President Franklin D. Roosevelt and Excess Condemnation

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Richard's Bio

President Franklin D. Roosevelt and Excess Condemnation

By Richard F. Weingroff

President Franklin D. Roosevelt was a big supporter of toll superhighways, which he saw as a way to create jobs for the unemployed during the Depression. During World War II, he saw the concept as vital to having projects on the shelf ready for construction by returning veterans in the post-war period. Less well know is his pet idea: to build the superhighways on excess right-of-way, well beyond what was needed for highway operations and expansion, so the extra land could be sold or rented to generate revenue to help pay for construction and upkeep. This article describes the President's interest and what happened to it.

President Franklin D. Roosevelt strongly supported development of a superhighway network, in part because it would create jobs for unemployed workers during the Depression that had begun with collapse of the stock market in October 1929. To keep the cost to taxpayers down, he believed the network should be financed by selling bonds to investors, with the bonds to be repaid from toll revenue. However, the most unusual feature of his concept was that the highways should employ "excess condemnation." Right-of-way would be acquired well beyond the needs of present or future highway operation, with the excess land sold or rented to help pay for construction. With revenue from tolls and the sale or rental of excess right-of-way, the superhighways could be built with little or no cost to taxpayers.

In February 1938, he was eagerly promoting the idea. On February 6, he met with Senator Robert J. Bulkley (D-Oh.), who had introduced a bill to create a United States Highway Corporation to build three transcontinental and seven north-south superhighways. The corporation would issue bonds to finance construction, with the bonds to be retired with revenue from tolls and concessionaires who would operate beyond the highway borders on the 600-foot wide right-of-way. The President told reporters he would consider construction of a transcontinental system of self-liquidating highways to spur economic recovery. (Despite the President's interest, Congress took no action on Senator Bulkley's bill and he lost his bid for reelection in November 1938.)

President Roosevelt cited the concept the following day when he met with members of the House of Representatives and on February 8 when he met with several big-city Mayors. Participants in both meetings reported that he had illustrated the concept of excess condemnation by describing how the British had built a six-lane highway between London and Brighton, with the rental or sale of the excess property returning two-thirds of the initial expenditures in 7 years.

That same day, February 8, he summoned Thomas H. MacDonald, Chief of the U.S. Bureau of Public Roads (BPR), to the White House. The President drew lines on a United States map-three east-west lines and five north-south lines-and asked MacDonald to study the feasibility of building a network of toll superhighways in those corridors. The President also wanted MacDonald to examine the feasibility of excess condemnation as employed on the London-Brighton highway.

During a European tour, MacDonald had seen the London-Brighton road while it was under construction, so he knew excess condemnation had not been employed on it. After contacting his British counterpart to confirm this recollection, MacDonald sent a message to the White House on February 14 asking the President for further guidance. Roosevelt replied via his staff on February 16: "Tell him I cannot give him any more leads but anyway it is a sound policy."

MacDonald submitted the internal report, *Proposed Direct Route Highways,* on April 16, 1938. It was based on extensive highway planning surveys that had been conducted in most States beginning in 1935. The surveys, conducted in cooperation with the State highway agencies, gathered information on the volume, character (including financial data), and range of traffic, the condition of highways, and the need for new facilities. At the time of the internal report, the BPR was still analyzing the data, but could conclude that:

> A national system of direct route highways designed for continuous flow of motor traffic, with all cross traffic on separated grades, is seriously needed and should be undertaken.

The highway surveys suggested that metropolitan sections and special high-cost facilities such as tunnels and bridges could be partially or wholly self-liquidating if financed with bonds. Beyond those segments, traffic volumes in rural areas would not be "sufficient to liquidate through direct tolls the cost of high standard improvement for an extensive mileage of continuous routes . . . ."

MacDonald had always preached that highway expenditures pay for themselves in benefits even though that fact was not as obvious on a toll facility. The financial data gathered during the highway planning surveys confirmed MacDonald's long-held view. Therefore, he emphasized that point in view of the report's conclusion regarding toll roads:

> This does not mean, however, that such expenditures will not be actually paid for by the traffic. On the contrary, any expenditure actually required for the accommodation of the traffic on these highways will be more than repaid by the normal road-user taxes generated by their use.

As for excess condemnation, the report explained that only a few States recognized such authority. Because State laws were inadequate for the purpose, the report suggested that a Federal Land and Financing Authority might be needed to acquire excess lands by eminent domain.

Proposed Direct Route Highways seems to have been written to address the President's enthusiasm-shared by MacDonald-for a new express highway network while, gently, redirecting him along the paths supported by the data from the highway planning surveys. In short, MacDonald was steering the President away from tolls and excess condemnation as impractical and unnecessary features of the desired highway network.

The Roosevelt report was not made public, but Members of Congress, having heard of the study, included a provision in the Federal-Aid Highway Act of 1938 asking the BPR for a report on a similar toll "superhighway" network consisting of three east-west routes and three north-south routes. Using its completed analysis of the highway planning survey data, the BPR expanded its internal report into a more expansive study.

On February 13, 1939, Secretary of Agriculture Henry A. Wallace, whose Department included the BPR, wrote to President Roosevelt to place "a circumstance" before him. After summarizing the report, the Secretary noted that although Congress had asked MacDonald to submit the report, it "involves many of the things with which you have been concerned, and upon which you have already made pronouncements . . . . He concluded:

> [Because] of the large amount of factual data which it contains with their great social and economic implications, it is certain to have considerable discussion, press comment, and quotation, it appears to us appropriate that you should transmit it to the Congress with any comments which you desire to make.

After receiving a draft of the report, Roosevelt had several questions for MacDonald on April 24, 1939, one of which was:

> Will you find out from MacDonald of Highways where in this report I can find anything about the excess condemnation principle . . . and if this is analyzed is it given approval and put in the summary? If it is not in at all-why not?

MacDonald replied the same day, citing references to excess condemnation and adding a recommendation to the summary.

Toll Roads and Free Roads

President Roosevelt transmitted the report, *Toll Roads and Free Roads,* to Congress on April 27, 1939. His transmittal letter endorsed the need for "a special system of direct interregional highways, with all necessary connections through and around cities, designed to meet the requirement of the national defense and the needs of a growing peacetime traffic of longer range." He included several paragraphs on excess condemnation:

> The report also points definitely to difficulties of right-of-way acquisition as obstacles to proper development of both rural highways and city streets, and makes important and useful recommendations for dealing with these difficulties.
>
> I call the special attention of the Congress to the discussion of the principle of "excess-taking" of land for highways. I lay great emphasis on this because by adopting the principle of "excess-taking" of land, the ultimate cost to the Government of a great national system of highways will be greatly reduced.
>
> For instance, we all know that it is largely a matter of chance if a new highway is located through one man's land and misses another man's land a few miles away. Yet the man who, by good fortune, sells a narrow right-of-way for a new highway makes, in most cases, a handsome profit through the increase in value of all of the rest of his land. That represents an unearned increment of profit-a profit which comes to a mere handful of lucky citizens and which is denied to the vast majority.
>
> Under the exercise of the principle of "excess-taking" of land, the Government, which puts up the cost of the highway, buys a wide strip on each side of the highway itself, uses it for the rental of concessions and sells it off over a period of years to home builders and others who wish to live near a main artery of travel. Thus the Government gets the unearned increment and reimburses itself in large part for the building of the road.

As in the internal report, Part I of *Toll Roads and Free Roads,* titled "Feasibility of Transcontinental Toll Roads," rejected the notion of a toll superhighway network because most of the corridors would not generate enough traffic to repay the bonds issued for their construction. Having rejected the idea proposed in the 1938 Act, the BPR decided to offer, unasked, its own concept. In Part II, the report advocated construction of a national network of toll-free express highways, referred to as an interregional highway system.

In "Summary of Findings and Recommendations," the report listed five "desirable joint contributions of the Federal and State Governments":

1. The construction of a special, tentatively defined system of direct interregional highways, with all necessary connections through and around cities, designed to meet the requirements of the national defense in time of war and the needs of a growing peacetime traffic of longer range.
2. The modernization of the Federal-aid highway system.
3. The elimination of hazards at railroad grade crossings.
4. An improvement of secondary and feeder roads, properly integrated with land-use programs.
5. The creation of a Federal Land Authority empowered to acquire, hold, sell, and lease lands needed for public purposes and to acquire and sell excess lands for the purpose of recoupment.

> The report emphasizes the difficulties encountered in the acquisition of adequate rights-of-way; and, in view of the fundamental necessity of such rights-of-way, proposes definite measures by which the United States could aid in the acquisition of suitable rights-of-way and simultaneously contribute helpfully to the solution of other urgent problems, especially certain problems confronting the larger cities.

In Part I, *Toll Roads and Free Roads* discussed "Standards of Design Adopted" for the toll highways studied at the request of Congress. The first topic was right-of-way:

Rights-of-Way

> In general, the design provides a right-of-way width of 300 feet in rural areas and 160 feet in suburban areas. These are in the nature of minimum widths. In rural areas it is expected that they may be exceeded where (1) land values are very low; (2) it may be less expensive to acquire extra land to avoid the cost of constructing grade-separation structures for roads to connect private property divided by the road; or (3) where additional land is needed for some special construction or border control. In suburban areas the minimum width may be exceeded where (1) the additional land is required to allow for expected future growth or to insure effective control of the road; (2) it may be economically feasible to purchase parcels of real estate in their entirety instead of paying damages for areas left isolated by the construction of the road; or (3) it may be less expensive to acquire additional land and so to avoid costly construction, such as retaining walls. In rare instances it may be advisable to restrict the right-of-way to less than the minimum widths mentioned to avoid the purchase of very expensive or important land or buildings, even though the result may be an apparently excessive construction cost; but in no case should this be done at a sacrifice of the minimum standards of design.

Still in Part I, the report included a section on "Estimated Costs of Right-of-Way and Construction" for the toll superhighway network:

> The estimates of right-of-way and construction costs were made and compiled in the several district offices of the Bureau of Public Roads in accordance with uniform basic decisions laid down by the Chief of Bureau. [At the time, the BPR did not have an office in each State; a "district office" provided coverage for several States.] All unit costs and construction quantities used were based on intimate knowledge of all local conditions and the current prices paid for the various items of work.
>
> *Right-of-way.*-Right-of-way, exclusive of accesses, was assumed to consist of 36 acres per mile for rural areas and a minimum of 19 acres per mile for urban areas. These values are based on widths of 300 feet and 160 feet, respectively. For each access point, from 3 to 10 acres were added for two-lane construction and from 10 to 15 acres were added for four-lane construction. [In sparsely populated areas where traffic volumes would be low, two-lane highways were perceived as satisfactory.] Property damage, if any, was estimated and added as a lump sum between control points. Right-of-way and property damage varied from a minimum of $5 per acre to $50,000 per acre.
>
> Where it was necessary to relocate existing highways or construct new service roads between control points so that traffic on closed cross roads could be rerouted to nearby separated crossings or to restore service on public roads occupied by the new construction, estimates were made of the mileage involved and the costs per mile.

Part I of *Toll Roads and Free Roads* did not consider the revenue or recoupment from excess condemnation in discussing the cost of right-of-way acquisition or in its final section on "Comparison of Revenues and Costs." In concluding that "a toll system on the roads selected . . . is not feasible," the report considered only the size of bonds and the toll revenue generated by the superhighways.

Part II, titled "A Master Plan for Free Highway Development," discussed the problem of right-of-way for the Nation's roads. During the early years of road improvement in the 20th century, the report stated, officials tended to accept the existing right-of-way of the road to be improved. "The sharp curvature and indirect alinement resulting from this policy are the causes of by far the greater part of the recognized present obsolescence of the main highway system." The report attributed this failure to the fact that many improvements occurred before the motor vehicle was perceived as "the abundant revenue producer it now is." Further, if the need for a better alignment and more adequate right-of-way had been felt "actual obtainment of the rights-of-way would have been a difficult and slow process because of the objections and obstructions that would have been offered by individual landowners all along the projected routes." As long as interstate traffic remained light, "there seemed to be no great need" to depart from the old right-of-way.

Since those early years, traffic had increased, motor vehicles had become more powerful, and highway engineers had developed new standards of highway design. Based on these developments, the defects of the existing interstate highways could be corrected only with the acquisition of right-of-way in large acreage. The report cited one of the main difficulties of the old roads:

> Moreover, there are other conditions that point to the same need, the need of additional right-of-way-mainly in the form of greater width. These are conditions associated with the private use of the land bordering the narrow strips within which the public highways are confined. Collectively such uses are described as "ribbon development." They include an unneeded number of unsightly stands and other minor and temporary retail establishments catering inefficiently and with little profit to the purchasing power of Americans awheel; a multiplication of roadside residences and more substantial business places, crowded close to the roadway; the private opening of innumerable accesses to the highways, many so blind as to be positive menaces; and the erection of billboards in such numbers on the more heavily traveled roads as virtually to obscure the natural scene.
>
> The mere presence of these numerous, close-crowding objects and establishments is a distraction to drivers of vehicles. Some of them, by every conceivable device, endeavor to attract the attention of drivers of vehicles from their primary responsibility; most of them contribute largely to the hazards of unexpected stopping, turning, and emergence upon the highways of both vehicles and pedestrians. All are positive menaces and must be controlled, and the only probability of material improvement lies in a general and substantial widening of the rights-of-way of the more important roads, together with effective border control. On such roads the availability of wider publicly controlled margins will permit employment of various measures designed to abate the menace; among them roadside planting to obscure unwanted billboards, the prevention of parking on the traveled way, and control of the conditions of egress from and ingress to the highway at all bordering properties.
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> The need for such additional right-of-way is not so great on the less frequented highways, because most of the developments complained of are only attracted by and associated with the denser traffic flows.

In Part I, the report had explained that on the toll superhighways, "All traffic would leave or enter at the right on suitable acceleration and deceleration lanes." Access restriction was necessary for safe, efficient operation, but also to protect the facility from loss of toll revenue by motorists entering or leaving the turnpike via private property to avoid tollbooths. For the toll-free express highways, Part II retained the right-of-way width described in Part I for the toll superhighways (300 feet in rural areas and 160 feet in urban areas) as well as access control:

> The right to limit access should be acquired at all points and should be exercised wherever and whenever the amount of entering vehicles is likely to endanger appreciably, or interfere materially, with the freedom of movement of the main stream of traffic. Approaching large cities and elsewhere, if necessary, bordering local-service roads should be provided.

Access control would be relaxed only in low-volume areas where grade separation with crossroads or rail-highway intersections would not be economical.

In a section on the "Nature of the Right-of-Way Problem," Part II stated that while the need for improved highways is real, the "most influential causes of the delay in effecting the needed changes hitherto have been the inadequacy of available funds and the overpowering legal obstacles and inhibitions that stand in the way of obtaining essential rights-of-way." Unless these problems were solved, they would "continue to retard action." With regard to right-of-way, the report stated:

> Thus far, the Government of the United States generally has been unwilling to assume any part of the cost of obtaining rights-of-way. In all work under the Federal Highway Act the responsibility to provide the right-of-way and to satisfy damage claims is placed solely upon the States. The Government . . . has refrained from lending any assistance to the States and local governments in overcoming the difficult legal and procedural obstacles encountered.

These problems had delayed many worthwhile projects, with the problems compounded by funding shortages. "In consequence, the character of the improvements undertaken too often has been governed by the limited possibilities of land acquisition." Often, "the obtainment of land is postponed until the very moment its possession becomes imperative for the provision of an announced and urgently required facility." This condition "conduces to precipitate ill-advised, uneconomical, and generally unsatisfactory action." The report attributed this problem, in large measure, to the State legislative practice "of appropriating or providing for land acquisition in the same acts that supply funds for the construction of public works."

Another problem related to access control along freeways. Access is "a common-law right in both England and the United States." The report explained:

> It appears to be a principle upon which the courts generally agree that if the right of access to a street or highway from abutting land is wholly denied the result may be equivalent to a taking of the property itself and may entitle the owner to compensation accordingly. Where complete denial of access is not involved, impairment may be considered a proper element of damages. Therefore, it may be taken as a fact that the cutting off of abutting owners from access to a highway or street must either be accompanied by a payment of damages or by the construction of service roads that will furnish access at other reasonably convenient points.
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> While this condition would seem to be reasonable with respect to premises served by an existing road that is incorporated into a freeway or road of limited access, if the public buys a right-of-way for such a road in a new location where highway service has not previously existed it would seem illogical to permit the abutting lands to claim damages because of the denial of access thereto. Yet, unless there is a change in existing law and a reversal of judicial opinion in many States, the abutting properties will possess the same right of access to new roads as to old ones.

Acquisition of right-of-way for freeways on new alignment, especially in cities, posed two additional problems:

> Such instances usually encounter not only a strong resistance to the change by those who may be inconvenienced thereby, but also generally involve, (1) the problem of remnants, i.e., small parcels that are separated by the road improvement from the main body of land to which they were originally attached, and the value of which to the owner is alleged to be destroyed or definitely impaired; and (2) the question of denial of access from adjacent lands to so-called freeways, i.e., highways to which access is permitted only at certain selected points as a measure for dealing with heavy streams of extra-local traffic.

Remnants, which are often narrow and irregular in shape, usually have no desirable use. In cities, they may be used for "sign boards, shanties, or some types of stand development that are usually unsightly and detrimental to the neighborhood." In rural areas, remnants "generally involve the cutting off from farms or areas that are too narrow, small, or irregular for convenient and economical tillage. Even fairly large parcels, if separated by a heavily traveled road, may take on the aspects of remnants."

Regarding the second concern, freeway construction would cause increasing problems "in connection with efforts to restrict or deny the right of access to highways from abutting lands." The courts agreed that owners whose access to a road is wholly denied for a public purpose should be compensated. Similar compensation is called for when access is impaired, if not completely denied.

Another unique situation involved the acquisition of additional right-of-way beyond that needed for the highway or street being built. The additional land might be needed for future expansion, aesthetic reasons, a measure of safety, "or at least to set back from the trafficway, those bordering developments, such as roadside stands, filling stations, taverns, dance halls, tourist camps, and used-car lots . . . that are such prolific sources of dangerous accidents." The President's favored excess condemnation was another reason, as explained in Part II:

> An anticipated new situation may arise through efforts by governmental agencies to recoup all or part of the cost of highway and street improvements by the resale or other disposal of benefited lands in excess of the need for the highways or streets acquired in advance of their improvement. This may be referred to as "recoupment taking." In support of the theory underlying such excess taking, there is usually cited the successful use of the practice in England, in Canada, in some European countries, and at least one early experience in the United States. A decision by the United States Supreme Court respecting resort to such taking in the case of *Cincinnati v. Vester* (281 U.S. 439), indicates that its use is subject to definite limitations in order to avoid infringement of rights guaranteed by the United States Constitution.

Appendix C of *Toll Roads and Free Roads* provided a digest of the Supreme Court's ruling, delivered by Chief Justice Charles Evans Hughes on May 19, 1930. The ruling involved the city's plan for widening Fifth Street. Three property owners filed separate claims, now consolidated, arguing that the excess condemnation violated Federal and State statutes and "would constitute a deprivation of property without due process of law in violation of the fourteenth amendment, it being alleged that the appropriation was not for a public purpose." (From Section 1 of the 14th Amendment of the U.S. Constitution: "No State shall . . . deprive any

person of life, liberty, or property, without due process of law . . . ." This amendment extended the 5th Amendment property right-"or shall private property be taken for public use, without just compensation"-to State actions.) The District Court and Circuit Court of Appeals agreed with the plaintiffs "that the excess condemnation was in violation of the constitutional rights of the plaintiffs upon the ground that it was not a taking for a public use 'within the meaning of that term as it heretofore has been held to justify the taking of private property.'"

The city appealed to the Supreme Court, challenging "the propriety of the assumption upon which these rulings . . . were based, that is, that the city was proceeding on the theory of the recoupment of expense by resale of the properties." The city believed that recoupment was consistent with the State's constitution, but its action "cannot thus be delimited." After the street widening, the city argued, it could "determine what sized tracts and what kinds of restriction will be best suited for the harmonious development of the south side of Fifth Street." The city might never resell the excess property, but may "preserve the public use" of the property.

The Supreme Court ruled for the plaintiffs. Chief Justice Evans began with an analysis of the city's position:

> The city says that it may preserve the public use in many ways, and that sale with restrictions is one that may hereafter be chosen, but that there is no warrant upon this record for discarding every possible use in favor of a use by sale that may, among other things, result in a possible recoupment.

> We are thus asked to sustain this excess appropriation in these cases upon the bare statements of the resolution and ordinance of the city council, by considering hypothetically every possible, but undefined, use to which the city may put these properties, and by determining that such use will not be repugnant to the rights secured to the property owners by the fourteenth amendment. We are thus either to assume that whatever the city, entirely uncontrolled by any specific statement of its purpose, may decide to do with the properties appropriated, will be valid under both the State and Federal Constitutions, or to set up some hypothesis as to use and decide for or against the taking accordingly, although the assumption may be found to be foreign to the actual purpose of the appropriation as ultimately disclosed and the appropriation may thus be sustained or defeated through a misconception of fact.

The Supreme Court put the unique circumstances of *Cincinnati* in the context of past rulings on application of the 14th Amendment:

> It is well established that in considering the application of the fourteenth amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of State courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution. In the present instance, we have no legislative declaration, apart from the statement of the city council, and no judgment of the State court as to the particular matter before us. Under the provision of the constitution of Ohio for excess condemnation when a city acquires property for public use, it would seem to be clear that a mere statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory [trifling, or no real value] the express condition upon which the authority is granted.

The ruling concluded:

> It is an established principle governing the exercise of the jurisdiction of this court, that it will not decide important constitutional questions unnecessary or hypothetically . . . . The present cases call for the application of this principle. Questions relating to the constitutional validity of an excess condemnation should not be determined upon conjecture as to the contemplated purpose, the object of the excess appropriation not being set forth as required by the local law.

> We conclude that the proceedings for excess condemnation of the properties involved in these suits were not taken in conformity with the applicable law of the State, and in affirming the decrees below upon this ground we refrain from expressing an opinion upon the other questions that have been argued.

This ruling did not determine that the Constitution prohibited (or permitted) excess condemnation; it denied the city's action based on its failure to comply with State requirements. As Appendix C explained,"the right to condemn private property solely for the purpose of recouping the cost of a public-works improvement was left open to question on the point of constitutionality by decision of the highest court."

At the same time, the ruling established that any such condemnation would have to satisfy a "public use" as determined by the Supreme Court. Part II discussed the term:

> It is believed also that the courts will take a more liberal attitude with respect to the taking of lands necessary for highway and street improvements on a basis that will be recognized by them as including within the term "public use" such additional areas as may be necessary for future widening, safety, parks, recreational, and sanitary facilities, preservation of scenic values, and the elimination of unsightly developments, such as billboards. In fact, while the courts have uniformly held that the question of what constitutes a public use is a judicial and not a legislative one, they nevertheless have sustained the taking of wider widths of rights-of-way than were required for the actual physical location of the traffic facility, and it is only reasonable to assume that they will be more and more responsive to the growth of traffic volume and the obvious necessity for expansion of the highway facilities to accommodate that traffic. It even may be that a few years hence we may find a disposition on the part of the courts to take judicial notice of traffic volume, traffic congestion, and the public need for expanding existing traffic facilities.

This discussion did not speculate on whether courts would approve excess condemnation for the purpose of recoupment as President Roosevelt had proposed. However, the appendix noted that before the Supreme Court's ruling in *Cincinnati* seven States had amended their constitution to authorize excess taking and resale of land, beginning with Massachusetts in 1911, and that an eighth State, Pennsylvania, had amended its constitution in 1933. However, the takings had limited purposes:

> Thus the object of the constitutional amendments in California, Massachusetts, New York, Pennsylvania, and Rhode Island, apparently is to prevent the formation of unusable remnants along a street improvement. In Ohio and Wisconsin, in addition, restrictions can be imposed on the future use of real estate, while in Michigan these objectives and recoupment as well seem to be permissible.

> Although there are these constitutional provisions in eight States, and statutory provisions in seven others (Delaware, Illinois, Indiana, Maryland, Nebraska, Oregon, and Virginia), the right to acquire marginal land in connection with highway development is still very limited. The right to resell a surplus of land taken is still more circumscribed; and the right to condemn private property solely for the purpose of recouping the cost of a public-works improvement is left open to question on the point of constitutionality by decision of the highest court. Even to prevent the creation of land remnants and to protect improvements by use of the power of eminent domain, in most States will require constitutional amendments.

(The "public use" issue has evolved through court cases over the years, including the Supreme Court's ruling on June 23, 2005, in *Kelo et al. v. City of New London et al*. The ruling noted that, "The *Cincinnati* ruling and its precedential authority have been consistently affirmed." In that ruling, "this Court implicitly rejected alleged financial benefit to a municipality [i.e., recoupment] as a legitimate 'public use.'"

(Now, in *Kelo*, the court affirmed the right of the city of New London, Connecticut, to take private property for use by private entities for the public purpose of stimulating economic development. "The disposition of this case," the ruling explained, "turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field." It added, "Because [the city's economic development] plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.")

A Federal Land Authority

One reason these issues were difficult to address was that each State had its own statutory requirements, or lack of statutory authority, to address issues that were common to all States. Each State, *Toll Roads and Free Roads* suggested, should examine its statutes to ensure its highway agency had the authority "to acquire all necessary land in advance of the time for the physical construction of the improvements." It also should have the funds for the purpose or "should be authorized to meet the cost by some form of deferred payment plan, or by long-term leasing arrangement with right of purchase." To avoid delays when construction was ready to begin, the State highway agencies also should have the right to use condemnation procedures under eminent domain so they can begin construction and let the courts determine compensation.

Further, each State should have the "discretionary power . . . to determine the width of right-of-way to be acquired for any improvements to be undertaken." This power could include "specific authority for such right-of-way to include lands in excess of those which be actually needed for the physical location of the traffic facility as will provide for safety, for reasonable roadside development, recreational, sanitary, and other facilities, and for future expansion of the transportation facility to meet the prospective future needs of traffic."

Securing uniform and adequate authority from the legislatures in the 48 States to meet the needs of the proposed program of nationwide access-controlled freeway construction would be difficult. What was needed, *Toll Roads and Free Roads* concluded, was "some central agency with sufficient funds and authority of law to acquire the lands necessary for the improvement of such highways and streets at a period substantially in advance of the time when the improvements actually would be made." The report explained:

> Such an agency would have to be created by the Congress in order that its jurisdiction and authority might be general throughout all of the States, and that its operations could be on such a basis that it would be in whole or in substantial part self-liquidating . . . .
>
> Such rights-of-way acquired with Federal funds at the request of a State highway department, and in accordance with State and Federal laws, could remain the property of the Federal Government subject to lease by the State over a period of 50 years on terms that would in that period amortize the initial cost. Representative State highway officials with whom this suggestion has been discussed are unanimously of the opinion that such a provision would not only be helpful toward a solution of the difficult right-of-way problem, but would also be welcomed and utilized by the State governments.
>
> Effectively to administer such a provision would probably require the creation of a Federal Land Authority, having corporate status with adequate capitalization and authority to issue obligations within prescribed limits, which would be empowered to acquire, hold, sell, and lease lands for stated purposes.

The authority could expand beyond highways to other types of projects and aid in coordination of federally funded projects such as conflicts "between the location of Federal slum-clearance projects and Federal-aid street improvements."

The report added a caution:

> In this connection it may be pointed out that the proposed aid of the Federal Government could not be effectively employed in any State in the absence of constitutional authority for the acquisition of lands in sufficient amount to provide for anticipated future developments and the most desirable use of, and protection of, the public works investment, whatever its nature.

(The Federal Government's authority to acquire land in the States had been one of the oldest questions in the history of Federal road building in the United States, although *Toll Roads and Free Roads* did not discuss this issue. The issue had been raised in 1806 when Congress debated the legislation that would authorize the Federal Government to build a road from Cumberland, Maryland, to Wheeling Virginia (now West Virginia), to give settlers a portage between the Potomac River and the Ohio River. The consensus was that under the Constitution, the Federal Government did not have the authority to abridge the sovereignty of the States by purchasing land within them. Therefore, the law that President Thomas Jefferson signed authorized acquisition of land for the National Road (or Cumberland Road) only with each State's consent.)

Recoupment Takings for Excess Condemnation

Appendix C concluded *Toll Roads and Free Roads* by summarizing examples of excess condemnation for purposes of recouping the cost of construction. It is reprinted in full:

Outstanding Instances of Recoupment Takings

> *The English experience.*-The first attempt of excess condemnation for recoupment purposes was made by the Metropolitan Board of Works, which had charge of public improvements in London from 1857 to 1889. This organization applied directly to Parliament for authority to condemn land in each instance. During this period, the board widened 14.13 miles of streets in London, condemning land worth $58,859,000; it recovered $26,608,000 from the sale of surplus land, which was 43.5 percent of the construction cost.

> *Northumberland Avenue improvement.*-This is the only street opening or improvement in London where it has thus far been possible to recoup the entire cost of the project. Northumberland Avenue was opened through a section of rather low economic development beween Trafalgar Square and the Embankment. Expensive properties and established businesses were not involved; the property was therefore acquired at a reasonable cost. The avenue created new economic utilities in its neighborhood and it was thereby possible to dispose of frontages at good prices. The project was completed in 1875 at a cost of £711,911 including the price of the land. The recovery from the land was £831,310. The profit to the public was about £120,000 or $600,000.

> *The Kingsway improvement.*-The Kingsway is a wide thoroughfare connecting Holborn and the Strand. The improvement was proposed in 1836 but was a matter of controversy until, in 1899, when the serious opposition to the project was finally eliminated and the empowering law enacted. [London County Council Act, 1897, 60 and 61 Victoria, cap. 242.]

> The law gave the London County Council power to condemn more land than was actually needed. This land could be taken specifically to recoup the cost of the undertaking, to protect the improvement, and to secure sites for necessary housing. The excess land could be sold or leased at any time within 60 years, and was subject to designated protective restrictions.

> The street itself was about three-fourths of a mile in length and 100 feet wide. About 600 estates were acquired and demolished, entailing the freeholds, leaseholds, or trade interests of about 1,500 persons. Over 6,000 persons of the working class were displaced and had to be rehoused. The area directly affected comprised 28 acres, of which 15¾ acres constituted the surplus to be leased or sold as building sites. From these lands the London County Council is understood to receive about £143,000 annually in ground rents and the buildings erected on the lands have cost approximately £5,000,000. A sum of £966 a year is received by the council in respect of betterment charges.

> A total of £735,507 has been received from the sale of sites and other sites valued at £225,191 were transferred in settlement of claims on a reinstatement basis. The total debt charges incurred for the improvement to March 31, 1936 (£5,209,563), plus the net debt outstanding at that date (£3,208,607), amounted to £8,418,170. Against this the aggregate rents received, plus the value of the leased sites, amounted to £6,009,931. The difference (£2,408,239) may therefore be said to represent the net cost to the taxpayer up to March 31, 1936.

Paris, France.-The decree of 1852 gave the city of Paris the power to use excess condemnation in its improvements. It is not only provided that fragments of land, unsuitable for development were to be condemned, but also that land outside the lines of an improvement could be taken where needed to replat these remnants. Between 1852 and 1869, among others, Baron Hausmann, as prefect of the Seine, executed improvements which left the city of Paris indebted to the extent of some $193,200,000, 56.25 miles of new streets being constructed with an average width of about 80 feet. The city condemned land worth $259,400,000. In 1869, the city had sold part of the land which it did not need for $51,800,000 and had on hand 728,000 square yards valued at $14,400,000, 390,000 square yards of surplus land having been acquired by the discontinuance of old streets which had cost the city nothing. Therefore, in the building of 56.25 miles of streets, the city had recovered about one-fourth of what it had paid originally for the land.

Brussels, Belgium.-In 1867, a law was passed in Belgium granting cities the right to condemn land, not only needed for public improvements, but also for a surrounding zone to improve sanitary conditions or to protect public improvements. To relieve the congested city of Brussels, the statute facilitated the construction of a through highway. The work, commenced in 1868, was completed in the late seventies and forms the present new or inner boulevards. Many of the loans which were advanced by the city to encourage development of adjacent properties were never repaid, the public being forced to take over half-finished buildings and complete them. As a net result, a public debt of some $50,000,000 accrued. In 1904, the city had title to about 400 buildings with a net debt of $6,400,000, about a million dollars in excess of a resale price. Several similar undertakings in the early eighties resulted in a like financial loss.

Montreal.-The city of Montreal, Canada, has carried out three excess condemnation projects.

The first of these improvements was the extension of St. Lawrence Boulevard from Notre Dame Street to the river front. This new highway covered an area 67 feet wide and about 650 feet long. In 1912 the city condemned all land lying between the north line of this highway and the next parallel street for an average depth of about 75 feet. A similar zone was taken on the south side of the new thoroughfare. The purchase price was $690,850 for 102,002 square feet of condemned land. Of this 49,258 square feet were used for street purposes, the surplus being sold at public auction for $722,194; the cost of sale amounted to $6,344; the city, therefore, made a profit of $25,000 which could be applied to construction costs.

The area of land taken in the two other projects was somewhat larger than in the St. Lawrence Boulevard instance, but the profit accruing was small, being $12,817 for one sale and $16,780 for the other.

In 1913, Montreal embarked upon a fourth project, in the opening of the St. Joseph Boulevard Improvement. About 794,000 square feet of land were acquired at a cost of about $2,500,000. The surplus land constituted an area of about 100,556 square feet.

The Massachusetts Back Bay Flats reclamation project.-Over 60 years ago, the State of Massachusetts reclaimed the so-called Back Bay Flats, which were lowlands washed by tides from Boston Harbor. The lands were absolutely unusable; in fact, their existence prevented the efficient use and development of the harbor. The State condemned the area, drained it, and provided proper protection with the result that usable land was created. A large portion was sold at a profit to the State. In a test case the court of Massachusetts upheld the project as constitutional.

> *Philadelphia, Pa.*-An effort to take marginal land for the protection of an improvement began in Philadelphia in 1903. In 1907, Fairmount Parkway was begun, and the legislature passed a law giving the city the right to take property within 200 feet of the boundaries of the improvement. In 1912, the city condemned certain areas abutting on the parkway. Such land-taking was declared illegal in 1913 in the case of the *Pennsylvania Mutual Life Insurance Co. v. City of Philadelphia* (22 Pa. Dist. Reports, 195). However, the city continued the work by purchasing without condemnation all the land possible, and by 1916 had acquired all but about 160 of the 1,000 parcels desired. After this unfavorable decision, the attempt to obtain legal sanction for marginal condemnation was continued, and in 1933 Pennsylvania adopted a constitutional amendment permitting the extended use of the power of eminent domain.

Interregional Highways

On April 14, 1941, President Roosevelt appointed a National Interregional Highway Committee of seven members. The President asked the committee to review existing data and report to him outlining and recommending a limited system of national highways in support of interregional transportation. In essence, the assignment was to follow up on *Toll Roads and Free Roads* by refining the proposed National System of Interregional Highways so that detailed plans and specifications could be prepared.

At the time, the Nation was engaged in a defense buildup linked to the war that had begun in Europe in 1939, but with an eye to possible involvement in that war on the side of England and France. The report of the National Interregional Highway Committee would permit the country to develop a jobs-creating road program that would be available when the present emergency ended. By employing personnel and industrial capacity productively, the program would help prevent a return to the high levels of unemployment that had been one of major features of the Depression.

The committee chose MacDonald, one of the members, to be the chairman. He appointed Herbert S. Fairbank, his top aide, to be the committee's secretary. Fairbank, who had conceived the highway planning surveys of the 1930s, had been the primary author of *Toll Roads and Free Roads*, as he would be of the committee's report.

Although the committee completed its work in 1941, the President decided to hold the report. With the Nation entering World War II following the attack on Pearl Harbor on December 7, 1941, the Nation's men and women, along with its industrial capacity, would be fully employed. A construction program the size of the proposed highway network would not be needed until war's end.

Congress forced his hand in the Federal-Aid Highway Amendment, Public Law 146, 78th Congress, July 13, 1943. Section 5 called for the Commissioner of Public Roads (MacDonald's title at the time as head of the Public Roads Administration (PRA), the BPR's name during the 1940s) "to make a survey of the need for a system of expressways throughout the United States" and to report to the President and the Congress within 6 months.

The legislation included a change in Federal-aid policy regarding right-of-way acquisition. From the start of the Federal-aid highway program in 1916, Federal law prohibited the State highway agencies from using Federal-aid highway funds to acquire right-of-way. In most cases, property owners donated land for the improvement of highways that they would be able to access as needed, thus potentially increasing the value of their remaining land. The Defense Highway Act of 1941, approved November 19, 1941, contained the first change in this policy. It authorized 100-percent Federal-aid funding for right-of-way costs on access roads to defense plants and 75-percent funding for acquisition costs on strategic network projects. When States lacked authority to acquire the needed land, the Federal Works Administrator was authorized to acquire the land and turn it over to the State highway agency. (The PRA, originally part of the Department of Agriculture, was now part of the Federal Works Agency.)

Although the Defense Highway Act of 1941 authorized separate funding, it was administered in the context of the Federal-aid highway program. The program operated (and still operates) on a reimbursement basis-the State highway agency expended funds for a project element, submitted vouchers for reimbursement, and received the Federal share (50 percent at the time). Commissioner MacDonald provided lengthy guidance to the agency's field offices on January 13, 1942, describing how to implement the right-of-way provisions of the 1941 Act. The guidance included instructions on how reimbursement would be managed:

> When agreements are entered into with the owner of the lands to be acquired it should be possible to start construction work at any time thereafter, leaving the actual deeds of transfer to be prepared and executed as the necessary steps in connection therewith are completed. When title papers for any particular parcel have been consummated consideration for such parcel may be included along with construction items as a percentage of the total cost in the first voucher submitted thereafter.

Under this arrangement, the State highway agency would not be reimbursed for the Federal share of right-of-way acquisition until construction was underway.

The 1943 Amendment, seen as a 1-year stopgap bill until Congress completed work on the post-war program, redefined the term "construction" to include the cost of right-of-way on regular Federal-aid highway projects on the same basis as funding for other elements of Federal-aid project development. Section 3 of the 1943 Amendment stated that Federal-aid project agreements were "for such post-war highway projects" as could be developed within funding limits. MacDonald, in guidance issued on September 23, 1943, informed field offices that the guidance issued on January 12, 1942, would cover the new authority. He also emphasized the intent of the legislation in the context of reimbursement:

> The principal objective of Section 3 is to permit the several State highway departments and Public Roads Administration to prepare themselves for the expeditious undertaking of an accelerated construction program immediately upon the close of the war. Projects which are included in a postwar program should be carried to the point where they can be let to contract and placed under construction immediately when such construction is authorized. In addition to preparation of final plans, specifications and estimates, therefore, it is essential to conclude at least all of the necessary negotiations in connection with rights-of-way which will assure immediate entry and use when construction is authorized. In connection with a postwar project covered by a construction agreement involving unobligated Federal-aid . . . funds, expenditures for rights-of-way will be eligible for reimbursement and such reimbursement will be made upon the submission of vouchers in the usual manner after the project is placed under construction in the postwar period.

In response to Section 5 of the 1943 Amendment, President Roosevelt transmitted *Interregional Highways* to Congress on January 12, 1944. As he had with *Toll Roads and Free Roads*, President Roosevelt endorsed the proposed highway network, and recommended early action by Congress "in authorizing joint designation by the Federal Government and the several State highway departments of a national system of interregional highways." Such a plan would "serve not only to help meet the Nation's highway transportation needs, but also as a means of utilizing productively during the post-war readjustment period a substantial share of the manpower and industrial capacity then available." As reflected in the final text of the report, the President expected to put its construction program into effect as soon as the war was over.

Excess condemnation was, again, on his mind:

> From personal experience, as Governor of a State [New York] and as President, I hope that the Congress will make additional studies in regard to the acquisition of land for highways.
>
> In the interest of economy, I suggest that the actual route of new highways be left fluid. It is obvious that if a fixed route be determined in detail, the purchase price of rights-of-way will immediately rise, in many cases exorbitantly; whereas, if two or three routes-all approximately equal-are surveyed, the cheapest route in relation to right-of-way can be made the final choice.
>
> Second, experience shows us that it is in most cases much cheaper to build a new highway, where none now exists, rather than to widen out an existing highway at a cost to the Government of acquiring or altering present developed frontages.
>
> As a matter of fact, while the courts of the different States have varied in their interpretations, the principle of excess condemnation is coming into wider use both here and in other countries. I always remember the instance of the farmer who was asked to sell a narrow right-of-way through his farm for a main connecting highway. From an engineering point of view it would have been as feasible to build the new highway across the dirt road that ran in front of his house and barn. Actually the owner received from a jury an amount equal to the whole value of the farm. The road was built. The owner of the land thereby acquired two new frontages. He sold lots on one frontage for the former value of his farm. A year or two later he sold the other frontage for the farm [sic] value of his farm. The result was that he still had his house and barn and 90 percent of his original acreage, and in addition he had received in cash three times the value of what the whole place was worth in the first instance.
>
> It hardly seems fair that the hazard of an engineering survey should greatly enrich one man and give no profit to his neighbor, who may have had a right-of-way which was equally good. After all, why should the hazard of engineering give one private citizen an enormous profit? If there is to be an unearned profit, why should it not accrue to the Government-State or Federal, or both?

The Administrator of the Federal Works Agency, Major General Philip B. Fleming, had transmitted *Interregional Highways* to the President on January 5, 1944. In addition to commenting on the origins of the study and its key points, General Fleming commented on right-of-way acquisition for the proposed network. The context of his comments was that he, like President Roosevelt, expected construction of the network to begin as soon as the war ended so it could achieve one of its primary purposes-to provide jobs for returning soldiers:

> There is, however, another equally important measure of preparation that must be taken if work on the planned projects is to begin promptly when peace returns. Rights-of-way for the planned improvements must be in hand; and funds for this purpose, clearly expendable during the war, should be made available. The recent act of Congress (Public Law 146, 78th Cong.) provides for payment of the Federal share of the right-of-way costs of post-war projects only after construction has been actually begun. The States are required to advance from their currently reduced revenues, for the period of the war, the whole cost of rights-of-way acquired. Their inability to do this in many cases means that essential rights-of-way will be lacking when construction should be started, and the purpose of the wise provision that has been made for advance planning will thus be in large measure defeated. Moreover, this right-of-way obstacle is likely to be most serious in the case of the very important projects that are being designed to relieve traffic congestion in cities, projects that will afford, if they are ready, large employment in the precise places where the need of employment will be greatest.
>
> To remedy this unfortunate defect in the preparatory measures that have been taken, I strongly recommend congressional action to permit the Federal Government to pay promptly its proportionate share of the costs of rights-of-way acquired in anticipation of post-war highway improvements.

The report contained a chapter on "Acquisition of Rights-of-Way" that restated many of the concerns discussed in *Toll Roads and Free Roads.* It identified two broad issues:

> The causes of these conditions ["delaying timely realization of desirable road improvements"] are mainly two: one, the failure to plan and provide funds for land purchases sufficiently in advance of the occasion for road construction, and the other the cumbersome and time-consuming land acquisition processes prescribed by the laws of most of the States. If work on the interregional highway system is to supply the post-war employment of which it is capable, and if design of the system improvements is to be unwarped by right-of-way compromises, both of these causes must be clearly recognized and remedied.

The report discussed the first point only briefly (in fact, in one paragraph), noting that what was needed was "the early and sufficient appropriation of immediately expendable funds." For this purpose, the report stated, the changes enacted by the Defense Highway Act of 1941 and the 1943 Act were "ineffectual." Although the report did not offer a solution, General Fleming had suggested a statutory change in his transmittal letter to allow the PRA to pay its share of right-of-way costs "promptly . . . in anticipation of post-war highway improvements."

As for the second cause, "A complete remedy . . . will require the most difficult revision of legally established methods of public land acquisition in many States." The committee illustrated the difficulty of this remedy by pointing out:

> In 55 jurisdictions examined, the Committee has found that there are no less than 320 such methods in present use, with nothing inherent either in the nature of the governmental units exercising the power or in the public uses for which lands are acquired to require such varied treatment. The common defect of the majority of these varied methods is that they postpone the public possession of required lands until the compensation due private owners has been determined by processes which involve many possibilities of legal delay and obstruction.

A few of the 320 methods, recently developed, could avoid these delays while protecting the rights of private property owners:

> Where these methods obtain, the condemning public authority, following required preliminaries, simply files a plat and description of the property to be acquired, and after notice to the owner of such action the appropriation is complete and title to the property vests in the State. If offers of the condemner are then rejected, the former owner must file a claim for the value of the property with the State court, which makes an award after hearing all the evidence.

The report conceded that, "Revision of the present laws and practices, if broadly conceived, can serve to remove the outmoded features of land acquisition for all purposes with a single effort." By "all purposes," the report made clear that the proposed express highways were conceived not simply as transportation arteries but as a means to revitalize blighted cities. Given the importance of acquiring land for highways in conjunction with land needed for "adjacent housing, airport, park, or other public development which the highways will be designed in part to serve," the committee recognized "a need for the creation of special land authorities, adequately empowered and financed, to acquire all lands needed for public purposes of any sort."

Interregional Highways endorsed the recommendation in *Toll Roads and Free Roads* regarding creation of a Federal land authority, as well as similar land authorities by the States, cities, and metropolitan areas. Cooperation among the authorities "will enable the Federal agency to finance the acquisition of needed lands for highway and other public purposes and permit amortization of the costs by the State and local authorities over a period of time." This cooperation was essential:

> The difficulties of land assembly are widely recognized as primary obstacles to the effective rebuilding of blighted areas at the cores of our great cities, an objective closely associated with one of the principal purposes of interregional highway development. The problems of land acquisition in this connection are so immense that they may be said to be virtually insoluble without government financial and directive assistance.
>
> It is inevitable, therefore, that government authority should now be used as an aid in the efficient assembly and appropriate redevelopment of large tracts of blighted urban lands, in reverse of the use of such authority many years ago to subdivide and encourage the settlement of unoccupied primitive lands. The essential role of government in this connection would be to facilitate the transition financing of the rehabilitation of blighted areas, to employ its power of eminent domain in the public interest, and to fix the standards of redevelopment. This role performed, the task of development and rebuilding according to the standards and master plan defined, should be transferred as largely and as promptly as possible to private initiative.

The section also discussed the advantages of widening highways on existing versus new alignments. Construction of the interregional system "will require much revision of alinement and in many sections a substantial widening of present rights-of-way." The extent of such changes would determine which option was suitable:

> Where such required changes are numerous, the acquirement of entirely new right-of-way will generally be found cheaper than widening and correcting the right-of-way of the existing road. The latter course will involve large takings of property frontage, always the most expensive of land acquisitions, and usually will entail also a heavy cost in incidental damages.

The issue was more difficult in cities than rural areas:

> In and around cities the widening of existing right-of-way is likely to be especially costly because of the high values usually attaching to urban street frontage and the improvements and structures characteristic of urban areas.

Acquisition of entire lots for widening, rather than leaving uneconomical remnants was desirable and would not cost much more "because of the heavy payment usually required in consequential damages to the untaken remainder." One advantage of this approach was that it would prevent the owners of the remnants leaving them as "ill-kept vacant lots" or generating revenue from "the erection of billboards, shanties, or other unsightly structures." In cities, the report anticipated that right-of-way for the proposed expressways "will require the acquisition of a block-wide strip."

In rural areas, right-of-way should be acquired to accommodate "any surface widening that may be reasonably anticipated." This width should be able to accommodate "marginal strips of land to serve as a protection against the unsafe and unsightly development of closely crowding roadside stands, filling stations, and signboards."

While these needs were clear, the possibility of excess condemnation beyond them was not:

> Unfortunately, the expropriation of width additional to that required for the physical improvements immediately planned is specifically sanctioned by law in only a few States. [Footnote: California, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Rhode Island, Virginia, and Wisconsin permit marginal land acquisition by constitutional amendment.] Cases in which such proposed takings have been tested in the courts have been complicated with a purpose to resell a portion of the land acquired and with the presumption of a motive to recoup a portion of the cost of the land retained by profiting on the sale of the excess. It is evident the courts have not been persuaded that the acquisition of the marginal strips, even for future roadway widening or for present border protection, is an appropriation for a "public use," the test to which they firmly adhere in determination of the validity of all expropriation. It must be admitted, however, that the necessities of such acquisition have not been clearly presented for judicial determination.
>
> The Committee is of the opinion that if marginal land is acquired for border protection and to make provision for definitely anticipated future roadway widening, its employment for these purposes will constitute a "public use" in the narrowest sense of the term. A reasonable and proper development of the interregional system requires the acquisition of such marginal areas, and they cannot be acquired in the fullness and continuity essential without use of the power of expropriation in at least some cases. The right to exercise the power of eminent domain for these purposes should be promptly established in all jurisdictions, either by State constitutional amendments or preferably by a discerning interpretation of the concept of "public use"; and, however established, the power should be sufficiently broad to encompass the public disposal by sale or lease of unneeded remnants unavoidably acquired with the needed lands.

Recognizing that acquisition of marginal land would be challenging, at best, the committee considered alternatives for protecting the roadside. One option was the exercise of police power "for control of roadside land use, as exemplified by present practices of zoning and billboard regulation." While not a permanent solution, police power "can become valuable auxiliary devices for the regulation of land uses detrimental to the safe and efficient use of the highways." A better alternative, in the committee's view, was acquisition of highway development rights, "i.e., the rights of owners of private property abutting on highways to improve road-marginal strips of their property in any manner inconsistent with present or future traffic requirements." Enabling State legislation would be necessary. This approach had another advantage:

> If the margins thus taken under control are later required for expansion of the road facility, as must inevitably be the case in many instances, the acquisition costs will be at a minimum because of the arrested development of the lands affected.

Interregional Highways ended with a one-page section on "Conclusions and Recommendations." The facts indicated that "the indirect employment that could be afforded by construction of the proposed system would be widely distributed throughout the entire country." It would also be "very quickly generated." It elaborated on the benefits of the system:

> In addition . . . the Committee concludes that construction of the recommended interregional system will make possible the productive utilization of a substantial part of the manpower and industrial capacity likely to be available in the post-war period. It also desires to give special emphasis to the importance of complete readiness for an immediate post-war initiation of construction as a condition precedent to the ultimate success of any comprehensive public works plan which looks toward the stabilization of the national income and the preservation of prosperity in the post-war period. The magnitude of the problems involved in the coordination of interregional-highway-system construction as an integral part of that plan, in the advance planning and design of component high-priority projects, and in the acquisition of required rights-of-way, serve to emphasize the need for their prompt and thorough consideration.

The report, therefore, recommended "the early provision of all required legal authorizations and statutory sanctions, to permit all necessary administrative preparatory measures to follow in swift succession." Further, "to insure a prompt beginning of construction on the system at the end of the war," the report suggested an annual expenditure of $750 million on the system.

Federal-Aid Highway Act of 1944

With the new report in hand, Congress took up the proposed National System of Interregional Highways along with plans for resuming the Federal-aid highway program when World War II ended. Many issues proved controversial as Congress developed the Federal-Aid Highway Act of 1944-and took most of the year to resolve.

One issue that lost out during the debates was Roosevelt's pet idea: excess condemnation. Neither the House nor the Senate included the concept in its final version of the legislation or even in an earlier version.

The Senate Committee on Post Offices and Post Roads had considered amending the definition of "construction" to include acquisition of right-of-way, as in the 1-year bill approved in 1943. However, the committee dropped the change from its version of the bill. One concern was that if "jurors" deciding the value of needed right-of-way in an eminent domain case knew the Federal Government would pay part of the cost, they would declare a higher value than if they thought the funds were coming entirely from State or county tax revenue.

The issue of excess condemnation came up during the Senate debate on September 15, 1944, when Senator Harry Flood Byrd (D-Va.) asked:

> I have received several letters with reference to a 100-foot right-of-way. Is there any such provision in the bill?

He did not explain who had written the letters or why. The floor manager, Senator Carl V. Hayden (D-Az.), pointed out that acquisition of right-of-way was a State matter:

> I think what the Senator has in mind is that in some places the State highway department is trying to obtain additional right-of-way. Under existing law, the State acquires the right-of-way. We have eliminated from the bill the provision for Federal participation in payment for rights-of-way.

Senator Charles O. Andrews (D-Fl.) asked if his understanding was correct that the State highway agencies could provide whatever width they deemed proper. Senator Hayden replied:

> They will have to obtain whatever they think is needed. That is a matter which the Congress does not dictate. There is no requirement that there must be a 50-foot, 60-foot, 100-foot, or 200-foot right-of-way.

What would happen, Senator Andrews asked, if "the National Association of Road Commissioners should lay down a rule that the right-of-way should be 200 feet wide?" Senator Hayden replied that, "the only interest of the Public Roads Administration is in having some control along each side where so-called free-ways are being built." He explained:

> Such roads are built with the object of permitting greater speed between cities. Unlimited access to such roads cannot be permitted. There must be limited access. In order that there may be limited access, the sides of the road for some distance must be controlled. Aside from the question of limited access to so-called free-ways, I have heard no discussion with respect to the width of rights-of-way.

Senator Andrews extended the colloquy to be absolutely certain:

> For example, if a 200-foot right-of-way were prescribed through my State for national-aid roads, I do not know how many millions of dollars it would cost, because the orange groves were there before the roads were built, and many millions of dollars' worth of property would be destroyed, even by a 100-foot right-of-way.

Senator Hayden reassured him:

> I can conceive of no substantial reason for anything of the kind, unless a road were being widened. For example, it might be desired to make a four-lane highway out of a two-lane highway, and it might be necessary to cut down some orange trees.

One last time, Senator Andrews wanted to be assured that such a decision would "be in the discretion of the State highway commission." Senator Hayden replied, "Certainly. They initiate all such projects under the Highway Act."

The end of excess condemnation occurred on November 28, 1944, when Representative Jennings Randolph (D-WV)-a strong good roads supporter who would be a major backer of the Interstate System in the United States Senate (1958-1985)- introduced an amendment during the floor debate:

> *Provided, however,* That the Commissioner of Public Roads shall not as a condition of approval of any project for Federal aid hereunder require any State to acquire title to or control of any marginal land along the proposed highway in addition to that reasonably necessary for road surfaces, median strips, gutters, ditches, and side slopes.

Senator Millard E. Tydings (D-Md.) had introduced an identical amendment in the Senate on September 8, but it was not discussed, or adopted, during floor debate; it was: "Ordered to lie on the table and to be printed."

Representative Randolph told the House that this was a protective amendment that "would allow to the States the discretion of securing the rights-of-way as to widths which would be necessary for any roadway to be laid down." He explained:

> Let us analyze that problem just a moment. Approximately 100 feet is now recognized as a sufficient width for the construction of most highways. Under the report [*Interregional Highways,* "Standards and Features of Roadway Location and Design"]-that the Commissioner of Public Roads "shall only approve projects which meet the basic standard specified in the report" or in other words the Federal Government would require the States to have 300-foot widths for highways; in other words, 100-foot marginal strips on either side of that roadbed, and so forth, which would be necessary for actual road construction.

The section of the report that Representative Randolph cited made the point that "it should be built on a location and to a standard of design that will make it a fit and lasting part of the complete interregional system . . . ." To achieve "the high degree of consistency of design and utility," two arrangements were necessary. First, all authorities must agree on standards of roadway design and location. Second, all parties must understand that "whatever work at any time is done on routes generally conforming to the selected system shall be well done in accordance with the agreed standards." It added, "In no other way will it be possible to achieve the timely completion of a consistently useful and wholly satisfactory interregional highway system."

Representative Randolph continued:

> I believe that it is necessary to reserve to the States reasonableness in connection with the purchase of the rights-of-way. One State might find it advisable not to have the 300 feet. Another State might find it advisable to have that amount. I do not want a farmer's land to be taken out of productivity because that acreage happens to abut on a road. I do not want legitimate business which is close by a highway, if it does not interfere with the actual motor travel, to be torn down and removed.

Representative Earl C. Michener (R-Mi.) interrupted because he was suspicious:

> Mr. Michener. Is this the amendment that has the support of the outdoor advertising companies?
>
> Mr. Randolph. It has general support, including those whose business is highway-sign advertising.
>
> Mr. Michener. That means billboards.
>
> Mr. Randolph. That is correct. Support also comes, I might say, of [sic] the American Federation of Labor, the Grange, the Highway Property Owners Association, and the Farm Bureau. These organizations have contacted Members in support of the amendment. It takes into consideration the acreage now in productivity. It takes into consideration the available sites that are used by legitimate business.

Representative George A. Dondero (R-Mi.) interrupted the colloquy to clarify, "In other words, the Federal Government might use that particular power as a club over the States in withholding Federal-aid."

Representative Randolph concurred:

> Yes; that could be done. I believe, as the gentleman believes, that there should be certain discretionary powers remaining to the States in connection with highway construction. No one is advocating a narrow road; one which is not adequate. All that we are asking is that the Federal Government not require the States to buy excessive land tracts on either side of the road where the highway is to be constructed.
>
> Mr. Chairman, I trust the committee [the "committee of the whole," the parliamentary form for most House action] will find it reasonable to support this amendment in the interest of a fair distribution of responsibility between Federal and State governments.

Representative Leon H. Gavin (R-Pa.) urged his Republican colleagues to support the amendment. He pointed out that the amendment would leave the matter of marginal strips to the States, without the Federal "club." He said:

> If the amendment is adopted, each State highway department and each State legislature can consider on its merits the proposal to establish these marginal strips. Each of them will then balance whatever advantages such strips may possess against their many disadvantages and objectionable features.

The objectionable features included added cost-triple the cost of acquiring right-of-way, he said. Further, most State highway agencies "would prefer to use whatever highway funds are available for the purpose of actual highway construction which will create jobs, rather than for the purchase of this excess right-of-way, which will create no jobs." Because the point of the "vast sums" to be used for the interregional system "is the creation of jobs," using the funds for excess right-of-way would not only cut into construction jobs but interfere "with the Nation's job-creating machinery by eliminating roadside business such as gasoline service stations, retail stores, outdoor advertising companies, and so forth."

Moreover, Representative Gavin hoped that Commissioner MacDonald did not agree with this part of *Interregional Highways* and "that he does not plan, as recommended by the report, to use this power of approval for any such harsh or unwarranted purpose." He added:

> Certainly it would cause much public resentment to have a Federal official use his veto power for the purpose of forcing States to take action, or to pass laws designed to carry out his ideas, especially where such ideas deal with a very controversial matter which has not been submitted to nor approved by the Federal Congress.

Chairman J. W. Robinson (D-Ut.) of the Committee on Roads pointed out that the committee had considered the amendment during development of the House bill, but he believed that "most of the members of the committee failed to understand some of the matters with reference to this particular amendment." He elaborated on this point:

> In the first place, the present law provides that the rights-of-way when purchased by the state must be approved by the Public Roads Administration. No serious trouble has ever arisen over that provision. We are going further in this bill than we have ever gone before. We are extending to the States and paying to the States one-half of the amount of the cost of the rights-of-way and yet, while we are making the Federal Government pay one-half of the cost of the rights-of-way, you are saying to the Federal Government, "You must not have any control, whatever, over these rights-of-way." This is a plan, I think, principally advocated by people who want to advertise along the right-of-way.

Representative J. Harry McGregor (R-Oh.), a member of the committee, pointed out that the committee had voted in favor of the amendment, but Chairman Robinson responded that "we were operating under a rule where everything had to be unanimous or we did not report it to the House." For that reason, the amendment had not been included in the House bill.

Robinson assured the House that "under the law as it now stands there has been no encroachment on States' rights." He added:

> Under the law as it is proposed here, we feel it is necessary that the Federal Government have some control over the rights-of-way that are purchased and that it becomes absolutely necessary if we are to build the proper highways.

McGregor put the amendment in perspective:

> I think my chairman will agree with me, this is not just a matter of advertising. Unless this amendment is accepted, it will be within the power of the Commissioner to say to every one of my farmers and every one of the property owners along the right-of-way that they must move their fences, corncribs, or other property.

Chairman Robinson responded:

> He has nothing to do with that; all the Commissioner of Public Roads has to do is approve of the action of the State road commission. He can approve or disapprove.

This statement led to a colloquy with:

> Mr. McGregor. May I ask my chairman, what if he [the Commissioner] does not approve? What is going to be the effect?

> Mr. Robinson. If he disapproved it, of course, then he will have to set forth his reasons for disapproval.

> Mr. McGregor. Then if the chairman wants to be fair, and the Commissioner wants to be fair, why is there any objection to this amendment?

> Mr. Robinson. Simply because we are trying now to make a harmonious road system throughout the whole United States. It will be for the entire people. If something arises where some State is interfering with the rights of the people of the United States, we feel, and the committee felt, that the Commissioner should have some say as to what action should be taken under those circumstances.

With the time allotted for discussion of the amendment nearing an end, Randolph took the floor again. He stated that he did not think the Chairman meant "to leave the impression with the Committee that rigidity of any highway system necessarily means it is a good system." He concluded:

> There has to be a give and take, with certain States, of course, using their judgment as to rights-of-way, and as to methods of raising funds with which they match the Federal dollar. We give by this amendment, reasonable assurance to the Federal Government that ditches and gutters and marginal slopes and median strips will be provided by the States.

No one had discussed the concept that President Roosevelt favored-the acquisition of excess right-of-way that could be sold or leased to defray the cost of construction. The discussion had been about the amount of right-of-way that would be provided for "median strips, gutters, ditches, and side slopes," versus marginal strips beyond that amount.

The House agreed to the amendment, which survived the House-Senate conference, with a modification that permitted, according to the Statement of Managers, the acquisition of sufficient land "to provide service roads to permit safe access to the highways."

The Federal-Aid Highway Act of 1944 authorized $500 million for 3 years to become available as soon as Congress certified that the war had ended. The legislation retained the 50-50 Federal-State matching ratio, but authorized the use of Federal-aid funds for up to one-third the cost of acquiring rights-of-way. Funds were authorized for the Federal-aid system, the secondary routes, and, for the first time, extensions of the Federal-aid system in urban areas.

In the final version of the 1944 Act, the Randolph amendment was included in Section 2:

> That the Commissioner of Public Roads shall not, as a condition of approval of any project for Federal aid hereunder, require any State to acquire title to, or control of, any marginal land along the proposed highway in addition to that reasonably necessary for road surfaces, median strips, gutters, ditches, and side slopes and sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking.

Section 2 applied to all authorizations.

The two reports on the need for a national interregional highway system, *Toll Roads and Free Roads* and *Interregional Highways*, resulted in Section 7, which provided a new name for the network:

> There shall be designated within the continental United States a National System of Interstate Highways not exceeding forty thousand miles in total extent so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense, and to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of the National System of Interstate Highways shall be selected by joint action of the State highway departments of each State and the adjoining States, as provided by the Federal Highway Act of November 9, 1921, for the selection of the Federal-aid system. All highways or routes included in the National System of Interstate Highways as finally approved, if not already included in the Federal-aid highway system, shall be added to said system without regard to any mileage limitation.

In that one paragraph, Congress set the Interstate Highway Program in motion. It did not authorize special funding for the new system, although funds authorized for the Federal-aid system and its urban extensions could be used on Interstate routes once they were designated. The Federal-State matching ratio would be the same as for other systems: 50/50. As Chairman Robinson put it:

> Because of variation in conditions among the States no attempt was made to specify what portion of available funds should be applied to the Interstate System.

Nothing in the 1944 Act indicated an urgency to have construction ready to begin at war's end.

When President Roosevelt signed the Federal-Aid Highway Act of 1944 on December 20, he issued a statement that said, in part:

> Adequate facilities for highway communication will be essential in the future as a part of an expanding, prosperous economy that will insure jobs. They will be essential also to the national defense, as well as to the safe and efficient transportation service which belong to America's way of living.

He added:

> This legislation makes possible the advance planning of the needed facilities on a sound basis. Now it becomes a challenge to the States, counties and cities which must originate the specific projects and get the program ready for construction after the war ends.

He did not comment on excess condemnation-its importance or absence from the new legislation.

The Post-War Era

The State highway agencies would have little time to develop projects under the Federal-Aid Highway Act of 1944 prior to the end of the war, as Congress had envisioned. The European phase of World War II ended on May 8, 1945. Japan surrendered on August 14, 1945. On October 2, Congress adopted a concurrent resolution declaring that the war emergency had been relieved to an extent that allowed the Federal-aid highway program to resume operations, with the first post-war fiscal year ending June 30, 1946.

In many ways, the post-war period would be different than the highway community-or anyone else-had expected. For one thing, Franklin D. Roosevelt, who had seen the Interstate System as a job producer that would help the Nation avoid a post-war Depression, was no longer President. The President was now Harry S. Truman, who had taken the oath of office in the White House on April 12, 1945, just 2 hours and 24 minutes after President Roosevelt died of a cerebral hemorrhage at the "Little White House" in Warm Springs, Georgia.

For the highway builders, the biggest difference was that economic recovery turned away from them. For years, the idea had been that the Nation must have a big post-war roads program ready to go at war's end. In 1943 and again in 1944, the urgency of completing the post-war highway bill was accepted by all concerned: the road builders needed this bill as soon as possible so they would have time to begin putting plans on the shelf, ready for use as soon as Germany, Italy, and Japan were defeated. Indeed, the Federal-Aid Highway Act of 1944 contained the trigger mechanism to unleash millions of dollars, and the jobs they would finance-none of the funds could be used to pay costs incurred under any construction contract entered into by any State before the beginning of the first post-war fiscal year.

The immediate aftermath of the war seemed to support this expectation. The Pentagon canceled billions of dollars in war contracts. Layoffs from wartime jobs were-inevitably-common. Strikes broke out across the country. The Nation faced the biggest housing shortage in history. Truman's predecessor as Vice President, Henry A. Wallace (1941-1944) and now the Secretary of Commerce, predicted a $40-billion drop in the gross national product, and a $20-billion drop in wages, all of which would translate into millions of unemployed workers.

After a period of disruption, however, the Nation entered what is typically called the "post-war boom." Truman biographer David McCullough summarized the result:

> Profits were up. Farmers were prospering. American prosperity overall was greater than at any time in the nation's history. The net working capital of American corporations hit a new high of nearly $64 billion. For the steel, oil, and automobile industries, it was a banner year. Unemployment was below 4 percent. Nearly everyone who wanted a job had one, and although inflation continued, people were earning more actual buying power than ever before, and all this following the record year just past, 1947, which, reported *Fortune* magazine, had been "the greatest productive record in the peacetime history of this or any other nation." [McCullough, David, *Truman*, Simon and Schuster, 1992, p. 621.]

Further, thousands of soldiers returning from the war zones went back to school under the G.I. Bill, rather than return immediately to the jobs in construction that had been envisioned for them.

The boom was in full swing by 1948, buoyed by housing construction that took contractors, equipment, and workers from highway jobs. The problems facing the highway builders were outlined in the annual reports of the PRA, such as this description in the FY 1948 report:

> Construction costs continued their upward trend, and by the middle of the fiscal year were double what they were in 1940 . . . . Shortages of material, particularly lumber and steel, and a difficult labor situation continued throughout the year. New equipment and spare parts were in short supply. Toward the end of the year shortages of cement developed in certain areas. Bid prices, the number of contractors choosing to bid on jobs, and delays by contractors in starting and completing jobs, indicated that highway contractors were operating near full capacity and could not do much additional work. Few new contractors entered the field because of difficulty in obtaining equipment and assembling a working force.

> These factors tended to make highway officials defer the largest and most costly projects; to await a leveling of prices rather than contribute to further inflation. Failure of many highway engineers to return to public employment after the way and lack of inducement to young engineers to enter the highway field tended to hold down the size of the program.

Far from providing jobs for returning veterans by taking plans "off the shelf" to build the National System of Interstate Highways, the PRA and State highway agencies would have time to approve design standards (1945), designate the network (1947 and 1955), and complete some projects to the original standards before President Dwight D. Eisenhower launched the Interstate construction program by approving the Federal-Aid Highway Act of 1956 on June 29 of that year. The legislation declared that construction of the "National System of Interstate and Defense Highways" as nearly as practicable over a 13-year period was "essential to the national interest." For that purpose, it authorized $25 billion through Fiscal Year 1969 to pay 90 percent of the cost of the Interstate System.

Despite President Roosevelt's interest, excess condemnation would not be part of the program adopted in 1956 to build the Interstate System. Control of access, which would be one of the most important design features of the Interstate System, would render excess lands less valuable because the properties would not have direct access to the highways. However, the 1956 Act contained two sections addressing right-of-way issues that had been discussed in *Toll Roads and Free Roads*, *Interregional Highways*, and the debates in Congress in 1943 and 1944.

Section 109 ("Acquisition of Rights-of-Way for the Interstate System") reflected the concern that in many States, the authority to acquire right-of-way needed for the new System was absent or deficient, particularly in view of the control-of-access feature. It authorized the Secretary of Commerce (BPR had returned to its prior name in 1949 and shifted to the Department of Commerce), at a State's request, "to acquire, enter upon, and take possession of such lands or interests in lands by purchase, donation, condemnation, or otherwise." Acquisition "may include the cost of examination and abstract of title, certificate of title, advertising, and any fees incidental to such acquisition." Funds would come from the apportionment of Interstate construction funds for the State where the purchase occurred.

The Federal Government would not retain ownership. The Secretary was directed to convey title to the State highway agency, "except the outside five feet of any such right-of-way in any State which does not provide control of access." The remaining 5 feet were to be conveyed to the State when that State "makes provision for control of access satisfactory to the Secretary."

For Interstate routes that would cross public lands or reservations of the United States, the Secretary "may make such arrangements with the agency having jurisdiction over such lands as may be necessary to give the State or other person constructing the projects on such lands adequate rights-of-way and control of access thereto from adjoining lands . . . ."

Section 110 ("Availability of Funds to Acquire Rights-of-Way and to Make Advances to the States") authorized the Secretary to make Federal-aid funds available to the States "in the most expeditious and economical manner . . . in anticipation of construction and under such rules and regulations as the Secretary may prescribe." This authority was granted in recognition "that the acquisition of rights-of-way requires lengthy planning and negotiations if it is to be done at a reasonable cost." The Secretary was to establish a revolving fund to advance funds "to enable the State highway department to make prompt payments for acquisition of rights-of-way, and for construction as it progresses." When subsequent apportionments allowed the State to repay the advances, the funds would be credited to the revolving fund for use elsewhere.

Although some States took advantage of these provisions shortly after enactment of the 1956, all States promptly secured necessary State legislation. As a result, the concerns that had surrounded right-of-way acquisition for the Interstate System since its inception in *Toll Roads and Free Roads* -such as the need for quick action and the inadequacy of State laws-dissipated quickly. As the program got underway, a wide array of unexpected problems would make right-of-way acquisition one of the most controversial features of the Interstate construction program, but the excess condemnation for recoupment that had been one of the key features that so attracted President Franklin D. Roosevelt to the program would not be part of it.

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