I've written about debates over permitting reform and other versions of regulatory streamlining to support the development of infrastructure that we need to address climate change. Another view, well articulated by Nicholas Bagley at University of Michigan, is that the problem is more fundamental: Excessive focus on governmental procedures and process, reinforced by searching judicial review, has paralyzed government and therefore undermined achieving a range of goals including more housing, more clean energy infrastructure, and mass transit.

I think there is much to Bagley's critique of what he calls the "procedure fetish" in law, including environmental and administrative law. But I also think the past few months have provided some insight into why judicial review, including process, might be important to facilitate the investment we need to achieve those very same goals that Bagley argues we are undermining with process and judicial review.

Investment, particularly long-term investment, requires stability, including policy stability. Firms, individuals, and even governments are less likely to want to put large amounts of money on the line for a payoff in the future if they cannot predict what the likely policy landscape will be over that timeframe. That's true whether it is private investment in housing or renewable energy, or public investment in infrastructure. Indeed, one of the significant economic impacts of the past two months of the new administration has been a beginning of a pullback in capital investment because of deep uncertainty about policy.

One constraint on rapid changes in policy, at least by the executive branch, is judicial review. In a political system in which legislation enacted by Congress is more difficult and time-consuming to change than executive decisionmaking by the President, requiring the President to comply with law will necessarily reduce the swings in policy. Thus, again, we can see that a significant constraint on some of the increased uncertainty in terms of policy over the past couple of months has been judicial orders requiring the government to make payments for grantee or contractor work already completed.

Of course, the policy uncertainty can only be constrained so much by courts. One of the most serious and significant negative impacts of the new administration has been to fundamentally undermine the perception that the United States government is a counterparty that can be trusted to honor its commitments. Everyone has learned that lesson – from allies no longer willing to buy military equipment from US companies, to contractors and grantees who have been stiffed by the new administration, to companies deciding whether major manufacturing

investments will survive a possible trade war, to researchers who have seen grants cut off with minimal notice. All of that uncertainty undermines the ability of the federal government to proactively encourage investments – all kinds of investments, from oil and gas to renewable energy.

Courts have therefore been a limited, but important check, on the extent of policy uncertainty and its negative impacts on our ability as a country to invest and make important commitments going forward. The uncertainty of the past two months would only be worse, probably far worse, without some form of judicial review. Nor is this a problem that is unique (albeit extreme in its expression) to this administration. The ping pong back and forth of policy from Obama to Trump I to Biden to Trump II is not beneficial in terms of encouraging lasting investment and growth. A policy prescription that calls for dramatically reducing judicial review of the administrative state in the name of advancing investments in important infrastructure must wrestle with the downsides of reducing judicial review in a political system that is highly polarized and where legislative action has been infrequent.