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## Congress Strikes Back: The Institutionalization of the Congressional Review Act

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**CONGRESS STRIKES BACK: THE  
INSTITUTIONALIZATION OF THE CONGRESSIONAL  
REVIEW ACT**

Sam Batkins<sup>†</sup>

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## I. INTRODUCTION

“Right now, I feel like I could take on the whole empire myself,” Dak declared shortly before the Battle of Hoth.<sup>1</sup> Though Luke Skywalker’s co-pilot did not mean American federal bureaucracy, the United States Congress shared a similar disdain for growing executive power when it passed the Congressional Review Act (CRA) in 1996. Little did Congress know, it would take twenty years to actually take on the executive branch. However, in the past five years, the CRA has become a critical congressional tool for both Republicans and Democrats.

Republicans started using the CRA more frequently during the Obama Administration—a product of their congressional majorities and skepticism for new regulation.<sup>2</sup> But, without the White House, they could do little to check new regulations promulgated by President Obama’s Administration.<sup>3</sup>

Following the election of President Donald Trump, Republicans felt they finally could tackle the administrative state that their progressive opponents spent decades building through legislation, court cases, and countless major regulations. Republicans acted swiftly to strike down Obama-era regulations using the CRA.<sup>4</sup> Few on Capitol Hill or in the conservative policy community expected this many successful CRA actions.<sup>5</sup> Many noted the Republican Senate majority was thin and floor time would be consumed with health-care repeal votes, nominations, and possible votes on tax reform.<sup>6</sup>

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1. THE EMPIRE STRIKES BACK (20th Century Fox 1980).

2. U.S. H.R., History, Art, and Archives, *Party Divisions of the House of Representatives*, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [https://perma.cc/MU67-SB2A]; U.S. S., Art and History, *United States Senate Party Division*, <https://www.senate.gov/history/partydiv.htm> [https://perma.cc/9JH6-GJB6].

3. Thomas Frank, *Republicans: We Don’t Need No Regulation*, THE GUARDIAN, <https://www.theguardian.com/world/2012/jan/06/republicans-no-business-regulation> [https://perma.cc/KXX2-W9HL].

4. *Signed into Law: Congressional Review Act (CRA) Resolutions*, House Republican Conf. (Jun. 1, 2018) (listing the sixteen Congressional Review Act resolutions repealing regulations originating from the Obama Administration), <http://www.gop.gov/cra/> [https://perma.cc/J6WK-8GP9].

5. Conversations with congressional employees suggested that Congress would repeal a maximum of twelve regulations. Some staff predicted only one or two successful CRA resolutions.

6. Sam Brodey, *The 5 Things the Republican Congress Will Get Done - or at Least Try to - in 2017*, MINNPOST, <https://www.minnpost.com/politics-policy/2017/01/5-things-republican-congress-will-get-done-or-least-try-2017/> [https://perma.cc/QGB8-ANGK].

The policy community doubted that a majority of Senate Republicans would agree on more than eight to ten resolutions to disapprove.<sup>7</sup> Furthermore, many were certain that Democrats would almost universally oppose Republican attempts to undo President Obama's environmental and labor standard accomplishments.<sup>8</sup> However, according to some scholars, Congress exceeded expectations and nullified sixteen regulations using the CRA's provisions.<sup>9</sup>

Moreover, the decision of Senate Democrats to wield the CRA to press for a vote to overturn the Federal Communications Commission's net neutrality repeal showed the CRA has become more than a partisan cudgel.<sup>10</sup> The CRA is now an institutionalized tool of the legislative branch to check the executive power. Democrats shifted from arguing that the CRA was an extreme mechanism to undermine President Obama's accomplishments to employing the CRA to advance their own agenda.<sup>11</sup>

Additionally, Congress has found new and innovative ways to employ the CRA to overturn executive branch actions.<sup>12</sup> At first, only the province of a widely dismissed 2017 *Wall Street Journal* editorial,<sup>13</sup> Congress asked the Government Accountability Office (GAO) about the Consumer Financial Protection Bureau's (CFPB's) auto-lending guidance document.<sup>14</sup> The GAO ruled the guidance constituted a rule under the CRA, even

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7. Based on personal conversations with scholars at the Brookings Institution, the Mercatus Center, and the George Washington Regulatory Studies Center.

8. See e.g., Michelle V. Rafter, *The Workplace Legacy of Barack Obama*, WORKFORCE, <https://www.workforce.com/2017/01/17/workplace-legacy-barack-obama/> [<https://perma.cc/75ZE-B8QC>] (discussing improved labor standards under President Obama); Keith Gaby, *Ready to Defend Obama's Environmental Legacy? Top 10 Accomplishments to Focus on*, ENVIRONMENTAL DEFENSE FUND, <https://www.edf.org/blog/2017/01/12/ready-defend-obamas-environmental-legacy-top-10-accomplishments-focus> [<https://perma.cc/N4WW-H4E6>] (discussing the environmental protection accomplishments of the Obama Administration).

9. House Republican Conf., *supra* note 4.

10. See S.J. Res. 52, 115th Cong. (2018).

11. *Id.*; see also 163 CONG. REC. H831-40 (2017) (discussing Congressman James McGovern's (D-MA) argument against striking down the Bureau of Land Management's Stream Protection Rule).

12. See Additional Supplemental Appropriations for Disaster Relief Requirements Act, Pub. L. No. 115-72, 132 Stat. 1290 (2018) (nullifying down the Consumer Financial Protection Bureau's auto lending guidance document).

13. See Kimberly Strassel, *A GOP Regulatory Game Changer*, WALL ST. J., Jan. 26, 2017, <https://www.wsj.com/articles/a-gop-regulatory-game-changer-1485478085/> [<https://perma.cc/FL2W-CFKC>].

14. See *GAO Issues Opinions on Applicability of Congressional Review Act to Two Guidance Documents*, EVERYCRSREPORT (Oct. 25, 2017), <https://www.everycrsreport.com/reports/IN10808.html> [<https://perma.cc/5GQ5-K66Y>].

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though it was issued beyond the sixty-legislative-day-review window outlined in the CRA.<sup>15</sup> The use of the CRA to nullify past guidance documents is profound and has significant potential ramifications.

Congress can now go back years, even decades, to strike down past administrative guidance.<sup>16</sup> Although a new president could unilaterally rescind the guidance issued by a previous administration, the CRA provides an added layer of protection by ensuring that a future executive cannot reissue the rule “in substantially the same form.”<sup>17</sup> There has not yet been any litigation surrounding this ambiguous statement since many agencies shy away from reissuing the rule, leaving the nullified policy in regulatory purgatory.<sup>18</sup> However, now that sixteen additional rules have been nullified, it is more likely that a previously rejected rule might rise from the grave—creating the possibility of litigation over the “substantially the same form” language.<sup>19</sup>

This article argues that the CRA has played a role rebalancing power between the executive and legislative branches. Congressional use of the CRA by both parties—on major rules and guidance—has put every future executive on notice that Congress will scrutinize the process (regardless of whether rules are submitted to Congress in the correct manner) and the substance of future executive action.

Part II offers a history of the CRA from its beginnings as part of a unicameral legislative veto to the modern CRA in 1996, including the limited debate surrounding CRA passage. The article also surveys the relevant dormancy period of the CRA from 1997 to 2016. Part III describes the current environment, including the reemergence of the CRA after the 2016 election. Part IV discusses bipartisan use of the CRA to strike down agency action and the institutionalization of the CRA. Part V surveys the CRA’s future and examines how the past few years might influence future executive action.

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15. *Id.*

16. *See, e.g.*, S.J. Res. 57, 115th Cong. (2018) (disapproving the Consumer Financial Protection Bureau’s auto lending guidance far outside of the CRA’s “carryover” period).

17. *See* 5 U.S.C. § 801(b)(2) (1996).

18. *See, e.g.*, S.J. Res. 6, 107th Cong. (2001) (nullifying down the Department of Labor’s ergonomics rule in 2001). Yet, after more than seventeen years, the DOL has yet to reissue the rule. *See, e.g.*, John Ho, *OSHA and Ergonomics: The Past, Present and Future*, EHS TODAY (Jun. 22, 2017), <https://www.ehstoday.com/osha/osha-and-ergonomics-past-present-and-future> [https://perma.cc/XZH4-PMUD].

19. *See* House Republican Conf., *supra* note 4.

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## II. HISTORY OF THE CONGRESSIONAL REVIEW ACT

In *INS v. Chadha*, the Supreme Court struck down the last vestiges of the legislative veto.<sup>20</sup> Following this decision, Congress struggled to check executive regulation for more than a decade. Congress could always pass a law striking down a regulation, but that would likely require a two-thirds vote in both houses of Congress since any sitting president would presumably object to a legislative attempt to rescind a recent rule.<sup>21</sup> It takes years—sometimes decades—to implement a regulation, and presidents are rarely willing to sign away rules after such a thorough vetting by the president’s own appointees.<sup>22</sup>

After *Chadha*, Congress could still employ appropriations “riders,” which insert a restriction on funding for a policy disfavored by Congress into a larger appropriations bill necessary to operate the federal government.<sup>23</sup> Riders are constitutional because the president must ultimately sign them into law. Typically, the executive and legislative branches will reach an agreement regarding the acceptable restrictions on new rules.<sup>24</sup> For example, President Obama signed several larger legislative packages with appropriations riders buried in them that limited the immediate implementation of his own rules.<sup>25</sup> However, Congress found that passing new legislation and appropriations riders did not allow it to effectively control administrative action. Congress wanted a more immediate and permanent way to check the executive branch that did not require veto-proof majorities. Surprisingly, Congress found a solution through legislation with broad bipartisan support.<sup>26</sup>

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20. *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (holding that a one-chamber legislative veto over executive branch action is unconstitutional because it violates the Constitution’s presentment and bicameralism requirements).

21. *See, e.g.*, U.S. CONST. art. I, § 7.

22. *See, e.g.*, 49 C.F.R. § 571.111 (2019) (codifying the Department of Transportation’s rear-view camera rule, which was in pre-rule stage in the spring of 2009, but the final version was not effective until June 6, 2014).

23. *See, e.g.*, U.S. Senate, *U.S. Senate Glossary Term*, [https://www.senate.gov/reference/glossary\\_term/rider.htm](https://www.senate.gov/reference/glossary_term/rider.htm) [<https://perma.cc/Q4AV-SB7M>].

24. Erik Wasson, *Obama Says He’s Not Bound by Guantanamo, Gun-Control Provisions*, THE HILL (Dec. 23, 2011), <http://thehill.com/policy/finance/201245-obama-says-he-wont-be-bound-by-guantanamo-gun-control-portions-of-omnibus> [<https://perma.cc/Y52A-C2ZW>].

25. *Id.*

26. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 251, 110 Stat. 847, 869-74 (1996) (passing the U.S. Senate with unanimous consent and the U.S. House of Representatives 328-91 as part of the broader Contract with America Advancement Act of 1996).

A. *Historical Vestiges*

When Congress passed the Immigration and Nationality Act in 1952, it reserved the right for either the House of Representatives or the Senate to invalidate a decision of the executive; namely, the decision of the attorney general to allow a deportable immigrant to remain in the United States.<sup>27</sup> Few in Congress at the time likely understood the weight of this provision. However, seventeen years later, this provision would find itself in the Supreme Court.<sup>28</sup>

In *Chadha*, Jagdish Rai Chadha, overstayed his student visa and the Immigration and Nationalization Service (INS) ordered him to provide a reason why he should not be deported.<sup>29</sup> Then, an immigration judge, acting pursuant to the Immigration and Nationality Act, suspended Chadha's deportation.<sup>30</sup> The House of Representatives overturned the suspension and the immigration court reopened the deportation proceedings.<sup>31</sup> Chadha then argued that the legislative veto portion of the Immigration and Nationality Act violated the U.S. Constitution, specifically alleging it violated the bicameral and presentment requirements of Article I.<sup>32</sup>

After finding Chadha had standing and the issue was justiciable, the Supreme Court agreed that the legislative veto violated Article I of the Constitution.<sup>33</sup> Writing for a six-to-three majority, Chief Justice Warren Burger found that the House of Representatives had essentially carried out a legislative function when it vetoed Chadha's suspended deportation.<sup>34</sup> However, the Constitution demands all legislative action pass both the

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27. Immigration and Nationality Act of 1952, Pub. L. No. 414 § 244(c), 66 Stat. 216 (1952), *invalidated* by *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

28. *Chadha*, 462 U.S. at 919.

29. *Id.* at 923.

30. *Id.*

31. *Id.* at 926.

32. *Id.* at 946, 948.

33. *Chadha*, 462 U.S. at 951 (“It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”).

34. *Id.* at 956 (“[W]hen the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. . . . These exceptions are narrow . . . [and] provide further support for the conclusion that Congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) is not authorized[.]”).

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House of Representatives and Senate and be signed by the president.<sup>35</sup> Therefore, the House's action was invalid.<sup>36</sup>

More than a generation later, the Supreme Court's ruling might seem obvious. At the time, however, the Supreme Court's decision wrested substantial power from Congress. In fact, "[s]ince 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures [had] been inserted in 196 different statutes[.]"<sup>37</sup> Nevertheless, despite Congress's affection for this power, the Court declined to extend it any further. Chief Justice Burger wrote, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."<sup>38</sup>

For Congress, the *Chadha* decision was a major setback. Not only did Congress lose the legislative veto on immigration decisions, but also it lost the legislative veto authorized in hundreds of other statutes. This reality was not lost in Justice White's dissent:

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." . . . The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the executive branch and independent agencies.<sup>39</sup>

Justice White likely did not realize it at the time, but he was forecasting what many in Congress—specifically Republicans—would argue in the future about the nature of regulation, congressional delegation, and the balance of power between the executive and legislative branch. In this Hobson's choice, Congress often delegates vast amounts of power to executive agencies by crafting legislation in broad terms and leaving the details to

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35. *Id.*

36. *See Chadha*, 462 U.S. at 959.

37. *Id.* at 944 (quoting James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977)).

38. *Id.*

39. *Id.* at 967-68.

agencies.<sup>40</sup> However, Congress could only tolerate this approach for roughly a decade before the legislative veto would return—this time in a new form to correct the bicameralism and presentment problems identified by the Court in *Chadha*.

### B. *Debate and Enactment*

The 1994 “Gingrich Revolution” ushered fifty-four additional Republicans into the House of Representatives and nine new Republicans into the Senate, creating Republican majorities in both chambers.<sup>41</sup> With these new majorities, Republicans moved quickly on their “Contract with America” that included a host of deregulatory measures beyond just the CRA.<sup>42</sup>

Indeed, Congress received little credit for the amount of reform they successfully enacted with the help of their political opponent, President Clinton.<sup>43</sup> In addition to the CRA, Congress passed the Unfunded Mandates Reform Act, amendments to the Paperwork Reduction Act, and amendments to the Regulatory Flexibility Act.<sup>44</sup> It did so, somehow, with strong support in both the House of Representatives and Senate.<sup>45</sup> For as much controversy as the CRA garnered at the beginning of the Trump Administration, it was a relative afterthought during the mid-1990s.

The CRA’s legislative history is surprisingly brief, which is one reason many worry about the fate of rules rescinded under its provisions. The prospects for crafting a second rule that is substantially dissimilar from the first iteration remains murky. The CRA only spans five pages of the

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40. See, e.g., *Does Congress Delegate Too Much Power to Agencies and What Should Be Done About It?: Hearing Before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the Committee on Government Reform*, 106th Cong. 219 (2001), <https://www.gpo.gov/fdsys/pkg/CHRG-106hhrg71984/html/CHRG-106hhrg71984.htm> [<https://perma.cc/WCC7-DKK9>].

41. U.S. H.R., History, Art, and Archives, *Party Divisions of the U.S. House of Representatives*, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [<https://perma.cc/8LM4-CGMJ>]; U.S. S., United States Senate Party Divisions, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/SY5Z-9NMS>].

42. See, e.g., Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (1995).

43. See Paperwork Reduction Act of 1995, Pub. L. 104-13, 109 Stat. 163 (1995); Contract with America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 847 (1996) (containing amendments to the Regulatory Flexibility Act).

44. *Id.*

45. See Contract with America Advancement Act, *supra* note 43 (passing by a vote of 328-91 in the House of Representatives and unanimously approved by the Senate).

Congressional Record and provides limited insight into Congressional intent.<sup>46</sup>

Senators Don Nickles (R-OK), Harry Reid (D-NV), and Ted Stevens (R-AK) were the CRA's chief sponsors.<sup>47</sup> At the outset, the Senators addressed the defects in previous legislative vetoes: bicameralism and presentment.<sup>48</sup> They noted, "[The CRA] uses the mechanism of a joint resolution of disapproval which requires passage . . . Congress and the President[.] In other words, enactment of a joint resolution of disapproval is the same as enactment of a law."<sup>49</sup> This reality is sometimes lost on critics of the CRA who claim it is "a legislative gimmick" or that the law is unconstitutional.<sup>50</sup>

The CRA simply makes it easier to pass a law to overturn a regulation. Absent the CRA, if Congress and the president desired, as soon as a rule was published in the Federal Register, they could immediately pass a law to rescind it. The CRA's main innovation is a set of expedited procedures for legislative action.<sup>51</sup> CRA Section 802 ensures that all points of order against resolutions of disapproval are waived, motions to reconsider are not in order, and debate is limited to ten hours.<sup>52</sup>

The CRA's expedited procedures allow Congress to review a statutory category of federal agency rules and determine whether the rules will take effect.<sup>53</sup> Essentially, the CRA directs federal agencies to submit all newly promulgated rules to Congress and the Comptroller General.<sup>54</sup> Congress can then schedule a vote for a joint resolution of disapproval, thereby

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46. See 142 Cong. Rec. 3,683-87 (1996), *Congressional Review Title of H.R. 3136*, <https://www.gpo.gov/fdsys/pkg/CREC-1996-04-18/html/CREC-1996-04-18-pt1-PgS3683.htm> [https://perma.cc/L63V-LMK6].

47. *Id.*

48. *Id.*

49. *Id.*

50. See, e.g., *Ctr. for Biological Diversity v. Zinke*, 313 F. Supp. 3d 976 (D. Alaska 2018), *appeal filed*, (9th Cir. Aug. 3, 2018); James Goodwin, *It's Time to Repeal the Congressional Review Act*, CTR. FOR PROGRESSIVE REFORM (May 2, 2018), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=1DBA8FE9-B109-E5C5-D4D9F870826A5050> [https://perma.cc/K6XH-E7XN].

51. See, e.g., 5 U.S.C. § 802 (2018) (noting, for example, "An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.").

52. *Id.*

53. See 5 U.S.C. §§ 801-02 (2018); Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 191 (2018) ("The Act does so by creating a fast-track procedure that enables Congress to set aside any new rule it finds unwise before the rule can go into effect.").

54. 5 U.S.C. § 801(a)(1)(A).

allowing the rules to be struck down without delay.<sup>55</sup> After the resolution's introduction, there must be a simple majority vote in both congressional bodies for the joint resolution to pass. If the resolution passes, it is then submitted to the president for approval.<sup>56</sup> The president's signature nullifies the rule.<sup>57</sup> Like other legislation, even if the president were to veto the joint resolution of disapproval, a two-thirds majority vote in both chambers could override the veto.<sup>58</sup> Once a joint resolution of disapproval is passed, the CRA bars federal agencies from reissuing rules that are "substantially the same" as those that were struck down by the resolution.<sup>59</sup>

While the CRA provides Congress a veto power, it is only applicable to "rules" as defined by the CRA.<sup>60</sup> The CRA defines a "rule" as the following:

The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.<sup>61</sup>

The CRA's definition of "rule" essentially gives Congress the ability to review every agency action passed.<sup>62</sup> While the definition of "rule" under the CRA is broad, it explicitly excludes rules which: (1) "approve[] or prescribe[] for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any

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55. See 5 U.S.C. § 802.

56. Daniel R. Perez, *Congressional Review Act Fact Sheet*, GEO. WASH. U. REG. STUD. CTR. (Nov. 21, 2016), <https://regulatorystudies.columbian.gwu.edu/congressional-review-act-fact-sheet> [<https://perma.cc/BM6B-8RJJH>].

57. *Id.*

58. *Id.*

59. 5 U.S.C. § 801(b)(1-2).

60. 5 U.S.C. § 804(3).

61. *Id.* (deriving definition from 5 U.S.C. § 551(4)).

62. Larkin, Jr. *supra* note 53, at 207-08 (explaining that "the federal courts have made clear that the term 'rule' must be construed broadly[,] and 'rule' as defined in the CRA is 'broad[] enough to include virtually every statement an agency may make . . .'" (quoting *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983) (citation omitted))).

of the foregoing;<sup>63</sup> (2) relate to “agency management or personnel;”<sup>64</sup> or (3) relate to “any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”<sup>65</sup>

While the CRA does not create a timeframe in which an agency must file its rule with Congress and the Comptroller General, it does provide that the rule will not become effective until it has been submitted.<sup>66</sup> Generally, Congress has sixty legislative days from the time the rule is submitted to it and published in the Federal Register to determine whether it will vote down the rule.<sup>67</sup> Moreover, a CRA resolution cannot be filibustered, which is the only reason Republicans were able to rescind sixteen regulations during early days of the Trump Administration.<sup>68</sup> It is unlikely that Republicans could have garnered sixty votes in the Senate for any of the measures.

Admittedly, some critics suggest that CRA resolutions impermissibly tip the balance of future regulation toward Congress because the regulation “may not be reissued in substantially the same form.”<sup>69</sup> The reasons for including this restriction are somewhat apparent. Without it, agencies may be tempted to engage in administrative “whack-a-mole” with hopes that the political winds will have changed by the time the agency has churned out a new, but functionally identical rule. The CRA’s sponsors were clear: the language barring similar rules was designed “to prevent circumvention of a resolution [of] disapproval.”<sup>70</sup>

There is an argument that this provision unconstitutionally binds future executives. Yet, so does passing a “normal” law to overturn agency action. Where a “normal” law is passed to overturn an agency action, it takes a law passed under the traditional process to rescind previous legislation (in most circumstances).<sup>71</sup> Under the CRA, if a future congress and president were to

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63. 5 U.S.C. § 804(3)(A).

64. 5 U.S.C. § 804(3)(B).

65. 5 U.S.C. § 804(3)(C).

66. 5 U.S.C. § 801(a)(1)(A).

67. 5 U.S.C. § 801(a)(2)(A). However, if a rule is submitted less than sixty legislative session days before it adjourns its final session, a new period of review becomes available to the incoming sessions of Congress. 5 U.S.C. § 801(d)(1)(B).

68. See House Republican Conf., *supra* note 4.

69. 5 U.S.C. § 801(b)(2) (“[A] new rule that is substantially the same as such a rule [that does not take effect] may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”).

70. See 142 Cong. Rec. 3,683–87, *supra* note 46.

71. Mark Strand & Tim Lang, *Rescissions, Rescissions: How Congress Can Use the Rescission Process Responsibly*, CONGRESSIONAL INSTITUTE, <https://www.conginst.org/2018/05/17/rescissions-rescissions-how-congress-can-use-the-rescission-process-responsibly/> [https://perma.cc/DEJ3-GSZK].

take action in an area where Congress used the CRA to strike down a prior rule, passing a new law granting the agency additional jurisdiction is all that is required.

Although not directly addressed in the legislative history, the CRA is often regarded as a tool of the legislative branch to check the executive.<sup>72</sup> While this is true, it is only an effective check when the president is supportive. Indeed, this article likely would not have been written if former Secretary of State Hillary Clinton had won the presidency and Congress had remained under Republican control. She likely would have vetoed every resolution, and there would have been less attention on fruitless attempts to overturn regulation. There is no doubt President Trump was eager to sign resolutions of disapproval.<sup>73</sup> Before he even took office, conservatives in the transition team were circulating potential lame duck rules eligible for CRA repeal.<sup>74</sup>

### C. *Infancy of CRA: 1996 to 2001*

Since the CRA's enactment, there have been more than two hundred resolutions of disapproval introduced in the House and Senate.<sup>75</sup> The

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72. Dylan Scott, *The New Republican Plan to Deregulate America, Explained*, VOX, <https://www.vox.com/policy-and-politics/2018/4/25/17275566/congressional-review-act-what-regulations-has-trump-cut> [<https://perma.cc/95PW-YT2A>] (“[t]he primary goal here is to hold the executive branch accountable . . .”).

73. Clyde Wayne Crews Jr., *Obama's Midnight Regulations to Get Increased Scrutiny from Congress and Trump*, FORBES, <https://www.forbes.com/sites/waynecrews/2016/11/16/obamas-midnight-regulations-to-get-increased-scrutiny-from-congress-and-trump/> [<https://perma.cc/9BYS-E22L>].

74. *Id.* In the months leading up to, and after, the election of 2016, I was contacted by members of Congress to generate a list of regulations eligible for repeal under the CRA. In addition, members of the transition team contacted me about providing a list of rules eligible for repeal.

75. Thirty-four resolutions disapproving of agency rules were introduced during the 114th Congress, while eighty-nine were introduced during the 115th Congress. S.J. Res. 8, 114th Cong. (2015); H.R.J. Res. 29, 114th Cong. (2015); H.R. Res. 152, 114th Cong. (2015); H.R.J. Res. 42, 114th Cong. (2015); S.J. Res. 14, 114th Cong. (2015); H.R.J. Res. 59, 114th Cong. (2015); H.R. Res. 408, 114th Cong. (2015); S.J. Res. 22, 114th Cong. (2015); H.R.J. Res. 67, 114th Cong. (2015); H.R.J. Res. 68, 114th Cong. (2015); H.R.J. Res. 70, 114th Cong. (2015); H.R.J. Res. 72, 114th Cong. (2015); S.J. Res. 24, 114th Cong. (2015); S.J. Res. 23, 114th Cong. (2015); H.R.J. Res. 71, 114th Cong. (2015); S.J. Res. 25, 114th Cong. (2015); H.R.J. Res. 74, 114th Cong. (2015); H.R. Res. 539, 114th Cong. (2015); S.J. Res. 27, 114th Cong. (2015); S.J. Res. 28, 114th Cong. (2015); H.R. Res. 583, 114th Cong. (2016); H.R.J. Res. 87, 114th Cong. (2016); S.J. Res. 33, 114th Cong. (2016); H.R.J. Res. 88, 114th Cong. (2016); H.R. Res. 706, 114th Cong. (2016); S.J. Res. 34, 114th Cong. (2016); S.J. Res. 35, 114th Cong. (2016); H.R.J. Res. 95, 114th Cong. (2016); H.R. Res. 836, 114th Cong. (2016); S.J. Res. 38, 114th Cong. (2016); S.J. Res. 37, 114th Cong. (2016); H.R. Res. 921, 114th

majority of resolutions have been introduced in just the past five years.<sup>76</sup> While there was little action during the CRA's infancy,<sup>77</sup> there was significant political activity from both Democrats and Republicans.<sup>78</sup> Shortly after the CRA's passage, there was recognition from both parties that an onerous

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Cong. (2016); H.R.J. Res. 107, 114th Cong. (2016); H.R.J. Res. 108, 114th Cong. (2016); H.R.J. Res. 11, 115th Cong. (2017); H.R.J. Res. 16, 115th Cong. (2017); H.R.J. Res. 22, 115th Cong. (2017); H.R.J. Res. 34, 115th Cong. (2017); H.R.J. Res. 35, 115th Cong. (2017); H.R. Res. 71, 115th Cong. (2017); H.R. Res. 70, 115th Cong. (2017); H.R.J. Res. 38, 115th Cong. (2017) (enacted); H.R.J. Res. 42, 115th Cong. (2017) (enacted); H.R.J. Res. 47, 115th Cong. (2017); H.R.J. Res. 37, 115th Cong. (2017) (enacted); H.R.J. Res. 39, 115th Cong. (2017); S.J. Res. 12, 115th Cong. (2017); H.R.J. Res. 45, 115th Cong. (2017); H.R.J. Res. 41, 115th Cong. (2017) (enacted); H.R.J. Res. 40, 115th Cong. (2017) (enacted); S.J. Res. 10, 115th Cong. (2017); H.R.J. Res. 36, 115th Cong. (2017); H.R.J. Res. 46, 115th Cong. (2017); S.J. Res. 15, 115th Cong. (2017); H.R.J. Res. 44, 115th Cong. (2017) (enacted); H.R.J. Res. 43, 115th Cong. (2017) (enacted); S.J. Res. 9, 115th Cong. (2017); S.J. Res. 14, 115th Cong. (2017); S.J. Res. 11, 115th Cong. (2017); S.J. Res. 13, 115th Cong. (2017); H.R.J. Res. 49, 115th Cong. (2017); H.R. Res. 74, 115th Cong. (2017); H.R.J. Res. 52, 115th Cong. (2017); H.R.J. Res. 55, 115th Cong. (2017); H.R.J. Res. 54, 115th Cong. (2017); H.R.J. Res. 58, 115th Cong. (2017) (enacted); H.R.J. Res. 57, 115th Cong. (2017); H.R.J. Res. 59, 115th Cong. (2017); H.R.J. Res. 56, 115th Cong. (2017); S.J. Res. 19, 115th Cong. (2017); S.J. Res. 18, 115th Cong. (2017); H.R.J. Res. 60, 115th Cong. (2017); S.J. Res. 21, 115th Cong. (2017); H.R.J. Res. 62, 115th Cong. (2017); H.R. Res. 91, 115th Cong. (2017); H.R. Res. 99, 115th Cong. (2017); H.R.J. Res. 66, 115th Cong. (2017) (enacted); H.R.J. Res. 67, 115th Cong. (2017) (enacted); H.R.J. Res. 69, 115th Cong. (2017) (enacted); H.R.J. Res. 68, 115th Cong. (2017); H.R.J. Res. 70, 115th Cong. (2017); H.R. Res. 116, 115th Cong. (2017); H.R.J. Res. 71, 115th Cong. (2017); H.R. Res. 123, 115th Cong. (2017); H.R.J. Res. 73, 115th Cong. (2017); S.J. Res. 23, 115th Cong. (2017); H.R.J. Res. 77, 115th Cong. (2017); H.R.J. Res. 82, 115th Cong. (2017); H.R.J. Res. 83, 115th Cong. (2017) (enacted); H.R. Res. 150, 115th Cong. (2017); S.J. Res. 25, 115th Cong. (2017); H.R.J. Res. 84, 115th Cong. (2017); S.J. Res. 26, 115th Cong. (2017); S.J. Res. 27, 115th Cong. (2017); S.J. Res. 28, 115th Cong. (2017); S.J. Res. 29, 115th Cong. (2017); S.J. Res. 32, 115th Cong. (2017); S.J. Res. 33, 115th Cong. (2017); S.J. Res. 34, 115th Cong. (2017) (enacted); H.R.J. Res. 86, 115th Cong. (2017); S.J. Res. 37, 115th Cong. (2017); H.R.J. Res. 87, 115th Cong. (2017); S.J. Res. 38, 115th Cong. (2017); H.R. Res. 230, 115th Cong. (2017); H.R.J. Res. 97, 115th Cong. (2017); H.R.J. Res. 96, 115th Cong. (2017); H.R.J. Res. 103, 115th Cong. (2017); H.R.J. Res. 111, 115th Cong. (2017) (enacted); S.J. Res. 47, 115th Cong. (2017); H.R. Res. 468, 115th Cong. (2017); H.R.J. Res. 122, 115th Cong. (2017); H.R.J. Res. 129, 115th Cong. (2018); S.J. Res. 52, 115th Cong. (2018); S.J. Res. 57, 115th Cong. (2018) (enacted); S.J. Res. 56, 115th Cong. (2018); H.R.J. Res. 131, 115th Cong. (2018); H.R.J. Res. 132, 115th Cong. (2018); H.R. Res. 873, 115th Cong. (2018); H.R. Res. 872, 115th Cong. (2018); S.J. Res. 63, 115th Cong. (2018); H.R.J. Res. 140, 115th Cong. (2018); S.J. Res. 64, 115th Cong. (2018); H.R.J. Res. 145, 115th Cong. (2018).

76. *Id.*

77. *Id.*

78. *Supra* note 75.

regulation could offend local constituencies enough to force a CRA resolution.<sup>79</sup>

In the CRA's first year, there were only two resolutions of disapproval.<sup>80</sup> Only one made it to a Senate vote, but it eventually failed.<sup>81</sup> The measure, introduced by Senator Trent Lott (R-MS), attempted to rescind a rule from the Department of Health and Human Services relating to Medicare reimbursement rates.<sup>82</sup>

By the next Congress (1997–1998), there were a total of six resolutions introduced—or roughly six percent of the volume from 2017.<sup>83</sup> It is clear Congress was still learning to use the CRA. None of these measures made it to a vote in either chamber.<sup>84</sup> At this point in the CRA's existence, it was solely used as a partisan tool to check the opposing party in the White House.

In 1999, there was only one resolution of disapproval introduced.<sup>85</sup> In 2000, there were four resolutions and the first Democratic attempt to rescind a regulation.<sup>86</sup> On July 18, 2000, Representative Marion Berry (D-AR) introduced a resolution of disapproval to rescind an Environmental Protection Agency measure implementing the Clean Water Act.<sup>87</sup> The joint resolution garnered twenty-three cosponsors, but never made it to the House floor.<sup>88</sup> Likewise, the three other CRA resolutions never garnered a

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79. *Id.*

80. H.R.J. Res. 178, 104th Cong. (1996) (declaring that certain rules submitted by the Federal Energy Regulatory Commission regarding the promotion of wholesale competition and stranded cost recovery shall have no force or effect); S.J. Res. 60, 104th Cong. (1996) (disapproving of a rule submitted by the Health Care Financing Administration relating to hospital reimbursement under Medicare).

81. *Compare* H.R.J. Res. 178, 104th Cong. (1996) (disapproving Orders Nos. 888 and 889 of the Federal Energy Regulatory Commission), *with* S.J. Res. 60, 104th Cong. (1996) (disapproving of a rule submitted by the Health Care Financing Administration relating to hospital reimbursement under Medicare).

82. *See* S.J. Res. 60, 104th Cong. (1996).

83. H.R.J. Res. 59, 105th Cong. (1997); H.R.J. Res. 67, 105th Cong. (1997); H.R.J. Res. 81, 105th Cong. (1997); S.J. Res. 25, 105th Cong. (1997); H.R.J. Res. 123, 105th Cong. (1998); S.J. Res. 50, 105th Cong. (1998).

84. *See Id.*

85. H.R.J. Res. 55, 106th Cong. (1999) (disapproving of a relating to delivery of mail to a commercial mail receiving agency).

86. H.R.J. Res. 104, 106th Cong. (2000) (disapproving a rule relating to water quality protections); S.J. Res. 50, 106th Cong. (2000) (disapproving a final rule concerning water pollution); H.R.J. Res. 106, 106th Cong. (2000) (disapproving a final rule concerning water pollution); H.R.J. Res. 105, 106th Cong. (2000) (disapproving relating to total maximum daily loads under the Federal Water Pollution Control Act).

87. H.R.J. Res. 105, 106th Cong. (2000).

88. *Id.*

vote. It is notable that—in addition to Representative Berry’s support to overturn the EPA regulation—seven other Democrats joined in support.<sup>89</sup>

By the next Congress (2001–2002), legislators introduced as many CRA resolutions as they had during the entire prior history of the law.<sup>90</sup> The timing made sense from a political perspective: Republicans still controlled Congress, and an outgoing Democratic administration gave way to an incoming Republican one. The CRA’s “carryover provision” allows the incoming Congress to scrutinize the last several months of regulations from the previous administration.<sup>91</sup> Of the thirteen resolutions introduced, six were introduced by Democrats to check new actions from the Bush Administration.<sup>92</sup> Given the conservative composition of Congress, none made it to a floor vote.<sup>93</sup>

When Senator Don Nickles, one of the chief sponsors of the CRA in 1996, introduced a resolution of disapproval to overturn the Department of Labor’s ergonomics rule, he made congressional history.<sup>94</sup> Despite a fifty-

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89. See H.R.J. Res. 105 *supra* note 87.

90. S.J. Res. 6, 107th Cong. (2001) (enacted); H.R. Res. 79, 107th Cong. (2001); H.R.J. Res. 35, 107th Cong. (2001); H.R.J. Res. 38, 107th Cong. (2001); S.J. Res. 9, 107th Cong. (2001); H.R.J. Res. 44, 107th Cong. (2001); H.R.J. Res. 43, 107th Cong. (2001); S.J. Res. 14, 107th Cong. (2001); S.J. Res. 15, 107th Cong. (2001); S.J. Res. 17, 107th Cong. (2001); H.R. Res. 414, 107th Cong. (2002); H.R.J. Res. 92, 107th Cong. (2002); S.J. Res. 37, 107th Cong. (2002); H.R.J. Res. 119, 107th Cong. (2002); S.J. Res. 48, 107th Cong. (2002).

91. RICHARD S. BETH, CONG. RESEARCH SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT 1–3 (2001) (discussing the CRA’s disapproval procedures), <http://www.au.af.mil/au/awc/awcgate/crs/rl31160.pdf> [<https://perma.cc/5222-EQLH>]; CURTIS W. COPELAND & RICHARD S. BETH, CONG. RESEARCH SERV., RL34633, CONGRESSIONAL REVIEW ACT: DISAPPROVAL OF RULES IN A SUBSEQUENT SESSION OF CONGRESS (2008) (discussing the “carryover” procedures), <https://fas.org/sgp/crs/misc/RL34633.pdf> [<https://perma.cc/2U42-FW5Y>].

92. S.J. Res. 9, 107th Cong. (2001) (disapproving a rule submitted by the President regarding the restoration of the Mexico City Policy); S.J. Res. 14, 107th Cong. (2001) (disapproving a rule regarding the delay in the effective date of a new arsenic standard); S.J. Res. 15, 107th Cong. (2001) (disapproving a rule regarding the postponement of the effective date of energy conservation standards for central air conditioners); S.J. Res. 17, 107th Cong. (2001) (disapproving a rule submitted by the President regarding the restoration of the Mexico City Policy); H.R.J. Res. 92, 107th Cong. (2002) (disapproving a rule regarding modification of the Medicaid upper payment limit for non-State government owned or operated hospitals); S.J. Res. 37, 107th Cong. (2002) (disapproving a rule regarding modification of the Medicaid upper payment limit for non-State government owned or operated hospitals).

93. See *107th Congress (2001-2003)*, U.S. HOUSE REPS., OFF. ART & ARCHIVES, <https://history.house.gov/Congressional-Overview/Profiles/107th/> [<https://perma.cc/S838-AEKZ>].

94. See S.J. Res. 6, 107th Cong. (2001).

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fifty partisan split in the Senate, the resolution managed fifty-six votes in the Senate, including all Republicans and six Democrats.<sup>95</sup> The vote also put the CRA's streamlined procedures on full display: without the CRA's filibuster preclusion, the vote to rescind never would have passed. During the debate, Senator Asa Hutchinson (R-AR) made his colleagues' intent clear:

With the CRA, we have a means by which we can address an agency that goes amok and passes a rule that is not in the interest of the American people. . . . For the first time ever, the Senate will today utilize the CRA to vitiate and overturn an agency rule—that is, a several-hundred-page OSHA rule—that imposes the largest and most costly regulatory mandate in American history on the workplace. It is appropriate that this would be the first use for the CRA.<sup>96</sup>

The next day, the House quickly followed suit and voted (223-206) to overturn the ergonomics rule.<sup>97</sup> Although sixteen Democrats and one Independent voted to overturn the Clinton-era rule, thirteen Republicans declined to support the disapproval resolution.<sup>98</sup> During the House debate, Congressman John Boehner (R-OH), then Chair of the House Education and Workforce Committee, made a prophetic comment on future rules under the CRA.<sup>99</sup> He noted, “[a]gain, no one is opposed to providing appropriate ergonomics protections in the workplace. The Secretary of Labor has indicated her intent to pursue a comprehensive approach to ergonomics protections. I look forward to working with her and my colleagues on such an effort.”<sup>100</sup>

The Bush Administration never pursued a new ergonomics rule, and there is evidence that legal uncertainty around the “substantially the same form” language in the CRA scared off future regulators from revisiting the ergonomics rule.<sup>101</sup>

The CRA's first few years were marked with a relative paucity of disapproval resolutions. However, the “perfect timing” of a Republican administration replacing a Democratic administration—with a friendly Congress—led to the first use of the CRA roughly five years after its

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95. S. Roll Call Vote No. 15, 107th Cong. (2001).

96. *Id.* at 1847.

97. H.R. Roll Call Vote No. 33, 107th Cong. (2001).

98. *Id.*

99. 147 CONG. REC. 29, 685 (2001).

100. *Id.*

101. See, e.g., Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the “Substantially Similar” Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707 (2011).

passage.<sup>102</sup> The legislative veto was back, if even only for an instant. It is likely there were no more resolutions because of the slim Republican majorities. Yet, unlike in 2001, that did not stop Republicans in 2017.

*D. Slow Weaponization of CRA: 2002-2015*

After Congress and the Bush Administration struck down the ergonomics rule, the CRA was somewhat dormant. Republicans had few incentives to defy the Bush Administration, and Democrats were not overly aggressive in their attempts to challenge his regulations especially since they did not control Congress until 2007.

Despite this relative lull, there were thirty-nine CRA resolutions introduced between 2001 and 2009, for an average of four or five each year.<sup>103</sup> There was no new resolution introduced in 2006, leading up to the midterm elections.<sup>104</sup> To an extent, the CRA's bipartisan use dispels the

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102. *Id.* at 725-27.

103. S.J. Res. 6, 107th Cong. (2001) (enacted); H.R. Res. 79, 107th Cong. (2001); H.R.J. Res. 35, 107th Cong. (2001); H.R.J. Res. 38, 107th Cong. (2001); S.J. Res. 9, 107th Cong. (2001); H.R.J. Res. 44, 107th Cong. (2001); H.R.J. Res. 43, 107th Cong. (2001); S.J. Res. 14, 107th Cong. (2001); S.J. Res. 15, 107th Cong. (2001); S.J. Res. 17, 107th Cong. (2001); H.R. Res. 414, 107th Cong. (2002); H.R.J. Res. 92, 107th Cong. (2002); S.J. Res. 37, 107th Cong. (2002); H.R.J. Res. 119, 107th Cong. (2002); S.J. Res. 48, 107th Cong. (2002); H.R.J. Res. 3, 108th Cong. (2003); H.R.J. Res. 41, 108th Cong. (2003); H.R.J. Res. 58, 108th Cong. (2003); S.J. Res. 17, 108th Cong. (2003); H.R.J. Res. 72, 108th Cong. (2003); S.J. Res. 32, 108th Cong. (2004); S.J. Res. 31, 108th Cong. (2004); S.J. Res. 4, 109th Cong. (2005); H.R.J. Res. 23, 109th Cong. (2005); S.J. Res. 20, 109th Cong. (2005); H.R.J. Res. 56, 109th Cong. (2005); H.R.J. Res. 47, 110th Cong. (2007); H.R.J. Res. 49, 110th Cong. (2007); S.J. Res. 18, 110th Cong. (2007); H.R.J. Res. 51, 110th Cong. (2007); H.R.J. Res. 54, 110th Cong. (2007); H.R.J. Res. 55, 110th Cong. (2007); S.J. Res. 20, 110th Cong. (2007); S.J. Res. 22, 110th Cong. (2007); S.J. Res. 28, 110th Cong. (2008); H.R.J. Res. 79, 110th Cong. (2008); H.R.J. Res. 78, 110th Cong. (2008); S.J. Res. 30, 110th Cong. (2008); S.J. Res. 44, 110th Cong. (2008).

104. S.J. Res. 6, 107th Cong. (2001) (enacted); H.R. Res. 79, 107th Cong. (2001); H.R.J. Res. 35, 107th Cong. (2001); H.R.J. Res. 38, 107th Cong. (2001); S.J. Res. 9, 107th Cong. (2001); H.R.J. Res. 44, 107th Cong. (2001); H.R.J. Res. 43, 107th Cong. (2001); S.J. Res. 14, 107th Cong. (2001); S.J. Res. 15, 107th Cong. (2001); S.J. Res. 17, 107th Cong. (2001); H.R. Res. 414, 107th Cong. (2002); H.R.J. Res. 92, 107th Cong. (2002); S.J. Res. 37, 107th Cong. (2002); H.R.J. Res. 119, 107th Cong. (2002); S.J. Res. 48, 107th Cong. (2002); H.R.J. Res. 3, 108th Cong. (2003); H.R.J. Res. 41, 108th Cong. (2003); H.R.J. Res. 58, 108th Cong. (2003); S.J. Res. 17, 108th Cong. (2003); H.R.J. Res. 72, 108th Cong. (2003); S.J. Res. 32, 108th Cong. (2004); S.J. Res. 31, 108th Cong. (2004); S.J. Res. 4, 109th Cong. (2005); H.R.J. Res. 23, 109th Cong. (2005); S.J. Res. 20, 109th Cong. (2005); H.R.J. Res. 56, 109th Cong. (2005); H.R.J. Res. 47, 110th Cong. (2007); H.R.J. Res. 49, 110th Cong. (2007); S.J. Res. 18, 110th Cong. (2007); H.R.J. Res. 51, 110th Cong. (2007); H.R.J. Res. 54, 110th Cong. (2007); H.R.J. Res. 55, 110th Cong. (2007); S.J. Res. 20, 110th Cong. (2007); S.J. Res. 22,

notion that is a purely partisan Republican tool to strike down “onerous” regulations.

There were numerous Bush Administration actions to which Democrats objected. For example, Representative Lane Evans (D-IL) introduced a measure to rescind a Department of Veterans Affairs’ health care rule.<sup>105</sup> Likewise, both Senator Byron Dorgan (D-ND) and Representative Maurice Hinchey (D-NY) introduced a CRA resolution to overturn the Federal Communications Commission’s (FCC) new media ownership rules.<sup>106</sup> Senator Dorgan’s resolution even passed the Republican-controlled Senate with fifty-five votes.<sup>107</sup> Notably, twelve Republicans supported the measure in the Senate, including former Senate Majority Leader Trent Lott (R-MS).<sup>108</sup> During recent CRA votes, few Democrats supported CRA resolutions to overturn a regulation promulgated by their own party.<sup>109</sup> To many, there was bipartisan opposition to FCC’s new rule, and Congress (at least one chamber) objected strenuously enough to seek to rescind it.<sup>110</sup> Few in Congress at the time wanted to abolish the CRA, knowing how close they were to achieving their own policy ends, *vis a vis* rescinding FCC’s rule.<sup>111</sup>

By the next Congress (2005–2006), Democrats managed to get two CRA resolutions onto the Senate floor, but none in the House.<sup>112</sup> Both of the resolutions were introduced by Democrats; one—introduced by Senator Kent Conrad (D-ND)—successfully passed the Senate.<sup>113</sup> It would have overturned the Department of Agriculture rule on “Mad Cow Disease” risk

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110th Cong. (2007); S.J. Res. 28, 110th Cong. (2008); H.R.J. Res. 79, 110th Cong. (2008); H.R.J. Res. 78, 110th Cong. (2008); S.J. Res. 30, 110th Cong. (2008); S.J. Res. 44, 110th Cong. (2008).

105. See H.R.J. Res. 41, 108th Cong. (2003).

106. See S.J. Res. 17, 108th Cong. (2003). Although the FCC is an independent agency, and not technically part of the Bush Administration, President Bush had appointed a majority of the commissioners. See, e.g., Pamela McClintock, *Bush Naming Names in D.C.*, VARIETY (Apr. 9, 2001), <https://variety.com/2001/biz/news/bush-naming-names-in-d-c-1117796745/> [<https://perma.cc/T8F8-JYAM>].

107. S. Roll Call Vote No. 348, 108th Cong. (2003).

108. *Id.*

109. See, e.g., H.R. Roll Call Vote No. 73, 115th Cong. (2017) (showing that there were only four Democrats in the U.S. House that supported the resolution to overturn the Department of Interior’s Stream Protection Rule).

110. Ben Scott, *The Politics and Policy of Media Ownership*, 53 AM. UNIV. L. REV. 645, 646–47 (2004).

111. See *id.* at 664–65.

112. Compare S.J. Res. 4, 109th Cong. (2005); S.J. Res. 20, 109th Cong. (2005), with H.R.J. Res. 23, 109th Cong. (2005), and H.R.J. Res. 56, 109th Cong. (2005).

113. S.J. Res. 4, 109th Cong. (2005); see S. Roll Call Vote No. 19, 109th Cong. (2005).

zones.<sup>114</sup> Opposition was not particularly strong in the Senate, as the CRA measure garnered just fifty-two votes, but eleven Republicans were upset enough, voting to rescind the regulation.<sup>115</sup> The CRA measure that failed the Senate, introduced by Senator Patrick Leahy (D-VT), would have repealed an EPA measure “to delist coal and oil-direct utility units from the source category list under the Clean Air Act.”<sup>116</sup> Despite the relatively partisan nature of the forty-seven to fifty-one vote against repeal, nine Republicans still voted for Senator Leahy’s joint resolution.<sup>117</sup> A freshman Democrat also voted to repeal the EPA rule: then-Senator Barack Obama (D-IL).<sup>118</sup>

The intentions of the vote to overturn were clear: the Bush Administration was attempting to degrade air quality. As Senator Frank Lautenberg (D-NJ) noted, “I suspect most Americans are going to be shocked to learn the administration wants to allow more poisonous mercury into the environment. But that is exactly what they are trying to do.”<sup>119</sup> Again, it makes little sense for either party to voluntarily cede legislative veto authority under the CRA. In this instance, Democrats, and many pro-environment Republicans, objected to a rule they thought would harm air quality. They had the power to rescind the rule and nearly succeeded in the Senate.<sup>120</sup> If these examples of Democrats objecting to regulations during the Bush Administration are evidence of anything, it is that Congress can have a legitimate policy objection to a regulation and not be “anti-regulation.”

By the last Congress of the Bush Administration (2007-2008), the story was mostly the same: Democrats continued to object to President Bush’s domestic policy regulations. Of the thirteen measures introduced during this time, Democrats sponsored all of them, and one managed to pass through the Senate.<sup>121</sup> Strangely, there was another push to overturn an FCC rule, and it passed by voice vote in the Democratic Senate.<sup>122</sup> Yet, the House

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114. S.J. Res. 4, 109th Cong. (2005).

115. S. Roll Call Vote No. 19, 109th Cong. (2005).

116. See S.J. Res. 20, 109th Cong. (2005).

117. S. Roll Call Vote No. 225, 109th Cong. (2005).

118. *Id.*

119. 151 CONG. REC. 9, 955-58, (2005).

120. See S. Roll Call Vote No. 19, *supra* note 115.

121. Introduced: H.R.J. Res. 47, 110th Cong. (2007); H.R.J. Res. 49, 110th Cong. (2007); S.J. Res. 18, 110th Cong. (2007); H.R.J. Res. 51, 110th Cong. (2007); H.R.J. Res. 54, 110th Cong. (2007); H.R.J. Res. 55, 110th Cong. (2007); S.J. Res. 20, 110th Cong. (2007); S.J. Res. 22, 110th Cong. (2007); H.R.J. Res. 79, 110th Cong. (2008); H.R.J. Res. 78, 110th Cong. (2008); S.J. Res. 30, 110th Cong. (2008); S.J. Res. 44, 110th Cong. (2008). Introduced and Passed Senate: S.J. Res. 28, 110th Cong. (2008).

122. See S.J. Res. 28, 110th Cong. (2008).

never took up the matter beyond initial introduction.<sup>123</sup> This all happened during the middle of a presidential election year with a financial crisis to follow that fall, so opponents of the rule might forgive Congress for turning to other matters.

By the time President Obama took office in January 2009, the partisan switch had largely flipped on the CRA. Although there were a few Democrats sponsoring resolutions to overturn regulations, they were objecting to independent agency actions of appointees from President Bush, not the Obama Administration.<sup>124</sup> However, EPA's actions to begin regulating carbon dioxide drew the ire of several "coal state" Democrats. For example, Representative Ike Shelton (D-MO) introduced a disapproval resolution following EPA's "endangerment finding," a regulation that essentially started the process of federal greenhouse gas regulation (GHG).<sup>125</sup> He was joined by fifty-two other cosponsors, including twenty-six Democrats.<sup>126</sup>

By the 112th Congress (2011-2012), legislators began to employ the CRA far more often. The 112th Congress set a record for the number of CRA resolutions introduced: twenty-five.<sup>127</sup>

Republicans introduced all of these resolutions.<sup>128</sup> However, without control of the Senate, none passed the upper chamber and only two passed

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123. See H.R.J. Res. 79, 110th Cong. (2008).

124. See S.J. Res. 23, 111th Cong. (2009).

125. See H.R.J. Res. 76, 111th Cong. (2010).

126. *Id.*

127. Congress managed to introduce twenty-five resolutions during the 112th Congress, compared to just eight resolutions from the prior Congress. Compare H.R.J. Res. 9, 112th Cong. (2011); H.R.J. Res. 19, 112th Cong. (2011); H.R.J. Res. 21, 112th Cong. (2011); H.R.J. Res. 37, 112th Cong. (2011); S.J. Res. 6, 112th Cong. (2011); H.R.J. Res. 42, 112th Cong. (2011); H.R. Res. 200, 112th Cong. (2011); H.R.J. Res. 59, 112th Cong. (2011); H.R.J. Res. 61, 112th Cong. (2011); H.R.J. Res. 58, 112th Cong. (2011); H.R.J. Res. 60, 112th Cong. (2011); S.J. Res. 27, 112th Cong. (2011); H.R.J. Res. 85, 112th Cong. (2011); S.J. Res. 37, 112th Cong. (2012); S.J. Res. 36, 112th Cong. (2012); H.R.J. Res. 103, 112th Cong. (2012); H.R.J. Res. 104, 112th Cong. (2012); S.J. Res. 38, 112th Cong. (2012); H.R.J. Res. 108, 112th Cong. (2012); S.J. Res. 40, 112th Cong. (2012); H.R.J. Res. 112, 112th Cong. (2012); H.R.J. Res. 113, 112th Cong. (2012); S.J. Res. 46, 112th Cong. (2012); S.J. Res. 48, 112th Cong. (2012); H.R.J. Res. 118, 112th Cong. (2012); S.J. Res. 50, 112th Cong. (2012); H.R. Res. 788, 112th Cong. (2012); S.J. Res. 51, 112th Cong. (2012), with H.R.J. Res. 18, 111th Cong. (2009); H.R.J. Res. 65, 111th Cong. (2009); H.R.J. Res. 66, 111th Cong. (2009); S.J. Res. 23, 111th Cong. (2009); S.J. Res. 24, 111th Cong. (2009); S.J. Res. 26, 111th Cong. (2010); H.R.J. Res. 76, 111th Cong. (2010); H.R.J. Res. 77, 111th Cong. (2010); S.J. Res. 30, 111th Cong. (2010); S.J. Res. 39, 111th Cong. (2010); H.R.J. Res. 97, 111th Cong. (2010); H.R.J. Res. 100, 111th Cong. (2010); H.R.J. Res. 103, 111th Cong. (2010).

128. See H.R.J. Res. 9, 112th Cong. (2011); H.R.J. Res. 19, 112th Cong. (2011); H.R.J. Res. 21, 112th Cong. (2011); H.R.J. Res. 37, 112th Cong. (2011); S.J. Res. 6, 112th Cong.

the House.<sup>129</sup> Republicans might have felt emboldened to introduce a record number of disapproval resolutions, but they did so with the hopes of a Republican president in 2013. They were denied that on Election Day and CRA activity dropped off considerably.<sup>130</sup>

From 2013-2014, there were only nine new CRA resolutions, the lowest figure since the 109th Congress (2005-2006).<sup>131</sup> Again, without control of the Senate, no resolution stood the chance of passing Congress and arriving on President Obama's desk. There were ten resolutions introduced, but they went nowhere in either congressional chamber.<sup>132</sup> As previewed by EPA's earlier endangerment finding, the agency's rule to finally regulate GHG emissions from power plants drew a CRA resolution in both the House and Senate.<sup>133</sup> The House resolution garnered fifty-six cosponsors and the Senate measure had forty-one—enough to discharge the measure to the floor, but there was never a vote.<sup>134</sup>

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(2011); H.R.J. Res. 42, 112th Cong. (2011); H.R. Res. 200, 112th Cong. (2011); H.R.J. Res. 59, 112th Cong. (2011); H.R.J. Res. 61, 112th Cong. (2011); H.R.J. Res. 58, 112th Cong. (2011); H.R.J. Res. 60, 112th Cong. (2011); S.J. Res. 27, 112th Cong. (2011); H.R.J. Res. 85, 112th Cong. (2011); S.J. Res. 37, 112th Cong. (2012); S.J. Res. 36, 112th Cong. (2012); H.R.J. Res. 103, 112th Cong. (2012); H.R.J. Res. 104, 112th Cong. (2012); S.J. Res. 38, 112th Cong. (2012); H.R.J. Res. 108, 112th Cong. (2012); S.J. Res. 40, 112th Cong. (2012); H.R.J. Res. 112, 112th Cong. (2012); H.R.J. Res. 113, 112th Cong. (2012); S.J. Res. 46, 112th Cong. (2012); S.J. Res. 48, 112th Cong. (2012); H.R.J. Res. 118, 112th Cong. (2012); S.J. Res. 50, 112th Cong. (2012); H.R. Res. 788, 112th Cong. (2012); S.J. Res. 51, 112th Cong. (2012); H.R.J. Res. 18, 111th Cong. (2009); H.R.J. Res. 65, 111th Cong. (2009); H.R.J. Res. 66, 111th Cong. (2009); S.J. Res. 23, 111th Cong. (2009); S.J. Res. 24, 111th Cong. (2009); S.J. Res. 26, 111th Cong. (2010); H.R.J. Res. 76, 111th Cong. (2010); H.R.J. Res. 77, 111th Cong. (2010); S.J. Res. 30, 111th Cong. (2010); S.J. Res. 39, 111th Cong. (2010); H.R.J. Res. 97, 111th Cong. (2010); H.R.J. Res. 100, 111th Cong. (2010); H.R.J. Res. 103, 111th Cong. (2010).

129. H.R.J. Res. 37, 112th Cong. (2011); H.R. J. Res. 118, 112th Cong. (2012).

130. See David A. Foretold, *Obama Reelected as President*, WASH. POST (Nov. 7, 2012), [https://www.washingtonpost.com/politics/decision2012/after-grueling-campaign-polls-open-for-election-day-2012/2012/11/06/d1c24c98-2802-11e2-b4e0-346287b7e56c\\_story.html](https://www.washingtonpost.com/politics/decision2012/after-grueling-campaign-polls-open-for-election-day-2012/2012/11/06/d1c24c98-2802-11e2-b4e0-346287b7e56c_story.html) [https://perma.cc/QN5B-NEFC].

131. S.J. Res. 8, 113th Cong. (2013); S.J. Res. 9, 113th Cong. (2013); H.R.J. Res. 63, 113th Cong. (2013); H.R.J. Res. 64, 113th Cong. (2013); S.J. Res. 27, 113th Cong. (2013); H.R. Res. 425, 113th Cong. (2014); S.J. Res. 30, 113th Cong. (2014); S.J. Res. 35, 113th Cong. (2014); H.R.J. Res. 118, 113th Cong. (2014).

132. S.J. Res. 8, 113th Cong. (2013); S.J. Res. 9, 113th Cong. (2013); H.R.J. Res. 63, 113th Cong. (2013); H.R.J. Res. 64, 113th Cong. (2013); S.J. Res. 27, 113th Cong. (2013); H.R. Res. 425, 113th Cong. (2014); S.J. Res. 30, 113th Cong. (2014); S.J. Res. 35, 113th Cong. (2014); H.R.J. Res. 118, 113th Cong. (2014).

133. See S.J. Res. 30, 113th Cong. (2014); H.R. J. Res. 64, 113th Cong. (2013).

134. S.J. Res. 30, 113th Cong. (2014); H.R. J. Res. 64, 113th Cong. (2013).

During this period, Congress gradually remembered the power it carved out back in 1996 and began using it to address onerous regulations. However, it was not until the lead up to the 2016 Election (the so-called “midnight” year for regulation) during which CRA activity peaked to record levels, delivering historic results for conservatives.<sup>135</sup>

### III. CONGRESS DISCOVERS CHECKS AND BALANCES

It is not as though Congress forgot about its ability to check the executive since passage of the CRA; it is just that, absent one occasion, for twenty years it never did.<sup>136</sup> This was largely due to the confluence of factors around a transition of power between one party in the White House and the other—in addition to needing a Congress with a long memory, ready to object to regulations from the previous year. Yet, Republicans only employed the CRA once in 2001 and Democrats never employed it successfully in 2009, even though their majorities afforded some flexibility.<sup>137</sup> For Republicans going into 2016, they foresaw the perfect opportunity and devised a plan to employ the CRA more frequently.

#### A. *Seeds of Trump Administration Push*

The volume of regulations promulgated in the late stages of the Obama Administration provided ample fodder for Republicans in the House and Senate. According to the Government Accountability Office (GAO), federal regulators issued 119 major rules in 2016, shattering the previous record of 100 major rules in 2010.<sup>138</sup> For comparison, President Bush issued fifty-one major rules during his first midterm year (2002) and ninety-five (the previous record) in 2008.<sup>139</sup>

Republicans began their push during the 114th Congress (2015-2016) with thirty-four CRA resolutions, breaking their previous record of twenty-eight.<sup>140</sup> However, the distinguishing feature about this CRA push was that

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135. See Pierre Lemieux, *Obama’s Record-Setting Midnight*, REG. MAG. (2017), [https://object.cato.org/sites/cato.org/files/serials/files/regulation/2017/3/regulation-v40n1-8\\_1.pdf#page=4](https://object.cato.org/sites/cato.org/files/serials/files/regulation/2017/3/regulation-v40n1-8_1.pdf#page=4) [https://perma.cc/4N68-28LE].

136. S.J. Res. 6, 107th Cong. (2001) (enacted) (disapproving rule submitted by the Department of Labor relating to ergonomics).

137. *Id.*

138. See U.S. GOV’T ACCOUNTABILITY OFFICE, DATABASE OF RULES, <https://www.gao.gov/legal/other-legal-work/congressional-review-act?fedRuleSearch> [https://perma.cc/PX2X-KDK7].

139. See *id.*

140. S.J. Res. 8, 114th Cong. (2015); H.R.J. Res. 29, 114th Cong. (2015); H.R. Res. 152, 114th Cong. (2015); H.R.J. Res. 42, 114th Cong. (2015); S.J. Res. 14, 114th Cong. (2015);

five resolutions wound up on President Obama's desk.<sup>141</sup> As expected, he vetoed all of them, but for Republicans, delivering the message mattered.<sup>142</sup> The floor debates were essential and forcing vulnerable Democrats to take votes on controversial regulations was key. No president had ever vetoed a CRA resolution since the legislation's passage in 1996.<sup>143</sup> When President Obama halted the attempted repeal of the National Labor Relations Board's representation case procedures rule on March 31, 2015, he was likely unaware Republicans would pass four more resolutions to send his way.<sup>144</sup>

The 2015-2016 CRA resolutions were destined to fail and Republicans knew it. President Obama was not going to nullify his administration's work. For Republicans, the CRA was starting to become a regular part of oversight; they had successfully established a framework for scrutiny—and more importantly—they had majorities for overturning “onerous” regulations. All that was needed was a new Republican president who would sign their CRA resolutions.

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H.R.J. Res. 59, 114th Cong. (2015); H.R. Res. 408, 114th Cong. (2015); S.J. Res. 22, 114th Cong. (2015); H.R.J. Res. 67, 114th Cong. (2015); H.R.J. Res. 68, 114th Cong. (2015); H.R.J. Res. 70, 114th Cong. (2015); H.R.J. Res. 72, 114th Cong. (2015); S.J. Res. 24, 114th Cong. (2015); S.J. Res. 23, 114th Cong. (2015); H.R.J. Res. 71, 114th Cong. (2015); S.J. Res. 25, 114th Cong. (2015); H.R.J. Res. 74, 114th Cong. (2015); H.R. Res. 539, 114th Cong. (2015); S.J. Res. 27, 114th Cong. (2015); S.J. Res. 28, 114th Cong. (2015); H.R. Res. 583, 114th Cong. (2016); H.R.J. Res. 87, 114th Cong. (2016); S.J. Res. 33, 114th Cong. (2016); H.R.J. Res. 88, 114th Cong. (2016); H.R. Res. 706, 114th Cong. (2016); S.J. Res. 34, 114th Cong. (2016); S.J. Res. 35, 114th Cong. (2016); H.R.J. Res. 95, 114th Cong. (2016); H.R. Res. 836, 114th Cong. (2016); S.J. Res. 38, 114th Cong. (2016); S.J. Res. 37, 114th Cong. (2016); H.R. Res. 921, 114th Cong. (2016); H.R.J. Res. 107, 114th Cong. (2016); H.R.J. Res. 108, 114th Cong. (2016).

141. S.J. Res. 8, 114th Cong. (2015) (disapproving rule submitted by the National Labor Relations Board relating to representation case procedures); S.J. Res. 22, 114th Cong. (2015) (disapproving rule regarding the definition of “waters of the United States” under the Federal Water Pollution Control Act); S.J. Res. 24, 114th Cong. (2015) (disapproving rule submitted regarding “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units”); S.J. Res. 23, 114th Cong. (2015) (disapproving a rule regarding “Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units”); H.R.J. Res. 88, 114th Cong. (2016) (disapproving rule submitted by the Department of Labor regarding the definition of the term “Fiduciary”).

142. *Joint Resolution of Disapproval*, BALLOTPEDIA, [https://ballotpedia.org/Joint\\_resolution\\_of\\_disapproval\\_\(administrative\\_state\)#cite\\_note-smithsonian-6](https://ballotpedia.org/Joint_resolution_of_disapproval_(administrative_state)#cite_note-smithsonian-6) [https://perma.cc/PLN9-AXW8].

143. Jason Daley, *What is the Congressional Review Act?*, Smithsonian (Feb. 10, 2017), <https://www.smithsonianmag.com/smart-news/what-congressional-review-act-180962031/> [https://perma.cc/W9BH-U2L3].

144. See S.J. Res. 8, 114th Cong. (2015).

*B. The CRA in 2017-2018*

President Obama and the Electoral College created a confluence of perfect circumstances for Republicans. The Obama Administration managed to churn out 119 major rules in 2016.<sup>145</sup> Consider the regulatory output at the Office of Information and Regulatory Affairs (OIRA) in December of 2016; it managed to conclude reviews of ninety-nine regulations that month—the most since December 1993.<sup>146</sup>

Leading up to the 2016 election, conservative policymakers started to gather a list of potential rules that then-presidential-candidate Donald Trump could help nullify following his election.<sup>147</sup> When he won in November, his transition team sat down with House and Senate leaders to arrive at a consensus regarding a set of rules that could likely garner majorities in both congressional bodies.<sup>148</sup> Outside of these private conversations, many speculated that President Trump would eventually sign between eight and twelve successful CRA measures.<sup>149</sup> There were few public predictions for the actual number: sixteen.<sup>150</sup> But even that number has an asterisk because of new developments in Congress with the CRA.<sup>151</sup>

In the end, the actual list of regulations overturned contained a few notable regulations in the energy and environmental world, but there were also rules few had ever heard of before, including many regulatory policy practitioners. The final list of disapproved rules, from a record seventy-three resolutions of disapproval introduced, contained sixteen regulations (250 percent more than the record from 2015-2016).<sup>152</sup>

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145. See Lemieux, *supra* note 135, at 6.

146. See *Executive Order Search Results*, OFF. MGMT. & BUDGET, <https://www.reginfo.gov/public/do/eoAdvancedSearch> [https://perma.cc/M7AC-N6A5] (searching Dec. 1, 2016, through Dec. 31, 2016).

147. See Lemieux, *supra* note 135, at 6-7.

148. The author personally discussed the issue with House and Senate staff. In December 2016, House and Senate leaders huddled with the transition team to determine which rules could pass both Houses of Congress.

149. This was based on personal conversations with Washington-based regulatory policy scholars. Some predicted only one or two regulations would be repealed, but others predicted a mid-range of roughly eight to twelve.

150. Steven Dinan, *GOP Rolled Back 14 of 15 Obama Rules Using Congressional Review Act*, WASH. TIMES, <https://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congress/> [https://perma.cc/YM5E-K6MF].

151. Susan E. Dudley, *We Haven't Seen the Last of the CRA Yet*, FORBES, <https://www.forbes.com/sites/susandudley/2017/10/31/we-havent-seen-the-last-of-the-cra-yet/> [https://perma.cc/JMF5-42WY].

152. See Erin Kelly, *Republicans Seek Quick Repeal of Latest Obama Administration Regulations*, USA Today, (Nov. 15, 2016), <https://www.usatoday.com/story/>

The number of resolutions certainly stands out because some questioned whether President Trump would be able to sign more than one or two CRA resolutions.<sup>153</sup> However, the most surprising development is that the list included four major rules.<sup>154</sup> The CRA provides that a major rule is one that: (1) has an economic impact of \$100 million; (2) will have a significant increase in prices for consumers; or (3) will have adverse impacts on competition or employment.<sup>155</sup>

The penultimate rule on the list—CFPB’s arbitration rule—was actually not a product of the Obama Administration.<sup>156</sup> It was published on July 19, 2017, with costs exceeding \$370 million, and was a product of a federal agency many Republicans wanted to repeal, along with an Obama appointee running the Consumer Financial Protection Bureau.<sup>157</sup> Had former CFPB Director Richard Cordray continued to serve, Republicans likely would have continued to use the CRA to rescind every controversial regulation he helped to promulgate.

In the end, the 2017-2018 CRA period easily broke records for number of resolutions introduced (seventy-three), number of rules rescinded (sixteen), and number of resolutions to pass a chamber (eighteen).<sup>158</sup> More importantly than the volume of resolutions passed, was the change in behavior. All of Congress, including Democrats, now routinely use the CRA to check executive power. The CRA has been

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news/politics/elections/2016/11/15/republicans-seek-quick-repeal-latest-obama-administration-regulations/93810344/ [https://perma.cc/H3CE-AGB5].

153. *See id.*

154. *See* U.S. GOV’T ACCOUNTABILITY OFF., MAJOR RULE REPORT ON ARBITRATION AGREEMENTS (2017), <https://www.gao.gov/assets/690/686499.pdf> [https://perma.cc/U9Q7-P8Z5]; U.S. GOV’T ACCOUNTABILITY OFF., MAJOR RULE REPORT ON ACCOUNTABILITY AND STATE PLANS (2016), <https://www.gao.gov/assets/690/682020.pdf> [https://perma.cc/F2QU-BPVC]; U.S. GOV’T ACCOUNTABILITY OFF., MAJOR RULE REPORT ON PAYMENTS BY RESOURCE EXTRACTION ISSUERS (2016), <https://www.gao.gov/assets/680/679328.pdf> [https://perma.cc/N7YD-K5JX]; U.S. GOV’T ACCOUNTABILITY OFF., MAJOR RULE REPORT ON FAIR PAY AND SAFE WORKPLACES (2016), <https://www.gao.gov/assets/680/679982.pdf> [https://perma.cc/26E5-ZY7T].

155. 5 U.S.C. § 804(2) (1996).

156. *See* Arbitration Agreements, 82 Fed. Reg. 33, 210 (July 19, 2017) (codified at 12 C.F.R. pt. 1040).

157. *Id.*

158. *See* Jenna Lewinstein, *A Brief History of Trump’s Use of the Congressional Review Act*, CLAREMONT J. L. & POL’Y (Mar. 30, 2018), <https://5clpp.com/2018/03/30/a-brief-history-of-trumps-use-of-the-congressional-review-act/> [https://perma.cc/XMQ4-WZ6S].

institutionalized as not just a deregulatory tool, but the legislative veto 2.0 that each party can wield to rein in a president.

After the public attention the CRA received recently, the law is no longer a forgotten legislative tool. It is a part of Congress' toolkit, just like appropriations riders or oversight hearings. The CRA's use might ebb year-to-year, but both parties will find it useful when confronted with regulations they find truly odious.

#### IV. FROM REGULATORY CUDGEL TO BIPARTISAN WEAPON

There is little doubt the CRA was used as a deregulatory weapon by Republicans during the early years of Trump Administration.<sup>159</sup> However, these deregulatory impulses are often bipartisan. In some instances, the CRA can overturn regulations that are deregulatory in nature.<sup>160</sup> As noted above, Democrats frequently introduced CRA resolutions during the first few years of the Bush Administration.<sup>161</sup> However, naturally, there were few reasons to introduce resolutions when President Obama took office. Yet, conservative Democrats nevertheless challenged a few controversial EPA regulations.<sup>162</sup>

##### A. *Progressive Conflict with CRA*

Beginning in 2017, there was plenty of progressive angst within the Democratic Party over the CRA.<sup>163</sup> What had largely been a nuisance during the Obama years now had the possibility to repeal several notable regulations during the first few months of the Trump Administration. Predictably, the CRA came under heavy scrutiny from progressive ranks.<sup>164</sup>

During the first few CRA votes of 2017, Democrats almost universally opposed every CRA resolution put on the House and Senate floors.<sup>165</sup> They not only talked about the negative environmental and public health consequences of rescinding regulations, but also about the long-term

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159. "Because of senseless, onerous regulations like the [S]tream [P]rotection [R]ule, the liberals in Washington have succeeded in putting most coal miners out of work." 163 CONG. REC. H840-48 (daily ed. Feb. 1, 2017) (statement of Rep. James Comer).

160. See S.J. Res. 52, 115th Cong. (2018) (aiming to nullify the FCC's repeal of net neutrality protection).

161. See, e.g., S.J. Res. 17, 108th Cong. (2003).

162. See, e.g., See H.R. J. Res. 76, 111th Cong. (2010).

163. See Goodwin, *supra* note 50.

164. *Id.*

165. See, e.g., H. Roll Call Vote No. 202, 115th Cong. (2017) (voting to overturn the FCC's privacy rule received zero Democratic votes in the House and Senate; S.J. Res. 34); S. Roll Call Vote No. 94, 115th Cong. (2017).

consequences of the CRA.<sup>166</sup> For example, during the debate over the Department of Interior's "Stream Protection Rule," Representative Raúl Grijalva remarked,

The use of the Congressional Review Act has been categorized as reckless and extreme. . . . The CRA was going to cause significant and lasting harm. If successful, two things are going to happen: the regulation is void and the agency is prohibited from issuing another similar rule ever again.<sup>167</sup>

Similarly, during the debate over the Stream Protection Rule in the Senate, Senator Chris Van Hollen (D-MD) noted, "[T]he Congressional Review Act, is a particularly blunt instrument. The Congressional Review Act allows the majority to rush a resolution of disapproval through the Senate with limited debate and only a limited opportunity for Americans to see what Congress is doing."<sup>168</sup> The definition of "rush" is, of course, subject to varying interpretations as well. In the Senate, the CRA provides for up to ten hours of debate, divided equally between the two sides.<sup>169</sup> Senator Van Hollen continued, "But a resolution of disapproval under the Congressional Review Act does not just send a rule back to the drawing board. Instead, the resolution repeals the rule and prohibits the Agency from ever proposing anything like it again."<sup>170</sup>

Again, for most of the debate, Democrats levied arguments for the rule Congress was set to repeal and against the very function of the CRA.<sup>171</sup> To many progressives, the CRA would not just upend a rule, it would prevent the agency—perhaps even one guided by progressive hands—from issuing a replacement rule in the future because of the statute's "substantially the same" restrictions.<sup>172</sup>

What CRA critics do not mention, however, is that Congress—if it really wanted to—could simply undo a resolution of disapproval.<sup>173</sup> When Democrats had strong majorities in Congress in 2009, they could have voted to extend new authority to the Department of Labor to reissue an ergonomics rule. However, they did not, and the legal uncertainty around

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166. See, e.g., 163 CONG. REC. H840-48 (daily ed. Feb. 1, 2017) (statement of Rep. Dan Beyer) ("Most importantly, the Congressional Review Act doesn't make sense here. If you want to trim a tree, you don't chop it down and bury it under cement so it will never grow again.").

167. *Id.*

168. See 163 CONG. REC. 611-32 (daily ed. Feb. 2, 2017).

169. 5 U.S.C. § 802(d)(2).

170. See 163 CONG. REC., *supra* note 168, at 611-32.

171. See *id.*

172. See Finkel & Sullivan, *supra* note 101, at 710.

173. See U.S. CONST. art. I.

the CRA likely limited the agency from attempting to reissue a new rule.<sup>174</sup> Regardless, what Congress takes away with a resolution of disapproval, it can restore by passing another law.<sup>175</sup>

*B. Senate Democrats Embraces the CRA*

The CRA was created to curb “onerous” federal regulations. Yet, as discussed above, that definition has different meanings to different political parties. For example, just five days after FCC published a rule rescinding net neutrality rules,<sup>176</sup> Democrats made net neutrality a voting issue in the Senate when Senator Edward Markey (D-MA) introduced a resolution of disapproval to rescind FCC’s rescission of open internet regulations.<sup>177</sup> The resolution of disapproval quickly garnered forty-eight cosponsors, far more than the thirty required to generate a discharge petition under the CRA.<sup>178</sup> By May 2018, there was a scheduled vote and it amassed fifty-two votes—enough for passage under the CRA.<sup>179</sup> No Democrat voted against the measure and two Republicans joined them.<sup>180</sup> To Senate Democrats and the moderate Republicans who joined them, the CRA was actually a pro-regulatory tool that would ensure internet consumer protections. Given the CRA’s general ability to strike down any regulation, including deregulatory actions, it is a tool for Congress, not necessarily a deregulatory cudgel, as detractors sometimes label the Act.

In the House, however, despite 169 cosponsors, Republican leadership had no desire to buck the president and a conservative FCC.<sup>181</sup> Although there might have been 200 votes for repeal, Republican leadership would never let a repeal go to a vote unless there were 218 Members on the resolution of disapproval. Although it did not pass, the net neutrality vote is one of only thirty CRA resolutions to ever pass a chamber of Congress. The FCC is an enticing target for progressives, as two other FCC rules were

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174. See Finkel & Sullivan, *supra* note 101, at 729.

175. See 5 U.S.C. § 801(b)(2) (1996) (allowing for the passage of another law as long as it is not in “substantially” the same form).

176. See GOV’T ACCOUNTABILITY OFF., MAJOR RULE REPORT ON RESTORING INTERNET FREEDOM (2018), <https://www.gao.gov/products/D18805#mt=e-report> [<https://perma.cc/J542-J4AT>].

177. See S.J. Res. 52, 115th Cong. (2018).

178. *Id.*; see also 5 U.S.C. § 802(c).

179. See Senate Roll Call Vote no. 97, 115th Cong. (May 16, 2018) (S.J. Res. 52, 115<sup>th</sup> Cong. (2018)), [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=115&session=2&vote=00097](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00097) [<https://perma.cc/Y3U3-B6FW>].

180. *Id.*

181. See H.R.J. Res. 129, 115th Cong. (2018).

struck down in the Senate as well, but they all ultimately failed to gain steam in the House.<sup>182</sup>

Implications of net neutrality repeal would have been broad had it passed. It would have restored “Title II” internet protections for consumers and content providers, but part of the original regulation included an important “transparency rule” that policymakers on both sides of the aisle supported.<sup>183</sup> Given that a substantially similar new rule from FCC cannot be issued, FCC would have been barred from issuing another transparency provision.<sup>184</sup> There will be an additional discussion of this below, but this is just one reason why some wonder whether net neutrality will be a “zombie regulation,” wandering “half alive and half dead” in regulatory purgatory.<sup>185</sup> Congressional action will now be required to resolve these issues. Avoiding such action may have been the original motivation of Democrats sponsoring the resolution in the first place.<sup>186</sup>

### 1. *Progressives Challenge the CRA in Court*

Discontent with the CRA may have reached its peak when the Center for Biological Diversity sued the Trump Administration, arguing the CRA was unconstitutional.<sup>187</sup> Like the earlier legislative veto struck down in *Chadha*, the plaintiffs argued the CRA violated both the bicameralism and presentment requirements and the “Take Care” Clause in Article II of the U.S. Constitution.<sup>188</sup>

Those contending the CRA’s constitutionality were dismissed at the time; their survival hinged on the approval from both congressional chambers and the president’s signature. After the Trump Administration filed a motion to dismiss, the federal court agreed as well.<sup>189</sup> Judge Sharon L. Gleason wrote:

[G]iven that the CRA is itself a law passed by Congress pursuant to the mechanisms outlined in the Constitution, [the plaintiff]

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182. *See id.*

183. *See* Will Rinehart, *The Congressional Review Act Might Not Fully Restore Net Neutrality, Leaving It a Zombie Regulation*, AM. ACTION F. (Apr. 19, 2018), <https://www.americanactionforum.org/insight/congressional-review-act-might-not-fully-restore-net-neutrality-leaving-zombie-regulation/> [<https://perma.cc/93HQ-CNJN>].

184. *Id.*

185. *Id.*

186. *Id.*

187. *See* Ctr. for Biological Diversity v. Zinke, 313 F. Supp. 3d 976 (D. Alaska 2018).

188. *Id.* at 980.

189. *See* Sam Batkins, *No, the CRA Isn’t Unconstitutional*, AM. ACTION F. (2018), <https://www.americanactionforum.org/insight/no-cra-isnt-unconstitutional/> [<https://perma.cc/ETW3-NUK7>].

does not adequately explain how the Take Care Clause mandates that the executive branch should retain authority that Congress, with Presidential approval, withdrew from it through [passage of a joint resolution].<sup>190</sup>

A CRA resolution itself does not violate bicameralism and presentment since it must pass both floors of Congress and get a presidential signature.<sup>191</sup> However, a creative plaintiff in this case argued that Congress needed to amend the underlying statute, not vitiate a rule amending the statute.<sup>192</sup> The plaintiffs also argued that the “substantially the same form” language in the CRA “creat[es] a large and unconstitutional shadow effect that undermines Interior’s rulemaking authority.”<sup>193</sup> This shadow effect is obviously real, but only because no agency has ever tested it.

Suppose an agency, for example, reissues an ergonomics rule that is a vastly scaled down version of its predecessor from 2001. If Congress does not use the CRA to rescind it, does that mean it is substantially different? Perhaps with technological changes and the passage of time, a rule must necessarily be different after eighteen years. These are all questions an executive could answer if it reissued a rule under the CRA—a move the CRA does not bar but establishes parameters to ensure agencies do not reissue the exact same rule to flout Congress.<sup>194</sup>

The plaintiffs went on to note that this effect violates the separation of powers between Articles I and II.<sup>195</sup> Judge Gleason dismissed this argument as well, noting the CRA “was also passed by both houses of Congress and signed into law by the President. Thus, the requirements of bicameralism and presentment are met and [plaintiff’s] separation of powers concerns fail to state a plausible claim for relief.”<sup>196</sup>

As a result of *Center for Biological Diversity v. Zinke*, the CRA appears safe from constitutional challenges for the near future. Yet, if roughly eighteen years pass and future agencies are shy about reissuing new rules, constitutional claims could arise again. It is more likely, however, that both sides of the aisle will use the CRA strategically to check the president.

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190. See *Zinke*, 313 F. Supp. 3d at 990.

191. *INS v. Chadha*, 462 U.S. 919, 946–51 (1983) (stating that the Constitution requires that all legislative action must pass the House and Senate and be signed by the President).

192. *Zinke*, 313 F. Supp. 3d at 983.

193. *Id.* (internal quotations omitted) (footnote omitted).

194. See 5 U.S.C. § 801(b)(1–2) (2018).

195. See *Zinke*, 313 F. Supp. 3d at 987–88.

196. *Id.* at 988.

## 2. *Public Interest Groups Urge Repeal*

Even after *Zinke* and limited Democratic embrace of the CRA, there were still progressive groups calling for Congress to abandon this tool. For example, the Center for Progressive Reform (CPR), a left-leaning policy organization, was heavily critical of Congress's use of the CRA during the Trump Administration.<sup>197</sup> In 2018, they released, "The Congressional Review Act: The Case for Repeal," documenting the public health and safety reasons for jettisoning the CRA.<sup>198</sup> The authors argued, "By unwinding the significant public health, safety, environmental, or financial security protections these safeguards would have otherwise delivered, each CRA resolution that is adopted boils down to a direct assault on the public interest."<sup>199</sup> Naturally, different political parties have unique views of what constitutes the "public interest."<sup>200</sup> For Democrats, this generally includes strong environmental and public safety rules.<sup>201</sup> For Republicans, the public interest may benefit from fewer "onerous" regulatory restrictions.<sup>202</sup>

Ironically, Public Citizen, another progressive policy organization, was vocal about the use of the CRA in 2017.<sup>203</sup> In 2017, two of its scholars wrote "Scrap the Congressional Review Act."<sup>204</sup> They argued:

The CRA should be repealed for two reasons. First, far from its promise of making Congress accountable to the public, in practice the CRA simply made Congress even more beholden to corporate interests. . . . The second reason to repeal the CRA is that it is so poorly drafted and vague that members of Congress cannot agree on how to interpret the plain language of the bill. For example, the CRA prohibits agencies from reissuing rules that are "substantially the same" as any rule overturned under the law, unless Congress passes a new law reauthorizing the rule. This draconian element of the CRA is one of the main reasons it should never have been used.<sup>205</sup>

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197. See Goodwin, *supra* note 50.

198. Thomas O. McGarity et al., *The Congressional Review Act: The Case for Repeal*, THE CTR. FOR PROGRESSIVE REFORM (May 2018), [http://progressivereform.org/articles/CRA\\_Repeal\\_Case\\_050218.pdf](http://progressivereform.org/articles/CRA_Repeal_Case_050218.pdf) [<https://perma.cc/8ATT-4UEJ>].

199. *Id.* at 1.

200. *Id.*

201. *Id.*

202. *Id.*

203. See Lisa Gilbert & Amit Narang, *Scrap the Congressional Review Act*, REG. REV. (Jun. 7, 2017), <https://www.theregreview.org/2017/06/07/gilbert-narang-scrap-congressional-review-act/> [<https://perma.cc/5SJR-CAPK>].

204. *Id.*

205. *Id.*

These are defensible policy arguments against the CRA, but no action better captures progressive angst with the CRA than Public Citizen's decision to support a resolution of the disapproval for FCC's net neutrality repeal just eight months after this op-ed.<sup>206</sup> Progressive groups may not love the use of the CRA at all times, but in this instance—when it is designed to produce a favorable policy outcome—resolutions of disapproval can come in handy. This is one glaring example of why, despite the number of progressives or conservatives in Congress, they will likely never vote to repeal the entire CRA.

The volume of CRA resolutions introduced by Democrats during the Bush Administration also supports this prediction.<sup>207</sup> It also tends to rebut the argument that the CRA solely acts to diminish public safety protections. Democrats introduced six of the thirteen CRA resolutions from 2001 to 2003.<sup>208</sup> Their reasons were varied: from expanding access to reproductive services, to ensuring new arsenic standards became effective more quickly.<sup>209</sup> Had these CRA resolutions succeeded, progressive groups likely would have praised the end result.

### C. *CRA Meets Guidance*

The CRA took its most expansive turn following a provocative *Wall Street Journal* editorial.<sup>210</sup> Shortly after President Trump took office, Kimberly Strassel wrote “A GOP Regulatory Game Changer.”<sup>211</sup> Virtually everyone knew Republicans could use the CRA to overturn a handful of rules issued in the last few months of the Obama Administration, but this hardly constituted a “game changer.”

Strassel did not limit her op-ed to just regulations from 2016.<sup>212</sup> This game changer involved overturning rules and guidance dating back to the beginning of the Obama Administration, or perhaps even earlier.<sup>213</sup> Strassel explained, “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

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206. See Pierce Stanley, *Over 50 Major Progressive Groups Urge Democrats to Support CRA Resolution to Restore Net Neutrality*, DEMAND PROGRESS (Feb. 28, 2018), <https://demandprogress.org/50-major-progressive-groups-urge-democrats-support-cra-resolution-restore-net-neutrality/> [<https://perma.cc/5WTN-J265>].

207. See *supra* notes 93–101 and accompanying text.

208. See *id.*

209. See H.R.J. Res. 32, 107th Cong. (2001); S.J. Res. 14, 107th Cong. (2001).

210. See Strassel, *supra* note 13.

211. *Id.*

212. *Id.*

213. *Id.*

Senate. The 60-day clock starts either when the rule is published or when Congress receives the report—whichever comes *later*.<sup>214</sup> According to the Pacific Legal Foundation’s Todd Gaziano, there were supposed to be consequences when agencies failed to notify Congress of a rule.<sup>215</sup>

Based on Strassel’s premise, any rule that an agency failed to submit to Congress would technically be ineffective, even though private actors might follow the rule.<sup>216</sup> The language of the CRA is somewhat clear, “Before a rule can take effect, the Federal agency promulgating such a rule shall submit to each House of Congress and to the Comptroller General a report . . . .”<sup>217</sup> Under Strassel’s logic, any prior rule, including guidance, could be challenged if an agency failed to submit it to Congress.<sup>218</sup> This would include measures dating back to 1996, when Congress passed the CRA.<sup>219</sup>

Naturally, there is always some skepticism whenever one reads a simple trick to undo countless controversial regulations. The Strassel op-ed was viewed cautiously even by supporters of aggressive CRA action.<sup>220</sup> However, it was enough to convince Senator Pat Toomey (R-PA) to issue a request to the GAO to determine whether past guidance could be considered a rule under the CRA.<sup>221</sup> On October 19, 2017, roughly nine months after the Strassel op-ed, the GAO found that past guidance on leveraged lending was “a general statement of policy and is a rule under CRA, which must be submitted to Congress for review.”<sup>222</sup> Like thousands of rules and other guidance documents, the leveraged-lending rule was never submitted to Congress, giving Republicans some legal leverage to undo past guidance.<sup>223</sup>

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214. *Id.* (emphasis in original).

215. *See* Strassel, *supra* note 13.

216. *Id.*

217. 5 U.S.C. § 801(a)(1)(A) (2018).

218. *See* Strassel, *supra* note 13.

219. *Id.*

220. This included many in the Washington, D.C. regulatory community who were skeptical the CRA could be used as a tool to overturn regulation from years prior. *See* Clyde Wayne Crews, Jr., *Lame Duck Update: Here’s How The 115th Congress Tried To Streamline Agency Guidance Documents*, FORBES (Dec. 4, 2018), <https://www.forbes.com/sites/waynecrews/2018/12/04/lame-duck-update-heres-how-the-115th-congress-tried-to-streamline-agency-guidance-documents/#26962e6c5f24> [https://perma.cc/V5N4-TSRY].

221. *See* U.S. GOV’T ACCOUNTABILITY OFF., B-329272, LETTER TO SENATOR TOOMEY (Oct. 19, 2017), <https://www.gao.gov/products/B-329272> [https://perma.cc/S34C-U9F4].

222. *Id.*

223. *Id.*

### 1. *Partisan Implications*

With the legal arguments in place, Republicans quickly scoured their caucus for a past guidance document they could rescind.<sup>224</sup> Since virtually all guidance fails to make its way to Congress, the universe was vast. Republicans settled on a CFPB rule on auto lending standards.<sup>225</sup>

Senator Jerry Moran (R-KS) introduced the resolution of disapproval on March 22, 2018; it became law less than two months later.<sup>226</sup> The debates in Congress around overturning a guidance document issued in 2013 (well outside of the traditional carryover period stipulated by the CRA) were especially contentious.<sup>227</sup> Senator Sherrod Brown (D-OH) argued this regulatory game changer was an illegal loophole to further push a deregulatory agenda. He argued:

[T]oo much time has passed for Congress to use the Congressional Review Act to roll back other protections the last administration put in place, but they now want to open up a whole new idea. They want to use a legal loophole to interfere with potentially thousands more Federal decisions, potentially going back as far as 20 years.<sup>228</sup>

Despite pleas from Democrats to avoid axing another federal rule—this time issued in 2013, not 2016—Republicans prevailed on their vote to overturn guidance: fifty-one to forty-seven.<sup>229</sup> In the House, the story was the same. However, the House did not vote until three weeks later.<sup>230</sup> Representative Maxine Waters (D-CA) argued that using the CRA to strike down old guidance “sets a dangerous precedent.”<sup>231</sup> She went on to note, “While congressional Republicans so far have been very active in using the Congressional Review Act to tear down important regulations that protect Americans, today they are expanding their harmful efforts even further to now go after regulatory guidance issued by the Consumer Bureau years ago.”<sup>232</sup> Despite these arguments, predictably, the House voted along party lines to disapprove CFPB’s guidance: 234–175.<sup>233</sup>

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224. This was based on personal experiences, as congressional staffers contacted me to look for notable guidance that agencies never submitted to Congress.

225. See S.J. Res. 57, 115th Cong. (2018).

226. See Pub. L. No. 115-172, 132 Stat. 1290 (2018).

227. See 164 CONG. REC. S2,200–11, (daily ed. Apr. 17, 2018).

228. *Id.*

229. See Sen. Roll Call Vote No. 76, 115th Cong. (2018).

230. See S.J. Res. 57, 115th Cong. (2018).

231. See 164 CONG. REC. H3, 815–23 (daily ed. May 8, 2018).

232. *Id.*

233. See H. Roll Call Vote No. 171, 115th Cong. (2018).

## 2. *Structural Implications*

Although the partisan implications were clear from the precedent Republicans set overturning guidance, it is not clear whether Congress was aware of the magnitude of their action. Now the party in power could reach back years to overturn guidance never submitted to Congress. The structural implications are profound from a balance-of-power perspective.

Consider what this action does for every future executive, regardless of political party. Guidance, already reviewed by agency attorneys, now will likely go through another round of critical review and be sent to Congress. Otherwise, a future Congress could not only rescind it, but also ensure the rule will never be reissued in “substantially the same form.” One could argue this largely forgotten guidance vote is already changing agency behavior. Consider, according to the GAO, the Trump Administration has submitted sixteen guidance documents to the GAO and Congress.<sup>234</sup> One CRA resolution has proven to be enough to at least partially change agency behavior. This is far more than just undoing an agency rule in a vacuum; it is enough to change both the substance—through signaling and barring future agency guidance—and procedure of the executive branch.

The implications of Congress striking down this little-known CFPB rule should be examined further by scholars, but it is a near certainty that even Democrats will avail themselves of this power if they gain control of both chambers of Congress and the Presidency. Again, this is a development practically no one predicted at the outset of the CRA wave.

In the future, a Democratic president could have his or her agencies overturn a Trump guidance document, but using the CRA to prevent conservatives from issuing substantially similar guidance in the future is an incredible power that Congress has only begun to exploit. The ability to nullify major regulatory guidance—indeed virtually every action of a president—is a notable shift in the balance of power between the executive and legislative branches. It is unlikely President Trump will tout this accomplishment as a regulatory landmark, but his agencies are now on notice.

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234. See *Database of Rules*, GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/legal/other-legal-work/congressional-review-act#database> (use keyword “guidance”; Date Published in Federal Register “01/20/2017” to “08/30/2018”; Rule Effective Date ending “12/31/2019”; Date Received by GAO ending “08/30/2018”) [<https://perma.cc/K69E-PL43>].

## V. WHAT'S NEXT FOR THE CRA

The CRA already has lived a life longer than many expected in the Trump Administration. It was employed sixteen times, dwarfing original expectations.<sup>235</sup> It is clear that Congress will continue using the CRA to nullify regulations in the future. The question is to what extent? Republicans will surely use it to strike down what they view as “onerous” regulations. Democrats, as evidenced from their push to stop FCC’s repeal of net neutrality, will employ the CRA to the extent the rescission of rules can ensure a progressive end.

This final section offers some predictions for how future legislators will use the CRA. It will cover possible mass changes in how Congress reviews executive guidance, the role of independent agencies under the CRA, the partisan lens of the law, and how courts might interpret the CRA’s “substantially similar” bar.

### A. *Guidance in Jeopardy*

If the vote to overturn CFPB’s auto lending guidance taught future presidents anything, it is that the White House counsel’s office and agency attorneys will have to add a layer of scrutiny on all executive and administrative guidance. Once an aberration, the GAO’s opinion on guidance and Congress’s vote demonstrates that most future guidance documents are subject to the CRA.

Based on the GAO’s opinion, not necessarily all guidance is subject to repeal—just guidance covered by the CRA.<sup>236</sup> In its opinion, the GAO noted that the definition of a rule under the CRA is broader than the Administrative Procedure Act’s (APA) notice and comment requirements.<sup>237</sup> Accordingly, some agency actions of general policy can fall to the level of guidance under the APA, but still be considered rules under the CRA.<sup>238</sup>

Fortunately, for those seeking a more complete history of how guidance should be treated under the CRA, its authors gave fairly clear instructions. In the legislative history of the CRA, Senator Nickles was explicit that guidance documents should apply.<sup>239</sup> He noted:

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235. *See id.*

236. *See GAO Issues Opinions on Applicability of Congressional Review Act to Two Guidance Documents*, *supra* note 14.

237. *See id.*

238. *See id.*

239. *See* 142 CONG. REC. S3, 683–87 (daily ed. Apr. 18, 1996) (providing statements from Sens. Nickles, Reid, and Stevens).

[T]here is a body of materials that fall within the APA definition of a ‘rule’ and are the product of agency process, but that meet none of the procedural specifications of the first three classes [formal rulemakings, informal rulemakings, administrative staff manuals]. These include guidance documents . . . .<sup>240</sup>

With this statement, the architects of the CRA made clear that guidance is subject to the CRA. If guidance applies, then agencies must follow the CRA and submit a report to Congress and GAO. This is hardly a high bar to climb for agencies, but as with anything in administrative law, process matters.

Observers should note the GAO’s intimate role in applying the CRA. The GAO determines whether guidance applies, keeps track of major rules, and receives all rules submitted.<sup>241</sup> The history of the GAO’s involvement in adjudicating what is subject to the CRA actually dates back to September 1996, six months after the CRA’s passage, according to the Congressional Research Service (CRS).<sup>242</sup> In their research, CRS noted that the GAO has issued thirteen opinions on whether guidance documents are subject to the CRA.<sup>243</sup> In nine of the thirteen cases, the GAO found that the guidance document was a rule within the context of the CRA.<sup>244</sup> The CRS opinion also was clear on what will happen if agencies fail to recognize the CRA covers guidance: “If a joint resolution disapproving [a guidance document] were to be enacted, the guidance would immediately no longer be in effect and the agencies would be prohibited from issuing guidance that is ‘substantially the same.’”<sup>245</sup> This finding only applies to guidance documents that act as general statements of policy, however.<sup>246</sup> In other words, they are “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”<sup>247</sup>

Past congressional votes to overturn guidance, the GAO’s opinions, and CRS’s research provide ample, legitimate reasons for future presidents

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240. *Id.*

241. See *GAO Issues Opinions on Applicability of Congressional Review Act to Two Guidance Documents*, *supra* note 14; see also *Database of Rules and FAQs*, GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/legal/other-legal-work/congressional-review-act> [<https://perma.cc/PHT4-7BX7>].

242. See *Congressional Research Service Report R43992*, EVERYCRSREPORT (2016), [https://www.everycrsreport.com/files/20171025\\_IN10808\\_76b115b319aff817387c33bd6e786d2e3fd06cb4.html](https://www.everycrsreport.com/files/20171025_IN10808_76b115b319aff817387c33bd6e786d2e3fd06cb4.html) [<https://perma.cc/US69-X75X>].

243. *Id.*

244. *Id.*

245. *Id.*

246. *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, n.31 (1979) (internal quotation and citation omitted)).

247. *Id.*

to treat future guidance like ordinary rulemaking and follow the CRA's strictures.

*B. Independent Agency Limbo*

When President Trump took office in January 2017, some of President Obama's appointees were still heading independent agencies—most notably the CFPB Director Richard Cordray.<sup>248</sup> At the time, there was little discussion of nullifying rules beyond the CRA's carryover period covering measures issued late in the Obama Administration. However, political circumstances quickly changed that calculus.

The day after CFPB published its rule on arbitration agreements, Congressman Keith Rothfus (R-PA) introduced a resolution of disapproval.<sup>249</sup> The rule was overturned roughly three months later.<sup>250</sup> Although the carryover period had expired for Obama-era rules, Congress was looking for any regulation with which it disagreed.

This scenario is likely to play out during future administrations. The Federal Trade Commission (FTC) and the CFPB examples above are illustrative. It took roughly sixteen months for President Trump to fill FTC with a new slate of commissioners.<sup>251</sup> During future presidential transitions, holdover appointees from independent agencies still have power to regulate. Until 2017, none of their regulations had ever been struck down under the CRA.<sup>252</sup> Given Congress's track record in 2017 and 2018, future independent agency appointees will likely refrain from regulating if they fear Congress and the president may object to new regulations.

Granted, presidential transitions already are times of change in cabinet and independent agencies, but the CRA's institutionalization will make future agencies think twice about issuing controversial rules until the president has had a chance to nominate and confirm new appointees. Otherwise, as CFPB learned with its arbitration rule, more than two years'

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248. See Renae Merle, *Richard Cordray Defends CFPB Arbitration Rule Amid Speculation He Plans to Run for Ohio Governor*, WASH. POST (Aug. 22, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/08/22/richard-cordray-defends-cfpb-arbitration-rule-amid-speculation-he-plans-to-run-for-ohio-governor/> [https://perma.cc/NAJ3-YWRU].

249. See Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (codified at 12 C.F.R. pt. 1040); H.R.J. Res. 111, 115th Cong. (2017).

250. See H.R. Roll Call Vote No. 412, 115th Cong. (2017).

251. See Harper Neidig, *Senate Confirms Full Slate of FTC Commissioners*, THE HILL (Apr. 26, 2018), <https://thehill.com/policy/technology/385096-senate-confirms-full-slate-of-ftc-commissioners> [https://perma.cc/J8KY-7QLX].

252. See Dudley, *supra* note 153.

worth of work will be undone in a matter of weeks.<sup>253</sup> The CRA's recent renaissance has taught the executive branch that all agencies are on notice—both cabinet and independent.

*C. Beyond “Substantially the Same Form”*

Other legal commentators and scholars have written about the fate of overturned rules and whether the CRA permits “substantially similar” rules from returning.<sup>254</sup> Much of this literature has been hypothetical in nature—speculating on what future courts might do with a new regulation that is “substantially [in] the same form” as a rule Congress overturned via the CRA.<sup>255</sup> Now that there are sixteen regulations overturned under the CRA process, as opposed to just one, and the process has become institutionalized, agencies are far more likely to revisit at least one overturned regulation in the future.<sup>256</sup> Given the controversial nature of the regulations rescinded, a lawsuit would likely result, and we will finally have some judicial clarity on what constitutes a substantially dissimilar rule under the CRA.

As a threshold matter, there is some disagreement about the justiciability of the CRA.<sup>257</sup> CRA Section 805 provides: “[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review.”<sup>258</sup> The CRA's authors were clear in their legislative history that courts were not to intervene during the legislative process or assume

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253. See *Unified Agenda and Regulatory Plan Search Results*, OFF. MGMT. & BUDGET, <https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=3170-AA51> [<https://perma.cc/K3YM-WFYB>]. Note that the Arbitration Rule was introduced in the spring of 2015. It was not finalized until July 19, 2017.

254. See Finkel & Sullivan, *supra* note 101.

255. *Id.* at 710.

256. House Republican Conf., *supra* note 4.

257. See MAEVE P. CAREY ET AL., THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 18 (2016), <https://crsreports.congress.gov/product/pdf/R/R43992> [<https://perma.cc/4ESW-EP4S>]. The report notes:

Section 805 of the CRA states that ‘[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review.’ Two federal appeals courts and several federal district courts have examined this section and determined that it unambiguously prohibits judicial review of any question arising under the CRA.

*Id.* (footnotes omitted). Yet, this history relates to Congress' actions during the CRA process, not necessarily whether an overturned rule is substantially similar.

258. 5 U.S.C. § 805 (2018).

congressional intent from failing to adopt a resolution of disapproval.<sup>259</sup> This language does not mean that a court must refrain from determining whether an agency issued a substantially similar rule. Otherwise, if courts could not review new agency actions to restore rules and Congress generally agreed with the new rules, injured parties would have no recourse to challenge a rule almost identical to the original.

Moreover, the CRA's authors were clear that the courts would have some role in adjudicating claims arising from the law.<sup>260</sup> Senator Nickles noted, "[A] court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule."<sup>261</sup> This seems clear enough that courts can have a role in deciding what is substantially the same and what is substantially different. Senator Nickles continued, "The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect."<sup>262</sup> If courts do have power to examine new rules after a resolution of disapproval, the big question is how should they accomplish this task?

There is some instructive language in the CRA, but not much. When CRS was tasked with answering this question, they gave a varied response. "[S]ameness could be determined by scope, penalty level, textual similarity, or administrative policy, among other factors."<sup>263</sup> The CRS's authors arguably provided the most helpful hint: "In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land."<sup>264</sup> In other words, looking to the congressional record as to why Congress struck down a rule might be most illustrative. However, if the Congressional Record is sparse, or if Congress only spoke of removing an onerous regulation *in toto*, divining intent will not be easy for a judge.

The CRA's drafters also established a hierarchy of discretion, from broadest to most restrictive, relying on the text and grant of authority of the underlying statute.<sup>265</sup> Three important points emerge from that statement.

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259. See 142 CONG. REC. S3, 683-87 (daily ed. Apr. 18, 1996) (statement by Sens. Nickles, Reid, and Stevens).

260. See *id.*

261. See *id.*

262. See *id.*

263. MAEVE P. CAREY ET AL., THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 18 (2016), <https://crsreports.congress.gov/product/pdf/R/R43992> [<https://perma.cc/4ESW-EP4S>].

264. See 142 CONG. REC. S3, 683-87 (daily ed. Apr. 18, 1996) (providing statements from Sens. Nickles, Reid, and Stevens).

265. See *id.*

First, if the law authorizing the disapproved rule provided broad discretion to the agency, then regulators would likely have similarly expansive authority to issue a substantially different rule.<sup>266</sup> That information is helpful, but it does not clarify where to draw the line between substantial and minor differences.

Second, if the original law that authorized the initial agency action did not mandate a particular rule, then regulators have discretion “not to issue any new rule.”<sup>267</sup> While this does not directly address how to interpret “substantially similar,” it does illustrate how the CRA’s drafters placed great importance on congressional intent—with respect to whether a given agency could return to the regulatory drawing board. If Congress were to strike down a new net neutrality rule under the CRA, for example, then the FCC could choose not to issue another rule at all because no statute specifically requires the FCC to do so.<sup>268</sup> That second category is important because a substantial fraction of federal rules do not have specific mandates and their underlying organic statutes are often silent on specifics. For example, the ergonomics rule that was struck down in 2001 was not explicitly authorized in statute.<sup>269</sup> The Department of Labor initiated the rule on its own discretion.<sup>270</sup>

A third, and perhaps the most important, point is that when Congress was explicit in the regulation’s authorizing statute and the grant of power to a federal agency was “narrowly circumscribed, [then] the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule.”<sup>271</sup> This can be interpreted to mean that if, for example, Congress states that the level of particulate matter in the atmosphere should be limited to twelve micrograms per cubic meter and a CRA measure strikes that down, the agency is prohibited from issuing the standard again.

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266. *Id.*

267. *Id.*

268. *See, e.g.*, Henry Goldberg, *FCC’s Net Neutrality Decision Corrects Telecom Act Mistakes*, THE HILL (Mar. 18, 2015), <https://thehill.com/blogs/congress-blog/technology/235985-fccs-net-neutrality-decision-corrects-telecom-act-mistakes> [https://perma.cc/X6QH-7UDP].

269. *See* Ergonomics Program, 65 Fed. Reg. 68,261, 68,267 (Nov. 14, 2000) (“In the absence of a federal OSHA ergonomics standard, OSHA has addressed ergonomics in the workplace under the authority of section 5(a)(1) of the OSHAct. This section is referred to as the General Duty Clause and requires employers to provide work and a work environment free from recognized hazards that are causing or are likely to cause death or serious physical harm.”).

270. *Id.*

271. *See* 142 CONG. REC. S3, 683–87 (daily ed. Apr. 18, 1996) (providing statements by Sens. Nickles, Reid, and Stevens).

The senators' explanation of this third category has direct relevance for the measures Congress has struck down recently. For instance, Section 1504 of the 2010 Dodd–Frank financial reform legislation mandated that the SEC require resource extraction issuers to disclose payments to foreign governments.<sup>272</sup> That section was explicit about the information that companies had to report.<sup>273</sup> Yet, Congress struck down the rule.<sup>274</sup> How do the attorneys at the SEC craft a new rule that follows section 1504, yet is somehow substantially dissimilar from the rule Congress struck down? It is an unenviable position and one that does not lend itself to an easy answer. There is likely no “right answer.” If presented before a court, a judge will have to be the first to jump into these murky legal waters.

A quantitative versus qualitative test might be appropriate for future courts.<sup>275</sup> Both do not necessarily answer the “substantially similar” question, but they do provide a framework. For instance, take the particulate matter example. If an agency codified twelve micrograms per cubic centimeter and Congress rescinded it under the CRA, what is a substantially dissimilar rule? Is five, ten, fifteen, or twenty? The answer to this question might be unknowable, but it would likely lean on rules of reason, conceptions of agency deference, and congressional intent. If many years have passed since the CRA resolution, tightening the standards to just ten micrograms per cubic centimeter might not be viewed as substantially similar. There are a host of factors to consider and they are regulation-specific and do not lend themselves to an overarching test.

The qualitative rule (i.e. a regulation without a set numerical formula for the private sector) might actually be easier to discern. Courts also will have to determine congressional intent, but at least they will not have a rigid or finite numerical formula they must navigate. The Volcker Rule is an example of a measure without quantitative guidelines. However, there are no easy answers for what constitutes a substantially dissimilar Volcker Rule either.

In sum, where there is little agency discretion and Congress has explicitly delegated certain tasks to an agency, even if the final rule comports with original intent, Congress can change its mind and strike down the rule. How can an agency issue a substantially dissimilar rule while concurrently

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272. See Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,359 (July 27, 2016).

273. *Id.*

274. See H.R.J. Res. 41, 115th Cong. (2017).

275. See Sam Batkins & Adam J. White, *Should We Fear Zombie Regulations*, REG. MAG. (2017), <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2017/6/regulation-v40n2-2.pdf> [<https://perma.cc/QNC6-PRSW>].

following the original intent of the statute? It would appear the most recent actions of Congress would prevail, and the rule would be barred until Congress granted new authority to the agency.

## VI. CONCLUSION

The CRA has enjoyed a renaissance during the Trump Administration. Although Republicans have employed the CRA primarily to repeal regulations and guidance from the Obama Administration, increasingly, Democrats have started to use the CRA to check President Trump. The CRA's explosive growth has led to the institutionalization of the law—for both political parties. It is now a weapon employed with each controversial new rule. More than a political tool, however, the increased use of the CRA has helped to rebalance power between the legislative and executive branches. In the future, we can expect both parties will wield the law to check the executive in their attempts to strike back against federal regulation.

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