

The Congressional Review Act ([CRA](#)), part of Newt Gingrich's "Contract With America", slumbered for many years in obscurity. Then, in 2017, Congress dusted it off and used it to kill fifteen Obama administration regulations. I'm not the first to ask whether there should be payback if the White House and Senate change hands.

There are legitimate reasons for using the CRA. Doing so would allow for reversal of some of the Trump administration's regulatory rollbacks without waiting for time-consuming litigation or cumbersome agency reconsideration. But the CRA is an ill-conceived law, and we should really aim at [repealing](#) it. One option might be to give legislators a choice: Agree to repeal the law, or watch as the CRA is wheeled into action.

What's Wrong with the CRA?

When one administration issues an agency regulation (including repeal of a prior regulation), the new administration can start its own agency procedure to undo what the last administration did. That's a lengthy process and invites litigation. The CRA provides a short cut. Congress can disapprove the previous administration's action. That immediately eliminates it. As applied to the Trump administration's regulatory rollbacks, the effect of a CRA resolution would be to restore the situation prior to the Trump regulation. In other words, this would undo the rollback.

Here's how the CRA works. Before major rules can go into effect, agencies must notify Congress, which then has a specified period of time in which to consider a joint resolution of disapproval. (In practice, this means that regulations in about the last six months of an outgoing administration can be reviewed). The law is basically limited to times when control of the White House flips, because otherwise the same President who was responsible for a regulation could veto the congressional resolution of disapproval. If a disapproval resolution becomes law, the CRA provides that a rule may not be issued in "substantially the same form" without additional statutory authorization.

The CRA has five serious design flaws. Taken together, these make it more a threat to rational governance than a method for controlling bad regulations. First, because Congress has a limited time to use the law and there's a fast-track procedure, there is little opportunity for Congress to gather evidence or deliberate. There are no committee hearings and severely limited time for debate. Regulations that have taken months or years of thought, supported by voluminous evidence and analysis, are tossed out overnight with barely an explanation. Congress can only reject the entire regulation, not the portions it dislikes. This is surely not the way to conduct congressional oversight.

Second, the law is basically useless except when control of the White House flips and the new President also has control of Congress. Under those circumstances, use of the CRA is inevitably seen as partisan and therefore divisive. Adding to political polarization is hardly something we need.

Third, the CRA creates the false impression that Congress is exercising real control over the administrative process. As was true under both Obama and Trump, the most important regulations are unlikely to be subject to CRA reversals. Those are exactly the regulations most likely to be fast-tracked within the administrative process precisely to avoid issuing them late in an Administration when the CRA would be a risk. What's left are typically the second-tier regulations that the previous Administration left for the end. Only a few of those can be reviewed. The reason is that the opposing party can insist on ten hours of floor debate for each one, and Senate floor time is a precious resource.

Fourth, given that only a small number of regulations can be reviewed, the selection is necessarily arbitrary. You can see this in the use of the CRA in 2017. Republicans argue that regulations create large economic burdens for minimal public benefits. My [study](#) of the 2017 CRA resolutions shows the targets didn't generally have major regulatory costs (over \$100 million per year). Instead, the rules selected for elimination were a grab bag. They included some rules impacting special interest groups (notably the oil industry), others impacting Republican constituencies like rural Westerners, and others that must have somehow caught the attention of Fox News or talk radio. As Professor Tom McGarrity has pointed out, many of these rules were not even especially controversial at the time they were proposed. They just happened to be convenient targets.

The final flaw in the CRA is the provision that prohibits an agency from proposing a substantially similar regulation after a rule is disapproved. This provision seems to have been initially added to prevent agencies from doing an end-run by reissuing the essentially same rule all over again. It applies, however, even years in the future, when the need for a rule may have become obvious to everyone. The bigger problem is that no one really knows what the standard is. Are only nearly identical new rules subject to the ban? Or is it any new rule that tries to achieve a similar purpose? Or is it any new rule at all dealing with the same topic? No one knows. No one even knows whether this ban is enforceable by the courts or only by Congress. The chilling effect on new regulation may be equivalent to repealing the agency's authority, but without Congress ever having to stand up and take responsibility for the repeal.

In the end, the CRA is more useful for scoring partisan points than fixing regulatory policy. Regulations subject to CRA are often not especially important and chosen haphazardly. Even

those regulations don't get a fair hearing before they are axed. And axing them makes it risky for regulators to address the same problem again for years into the future, even though the statute requiring them to do so is still on the books.

What Should be Done?

It's all very well, you may well be thinking, to say that the CRA should be repealed. But it's on the books and Republicans have felt free to use it before. Why should Democrats unilaterally disarm themselves?

That's a fair point. Although most of the worst regulatory rollbacks are deliberately timed to avoid possible CRA review by a new Congress, some will still fall within the CRA's orbit. Recent examples include efforts to limit environmental impact statements and to end limits on methane emissions by oil and gas companies. Pending rules that are likely to come down within the timeframe for CRA review, would shackle future regulation of dangerous pollutants and freeze air quality standards despite scientific evidence they urgently need tightening.

Although it would be nice to kill those efforts, using the CRA also has downsides. Using the CRA might hinder the government's ability to issue future regulations. How a court might interpret the CRA's restriction on future regulations is completely unknown. The safest targets for CRA actions are rules like the ones on environmental impact statements and on future toxics regulation, where there's no pressing need for new initiatives in the area anyway. Another important problem with using the CRA is that it eats up time on the Senate floor when there may be more pressing business in the midst of a public health and economic crisis. In short, using the CRA isn't risk free or costless.

Still, despite the imperfections of the CRA as a way of reversing policies, using it would admittedly allow at least *some* bad policies to be eliminated. It would also be a morale boost for a new Congress. In any event, unless the filibuster is abolished, the CRA can only be repealed with bipartisan support, and there hasn't been any interest in that.

In my view, the short-term benefits of using the CRA are outweighed by the public interest in eliminating it. A demand to repeal the law should be pressed by a new Congress, with any actual or threatened use of the CRA serving as leverage. That's the reason for my suggestion that negotiators offer a choice between suffering the use of the CRA against rules they support or agreeing to its repeal. An alternative would be for the Democrats to use the CRA exactly as many times as the Republicans did, declare the two sides even, and suggest talks about repeal. I wouldn't blame politicians for simply using the CRA for all it's

worth, without worrying about repeal. But to my mind, that would only legitimize a fatally flawed instrument of governance. Whether or not there are tactical reasons to make any use of the CRA next year, the ultimate goal should be total repeal.

Reposted from the American Constitution Society blog. For more information on how progressives should reform Administrative Law, read ACS's Issue [Brief Reforming "Regulatory Reform:" A Progressive Framework for Agency Rulemaking in the Public Interest](#) by Professors Dan Farber, Lisa Heinzerling, and Peter Shane.