

The Congressional Review Act: The Case for Repeal

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Executive Summary

Americans are understandably frustrated with how Congress operates these days. Rather than work together across party lines to address the real and significant challenges we face as a nation – issues such as climate change, immigration reform, and the opioid crisis – members focus considerable energy on riling up their base by seeking to score whatever short-term political points they can. When not rifling off these partisan potshots, some members preoccupy themselves with taking actions that have the conspicuous effect of conferring substantial benefits upon their special interest benefactors – almost exclusively powerful corporations and other industry groups – often at considerable expense to the public interest.

Perhaps no law has come to encapsulate and epitomize this dark era in Congress's history more completely than the Congressional Review Act (CRA). Simply put, the CRA is a law designed to short-circuit Congress's deliberative process and allow narrow partisan majorities to attack broadly popular public safeguards on behalf of politically powerful interests. The CRA accomplishes this by creating a special form of legislation known as a "joint resolution of disapproval," a sort of legislative veto of regulatory agencies' work, that, once enacted, immediately repeals a targeted regulatory safeguard.

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. What's more, the CRA further provides that these resolutions prohibit the agency from issuing another rule "in substantially the same form" without first receiving specific congressional authority to do so. This effectively ties an agency's hands so that it may no longer take any effective action to provide the kinds of protections that were the object of the original regulation, regardless of any underlying statutory authority or obligation they have in the given area.

In 2017, anti-safeguard members of Congress, with President Trump riding shotgun, took the CRA for a reckless test drive, confirming just how dangerous the law is, especially when in the wrong hands.

The CRA is best understood as a legislative gimmick, as its real power comes from greasing the procedural skids so that attacks on commonsense protections can become law in a matter of just days or weeks with scant consideration or substantive debate, and almost no public scrutiny. The CRA helps ease the passage of these resolutions by exempting them from much of Congress's self-imposed deliberative process, including committee consideration, floor debate and amendments, and conference committees to resolve differences between the two chambers' respective bills. Most significantly, the CRA exempts these resolutions from the most consequential chokepoint in the legislative process: the 60-vote cloture requirement in the Senate.

Over the course of 2017, anti-safeguard members of Congress, with President Donald Trump riding shotgun, took the CRA for a reckless test drive, confirming just how dangerous the law is, especially when in the wrong hands. In all, they managed to **roll back a total of 15 regulatory safeguards**, covering a broad and diverse range of protections related to public health, safety, the environment and financial security. Among the safeguards Congress repealed through the CRA were measures to:

- Ensure safe drinking water for economically depressed Appalachian communities;
- Prevent mass shootings such as the 2007 Virginia Tech University massacre by strengthening existing efforts to stop individuals suffering from mental illness from improperly acquiring guns;
- Secure the privacy of Internet users' browsing data against misuse by unscrupulous marketing companies;
- Allow consumers a realistic avenue to just compensation when they are cheated out of money by a bank, credit card company, or other financial institution; and
- Promote greater access to family planning and other health care services for women in low-income and other underserved communities.

Taken together, the inevitable result of these resolutions is to make the public less safe and secure. Not surprisingly, the greatest burden falls on the working poor and communities of color, groups that bear a disproportionate share of the harms that these safeguards were meant to address.

Beyond their direct assaults on the public interest, these CRA resolutions are also causing another kind of lasting damage – namely, contributing to the ongoing erosion of Congress's legitimacy as a governing institution. An analysis

of several key features of the 15 successful CRA resolutions reveals the extent to which they were little more than attacks against the effective implementation of broadly popular public interest laws on behalf of powerful corporate special interests perpetrated by narrow partisan majorities. Among the key findings of this analysis include the following:

- Campaign contribution disclosure data reveal that the members of Congress who served as the lead sponsors of the CRA resolutions have strong financial ties to the very industries that most directly benefited from the regulatory rollbacks the resolutions accomplished. For example, Sen. Mitch McConnell (R-KY), the lead sponsor of the CRA resolution to repeal the rule to better protect Appalachian communities' drinking water supplies from coal mining-related water pollution, received **\$432,950 in campaign contributions from the mining industry** between 2011 and 2016. Rep. Keith Rothfus (R-PA), who sponsored the resolution that rolled back a rule that would ensure that victims of fraud by banks or other financial institutions had a realistic opportunity to be made whole, received **campaign contributions totaling \$108,169 from commercial banks and \$104,740 from the securities and investment industry** between 2015 and 2016.
- On average, the 15 CRA resolutions passed the House by **a margin of only 45 votes** (at the time of the votes, Republicans held a 47-seat majority in the lower chamber) while passing the Senate by **a margin of only four votes** (at the time of the votes, Republicans held a four-seat majority in the Senate). For two of the CRA resolutions, Vice President Mike Pence had to cast the deciding vote to break a 50-50 deadlock in the Senate. None of these resolutions came close to mustering the 60 votes required under regular Senate rules.
- The close vote counts for the 15 CRA resolutions stand in stark contrast to the wide 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**. Almost all of the bills enjoyed broad bipartisan support, and some passed unanimously or nearly unanimously.

Notwithstanding the damning evidence of the dangers posed by the CRA, the law's supporters nevertheless defend it as an effective means for reclaiming Congress's power over policymaking from federal administrative agencies. This claim collapses under modest scrutiny.

- The CRA’s design renders it a poor tool for conducting meaningful congressional oversight. In particular, the shortcuts in legislative procedures it creates preclude, rather than advance, the kind of meticulous investigation and thoughtful deliberation that is at the heart of effective oversight. For the 15 rules that were fully repealed using the CRA’s procedures in 2017, the process took **an average of only 48 days to complete**. This lightning-quick pace left little time for adequate investigation and deliberation. This quick process for repealing rules also stands in stark contrast to the long period of time agencies spent developing them. On average, the 15 rules that were eliminated through the CRA had been **in the works for approximately three years each**.
- If, as the CRA’s proponents claim, there is an imbalance of power between the legislative and executive branches in policymaking, the CRA provides a poor mechanism for correcting that imbalance. Indeed, legislative gimmicks such as the CRA serve only to reinforce Congress’s abdication of its policymaking responsibilities by exacerbating its hyperpartisanship-fueled dysfunction and by further degrading its legitimacy as a governing institution.

The CRA has proved to be such a profoundly dangerous law that Congress should take appropriate legislative steps to repeal it at once. Over the course of 2017, we witnessed firsthand how the CRA leaves Americans less safe and secure while further undermining the integrity of our governing institutions – all without serving any legitimate policy goals to offset or redeem these harms. To make matters even worse, in April 2018, anti-safeguard lawmakers set out to expand the potential damage the CRA can perpetrate, attempting to use it for the first time to target an agency action that had been in place for five years. In effect, these lawmakers are seeking to create a new loophole that would greatly expand the scope of the CRA’s reach, resulting in ever greater threats to public protections and creating even more regulatory uncertainty for affected businesses.

Congress need not resort to such legislative gimmicks as the CRA because it still retains the power to reject regulations – both new and old – by means of the regular legislative order: investigative hearings, bipartisan legislation, amendments, deliberative floor debates, conference committees, and most important, actual discussion and genuine public scrutiny. This return to regular order not only offers a more effective approach to congressional oversight of

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executive branch rulemaking; it would go a long way toward restoring the public's trust in Congress.

In addition, Congress should take any necessary action to undo the damage that the CRA resolutions have already done, including reinstating all the rules that have been repealed so the relevant agencies can resume the work of enforcing these vital safeguards.

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A Dangerous Law in Reckless Hands Produces Disastrous Results

Before 2017, few had ever heard of the Congressional Review Act (CRA), a “Contract with America”-era law designed to short-circuit Congress’s deliberative process and allow narrow partisan majorities to attack broadly popular public safeguards on behalf of politically powerful interests. By May of that year, though, conservative lawmakers – wielding control of both policymaking branches for the first time in more than a decade – demonstrated just how muscular and dangerous this law is, particularly in the hands of members of Congress more concerned with advancing the interests of their corporate benefactors than with promoting the welfare of the working families they are supposed to be representing.

Over the course of 2017, Congress passed and President Trump signed 15 pieces of legislation using the CRA’s expedited procedures. Because they were adopted under the CRA, all of these laws, referred to as a “resolution of disapproval,” served a unique, though limited function: to repeal a regulatory safeguard. Each resolution targeted a rule issued during the final months of the Obama administration or during the Trump administration by an independent agency still operating under Obama administration appointees. Such aggressive use of the CRA is unprecedented. Before 2017, the law had only been invoked once since its enactment in 1996.

Among the safeguards Congress repealed through the CRA were measures to:

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- Secure the privacy of Internet users’ browsing data against misuse by unscrupulous marketing companies;
- Allow consumers a realistic avenue to just compensation when they are cheated out of money by a bank, credit card company, or other financial institution; and
- Promote greater access to family planning and other health care services for women in low-income and other underserved communities.

Consequently, the 15 CRA resolutions condemn the public – especially the working poor and communities of color – to continue bearing the harms that these and other repealed safeguards would have prevented. Over the next several years, we will likely see additional cases of drinking water-related cancers in Appalachia, episodes of fraud and harassment perpetrated through misappropriated Internet browsing data, and mass shooting events – and many of these harms will be directly traceable to Congress’s abuse of the CRA.

The breadth and gravity of these harms is especially striking considering the arbitrary and scattershot nature of the CRA targets, even when judged by conservatives’ own purported criteria for attacking the regulatory system. Almost none of the rules that were repealed were all that controversial while they were under development. Among the rules eligible for repeal under the CRA, they did not impose the greatest costs on polluters or employers indifferent to unsafe working conditions; nor did the supporters of the repeal efforts attempt to make any credible case that they were an impediment to economic growth or job creation. Even Marc Short, President Trump’s legislative affairs director, admitted as much, conceding at a White House briefing that “not each one of these [CRA repeals] can you look at and say it is necessarily a job creator.”¹ Instead, much like a mother bird feeding her chicks, the individual CRA resolutions appear to be best explained as gifts doled out by lawmakers to whichever narrow interests were able to leverage their access and political power – including, most notably, the promise of campaign contributions – to “squawk” the loudest.

Further underscoring the arbitrary nature of these CRA resolutions is the careless process by which they were adopted, particularly in contrast to the years of careful study and analysis that went into the development of the rules that they ultimately were used to repeal. Throughout this process, supporters of the CRA repeals demonstrated scant concern for the policy merits of their resolutions, even frequently ceding the little Senate floor debate time that the CRA’s provisions afforded them. Thanks to procedural shortcuts designed to thwart meaningful consideration and deliberation, these CRA repeals took mere weeks to complete, from start to finish. Tellingly, President Trump eschewed his normal penchant for flair and showmanship and instead signed many of the CRA resolutions into law during secret signing ceremonies. Between February and May of 2017, the CRA repeals came so thick and fast that the damage was frequently already done before members of the public even knew what happened.

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Supporters of the CRA resolutions have defended these actions as necessary for reclaiming Congress's power over policymaking from federal administrative agencies. This claim, however, ignores that Congress always retained ultimate authority over federal policymaking. The regulations targeted for repeal were the products of legislative authority that Congress granted to agencies because of their ability to apply scientific and administrative expertise to often complicated technical matters, and nothing prevents Congress from taking that legislative authority away using the regular order of the lawmaking process. Nothing except Congress, that is.

Unfortunately, Congress has become so mired in partisan dysfunction that it is largely incapable of acting through "regular order," a phrase connoting the use of all the tried and true mechanisms created over two centuries, from the drafting and introduction of bills, their referral to committees and subcommittees, 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. Consequently, lawmakers frequently resort to legislative gimmicks such as the CRA to make an end-run around this regular order to advance their agendas. They resort to such inherently sunshine-resistant tactics because, as the CRA resolutions illustrate, their agenda is usually either highly partisan in nature or serves the narrow concerns of powerful corporate interests, often at the expense of the public interest.

To make matters worse, lawmakers' preoccupation with exploiting these legislative tricks is occurring against the backdrop of numerous public policy crises that cry out for bold responses from the people's representatives in Congress. Immigration reform, climate change, and the ongoing opioid epidemic – all of these issues and more remain conspicuously unaddressed.

The public recognizes all of this. During much of Trump's first year in office, Congress's approval rating hovered at historic lows, bottoming out at a paltry 12 percent in October 2017.² With such actions as its abuse of the CRA, it's easy to see how the legislative branch earned such broad-based contempt.

Having taken the CRA for such a thorough and reckless test drive, President Trump and Congress have left little doubt that, as a policy tool, the CRA is an unmitigated failure. Through this experience, we have witnessed how highly susceptible the CRA is to corporate interest-driven abuse, resulting in both

immediate harms – to public health, safety, the environment, and financial security – and lasting damage to the integrity of our governing institutions. Nor has the CRA lived up to any of its supporters’ promises. It has failed to advance such policy objectives as improved congressional oversight of the executive branch and institutional strengthening of constitutional separation of powers principles.

In short, the CRA is a profoundly dangerous law, and Congress should repeal it immediately. Moreover, Congress should take any necessary action to reinstate those rules that the CRA has been used to repeal, and the relevant agencies should resume their enforcement as appropriate, consistent with their other existing legal authorities. Finally, if Congress is to regain the public’s trust and esteem and reestablish its legitimacy and relevance as a policymaking institution, it must relearn the lost art of political compromise and the lost skill of regular-order lawmaking.

What Is the Congressional Review Act, Anyway?

The CRA is, simply put, a legislative gimmick designed to enable politicized attacks against regulatory safeguards. Until recently, it was believed that these attacks could only be applied to safeguards that had been recently issued, somewhat limiting the damage the CRA can perpetrate. Now, anti-safeguard members are on the cusp of creating a new loophole in the law that would enable them to attack older agency actions, even those that were issued decades ago.

The CRA accomplishes its attacks by creating a special form of legislation known as a “joint resolution of disapproval,” a sort of legislative veto of regulatory agencies’ work, that, once enacted, immediately repeals a targeted regulation. What’s more, the CRA further provides that these resolutions prohibit the agency from issuing another rule “in substantially the same form” without first receiving specific congressional authority to do so. This effectively ties the agency’s hands so that it is no longer able to tackle the problem that it sought to address in the original regulation.

What makes the CRA especially powerful are the procedural shortcuts it creates for passing resolutions of disapproval – procedures that enable bare majorities in Congress to ram through this legislation in a matter of days or weeks with scant consideration or substantive debate. Under these procedures, CRA

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resolutions are exempt from much of Congress's self-imposed deliberative process – including committee consideration, floor debate and amendments, and conference committees to resolve differences between the two chambers' respective bills – to help ease their passage. And most significantly of all, the CRA exempts these resolutions from the most consequential chokepoint in the legislative process: the Senate's 60-vote cloture requirement. Congress must act quickly to take advantage of these shortcuts, though, since the CRA's changes to the Senate procedural requirements, including the cloture requirement, expire after 60 "session days" (*i.e.*, active work days in the Senate), beginning when the final rule is reported to Congress.

These procedural shortcuts are also what make the CRA so controversial. After all, Congress can pass legislation whenever it wants to repeal existing regulations that its members disfavor, since those regulations are themselves the offspring of laws that Congress passed. The problem, in the eyes of opponents of regulatory safeguards, is that these actions would have to proceed through the regular legislative order, including the Senate's cloture rules. For good reason, repeals of existing safeguards are often controversial and would rarely make it through this process. Therein lies the gimmick of the CRA: Its power comes not from giving new authority to Congress, but from making it possible for Congress to make an end run around normal procedures to enact unpopular legislation.

Despite these procedural shortcuts, the CRA still faces one huge obstacle that prevents it from being used more frequently. Resolutions of disapproval, as legislation, must satisfy the constitutional requirement of a presidential signature before taking effect. Presidents are unlikely to sign off on measures that would repeal regulations issued by their own agencies that presumably advance their policy agenda.

Consequently, the successful use of the CRA has, until recently, been confined to two 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 the president's policy preferences. So far, only one rule – the Consumer Financial Protection Bureau's (CFPB) rule on forced arbitration – has been repealed through the CRA under this scenario.

The second scenario, which applies to rules issued late in a presidential administration, arises from the CRA's unusual set of "carryover" provisions.

Under these provisions, any rules issued late enough in a particular calendar year (depending on the congressional work calendar, what qualifies as “late” can stretch back anywhere from two to six months) are automatically carried over to the next session of Congress for a new period of consideration and potential repeal. Because the CRA treats these rules as if they had been newly issued early in the new session, the clock resets on the Senate’s 60 session days to use the law’s expedited procedures for considering a resolution of disapproval.

Thanks to these carryover provisions, rules issued by an outgoing president may be vulnerable to repeal if the succeeding president comes from the other political party and is joined by majorities in both chambers of Congress from the same political party. The “stars have aligned” in this fashion several times since the CRA first became law in 1996, including at the beginning of the George W. Bush, Obama, and Trump administrations. Yet, prior to the Trump administration, the CRA had only been used once under this scenario: in 2001, by the Bush administration to repeal a Clinton-era worker health and safety rule. During the Trump administration, all but one of the 15 successful CRA resolutions have involved the use of the CRA’s carryover provisions to repeal rules issued during the final months of the Obama administration.

The common characteristic of these two scenarios is that they both involve rules that were recently issued, thereby limiting the potential damage that lawmakers can accomplish through the CRA. That may change, however, as anti-safeguard members of Congress are attempting to create a massive loophole in the CRA that would extend its reach to older existing agency actions – even ones that have been in place for decades. Under a technical reading of the CRA, the clock on Congress’s review period – and, most notably, the Senate’s expedited procedures – does not begin ticking until an agency action has been formally submitted to Congress. If an agency did not submit an action to Congress at the time it was issued – usually because the agency made the mistaken determination that the action was not eligible for review under the CRA – then it can be forced to “submit” the action to Congress, thereby triggering the CRA’s review process as if the action had just been issued.

In April 2018, anti-safeguard members took the first steps toward establishing the precedent for this loophole by using the CRA to repeal a 2013 CFPB “bulletin” aimed at discouraging discriminatory automobile lending practices. If successful, this action could encourage like-minded lawmakers to identify still other older agency actions that were never formally submitted for CRA review

and potential repeal.³ This new loophole threatens to put even more public protections at risk, create more regulatory uncertainty for affected businesses, and create a new distraction for lawmakers, further contributing to congressional dysfunction.

Harming the Public, Corroding Our Governing Institutions

A One-Way Ratchet for Rolling Back Public Protections

Their fingers are twisted and permanently disfigured, their hands are swollen and covered in chemical burns, and their backs, shoulders, and necks are wracked with chronic muscle pain and weakness. These are the physical hallmarks of workers who toil away in the dozens of poultry processing plants spread across the country. The plants are primarily concentrated in areas marked by poverty and weak labor standards, and the vast majority of these workers are among the most vulnerable members of our society, including women, people of color, and immigrants. Standing on their feet, and using dull knives, the workers operate in small teams to butcher and prepare for packaging thousands of chickens every day – often at a rate of more than 100 chickens per minute – for more than eight hours a day with few breaks, and for more than five days a week.

Humans are not machines, and we are not built to withstand these kinds of constant, repetitive motions. It doesn't take long before this grueling work takes its toll on poultry processing workers – a condition that doctors generally refer to as musculoskeletal disorders (MSDs) and that includes such specific ailments as carpal tunnel syndrome and tendinitis. While many cases of MSDs can be treated, the worst can leave individuals so debilitated that they are unable to lead a normal, productive life.

MSDs like those that afflict poultry processing workers represent the single biggest harm to worker health and safety in the United States. And the magnitude of that harm is growing as the service sector and light industry – where these injuries are especially prevalent – continue to comprise a larger share of our evolving economy. The U.S. Bureau of Labor Statistics estimates that MSDs account for a third of all workplace injuries. The economic costs from these injuries are staggering. In 2000, the Occupational Safety and Health Administration (OSHA) estimated the total direct and annual costs of these injuries at \$54 billion.

Remarkably, OSHA – the federal agency charged with promoting worker health and safety – may be legally prohibited from doing anything about MSDs, and the CRA is to blame. In 2001, the Republican-controlled Congress passed and President George W. Bush signed the first ever CRA resolution of disapproval, which repealed an OSHA rule issued late in the Clinton administration that was aimed at protecting workers in most industries from MSDs. This resolution did not just repeal the Clinton rule, though; according to the CRA, it also purports to prevent OSHA from issuing another such rule “in substantially the same form.” How different a rule would need to be so as not to be “substantially the same” is unclear. Faced with this uncertainty, though, OSHA has conspicuously avoided tackling MSDs, even for specific industries where these injuries are particularly egregious, such as poultry processing, in the nearly two decades since the CRA resolution passed.

Had it not been repealed by Congress via the CRA, OSHA’s ergonomics rule would have had a substantial impact on the health of working men and women in the United States. Instead, Congress voted to spare industry the cost of making its workplaces and methods safe for workers. Poultry can be processed in ways that do not leave workers permanently injured, and unsafe workplaces ought not to be tolerated simply so industry can shift the costs their own corner-cutting creates onto workers in the form of lifelong injuries. The president and his allies refer constantly to the “costs of regulation.” But the costs are not created by the regulation; they’re created by the unsafe workplace practices. Regulation simply shifts the costs back to the company that created them, and away from the workers, families, and consumers who would otherwise be forced to bear them, usually without their consent.

In just a few short months, the Trump administration, along with complicit conservatives in Congress, consigned 15 more critical safeguards to a similar fate, not only undoing the protections they promised to offer but also likely blocking any future efforts at tackling the harms those safeguards were meant to address. Taken together, these rollbacks will negatively impact nearly every single American. These harms include the following:

- **Allowing telecommunications giants like Comcast and Verizon to profit off of Americans’ private web browsing information.** The Federal Communications Commission’s Broadband Privacy Protection rule would have required Internet service providers (ISPs) to affirmatively obtain their customers’ permission before mining their web browsing data for their own commercial use or to sell it to online advertisers. It would also have required

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ISPs to properly secure the web browsing data they do collect to better protect it against crimes like hacking and identity theft.

- **Barring the courthouse doors to consumers who have been cheated by banks, credit card companies, and other financial institutions, such as the Wells Fargo fake bank account scandal.** With its Forced Arbitration rule, the CFPB sought to restrict the use of abusive “forced arbitration clauses” in contracts for financial products and services. Most of these clauses specifically bar consumers from joining together in class action lawsuits against financial services or products companies for engaging in widespread fraud or cheating. Instead, consumers must attempt to resolve their disputes through private arbitration, a shadowy process in which few consumers are able to prevail or obtain just compensation because its procedures and rules are heavily stacked against them.
- **Denying women in low-income and other underserved communities access to affordable health care.** A Department of Health and Human Services (HHS) rule sought to guarantee that all qualified providers of family planning and related health care services are eligible to receive grants through the HHS Title X program, which seeks to ensure that such services are available to low-income women. This rule would have prevented states from denying eligibility to Title X grants to otherwise qualified providers simply because they offered legal abortions, even though no funding under the Title X program could be used for this purpose.
- **Permitting catastrophic damage to fragile Appalachian Mountain ecosystems and poisoning drinking water sources of Appalachian communities.** With the Stream Protection Rule, the Department of the Interior sought to establish better protection for headwaters and mountain streams against the impacts of mountaintop removal mining, a practice that involves literally blowing the tops off mountains to expose thin coal seams and pushing the resulting tons of refuse into nearby valleys where mountain streams originate. The agency projected that the rule would have improved water quality in 263 miles of intermittent and perennial streams per year and would contribute to the reforestation of 2,486 acres of mined land per year. The Department of the Interior also projected that the productive economic activity involved in implementing the rule would create 156 jobs on net per year between 2020 and 2040.
- **Enabling greater government corruption related to the extraction of oil, minerals, and other natural resources.** The Securities and Exchange Commission’s (SEC) Resource Extraction Disclosure rule sought to promote greater transparency around the exploitation of a country’s natural resources by requiring resource extraction companies to report any payments they make to governmental entities, such as taxes, royalties, and

other fees. Using this documentation, citizens could ensure that their government officials put these monies to public use rather than using them to unjustly enrich themselves. They could also ensure their country was receiving fair value for the exploitation of their country's public resources.

- **Defeating efforts to prevent individuals with severe mental illness from obtaining guns.** With this rulemaking, the Social Security Administration (SSA) sought to leverage its existing records on individuals receiving disability benefits for certain mental health conditions to strengthen the implementation of the national background check system, which federal law enforcement officials use to screen out prospective gun purchasers who are legally ineligible to make such purchases. Numerous mass shooting episodes over the last decade, such as the Virginia Tech massacre, have been perpetrated by individuals suffering from severe mental illness, underscoring how crucial it is that the national government background system's databases contain as complete and comprehensive information as possible.
- **Boosting inhumane hunting practices against grizzly bears and other large predators, such as killing wolf pups in their dens and hunting from airplanes, in Alaska's National Wildlife Refuges.** The Department of the Interior's Alaska Wildlife Refuge Predator Control rule would have better balanced the goals of preserving traditional sport hunting activities with careful management of species and ecosystems on some of America's most spectacular public lands. Not only are the practices that the rule would have prohibited morally outrageous, they also risk destabilizing the refuges' fragile ecosystems by permitting the over-hunting of key predator species, which serve to control the populations of deer, caribou, and other species lower on the food chain.
- **Giving a free pass to federal contractors who cut corners on fair pay and workplace health and safety standards.** In a joint rulemaking, the Department of Defense, the General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) sought to ensure that the federal government practices what it preaches by doing business with "high road" companies. This rule would have required businesses that enjoy the privilege of receiving contracts from the federal government to comply with applicable regulations governing fair pay for employees and workplace health and safety as a condition of receiving the contract and to ensure ongoing compliance with those regulations over the lifetime of the contract. Moreover, because the federal government has such a large contracting footprint, the rule likely would have elevated worker protection standards across entire industries, pushing even those companies with which the federal government does not contract to better protect the health, safety, and financial well-being of their workers.

- **Enabling scofflaw employers to hide their dangerous records of workplace injuries and illnesses.** OSHA's Injury and Illness Recordkeeping rule would have closed a big enforcement loophole in the agency's recordkeeping requirements, enabling it to more effectively hold businesses accountable when they fail to maintain accurate records. In addition to strengthening OSHA enforcement efforts, this rule would have reinforced the agency's efforts to identify broader trends in occupational health and safety harms that could inform future rulemakings.
- **Further depriving historically disadvantaged student populations from receiving better educational opportunities.** The Department of Education's State Plan Accountability rule would have ensured that states and local school districts complied with certain mandates in the bipartisan Every Student Succeeds Act, which sought to provide state and local officials with greater control over education policy while still guaranteeing a basic level of educational quality for all students. The state accountability plans that were subject of the Department of Education's rulemaking were supposed to have been a major linchpin in the law's effective implementation.
- **Blocking states and cities from helping low-wage workers save for retirement.** Through a pair of rulemakings, the Department of Labor sought to provide states and local governments, respectively, new legal authorities to provide private-sector workers in their jurisdictions with some form of retirement savings program. These programs would have been essential for ensuring the financial security of the millions of Americans approaching retirement age without adequate savings. In addition, they would have enabled states and local governments to alleviate the demand for public services and social safety net programs that the impending "retirement crisis" will bring.
- **Excluding local voices and perspectives from federal land use planning, resulting in resource utilization decisions that favor extractive industries and other commercial interests.** The Department of the Interior's Resource Management Plan rule would have updated the agency's procedures for gathering public input and other evidence to inform its land use planning activities.
- **Deterring talented young people, including those from historically disadvantaged communities, from pursuing a career in education.** With its Teacher Preparation Standards rule, the Department of Education sought to provide states greater control over the design of their teacher preparation programs while establishing objective criteria for evaluating the quality of those programs. Beyond elevating the quality of education in schools across the country, the rule would have provided crucial guidance to young adults

interested in becoming teachers, helping them select the best training program to fit their needs.

As this list makes apparent, the most vulnerable members of our society will bear the brunt of the regulatory rollbacks achieved through the CRA. Low-wage workers will be hit particularly hard by measures that targeted workplace health and safety and financial security. Other historically disadvantaged populations – including women, people of color, and rural communities in Appalachia and the West – will also suffer disproportionately.

A Powerful Weapon for Corporate Interests to Attack Public Interest Laws

The bulk of the CRA resolutions that Congress has adopted and that presidents have signed have the conspicuous effect of delivering significant economic benefits to a few politically well-connected industries, sparing them the costs that the repealed rules might otherwise have imposed. (To be sure, a few of the rules that were repealed – notably, the HHS rule on federal funding for family planning programs – were strongly opposed by social conservatives, rather than by defined corporate interests.) With these rules repealed, and any replacements seemingly blocked forever, these corporations can continue to profit off of cheating their customers, endangering our health by polluting our air and water, and cutting corners on worker health and safety.

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 very industries that most directly benefited from the regulatory rollbacks the resolutions accomplished. The table below summarizes the campaign contributions given by relevant industrial sectors to the lead House and Senate sponsors of several of the recent CRA resolutions.

Table 1. Lead Sponsors of Select CRA Resolutions and Campaign Contributions from Corporate Special Interests

Rule Repealed by CRA Resolution	House Sponsor and Related Campaign Contributions	Senate Sponsor and Related Campaign Contributions
Department of the Interior Stream Protection	Rep. Bill Johnson (R-OH) <u>Mining: 2017-2018: \$57,820;</u> <u>electric utilities: 2017-2018:</u> <u>\$52,500; miscellaneous</u> <u>manufacturing and</u> <u>distributing: 2017-2018:</u> <u>\$17,800</u>	Sen. Mitch McConnell (R- KY) <u>Mining: 2013-2018:</u> <u>\$335,000; miscellaneous</u> <u>manufacturing and</u> <u>distributing: 2013-2018:</u> <u>\$298,455; electric</u> <u>utilities: 2013-2018:</u> <u>\$273,400</u>
Department of the Interior Land Use Planning	Rep. Liz Cheney (R-WY) <u>Oil and gas: 2017-2018:</u> <u>\$29,900; livestock: 2017-</u> <u>2018: \$18,200; mining: 2017-</u> <u>2018: \$17,500</u>	No companion resolution introduced in Senate
Department of Labor Injury Recordkeeping	Rep. Bradley Byrne (R-AL) <u>Crop production and basic</u> <u>processing: 2017-2018:</u> <u>\$27,500; building materials</u> <u>and equipment: 2017-2018:</u> <u>\$17,700; forestry and forest</u> <u>products: 2017-2018:</u> <u>\$13,939; miscellaneous</u> <u>manufacturing and</u> <u>distributing: 2017-2018:</u> <u>\$11,200</u>	Sen. Bill Cassidy (R-LA) <u>Oil and gas: 2013-2018:</u> <u>\$884,070; general</u> <u>contractors: 2013-2018:</u> <u>\$303,300; miscellaneous</u> <u>manufacturing and</u> <u>distributing: 2013-2018:</u> <u>\$236,000</u>
Multi-Agency Fair Contractor	Rep. Virginia Foxx (R-NC) <u>General contractors: 2017-</u> <u>2018: \$25,500; special trade</u> <u>contractors: 2017-2018:</u> <u>\$21,000</u>	Sen. Ron Johnson (R-WI) <u>Miscellaneous</u> <u>manufacturing and</u> <u>distributing: 2013-2018:</u> <u>\$505,443; miscellaneous</u> <u>business: 2013-2018:</u> <u>\$291,996; building</u> <u>materials and equipment:</u> <u>2013-2018: \$232,682;</u> <u>general contractors: 2013-</u> <u>2018: \$191,894</u>

Rule Repealed by CRA Resolution	House Sponsor and Related Campaign Contributions	Senate Sponsor and Related Campaign Contributions
Department of Labor Sub-State Government Retirement Savings Program	Rep. Francis Rooney (R-FL) <u>Miscellaneous finance: 2017- 2018: \$13,500; securities and investment; 2017-2018: \$10,800</u>	Sen. Orrin Hatch (R-UT) <u>Securities and investment: 2013-2018: \$768,462; miscellaneous finance: 2013-2018: \$186,500; business services: 2013-2018: \$164,100</u>
Department of Labor State Retirement Savings Program	Rep. Tim Walberg (R-MI) <u>Securities and investment: 2017-2018: \$29,650; commercial banks: 2017- 2018: \$14,200</u>	Sen. Orrin Hatch (R-UT) <u>Securities and investment: 2013-2018: \$768,462; miscellaneous finance: 2013-2018: \$186,500; business services: 2013-2018: \$164,100</u>
SEC Anti- Corruption	Rep. Bill Huizenga (R-MI) <u>Oil and gas: 2017-2018: \$15,500</u>	Sen. James Inhofe (R-OK) <u>Oil and gas: 2013-2018: \$348,200; mining: 2013- 2018: \$93,775</u>
CFPB Forced Arbitration	Rep. Keith Rothfus (R-PA) <u>Securities and investment: 2017-2018: \$99,900; commercial banks: 2017- 2018: \$79,556; miscellaneous finance: 2017-2018: \$18,400</u>	Sen. Mike Crapo (R-ID) <u>Securities and investment: 2013-2018: \$909,450; commercial banks: 2013-2018: \$405,050; finance/credit companies: 2013-2018: \$219,300; miscellaneous finance: 2013-2018: \$200,552</u>
FCC Internet Privacy	Rep. Marsha Blackburn (R- TN) <u>Telecom services: 2017-2018: \$110,750; businesses services: 2017-2018: \$39,700</u>	Sen. Jeff Flake (R-AZ) <u>Businesses services: 2013- 2018: \$68,668</u>
Department of Education State Accountability	Rep. Todd Rokita (R-IN) <u>Education industry: 2017- 2018: \$23,850</u>	Sen. Lamar Alexander (R- TN) <u>Education industry: 2013-2018: \$136,788</u>

To be sure, the mere existence of close financial ties does not mean that these CRA resolutions were the result of an explicit *quid pro quo* agreement between the lawmakers and corporate interests. Nevertheless, the secretive nature by which these resolutions are developed, combined with the direct benefits they confer on favored corporate interests, is enough to 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 even further.

More Fuel for the Partisan Fire in Congress

All the CRA resolutions that Congress took up in 2017 passed by slim, almost entirely party-line votes, underscoring what a nakedly partisan exercise the resolutions were. None of these resolutions came close to mustering the 60 votes required under regular Senate rules, illustrating how the CRA's procedural shortcuts are essential for the passage of resolutions of disapproval. Table 2 summarizes the close vote counts for each of the CRA resolutions that have passed during the Trump administration.

Table 2. Vote Margins for CRA Resolutions, 2017

Rule	House Vote on CRA Resolution	Senate Vote on CRA Resolution
Department of the Interior Stream Protection	228-194	54-45
Department of the Interior Land Use Planning	234-186	51-48
Department of the Interior Alaska Predator Protection	225-193	52-47
Department of Labor Injury Recordkeeping	231-191	50-48
Multi-Agency Fair Contractor	236-187	49-48
Department of Labor Drug Testing	236-189	51-48
Department of Labor Sub-State Government Retirement Savings Program	234-191	50-49
Department of Labor State Retirement Savings Program	231-193	50-49

Rule	House Vote on CRA Resolution	Senate Vote on CRA Resolution
SEC Anti-Corruption	235-187	52-47
CFPB Forced Arbitration	231-190	50-50 (Vice President Pence broke the tie, voting to repeal)
SSA Gun Purchase Background Check	235-180	57-43
FCC Internet Privacy	215-205	50-48
HHS Women's Access to Family Planning Healthcare Services	280-188	50-50 (Vice President Pence broke the tie, voting to repeal)
Department of Education State Accountability	230-194	50-49
Department of Education Teacher Preparation	240-181	59-40

On average, CRA resolutions passed the House by a margin of only 45 votes (at the time of the votes, Republicans held a 47-seat majority in the lower chamber) while passing the Senate a by a margin of only four votes (at the time of the votes, Republicans held a four-seat majority in the Senate). For two of the CRA resolutions – the CFPB's rule on forced arbitration and HHS's rule on women's access to family planning services – Vice President Mike Pence had to cast the deciding vote to break a 50-50 deadlock.

These close vote counts stand in stark contrast to the wide 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. As the table below illustrates, almost all of these bills enjoyed broad bipartisan support, and some, such as the Employment Retirement Income Security Act and the NICS Improvement Amendments Act, passed unanimously or nearly unanimously.

Table 3. Vote Margins for Authorizing Legislation

Rule	House Vote on Main Authorizing Legislation	Senate Vote on Main Authorizing Legislation
Department of the Interior Stream Protection	Surface Mining Control and Reclamation Act of 1977 325-68	Surface Mining Control and Reclamation Act of 1977 85-8
Department of the Interior Land Use Planning	Federal Land Policy and Management Act of 1976 169-155	Federal Land Policy and Management Act of 1976 78-11
Department of the Interior Alaska Predator Protection	Alaska National Interest Lands Conservation Act of 1980 360-65	Alaska National Interest Lands Conservation Act of 1980 78-14
Department of Labor Injury Recordkeeping	Occupational Safety and Health Act of 1970 310-58	Occupational Safety and Health Act of 1970 83-8
Multi-Agency Fair Contractor	<i>Various laws</i>	<i>Various laws</i>
Department of Labor Drug Testing	Middle Class Tax Relief and Job Creation Act of 2012 293-132	Middle Class Tax Relief and Job Creation Act of 2012 60-36
Department of Labor Sub-State Government Retirement Savings Program	Employee Retirement Income Security Act of 1974 407-2	Employee Retirement Income Security Act of 1974 85-0
Department of Labor State Retirement Savings Program	Employee Retirement Income Security Act of 1974 407-2	Employee Retirement Income Security Act of 1974 85-0
SEC Anti-Corruption	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 232-202	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 60-39

Rule	House Vote on Main Authorizing Legislation	Senate Vote on Main Authorizing Legislation
CFPB Forced Arbitration	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 232-202	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 60-39
SSA Gun Purchase Background Check	NICS Improvement Amendments Act of 2007 Passed under suspension	NICS Improvement Amendments Act of 2007 Passed by unanimous consent
FCC Internet Privacy	Telecommunications Act of 1996 414-16	Telecommunications Act of 1996 91-5
HHS Women's Access to Family Planning Healthcare Services	Title X Family Planning Program, Public Health Service Act of 1970 298-32	Title X Family Planning Program, Public Health Service Act of 1970 "Unanimous"
Department of Education State Accountability	Every Student Succeeds Act of 2015 359-64	Every Student Succeeds Act of 2015 85-12
Department of Education Teacher Preparation	Higher Education of 1965 368-22	Higher Education Act of 1965 79-3

These data confirm that the narrow conservative majorities in Congress have been wielding the CRA as a weapon to advance a distinctly partisan, often industry-driven, agenda, and in the process have thwarted the effective implementation of laws that enjoy strong public backing. This abuse of the CRA risks further inflaming the hyper-partisanship that presently characterizes the legislative branch, reinforcing its dysfunctional state of paralysis. With each resolution that is adopted, the mutual animosity and distrust between the two parties risks growing ever greater, putting future efforts at reaching across the aisle on bipartisan compromise further out of reach.

To the extent there was any norm governing the judicious use of the CRA, conservatives in Congress have obliterated it. The floodgates now open, each swing in control of Congress or new rules from independent agencies promise to bring with them a fresh flurry of new CRA resolutions.⁴ These resolutions may

offer the newly empowered party a chance to score some “short-term” wins by inflicting political damage on the opposing party, but in the longer run risks doing serious damage to the public’s perception and legitimacy of Congress as one of our constitutional policymaking institutions.

The CRA’s House of Canards

According to its supporters, the CRA serves several critical policy functions, including as a powerful tool for congressional oversight of executive branch agencies and as means for recalibrating the constitutional balance of powers between the executive and legislative branches. Neither policy justification for the CRA withstands scrutiny, however. Instead, it appears that these policy justifications are little more than a neutral-sounding disguise for the real goals of the CRA’s supporters: unimpeded elimination of regulatory safeguards that inconvenience industries with the largest megaphones and the fattest wallets.

A Poor Tool for Congressional Oversight

Meaningful congressional oversight is time consuming, labor intensive, and complex. It requires dispassionate and meticulous investigation and must permit time for thoughtful deliberation. The CRA – and especially the shortcuts in legislative procedures it creates – could hardly be better designed to *preclude* such investigation and deliberation by members of Congress. In this way, the CRA takes what is best about the regulatory system and displaces it with what is worst about Congress, enabling partisan politics to eclipse the sober, expertise-driven policymaking undertaken by administrative agencies.

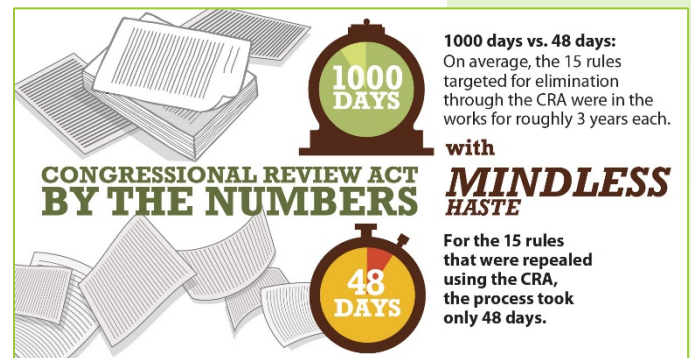
Under the CRA, resolutions of disapproval can easily bypass committee consideration, where much of the important investigative work – undertaken by staff and lawmakers who have acquired relevant policy expertise – would normally occur. For example, one provision empowers a small minority of just 30 senators to discharge any resolution for disapproval for privileged floor consideration once that resolution has spent at least 20 calendar days at the committee to which it was referred. Another provision stipulates that whenever one chamber of Congress receives a resolution of disapproval that has been passed by the other chamber, that resolution does not get referred to a committee in the receiving chamber. Instead, that chamber must proceed with its normal legislative procedures, as amended by the CRA, but with the resolution of disapproval from the other chamber serving as the legislative vehicle under consideration. As recent experience has shown, these provisions

have had their intended effect: None of the 16 resolutions of disapproval that received floor votes during the Trump administration were the subject of a single committee hearing or vote.⁵ As a result, meaningful consideration by committees of jurisdiction was replaced with floor speeches that rarely rose above the level of bumper stickers and tweets.

The CRA's provisions similarly discourage, if not prevent outright, meaningful deliberation on the merits of pending resolutions of disapproval. With respect to the Senate, the CRA prohibits consideration of amendments and most other motions while capping floor debate at just 10 hours, split evenly between those in favor and against the resolution. Even this truncated process appears to have been too much for many of the CRA resolutions that received votes in 2017, as supporters of the resolutions simply ceded much or all of their five-hour allotment during the floor debate — the better to avoid public scrutiny as they peeled back safeguards for workers, families, and the environment.

The CRA also forestalls the critical deliberation that would take place during a potential conference committee involving representatives from the House and the Senate. The CRA strictly prescribes the language that can be used for resolutions of disapproval and, as noted above, provides that any resolution that has passed one chamber of Congress must become the legislative vehicle that is acted upon in the second chamber, rather than allowing the second chamber to proceed with consideration of its own version. The effect of these provisions is to prevent a conference committee from ever being formed for a CRA resolution, since it would be literally impossible for the two chambers of Congress to pass different versions of a resolution that would require reconciling.

Finally, the relatively short window of only 60 session days for using the CRA's expedited procedures in the Senate — including the suspension of the cloture process — further encourages hasty action on resolutions of disapproval at the expense of careful investigation and thoughtful deliberation. Consequently, the whole process — from beginning to end — to use the CRA to repeal a rule usually takes place in just a few weeks at most, a lightning-quick pace by inside-the-Beltway standards. For the 15 rules that were fully repealed using the CRA's procedures in 2017, the process took an average of only 48 days to complete. In



one extreme case, conservatives in Congress and President Trump devoted just 12 days to repeal the FCC's Internet privacy rule.

This quick process for repealing rules stands in stark contrast to the long period of time agencies spent developing them, including the process of researching any underlying scientific, technological, economic, or legal matters; soliciting and incorporating public input; and conducting elaborate analyses of each rule's predicted impacts. On average, the 15 rules that were eliminated through the CRA had been in the works for approximately three years each. Two of those rules – the Department of the Interior's stream protection rule and the SEC's anti-corruption rule – took more than seven years to complete, a reflection of the complex analysis and careful consideration that was involved in their development. These long rulemaking timelines also directly refute the claims made by supporters of the CRA that the resolutions of disapproval were targeted at the Obama administration's so-called "midnight rules" that were "rushed" through the rulemaking process without adequate analysis or opportunity for public participation.

A Flawed Mechanism for Promoting Constitutional Checks and Balances

Supporters of the CRA claim that the law provides a necessary counterweight to what they perceive as Congress's unhealthy predilection for "over-delegating" its legislative authority to administrative agencies. Such over-delegation, they claim, upsets the balance of powers between the policymaking branches at the heart of our constitutional system of government.

According to their elaborate theory, members of Congress face strong institutional incentives to over-delegate legislative authority. On the one hand, the highly visible act of passing bold legislation that purports in mostly aspirational terms to advance popular public policy goals, such as clean air, safe drinking water, and greater financial security, allows lawmakers to claim credit with their constituents. On the other hand, the vague platitudes contained in these laws allow them to evade the political costs that follow when those public policy goals become translated into concrete constraints on private behavior. Instead, lawmakers simply punt that thankless task to the administrative agencies, which must bear the brunt of public outrage, much of which – ironically – is stoked by the very same members of Congress who authorized the policies in the first place.

While a neat theory, the CRA's proponents fail to account for the many legitimate reasons for this division of policymaking labor between the legislative

and executive branches. More to the point, even if one were to accept this theory as an accurate description of the institutional dynamics between Congress and the federal agencies, the CRA fails to provide an effective antidote for the malady it purportedly diagnoses.

By its very design, the CRA is uniquely ill-suited to address the alleged problem of excessive delegation of policymaking responsibilities. The resolutions of disapproval it empowers Congress to adopt offer very little in the way of substantive guidance regarding how Congress expects an agency to exercise its policymaking discretion for a particular rulemaking. Instead, these resolutions convey only the message that the particular approach that the agency had attempted is no longer on the table. Beyond that, the agency has little more by way of clarification of Congress's expectations for how its legislative mandates should be carried out than it did before the resolution of disapproval was passed.

Even this little guidance is likely to be of limited utility to the rulemaking agency given the law's bar against the reissuance of disapproved regulations that are "substantially the same." After all, the agency is unlikely to expend its limited resources on such a significant undertaking as a replacement rulemaking that it believes might be more in line with Congress's expectations, only to see the replacement rule rejected for not being "substantially" different. Rather, the agency might simply abandon the effort of implementing that part of its authorizing statute, to the extent that it is at all discretionary, which, ironically, is almost certainly not what Congress intended when it passed the statute.

In short, the CRA has no direct impact on the baseline conditions that opponents of regulatory safeguards claim give rise to the "win-win" scenario that supposedly encourages improper over-delegation of policymaking responsibilities by Congress. Nor does the CRA address what is likely the largest barrier to Congress's ability to participate more effectively in policymaking: the hyper-partisanship that has rendered the legislative branch all but irrelevant as a policymaking institution. Indeed, as noted above, the CRA is more likely to exacerbate the paralyzing dysfunction that now afflicts the legislative branch.

Gimmicky procedural tricks like the CRA will not help Congress reclaim its policymaking responsibilities. To do that, Congress must relearn the lost art of bipartisanship and return to procedural "regular order," including meaningful committee oversight and legislative development, propriety in budget and

Gimmicky procedural tricks like the CRA will not help Congress reclaim its policymaking responsibilities.

appropriations, loyalty to institution over party affiliation, and a shared commitment to the public welfare over narrow special interests.

What's Next for the Congressional Review Act?

Despite the CRA's many flaws, abuses of this legislative gimmick are likely to continue, and may even increase, in the future. Indeed, evidently dissatisfied with the CRA's limited reach to recently issued regulations, anti-safeguard lawmakers are already pushing to expand it so that it covers agency actions that are years or even decades old. The hyper-partisanship currently gripping Congress has made it all but impossible to enact any legislation of import over the threat of the Senate cloture rules. As a result, legislative vehicles such as the CRA that are exempt from this procedural obstacle will remain attractive to lawmakers – particularly conservatives – who are desperate to chalk up some legislative victories. Moreover, the CRA offers lawmakers a powerful tool for doing legislative favors for generous campaign contributors. This function of the CRA has become especially valuable thanks to the growing influx of corporate money in the wake of the Supreme Court's *Citizens United* decision.

Conservative members of Congress have become so enamored with the CRA that they are working with anti-safeguard policy advocates to identify ways to expand the law's reach and make it even more powerful. One leading legislative option is the Midnight Rules Relief Act.⁶ As expeditious as the CRA's procedures are, the law is still restrictive in that its resolutions of disapproval may only be used to repeal one rule at a time. The Midnight Rules Relief Act would change that by permitting members to "bundle" as many rules that are eligible for repeal under the CRA as they wish. This bill would be particularly pernicious because lawmakers could include in the bundle rules that otherwise would not have attracted enough votes for a repeal if they were considered on their own. Nevertheless, members might still vote on a package containing such rules if they were opposed to enough of the rules included in the package. To be sure, this strategy could backfire if a particular rule was popular enough to induce enough members to reject the bundle of rule repeals, even if those members were opposed to most or all of the rules included in the bundle.

Conservative policy advocates have also proposed a pair of related non-legislative options for extending the reach of the CRA.⁷ According to one option, which its proponents refer to as "CRA 2.0," Congress can still review and repeal older rules and guidance documents using the CRA's expedited procedures if

those rules and guidance documents were not formally submitted to Congress. Agencies could strategically “submit” these actions to Congress at steady intervals to permit their repeal. The attack on the CFPB’s bulletin on auto lending discrimination, as noted above, illustrates how this option might be deployed. While still unclear, the value of this option may turn out to be limited if there are only a few rules or guidance documents of any consequence that were not formally submitted at the time they were finalized. In any case, agencies would be free to repeal any such guidance documents on their own without involving Congress, and Trump-controlled agencies have already set about that task.

The second option, which is sometimes referred to as CRA 3.0, similarly rests on a strict reading of the CRA’s submission requirements for agencies. According to this provision, agency rules and guidance may not “take effect” unless they have been submitted in compliance with the CRA. Given that such rules are not in effect, this option would simply involve agencies refraining from enforcing or implementing the offending action. With the rule or guidance officially in legal limbo, the agency could then take whatever desired steps to eliminate or weaken it, including through the use of the notice-and-comment rulemaking process.

The frequent abuses of the CRA this past year have also spurred the public interest community to fight back against the law. In response to the CRA resolution repealing the Department of the Interior’s rule barring inhumane hunting practices in Alaska’s national wildlife refuges, the Center for Biological Diversity brought a lawsuit challenging the constitutionality of the CRA. In particular, the suit claims that the CRA violates separation of powers principles by prohibiting the Department of the Interior from issuing a replacement rule that would be “substantially the same” as the one that was repealed.⁸ The case is pending in the U.S. District Court for the District of Alaska, where the district judge is currently considering motions to dismiss the litigation from Interior Secretary Ryan Zinke and various intervenors – including the state of Alaska and several conservative organizations.

In May, congressional Democrats introduced the SCRAP Act – or the Sunset the CRA and Restore American Protection Act – in both the House and the Senate.⁹ This bill would repeal the CRA and authorize agencies to reinstate any of their rules that had been eliminated through a CRA resolution of disapproval. While such a measure is unlikely to become law in today’s political climate, it does

offer its proponents a valuable platform for highlighting the manifest dangers the CRA poses to the public interest.

Conclusion

If there were any doubts about what a dangerous law the CRA is, the first year of the Trump administration surely laid those doubts to rest. Nearly every American will experience some harm – to their health, safety, or pocketbook – as a result of the frequent abuses of the CRA’s procedures. Moreover, these abuses will only further corrode public esteem for Congress as a policymaking institution while reinforcing the strong partisan divisions that have reduced Congress to a paralyzed and dysfunctional mess. Even the policy objectives that the CRA’s supporters claim to support do not stand up to scrutiny. In short, the CRA has proved to be an irredeemably bad policy tool, with numerous disadvantages and no offsetting advantages.

The best-case scenario would be for Congress to legislatively repeal the CRA while reinstating the rules it was used to eliminate. The SCRAP Act currently pending in Congress would accomplish these objectives. With Congress unlikely to take such action any time soon, though, perhaps the best the American public can hope for is that lawmakers will renounce this harmful law and relegate it once again to its previous state of dormancy.

Endnotes

¹ Press Briefing on the Congressional Review Act with Sean Spicer, White House Press Secretary, and Marc Short, White House Director of Legislative Affairs (Apr. 5, 2017), *available at* <https://www.whitehouse.gov/briefings-statements/press-briefing-congressional-review-act-2-040517/> (last visited Feb. 20, 2018).

² Real Clear Politics, *Polls: Congressional Job Approval*, https://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html (last visited Apr. 17, 2018).

³ Zachary Warmbrodt, *GOP Maneuver Could Put Decades of Regulations at Risk*, POLITICO, Apr. 17, 2018, <https://www.politico.com/story/2018/04/17/congressional-review-act-fallout-485426> (last visited Apr. 17, 2018).

⁴ See, e.g., John Bowden, *Dems Say They Have 50 Votes in Senate to Overrule Net Neutrality Repeal*, THE HILL, Jan. 16, 2018, <http://thehill.com/policy/technology/369094-dems-say-they-have-50-votes-in-senate-to-overrule-fccs-net-neutrality> (last visited Feb. 20, 2018).

⁵ In 2017, Congress repealed 15 rules using the CRA. Congress also attempted but ultimately failed to repeal a 16th rule issued during the Obama administration. This rule, which had been issued by the Department of the Interior, sought to limit emissions of methane, a potent greenhouse gas, from oil and gas development activities occurring on public lands. The House passed a CRA resolution to repeal this rule, but the resolution failed in the Senate where it fell one vote shy of reaching the 50 votes necessary to secure passage. Juliet Eilperin & Chelsea Harvey, *Senate Unexpectedly Rejects Bid to Repeal a Key Obama-Era Environmental Regulation*, WASH. POST, May 10, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/05/10/senates-poised-to-repeal-a-final-obama-era-rule-as-soon-as-wednesday/?utm_term=.31c2cce76e0c (last visited Feb. 20, 2018).

⁶ Midnight Rules Relief Act of 2017, H.R. 21, 115th Cong. (2017), *available at* <https://www.congress.gov/bill/115th-congress/house-bill/21> (last visited Feb. 20, 2018).

⁷ Pac. Legal Found., *Red Tape Roll Back: A 'Regulatory Game Changer,'* <https://www.redtaperollback.com/cra-2/> (last visited Feb. 20, 2018).

⁸ Press Release, Ctr. for Biological Diversity, *Trump Sued for Revoking Protections for Wolves, Bears in Alaska* (Apr. 20, 2017), *available at* https://www.biologicaldiversity.org/news/press_releases/2017/alaska-wildlife-04-20-2017.php (last visited Feb. 20, 2018).

⁹ Sunset the CRA and Restore American Protection Act of 2017, H.R. 2449 (115th Cong.), *available at* <https://www.congress.gov/bill/115th-congress/house-bill/2449> (last visited Feb. 20, 2018).