

Resolution of Disapproval

The Congressional Review Act became a force against public interest rules when Republicans took over the White House in 2017 while retaining control of Congress. Let's get rid of this beast before the next time the law permits one party to sweep out the other's duly promulgated regulations



James Goodwin is a senior policy analyst with the Center for Progressive Reform, where he has worked on administrative law and regulatory policy matters since 2008.

Before January 2017, few had ever heard of the Congressional Review Act. The CRA makes it easy for narrow majorities in Congress to repeal certain kinds of rules and other agency actions, like guidance documents. By May of that year, though, the once-obscure law's profile had been elevated quickly, earning it intense veneration or vilification — depending on one's ideological predisposition toward regulation in the public interest.

Opposition to regulation of business has long been a key plank of the Republican policy platform, and starting in January 2017, with the party enjoying unified control of the federal policymaking branches for the first time in over a decade, its members quickly demonstrated how powerful a tool the CRA is for advancing that objective. During the first few months of the 115th Congress, Republican lawmakers deployed the act on 14 occasions to roll back a wide variety of regulatory safeguards issued during the final few months of the Obama administration, including several aimed at protecting the environment and public health.

This was an unusual move. The CRA had only been used once before, during the first few months of the George W. Bush administration, when it was invoked to repeal an Occupational Safety and Health Administration rule that had been issued late in the Clinton administration to protect workers from ergonomic injuries.

But two years ago, after Donald Trump won the White House and GOP lawmakers used the law sev-

eral times during its defined window of opportunity, Republicans continued to search for ways to expand the law's reach. Before the close of the 115th Congress, they had repealed two more agency actions through unprecedented applications of the CRA's expedited legislative procedures.

The return of divided government following the Democratic Party's takeover of the House of Representatives in the 2018 mid-term elections makes it unlikely that the CRA will be used successfully during the current Congress. It appears, though, that the die has already been cast for the future of this dangerous law, and it is likely to herald a major shift in the future dynamics of how Congress operates — at least as long as the body remains mired in partisanship and dysfunction. The alternative is for Congress to get rid of this ugly beast now that its anti-democratic results are at last obvious, by repealing the dangerous and ill-conceived statute.

One of the enduring legacies of the last Congress, it seems, will be the normalization of the CRA as a political weapon, and the law's use and abuse may in retrospect become recognized as a defining feature of our current hyperpartisan era. Accordingly, it is important to understand how the act works and to take stock of how it can affect the task of policymaking, especially with regard to environmental and public health protections.

The primary function of the CRA is to create *resolutions of disapproval*, a special form of legislation that serves a unique but limited purpose: the repeal of agen-

cy regulations and guidance documents. To be sure, there is nothing constitutionally objectionable about Congress's reviewing and repealing agency regulations that implement statutes the senators and representatives had passed, if the lawmakers find the agency action to be contrary to their legislative will and intent. Indeed, Congress can — and should — carry out this task whether or not the CRA exists. Regulations are the progeny of previously granted legislative authority, and thus the Senate and House acting jointly, with the president's signature, can revoke this authority whenever they wish by means of new legislation. Instead, the problem is how the CRA enables Congress to carry out this task. The unique review-and-repeal function that the CRA establishes in place of the normal legislative process raises numerous policy alarms — all of which are by definition unnecessary and avoidable.

The bulk of the CRA's provisions are dedicated to establishing a privileged process for these resolutions, under which they are exempt from various aspects of Congress's self-imposed deliberative procedures, including committee consideration, floor debate and amendments, and conference committees to resolve differences between the two chambers' respective bills. Most significantly of all, resolutions of disapproval are exempt from the Senate's 60-vote cloture requirement to avoid a filibuster. Congress must act quickly to take advantage of these shortcuts, though, since the CRA's changes to the Senate procedural requirements, including cloture, expire after 60 session days — defined as active work days in the Senate — beginning when the final rule is reported to Congress.

Beyond these procedural changes, not only does a resolution of disapproval repeal a targeted agency action, it also prohibits the agency from issuing another measure “in substantially the same form” without first receiving specific congressional authority to do so. This salt-the-earth provision effectively ties the agency's hands so that it is no longer able to tackle the problem that it sought to address with the original regulation. As a result, agencies may fail in their duties out of fear that a resolution of disapproval would stall desirable policy progress until Congress deems it appropriate through new legislation.

Since presidents are unlikely to support the repeal of one of their own regulations, the antidemocratic use of the CRA for recently issued regulations would generally be confined to just two political scenarios. The first involves rules issued by independent regulatory

agencies. By design, presidents have limited control over these agencies, freeing them to issue rules that may be inconsistent with a sitting president's policy preferences. But with the CRA, that changes. In November 2017, Congress passed and President Trump signed into law a resolution that repealed a rule issued by the Consumer Financial Protection Bureau that sought to limit the use of forced arbitration agreements in consumer contracts for financial products and services. That means the CFPB is also prohibited from making progress in better dispute resolution.

The second scenario may be more disturbing. We witnessed it two years ago. It applies to rules issued late in a presidential administration when a new party comes into power in the executive branch, and that party also retains or gains control of Congress. Under the CRA, regulations issued late enough in a particular calendar year are automatically carried over to the next session of Congress for a new period of review. Because the statute treats these rules as if they had been issued for the first time early in the new session, the clock resets when a Congress is sworn in on the 60 session days to use the law's expedited procedures for considering a resolution of disapproval.

That means if the White House switches parties and the new president's party holds or attains a majority in both chambers of the Congress, the party now in control can strike down virtually everything the other party did late enough in its term. This was the situation that the Trump administration and the Republican-controlled 115th Congress found themselves in on January 20, 2017. By the time the window had closed for using the CRA's carryover provisions in the middle of May, Republican lawmakers had used the law to repeal more than a dozen regulations issued toward the end of the Obama administration.

In May 2018, Congress established a novel third scenario for using the CRA when it repealed a 2013 CFPB bulletin that clarified that certain kinds of discriminatory auto lending practices were barred under existing law and regulations. The CRA provides that Congress's review period begins on the “submission or publication date” — that is, the date on which Congress had received the rule from the issuing agency in accordance with applicable statutory requirements. No submission or public date was ever established for the auto lending bulletin because the CFPB did not submit the document to Congress at the time it was issued six years ago. Legislative opponents of the bulletin were thus able to trigger the start of the review process years later by having the document constructively submitted in a way that met the law's requirements.

Complicating this strict reading of the CRA's submission requirements, however, is the fact that the law purports to cover not just all agency legislative rules, but all agency guidance as well — a universe of agency actions that might theoretically encompass thousands of documents an agency issues every year. Since this broad definition makes literal compliance with the CRA's submission requirements an impossibility, agencies are left trying to arbitrarily guess which guidance they should submit pursuant to the CRA. In the case of the auto lending bulletin, the CFPB guessed wrong. (Given its inherent unworkability, this literal reading of the CRA's definition of covered actions appears ripe for judicial challenge.)

The repeal of the auto lending bulletin also served to dramatically expand the reach of the CRA to include older existing actions — even ones that had been around for several years. Given the many agency guidance documents that were never formally submitted, some congressional Republicans were already looking for new targets for using this new application of the CRA until the party lost unified control in the last election.

In total, 16 agency actions were repealed over the course of the 115th Congress using the CRA. These actions would have provided a diverse range of safeguards, including several measures that would have delivered significant environmental and public health protections. Among those targeted were a Department of the Interior rule that would have protected Appalachian headwaters and streams against mountaintop removal mining waste pollution, an Interior rule that would have updated and improved its procedures for developing land use plans, an Interior rule that would have limited inhumane hunting practices in Alaska's national wildlife refuges, and a Securities and Exchange Commission rule that would have promoted government accountability in relation to the extraction of publicly owned natural resources.

Taken together, the inevitable result of these CRA resolutions is to make people and the environment less safe and secure against the harms the repealed regulatory actions were intended to address, with the greatest burdens likely to fall on the working poor and communities of color. Over the next several years, for example, Appalachian communities may see additional cases of drinking water-related cancers, and the political and

economic dynamics that drive the “resource curse” in developing countries will continue to be reinforced in our poorest states.

And because of the CRA's salt-the-earth provision, the deprivation of public protections may well extend beyond these immediate rollbacks. For example, depending on how Interior interprets the struck-down provision, the agency may give up on addressing the problem of mountaintop removal mining pollution in Appalachian headwaters, leaving the communities and ecosystems that depend on these waters permanently unprotected. This is how OSHA has responded following the CRA repeal of its ergonomics rule in 2001. In the 18 years since, the agency has not pursued any regulatory action to protect workers from ergonomics-related injuries, even as they have become the single largest threat to worker health and safety, accounting for a third of all workplace injuries

according to the U.S. Bureau of Labor Statistics.

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These outcomes should hardly be surprising given the CRA's distinctly anti-regulatory provenance. Passed in 1996 as part of the Contract with America Advancement Act, the CRA was one of many regulatory process laws enacted during the 104th Congress that sought to make it harder for agencies to put new rules in place. At the time, both chambers were under Republican control for the first time in decades, and the so-called Gingrich Congress had made weakening the regulatory system a top priority. Because congressional Republicans had succeeded in whipping up enough public concern over federal regulations — and in an effort to forestall even more extreme anti-regulatory legislation that was under consideration — many congressional Democrats ended up backing the measure as a moderate compromise, and President Clinton followed suit by signing it into law.

To the extent regulations have become such a strongly partisan issue, the CRA itself has likewise become politically asymmetrical as a policy tool. This asymmetry largely stems from the salt-the-earth provision. The CRA offers little recourse to Democrats who might object to a Republican-developed regulation — particularly one related to environmental or public health protections — because it is perceived to

be insufficiently stringent. A resolution of disapproval would repeal the offending regulation, but the salt-the-earth provision would theoretically block EPA or another agency from issuing a more stringent replacement, one more consistent with Democratic policy preferences. Thus, the law appears to only benefit the party that has opposed environmental regulation since the Reagan administration

Historical experience further bears out the CRA's political asymmetry. The law has only been used to repeal regulatory actions when the policymaking branches were under Republican control. Even though the stars were aligned at the beginning of the Obama administration — Democrats controlled the White House and both chambers of Congress following a Republican administration — the CRA was not deployed a single time to repeal any actions issued late in the George W. Bush presidency.

Worse, most of the CRA resolutions passed during the last Congress have the conspicuous effect of delivering significant economic benefits to a few targeted industries by sparing them the costs that the repealed actions might otherwise have imposed. Campaign contribution disclosure data reveal that the members of Congress who served as the lead sponsors of these CRA resolutions have strong financial ties to the industries that most directly benefited from the regulatory rollbacks. For example, Representative Bill Johnson (R-Ohio), who sponsored the House's resolution of disapproval for the mountaintop removal rule, has received \$102,000 in campaign contributions from electric utilities and another \$76,070 in contributions from the mining industry during the most recent election cycle, according to data collected by the Center for Responsive Politics.

To be sure, the mere existence of these close financial ties does not mean that the CRA resolutions were the result of an explicit quid pro quo agreement between the lawmakers and corporate interests. The circumstances surrounding their passage, however, do create a strong appearance of impropriety, one that risks undermining the legitimacy of our democracy by inviting corruption and weakening the public's esteem for our governing institutions. The CRA resolutions in the 115th Congress show how shrouded in secrecy these measures are, as the law's expedited procedures — which bypass hearings and floor debate — enabled them to move

forward with little transparency or opportunities for meaningful public accountability. That these measures, adopted in relative obscurity, also confer significant direct benefits to corporate interests only reinforces that appearance of impropriety.

The aggressive use of the CRA also risks further inflaming the kind of partisan discord that has rendered the legislative branch so dysfunctional in recent years. All the CRA resolutions that the 115th Congress passed did so on slim, almost entirely party-line votes. None mustered the 60 votes required under regular Senate rules to overcome cloture, confirming how essential the CRA's procedural shortcuts have been for the passage of the resolutions.

On average, CRA resolutions passed the House by a margin of only 45 votes (at a time when Republicans held a 47-seat majority) while passing the Senate by a margin of only four votes (during which most of the time Republicans held a four-seat majority). These close vote counts stand in stark contrast to the wide bipartisan margins by which the legislation that authorized or required the repealed rules passed Congress. On average, those authorizing bills passed by a margin of 240 votes in the House and 63 votes in the Senate. The huge disparities in vote margins demonstrate how the CRA can be used by narrow partisan majorities to effectively thwart the public will. To the extent CRA resolutions are perceived as favors for politically connected industries, they buttress the public's growing cynicism toward government, with an increasing number of Americans coming to view lawmakers as more concerned with special interests than with the interests of their constituents.

Supporters of the CRA defend the law as a necessary antidote to what they consider to be the problem of congressional "over-delegation" of rulemaking authority. They claim that members of Congress face strong incentives to punt the often politically fraught task of filling in the details of public interest legislation — details that necessarily involve the imposition of constraints on business behavior — to expert administrative agencies. CRA supporters argue that this dynamic upsets the balance of powers between the pol-

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icymaking branches at the heart of our system because it shifts the locus of decisionmaking from Congress to administrative agencies. The CRA supposedly fixes this problem by giving Congress one last chance to endorse or reject the manner in which an agency has exercised its delegated discretion by repealing any rules it finds objectionable before they take effect.

This defense rests on a flawed understanding of the CRA. For one thing, a real fix would address the underlying incentives that supposedly compel Congress to over-delegate, something even the CRA’s supporters do not claim it accomplishes. For another, it overlooks that Congress already possessed the authority to legislatively repeal agency regulations it opposes. The only thing that prevents Congress from doing so has been Congress itself.

Rather than a good government reform, the CRA is more properly understood as a gimmick. The CRA’s real power does not come from what it gives to Congress, but from what it takes away — namely, key procedural steps in the legislative gauntlet that were intended to promote careful deliberation and compromise. Thus, the trick of the CRA is that it makes it possible for a bare majority in Congress to make an end-run around its normal legislative process to enact controversial legislation — laws that could not otherwise pass on their own merits.

As such, the CRA does nothing to strengthen the institution of Congress relative to administrative agencies or to restore any perceived imbalance between the policymaking branches. Instead, its real effect is to strengthen whichever political party happens to enjoy ephemeral control of both branches after the White House changes parties.

Nor is the CRA the only legislative gimmick that lawmakers are using to avoid Congress’s normal legislative process. Over the last two decades, members have increasingly sought to include so-called “limitation riders” on must-pass appropriations bills. These riders purport to block targeted agencies from using appropriated funds on specified activities. For example, the original House appropriations bill to fund EPA for 2019 included a rider that would repeal the Obama administration’s Waters of the United States rule.

The gimmick of limitations riders is that they rely on a form of legislative extortion. The measures are often too partisan or controversial to pass as stand-alone legislation. But their inclusion in must-pass appropriations measures puts individual legislators in a difficult

position. They must either accept the rider, which they might otherwise oppose, or they could vote against the appropriations bill, which they might otherwise support, and risk a potentially costly government shut-down.

As it is, Congress has become so mired in partisan dysfunction that it has proven largely incapable of acting through regular-order lawmaking. Comprising the use of all the tried and true mechanisms created over two centuries, regular order lawmaking involves the drafting and introduction of bills, their referral to committees, debates within those small groups of expert members, negotiation, mark-up, reconciliation of the different bills reported out by all the committees with jurisdiction, more negotiation, debate on the floor, approval, referral to a conference committee, more negotiation, and final passage. The increased use of legislative gimmicks like CRA resolutions and limitations riders could reinforce the trend of skipping these essential steps.

The mid-term elections have brought the restoration of divided government, and likely with it a temporary reprieve from further CRA-based repeals of regulations. But the precedent of a fully weaponized and politicized CRA may have already been set during the 115th Congress.

If so, then the law can be likened to a cocked and loaded gun, waiting to be triggered by the return of single-party control of the policymaking branches to a different party.

Some members have already come to this realization. In 2018, Representative David Cicilline (D-RI) and Senator Cory Booker (D-NJ) introduced companion versions of the Sunset the CRA and Restore American Protection Act. The SCRAP Act would repeal that statute so offensive to democracy and authorize agencies to reinstate any of their rules that had been eliminated through a resolution of disapproval. Separately, Senator Elizabeth Warren (D-MA) introduced a massive bill aimed at tackling corruption in the federal government, which includes a provision that would eliminate the CRA’s salt-the-earth provision. Discouragingly, though, no Republican members signed on as cosponsors of either measure.

Addressing the Congressional Review Act, with all its manifest flaws, will only fix one aspect of all that ails our legislative process. But it is difficult to envision Congress returning to regular order and the lost art of compromise — plus a healthy relationship between expert agencies and their congressional overseers — as long as legislative gimmicks like the CRA remain tantalizingly within reach. **TEF**