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How the Biden administration can quickly revoke Trump agency rules

Power granted under the Congressional Review Act further illustrates the groundbreaking importance of the Georgia Senate races.

By Ian Lewenstein



President-elect Joe Biden announcing nominees and appointees to serve on his health and coronavirus response teams during a news conference.

REUTERS/Kevin Lamarque

Jan. 14, 2021 Along with other historical firsts, the two Democratic victories in the Georgia Senate races will quickly alter the direction and scope of the Biden administration because with a 50-50 Senate split, the

administration can have Vice President Harris break Senate ties, allowing it to 1) confirm Cabinet members and appoint judges, 2) pass budget bills through reconciliation, and 3) control the flow of legislation. Yet the Biden administration will reap one additional advantage, one that previously had been rarely used: the power to quickly revoke agency regulations without going through the rulemaking process.

Regulations, or rules, are adopted by executive agencies and must go through a costly and time-consuming rulemaking process. Rulemaking sits outside of Congress's purview; accordingly, to tighten legislative oversight of agencies and their rules, Congress in 1996 passed the Congressional Review Act. Under the act, an agency must submit most rules to Congress, which then has 60 legislative days to pass a joint resolution disapproving the rule. Critically, the joint resolution requires only a simple majority to pass, skirting the Senate filibuster. The president can then sign the resolution and overturn the rule.

Part of the impetus for Congress to pass the act stemmed from the Supreme Court in 1983 striking down congressional authority to legislatively veto an agency action, which the court claimed violated separation of powers. Subsequently, Congress passed the act to ensure congressional oversight without violating separation of powers, which Congress accomplished by requiring the president to sign the resolution revoking the rule. Realistically, to take advantage of the act, one political party must have a House-Senate-president trifecta after a presidential election, as the Trump administration had in 2016-17, and which the Biden administration will now enjoy.

Until the Trump administration, the act had been used only once and was a barely noticeable congressional oversight tool. But the Trump administration shrewdly used the act to strike down 16 agency rules, including one from 2013 that was not submitted to Congress, which introduces an important kicker under the act: Until an agency submits a rule to Congress, the rule is technically not effective for purposes of the act. This significant provision means that Congress and the

president can overturn all rules that have not yet been submitted according to the act.

Even more consequential than congressional power to retroactively nullify rules is another provision designed to clog the wheels of agency rulemaking. For example, if Congress and the president pass a joint resolution overturning a rule, the agency cannot issue a new rule that is “substantially the same” as the disapproved rule unless the new rule is later authorized by law. What “substantially the same” and who determines this is unclear. But Congress and an agreeable president can impair future administrations from adopting certain rules — or at least make it overly cumbersome.



Ian Lewenstein

What is the upshot for the Biden administration? Any rule that the Trump administration pushes through in its last months may be revoked. Notably, the 60-day period resets if a rule is submitted to Congress less than 60 legislative days before it adjourns *sine die*, so the Biden administration has a fresh clock to quickly overturn 1) recently adopted rules from last year, and 2) rules adopted so far this year, such as one on the Migratory Bird Treaty Act or one limiting how the EPA considers findings from public-health studies.

For the Biden administration, this power to quickly revoke Trump rules without having to go through an onerous rulemaking process or potential litigation further illustrates the groundbreaking importance of the Georgia Senate races. And Trump rules that were not submitted to Congress are also fair game; this is very possible considering how woefully inept the Trump administration was at properly adopting rules ([a 20% success rate, according to the Institute for Policy Integrity](#)).

While Minnesota does not have a provision similar to the act under its rulemaking process, the more far-reaching provisions of the act demonstrate the need for state agencies to properly follow applicable rulemaking provisions and to ensure that they properly notify both the public and the Legislature of rulemaking proceedings. Agencies, too, must follow the rules.

Ian Lewenstein is a Minnesota state employee, specializing in state rulemaking. His comments represent his views alone.

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