Research

Policy Outline: A Primer on the Congressional Review Act and Proposals for Reform

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The policy debate during 2009-2010 was dominated by the legislative agenda of the 111th Congress: health care, financial reform, and government stimulus. There will doubtless be more legislative fights in the 112th Congress, but the current regulatory onslaught should receive more attention from policymakers.

It is hornbook law that administrative agencies implement federal law; they do not make it. However, the Federal Communications Commission (FCC), the National Labor Relations Board (NLRB), and the Environmental Protection Agency (EPA) have all promulgated major regulations that would fundamentally alter the workplace, the Internet, and the entire energy sector.

New regulations like so-called "net neutrality", CO_2 controls, and union notification postings weren't the result of enacted law. With control of government divided, there are few viable options for comprehensive legislation. Instead, bold attempts at legislating by regulatory bodies suggest that Congress must act quickly to ensure that Administration agencies are held accountable.

The Congressional Review Act (CRA), passed during the Clinton Administration, is one option that allows Congress to disapprove of and vacate new regulations. Historically, the CRA has been largely ineffective as a check on executive excess. However, new majorities in Congress and the prospect of reform proposals could lead to more effective control over the regulatory regime.

CRA HISTORY

The CRA (5 U.S.C. 801) became law in 1996 and allows Congress to pass a joint resolution of disapproval voiding federal regulations. According to its legislative sponsors, the CRA was designed "to help redress the balance [between the branches], reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency." Successful passage of a disapproval resolution, with the president's signature, will vacate a new regulation. (A grandfather of the CRA, the legislative veto, was struck down by the U.S. Supreme Court in *INS v. Chahda* (462 U.S. 919) because, the Court reasoned, a veto is a lawmaking function, which must be authorized by both Houses of Congress and the President.)

PROCEDURE

The CRA operates essentially like any other legislative action. Majority votes in both Houses are required, in addition to presidential approval. However, there are procedural differences that allow resolutions of disapproval to bypass legislative roadblocks.

The logistics of the CRA are contained in 5 U.S.C §§ 801, 802:

- Before a final rule can take effect, the agency responsible must submit a copy, including a cost-benefit analysis and effective date of the rule, to Congress and the Comptroller General at the Government Accountability Office (GAO).
- Rules promulgated under the Telecommunications Act of 1996, namely net neutrality and other relevant FCC rules, are **not** considered "major rules" under the CRA.
- The Comptroller General must provide a report on a **major rule** to the committees of jurisdiction in each House of Congress at least 15 calendar days after either publication in the *Federal Register* or agency submission to Congress.
- If no disapproval resolution is passed, the rule will take effect 60 days after Congress receives a written report on the major rule, or when the rule is published in the *Federal Register*, whichever is later.
- Section 802 outlines the expedited review process in the Senate:
    - If a CRA is proposed, debate is limited to ten hours and may not be filibustered. In addition, points of order against the resolution are waived; it is not subject to amendment, or a motion to reconsider or postpone.
    - Once a joint resolution of disapproval passes in one House it skips the relevant committee in the other House. Thus, if a Republican House could take up a CRA measure and pass it out of committee and the House floor, then the measure would proceed to the Senate floor under expedited review.
    - After a single quorum call the vote on final passage occurs.
- The actual text of a resolution of disapproval: "That Congress disapproves the rule submitted by the _____ relating to the _____, and such rule shall have no force or effect."
- If the CRA passes and the President signs the resolution, the regulation "shall have no force or effect." In addition, the disapproval would supersede other rules inconsistent with Congressional intent, effectively killing current and future regulation. Section 801 (b)(2) states that a new rule "may not be reissued in substantially the same form."
- The CRA can be used to delay implementation even if vetoed by the President. If a joint resolution is approved but the President vetoes the measure, then the regulation wouldn't take effect until the later of Congressional failure to overturn the veto or 30 **session days** after Congress received the Presidential veto.
- The veto can be overridden by Congress, but only with a two-thirds supermajority.

CRA IN PRACTICE

To date, the CRA has not been an effective check on administrative agencies. It has been used successfully once, during the debate over OSHA's ergonomics rules in 2001. That required a pending rule from the lame

duck Clinton Administration, a new Republican President, and a Republican Congress. The unusual confluence of circumstances that occurred in 2001 won't occur again until at least 2013.

As the Congressional Research Service (CRS) noted, between April 1996 and May of 2008, more than 47,540 major and non-major rules were reported to Congress and became law. Of those, Congress used the CRA 47 times and the President signed only one resolution.

In practice, four CRA attempts were made in the Senate during the 111th Congress (disapproving of obligations under TARP, the EPA's Endangerment Finding, National Mediation Board procedures, and health plans under the Affordable Care Act).

The Senate was the only chamber to vote on CRA proposals during the past Congress. Disapproval of EPA's Endangerment Finding garnered the most support (47 votes). However, four Democrats (Roland Burris, Byron Dorgan, Russ Feingold, and Arlen Specter) who voted against passage have been replaced by Republicans.

In the House, Republicans on the House Energy and Commerce Committee have already scheduled a CRA hearing on net neutrality for February 16.

POSSIBLE REFORM OPTIONS

The CRA relies on presidential approval, and is generally useful only during times of unified government and a transitioning administration. There are policy proposals that would strengthen the CRA and Congress's ability to combat unaccountable regulatory bodies.

A 2006 House Judiciary Subcommittee Interim Report noted that the CRA could be amended to provide that all major regulations must be submitted to Congress, and cannot become law until Congress passes a joint resolution of approval. The pitfall of this proposal is that it would force hundreds of regulations onto the already crowded legislative docket. According to the Office of Information and Regulatory Affairs, there are currently 136 regulations pending.

Another subcommittee proposal would establish a Joint Congressional Committee to be a clearinghouse for all major regulation. This might be the most bipartisan approach, but it would demand another committee, more staff, and no guarantee that onerous regulations would be curtailed by the joint committee.

As proposed by Senator Mark Warner (D-VA), Congress could enact a Cut as You Go rule to "major" federal regulations. Congress would empower agencies, if enacting a regulation costing more than $100 million, to concurrently cut unworkable and expensive regulations. The business community supports this approach; as the National Association of Manufacturers commented, "This both addresses the issues of new costly regulation and also asks us to look at legacy regulation in a way that few other proposals do."

Finally, Congress could also strengthen the CRA to provide for a sunset period for major regulation. After a period of enactment, the administrative agency would be responsible for conducting a study on the actual cost and realized benefits of the regulation. If the rule proves too costly, Congress could then subject the regulation to a joint resolution of approval on whether it would continue.

All of these reform options would likely be an improvement over the current regime of unaccountable regulatory agencies. The implementation of federal law is to be expected, but making policy in defiance of

Congress is at odds with the sound governance. Businesses and consumers must have some certainty and predictability in the rulemaking process and a new CRA would go a long way toward providing some stability for the businesses community.