

# ISSUE BRIEF

No. 4830 | MARCH 22, 2018

## The Good, Bad, and Ugly of the Fiscal Year 2018 Omnibus Appropriations Act

*Edited by Justin Bogie*

Last month, Congress passed a sweeping budget deal that increased the 2011 Budget Control Act's discretionary spending caps by \$296 billion for fiscal years (FYs) 2018 and 2019.<sup>1</sup> Now, nearly six months into FY 2018, Congress is poised to debate a \$1.3 trillion spending bill that would provide funding to the federal government for the rest of the year at those levels.

The bill disregards the country's unstable fiscal path in favor of more deficit spending. It continues to fund numerous failed policies and programs that fall squarely outside the constitutional role of the government. The omnibus was introduced Wednesday night and comes in at 2,232 pages.<sup>2</sup> Congress will vote on it almost immediately, providing an insufficient amount of time for thorough debate and constructive amendment. This is not the way that the budget process is supposed to work, and it fails taxpayers.

It represents yet another missed opportunity by Congress to take the national debt seriously and make meaningful spending reforms.

The omnibus touches on a wide variety of issues, including higher spending levels, national defense, Obamacare subsidies, border security, the so-called grain glitch, additional funding for the Department of Education, and infrastructure, among others.

Some of these issues should be addressed on their own merits rather than being jammed into a "must-pass" bill to keep the government open.

It fails to address other conservative priorities, such as nuclear waste disposal at Yucca Mountain and the "waters of the United States" rule.

This is an analysis of several of the key issues. However, with less than a day to review the final text, this analysis is far from complete. It would be more responsible for Congress to pass a one-week continuing resolution to provide additional time for lawmakers, policy experts, and the public to thoroughly analyze the spending commitments and other priorities that this government intends to make on the behalf of the American people.

### Topline Budget and Spending

The omnibus provides \$1.207 trillion in base discretionary spending for FY 2018. This is \$143 billion more than the original Budget Control Act caps. When additional funding for Overseas Contingency Operations (OCO), disaster- and emergency-designated funding, and program integrity initiatives is included, the total swells to \$1.3 trillion.<sup>3</sup>

Once again, Congress has missed an opportunity to reduce the size of the federal government and get the federal budget back on track. The spending increases laid out by the Bipartisan Budget Act of 2018 represent a maximum amount that Congress can spend, not a spending goal for which it should aim.<sup>4</sup>

The \$80 billion increase in defense spending is appropriate, as the military has suffered half of the cuts imposed by the Budget Control Act, while accounting for only 15 percent of the federal budget.<sup>5</sup> Still, Congress should look for savings and reforms in all aspects of government, including national defense.

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This paper, in its entirety, can be found at <http://report.heritage.org/ib4830>

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The bill provides an additional \$71 billion in OCO funding for national defense. This funding has too often been used as a slush fund for non-war-related costs. Moving forward, Congress should phase out this designation and provide all necessary defense funding through the base budget.

In addition to the defense increase, the omnibus provides an additional \$63 billion in funding above the Budget Control Act caps for domestic spending. This increase is unwarranted. There are numerous wasteful, inefficient, and misguided non-defense programs that could be cut or eliminated entirely. Furthermore, agencies will likely rush to spend all this additional money over the next six months, leading to even more waste.

Instead of going through the regular order budget process, Congress continues to fund the government by self-created crisis, failing to perform its oversight function and allowing wasteful and inappropriate spending to continue year after year.<sup>6</sup> Heritage's "Blueprint for Balance: A Federal Budget for Fiscal Year 2018" laid out over \$89 billion in reforms to these programs that could be realized in 2018.<sup>7</sup>

The bill also completely ignores many of the proposals found in the President's FY 2019 budget request that would have reduced domestic spending. Programs eliminated by the Administration's proposal that continue to receive funding or see increases under this bill include the Corporation for Public Broadcasting, various regional development authorities, the Neighborhood Reinvestment Corporation, the National Endowment for the Arts, the National Endowment for

the Humanities, and the Woodrow Wilson International Center for Scholars, among others.

On top of the increased base spending, the bill also provides \$12 billion in funds that are not subject to the revised budget caps for non-defense OCO. This funding is purely used to prop up the base State Department budget. Congress should discontinue this practice immediately. If Congress determines that the State Department needs additional funding, it should provide it by cutting other areas of the non-defense budget.

This bill also provides \$7.4 billion in disaster relief funding. These funds are appropriated at approximately the same level each year and go toward relief when disasters cross the \$500 million threshold. This is in addition to the nearly \$126 billion in supplemental disaster relief appropriations that have already been provided for FY 2018. Congress should budget for these recurring disasters within base appropriations and save the disaster designation for truly unforeseen and catastrophic events.<sup>8</sup>

Finally, the omnibus relies on budget gimmicks to increase spending even more. This bill claims billions of dollars in "savings" through Changes in Mandatory Programs (CHIMPs). CHIMPs are one of the most commonly used budget gimmicks. Congress claims savings by rescinding funds that in most cases were never going to be spent, and then uses that money to increase unrelated discretionary spending. Congress should immediately ban the use of CHIMPs that have no real outlay savings and stop using them as means to spend more money.<sup>9</sup>

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1 H.R. 1892, 115th Congress, 2018.

2 Rules Committee Print 115-66, Text of the House Amendment to the Senate Amendment to H.R. 1625 <http://docs.house.gov/billsthisweek/20180319/BILLS-115SAHR1625-RCP115-66.pdf> (accessed March 22, 2018).

3 Ibid.

4 Paul Winfree, "Note to Congress: Spending Limits Represent a Maximum, Not a Goal," Heritage Foundation *Commentary*, November 17, 2015, [https://www.heritage.org/budget-and-spending/commentary/note-congress-spending-limits-represent-maximum-not-goal?\\_ga=2.170262048.143062378.1521469029-1499240314.1515443002](https://www.heritage.org/budget-and-spending/commentary/note-congress-spending-limits-represent-maximum-not-goal?_ga=2.170262048.143062378.1521469029-1499240314.1515443002).

5 Justin Bogie, "5 Things to Know About Congress' Latest Budget-Busting Deal," The Daily Signal, February 8, 2018, <https://www.heritage.org/budget-and-spending/commentary/5-things-know-about-congress-latest-budget-busting-deal>.

6 Justin Bogie, "Earmarks Won't Fix Washington's Budget Dysfunction," *The Hill*, January 29, 2018, <http://thehill.com/opinion/finance/370929-earmarks-wont-fix-washingtons-budgeting-dysfunction> (accessed March 19, 2018).

7 The Heritage Foundation, "Blueprint for Balance: A Federal Budget for Fiscal Year 2018," March 28, 2017, <https://www.heritage.org/budget-and-spending/report/blueprint-balance-federal-budget-fiscal-year-2018>.

8 Justin Bogie, "A Primer on Disaster and Emergency Appropriations," Heritage Foundation *Issue Brief* No. 4524, March 2, 2016, <https://www.heritage.org/budget-and-spending/report/primer-disaster-and-emergency-appropriations>.

9 Justin Bogie, "Budget Gimmicks Increase Federal Spending and Mask True Costs of Legislation," Heritage Foundation *Backgrounder* No 3234, July 26, 2017 <https://www.heritage.org/budget-and-spending/report/budget-gimmicks-increase-federal-spending-and-mask-true-costs>.

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## Increases Funding for National Defense

The omnibus meets the cap for defense spending agreed to by the Bipartisan Budget Act of 2018 of \$629 billion. These resources will enable the Department of Defense to start a much-needed rebuilding of the military forces.<sup>10</sup> The rebuilding is not a one-year effort and it will require the continued attention and support of both Congress and the public.

The need for increased resources for national defense has broad bipartisan support, as demon-

strated by wide margins of approval received by the National Defense Authorization Act. This bill will allow the Department of Defense to move beyond continuing resolutions and finally have access to these resources.<sup>11</sup>

The delayed pace of appropriations has prompted both the Pentagon and lawmakers to call for increased flexibility in allocating operations and maintenance resources.<sup>12</sup> This bill gives the department limited authority on those terms. It is a wel-

10 Frederico Bartels, "The Military Rebuild Needs to Start in 2018," Heritage Foundation *Issue Brief* No. 4779, November 7, 2017, <https://www.heritage.org/defense/report/the-military-rebuild-needs-start-2018>.

11 Frederico Bartels, "Continuing Resolutions Invariably Harm National Defense," Heritage Foundation *Issue Brief* No. 4819, February 21, 2018, <https://www.heritage.org/defense/report/continuing-resolutions-invariably-harm-national-defense>.

12 Joe Gould, "Let Pentagon Carry Over FY18 Budget Boost So Money Isn't Wasted, Key Lawmaker Says," *Defense News*, February 22, 2018, <https://www.defensenews.com/congress/budget/2018/02/21/let-pentagon-carry-over-fy18-budget-boost-so-money-isnt-wasted-key-lawmaker-says/> (accessed March 20, 2018).

come development that allows the Pentagon to properly prioritize the taxpayers' dollars.

## Obamacare Bailouts of Insurance Companies

The House omnibus bill does not include language proposed by Republicans to provide new federal funding to health insurers and Obamacare outreach efforts.<sup>13</sup> The Senate should follow the House's example because Republicans promised to repeal and replace Obamacare—not entrench and expand it.

Congress should reject this bailout proposal as (1) costly corporate welfare funded by taxpayers to Obamacare health insurers; (2) unnecessary;<sup>14</sup> (3) papering over the real reasons that costs are rising (the nature of Obamacare's regulation and subsidy structure itself);<sup>15</sup> and (4) failing to address meaningfully the real problems caused by the poorly designed law.<sup>16</sup> Despite bailout advocates' claims, the bailouts will not save money or lower premiums.<sup>17</sup> Moreover, Americans do not want this bailout: A recent poll found<sup>18</sup> that 61 percent of Americans oppose providing payments to insurers even if they would reduce premiums; 83 percent agree that if private health insurance companies lose money selling health insurance under the Obamacare program, taxpayers should not have to bail them out.

Rather than provide bailouts to health insurance companies, Congress should pursue real reforms that address the reasons why costs are rising and choices are declining under Obamacare. Under Obamacare, premiums have more than doubled, while health insurance companies fled the exchanges leaving over half of the nation's counties—including all counties in 10 states—with only one insurer. At the same time, nearly three-quarters of exchange plans have restrictive provider networks.<sup>19</sup> Conservatives have developed a plan to address these Obamacare effects by replacing the law with a pathway for states to stabilize their markets. To provide near-term improvements, Congress should give states the flexibility to stabilize their markets. Senators Ron Johnson (R-WI), Lindsay Graham (R-SC), Bill Cassidy (R-LA), and Dean Heller (R-NV) have offered a model that, with additional improvements, could provide a framework for such additional flexibility.<sup>20</sup>

**Funds for the New York–New Jersey Gateway Tunnel Project.** The Gateway tunnel project between New York and New Jersey—part of the larger Gateway Program—was one of the major sticking points in finalizing the FY 2018 funding bill, even drawing a veto threat from President Donald Trump if the bill included the requested \$900 billion for the project.<sup>21</sup> While the omnibus does not explic-

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- 13 The proposal from Senators Alexander (R-TN) and Susan Collins (R-ME) and Representatives Greg Walden (R-OR) and Ryan Costello (R-PA) would provide new federal funds to health insurers (in the form of "cost sharing reduction (CSR)" payments and \$30 billion over three years for reinsurance programs), as well as designating new funds to promote enrollment in Obamacare plans.
  - 14 States can already establish risk-mitigation programs by obtaining federal waivers. For example, Alaska's "reinsurance" waiver reduced premiums in its first year without requiring new federal spending.
  - 15 Edmund F. Haislmaier and Doug Badger, "How Obamacare Raised Premiums," Heritage Foundation *Backgrounder* No. 3291, March 5, 2018 <https://www.heritage.org/sites/default/files/2018-03/BG3291.pdf>.
  - 16 Language released this week includes provisions that: (1) rescind prior Section 1332 regulations and instruct the Secretary of the Health and Human Services Department to issue new guidance; (2) change the requirement that states ensure that Section 1332 waivers are budget neutral over a 10-year window (up from five years today); (3) provide for expedited waiver approval if the request is related to using the new bailout monies; and (4) provide insurers the ability to offer a new plan option on the exchanges. These provisions are insufficient to provide relief from the reasons why Obamacare regulations are increasing costs and decreasing choices, including through narrower provider networks. Achieving that goal would, at a bare minimum, require revising additional provisions of Section 1332 itself.
  - 17 Edmund F. Haislmaier, "Obamacare Bailouts Will Not Save Money and Lower Premiums, Despite Contrary Claims," *The Daily Signal*, March 16, 2018 <https://www.heritage.org/health-care-reform/commentary/obamacare-bailouts-will-not-save-money-and-lower-premiums-despite>.
  - 18 "Poll: Americans Oppose Obamacare Insurer Bailouts Even If They Would Reduce Premiums," The Heritage Foundation, March 2018, [https://www.heritage.org/sites/default/files/2018-03/Obamacare\\_Payments.pdf](https://www.heritage.org/sites/default/files/2018-03/Obamacare_Payments.pdf).
  - 19 Edmund F. Haislmaier and Robert Moffit, "Congress Should Provide Obamacare Opt-Outs, Not Bailouts," *The Daily Signal*, March 19, 2018, <https://www.dailysignal.com/2018/03/19/congress-provide-obamacare-opt-outs-not-bailouts/>.
  - 20 Nina Owcharenko Schaefer, "Bailouts Will Not Bring Lasting Stability to the Health Insurance Market," Heritage Foundation *Issue Brief* No. 4825, March 7, 2018, <https://www.heritage.org/sites/default/files/2018-03/IB4825.pdf>.
  - 21 John Bresnahan, Burgess Everett, and Eliana Johnson, "Trump Threatens Veto Over Gateway Tunnel Funding," *Politico*, March 8, 2018, <https://www.politico.com/story/2018/03/08/trump-gateway-funding-veto-445926> (accessed March 22, 2018).
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itly include funding for the project, it does include an additional \$322 million in grants to Amtrak for Northeast Corridor improvements (for which the tunnel would be eligible)—nearly doubling this budget account to \$650 million. Furthermore, additional funding made available to the Federal Transit Administration and the Federal Railroad Administration could also be spent on the project.

While the President's resistance to Gateway funding was largely due to politics, providing additional funding for the Gateway tunnel project is poor public policy. Lawmakers do deserve a small amount of credit for not providing the full \$900 billion and for routing the funding through the Department of Transportation, allowing the Administration to exercise oversight.

Although the New York region does require imminent trans-Hudson rail improvements, the current formulation of the tunnel project and associated federal funding is the wrong way to address the region's needs. The cost of the tunnel project—originally pegged at \$7.7 billion—has swollen to \$12.7 billion for roughly 2.5 miles of tunnel.<sup>22</sup> The assumption made by members of the New York and New Jersey congressional delegations was that the federal government would pay for half of the project and issue a loan for the other half to be repaid by the local parties.<sup>23</sup>

This puts both federal and local taxpayers at risk for one of the most expensive projects in the world. Compare Gateway tunnel's \$12.7 billion price tag to the recently completed Gotthard rail tunnel in Switzerland, which cost slightly less (\$12 billion), but funded *35.4 miles of tunnel* (even with unusually complicated engineering required for the Alpine project).<sup>24</sup> Given that New York has recently come under fire for the world's most expensive infrastructure construction costs, the federal government should eliminate or substantially reduce its contribution to the region's megaprojects in order to impose much-needed cost discipline on these projects.<sup>25</sup>

Even worse, the tunnel project would not increase rail capacity whatsoever, as additional improvements to the existing tunnels and—critically—station expansion in New York City, are required to accommodate additional trains. Indeed, the project sponsor itself calls the new tunnel “redundant.”<sup>26</sup> This means that taxpayers would spend \$13 billion without any improvements in rail service to show for the expenditure, an exceptionally poor use of scarce resources.

The Gateway tunnel project requires further study and debate. While the bill does not provide the lavish amount requested, opening the possibility of using backdoor funds through an increased appropriation to Amtrak is disturbing, and may trigger large future liabilities for taxpayers in the New York City area and across the country.

**Massive Spending Increases for Federal Transportation Programs.** Overall, the bill provides roughly \$10 billion in additional funding for federal infrastructure programs, representing a roughly 10 percent increase in total federal infrastructure spending for FY 2018 alone. The increase for certain programs is even more substantial. This is especially troubling because these amplified funding levels will likely become the new baseline for programmatic funding, permanently locking in much higher spending levels without any reforms or debate on the programs' merits.

The most egregious provisions include:

- **TIGER National Infrastructure Investments.** The omnibus triples the Transportation Investment Generating Economic Recovery (TIGER) program's budget from \$500 million to \$1.5 billion. A vestige of the stimulus bill, TIGER bestows federal funding on typically local projects, serving as a replacement for earmarks, causing waste, skewing local decisions, and expanding the scope of federal activities. Funding for this program

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22 K. Jane Williams, letter to Robert F Mujica Jr., Director of the Budget, New York State Division of the Budget, December 29, 2017, <http://www.crainsnewyork.com/assets/pdf/CN1137151229.PDF> (accessed March 22, 2018), and Paul Berger, “Tunnel Portion of Gateway Project Estimated at \$12.9 Billion,” *The Wall Street Journal*, July 6, 2017, <https://www.wsj.com/articles/tunnel-portion-of-gateway-project-estimated-at-12-9-billion-1499375187> (accessed March 23, 2018).

23 K. Jane Williams, letter to Robert F Mujica Jr.

24 “After 17 Years and \$12 billion, Switzerland Inaugurates World's Longest Rail Tunnel,” Associated Press, June 1, 2016, <http://www.latimes.com/world/la-fg-switzerland-rail-tunnel-20160601-snap-story.html> (accessed March 22, 2018).

25 Brian M. Rosenthal, “The Most Expensive Mile of Subway Track on Earth,” *The New York Times*, December 28, 2017, <https://www.nytimes.com/2017/12/28/nyregion/new-york-subway-construction-costs.html> (accessed March 22, 2018).

26 Hudson Tunnel Project, “About the Project,” 2017, <http://hudsontunnelproject.com/about.html> (accessed March 22, 2018).

should be wholly eliminated—as proposed in the President’s budget request—not tripled.

- **Airport Improvement Program (AIP).** The AIP receives a one-time \$1 billion increase to its \$3.35 billion budget—an effective 30 percent increase. This program redirects fliers’ dollars from the nation’s most vital airports to those of little significance. Though the 60 largest airports carry 88 percent of taxpaying passengers, they receive only 27 percent of AIP funding.<sup>27</sup> The lion’s share of federal AIP funding is directed to airports that serve few people. The omnibus will likely exacerbate this inequity as it requires the Secretary of Transportation to prioritize non-primary airports (small airports) in rural areas when considering how to allocate the additional \$1 billion. This is hugely counterproductive given that the largest airports are those with the greatest capital needs.

A far superior way to raise capital funds for airport improvements would be to lift or eliminate the federal price control on the Passenger Facility Charge while lowering federal taxes and AIP funding. This bipartisan reform would enable airports to generate their own funding locally instead of sending fliers’ dollars through the Washington middleman. Instead, the omnibus increase in AIP further entrenches airports’ reliance on federal funds while exacerbating the flaws endemic to the nation’s airport financing system.<sup>28</sup>

- **Other spending increases.** The bill further dramatically expands the Department of Transportation’s program budgets in other areas, continuing the federal government’s reach beyond national priorities into local or private transportation matters. These include:
  - **Capital Investment Grants (New Starts).** \$231 million increase (10 percent) to its previous \$2.4 billion level.

- **Federal Transit Administration formula grants.** \$834 million increase (9 percent) to its previous \$9.7 billion level.
- **Amtrak.** \$426 million increase (30 percent) to the railroad’s previous \$1.17 billion level.
- **Federal Highway Administration.** \$2.53 billion increase (6 percent) to its previous \$44.4 billion level.
- **Federal Railroad Administration.** \$1.2 billion increase (67 percent) to its previous \$1.8 billion level. (This includes the above Amtrak funding.)
- **Army Corps of Engineers.** \$800 million increase (13 percent) to its \$6.2 billion budget.

**Federal Aviation Administration (FAA) Authorization.** The omnibus also extends until October the current authorization for FAA, which is currently set to expire at the end of March. While the extension contains no major policy changes, attaching an authorization to an appropriations bill is an abdication of duty on the part of the authorizers, silencing much-needed policy debates by attaching the extension to a must-pass bill.

The FAA is long overdue for substantial reform. The House had at least examined ambitious structural reform to the FAA in generations over the past year in the 21st Century AIRR Act, which would remove air traffic operations from the FAA and establish them in a private, nonprofit entity.<sup>29</sup> However, House Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA) was forced to withdraw the bill due to intense special interest pressure against the free-market reform.

Moving forward, Congress must embrace an open authorization process to address the following outstanding issues:

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27 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, <http://www.heritage.org/budget-and-spending/report/end-the-runway-rethinking-the-airport-improvement-program-and-the>.

28 Ibid.

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

- **Air Traffic Control corporatization.** Remove air traffic control from the federal government and privatize its operations.
- **Airport funding.** Localize airport funding by eliminating the AIP, corresponding aviation taxes, and burdensome airport revenue regulations. Alternatively, uncap the Passenger Facility Charge and lower AIP grants and ticket taxes proportionally.
- **Airport privatization.** Expand access to the Airport Privatization Pilot Program by reducing airlines' veto power, uncapping the number of available pilot slots, allowing partial or full privatization, and approving the use of tax-exempt bonds at private airports.<sup>30</sup>

### **Provides Additional Funding for Border Security**

The omnibus includes approximately \$1.6 billion in extra funds for border security, including \$641 million for new fencing. Those funds should be used in a cost-effective manner to improve security in those areas where it is most needed. Furthermore, physical barriers, while important in some areas, must be backed up with surveillance and detection technologies. Whether there is a wall, a fence, or just wilderness, technology is an important force multiplier that allows the Border Patrol to watch the border more effectively.

Policymakers should keep in mind that border security is not a silver bullet.<sup>31</sup> Even with additional border barriers and technology, many illegal border crossers will still make it through. Others will be caught by the border patrol after crossing or will claim asylum at ports of entry. Many more will come to the U.S. legally and overstay their visa. Border security alone cannot stop these illegal immigrants. Robust immigration enforcement, on the

other hand, can combat such illegal immigration and is as—if not more—essential to the U.S. immigration system than border security.<sup>32</sup> Indeed, with some liberals suggesting the U.S. abolish Immigration and Customs Enforcement (ICE)<sup>33</sup> because it is *enforcing existing immigration laws*, it is perhaps more important than ever to ensure that ICE, immigration courts, and related agencies have the appropriate resources, manpower, and authorities they need to deter and punish illegal entry and overstay.

### **Reauthorizes the National Flood Insurance Program Without Needed Reforms**

The budget reauthorizes the National Flood Insurance Program (NFIP) through July 31, 2018, while providing some \$400 million for the Federal Emergency Management Agency (FEMA) to administer the program through FY 2019. This is a program drowning in debt and dysfunction, and the House wasted this opportunity to institute badly needed reforms. (The Administration and Congress in October “forgave” \$16 billion of the NFIP’s \$25 billion debt.)

According to the Congressional Budget Office, the NFIP runs an annual shortfall of about \$1.4 billion—about half of which reflects the difference between what homeowners and business owners pay for coverage and the actual cost of servicing policies and paying claims.

The problem is the subsidies. A large proportion of FEMA’s flood-risk maps are obsolete, and thus the NFIP premiums do not reflect actual risk. Because property owners do not bear the full cost of flood risk, they are more likely to locate in flood-prone areas and less likely to undertake preventive measures. The devastation of natural disasters is worsened as a result.

The best course of action is to phase out government flood insurance and enable private insurance to replace it.

30 Michael Sargent and Nicolas D. Loris, “Driving Investment, Fueling Growth: How Strategic Reforms Can Generate \$1.1 Trillion in Infrastructure Investment,” Heritage Foundation *Background* No. 3209, May 8, 2017, <http://www.heritage.org/government-regulation/report/driving-investment-fueling-growth-how-strategic-reforms-can-generate>.

31 David Inserra, “Ten-Step Checklist for Revitalizing America’s Immigration System: How the Administration Can Fulfill Its Responsibilities,” Heritage Foundation *Special Report* No. 160, November 3, 2014, [http://thf\\_media.s3.amazonaws.com/2014/pdf/SR160.pdf](http://thf_media.s3.amazonaws.com/2014/pdf/SR160.pdf).

32 David Inserra, “The Wall Is Not Enough. Here’s How to Solve Illegal Immigration,” *The Daily Signal*, January 9, 2018, <https://www.dailysignal.com/2018/01/09/wall-not-enough-heres-solve-illegal-immigration/>.

33 Molly Roberts, “ICE Deserves to Be Abolished,” *The Washington Post*, March 13, 2018, [https://www.washingtonpost.com/blogs/post-partisan/wp/2018/03/13/of-course-democrats-should-want-to-abolish-ice/?utm\\_term=.d85354872b9a](https://www.washingtonpost.com/blogs/post-partisan/wp/2018/03/13/of-course-democrats-should-want-to-abolish-ice/?utm_term=.d85354872b9a) (accessed March 21, 2018).

### **Includes the Fix NICS Act**

Also included in the omnibus bill is the Fix NICS Act of 2017, which involves improving the National Instant Criminal Background Check System (NICS), which has many current problems and which is used to determine who may lawfully purchase and possess a firearm. The Fix NICS Act requires that all affected federal agencies, states, and Indian tribal governments file annual reports with the Attorney General that outline whether they are in “substantial compliance” with certain benchmarks, and uses a combination of carrots and sticks to incentive them to comply. Federal agencies that are not in compliance are listed on various public websites and are ineligible to receive bonus pay until they come into compliance. States and Indian tribal governments that are in compliance are given preference for the receipt of certain federal funds, and those not in compliance are publicly named and are ineligible for grants.

The Fix NICS Act further provides that the Department of Justice is available to provide assistance to any entity that is not in compliance.

### **Expands Federal Intervention in Education**

Despite efforts by the Trump Administration to reduce the federal footprint in education and trim the size and scope of the U.S. Department of Education, the omnibus spending bill would increase the agency’s budget by \$3.9 billion, to \$70.9 billion. That increase represents a 6 percent increase in the Department of Education’s budget over 2017 levels.

The omnibus goes in the opposite direction of the request made by the White House in its FY 2019 budget request, which initially recommended a 10.5 percent *decrease* in the Department’s budget, trimming it by \$7.1 billion to \$59.9 billion in total spending. The budget request was later revised in an addendum issued in the wake of the February 2018 budget deal, reducing the overall level of requested cuts. Regardless, in order to eliminate billions of dollars in funding for duplicative and ineffective programs and those that are more appropriately funded through state, local, or private funds, the Trump Administration rightly sought reductions—rather than increases—in the agency’s budget.

By contrast, the omnibus spending package increases federal education spending in a number of areas, including on Pell Grants (increasing the maximum award amount by \$175 annually to \$6,095), work study programs, Title I funding under the Every Student Succeeds Act (increase of \$300 million), special education under the Individuals with Disabilities Education Act (increase of \$299 million), Student Support and Academic Enrichment Grants (\$700 million), and the 21st Century Community Learning Centers program (increase of \$20 million). Some of these programs, such as the 21st Century Community Learning Centers program, had been slated for outright elimination by the Trump Administration as it is a particularly ineffective program.<sup>34</sup>

A portion of the additional funding provided for Student Support and Academic Enrichment Grants would be available for school safety initiatives. In total, the omnibus provides an additional \$2.3 billion in new funding for mental health, training, and school safety programs that would be spread between the Departments of Justice, Education, and Health and Human Services. While ensuring that children’s safety is an utmost priority, Congress should do so through the use of existing funding. Furthermore, the new funds would serve only as seed money for the states since the cost of what they need to do would dramatically exceed the amount of the new money provided by this bill.

More spending—and with it, more federal intervention in local school policy—is not the answer to improving educational outcomes. Inflation-adjusted public school spending per pupil has almost tripled in the last half-century. Since 1985, real federal spending on K–12 education has increased 138 percent, and since the 1960s, inflation-adjusted per-pupil federal education expenditures have nearly tripled. Meanwhile, academic achievement has languished. Since the 1970s, math and reading achievement have flat-lined, and graduation rates have stagnated for disadvantaged students.

If Congress appropriates another \$3.9 billion in additional money to the Department of Education, it will be continuing the flawed, decades-old practice of filtering taxpayer resources through an inefficient federal agency. Instead of increasing spending and doing the opposite of what the Trump Administra-

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34 David B. Muhlhausen, “Trump’s Responsible Decision to End an After-School Program that Harms Children,” The Daily Signal, March 17, 2017, [https://www.dailysignal.com/2017/03/17/trumps-responsible-decision-to-end-an-after-school-program-that-harms-children/?\\_ga=2.67116824.803644854.1521683122-1797755490.1509580048](https://www.dailysignal.com/2017/03/17/trumps-responsible-decision-to-end-an-after-school-program-that-harms-children/?_ga=2.67116824.803644854.1521683122-1797755490.1509580048).



tion suggested in its budget proposal, policymakers should reduce spending, ease the regulatory burden on states, and permit states increased flexibility with their educational resources.

### **“Grain Glitch” Fix and Low-Income Housing Credit Program Expansion**

The omnibus includes two tax-related provisions, a necessary patch to the Tax Cuts and Jobs Act (TCJA) and an expansion of the Low-Income Housing Tax Credit.

The necessary patch to rules for the taxation of cooperatives—the so-called grain glitch—limits a problem with the new Section 199A business deduction. Without the patch, some farmers could have avoided paying federal income tax and it would have created a major market distortion in the agricultural sector.<sup>35</sup> The chosen patch, however, goes beyond a simple limit to the deduction: The omnibus also reinserts a tax subsidy just for cooperatives, which was more broadly eliminated for all businesses in the TCJA. Reintroducing the old-law tax subsidy only perpetuates a culture of using the tax code to support industries that have political power in Washington. The modification does not level the playing field between cooperatives and independent businesses and does nothing to simplify business taxation.

The temporary, four-year expansion of the Low-Income Housing Credit Program (LIHCP) is intended to further encourage the provision of low-income rental housing. The tax credit achieves its goal poorly and mainly benefits special interest groups and investors.<sup>36</sup> Tax-credit subsidized projects cost 20 percent more per square foot than comparable market housing projects and are less cost-effective than other housing programs.<sup>37</sup> The program is widely abused by tenants occupying housing for which they are not eligible, by developers who inflate their costs to receive excess tax credits, and by government officials using their discretionary powers to award credits for personal gain.

There are a host of other technical corrections, all relating to tax bills from before the TCJA. The grain

glitch is the only explicit correction to the TCJA included in the Omnibus.

### **Misplaced Funding for Energy Dominance**

In contrast to President Trump’s budget, energy programs in the Department of Energy received a sizeable increase from FY 2017 enacted levels. Fossil fuel (\$726.8 million), nuclear (\$1.2 billion), and renewable energy (\$2.3 billion) offices all received increases from the previous year. The omnibus also includes \$353.3 million for Advanced Research Projects Agency–Energy (ARPA–E). ARPA–E awards taxpayer dollars to high-risk, high-reward projects in which the private sector ostensibly would not invest on its own. ARPA–E’s mission is “to reduce energy imports, increase energy efficiency, and reduce energy-related emissions, including greenhouse gases.”<sup>38</sup> The bill would also authorize \$2 billion in loan guarantees for electric cooperatives to use carbon capture and sequestration technology.

All of these activities are not legitimate functions of the federal government. When the Department of Energy intervenes in energy markets through loan programs, research, development, and commercialization, it harms innovators that do not receive government support. Both public and private investment dollars aggregate to projects that the Department of Energy anoints as political winners rather than the market. Other potentially promising technologies lose out. Even federally funded research that is basic in nature but has the end goal of creating a commercially viable energy source is wasteful and market distorting. Free-market competition, not political favoritism through the government, should determine the allocation of energy investments.

### **Fails to Provide Funding for Yucca Mountain Repository**

Congress and the previous Administration have amplified uncertainty in the existing and future nuclear industry by not faithfully executing the law as it pertains to Yucca Mountain in the Nuclear

35 Daren Bakst and Adam N. Michel, “Why the Harmful ‘Grain Glitch’ in the New Tax Law Must Be Fixed,” Heritage Foundation *Issue Brief* No. 4826, March 8, 2018, <https://www.heritage.org/taxes/report/why-the-harmful-grain-glitch-the-new-tax-law-must-be-fixed>.

36 Chris Edwards and Vanessa Brown Calder, “Low-Income Housing Tax Credit: Costly, Complex, and Corruption-Prone,” Cato Institute *Tax and Budget Bulletin* No. 79, November 13, 2017, <https://www.cato.org/publications/tax-budget-bulletin/low-income-housing-tax-credit-costly-complex-corruption-prone> (accessed March 22, 2018).

37 Michael Eriksen, “The Market Price of Low-Income Housing Tax Credits,” *Journal of Urban Economics*, Vol. 66, No. 2 (2009), pp. 141-149.

38 U.S. Department of Energy, Advanced Research Projects Agency–Energy, “About,” <http://arpa-e.energy.gov/> (accessed March 22, 2018).

Waste Policy Act as amended. As it has since 2010, Congress is passing again on an opportunity to appropriate funds for the review of a possible nuclear waste repository at Yucca Mountain.

Unlike the previous Administration, the Trump Administration has faithfully committed to following the law.<sup>39</sup> However, Congress has neither appropriated the funds to execute the law, nor changed the law to provide new direction. This no man's land is costing taxpayers and severely challenging the existing and future nuclear power industry.

Americans have already paid over \$6.2 billion in Department of Energy legal fees and damages to the nuclear industry for the department's failure to collect waste.<sup>40</sup> Circumstances are on track to cost taxpayers \$24.7 billion to \$50 billion. Further, having tied a full third of its enterprise (waste management) to government management, the commercial nuclear industry has also had to accept the delays, expenses, and uncertainty of the political process. Unless waste management can be addressed, the commercial nuclear industry has nowhere to grow.

Congress must now at least provide enough funding to complete the Yucca Mountain permit review. Finishing the review does not commit Congress to building the facility. It merely empowers Congress, the Administration, the State of Nevada, and the nuclear industry to make informed decisions about how to proceed. Kicking the can down the road will only create more uncertainty and leave Americans with a bigger bill.

### **Fails to Address the "Waters of the United States" Rule**

Congress inexplicably failed to address the Obama Administration's 2015 Clean Water Rule, better known as the "waters of the United States" (WOTUS) rule.<sup>41</sup>

Even before the WOTUS rule, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers have been seeking to regulate almost every

water imaginable and trample on property rights by developing an overbroad definition of "waters of the United States." The WOTUS rule takes this federal overreach to a new level. For example, it would regulate certain man-made ditches and even regulate what most people would consider dry land.

While the Trump Administration, to its credit, is seeking to withdraw the rule and issue a new rule to properly define the Clean Water Act term "waters of the United States," Congress needed to take action in this omnibus bill. There will be major legal obstacles to eliminating the rule and then finalizing a new rule that is based on a proper interpretation of the Clean Water Act and consistent with the U.S. Constitution.

Complicating matters, the 6th U.S. Circuit Court of Appeals' nationwide stay blocking the rule was recently lifted in response to the Supreme Court decision in *National Association of Manufacturers v. Department of Defense*.<sup>42</sup>

This Supreme Court decision focused on a technical procedural issue and in no way addressed the substance of the WOTUS rule.

Congress should have expressly prohibited funding for implementation and enforcement of the WOTUS rule, especially in light of the lifting of the nationwide stay. Congress also should have expressly required that the EPA and the Corps issue a new rule to define what is meant by "waters of the United States." Such a clear congressional requirement would have helped eliminate many of the needless legal obstacles that are expected when the agencies move forward to withdraw the Obama-era WOTUS rule and develop a new rule. Further, Congress should have provided some guidance as to which waters are covered under the term "waters of the United States."

By not addressing the rule in the omnibus, Congress has ensured that there will continue to be significant confusion and unpredictability, extensive litigation, and even the possibility that the WOTUS rule would be fully enforced.

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39 Sam Mintz, "Perry Won't Budge on Nuclear Waste Project," *E&E News*, March 16, 2018, <https://www.eenews.net/eedaily/stories/1060076519> (accessed March 22, 2018).

40 U.S. Department of Energy, "Fiscal Year 2016 Agency Financial Report," November 15, 2016, pp. 82 and 83, <https://www.energy.gov/cfo/downloads/fy-2016-doe-agency-financial-report> (accessed March 22, 2018).

41 U.S. Department of Defense, Department of the Army Corps of Engineers, and U.S. Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,'" *Federal Register*, Vol. 80, No. 124 (June 29, 2015), <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states> (accessed March 21, 2018).

42 *National Association of Manufacturers v. Department of Defense*, No 16-299, January 22, 2018, <https://www.law.cornell.edu/supremecourt/text/16-299> (accessed March 21, 2018).

## **Instead of Reining in Out-of-Control Farm Handouts, Congress Would Add Supplemental Farm Subsidies**

In the last farm bill, passed in 2014, Congress created two new massive subsidy programs called the Agricultural Risk Coverage (ARC) and Price Loss Coverage (PLC) programs. Both of these anti-market handout schemes assume that agricultural producers are incapable of operating in the marketplace and therefore need help when revenue targets are not met or prices for commodities are lower than what Congress thinks are the “right prices.”

The House in a bipartisan fashion overwhelmingly passed an amendment to its last farm bill (267 to 156) that would have protected taxpayers by capping how much money these programs would pay out to producers.<sup>43</sup> This amendment made it to the conference committee, where the House and Senate conferees unfortunately took it out. Both the ARC and PLC programs are projected to cost far more (\$31 billion as opposed to \$18 billion, that is \$13 billion more) than originally projected over the first five years of the programs.<sup>44</sup> If the cap had remained, most if not all of that money would have never been paid out to producers, providing significant protection to taxpayers.

Instead of trying to address these excessive costs to taxpayers, Congress has decided to use the omnibus as another way to potentially expand payments to producers. A pilot program was included in the omnibus that would provide a supplemental payment to producers under the ARC program in certain circumstances.<sup>45</sup> This provision may be claimed to simply provide a more accurate calculation of what producers should receive under the program yet it appears to only provide producers *more money*, not less money, than they otherwise would have received under the ARC program.<sup>46</sup>

Regardless, these important substantive policy questions should be addressed through the farm bill process, not buried in a massive omnibus bill; the farm bill debate is already under way, with the 2014 farm bill set to expire this year. The ARC program, which protects farmers when they have minor dips in expected revenue should be eliminated altogether. Congress should certainly not be adding new subsidy schemes to this program that, along with the PLC program, has cost taxpayers so much money. Instead of protecting taxpayers, Congress has used a behind-the-doors process to apparently funnel more money to primarily large agricultural producers growing a small number of crops.

## **Congress Ignores Bipartisan Efforts to Eliminate the Poster Child for Cronyism and Makes Things Even Worse**

In general, the Food and Drug Administration (FDA) inspects all seafood. The exception is catfish. In the 2008 farm bill,<sup>47</sup> catfish producers were able to get a special exception for catfish to be inspected by the U.S. Department of Agriculture (USDA) instead of the FDA.

This is quite simply a protectionist scheme. Moving catfish inspection to the USDA requires foreign countries to develop new catfish inspection schemes that are the regulatory equivalent of the more burdensome USDA system.<sup>48</sup> If they do not meet the USDA’s requirements, foreign exporters from various countries that currently supply the United States with catfish will be blocked from selling their catfish in the U.S. Some countries may not even bother to go through the regulatory equivalence process.

There is significant opposition to the USDA catfish inspection program. The Government Accountability Office has repeatedly been critical of the

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43 Daren Bakst, “Handouts to the Agriculture Industry Are Out of Control,” *National Review*, April 13, 2017, <https://www.nationalreview.com/2017/04/congress-farm-subsidies-agribusiness-cotton-growers-dairy-farmers-2014-farm-bill/> (accessed March 22, 2018).

44 Daren Bakst, “Congress Should Protect Taxpayers, Not Cave to Agricultural Special Interest, in Next Budget,” *The Daily Signal*, July 6, 2017, <https://www.dailysignal.com/2017/07/06/congress-protect-taxpayers-not-cave-agricultural-special-interests-next-budget/>.

45 Senate Amendment to H.R. 1625, Rules Committee Print 115-66, 115th Congress, March 2018, Section 752, p. 110 et seq., <http://docs.house.gov/billsthisweek/20180319/BILLS-115SAHR1625-RCP115-66.pdf> (accessed March 22, 2018).

46 *Ibid.*

47 Section 11016 of Public Law 110-246, 110th Congress, June 18, 2008, <https://www.gpo.gov/fdsys/pkg/PLAW-110publ246/pdf/PLAW-110publ246.pdf> (accessed March 22, 2018).

48 United States Department of Agriculture, Food Safety and Inspection Service, “Operations/Inspection,” <https://www.fsis.usda.gov/wps/portal/fsis/topics/inspection/siluriformes/operations-inspection> (accessed March 22, 2018)

program.<sup>49</sup> President Barack Obama called for eliminating the USDA catfish inspection program in his FY 2014 budget request.<sup>50</sup>

In May 2016, the Senate, in a bipartisan manner, passed legislation that would have effectively eliminated the program.<sup>51</sup> In the House, a bipartisan group of 220 members went on record asking House leadership to take up the Senate bill (House leadership failed to do so).<sup>52</sup> More recently, President Trump called for eliminating the program in his FY 2019 budget request.<sup>53</sup>

Congress should have prohibited any funding from going toward implementation of this new inspection and protectionist program. Instead, Congress requires the USDA to finalize equivalency determinations within 180 days after enactment of the omnibus bill. The problem is that these determinations could take several years. If the requirements for equivalency are not met within this time frame, catfish exported from other countries will not be allowed into the U.S.<sup>54</sup>

Congress will be taking this already widely opposed program and making it even worse by putting the protectionist measures on a fast track. Domestic

catfish producers certainly might benefit from less competition, but they will do so at the expense of consumers. Reduced supply of catfish will drive up its prices, which disproportionately hurts the poor.<sup>55</sup>

The program risks trade retaliation from other countries, who would likely win any lawsuits against the United States before the World Trade Organization since this program is an unjustified non-tariff trade barrier to protect domestic catfish producers.<sup>56</sup> This trade retaliation would likely focus on other agricultural interests, such as meat packers and soybean farmers.

### **Extends the Generalized System of Preferences**

The omnibus extends the Generalized System of Preferences (GSP), a program that eliminates tariffs on thousands of products from around the world. Two-thirds of these products are intermediate goods used in manufacturing in the U.S. Reauthorization of the GSP is a routine process that Congress failed to undertake prior to the expiration of the program on December 31, 2017. American businesses have paid roughly \$2.5 million in additional taxes each day since

49 Office of Management and Budget, "Building a 21st Century Government by Cutting Duplication, Fragmentation, and Waste," April 9, 2013, [https://obamawhitehouse.archives.gov/omb/Building\\_a\\_21st\\_Century\\_Government\\_by\\_Cutting\\_Duplication\\_Fragmentation\\_and\\_Waste](https://obamawhitehouse.archives.gov/omb/Building_a_21st_Century_Government_by_Cutting_Duplication_Fragmentation_and_Waste) (accessed March 22, 2018).

50 See, for example, U.S. Government Accountability Office, "Seafood Safety: Status of Issues Related to Catfish Inspection," testimony before the Subcommittee on Health, Committee on Energy and Commerce, U.S. House of Representatives, December 7, 2016, <http://docs.house.gov/meetings/IF/IF14/20161207/105448/HHRG-114-IF14-Wstate-MorrisS-20161207-U2.pdf> (accessed March 22, 2018), and U.S. Government Accountability Office, "Seafood Safety: Responsibility for Inspecting Catfish Should Not Be Assigned to USDA," May 10, 2012, <http://www.gao.gov/products/GAO-12-411> (accessed March 22, 2018). Other reports addressing the catfish program include U.S. Government Accountability Office, "High-Risk Series: An Update," February 2013, <http://www.gao.gov/assets/660/652133.pdf> (accessed March 22, 2018), and U.S. Government Accountability Office, "2013 Annual Report: Actions Needed to Reduce Fragmentation, Overlap, and Duplication and Achieve Other Financial Benefits," April 2013, <http://www.gao.gov/assets/660/653604.pdf> (accessed March 22, 2018).

51 114th Congress, S. J. Res. 28, "A joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Secretary of Agriculture relating to inspection of fish of the order Siluriformes," <https://www.congress.gov/bill/114th-congress/senate-joint-resolution/28> (accessed March 22, 2018).

52 News release, "Pallone Calls to Eliminate Duplicative USDA Catfish Program," Committee on Energy and Commerce, December 7, 2016, <https://democrats-energycommerce.house.gov/newsroom/press-releases/pallone-calls-to-eliminate-duplicative-usda-catfish-program> (accessed March 22, 2018). See also Casey Wooten, "Backers of Catfish Import Measure Say They Have House Majority," Bloomberg BNA, September 16, 2016, <https://www.bna.com/backers-catfish-import-n57982077097/> (accessed March 22, 2018).

53 U.S. Department of Agriculture, "FY 2019 Budget Summary," February 16, 2018, <https://www.obpa.usda.gov/budsum/fy19budsum.pdf> (accessed March 22, 2018).

54 Senate Amendment to H.R. 1625, Rules Committee Print 115-66, 115th Congress, March 2018, p. 25, <http://docs.house.gov/billsthisweek/20180319/BILLS-115SAHR1625-RCP115-66.pdf> (accessed March 22, 2018).

55 U.S. Bureau of Labor Statistics, "Table 1101. Quintiles of income before taxes: Annual expenditure means, shares, standard errors, and coefficients of variation, Consumer Expenditure Survey, 2015," <https://www.bls.gov/cex/2015/combined/quintile.pdf> (accessed March 22, 2018).

56 Vietnam has already expressed its concerns before the World Trade Organization. See "Comments of Viet Nam on the New Regulation of the United States on Mandatory Inspection of Catfish and Catfish Products," SPS WTO Committee Meeting, Geneva, Switzerland, March 16-17, 2015, [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=228777,228543,228296,228109,228102,228103,227995,227604,227515,227484&CurrentCatalogueIdIndex=7&FullTextHash](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=228777,228543,228296,228109,228102,228103,227995,227604,227515,227484&CurrentCatalogueIdIndex=7&FullTextHash) (accessed March 22, 2018).

the GSP expired. Renewing this program for three years will get the program up and running again, but Congress should extend the GSP for at least 10 years. That would allow U.S. companies to plan for the long term, increase investment, and create new jobs.<sup>57</sup>

### **Fails to Roll Back the President's New Tariffs**

Congress failed to roll back sweeping tariffs imposed by the President on steel and aluminum imports. The omnibus bill should have cut off funding for U.S. Customs and Border Protection for the collection of duties recently imposed under Section 232 of the Trade Expansion Act of 1962. Not including such a provision shows that Congress is not serious about preventing the significant harm that will be inflicted on steel and aluminum-using manufacturers and American workers as a result of these tariffs.

### **Conclusion**

This latest massive omnibus spending bill represents everything that is wrong with Washington. It ignores any semblance of the regular order budget process in favor of funding by crisis. In doing so, Congress has again failed to perform one of its most important functions: oversight. Instead, wasteful, inefficient, and inappropriate programs will receive tens of billions of dollars in additional funding. Congress should reject this bill and start over with a goal of achieving meaningful reforms through an open, transparent, and accountable budget process. America's taxpayers deserve better than another bloated spending bill that postpones reforms yet again.

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57 Tori K. Whiting, "Congress Should Renew the Generalized System of Preferences," Heritage Foundation *Issue Brief* No. 4805, January 8, 2018, <https://www.heritage.org/trade/report/congress-should-renew-the-generalized-system-preferences>.