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Regulatory Reform Is the Key to Unlocking Infrastructure Investment

Nicolas D. Loris and Katie Tubb

Abstract

Lawmakers on both sides of the aisle have identified infrastructure as a top policy priority for the 116th Congress. Another top-down, massive government-spending approach would be inefficient, rife with cronyism, and far more likely to result in poor investments that are not aligned with real needs. Instead, any infrastructure package must be fiscally responsible and include enduring regulatory reforms that allow new projects to be completed in a timely manner. Congress and the Trump Administration should implement reforms that will stimulate investment in new infrastructure projects and create shovel-ready jobs across the country.

With a divided Congress, policymakers in both chambers have suggested an infrastructure package as an area of potential bipartisanship. If past is prologue, this should worry American taxpayers. The last $305 billion infrastructure bill signed into law by President Barack Obama in 2015 was fiscally irresponsible and failed to include any meaningful reforms to government-imposed barriers to infrastructure investment. To make matters worse, late last year, Senate Minority Leader Chuck Schumer (D–NY) told President Donald Trump that any infrastructure package must include significant government spending on green energy infrastructure and climate change.[1]

Another top-down, massive government-spending approach would be inefficient, rife with cronyism, and far more likely to result in poor investments that are not aligned with existing needs. Furthermore, spending frivolously exacerbates America's overwhelming federal debt problem.

Key Points

- In a divided Congress, policymakers in both chambers have suggested an infrastructure package as an area of potential bipartisanship. If past is prologue, this should worry American taxpayers.
- Another top-down, massive government-spending approach would be inefficient, rife with cronyism, and extremely likely to result in poor investments that are not aligned with real needs.
- Any infrastructure proposal must focus on the federal role and unleash private-sector investment through substantial regulatory reform. Reforming or repealing government-imposed obstacles will stretch public money further and unshackle private investment from burdensome regulations.
- Heritage Foundation analysts proposed a variety of policy reforms that would generate an estimated $1.1 trillion in infrastructure investments over 10 years. The reforms draw on private and public funding, require necessary structural and regulatory changes, and prioritize infrastructure projects that are truly federal responsibilities.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3384**

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214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Any infrastructure package must be fiscally responsible and include long-lasting regulatory reforms that allow projects to complete construction in a timely manner. A fiscally responsible bill should have offsets to pay for new spending and narrow the federal role by eliminating funding for local and often wasteful projects, such as bike paths and mass transit.[2] Reforming or repealing government-imposed obstacles will stretch public money on infrastructure further and unshackle private investment tied up by burdensome regulations. Implementing such reforms will produce outcomes that Republicans and Democrats should agree on: good stewardship of taxpayer money and private-sector investment that will fuel economic growth and job creation.

Excessive Regulations Obstruct Infrastructure Investment

As Heritage Foundation Senior Research Fellow Diane Katz noted in testimony before the House Oversight Committee, "the United States ranked a measly 15th out of 33 OECD [Organization for Economic Co-operation and Development] countries for ease of permitting, according to the World Bank's 2017 'Doing Business' study."[3] Under the previous Administration, annual compliance costs increased by $122 billion, contributing to a 13-year decline in business freedom and a 10-year decline in overall economic freedom according to The Heritage Foundation's *Index of Economic Freedom*.[4] This has put the U.S. behind such countries as the United Kingdom, South Korea, Norway, Finland, and Australia in regulatory efficiency and business freedom.

Excessive and redundant regulations adversely affect both private-sector and public-sector infrastructure investment.[5] Burdensome regulations drain resources and shift spending from productive activities to unproductive ones. Rather than creating jobs by actually building infrastructure, a company has to hire more lawyers and compliance officers to navigate complex, unclear regulatory schemes and fend off legal challenges to development. Costly regulatory processes particularly squeeze out smaller companies from competing for projects because they cannot afford to have large sums of capital tied up in regulatory limbo.[6] While businesses will always have to allocate some amount of resources to regulatory compliance, unnecessary regulations take resources away from potential entrepreneurial activity—without achieving any benefits. More paperwork, additional bureaucracies, and unnecessary litigation are hardly a measure for better environmental outcomes or increased safety.

This predicament was well-illustrated by the Obama Administration's 2009 stimulus package. President Barack Obama himself acknowledged that his touted shovel-ready infrastructure "was not as shovel ready as we expected."[7] A major barrier to the shovel-readiness of the stimulus money was the National Environmental Policy Act (NEPA). Any major federal action, "including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals," triggers NEPA.[8] NEPA requires federal agencies to conduct

1. News release, "Schumer to President Trump: Any Infrastructure Package Considered in the New Congress Must Include Policies, Funding to Combat Climate Change & Transition to a Clean Energy Economy," Senate Democrats, December 7, 2018, https://www.democrats.senate.gov/newsroom/press-releases/schumer-to-president-trump-any-infrastructure-package-considered-in-the-new-congress-must-include-policies-funding-to-combat-climate-change-and-transition-to-a-clean-energy-economy (accessed January 11, 2019).
2. Michael Sargent, "Building on Victory: An Infrastructure Agenda for the New Administration," Heritage Foundation *Issue Brief* No. 4629, November 21, 2016, http://thf-reports.s3.amazonaws.com/2016/IB4629.pdf.
3. Diane Katz, "An Examination of Federal Permitting Processes," testimony before the Subcommittee on Interior, Energy, and Environment, Committee on Oversight and Government Reform, U.S. House of Representatives, March 15, 2018, https://docs.house.gov/meetings/GO/GO28/20180315/106919/HHRG-115-GO28-Wstate-KatzD-20180315.pdf (accessed January 11, 2019).
4. Terry Miller, Anthony B. Kim, and James M. Roberts, eds., "United States," in *2019 Index of Economic Freedom* (Washington, DC: The Heritage Foundation, 2019), pp. 430 and 431, https://www.heritage.org/index/pdf/2019/book/chapter6.pdf (accessed January 11, 2019).
5. Katz, "An Examination of Federal Permitting Processes."
6. U.S. Chamber of Commerce Foundation, "The Regulatory Impact on Small Business: Complex. Cumbersome. Costly," March 2017, https://www.uschamberfoundation.org/smallbizregs/assets/files/Small_Business_Regulation_Study.pdf (accessed January 11, 2019).
7. "Obama Jokes at Jobs Council: 'Shovel-Ready Was Not as Shovel-Ready as We Expected,'" Fox News, June 13, 2011, http://nation.foxnews.com/president-obama/2011/06/13/obama-jokes-jobs-council-shovel-ready-was-not-shovel-ready-we-expected (accessed January 11, 2019).
8. 43 Code of Federal Regulations § 1508.18 (1978).

comprehensive environmental assessments for highways, pipelines, and a number of other infrastructure projects.

The Obama Administration recognized that NEPA reviews should be expedited to speed up project investment without sacrificing the environment by effectively relinquishing NEPA requirements for projects funded by the American Recovery and Reinvestment Act, better known as the stimulus package. The Administration granted more than 179,000 categorical exclusions for stimulus projects because, as then-Energy Secretary Steven Chu said, it was necessary to "get the money out and spent as quickly as possible" because "[i]t's about putting our citizens back to work."[9]

The same logic applies to other publicly and privately funded infrastructure projects. In addition to NEPA, a laundry list of environmental, labor, telecommunications, and other overbearing regulations adversely affects infrastructure investment.

Public vs. Private Spending

Market competition yields better results for customers in the immediate and long term and is the best antidote to cronyism and wasteful spending. Private-sector activity places risk on investors rather than (socialized) across taxpayers.[10] Market pressures ultimately lead to cost efficiency, prioritization, and solutions that are more creative. In contrast, political interventions destroy investment confidence in the face of ever-changing and arbitrary political winds.

Top-down, tax-and-spend approaches are inefficient, politically driven, and result in poor infrastructure outcomes that are not aligned with real needs. In the past, massive federal transportation bills have lavished money on pet political projects at the expense of federal infrastructure priorities. Congress and the Trump Administration should focus on reducing barriers for a robust, dynamic private sector to invest in infrastructure needs.

Trump Administration Making Good Progress. The key to robust private-sector investment is regulatory reform and the certainty that politicians will not arbitrarily interfere in markets. The Trump Administration has made considerable headway in reducing regulatory burdens on the private sector. For example, the Trump Administration issued a number of executive orders directed at regulatory reform and accountability within executive agencies.[11] The result has been a marked decrease in costly federal regulatory actions compared to the past two Administrations.[12]

Even where compliance measures were already in place, the Trump Administration has reduced delays. For example, the Federal Energy Regulatory Commission has addressed permit backlogs for natural gas infrastructure by contracting with the private sector to conduct parts of the regulatory assessment and increasing information sharing with relevant agencies to avoid duplication.[13] Congress and the Trump Administration must codify and extend the regulatory reforms that will have long-lasting positive implications for infrastructure investment in the U.S.

The Proposals. In May 2017, Heritage Foundation analysts proposed a variety of policy reforms and projects that would generate an estimated $1.1 trillion in infrastructure investments over 10 years. They draw on both private and public funding sources, require necessary change of current laws and regulations, and prioritize infrastructure projects that are actual federal responsibilities:

- **Repeal the National Environmental Policy Act (NEPA).** Rather than improving environmental outcomes, NEPA has evolved to become a tool to delay and obstruct projects that are unpopular with special interest groups or politicians who

9. Kristen Lombardi and John Solomon, "Obama Administration Gives Billions in Stimulus Money Without Environmental Safeguards," *The Washington Post*, November 28, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/28/AR2010112804379.html (accessed January 11, 2019).
10. Katie Tubb, Nicolas D. Loris, and Paul Larkin, Jr., "The Energy Efficiency Free Market Act: A Step Toward Real Energy Efficiency," Heritage Foundation *Backgrounder* No. 3144, August 17, 2016, https://www.heritage.org/environment/report/the-energy-efficiency-free-market-act-step-toward-real-energy-efficiency#_ftnref27.
11. Katz, "An Examination of Federal Permitting Processes," p. 7.
12. Diane Katz, "Here's How Much Red Tape Trump Has Cut," Heritage Foundation *Commentary*, October 17, 2018, https://www.heritage.org/government-regulation/commentary/heres-how-much-red-tape-trump-has-cut (accessed January 11, 2019).
13. Nicolas D. Loris, "Increasing Export Efficiency for Liquefied Natural Gas Is a Win for the U.S. and Global Economies," Heritage Foundation *Backgrounder* No. 3361, November 5, 2018, https://www.heritage.org/sites/default/files/2018-11/BG3361.pdf.

ignore scientific and technical logic. Far from compromising environmental stewardship, repealing NEPA would provide an opportunity to remove duplication of state environmental and other federal requirements.

Additional reading: Diane Katz, "Time to Repeal the Obsolete National Environmental Policy Act (NEPA)," Heritage Foundation *Backgrounder* No. 3293, May 14, 2018, https://www.heritage.org/sites/default/files/2018-03/BG3293_0.pdf.

- **Reform the Endangered Species Act (ESA).** The ESA has largely been an ineffective conservation tool, but it has succeeded in blocking economic development, creating perverse incentives, and engendering unintended consequences.

  Additional reading: Robert Gordon, "Correcting Falsely 'Recovered' and Wrongly Listed Species and Increasing Accountability and Transparency in the Endangered Species Program," Heritage Foundation *Backgrounder* No. 3300, April 16, 2018, https://www.heritage.org/environment/report/correcting-falsely-recovered-and-wrongly-listed-species-and-increasing.

- **Re-establish vital highway maintenance as the primary function of the Highway Trust Fund.** Although much federal roadway funding would be better handled under the jurisdiction of the states, refocusing federal spending on maintaining the Interstate Highway System is far more worthwhile than the current programmatic structure under which 29 percent of the Highway Trust Fund is diverted to non-highway programs.

  Additional reading: Michael Sargent, "Highway Trust Fund Basics: A Primer on Federal Surface Transportation Spending," Heritage Foundation *Backgrounder* No. 3014, May 11, 2015, https://www.heritage.org/transportation/report/highway-trust-fund-basics-primer-federal-surface-transportation-spending.

- **Condition grants to states and local governments on competitive procurement practices.** The costs of infrastructure projects can be inflated unnecessarily by restrictive regulations at state and local levels that cater to favored industries and effectively block competition from industries and materials that may meet engineering requirements equally well.[14] Any federal loans, grants, or guarantees for infrastructure projects should be conditioned on a competitive bidding process.

  Additional reading: Daren Bakst, "The State of the Nation's Water and Power Infrastructure," testimony before the Subcommittee on Water, Power and Oceans, Committee on Natural Resources, U.S. House of Representatives, February 14, 2018, https://docs.house.gov/meetings/II/II13/20180214/106884/HHRG-115-II13-Wstate-BakstD-20180214.pdf.

- **Repeal the Davis–Bacon Act.** The Davis–Bacon Act, enacted in 1931, effectively requires construction contractors for federal projects to use union-wage and benefit scales and follow union work rules. These rules inflate the cost of federal construction by nearly 10 percent on average. Eliminating the Davis–Bacon Act has current support in Congress.

  Additional reading: James Sherk, "Why the Davis–Bacon Act Should be Repealed," Heritage Foundation *WebMemo* No. 3451, January 12, 2012, https://thf_media.s3.amazonaws.com/2012/pdf/wm3451.pdf.

- **Prohibit project labor agreements (PLAs).** PLAs require the main contractor for government contracts to sign a collective bargaining agreement as a condition of winning a project bid. PLAs inflate construction costs by 12 percent to 18 percent on top of increased costs attributed to the Davis–Bacon Act and discriminate against the 87 percent of workers who are not members of a union.

14. BCC Research, "Nationwide Pipe Length and Cost Savings Evaluation," *Special Research Study* for the American Chemistry Council, February 24, 2017, https://www.americanchemistry.com/BCC-Research-National-Study.pdf (accessed January 28, 2019); Wood, "The Road to Recovery"; and news release, "Study for Nation's Oldest Taxpayer Group Identifies Hundreds of Billions in Savings from 'New Approach' to Water Infrastructure," National Taxpayers Union, April 30, 2013, https://www.ntu.org/publications/detail/study-for-nations-oldest-taxpayer-group-identifies-hundreds-of-billions-in-savings-from-new-approach-to-water-infrastructure (accessed January 28, 2019).

Additional reading: James Sherk, "Opportunity, Parity, Choice: A Labor Agenda for the 112th Congress," Heritage Foundation *Special Report* No. 96, July 14, 2011, https://www.heritage.org/jobs-and-labor/report/opportunity-parity-choice-labor-agenda-the-112th-congress.

- **End "Buy America" restrictions.** Most federally funded infrastructure projects must comply with "Buy America" mandates, which require that certain input components be manufactured in the United States. This protectionist mandate limits selection and price competition among input manufacturers, which often leads to higher costs for projects.

  Additional reading: Tori Whiting, "'Buy American' Laws: A Costly Policy Mistake That Hurts Americans," Heritage Foundation *Backgrounder* No. 3218, May 18, 2017, https://www.heritage.org/trade/report/buy-american-laws-costly-policy-mistake-hurts-americans.

- **Prohibit the use of the social cost of carbon (SCC) in regulatory proceedings and eliminate agencies' ability to regulate greenhouse gases.** The federal government uses the SCC to calculate the climate benefit of abated carbon-dioxide emissions from regulations or the "climate cost" of infrastructure projects. Models used to estimate the SCC are highly subjective, and are inadequate tools for policymaking.

  Additional reading: Kevin Dayaratna, "An Analysis of the Obama Administration's Social Cost of Carbon," testimony before the Committee on Natural Resources, U.S. House of Representatives, July 23, 2015, https://www.heritage.org/testimony/analysis-the-obama-administrations-social-cost-carbon.

- **Withdraw the Environmental Protection Agency's (EPA's) 2015 ozone standard.** National average ozone levels have fallen 32 percent since 1980 and are on track to continue decreasing. Withdrawing the 2015 standard would unlock economic activity at the state and local level even as states are still trying to meet the 1997 and 2008 standards.

  Additional reading: Daren Bakst and Patrick Tyrrell, eds., "Big Government Policies that Hurt the Poor and How to Address Them," Heritage Foundation *Special Report* No. 176, April 5, 2017, https://www.heritage.org/poverty-and-inequality/report/big-government-policies-hurt-the-poor-and-how-address-them.

- **Curb nuisance litigation.** Citizen-suit provisions in environmental laws are an important piece of environmental law. However, reform is necessary to prevent their abuse, given the low or nonexistent threshold for determining legal standing.

  Additional reading: Robert Gordon and Diane Katz, eds., *Environmental Policy Guide: 167 Recommendations for Environmental Policy Reform* (Washington, DC: The Heritage Foundation, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/EnvironmentalPolicyGuide.pdf.

- **Repeal the Public Utilities Regulatory Policies Act.** The electricity sector would benefit from competition rather than current policy forcing utilities to purchase qualifying renewable energy and arbitrarily limiting renewable energy capacity to small-scale projects or geographic proximity. Technology and energy-source-neutral competition in the electricity sector encourages companies to meet unique customer energy needs and preferences *while* protecting customers from unwise investments. Competitive markets have also resulted in the efficient exit of older, expensive units and the entry of innovative technologies.[15]

  Additional reading: Adam Thierer, "Energizing America: A Blueprint for Deregulating the Electricity Market," Heritage Foundation *Backgrounder* No. 1100, January 23, 1997, https://www.heritage.org/environment/report/energizing-america-blueprint-deregulating-the-electricitymarket.

- **Repeal the Jones Act and Foreign Dredge Act for U.S. ports.** These laws prohibit foreign-built or foreign-chartered ships from dredging or delivering goods between U.S. ports under the premise of national security interests. They have

15. Katie Tubb, Nicolas D. Loris, and Rachel Zissimos, "Taking the Long View: How to Empower the Coal and Nuclear Industries to Compete and Innovate," Heritage Foundation *Backgrounder* No. 3341, November 5, 2018, https://www.heritage.org/sites/default/files/2018-09/BG3341_0.pdf.

failed to stimulate domestic shipping and dredging industries, and they impede the U.S. from making cost-effective maritime investments, and hamper commerce.

Additional reading: Brian Slattery, Bryan Riley, and Nicolas D. Loris, "Sink the Jones Act: Restoring America's Competitive Advantage in Maritime-Related Industries," Heritage Foundation *Backgrounder* No. 2886, May 22, 2014, https://www.heritage.org/government-regulation/report/sink-the-jones-act-restoring-americas-competitive-advantage-maritime, and

Michael Sargent and Nicolas D. Loris, "Driving Investment, Fueling Growth: How Strategic Reforms Can Generate $1.1 Trillion in Infrastructure Investment," Heritage Foundation *Backgrounder* No. 3209, May 8, 2017, https://www.heritage.org/transportation/report/driving-investment-fueling-growth-how-strategic-reforms-can-generate-11.

- **Repeal New Source Review.** Adopted in 1977, New Source Review requires that new energy-producing facilities—and existing facilities that make "major modifications"—undergo an extensive and costly permitting process and install the best-available pollution-control equipment. What constitutes a major modification is subjective under the rules. Despite multiple administrative attempts to clarify the meaning, it remains murky. Plant upgrades can improve efficiency and reduce operating costs, thereby reducing emissions and lowering electricity bills.

  Additional reading: Nicolas D. Loris, "The Assault on Coal and American Consumers," Heritage Foundation *Backgrounder* No. 2709, July 23, 2012, https://www.heritage.org/environment/report/the-assault-coal-and-american-consumers.

- **Eliminate federal barriers to public–private partnerships (P3s).** Expanding the private sector's role in infrastructure financing and operations will improve infrastructure management, procurement, and economic efficiency while reducing taxpayer risk. The Trump Administration and Congress should eliminate federal barriers to P3s—for example, by increasing the federal cap on private activity bonds—and advocate for them at the state level.

  Additional reading: Michael Sargent, "Building on Victory: An Infrastructure Agenda for the New Administration," Heritage Foundation *Backgrounder* No. 4629, November 21, 2016, https://www.heritage.org/transportation/report/building-victory-infrastructure-agenda-the-new-administration, and

  William G. Reinhardt and Ronald D. Utt, "Can Public–Private Partnerships Fill the Transportation Funding Gap?" Heritage Foundation *Backgrounder* No. 2639, January 12, 2012, https://www.heritage.org/transportation/report/can-public-private-partnerships-fill-the-transportation-funding-gap.

- **Complete the Yucca Mountain license review.** Political mishandling of nuclear waste management is a major barrier to the current and future nuclear industry. The Trump Administration should fund and extend the key license support contracts to complete the review of the Yucca Mountain facility. Congress and the Trump Administration should then address fundamental problems with the current approach to management.

  Additional reading: Katie Tubb, "Yucca Mountain: The Department of Energy Should Take Steps Now While Awaiting Funding," Heritage Foundation *Backgrounder* No. 4705, May 17, 2017, https://www.heritage.org/nuclear-energy/report/yucca-mountain-the-department-energy-should-take-steps-now-while-awaiting.

- **Prioritize nuclear weapons complex cleanup.** The federal government has a moral and legal responsibility to clean up the nuclear weapons complex that supported the manufacturing and testing of nuclear weapons during World War II and the Cold War, as managed under the Department of Energy's Office of Environmental Management. The Energy Department estimates environmental cleanup and disposal liabilities at a total of $494 billion.[16]

Additional reading: Katie Tubb, Nicolas D. Loris, and Jack Spencer, "DOE Reset: Focus the Department of Energy on Core Missions and Decrease Distractions," Heritage Foundation *Backgrounder* No. 3196, March 2, 2017, https://www.heritage.org/energy-economics/report/doe-reset-focus-the-department-energy-core-missions-and-decrease.

- **Corporatize the air traffic control (ATC) system.** Unlike most other developed countries, the U.S. still houses ATC within its aviation regulatory agency, the Federal Aviation Administration. Consequently, the ATC services have been slow to adapt to change and are micromanaged by politicians. Moving ATC services into a non-governmental entity would allow modernization measures to be funded by customer-based user fees and financed up-front by private capital through bond issuances—eschewing the reliance on taxes and uncertain federal appropriations.

  Additional reading: Michael Sargent, "2018 FAA Reauthorization: Potential for Positive Air Traffic Control Reforms, But More Policy Improvements Needed," Heritage Foundation *Backgrounder* No. 4724, June 26, 2017, https://www.heritage.org/transportation/report/2018-faa-reauthorization-potential-positive-air-traffic-control-reforms-more.

- **Overhaul airport funding and privatize the major U.S. airports.** Although most major U.S. airports are owned by local governments, federal laws and regulations pose significant barriers to privatization. Hence, airports remain owned by local governments and are largely unable to function like effective businesses in raising revenue and making investments. The Trump Administration should promote reforms that redefine how airports are allowed to operate and how they generate revenues.

  Additional reading: Michael Sargent, "End of the Runway: Rethinking the Airport Improvement Program and the Federal Role in Airport Funding," Heritage Foundation *Backgrounder* No. 3170, November 23, 2016, https://www.heritage.org/transportation/report/end-the-runway-rethinking-the-airport-improvement-program-and-the-federal.

Conclusion

Whether it is traditional infrastructure or energy infrastructure, these actual shovel-ready job projects should not be held up for years in regulatory paralysis or through litigation. Any infrastructure proposal must focus on the role of the federal government and unleash private-sector investment through substantial regulatory reform. Reforming environmental and labor regulations with a focus on transitioning authority to the states, creating market incentives, and removing costly, ineffective regulations will stimulate investment in new infrastructure around the country while improving the environment at a lower cost.

*—**Nicolas D. Loris** is Research Manager for Energy and the Environment, and Herbert and Joyce Morgan Research Fellow in the Thomas A. Roe Institute for Economic Policy Studies, of the Institute for Economic Freedom, at The Heritage Foundation. **Katie Tubb** is a Policy Analyst in the Roe Institute.*

16. U.S. Department of Energy, *Fiscal Year 2018 Agency Financial Report*, December 14, 2018, p. 68, https://www.energy.gov/sites/prod/files/2018/12/f58/fy-2018-doe-agency-financial-report.pdf (accessed January 29, 2019).