

## REGULATORY REFORM

# How Democrats Learned to Stop Worrying and Love the CRA

*Both parties now embrace the Congressional Review Act to overturn each other's regulations.*

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In the run-up to the 2016 election, Republicans spoke of using the Congressional Review Act (CRA) to repeal as many Obama-era regulations as possible. Standing in their way was the legislative calendar (the CRA can only be used for recently adopted regulations), control of Congress, and the White House. Although the G.O.P. held both houses of Congress going into the election, few expected Donald Trump to win the presidency or for Republicans to hold the Senate. But then election night came and Republicans won unified control of Washington. As 2016 played out, the Obama administration rushed through “midnight regulations” (rules typically issued in the final year of a presidential administration or between Election Day and the Inauguration), and Republicans began compiling a list of those and other rules for rescission in the new Congress.

Once the 115th Congress convened that January, President Trump and G.O.P. lawmakers worked quickly. With expedited rules in the House and the filibuster curtailed in the Senate, they were able to use the CRA 16 times, undoing most of the controversial rules ushered in by the Obama administration in 2016.

Democrats were outraged by the effort. The CRA had been used successfully only once before, in 2001, but the Republicans had transformed the “obscure” law into a potent tool to overturn the previous administration’s rules. And the CRA did more than just repeal a rule; once it was disapproved, it could not be reissued “in substantially the same form” again, meaning rulemakers

had to start over from scratch. (See “Should We Fear Zombie Regulations?” Summer 2017.) Democrats and progressive allies quickly denounced the CRA, with some calling for repealing the law. Public Citizen, a progressive advocacy group, likewise called for repeal of the CRA in May 2017.

But then the Trump administration began issuing its own regulations, some of which progressives—and a few Republicans—opposed. When the Federal Communications Commission issued rules retracting Obama-era net neutrality rules, Public Citizen performed an about-face on the CRA and joined other progressives in calling for Congress to use the act to disapprove the FCC’s move. Democrats got the resolution through the Senate, but the Republican House failed to take up the measure, leaving the new FCC rules in place.

A few months later, Democrats captured the House in the 2018 midterms and suddenly they were racing to introduce CRA measures. Granted, with the Senate and White House in G.O.P. hands, repeal was not in the offing, but the Dems now saw the efforts—and the CRA itself—as worthwhile because it allowed them to signal their opposition to Trump rulemaking. And, if the next election delivered Democrats unified control, they could do much more via the CRA. Indeed, lawmakers of both parties understood Congress has few checks on executive power. Why would Democrats or Republicans ever cede more power to the president, especially one they oppose on nearly all policy grounds? Republicans had figured out the power of the CRA, and Democrats glommed onto it once they saw the proof of concept.

We have now concluded another election cycle, and Democrats



may soon have unified control. They have held the House and captured the White House, and they can take the Senate if they win a pair of special Georgia elections in January. Even if that doesn't happen, the Dems need only attract support from a few Republican senators in order to disapprove some 2020 Trump rules.

The days of lawmakers lambasting the CRA as purely a deregulatory tool are over; it's now understood the law can also be used as a reregulatory tool, overriding Trump's deregulatory rules. In sum, both parties have something to gain from the CRA.

#### **DEMOCRATS EMBRACE THE CRA**

Before 2016, the CRA had little effect on regulation. Because a repeal effort under the act proceeds like any other resolution, the president must sign onto the disapproval measure or be overrid-

den by two-thirds majorities in both houses. As a result, the CRA has only been deployed successfully during transitions from one party to the other, and when there is new unified party control of government. For example, in 2001 Democratic President Bill Clinton gave way to Republican President George W. Bush and, early in the year, Republicans had control of both the House and Senate. They promptly used the CRA to undo a controversial ergonomics rule issued by the Labor Department at the end of Clinton's administration. Until 2017, that was the only repeal under the act.

But that does not mean the act went unused in the intervening years. From 2001 to 2016, 51 CRA resolutions were introduced in Congress, a pretty large number considering most media accounts of the law describe it as "obscure." Largely, these resolutions

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were messaging bills, demonstrating to constituents that certain members of Congress had *tried* to undo the rules.

Interestingly, many of those 51 resolutions were introduced by Democrats. Contrary to the “anti-regulation” moniker some have placed on the CRA, it is really “anti-the-president’s-regulatory-agenda.” Naturally, Republican presidents issue plenty of rules that Democrats don’t like and Democratic presidents issue plenty that Republicans don’t like. The CRA is a way for lawmakers to fight against those rules—or at least to signal to their constituents that they’re fighting back.

Of the 51 disapproval resolutions introduced over the 2001–2016 period, 23 were introduced in the 114th Congress (2015–2016), 45% of the total figure. This coincided with Republican control of both the House and Senate. They were eager to use their new power to force President Obama to veto CRA resolutions. He had no problem doing that, effectively upholding regulations his administration had crafted. In doing so, he made minor history, becoming the first president to veto a resolution of disapproval.

If a total of 23 CRA resolutions sounds like a major uptick over the 113th Congress (just six), the next Congress would see a new highwater mark in CRA activity. The 115th Congress introduced 65 CRA resolutions. As noted, early on that activity centered around Republicans eager to undo the midnight rules of the Obama administration. But by the end of the session, Democrats were adding to the ledger in response to Trump administration

remove debt. As one might expect, President Trump vetoed it because the rule was a product of his Department of Education.

The measures Democrats targeted ran the gamut:

- Rules tightening student loans standards
- Community Reinvestment Act rules (Only in D.C. could one act dubbed “CRA” be used to repeal another act dubbed “CRA.”)
- IRS measures
- President Trump’s controversial action to unilaterally delay payroll taxes

The lesson from the past four years is clear: both parties will work diligently to use the CRA to check the executive. Fans of strong separation of powers and critics of growing executive authority should applaud this development. Although its practical use is limited to transitions of power with unified party control, the bipartisan embrace of the CRA is welcome as an antidote to the gradual legislative delegation of power to the executive branch that has occurred over the last several generations.

#### A 2021 CRA BONANZA?

The question now is how Democrats plan to employ the CRA in the 117th Congress. With unified control and a wealth of Trump-era regulations ripe for repeal, could the Dems break the CRA record Republicans set in 2017? If the 116th Congress is predictive, progressives will probably do so.

According to media reports, the Center for American Progress and other progressive groups have already compiled a list of rules Democrats should repeal in 2021. They range from financial regulations to environmental rules. If Democrats do succeed in capturing both Georgia Senate seats this January, those efforts are a go.

Given Republicans spent considerable time pruning the 2010 Dodd–Frank finance legislation and its hundreds of implement-

ing regulations, we can expect Democrats to use the CRA to repeal those repeals. Chief among this push will be an attempt to undo a recent tweak of the Volcker rule, which limits how banks can invest their own money. Although the rule on paper did not reduce any regulatory costs—largely because independent agencies implemented the measure—reports indicate Democrats are especially eager to undo it. Likewise, reports indicate Democrats have their eyes on a payday lending rule from the Consumer Financial Protection Bureau. Viewed as harming low-income borrowers and with only a short window to pass a disapproving resolution under the CRA, this rule may be one of the first actions by progressives in 2021. Another target is a 2020 Securities and Exchange Commission rule placing restrictions on shareholder activity that critics complain makes it more difficult for activists to push companies on social and environmental issues.

*The CRA not only offers lawmakers a way to repeal rules they dislike, it also signals to their constituents that even if they don’t have presidential and congressional support for repeal, they’re still fighting against the rules.*

actions. For example, Rep. David Price (D–NC) introduced a measure to repeal an IRS rule regarding tax returns. Rep. Kathy Caster (D–FL) attempted to undo a Health and Human Services rule on short-term insurance. Finally, Sen. Ed Markey (D–MA) led the charge to reinstate the FCC’s net neutrality rules. That session saw a record 19 CRA resolutions pass at least one chamber; two of them were sponsored by Democrats.

After regaining control of the House in 2019, Democrats upped the ante and began setting the stage for rules a Democratic president could repeal in 2021. In 2019 and 2020, lawmakers introduced 13 CRA resolutions, the third highest figure on record (as of this writing). Of those 13 measures, Democrats introduced all but one. Democrats managed to pass four through at least one chamber, and one through both—a measure that would have disapproved of a Trump rule that made it more difficult for student loan borrowers to

Beyond Dodd–Frank, it is likely the Biden administration will try to disapprove all the Trump-era environmental and energy rules that it can. Biden is expected to move quickly on measures to curb greenhouse gas emissions. Another target is last September’s Environmental Protection Agency repeal of greenhouse gas and volatile organic compound rules for the oil and natural gas industry. In late August, the EPA also revised guidelines for toxic

According to the AAF, there were three proposed rules in 2020 that carry deregulatory savings of least \$1 billion. The “most deregulatory” measure comes courtesy of the Labor Department, which has proposed modifying independent contractor status under the Fair Labor Standards Act. At \$3.2 billion in regulatory savings, the rule would go a long way toward Trump’s deregulatory vision of cutting the cost of regulation. However, the rule was proposed on September 25, 2020 and it would be quite a rush to publish a final rule before Trump leaves office—though not an impossible feat in the history of regulatory rush jobs.

Another rush job would be the EPA’s proposal to modify coal ash rules. The measure would then become a prime Democratic target for CRA disapproval. For Republicans, \$2 billion in potential regulatory savings are the benefits of preserving the Trump measure.

In June the Department of Transportation proposed modifying gas pipeline regulations. The agency projects more than \$1.4 billion in long-term regulatory savings if the rule goes final. The agency’s Unified Agenda entry lists no date for a final rule but expect it to be a Trump midnight priority.

It should be remembered that lawmakers will not be the only ones checking Trump’s last-minute regulatory actions. As both he and Obama can attest, the courts have their say over a president’s regulatory agenda. However, the judiciary does not move as quickly as a disapproval resolution. This adds to the incentive for lawmakers to use the CRA to undo disfavored rules from the last administration.

## CONCLUSION

The CRA was once viewed largely as a deregulatory cudgel only capable of eroding health and safety standards. But now it is one of the top weapons Congress has to check the executive’s regulatory power. Granted, the check is only effective when the White House changes party hands and there is unified party control of the U.S. government, but the CRA’s transformation from a deregulatory tool in 2017 to a potentially pro-regulatory tool in 2021 is remarkable.

Given how little Congress used it before the 114th Congress, one can argue the CRA was almost a forgotten check on the executive from the time of its inception in 1996 to 2015. However, it is now seen as a favored tool of both Democrats and Republicans. Any why not? Both parties have quickly learned its efficacy, not only from a legislative perspective, but a political messaging perspective too. Beyond that, successful disapproval resolutions under the CRA have a certain permanence because similar rules cannot be reissued in “substantially the same form.” We can expect Congress to call on the CRA often in 2021, as Democrats have a full slate of rules they would like to repeal. R

*Both Republicans and Democrats have discovered the Congressional Review Act’s efficacy not just from a legislative perspective, but a political messaging perspective too.*

wastewater from power plants. In July, it limited the ability of states to issue water quality certifications pursuant to the Clean Water Act. And in late August, the agency loosened coal ash disposal rules. The list of targets, from a progressive perspective, is nearly endless and the agency’s bounty of recently finalized rules provides plenty of fodder for CRA review in 2021.

According to the American Action Forum (AAF), Trump’s EPA rules reduced regulatory costs by more than \$200 billion in 2020 alone. The largest such deregulatory action was the move to repeal vehicle fuel economy standards for 2021–2026 passenger cars and light trucks. Although published on April 30, 2020 and likely outside the CRA’s disapproval window, the Biden administration and allies in Congress will probably take a stab at overturning the measure, with the effort ending up in court.

Democrats also have a suite of appealing targets resulting from the 2020 CARES Act, which initiated several government programs in response to the COVID-19 pandemic, as well as executive orders related to the pandemic. As noted above, President Trump’s move to unilaterally suspend the collection of certain payroll taxes outraged Democrats. In response, Democrats asked the Government Accountability Office whether the executive action constituted a rule under the CRA. Faced with a similar question in 2018, the GAO decided that a measure would be deemed a rule if the agency had previously submitted it to the GAO for review in accordance with CRA procedure. As a result, the GAO just referenced its 2018 opinion; thus, the payroll tax deferral and likely other COVID-19 executive actions are eligible for repeal in 2021. As the GAO noted, just because a rule fails to appear in the *Federal Register* does not obviate its CRA scrutiny.

More targets might emerge during Trump’s midnight period. Amidst this flurry of activity, the quality of benefit–cost analysis shrinks significantly and political considerations supercharge the implementation of hasty final rules.