

Comments from Sean Croston on the Congressional Review Act Project

My Personal Comments on Morton Rosenberg's Draft Report on the Congressional Review Act:

I'm sure most of the more controversial (e.g., REINS Act) recommendations in Mort Rosenberg's draft report will be adequately addressed by other commenters. That being the case, I just wanted to address a few other matters:

1. Regarding recommendation #6, as my article (cited by the report) makes clear, I certainly support amending the CRA to make it clear that failing to report a covered rule renders that rule potentially unenforceable if challenged in federal court. Otherwise, the law as it stands is simply hortatory and arguably irrelevant. For example, CRA sponsor and former Rep. David McIntosh recently identified this as the most fatal flaw in the current CRA scheme – see <http://republicans.judiciary.house.gov/hearings/pdf/McIntosh01242011.pdf> at 19-20.

However, the one difficulty that neither my article nor this report addressed involves guidance documents, like interpretive rules, policy statements, and the like. Most of these guidance documents are covered "rules" under the CRA. But what is the practical effect of rendering such guidance "unenforceable" ? It's already unenforceable, because it's mere guidance, not a legally-binding regulation. A judge's ruling "striking" the guidance for failure to report it to Congress would therefore have little real effect. In fact, one could say that as soon as an agency publicly issues a guidance document, it has achieved all of the "effect" it's ever going to get, because stakeholders are then aware of the agency's views (which is the whole point of guidance) from that point forward, regardless of any judge's ruling. Perhaps if the CRA only applied to legally-binding regulations (or to major regulations), this anomaly wouldn't exist. But until then, it's an odd problem worth looking into.

2. I might also look into another strange quirk of the CRA, which involves the interplay between the infamous Senate filibuster rule and the bar on future rules that are "substantially" similar to disapproved rules under the CRA, unless authorized by a future statute. See 5 USC 801(b)(2). Because of the infamous Senate filibuster rule (which is not in effect for CRA disapproval resolutions), a bare majority of 51 Senators (plus an equally tiny House majority) and a sympathetic President could apparently conduct a cynical, preemptive strike against future administrations and entrench their policy preferences by ensuring that any future administration would need at least 60 Senators (under the filibuster rule) plus an allied House majority to enact legislation authorizing a certain type of rule.

For example, in 2003, the Republican administration of President George W. Bush controversially announced that it would not exercise any authority to regulate greenhouse gas emissions from motor vehicles. The administration quickly and inevitably faced a lawsuit

challenging its decision, and ultimately lost at the Supreme Court, in *Massachusetts v. EPA*, 549 U.S. 497 (2007). As a result, the greenhouse gas regulations opposed by the Bush administration now seem inevitable under the current administration. But imagine that at the same decision point in 2003, the Bush EPA had instead (cynically) issued very expansive regulations covering greenhouse gas emissions, which of course it actually opposed in practice. Then, assuming that such regulations would be vigorously opposed by the Republican-controlled 108th Congress (consisting at that time of only 51 Republican Senators and a slightly larger majority of 229 Republican Representatives), the House and Senate could have immediately passed a CRA disapproval resolution (immune from filibuster) concerning those rules, and President Bush could have immediately signed it into law, thus barring future Administrations, like the current one, from issuing similarly expansive greenhouse gas regulations. (After all, the CRA's sponsors explained that some disapproval resolutions could effectively "work to prohibit the reissuance of any rule" on a subject -- see 142 Cong. Rec. S3686 (Apr. 18, 1996)) And of course, it would only take 41 Senators to filibuster any attempt to override that disapproval resolution with a new statute. Or at least it might work that way... (it could all hinge on a federal court's interpretation of the CRA's "substantially the same" provision). Now whether this is a flaw in the filibuster rule or the CRA is a subject for another debate, but at any rate, illustrated this way, the potential for cynical CRA gamesmanship is clear and somewhat disturbing.

3. On a slightly related note, on page 13, the Report suggests that agency action to reverse old rulemakings and Congressional action through appropriations bills is essentially as effective as the CRA process in overturning or stopping undesirable rules. But one key difference between those methods of disapproval and a successful CRA resolution of disapproval is that the former means do not have the precedential effect of a CRA disapproval, which by law prevents the agency from issuing a similar rule in the future. This statutory action cannot be reversed by future Presidential or agency action or (arguably) by mere appropriations language. Thus, the current CRA is still a potentially powerful tool when implemented successfully, and should not be disregarded just because it hasn't been used very often.

That's it for now. Thanks for all your hard work in putting together this report, along with the others. ACUS is doing great work on a number of important issues, and I certainly appreciate it.

Sincerely,

Sean Croston (speaking on my own behalf, not as a representative of any agency or party)