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Stars Align for the Congressional Review Act

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Enacted over 20 years ago as part the "Contract with America" package of reforms, the Congressional Review Act (CRA) has sat largely unused in the congressional toolbox. This law sought to make it easier for Congress to repeal regulations, but only once has it been successfully used to do so. That is about to change. During the next few months, the CRA could become one of the most significant congressional weapons in the fight against the rising amount of red tape.

While Congress has always had the power to stop any regulation it disapproves of, the CRA provides a streamlined process for Congress to disapprove a final rule[1] without threat of filibuster. Moreover, it bars agencies from re-imposing the same or similar rule afterward. Because of this, the CRA could in many cases provide a more effective way to address newly imposed final rules than even direct repeal of a final rule by federal agencies. The CRA's effectiveness could, however, be strengthened by use of explanatory "preambles."

Congress should make the CRA a frequently used weapon in the fight against red tape.

The CRA Review Process

The CRA process, which applies to both "major" and "non-major" rules[2] begins with a notification to Congress from the agency of the adoption of a new regulation. This triggers a 60-day period in which Congress[3] can introduce a "resolution of disapproval" of a rule.

Importantly, this 60-day period is calculated in terms of "legislative" days,[4] not actual calendar days. Thus, as calculated by the Congressional Research Service (CRS), this means that rules adopted as far back as June 3, 2016, are still within this review period. (This date is subject to change.)[5] Rules that are still within this 60-day period when Congress adjourns will have a fresh 60-day review period at the start of the next Congress. As explained by the CRS:

> [I]f a final rule is submitted to Congress either less than 60 days of session in the Senate or less than 60 legislative days in the House of Representatives before Congress adjourns a session *sine die*, a new period for congressional review of that rule becomes available in the next session of Congress.[6]

This ensures that the current Congress or the successive Congress will enjoy a full 60 days to review and challenge questionable rules.

A generally concurrent 60-day period is also provided by the CRA in which Congress—specifically the Senate—can exercise a set of streamlined procedures to repeal a rule (a fast-track process), the most important of which is the barring of filibusters.[7] This is the primary procedural benefit of the CRA.[8]

As part of this process, the CRA also provides Senators a fairly easy way to move a resolution of disapproval onto the floor. If a committee has had a

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resolution pending for more than 20 legislative days, it can be brought to the floor for a vote if 30 Senators support a petition to do so.[9]

A rule that does not qualify for the Senate's fast-track process can still be disapproved under the CRA, although the benefits of the fast-track process (such as avoiding a filibuster) would not be available in such a case.

As with other legislation, the CRA resolution, once passed by both the House and Senate, must be presented to the President for signature or veto. If the President signs the CRA resolution into law, or Congress overrides a presidential veto,[10] the rule is deemed "disapproved" and will not take effect. From that time forward, the agency cannot promulgate any rule which is "substantially the same" as the one disapproved.[11]

Under the law as currently written, the CRA does not seem to allow multiple rules to be repealed in one resolution. But H.R. 5982, the "Midnight Rules Relief Act," would allow Congress to do so during the final year of a presidential term.[12] The Senate has yet to approve this reasonable change, however.

A Largely Unused Tool

The CRA, authored by Representative David McIntosh (R–IN), was signed into law by President Clinton in 1996. It was accompanied by praise and high expectations from both sides of the aisle. A statement by Senator Harry Reid (D–NV) and two other Senators proclaimed:

> This legislation will help to redress the balance [between the branches], reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.[13]

Then-Senator Carl Levin (D–MI) similarly announced: "Now we are in a position to do something ourselves,"[14] adding that "[i]f a rule goes too far afield from the intent of Congress in passing the statute in the first place, we can stop it. That's a new day, and one a long time incoming."[15]

Despite this fanfare, the CRA has rarely been used. From the law's passage in 1996 to August 2011, agencies have submitted 1,029 major rules and over 56,000 non-major rules to Congress. In that peri-

1. The CRA appears to cover only final rules, including interim final rules.
2. A major rule is defined generally as a rule with $100 million or more in expected economic impact, and other rules with economic effects of certain levels. The effective date of major and non-major rules differs under the CRA. See Maeve P. Carey, Alissa M. Dolan, and Christopher M. Davis, "The Congressional Review Act: Frequently Asked Questions," Congressional Research Service *Report for Congress* No. 43992, p. 9, https://fas.org/sgp/crs/misc/R43992.pdf (accessed December 15, 2016).
3. The 60-day period starts once the rule has been received by Congress. See ibid., p. 12.
4. In the House of Representatives, these days are referred to as "legislative days." In the Senate, it is "days of session."
5. Christopher M. Davis and Richard S. Beth, "Agency Final Rules Submitted After June 2, 2016, May Be Subject to Disapproval," Congressional Research Service *Insight* No. 10437, November 30, 2016, https://fas.org/sgp/crs/misc/IN10437.pdf (accessed December 15, 2016).
6. Ibid.
7. Also known as the "action" period, this "fast track" period" is also re-set at the beginning of a new Congress.
8. "In order to be eligible for the "fast track" procedures in the Senate, that body must act on a disapproval resolution during a period of 60 days of Senate session which begins when the rule is received by Congress and published in the *Federal Register*. After that period, the measure would have to be considered under normal Senate rules." Carey, Dolan, and Davis, "The Congressional Review Act: Frequently Asked Questions," p. 14.
9. Filibusters are not typically permitted in the House of Representatives for any legislation.
10. The presidential role in adoption of a CRA resolution is a constitutionally required element of the legislative process. See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).
11. Carey, Dolan, and Davis, "The Congressional Review Act: Frequently Asked Questions."
12. Midnight Rules Relief Act of 2016, H.R. 5982, 114th Cong., 2nd Sess., https://www.congress.gov/bill/114th-congress/house-bill/5982?q=%7B%22search%22%3A%5B%22h.r.+5982%22%5D%7D&r=1 (accessed December 15, 2016).
13. *Congressional Record*, April 18, 1996, p. S3683.
14. "The Mysteries of the Congressional Review Act," *Harvard Law Review*, Vol. 122, No. 8 (June 2009), pp. 2162–2183, http://harvardlawreview.org/wp-content/uploads/pdfs/vol_122_the_mysteries.pdf (accessed December 15, 2016).
15. Ibid.

od, 72 CRA resolutions of disapproval relating to 49 major rules were introduced. Of these, only three passed both Houses,[16] and only one was enacted.[17] Congress has adopted a number of resolutions of disapproval since 2011, but all have been vetoed.

The primary reason for this disuse is simple: Few presidents are willing to disapprove rules imposed by their own Administration.

In fact, the one instance in which the CRA has been successfully used involved an ergonomics rule adopted in 2000 during the waning days of the Clinton Administration. In early 2001, incoming President George W. Bush signed a resolution of disapproval passed by a largely Republican Congress.[18]

Using the CRA to Cut Red Tape

In 2017, however, the stars seem aligned for the CRA to play a much greater role. Both the House and the Senate are in Republican hands, with a Republican President to be inaugurated in January. Congressional leaders as well as the President-elect have denounced what they agree is massive regulatory overreach by the outgoing Obama Administration.

Adding to this alignment is the sheer number of rules eligible for disapproval under the CRA. Given the active pace of rulemaking over the past few months, many dozens of major rules could be vulnerable to a CRA challenge. These include, among others:

- Rules under the Dodd–Frank financial regulation law,
- Sick leave for federal contractors,
- Offshore drilling rules, and
- Energy mandates for home appliances.

It is a truly target-rich environment and a historic opportunity for Congress to limit the growth of red tape.

Avoiding Hurdles of Repealing Rules

Many of the CRA-eligible rules could also be rescinded by the new Administration on its own authority without involving Congress. But this would require the agency to complete a notice and comment process under the Administrative Procedure Act, and to identify judicially defensible reasons for repeal.[19] And the resulting changes are certain to get bogged down in the courts for years.

If Congress uses the CRA to block costly new rules, these hurdles can be avoided. Plus, the CRA provides the additional bonus of barring the promulgation of any "substantially similar rules."

The Value of Preambles

For the most part, the form of a resolution of disapproval is straightforward. But there are some areas that need consideration. One of these is using "preambles," statements that can be included in the body of the resolution stating the resolution's purpose and the objections Congress has to the rule in question.

A preamble is the language usually at the start of bills that include the "whereas" clauses which explain the intent and general findings of Congress. A preamble does not have the weight of the bill's other text, but it can help when a law has ambiguities.[20]

Preamble language could provide guidance to the agency as to what Congress is objecting to when it comes to a rule. For example, with regard to greenhouse gas regulations, Congress could clarify it is not merely objecting to how a greenhouse gas rule works, but also whether the agency has the power to regulate greenhouse gases in the first place.

Some question, however, remains whether such statements can be included in a CRA resolution. The

16. One of these involved the disapproval of a deregulatory action by the Federal Communications Commission.
17. Morton Rosenberg, "The Critical Need for Effective Congressional Review of Agency Rules: Background and Considerations for Incremental Reform: A Report Prepared for the Administrative Conference of the United States," Administrative Conference of the United States, July 18, 2012, https://www.acus.gov/sites/default/files/documents/CRA%20_%20Final%20Report.pdf (accessed December 15, 2016).
18. The House of Representatives was in Republican hands after the election, while the Senate was split evenly.
19. See, for example, "With the Stroke of a Pen: What Executive Branch Actions Can President-Elect Trump 'Undo' on Day One?" Congressional Research Service *Legal Sidebar*, November 22, 2016, https://fas.org/sgp/crs/misc/stroke.pdf (accessed December 15, 2016).
20. Larry M. Eig, "Statutory Interpretation: General Principles and Recent Trends," Congressional Research Service *Report for Congress* No. 97-589, December 19, 2011, https://fas.org/sgp/crs/misc/97-589.pdf (accessed December 15, 2016).

CRS, for instance, states that it is unclear whether such statements can enjoy the fast-track treatment given to the resolution itself.[21] It is not expressly prohibited and the CRS indicates that use of a preamble would be a question for the parliamentarians of the House and Senate.[22]

However, a preamble could be a crucial aid in determining congressional intent for purposes of applying the "substantially the same" test to disapproved rules. The preamble is certainly not going to expand or diminish the CRA's "substantially the same" standard, but a preamble can provide some clarity. Further, while certainly an open question, a preamble could address an ambiguity in an existing statute, which might help provide clarity to courts on how it should interpret statutory text.

Next Step: The REINS Act

Further legislative reform is needed. Despite the rare alignment of circumstances that will make the CRA so valuable in 2017, the underlying shortcoming of the Act remains. Congress needs to ensure that the rules governing Americans are necessary and proper every year, not just in presidential transition years.

To do this, Congress should be required to adopt a "resolution of approval" before a major regulation can take effect, rather than be limited to "resolutions of *dis*-approval." This approach, embodied in the Regulations from the Executive in Need of Scrutiny (REINS) Act[23] passed by the House in 2015, would ensure that no major rule is imposed on Americans without the consent of the body constitutionally responsible for making the laws.[24]

Conclusion

Both Congress and the President will have an opportunity in 2017 to roll back costly new rules that have been and are continuing to be imposed on the American people by the outgoing Administration. One powerful tool they can use to accomplish this task is the Congressional Review Act. This long-neglected tool can provide Congress with the power to swiftly remove months of Obama Administration rules from the books and to help ensure that they do not come back. Congress should not hesitate to use the CRA extensively.

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21. Carey, Dolan, and Davis, "The Congressional Review Act: Frequently Asked Questions."
22. Ibid.
23. Regulations from the Executive in Need of Scrutiny Act of 2015, H.R. 427, 114th Cong., 1st Sess., https://www.congress.gov/bill/114th-congress/house-bill/427/text (accessed December 15, 2016).
24. See James L. Gattuso, "REINS Act of 2013," testimony before the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, Committee on the Judiciary, U.S. House of Representatives, Mach 5, 2013, http://www.heritage.org/research/testimony/2013/reins-act-of-2013.