Insight

Progressives Want to Repeal CRA, Which Passed Unanimously in 1996

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Yesterday, Senators Cory Booker and Tom Udall introduced legislation to repeal the Congressional Review Act (CRA) and reinstate the 14 regulations struck down this year. Reimplementing the 14 rescinded rules makes sense considering both Senators voted against the CRA resolutions overturning the rules. However, the wholesale repeal of the CRA is a shortsighted goal. There might be a time when those generally favoring more federal regulation lean on the law to repeal targeted and politically-motivated regulatory actions.

For background, the CRA passed the U.S. Senate unanimously in 1996. Senator Harry Reid, the former Democratic Majority Leader, was a chief co-sponsor of the bill. The purpose was clearly stated during passage: "This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects."

By attempting to end the CRA, Senators Booker and Udall are effectively ceding their legislative oversight back to the executive branch. They appear unconcerned with the gradual erosion of congressional power and constant growth in executive authority. "All legislative" power is conferred to Congress under Article I of the U.S. Constitution, but history has shown broad grants of power to administrative agencies and the ability of regulators to turn one-to-two pages of regulatory text into thousands of pages of rules. After the power has been delegated, there is little the directly-elected Members of Congress can do to restrain that authority.

The CRA offers a modest check on an outgoing administration, and until 2017, was a barely used tool. Consider, there have been a total of **four** major rules repealed via the CRA since 1996. There have been 1,520 major rules since Congress overwhelmingly passed the CRA. In other words, despite the "historic" use of the law in 2017, it has only resulted in the repeal of 0.2 percent of major regulations.

This "unprecedented rush of regulatory reversals" pales in comparison to the unprecedented rush of regulation from the Obama Administration in 2016. President Obama issued 116 major rules last year, breaking his own record by 16 percent. This, despite pleas from his "Regulatory Czar" to avoid midnight rules. Isn't one historic turn of regulatory record-breaking worth a historic response from a majority of elected officials?

For perspective, the CRA will always be a limited tool to rescind past rules. If history is any guide, it will only be used when an outgoing Democratic administration is replaced by an incoming Republican administration and conservative majorities in both chambers of Congress. In other words, the earliest Congress would hypothetically use the CRA again is in 2025, assuming comparable variables align. In the meantime, Congress is free to redelegate power back to the agencies for the 14 rescinded rules after debates and votes.

Progressives that attempt to strike down the CRA now may not realize there are certain rules they may want to rescind in the future. Although the CRA is seen as an inherently anti-regulatory vehicle, it's not difficult to imagine a scenario where a federal rule targets a specific group or preferred industry that progressives object to

in the future.

And contrary to the debate over "killing" these rules off permanently, there is no firm definition of " substantially the same," so all that is required is an emboldened administration and a favorable court opinion to reissue a rule. The debate when the CRA was drafted makes clear the authors expected some rules to return, in various forms. Indeed, during the debate over the "Resource Extraction" rule this year, Republicans expected regulators to "go back to the drawing board." Likewise, Congressman Kevin Brady is expecting another rule for drug testing unemployment applicants during this administration. If they don't get one, or regulators issue a rule they don't like, Congress can always pass new legislation dictating the form and timing of the new rule.

The progressive outrage over the CRA is especially strange considering all but three voted for the outright repeal of a Department of Transportation (DOT) rule earlier this spring. The $86 million rule, another relic of the Obama Administration, received unanimous support in the Senate for repeal. However, there was never a controversy over repealing this measure.

One reason why the DOT rule repeal likely sailed through the process, in addition to the overwhelming bipartisan support, is that it was passed through regular order, not with the CRA. The bill could have been filibustered, but it would have easily obtained cloture. For progressives wanting to repeal the CRA, this is likely the future if they are successful. It's hardly news that the filibuster could die in the near future. Undoing the CRA, which avoids filibusters, won't accomplish anything when the Senate finally goes "nuclear" on the 60-vote requirement. Since this might happen before 2025, the earliest Republicans could use the CRA, repealing the CRA will have zero practical effect.

Conclusion

The CRA has stood for more than twenty years and passed the Senate with unanimous support for a reason. It's a commonsense law that allows Congress to scrutinize rules from regulators, to whom Congress has delegated power. If the elected leaders in Congress don't like a particular law, they have every constitutional right to examine it and repeal if necessary. Attempting to gut the CRA in 2017 only lessens congressional oversight and does nothing to halt the repeal of regulations during the next four years. As everyone has learned, there is much a president can do without Congress to influence policy, which is one of many reasons the CRA exists in the first place.