



INFRASTRUCTURE AS A POLICY TOOL

US infrastructure is having its long-delayed day in the sun. The 2,702-page Infrastructure Investment and Jobs Act (IIAJ Act), enacted in November 2021, received significant mainstream attention, due in part to its size – at more than US\$1trn, it is the largest infrastructure programme in a generation – and the fact it was a rare piece of legislation passed with bi-partisan support.

By **RODERICK DEVLIN, NIXON PEABODY LLP.**

Transportation Secretary Pete Buttigieg, President Biden’s infrastructure point man, is arguably the Cabinet member with the most public face recognition. Mayor Pete, as he is known due to his time as former mayor of South Bend, Indiana, is even a regular on the late-night talk shows, bringing the importance of infrastructure investment to a national audience.

This attention has been a long time coming. For years, Washington’s annual “Infrastructure Week” came and went with little progress. In 2021, the nation’s infrastructure was awarded a C– average by the American Society of Civil Engineers (ASCE), with many categories, including transit and aviation, scoring in the D range. The ASCE, which has been issuing periodic infrastructure “report cards” since the 1980s, argues that the US “infrastructure investment gap” could cost US\$10trn in lost GDP and three million jobs by 2039. The IIAJ Act is a major step in addressing this deficit.

Significant though the IIAJ Act is, the Biden administration proposed an even greater level of investment in its Build Back Better Plan (BBB Plan), initially sized at US\$3.5trn. This plan expanded the traditional US definition of infrastructure, focusing on child and elderly care, education, affordable housing and clean energy. However, the BBB Plan failed to gain the support of the full Democratic caucus in Senate and attracted no Republican support. It is possible that portions of the BBB Plan may still progress as separate bills.

Another key differentiator of the IIAJ Act compared with past US infrastructure programmes is its articulated use of infrastructure to advance policy goals, by addressing past inequalities in resource allocation and directing funds to historically underserved communities.

PAST IMPACT ON DISADVANTAGED COMMUNITIES

The construction of the federal interstate highway system, which displaced more than 1m people from their homes, had a disproportionate impact on communities of colour. Some subsequent highway developments physically split communities. Disparate infrastructure investments have resulted in communities of colour having fewer public transit options, inequitable access to clean water, and poor internet connectivity, all of which resulting in an overall decrease in economic opportunity. Some of these impacts were the result of negligence, but some arose from deliberate policy decisions. President Biden has made addressing these issues a key part of his infrastructure plan.

INFRASTRUCTURE AS A POLICY TOOL

In his first week in office, President Biden signed an executive order, “Tackling the Climate Crisis at Home and Abroad” (Executive Order 14008) creating the Justice40 Initiative. The Order notes that, “to secure an equitable

economic future, the United States must ensure that environmental and economic justice are key considerations in how we govern. That means ... turning disadvantaged communities – historically marginalized and overburdened – into healthy, thriving communities...” It included a desire to “secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalised and overburdened by pollution and underinvestment...” The Order included “a goal that 40% of the overall benefits [of certain federal investments] flow to disadvantaged communities...”

In President Biden’s Executive Order 14052 (on the implementation of the ILIA Act), he directs federal agencies to prioritise “investing public dollars equitably, including through the Justice40 Initiative, which is a Government-wide effort toward a goal that 40 percent of the overall benefits from Federal investments in climate and clean energy flow to disadvantaged communities...”

The particular programmes identified in Executive Order 14008 to be used to implement the Justice40 Initiative are: clean energy and energy efficiency; clean transit; affordable and sustainable housing; training and workforce development; remediation and reduction of legacy pollution; and clean water infrastructure

The Justice40 Initiative has been criticised by some as being too limited in scope, in that it focuses on environmental impacts rather than throwing a wider net. Further, the particular programmatic focus of Executive Order 14008 excludes the majority of federal infrastructure investment, which goes toward highways, roads, bridges, and other traditional transportation.

However, the Justice40 Initiative has its roots in a decades-long grassroots environmental activism (notably in New York and California) focusing on environmental justice, clean transportation options, water safety, and investment in community resiliency. Indeed, the programmatic focus of Executive Order 14008 closely tracks those areas that have long been the focus of local environmental activism.

The IIAJ Act is a key part of implementing the Justice40 Initiative. Further, an agenda to assist disadvantaged communities is also found in the expanded definition of infrastructure in the IIAJ Act:

- The Digital Equity Act contained within the IIAJ Act seeks to address digital redlining that has limited underserved communities especially in rural areas from having access to secure high-speed internet access.
- The IIAJ Act’s Tribal Broadband Connectivity Program aims to expand the availability of high-speed internet on Tribal lands (which are historically underserved by internet access).

ROCKY ROAD

With limited exceptions including activities by the Army Corp of Engineers, the federal government does not itself procure or construct infrastructure projects. Instead, it funds or finances the projects proposed by states and local municipalities. This poses a significant impediment to President Biden’s desire to use infrastructure to advance his policy agenda.

Earlier this year Mitch Landrieu, the former Democratic mayor of New Orleans and co-chair of the White House’s Infrastructure Implementation Task Force, sent a letter to

state governors proposing goals for implementation of the Act. These included “supporting disadvantaged and underserved communities...” Sixteen republican governors pushed back, stating that “[e]xcessive consideration of equity, union memberships, or climate as lenses to view suitable projects would be counterproductive. Your administration should not attempt to push a social agenda through hard infrastructure investments...” Hinting at possible litigation, the governors continued that “restrictions on the use of funds not authorized by statute are unacceptable and often struck down by the judicial system”.

The governors’ stance has legal support. The Justice40 initiative was created by executive order and thus does not have the force of law. Over three-quarters of the funds under the Act will be allocated based on well-established formulas that leave little room for federal government to steer funding based on the Biden administration’s declared policy goals.

IMPLEMENTING JUSTICE40

Competitive grants constitute about 24% of the overall funds under the Act. States and municipalities are invited to submit applications for these funds, and the Biden administration can take account of policy goals in allocating such funds.

Significant steps have already been taken in this regard: in May 2022, the White House announced that US\$29bn in federal funding (including under the Act) had already been applied using the Justice40 criteria to support housing, clean up environmental hazards, and support new job creation in coal communities (typically in rural areas).

The White House Interim Implementation Guidance for Justice40 (WHIIG) identifies 21 existing federal programmes that will be used to implement the Justice40 Initiative. WHIIG instructs the federal agencies overseeing these 21 programmes to facilitate implementation of the Justice40 Initiative, including through stakeholder and community engagement. Further, the IIAJ Act increases Justice40 spending more than fivefold compared with the 2020 numbers. The relevant programs are listed in Table 1.

Moreover, as Lew Daly of the Roosevelt Institute notes, many other federal programmes beyond those listed above expressly identify disadvantaged or low-income communities as a priority for investments. According to Daly, “these programs essentially bear the imprint of Justice40 without being codified as part of Justice40...” Under the IIAJ Act these programmes include:

- Water investments including over US\$23bn to fund grants/ forgivable loans for drinking water and clean water projects in DACs, plus an aggregate of US\$21bn for lead pipe replacement and environmental remediation;
- US\$7bn for state carbon reduction programmes with a focus on emissions from transportation and equipment;
- US\$5.6bn for zero or low emissions buses;
- US\$2.5bn for electric vehicle (EV) charging infrastructure in underserved communities;
- US\$2.5bn for infrastructure for clean ports, often located in close proximity to disadvantaged communities;
- US\$1bn for reconnecting communities by addressing highways and other infrastructure that historically segregated communities of colour

TABLE 1 - JUSTICE40 PROGRAMMES

Federal Agency	Program	Spending enacted in FY 2020 (US\$m – numbers rounded)	IIAJ Act spending (US\$m – numbers rounded)
US Department of Homeland Security (DHS)	Flood Mitigation Assistance Program	160	3,500
DHS	Building Resilient Infrastructure and Communities Program (BRIC)	500	1,000
US Department of Energy (DOE)	Weatherisation Assistance Program	305	3,500
DOE	Solar Energy Technologies Office (National Community Solar Partnership)	280	–
DOE	Vehicles Technologies Office (Clean Cities)	396	–
DOE	Environmental Management, Los Alamos	220	–
DOE	Advanced Manufacturing Office (Industrial Assessment Centers)	395	–
US Department of the Interior (DOI)	Abandoned Mine Land Economic Revitalization (AMLER) Program	115	–
US Department of Transportation (DOT)	Bus and Bus Facilities Infrastructure Investment Program	464	5,100
DOT	Low or No Emissions Vehicle Program	130	5,600
Environmental Protection Agency (EPA)	Drinking Water State Revolving Fund	1,120	30,700
EPA	Clean Water State Revolving Fund	1,600	12,700
EPA	Brownfields Program	24	1,500
EPA	Superfund Remedial Program	795	3,500
EPA	Diesel Emissions Reductions Act Program (DERA)	87	–
EPA	Reducing Lead in Drinking Water	20	500
US Department of Health & Human Services (HHS)	National Institute of Environmental Health Science (NIEHS) Environmental Career Worker Training Program	803	–
HHS	HHS Low-Income Home Energy Assistance Program (LIHEAP)	3,740	500
US Department of Housing and Urban Development (HUD)	HUD Lead Hazard Reduction and Healthy Homes Grants	221	–
US Department of Agriculture (USDA)	USDA Rural Energy for America Program	706	–
Appalachian Regional Commission (ARC)	Partnerships for Opportunity and Workforce and Economic Revitalization (POWER)	45	–
	Total	US\$12.126bn	US\$68.100bn

In total, Daly identifies US\$192.6bn of IIAJ Act authorised funding that “bear the imprint of Justice40” without being expressly identified by the White House as part of the initiative, US\$38.5bn of which is under competitive grant/loan mechanisms.

TAKING THE ROAD

The Biden administration’s proposed Build Back Better (BBB) Bill would have substantially increased these figures, with more than US\$230bn being directed to Justice40 relevant programmes. However, the BBB Bill, which combined many disparate elements, failed to pass the US Congress, although portions of it may yet pass as separate bills.

There has been criticism, notably from within the Democratic Party, that the Justice40 Initiative does not go far enough. For some, requiring that 40% of “overall benefits” of the identified programmes benefit disadvantaged communities falls far short of actually requiring that 40% of the actual investments go toward such communities.

Identifying disadvantaged communities for purposes of Justice40 Initiative is also an area of controversy, as it was in the context of the analogous New York State legislation. In February 2022, the White House released a beta version of its Climate and Economic Justice Screening Tool (CEJST) intended to identify which communities are “disadvantaged” for purposes of the Justice40 Initiative. The CEJST includes

eight different environmental, climate, health, housing and economic criteria for identifying if a community is disadvantaged.

The CEJST was praised in some quarters for its innovative open-source process, which was intended to encourage public input, with one commentator describing it as “a pioneering experiment in open governance”. As with any experiment, there was also criticism, including from those who noted that many neighbourhoods of colour that would be considered disadvantaged by most measures had not been identified by the tool. Others took exception to the fact that race itself was excluded as a consideration. It remains to be seen how the CEJST will operate once it emerges from its beta stage.

CONCLUSION

The Biden administration has signalled a major shift in federal infrastructure policy by expressly acknowledging that past infrastructure developments have disproportionately impacted disadvantaged communities/communities of colour in an adverse manner (by neglect or intent) and making it a goal to address such impacts. There are structural limits as to how far the federal government can pursue this goal. Nevertheless, it is an important step as, without acknowledging the issue, it is impossible to work toward a solution regardless of how long the road. ■