



How Trump's Republicans have used an obscure Gingrich-era law to eviscerate health, safety, labor, environmental, and financial protections

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President Donald Trump has boasted that he had signed far more bills during his first months in office than many of his predecessors. Like many of his boasts, this one was misleading. Apart from purely ceremonial bills, the vast majority of bills enacted during his first six months in office stemmed from the Congressional Review Act of 1996 (CRA).

This relatively obscure statute passed by the Gingrich Congress, which President Clinton ill-advisedly signed, empowers Congress to overturn major federal regulations within 60 “session” days of promulgation by passing a joint resolution of disapproval signed by the president. If Congress permanently adjourns prior to the end of 60 days that it is in session, the next Congress gets another 75 session days to pass a joint resolution. The current Congress therefore had until late May of 2017 to overturn any major regulation promulgated by the Obama administration after early May of 2016. While “midnight” regulations of a prior administration have gotten most of the

publicity, the CRA allows a legislative veto of any major agency rule. A special provision in the law simplifies enactment by amending the Senate's rules to prevent filibusters.

The current Congress has thus far passed 15 joint resolutions overturning federal regulations designed to protect consumers, investors, workers, low-income women, students, the environment, and potential victims of gun violence. But with the stroke of a pen, the president consigned those protections to oblivion. Unless Congress passes specific authorizing legislation in the future (which would be subject to a filibuster), the agencies may never promulgate regulations that are "substantially the same" as the disapproved rules. Protections that in many cases were years in the making are now effectively lost forever.

The disapproved regulations would have protected real people from serious risks. Many of the resolutions advanced the economic agendas of narrow special-interest groups, and some advanced the ideological agendas of the Tea Party wing of the Republican Party. Although it is unlikely that an executive branch agency will promulgate a regulation that attracts a joint resolution of disapproval during the remainder of the Trump administration, the independent Consumer Financial Protection Bureau (CFPB) has promulgated two final rules during the Trump administration that have attracted CRA joint resolutions, one of which has recently passed.

An Obscure Statute with a Vicious Bite

Since presidents are generally unwilling to sign joint resolutions overturning regulations promulgated by the executive branch agencies under their supervision, the CRA has served primarily as a vehicle for publicizing Republican dissatisfaction with particular regulations when a Democrat occupies the Oval Office. During the Clinton and Obama presidencies, Republicans introduced dozens of joint resolutions aimed at regulations that irritated powerful economic or ideological constituencies, but the Senate rarely wasted its precious time with resolutions that the president was not going to sign. President Obama only had to veto four CRA joint resolutions.

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Prior to 2017, only one CRA joint resolution was signed by the president, and that was during a change in administrations. The Occupational Safety and Health Administration (OSHA) spent most of the Clinton administration writing a regulation requiring employers to establish “ergonomics” programs to protect workers from musculoskeletal injuries associated with jobs involving repetitive motions, lifting heavy objects, and other tasks that strained their bodies. Unfortunately for the workers who would have benefited from the regulation’s protections, it was one of the “midnight” regulations finalized at the very end of the Clinton administration. The Republican-controlled 107th Congress quickly passed the resolution of disapproval, and President George W. Bush signed it in early 2001. The protections never went into effect. And OSHA may not promulgate a regulation on that topic until Congress passes an authorizing bill, despite a growing scientific understanding of musculoskeletal injuries and how they can be prevented.

As in previous administrations, executive branch agencies pushed out a large number of regulations toward the end of Obama’s second term. Having run campaigns against federal regulation in 2016, President Trump and Republican congressional leaders were eager to demonstrate to their conservative populist base that they were going to bring about the “deconstruction of the administrative state,” in the memorable words of presidential adviser Steve Bannon. And what better way to begin that project than by throwing out regulations that might contribute to a positive legacy for President Obama?

Within weeks of the inauguration, nearly 40 joint resolutions were introduced to declare recently issued regulations “without force or effect.” Between January and May 18, when the CRA window closed on regulations passed during the previous administration, Congress passed and Trump signed 14 such resolutions, reversing hard-won consumer, worker, or investor protections in several key areas. More recently, the president signed a joint

resolution overturning a key consumer protection issued by the Consumer Financial Protection Bureau.

Protections for Workers

Fair Pay and Safe Workplaces. The Department of Labor's Fair Pay and Safe Workplaces rule required any company bidding on a federal contract worth more than \$500,000 to disclose to the contracting agency violations of minimum-wage and wage-theft regulations, sex discrimination and sexual harassment regulations, occupational safety and health standards, and several other labor laws over the previous three years. The primary purpose of the regulation was to make information on violations of labor laws available to contracting agencies to consider in determining whether bidders were responsible companies. The department also hoped that the regulation would incentivize prospective federal contractors to comply with those laws.

A CRA joint resolution overturning the rule easily passed the House and passed the Senate on a 49–48 party-line vote. Apparently law-and-order Republicans were not as enthusiastic about laws protecting vulnerable workers from wage theft, sex discrimination, and workplace injuries as they were about punishing immigrant workers without green cards.

Injury Recordkeeping. For 40 years, OSHA required employers in high-hazard industries to maintain accurate records of on-the-job injuries for five years. Accurate information on workplace injuries was essential to OSHA's efforts to write effective safety standards, and injury information assisted the agency in prioritizing workplaces for inspections by its very limited enforcement staff. OSHA's ability to cumulate violations over a five-year period also allowed it to seek large penalties that made it worth the effort.

The program hit a snag in 2012 when a court of appeals held that OSHA's regulations did not support its long-held position that violations of its recordkeeping requirements were cumulative. The agency therefore had only six months from the time that a violation occurred to discover and prosecute it. Given the agency's tiny inspectorate, this effectively rendered the recordkeeping requirements unenforceable, and citations for violations fell by 75 percent. OSHA fixed the problem in late 2016 by amending its

recordkeeping regulations to clarify that the failure to record an injury was a continuing violation until it was reported.

In early April 2017, Trump signed a CRA joint resolution that took away the fix. OSHA therefore remains powerless to prosecute failures to record workplace injuries after six months following the failure. Employers are free to fudge the numbers, secure in the knowledge that OSHA will probably not catch them in time to make them pay a fine. And a vital source of information about the nature and extent of job-related injuries has become far less dependable.

Retirement Savings Plans. In recent years, seven states and several cities have established retirement savings programs for employees of small businesses who do not have retirement plans of their own. These so-called “auto-IRA” programs automatically enroll uncovered employees in a state or city program, unless they opt out. More than 25 other states have been considering similar programs.

In addition to providing an opportunity to help some 55 million workers prepare for retirement, these programs could save taxpayers billions of dollars in Medicaid expenditures by lifting more retirees above poverty levels. An American Association of Retired Persons poll found that 80 percent of workers and 77 percent of conservative private-sector workers supported state-facilitated retirement programs. Many states were worried, however, that the federal program for large employers that contribute to employee retirement funds would preempt state and local programs.

Hoping to encourage states and cities to adopt these retirement plans, the Department of Labor promulgated two rules near the end of the Obama administration making clear that these programs would not be subject to federal preemption. Since they freed states and cities, the rules were deregulatory in nature and should have been music to the ears of small-government Republicans.

The rules, however, attracted fierce opposition from Wall Street banks that could have lost business opportunities when employees enrolled in the state programs, rather than in bank-run retirement plans. Joined by the Chamber of Commerce and the Heritage Foundation, they successfully lobbied Congress to repeal the rules under the CRA. The states and cities that have adopted

retirement programs now run the risk of lawsuits claiming that they are preempted, and the shift will discourage other states and cities from adopting such programs.

Drug Testing for the Unemployed. Prior to 2012, a few states attempted to cut off unemployment insurance benefits to “undeserving” applicants who tested positive for drugs in mandatory testing programs. The Obama administration and most courts, however, concluded that drug testing was not authorized by the statutes governing unemployment insurance. In that year, Congress enacted compromise legislation that extended the expiring unemployment insurance program but also empowered the Labor Department to promulgate regulations specifying occupations in which applicants could be tested for drugs. Late in the Obama administration, the department issued rules narrowly limiting the occupations to those where drug testing was already common, like aviation, trucking, and law enforcement.

The Republican regulatory reformers should have been careful what they wished for.

Presuming that the Trump administration would allow drug testing for a much larger class of jobless applicants, Republicans on a nearly straight party-line vote passed joint resolutions voiding the Labor Department regulations. They may, however, have outsmarted themselves. With the regulations thrown out, the law reverted back to the judicial interpretations before it was promulgated, under which drug testing was generally prohibited in all occupations. And the Trump Labor Department is now powerless to promulgate a regulation that is “substantially the same” without explicit congressional authorization. The Republican regulatory reformers should have been careful what they wished for.

Protections for the Environment

Stream Protection. The Department of the Interior’s Office of Surface Mining (OSM) spent multiple years of the Obama administration working on a major

overhaul of its stream protection rule. The regulations issued in mid-December 2016 required operators of surface mines, including enormous mountaintop removal mines in Appalachia, to monitor streams and groundwater for pollutants before and during mining operations, to keep discarded trashpiles (“overburden”) more than 100 feet away from streams, and to restore mined areas to a condition capable of supporting prior land uses. In addition to protecting aquatic life in 6,000 miles of Appalachian streams, the rule aimed to protect vital sources of drinking water for residents near the mines.

The coal mining industry adamantly opposed the regulation, and it assigned a high priority to persuading Congress to overturn it under the CRA. The joint resolution easily passed the House, and four Democratic senators from coal states joined all but one Republican in passing it in the Senate. The mining industry is now free for the foreseeable future to add to the 2,000 miles of streams that it has already destroyed with mountaintop removal mining.

Landscape-Level Planning. In December 2016, the Department of the Interior’s Bureau of Land Management (BLM) published an update to its 1983 procedures for land-use planning on federal lands, called “Planning 2.0.” The new procedures provided for public input early in the process of developing plans, focused on “landscape-level” planning that took into account wildlife corridors and important habitats as well as potential disruptions due to wildfires, invasive species, and climate change, and suggested that approvals of private-sector projects on federal lands should result in “no net loss” of environmental assets.

Oil and gas companies that leased public lands for fracking operations and ranchers who grazed cattle on public lands opposed the new procedures because they appeared to elevate environmental concerns over their economic interests and to centralize authority in Washington, D.C. After Congress killed the rule in March 2017, planning at BLM reverted to the far less transparent 1983 procedures, and local BLM officials were free to ignore the “no net loss” goal.

Hunting in the Arctic National Wildlife Refuge. At the insistence of lobbyists for hunting interests (gun manufacturers, sporting goods stores, professional guides, and hunters), the state of Alaska passed a law allowing licensed predator controllers to gas mother wolves and their pups in their

dens, shoot hibernating bears, kill bears with steel traps and wire snares, use donuts and other sweet baits to set up bears for easy kills, and use airplanes to scout and (in the case of state wildlife officials) shoot bears. The reason for allowing all of this unsportsmanlike carnage was to preserve more elk, moose, and caribou for hunters.

Toward the end of the Obama administration, the Department of the Interior's Fish and Wildlife Service (FWS) promulgated a regulation that effectively prohibited this "on the 76 million acres of federally managed National Wildlife Refuges in Alaska" where predator control is scientifically managed to ensure sustainable populations of predators and prey. Claiming that this restriction on the use of the federal government's own land was an unnecessary restriction on states' rights, members of the Alaska delegation introduced joint resolutions in both houses of Congress to declare the rule null and void. Their Republican colleagues (and a few Democrats) joined them in passing the joint resolution. Now FWS is powerless to protect bears and wolves on lands specifically designated as federal "refuges" for wildlife until Congress passes a law specifically authorizing such protection.

Protections for Consumers

Internet Privacy. Concerned that "online privacy" was rapidly becoming an oxymoron, the Federal Communications Commission (FCC) promulgated a regulation in October 2016 providing privacy protections for customers of internet service providers (ISPs) like AT&T, Comcast, and Spectrum. ISPs had to provide "reasonable data security" to protect information concerning their customers' use of the internet from hackers, and they had to secure the consent of customers before selling "sensitive" information on activities like web browsing, transactions, and app usage to advertisers and other entities. Public reaction to these protections was uniformly positive, except, of course, for the ISPs and the advertising companies to whom they sold the information.

Knowing that public opposition to an effort to overturn the privacy rule would be vociferous, the affected companies hit upon a strategy of quietly passing a CRA joint resolution in the Senate while the House was attracting media attention as it debated the attempted repeal of the Affordable Care Act. Taken

by surprise, consumer and civil liberties groups were out-lobbied 50 to 1, as the Senate passed the resolution by a 50–48 vote. But the resolution almost failed in the House, where several libertarian Republicans were not persuaded that it was a good idea to give ISPs free rein with the intimate details of internet users' habits and predilections. The resolution passed that body by a mere ten votes.

In the maelstrom of public protest that followed Trump's signing of the resolution, its House sponsor, Representative Marsha Blackburn of Tennessee, introduced legislation empowering the FCC to write privacy regulations and extending the authorization to all internet firms, including Google and Facebook. Unlike the joint resolution, however, that bill will be subject to a filibuster in the Senate, and Trump will have to be persuaded to sign it.

Consumer Class Actions. Created by the Dodd-Frank Act of 2010, the Consumer Financial Protection Bureau (CFPB) is an independent agency, the head of which could not be fired by the president other than for specific derelictions of duty. Its arbitration rule, promulgated in July 2017, addressed a little-known clause in most consumer contracts with financial institutions that waived the consumers' constitutional rights to a jury trial and required them to adjudicate any complaints before an arbitrator chosen by the bank. A lengthy CFPB study demonstrated that the arbitration process was so heavily weighted in favor of financial institutions that consumers prevailed less than 10 percent of the time.

These forced arbitration clauses also prevented consumers from joining together to file a class-action lawsuit. Since the amount of money involved in individual claims is usually small, it is seldom worth it to pursue a single arbitration action. As former judge Richard Posner put it, "only a lunatic or a fanatic sues for \$30." Therefore, the vast majority of consumers just eat their losses, and the offending financial institutions, ranging from payday lenders to the country's largest banks, avoid any accountability for their misdeeds. In those rare cases where consumers do pursue arbitration and prevail, the forced arbitration clauses swear them to secrecy, and nobody learns of the institution's misdeeds, not even regulatory agencies with the power to prevent them from fleecing other consumers.

The arbitration rule addressed these problems by prohibiting companies from using forced arbitration clauses to deny consumers' ability to bring class-

action lawsuits. It also required financial institutions to submit records to CFPB concerning claims, counterclaims, and awards in arbitrations.

Lobbyists for the financial-services industry and the Chamber of Commerce swarmed Capitol Hill pressing members of Congress to pass a joint resolution killing the regulation. Because soldiers were frequent victims of financial scams protected by arbitration clauses, the American Legion joined consumer groups in supporting the regulation. Even the head of Tea Party Nation editorialized against the joint resolution.

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The House passed the joint resolution killing the regulation by a 231–190 majority that included no Democrats. While the Senate was considering the joint resolution, an Alabama district judge upheld Wells Fargo’s motion to dismiss a class-action lawsuit brought by victims of its fake-accounts scheme in that state. Ignoring this indisputable evidence that banks were abusing arbitration clauses to avoid accountability for despicable conduct, the Senate passed the joint resolution in late October with Vice President Pence casting the deciding vote while Republican senators Lindsey Graham and John Kennedy voted against it. A protective regulation that took the CFPB five years of careful research and deliberation to promulgate was undone by a Republican Congress that conducted not a single hearing, suffered little floor debate, and attracted not a single Democratic vote.

Protections for Investors

Foreign Corruption. As part of the 2010 Dodd-Frank legislation, Congress enacted the bipartisan Cardin-Lugar Anti-Corruption Act, which required the Securities and Exchange Commission (SEC) to issue regulations requiring

domestic companies to report the payments—often bribes—they make to foreign governments to secure access to oil, gas, and mineral resources. Congress meant for the regulations to protect investors who were worried about the impact of possible corrupt foreign practices on the value of their investments as well as citizens of foreign countries who wanted to hold public officials accountable for how they managed their countries' resources. The implementing regulations that SEC promulgated in June 2016 required U.S. companies to report payments of more than \$100,000 on both a project-by-project and a cumulative basis to the agency. The agency denied a plea for an exemption in cases where laws enacted by foreign governments prohibited such reporting.

Several companies in the oil, gas, and mining industries lobbied Congress vigorously for a joint resolution declaring the rule to be null and void, and Trump signed the joint resolution in mid-February 2017. The joint resolution created a real dilemma for the SEC. The CRA forbids the agency from promulgating a regulation that is “substantially the same” as the 2016 rule, but the Cardin-Lugar Act told the agency to promulgate them within 270 days of the enactment of the statute. The agency has an obligation to publish final rules, but it apparently cannot perform that duty until Congress passes legislation authorizing it to do so. It is not clear, for example, whether SEC could promulgate the same rule, but with the exception that the industry demanded.

Protections for Potential Victims of Gun Violence

Gun Background Checks. The internal management regulation that the Social Security Administration (SSA) promulgated in December 2016 seemed like a no-brainer. It directed its personnel to submit to the National Instant Criminal Background Check System (NICS) relevant records of Social Security recipients who were not allowed to possess guns because of severe mental illness. A 2007 statute prohibited individuals who had been “adjudicated as a mental defective” by a court or other authority from purchasing guns, and it required their names to be added to the NICS. The regulations simply implemented a law designed to keep firearms out of the hands of mentally deranged

individuals. Who could argue with that? The National Rifle Association, of course.

The NRA argued that the regulation was unlawful, unsupported by empirical evidence, and deprived persons accused of being mentally ill of due process and of their Second Amendment rights. Despite the fact that many firearms advocates supported the SSA regulation, the NRA successfully lobbied Congress to pass a joint resolution overturning it. All Republican senators and four Democrats voted for the resolution. Since the agency may not promulgate a regulation that is substantially the same absent an act of Congress, the joint resolution has effectively emasculated the 2007 statute. So much for the Republican mantra that the solution to mass killings like the recent Las Vegas massacre is to keep guns out of the hands of mentally impaired people.

Protections for Low-Income Women

Family Planning. The Title X Family Planning Program provides federal funds to states to distribute to private organizations that provide family planning and related health services to women who are unable to obtain health insurance. For decades, the program has helped millions of women to obtain preconception health care and counseling, vaccines, Pap tests, and other services. Although federal funds may not be spent on abortions, Title X funds are available to organizations like Planned Parenthood that provide abortions with separate money.

Reacting to reports that some states were attempting to keep low-income residents from using Planned Parenthood, the Obama administration promulgated a rule preventing states from distributing Title X funds based on whether the recipient organization also performed abortions. That motivated anti-abortion activists and other longtime critics of Planned Parenthood to demand a CRA joint resolution voiding the rule. The resolution easily passed the House, but Vice President Pence had to cast the deciding vote in the Senate when Republicans Lisa Murkowski and Susan Collins voted against it.

Politicians who have for years railed against Planned Parenthood are now more free to defund it. Vulnerable women who have relied on that

organization for family-planning services must now seek help from providers deemed acceptable to male-dominated state legislatures.

Protections for Students

Education Accountability and Teacher Preparation Programs. The Every Student Succeeds Act of 2015 (ESSA), which delegated most of the responsibility for managing federal primary and secondary education grants to the states, required the Department of Education to promulgate regulations ensuring that state accountability plans were equitable and addressed needs of low-income and minority students. It also required the Department of Education to issue regulations on reporting requirements for teacher preparation programs at schools receiving federal grants.

The Department of Education's fairly innocuous regulations of November 2016 gave states a great deal of leeway, but did clarify state responsibilities and created timelines for submission of adequate accountability plans. The teacher preparation regulations were aimed at ensuring that teacher preparation programs were of "high quality." The regulations allowed the states wide discretion in creating the metrics for determining quality, but they also required programs to file reports on eight indicators of quality, including student learning outcomes. They did not specify how the indicators should be measured or what their relative weights should be.

Republican members of Congress thought the provisions on treatment of historically marginalized groups retained too much federal control over federal money. Surprisingly, Republican critics of the teacher preparation regulations had the support of teachers unions that feared states would use student test scores as a surrogate for student learning outcomes. Both regulations went down in flames. Unless Congress enacts a new law, states will have no guidance from the Department of Education on how to implement the accountability and teacher preparation programs, and the federal government will have little say over how the federal dollars are spent.

Regulations That Survived the Assault

The CRA initiative ran into serious opposition toward the end of the statutory review period. The Senate voted down a joint resolution aimed at overturning the Department of the Interior's regulation of oil and gas fracking operations in federal wildlife refuges. And the Senate leadership pulled back a joint resolution to overturn the CFPB's prepaid debit card rule that provided the same protections to those cards as applied to regular credit and debit cards. Both joint resolutions attracted loud enough howls of outrage from an aroused public that a few Republican senators decided to oppose the joint resolutions. As time ran out in mid-May, more than 20 joint resolutions remained unaddressed.

Poor Public Policy

As should be apparent from the preceding abuses, the CRA is a profoundly bad idea. It provides a vehicle for special interests and ideologues with access to the congressional leadership to disrupt the administrative process and destroy carefully crafted regulations with minimal deliberation and little explanation.

Issuing a regulation of any consequence takes a great deal of time and resources. The agencies must gather and analyze information on the harms that the regulation is addressing and the benefits and costs of various options for dealing with those dangers. All agencies must invite public comment on their proposals and be prepared to modify them in light of those comments. Agencies often hold public hearings on the proposals in various locations. They must then assemble a record, explain their conclusions by reference to their statutes and materials in the record, and respond to significant public comments. Proposed regulations must run a further gantlet in the form of approval by the White House Office of Information and Regulatory Affairs, which was designed to be anti-regulation. And agencies must be prepared to defend their factual determinations and policy judgments in court.

The CRA gives opponents a far less transparent opportunity to lobby behind closed doors, to flood the media in congressional districts with advertisements, and to make strategic campaign

contributions in pursuit of a joint resolution to kill a regulation outright.

The companies, trade associations, and interest groups that oppose a rulemaking initiative have multiple opportunities to persuade agency decision-makers, administration higher-ups, and courts that the regulation is a bad idea or should be changed. The CRA gives opponents a far less transparent opportunity to lobby behind closed doors, to flood the media in congressional districts with advertisements, and to make strategic campaign contributions in pursuit of a joint resolution to kill a regulation outright. And this can be accomplished without a single hearing and without any serious deliberation over the regulation's virtues and detriments.

The CRA allows piecemeal attacks on agency implementation of protective statutes that are almost always inconsistent with the policies underlying those laws. Congress typically enacts new regulatory statutes like the Gun Control Act of 1968 or the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 in response to crises that create demands for governmental action to protect the public. Lacking sufficient public support to repeal the law, the proponents of CRA joint resolutions can accomplish the same result by preventing the agency from implementing regulations. There was no public demand for repealing the SSA's mental illness reporting rule or the CFPB's arbitration rule, but Congress killed them anyway at the behest of the NRA and Wall Street bankers.

Furthermore, the CRA is rigged against protective regulations. By eliminating the Senate filibuster, the CRA makes it much easier to kill a protective policy initiative than it is to enact the legislation authorizing the rule. Most controversial legislation these days requires 60 votes in the Senate. Two of the joint resolutions that Congress passed this year could not even attract a majority of senators and required Pence's vote to break ties. It will be much more difficult to pass legislation re-empowering an agency to act in the future because it will have to overcome the 60-vote filibuster hurdle. Even though Congress would never have passed a statute allowing bounty hunters to kill bear cubs and wolf pups in their dens on National Wildlife Refuges, it will be extremely difficult for proponents of the FWS's regulation to secure the 60 Senate votes necessary to prevent that carnage.

The CRA is a sleeper statute that only awakens when a single political party gains control over both the presidency and Congress after a period of regulatory activity by the other party. Nevertheless, it has played a powerful role in the Trump administration's efforts to deconstruct the administrative state. Because it eliminates filibusters, it has allowed the president to declare a series of legislative victories without having to cut a deal with a single Democrat. And it has caused a great deal of damage. The 15 regulations that Trump has signed so far would have protected all of us from serious threats to our health and safety, our shared environment, and our pocketbooks. Unless Congress enacts legislation allowing those agencies to address those threats at some point in the future, the damage will be permanent. The best remedy for the harm wrought by the CRA would be to repeal it.

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