



Insight

Congress and Regulation in 2017

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When the 115th Congress takes the oath of office next January, they will be confronted with a host of national and international policy concerns. Health care, trade, and tax policy could and should all take center stage. However, regulatory policy is often the tail that wags the dog in the nation's capital and where a majority of the "lawmaking" takes place.

Generally, Congress has three tools available for its authority over federal rulemaking: oversight hearings, appropriations riders, and the Congressional Review Act.

Oversight

This is by far the most frequently used tool since every Congress calls administration and independent agency officials before a committee to testify. Virtually every committee in Congress has some jurisdiction over the regulatory state. Judiciary and Oversight routinely scrutinize the pace and output of federal rules, in addition to proposing regulatory reform legislation. Energy, Commerce, and Environmental committees often deal with the substance of rulemaking from the Department of Energy and the Environmental Protection Agency. Even the Budget and tax committees have held regulatory reform and oversight hearings for federal rules.

Despite the prevalence of these hearings, they don't necessarily alter the pace and output of rulemaking. Generally, the administration and independent agencies control the process, subject to the Administrative Procedure Act, and Congress is left to monitor regulators, and occasionally find officials in contempt of Congress.

Appropriations

For new Members of Congress, there is perhaps no way they can affect the administrative state more than through the control of spending. Congress has the power of the purse and ratcheting spending levels in one direction or another is a manifestation of the legislative branch's approval of the executive branch and other agencies. If oversight and pleas on specific regulations meet deaf ears, Congress can respond by cutting or freezing agency budgets.

In some instances, Congress can pass what is known as an "appropriations rider." These are specific line-items in appropriations bills directed at a specific regulation. Generally, these measures only modify, not repeal, specific regulations, but many can extend the effective compliance date. Under President Obama, these riders have to be negotiated with Congress because the president will not sign an appropriations bill that modifies or eliminates too many of his domestic priorities.

Congressional Review Act

If appropriations riders are the scalpels of regulatory oversight, then the Congressional Review Act (CRA) is the hatchet. As the American Action Forum (AAF) has detailed [in the past](#), the CRA allows Congress to repeal a recently-issued final rule. If it passes the House and Senate, and the president signs the legislation, it may not be reissued in “substantially the same form.” In other words, the regulation is dead until Congress and the administration decide to authorize a new set of rules through regulation.

However, the CRA has only been used successfully once. That occurred around a confluence of circumstances, an outgoing president issuing a controversial rule, a new unified Republican Congress, and a Republican president replacing a Democratic president. Recently, the CRA has been used largely for messaging. Forcing the president to veto a CRA resolution shows that Congress has identified and rejected a controversial regulation and the president, for the second time, has defended the rule. The CRA is a targeted tool for consequential regulations and it is effective only when a new administration and Congress have an opportunity to [review rules](#) from the previous administration.

Regulatory Reform

Finally, aside from the three oversight tools listed above, Congress can also craft a positive vision for a modernized regulatory state. The 114th Congress passed roughly a dozen regulatory modernization bills and Speaker Paul Ryan touted these efforts in his “[Better Way](#)” approach to governing recently. The next Congress once again has the opportunity to craft its vision for an effective administrative state. How will Congress address the Clean Power Plan, Climate Change, Net Neutrality, and new labor rules?

Broadly, Congress can legislate these policy issues horizontally or vertically. The horizontal approach revolves around a process that applies to all agencies. For example, the [Regulatory Accountability Act](#) and the [Regulatory Budget](#) apply uniformly to the process and output of all agencies. For Members of Congress interested in a specific agency or issue area, vertical reform would be appropriate. Reforming the Clean Air Act or the Fair Labor Standards Act are two examples.

In conclusion, the problems of the next Congress won’t be altogether different from the 114th Congress. Economic growth, climate change, income inequality, and criminal justice reform will all be priorities, if not for the legislative branch, then certainly for some regulators. In its capacity, Congress can exercise constant oversight through hearings and frank discussions with administrative officials or use the power of the purse to curtail or boost agency action. Finally, employing the CRA or enacting comprehensive regulatory modernization are other vital tools the next Congress can employ. Although the power has shifted dramatically to the executive in the last few generations, the legislative branch is hardly empty-handed.