooperative Highway Research program to conduct problem solving for transit operators.<sup>63</sup> Metropolitan Planning Organizations ("MPOs") were given a more significant role in the planning process. Each MPO was required to develop and periodically update a long-range plan taking into account project finances, land use, air quality, traffic congestion, and

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57. *Id.* § 3010.

58. *Id.* §§ 3013, 3025.

59. *Id.* § 3023.

60. Intermodal Surface Transportation Efficiency Act of 1991-Summary, *available at* <http://ntl.bts.gov/DOCS/ste.html>.

61. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 3013(h), 105 Stat. 1914 (1991).

62. *Id.* § 1008.

63. *Id.* § 3030.

other related factors. MPOs were also required to develop Transportation Improvement Programs ("TIP"), which contained a prioritized list of projects.<sup>64</sup>

## X. THE FEDERAL TRANSIT ACT OF 1998

The Federal Transit Act of 1998, Title II of the Transportation Equity Act for the 21st Century ("TEA-21"), increased funding levels by 70 percent from ISTEA. The Act authorized \$41 billion for transit programs, with \$29.34 billion coming from the Mass Transit Account of the Highway Trust Fund and \$11.65 billion authorized from the General Fund.<sup>65</sup> Two new programs were created by this Act, the Clean Fuels Formula Grant program<sup>66</sup> and the Job Access and Reverse Commute program.<sup>67</sup> The Act eliminated operational assistance for urban areas with populations greater than 200,000, but allowed urban formula and fixed guideway funds to be used to support preventative maintenance.<sup>68</sup>

### A. DISCRETIONARY GRANT PROGRAMS

#### 1. *Capital Investment Program:*

ISTEA authorized \$18.32 billion for discretionary programs for capital investments: \$8.18 billion for New Starts, \$6.59 billion for Fixed Guideway Modernization,<sup>69</sup> and \$3.55 billion for bus and bus-related facilities for FY 1998 to FY 2003.<sup>70</sup> ISTEA established new considerations for the Secretary when evaluating New Starts projects: (1) population density and current transit ridership in the corridor; (2) the technical capability of the grant recipient to construct the project; and, (3) factors reflecting differences in local land, construction, and operating costs.<sup>71</sup>

#### 2. *Job Access Reverse Commute:*

The Act authorized \$500 million for the newly created Job Access and Reverse Commute ("JARC") program, which was established to address the unique transportation challenges faced by welfare recipients and low-income persons seeking to secure jobs. Many entry-level positions require commuting from inner city areas into suburban areas on nights and weekends when regular transit service is not readily available.

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64. *Id.* § 3012.

65. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3029, 112 Stat. 107, 368-73 (1998).

66. *Id.* § 3008.

67. *Id.* § 3037.

68. *Id.* § 3007.

69. *Id.* § 3028.

70. *Id.* § 3031.

71. *Id.* § 3009(e)(3).

The Act required JARC project selection be made through a national competition based on statutorily specified criteria.<sup>72</sup>

## B. FORMULA GRANTS

The Act authorized \$19.97 billion for formula grants: \$2 billion for the Clean Fuels Grant Program, \$18.03 billion for the Urbanized Area Formula Grant Program, \$24.3 million for Rural Transportation Accessibility Incentive Program, and \$1.18 billion for the formula grant program other than urbanized areas for FY 1998 to FY 2003.<sup>73</sup>

### 1. *Clean Fuels:*

The newly created Clean Fuels Formula Grant Program provides funds for adoption of clean fuel technologies. Eligible projects included the purchasing or leasing of clean fuel buses and facilities, and the improvements of existing facilities to accommodate clean fuel buses.<sup>74</sup> Two-thirds of the funds were designated for urban areas with a population of at least one million.<sup>75</sup>

### 2. *Urbanized Areas:*

For urbanized areas with populations less than 200,000, TEA-21 continued to allow funding for either capital or operating costs. The Act eliminated operating assistance for urbanized areas with populations of 200,000 or more. However, the Act revised the definition of “capital,” allowing urbanized area formula funds and fixed guideway funds to be used for preventative maintenance of transit equipment and facilities.<sup>76</sup>

### 3. *Elderly & Disabled/Rural/Other than Urbanized Areas:*

The Act authorized \$456 million through 2003 to serve the special needs of elderly individuals and individuals with disabilities.<sup>77</sup> This funding was to be apportioned based on each state’s share of the national elderly and disabled population.<sup>78</sup> TEA-21 authorized \$24.3 million through 2003 to assist public and private over-the-road bus operators to finance the incremental capital and training costs of complying with the DOT’s final rule on accessibility and over-the-road buses.<sup>79</sup> “Other than urbanized areas” received \$1.18 billion for capital, operating, State <sic>

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72. *Id.* § 3037.

73. *Id.* § 3029.

74. *Id.* § 3008.

75. *Id.*

76. *Id.* § 3007.

77. *Id.* §§ 3013, 3029.

78. *Id.* § 3013.

79. *Id.* §§ 3029, 3038.



administration, and project operation expenses.<sup>80</sup>

## XI. THE SAFE, ACCOUNTABLE, FLEXIBLE, EFFICIENT TRANSPORTATION EQUITY ACT: A LEGACY FOR USERS

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") authorized \$53.6 billion in transit funding for FY 2005 through FY 2009.<sup>81</sup> This was a 46 percent increase over TEA-21 funding levels. The authorization of SAFETEA-LU was not only a milestone in terms of transit funding levels, but also due to the creation of several new programs and funding categories. To reflect the broad array of programs that Congress authorized the DOT Federal Transit Administration ("FTA") to oversee, the Act replaced the term "mass transportation" with "public transportation."<sup>82</sup>

### A. DISCRETIONARY PROGRAMS

SAFETEA-LU created two new discretionary programs: Alternative Transportation in Parks and Public Lands and the Alternative Analysis Program.

#### 1. *Alternative Transportation in Parks and Public Lands Program:*

SAFETEA-LU created a new program to develop public transportation in national parks, with the goal of improving mobility while reducing congestion and pollution. DOT and the U.S. Department of Interior were to work cooperatively to develop and select capital projects.<sup>83</sup>

#### 2. *Alternatives Analysis Program:*

SAFETEA-LU authorized \$25 million each fiscal year from FY 2006 through FY 2009 for alternatives analysis for New Starts projects.<sup>84</sup>

#### 3. *Rural Program:*

SAFETEA-LU significantly increased funding for the rural program of the transit formula program. The Act also created a new formula tier that was based on land area to address the needs of low-density states. Indian tribes were added as eligible recipients, and a portion of funding was set aside each year for Indian tribes: \$8 million in FY 2006 and rising

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80. *Id.* § 3014.

81. Safe, Accountable, Flexible, Efficient Transportation Act, Pub. L. 109-59, § 1101, 119 Stat. 1144, 1153-57 (2005) [hereinafter *SAFETEA-LU*].

82. *Id.* § 3003.

83. *Id.* § 3021.

84. *Id.* § 3037.

to \$15 million by FY 2009.<sup>85</sup>

#### 4. *Clean Fuels Grant Program:*

The Clean Fuels grant program switched from a formula program to a discretionary program. Funds were provided for the purchase of clean fuels buses, including clean diesel vehicles in certain non-attainment areas and areas trying to maintain compliance with clean air standards.<sup>86</sup>

### B. CAPITAL INVESTMENT PROGRAMS

The Act authorized \$22.7 billion for Capital Investment projects which include New Starts, Fixed Guideway Modernization, and the Bus and Bus Facility program. The Act created a new program for smaller capital investment projects: Small Starts. The Act did not make any changes to the Fixed Guideway Modernization Program.<sup>87</sup>

#### 1. *New Starts:*

The Act authorized \$4.5 billion for the New Starts program and retained the maximum New Starts federal share of 80 percent. The three-level rating system for New Starts was replaced by a five-level system: High, Medium High, Medium, Medium-Low, and Low. Economic development and land use were added to the project justification criteria. FTA was directed to implement New Starts Program changes with a rulemaking and to provide an opportunity for notice and comment on changes to New Starts policies. The Act also created a pilot program to demonstrate the benefits of public private partnerships.<sup>88</sup>

#### 2. *Small Starts:*

SAFETEA-LU authorized \$600 million for the newly created Small Starts Program. This program was for smaller projects with a federal share of less than \$75 million, including streetcar, bus rapid transit (including non-fixed guideway BRT), and commuter rail projects.<sup>89</sup>

#### 3. *Bus and Bus Facilities:*

Although SAFETEA-LU made few changes to the bus program, the Act authorized \$4.8 billion for the Bus and Bus Facilities Program – a significant increase in funding from TEA-21. However, 600 earmarks were included in this section; thus, taking about half of the discretionary

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85. *Id.* § 3013.

86. *Id.* § 3010.

87. *Id.* § 3011, at 1573-90.

88. *Id.*

89. *Id.*

bus program resources in each fiscal year through FY 2009.<sup>90</sup>

### C. FORMULA PROGRAMS

SAFETEA-LU authorized \$28.4 billion for formula programs and created the New Freedom Program.<sup>91</sup>

#### 1. *New Freedom:*

The Act authorized \$339 million over six years for the newly created New Freedom program.<sup>92</sup> This program provided formula funding for new transportation services and public transportation alternatives beyond those required by the Americans with Disabilities Act ("ADA") to assist persons with disabilities.<sup>93</sup> The New Freedom Program is allocated using a formula based on the disabled population in a state, with 60 percent of the funds allocated to urbanized areas with populations larger than 200,000, 20 percent to states for use in urbanized areas of less than 200,000, and 20 percent to states for use in rural areas.<sup>94</sup> The funds are made available to transit systems and the states. The program contains language mandating coordination of transportation services with other federal human service programs.<sup>95</sup>

#### 2. *Urbanized Areas:*

SAFETEA-LU preserve[d] the existing formula program and its distribution factors, but create[d] several new programs or tiers to distribute a portion of the funds to urbanized areas (UZAs).<sup>96</sup> It establishe[d] a new tier for transit intensive urbanized areas with fewer than 200,000 in population and extends the authority to use formula funds for operating purposes in [UZAs] reclassified as being larger than 200,000 in population under the 2000 Census.<sup>97</sup>

#### 3. *Metropolitan and Statewide Planning:*

The Act authorized \$560 million for Metropolitan and Statewide Planning.<sup>98</sup> The Act maintained the requirement for separate transportation plans and transportation improvement programs ("TIP") and re-

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90. *Id.*

91. *Id.* § 3019.

92. FTA Authorization Fact Sheet: New Freedom Program, [http://www.fta.dot.gov/documents/FTA\\_New\\_Freedom\\_Fact\\_Sheet\\_Sept05.pdf](http://www.fta.dot.gov/documents/FTA_New_Freedom_Fact_Sheet_Sept05.pdf) (last visited Apr. 9, 2010).

93. *Id.*; SAFETEA-LU, *supra* note 81, § 3019(b)(1).

94. SAFETEA-LU, *supra* note 81, § 3019(c)(1).

95. *Id.* at (f)(1), (3).

96. AMERICAN PUBLIC TRANSPORTATION ASSOCIATION, SAFETEA-LU: A GUIDE TO TRANSIT-RELATED PROVISIONS 4 (2005), available at [http://www.apta.com/gap/policyresearch/Documents/safetela\\_lu\\_guide.pdf](http://www.apta.com/gap/policyresearch/Documents/safetela_lu_guide.pdf) [hereinafter SAFETEA-LU: A GUIDE TO TRANSIT-RELATED PROVISIONS].

97. *Id.*; SAFETEA-LU, *supra* note 81, § 3009(c)(2)(A)(i).

98. FTA Authorization Fact Sheet: New Freedom Program, <http://www.fta.dot.gov/docu->

quired certification and updating of the metropolitan plan and TIP every four years.<sup>99</sup> The Act required a new public participation plan to afford parties who participate in the metropolitan planning process with a specific opportunity to comment on the plan and TIP before its approval.<sup>100</sup> The Act added a new provision that required the Secretary to issue rules regarding the publication of the projects in the transportation improvement program for which funds have actually been obligated.<sup>101</sup>

#### 4. *Elderly and Individuals with Disabilities:*

SAFETEA-LU maintained the current program for special needs of elderly individuals and individuals with disabilities, but established a new seven-state pilot program to determine whether to expand authority to use up to 33 percent of the funds apportioned under section 5310 for operating costs to improve services to elderly individuals and individuals with disabilities.<sup>102</sup>

#### 5. *Job Access and Reverse Commute:*

The Act switched the Job Access and Reverse Commute (“JARC”) program from a competitive discretionary grants program to a formula program.<sup>103</sup> “The formula is based on ratios involving the number of eligible low-income and welfare recipients” in each urbanized area, “with 60 percent of funds going to urban areas with more than 200,000 population, 20 percent for urban areas with less than 200,000 population, and 20 percent to rural areas.”<sup>104</sup> The Act required coordination between private, non-profit, and public transportation providers and other federal programs in the JARC program, the New Freedom Program, and the Elderly and Disabled program.<sup>105</sup>

## XII. MOVING FORWARD, BUT MOVING SLOWLY: ISSUES FOR REAUTHORIZATION

The current six year federal transportation act, SAFETEA-LU, expired on September 30, 2009, but Congress is nowhere near passing new long-term authorizing legislation. On July 6, 2009, the DOT sent a two-page document to Congressional committees containing an outline of the

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ments/FTA\_Metropolitan\_and\_State\_Planning\_Fact\_Sheet\_Sept05.pdf (last visited Apr. 1, 2010).

99. *SAFETEA-LU*, *supra* note 81, §§ 3005(j)(1)(D), (k)(5)(A)(ii), 3006(g)(1).

100. *Id.* § 3005(i)(5)(A).

101. *Id.* §§ 3005-3006.

102. *Id.* § 3012(b)(1).

103. *SAFETEA-LU: A GUIDE TO TRANSIT-RELATED PROVISIONS*, *supra* note 97, at 7.

104. *Id.*; *SAFETEA-LU*, *supra* note 81, § 3018(c)(2)(A)-(C).

105. *SAFETEA-LU: A GUIDE TO TRANSIT-RELATED PROVISIONS*, *supra* note 97, at 7.

Obama Administration's proposal for what it called the "Stage I Reauthorization" of federal surface transportation programs.<sup>106</sup> This document outlined the Administration's proposal for the first stage of surface transportation reauthorization, consisting of an 18 month extension plan that addresses the Highway Trust Fund shortfall and contains many of the same themes, although on a much more limited scale, as The Surface Transportation Authorization Act of 2009: A Blueprint for Investment and Reform, which was introduced by Congressman Jim Oberstar (D-MN), Chairman of the Committee on Transportation and Infrastructure, U.S. House of Representatives, on June 18, 2009.<sup>107</sup>

The announcement of this extension was met with great protest from Chairman Oberstar and other members of the House Transportation Committee. In a letter to President Obama, signed by the Democratic Members of the House Transportation Committee, Oberstar states,

An 18-month extension of current law and temporary restoration of the Highway Trust Fund will leave states without the certainty and reliable funding source that they need to plan, design, and construct significant multi-year highway and transit projects. States will slow investments – as they have done during past extensions – and this slowdown will offset much of the benefit of the increased transportation investment provided under the American Recovery and Reinvestment Act of 2009 (P.L. 111-5).<sup>108</sup>

However, the leaders of several Senate Committees are supportive of a 6 to 18 month extension of the federal surface transportation authorization and are expected to approve an extension soon.<sup>109</sup>

Both Congress and the Obama Administration will be addressing the following major issues in their legislative proposals:

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106. Memorandum from the Department of Transportation to Congressional Committees (June 30, 2009), *available at* <http://www.ncsl.org/documents/transportation/HillReauthMemo070109.pdf> (the surface transportation bill will AUTHORIZE THE FEDERAL SURFACE TRANSPORTATION PROGRAMS FOR HIGHWAYS, HIGHWAY SAFETY, TRANSIT, AND POSSIBLY TRANSIT SAFETY, FOR A 5-YEAR PERIOD).

107. *Id.*; STAFF OF TRANSPORTATION AND INFRASTRUCTURE COMMITTEE, 111th CONG., THE SURFACE TRANSPORTATION AUTHORIZATION ACT OF 2009: A BLUEPRINT FOR INVESTMENT AND REFORM (Comm. Print 2009), *available at* [http://transportation.house.gov/Media/file/Highways/HPP/OBERST\\_044\\_xml.pdf](http://transportation.house.gov/Media/file/Highways/HPP/OBERST_044_xml.pdf).

108. Letter from James L. Oberstar, Chairman, Comm. on Transp. and Infrastructure, to Barack Obama, President, United States (June 24, 2009), *available at* [http://transportation.house.gov/Media/file/Full%20Committee/Letter%20to%20the%20President\\_ExtensioE.pdf](http://transportation.house.gov/Media/file/Full%20Committee/Letter%20to%20the%20President_ExtensioE.pdf).

109. This authorization has already been extended twice, most recently through Dec. 31st, 2010. The latest extension, signed into law on March 18, 2010 was a part of the "Hiring Incentives to Restore Employment Act" (HIRE). It has become public law number 111-147, and the part regarding SAFETEA is under Title IV, Subtitle A, Section 411(a), <http://wsdot.federal.funding.blogspot.com/2010/03/safetea-lu-extended-through-dec-31-2010.html>.

## A. OPERATING FUNDS

As a result of the recent economic downturn, the issue of operating subsidies for transit agencies has come to the attention of several members of Congress. During a hearing before the U.S. Senate Committee on Banking, Housing, and Urban Affairs on March 12, 2009, Senator Jack Reed (D-RI) asked Transportation Secretary Ray LaHood about operational funds and expressed his concern that systems were not receiving adequate funding for operations.<sup>110</sup> The Secretary responded that he will be “open-minded” to the possibility of allocating funds towards operating assistance, particularly as the American Recovery and Reinvestment Act (“ARRA”) has provided additional funding for transit capital costs.<sup>111</sup>

On May 21, 2009, the Senate passed S. 1054, the “Supplemental Appropriations Act, 2009,” for additional funding for the wars in Afghanistan and Iraq.<sup>112</sup> The bill includes a provision sponsored by Senator Patty Murray (D-WA), the Chairwoman of the Appropriations Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, which would allow transit agencies to use up to 10 percent of their ARRA Transit Capital Assistance funds apportioned pursuant to formula for operating costs.<sup>113</sup> The corollary House bill, H.R. 2346, does not contain such a provision.<sup>114</sup> The Senate report language, S. Rept. 111-20, articulates that the Congressional intent of providing operating subsidies as necessary to address the immediate need for job preservation and economic recovery.<sup>115</sup> There is no indication that the Appropriations Committees will seek to enact legislation permitting urbanized area with a population of 200,000 or over to use FTA urbanized formula grants for operating expenses. The Appropriations Committees will likely leave the matter to the Authorizing Committees.

## B. STREAMLINING NEW STARTS

The streamlining of FTA’s New Starts program has been the subject of several Congressional hearings as a result of the high costs and lengthy process associated with getting a transit project to completion.<sup>116</sup> FTA’s

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110. *Sustainable Transportation Solutions: Investing in Transit to Meet 21st Century Challenges: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 15, 17 (2009) (statement of Raymond H. LaHood, Secretary, Department of Transportation), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg68/pdf/CHRG-111shrg68.pdf>.

111. *Id.*

112. Supplemental Appropriations Act, 2009, S. 1054, 111th Cong.

113. *Id.* § 1202.

114. Supplemental Appropriations Act, 2009, H.R. 2346, 111th Cong.

115. SEN. REP. NO. 111-20, at 96 (2009), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_reports&docid=f:sr020.111.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:sr020.111.pdf).

116. See generally *A Fresh Start for New Starts: Hearing Before the Subcomm. on Housing Transportation and Community Development of the S. Comm. on Banking, Housing, and Urban*

discretionary New Starts program is the federal government's primary financial resource for supporting locally-planned, implemented, and operated transit "guideway" capital investments.<sup>117</sup> It typically takes anywhere from 6 to 12 years for a transit project to progress from the initial planning process to final design. Critics of the New Starts program say that the process is too rigorous and FTA is risk averse. FTA's project justification criteria have also come under intense scrutiny.<sup>118</sup> Currently, of these criteria, Cost-Effectiveness and Transit Supportive Land Use are weighted 50 percent to determine the overall rating for Project Justification.<sup>119</sup> The other criteria (Economic Development, Environmental Benefits, Operating Efficiencies, and Mobility Improvements) are evaluated but not included in calculating the overall Project Justification Rating.<sup>120</sup> As a result, critics argue that viable projects are refused federal funding due to the burdensome cost effectiveness criteria.

### C. SAFETY

Recent transit accidents in Washington, D.C., California, and Massachusetts have brought the federal role in regulating transit rail systems to the attention of Congress. "Our nation's rail transit systems operate under two very different federal safety regimes.<sup>121</sup> Some FTA funded rail transit systems are governed by the Federal Railroad Administration['s'] ("FRA") safety regulations while others are governed by the States <sic>," through State Safety Oversight Offices.<sup>122</sup> Transportation Secretary LaHood, formed a U.S. Department of Transportation Safety Council, to examine safety issues facing the department, including expanding the role of the FTA to regulate transit safety.<sup>123</sup>

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*Affairs*, 111th Cong. (2009); See also *The Federal Transit Administration's Proposed Rule on the New Starts and Small Starts Programs: Hearing Before the Subcomm. on Highways and Transit of the H. Comm. on Transportation and Infrastructure*, 110th Cong. (2007).

117. FTA, Introduction to New Starts, [http://www.fta.dot.gov/planning/newstarts/planning\\_environment\\_2608.html](http://www.fta.dot.gov/planning/newstarts/planning_environment_2608.html) (last visited Apr. 1, 2010).

118. See *New Starts Program Challenges and Preliminary Observations on Expediting Project Development: Testimony Before the Subcomm. On Housing, Transportation, and Community Development of the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 8 (2009) (statement of Nicole Clowers, Acting Director of Physical Infrastructure Issues, Government Accountability Office), available at <http://www.gao.gov/new.items/d09763t.pdf>.

119. *Id.* at 7.

120. *Id.*

121. *Back on Track: WMATA Red Line Metrorail Accident and Continual Funding Challenges: Hearing Before the Subcomm. on Fed. Workforce, Postal Serv., and the District of Columbia of the H. Comm. on Oversight and Government Reform*, 111th Congress (2009) (statement of Peter M. Rogoff, Administrator, Fed. Transit Administration), available at [http://www.fta.dot.gov/news/news\\_events\\_10217.html](http://www.fta.dot.gov/news/news_events_10217.html).

122. *Id.*

123. Press Release, U.S. DEP'T TRANSP., Newly Formed Safety Council to Take Safety Com-

On February 22, 2010 the Obama Administration's transit safety proposal was introduced in Congress.<sup>124</sup> The proposal provides the Secretary of Transportation with oversight authority over transit agencies and operators and requires the Secretary to promulgate regulations to establish a federal certification program for employees and contractors who carry out state public transportation safety program activities in compliance with the Act. The proposal also provides federal funds to state safety oversight (SSO) agencies for hiring, training, inspections, and other safety-related activities. If passed, this bill would create more uniformity among the performance and capabilities of SSOs; thus, ensuring that transit systems throughout the country are meeting baseline safety requirements.

### XIII. CONCLUSION

In 1964, the federal government began a tenuous relationship with public transportation. However, in recent years that relationship has changed. The many economic, environmental, and energy conservation benefits that public transportation provides have become increasingly more quantifiable and understood both by the general public and by local, state, and federal lawmakers. Additionally, public transportation is no longer limited to major metropolitan areas. Individuals living in small and mid-sized cities and rural communities are increasingly relying on public transportation to get where they need to go. As a result, there is more demand than ever, from both sides of the aisle in Congress, for greater federal investment in rail, bus, and other public transportation systems.

Yet, there are no guarantees that the next surface transportation bill will usher in a new era for public transportation with a comprehensive national transportation plan, new funding mechanisms, restructured programs, and adequate capital funds for shiny new systems. Existing transit systems are aging and are in desperate need of federal funds to maintain a state of good repair, to enhance safety, and to meet basic operational needs. In addition, public transportation is competing with many other programs and services for a limited amount of federal resources. Until Congress gets further along in the drafting process, it will remain unclear whether they will create a bill that "faces the realities of American life

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mitment to Next Level (October 26, 2009), available at <http://www.dot.gov/affairs/2009/dot17209.htm>.

124. *Public Transportation Safety Program Act*, S. 3015 and H.R. 4643, 111th Congress, (2010).



and attempts to put in motion a movement to do something about it”<sup>125</sup> or legislation that simply patches up what already exists.

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125. President Lyndon B. Johnson, Remarks Upon Signing the Urban Mass Transportation Act (July 9, 1964), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=26369&st=transportation&st1=>.