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A GOP Regulatory Game Changer

Legal experts say that Congress can overrule Obama regulations going back to 2009.



By

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Todd Gaziano on Wednesday stepped into a meeting of free-market attorneys, think tankers and Republican congressional staff to unveil a big idea. By the time he stepped out, he had reset Washington's regulatory battle lines.

These days Mr. Gaziano is a senior fellow in constitutional law at the Pacific Legal Foundation. But in 1996 he was counsel to then-Republican Rep. David McIntosh. He was intimately involved in drafting and passing a bill Mr. McIntosh sponsored: the Congressional Review Act. No one knows the law better.

PHOTO: GETTY IMAGES

Everyone right now is talking about the CRA, which gives Congress the ability, with simple majorities, to overrule regulations from the executive branch. Republicans are eager to use the law, and House Majority Leader Kevin



McCarthy this week unveiled the first five Obama rules that his chamber intends to nix.

The accepted wisdom in Washington is that the CRA can be used only against new regulations, those finalized in the past 60 legislative days. That gets Republicans back to

June, teeing up 180 rules or so for override. Included are biggies like the Interior Department’s “streams” rule, the Labor Department’s overtime-pay rule, and the Environmental Protection Agency’s methane rule.

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But what Mr. Gaziano told Republicans on Wednesday was that the CRA grants them far greater powers, including the extraordinary ability to overrule regulations even back to the start of the Obama administration. The CRA also would allow the GOP to dismantle these regulations quickly, and to ensure those rules can't come back, even under a future Democratic president. No kidding.

Here's how it works: It turns out that the first line of the CRA requires any federal agency promulgating a rule to submit a "report" on it to the House and Senate. The 60-day clock starts either when the rule is published or when Congress receives the report—whichever comes *later*.

"There was always intended to be consequences if agencies didn't deliver these reports," Mr. Gaziano tells me. "And while some Obama agencies may have been better at sending reports, others, through incompetence or spite, likely didn't." Bottom line: There are rules for which there are no reports. And if the Trump administration were now to submit those reports—for rules implemented long ago—Congress would be free to vote the regulations down.

There's more. It turns out the CRA has a expansive definition of what counts as a "rule"—and it isn't limited to those published in the Federal Register. The CRA also applies to "guidance" that agencies issue. Think the Obama administration's controversial guidance on transgender bathrooms in schools or on Title IX and campus sexual assault. It is highly unlikely agencies submitted reports to lawmakers on these actions.

"If they haven't reported it to Congress, it can now be challenged," says Paul Larkin, a senior legal research fellow at the Heritage Foundation. Mr. Larkin, also at Wednesday's meeting, told me challenges could be leveled against any rule or guidance back to 1996, when the CRA was passed.

The best part? Once Congress overrides a rule, agencies cannot reissue it in "substantially the same form" unless specifically authorized by future legislation. The CRA can keep bad regs and guidance off the books even in future Democratic administrations—a far safer approach than if the Mr. Trump simply rescinded them.

Republicans in both chambers—particularly in the Senate—worry that a great use of the CRA could eat up valuable floor time, as Democrats drag out the review process. But Mr. Gaziano points out another hidden gem: The law allows a simple majority to limit debate time. Republicans could easily whip through a regulation an hour.

Imagine this scenario: The Trump administration orders its agencies to make a list of any regulations or guidance issued without a report. Those agencies coordinate with Congress about when to finally submit reports and start the clock. The GOP puts aside one day a month to hold CRA votes. Mr. Obama's regulatory legacy is systematically dismantled—for good.

This is aggressive, sure, and would take intestinal fortitude. Some Republicans briefed on the plan are already fretting that Democrats will howl. They will. But the law is the law, and failing to use its full power would be utterly irresponsible. Democrats certainly would show no such restraint were the situation reversed. Witness their treatment of Mr. Trump's cabinet nominees.

The entire point of the CRA was to help legislators rein in administrations that ignored statutes and the will of Congress. Few White House occupants ever showed more contempt for the law and lawmakers than Mr. Obama. Republicans if anything should take pride in using a duly passed statute to dispose of his wayward regulatory regime. It'd be a fitting and just end to Mr. Obama's abuse of authority—and one of the better investments of time this Congress could ever make.

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