

The Trump Administration and the Congressional Review Act

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ABSTRACT

The Congressional Review Act (CRA) gives a new Administration and a new Congress with a majority of members from the President's party the opportunity to invalidate "midnight rules" promulgated by an outgoing Administration and to reject rules that an agency never submitted to Congress. Taking advantage of that opportunity requires internal analysis by the new Administration of the rules subject to the CRA and coordination with Congress. The President must identify the particular rules that he wishes to see held invalid; the Speaker of the House and Senate Majority Leader must ensure that there are sufficient votes to invalidate the rules to which the President objects; and both branches must ensure that the CRA process is conducted in an orderly and expeditious manner. In the first half of 2017, the Trump Administration and Congress vigorously used the CRA to eliminate unlawful or unwise agency rules. Until recently, however, the CRA review process has largely gone quiet. The interesting question is why. There are additional opportunities for use of the CRA. Whether President Trump and Congress will make use of those opportunities is likely more a matter of politics than law.

TABLE OF CONTENTS

INTRODUCTION	506
I. THE CONGRESSIONAL REVIEW ACT	508
II. THE TRUMP ADMINISTRATION AND CONGRESS' PAST USE OF THE CONGRESSIONAL REVIEW ACT	512
III. THE TRUMP ADMINISTRATION AND CONGRESS' POTENTIAL USE OF THE CONGRESSIONAL REVIEW ACT.	514
A. <i>Step 1: Identify the Rules</i>	515
B. <i>Step 2: Categorize the Rules</i>	515

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Category 1: Rules that the Trump Administration Wants Congress to Nullify	515
Category 2: Rules that the Trump Administration Does Not Want Congress to Nullify.	516
Category 3: Rules that the Trump Administration Will Repeal Itself	517
Category 4: Rules that the Trump Administration Will Leave to Private Parties to Challenge in Litigation	518
CONCLUSION.	519

INTRODUCTION

Early in 2017, President Donald Trump and his advisors announced that one of his Administration's priorities was to remake the regulatory state.¹ President Trump's nonelected government not only is massive in size, but also is responsible for adopting far more law through regulations than Congress does via statutes. Those rules can also be quite expensive. In 2015 alone, federal agencies promulgated regulations that imposed more than \$22 billion in annual costs on the nation.²

The overregulation problem, however, is not a partisan one. Then-President Barack Obama once quipped that, even though he no longer had a governing majority in Congress, he had a pen and a phone and would govern by using them.³ He probably used his pen to sign executive orders and his phone to call agencies with instructions to come up with new rules. But Republican presidents have been guilty of the same affliction since Richard Nixon was President. They built out the administrative state by establishing new departments, such as the

1. See, e.g., Michael C. Bender & Rebecca Ballhaus, *Trump Strategist Steve Bannon: 'Every Day Is Going to Be a Fight,'* WALL STREET J. (Feb. 23, 2017), <https://www.wsj.com/articles/trump-strategist-steve-bannon-every-day-is-going-to-be-a-fight-1487881616> [<https://perma.cc/BLU4-6JAM>] (stating that Steve Bannon, who was at that time the chief strategist to President Trump, said that the President will "push for deregulation, which Mr. Bannon referred to as 'deconstruction of the administrative state'"); see also Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL'Y 187, 189–90 & n.4 (2018).

2. Adam J. White, *Republican Remedies for the Administrative State*, in UNLEASHING OPPORTUNITY, PART II: REFORMS FOR AN ACCOUNTABLE ADMINISTRATIVE STATE 1 (Yuval Levin & Emily MacLean eds., 2017); see also JAMES L. GATTUSO & DIANE KATZ, HERITAGE FOUND., RED TAPE RISING 2016: OBAMA REGS TOP \$100 BILLION ANNUALLY, BACKGROUND, at 1 (2016), <http://www.heritage.org/research/reports/2016/05/red-tape-rising-2016-obama-regs-top-100-billion-annually> [<https://perma.cc/CP5C-524H>] ("The addition of 43 new major rules [in 2015] increased annual regulatory costs by more than \$22 billion, bringing the total annual costs of Obama Administration rules to an astonishing \$100 billion-plus in just seven years.")

3. Brendan Bordelon, *Obama declares Congress redundant: 'I've got a pen, and I've got a phone,'* THE DAILY CALLER, Jan. 14, 2014, <http://dailycaller.com/2014/01/14/obama-declares-congress-redundant-ive-got-a-pen-and-ive-got-a-phone-video/> [<https://perma.cc/LP9H-ZQS5>].

Environmental Protection Agency, creating a regulatory state with decades and decades of roots and branches.⁴

President Trump began Year One of his deregulatory program with gusto.⁵ During his first few months, he issued a series of executive orders directing federal officials to eliminate unnecessary rules and slow the adoption of new ones.⁶ The result was to start paring back the Leviathan.⁷ At a minimum, he slowed its growth.⁸

In one respect, President Trump has done even more. By relying on a previously little-known statute called the Congressional Review Act (CRA), President Trump has been able to eliminate regulations adopted during the last year of the

4. See Christopher DeMuth, *The Regulatory State*, 28 NAT'L AFF. 70, 70, Summer 2012 (“[T]he apparent partisan divide over regulations is illusory During the half-century before President Obama’s election, the greatest growth in regulation came under Presidents Richard Nixon and George W. Bush.”).

5. For an early—and highly critical—analysis of the first year of the Trump Administration’s deregulatory efforts, see Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). For responses, see Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13 (2017); Aaron L. Nielson, *Confessions of an “Anti-Administrativist,”* 131 HARV. L. REV. F. 1 (2017).

6. See, e.g., Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (Promoting Energy Independence and Economic Growth); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017) (Enforcing the Regulatory Reform Agenda); Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017) (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 8, 2017) (Core Principles for Regulating the United States Financial System); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (Reducing Regulation and Controlling Regulatory Costs); Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017) (developing a process for identifying high priority infrastructure projects and creating expedited environmental reviews and approvals for such projects); Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 24, 2017) (Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal). Trump’s lieutenants followed his lead. See, e.g., Fiduciary Duty Rule, Memorandum for the Secretary of Labor, 82 Fed. Reg. 9675 (Feb. 7, 2017); Memorandum from Dominic J. Mancini, Acting Adm’r, Office of Info. & Regulatory Affairs, to Regulatory Policy Officers at Exec. Dep’ts & Agencies & Managing & Exec. Dirs. of Certain Agencies and Comm’ns (Feb. 2, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017> [<https://perma.cc/2NBH-LW56>].

7. See, e.g., Andrew Rudalevige, *Regulation Beyond Structure and Process*, 34 NAT'L AFF. 93, 93–94, Winter 2018; Editorial Bd., *The Great Rules Rollback*, WALL STREET J. (Dec. 25, 2017), <https://www.wsj.com/articles/the-great-rules-rollback-1514237372?mod=searchresults&page=1&pos=2> (“The results have been impressive. [Director of the Office of Information and Regulatory Affairs Neomi] Rao reported this month that through Sept. 30 the Trump Administration had taken 67 deregulatory actions but only three new significant regulatory actions. That’s a 22 to 1 ratio. She also reported that since fall 2016 more than 1,500 planned regulatory actions have been withdrawn or delayed. For fiscal 2018, the current agenda includes 448 deregulatory actions and 131 regulatory actions, a better than 3 to 1 ratio.”); James Freeman, *Rookie of the Year*, WALL STREET J. (Dec. 29, 2017), <https://www.wsj.com/articles/rookie-of-the-year-1514589049?mod=searchresults&page=1&pos=1> (“The largest rate cut in the history of the U.S. corporate income tax, along with individual tax cuts up and down the income scale, arrive on top of a year-long effort to reduce America’s regulatory burden.”); Ted Mann & Rebecca Ballhaus, *Trump Boasts of Success in Cutting Red Tape*, WALL STREET J. (Dec. 14, 2017), <https://www.wsj.com/articles/trump-boasts-of-success-in-cutting-red-tape-1513286752?mod=searchresults&page=1&pos=12>.

8. See, e.g., CLYDE WAYNE CREWS, TRUMP REGULATIONS: FEDERAL REGISTER PAGE COUNT IS LOWEST IN QUARTER CENTURY, COMPETITIVE ENTERPRISE INST. (Dec. 29, 2017), <https://cei.org/blog/trump-regulations-federal-register-page-count-lowest-quarter-century> [<https://perma.cc/2JK7-PMEA>].

Obama Administration.⁹ One aspect of a Trump Administration Year 1 retrospective, therefore, should be an analysis of the Administration's efforts to use that statute to eliminate agency rules, including the ones that went into place as Obama Administration officials walked out the door.

The bottom line is this: The Trump Administration was fast out of the gate. Then, for some unknown reason it slowed down around the clubhouse turn. But the Administration can—and should—make up for lost ground in the backstretch. With tax reform behind him, President Trump might decide that reformation of the administrative state would be a good strategy for the remaining 2018 straightaway.¹⁰

I. THE CONGRESSIONAL REVIEW ACT

The CRA empowers Congress and the President to use a fast-track process to pass legislation repealing an agency rule.¹¹ The Act benefits both branches of government. The law enables a president to revoke certain agency rules expeditiously without undergoing the often-lengthy notice-and-comment process that agencies must generally pursue to rescind an agency rule.¹² The Act also allows Congress to consider a rule and quickly decide whether to invalidate it without fear of a Senate filibuster. In a time of always polarized and often poisonous relationships between the parties, the ability to accomplish results expeditiously is a godsend.

The CRA works as follows: A federal agency¹³ must submit to Congress and the Comptroller General a copy of a new “rule” before the rule can take effect.¹⁴ The term “rule” has an exceptionally broad reach, effectively reaching any regulation, legal opinion, guidance document, manual, or other document that establishes rights or responsibilities or offers an agency's interpretation of the law.¹⁵

9. 5 U.S.C. §§ 801–08 (2012). The CRA was enacted as Title II, Subtitle E, of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 871 (1996).

10. A straightaway that could be longer than originally anticipated. See Kristina Peterson & Natalie Andrews, *GOP Cancels Most of Senate's August Recess*, WALL STREET J. (June 5, 2018), <https://www.wsj.com/articles/gop-cancels-most-of-senates-august-recess-1528224651?mod=searchresults&page=1&pos=4>.

11. See Larkin, *supra* note 1, at 197–204.

12. See *Motor Vehicle Mfrs. of Am. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (ruling that an agency must undergo the same notice-and-comment process to repeal a regulation that is required to adopt one by the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq. (2012)).

13. The CRA applies both to those agencies under the direct supervision of the President and to so-called “independent agencies.” Larkin, *supra* note 1, at 214 & n.85.

14. With a few exceptions, the CRA incorporates the definition of “rule” adopted by the APA. See 5 U.S.C. § 801 (2012) (incorporating § 551(4)): “[R]ule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing”); see Larkin, *supra* note 1, at 204–14.

15. Larkin, *supra* note 1, at 204–14.

The submission requirement enables the Comptroller General to review the rule for Congress and sets in motion an expedited process by which Congress can nullify the rule quickly by passing a joint resolution of disapproval that is presented to the President for his signature or veto. If the President signs the resolution or Congress overrides his veto, the rule is nullified and the agency cannot re-adopt it or a “substantially similar” one unless Congress passes new authorizing legislation.¹⁶

President Trump and Congress took advantage of the CRA in 2017. Together, they quickly erased 14 agency rules promulgated during President Obama’s last year in office and one adopted in 2017 by the Consumer Financial Protection Bureau.¹⁷ From a deregulatory perspective, the result was to eliminate rules that neither the President nor Congress wanted to see on the books. From a “good government” perspective, the result was to void rules adopted by an outgoing administration that was no longer politically accountable to the public.

But there is more. The invalidation of a rule under the CRA does not just render the rule null and void. It also bars an agency from adopting the same or “substantially the same” rule absent some intervening legislation by Congress authorizing the agency to reissue the rule.¹⁸ This prevents agency gamesmanship in the regulatory process.

How far back can Congress and the President reach to nullify an agency rule that was never submitted to Congress? Put another way, is the CRA limited to rules adopted during the twilight of an administration or can Congress and the President invalidate any rule that was never submitted to Congress even if the rule has been on the books for years? The answer to that question is important because it goes a long way toward determining whether the CRA is merely a mechanism for rescinding the so-called “midnight rules” adopted by an outgoing administration before it shuts off the lights. Of course, the CRA would be a valuable tool even if it served only that limited role. The statute would partially remedy the problem that an outgoing administration cannot be held politically accountable after the election for any agency rules that it generates. But a broader reach-back potential would allow the CRA to function as an even more important congressional oversight mechanism because it would prevent an agency from trying to deny Congress the opportunity to nullify one of the agency’s rules by sitting on the rule forever.

The CRA gives Congress a maximum of 60 legislative days to review a rule and pass a joint resolution of disapproval for the President to sign or veto.¹⁹ It therefore could be argued that the CRA does not allow Congress to reach back beyond that period to review an unsubmitted rule. That interpretation, however,

16. *Id.* at 198–204.

17. *Congressional Review Act*, GEORGE WASH. UNIV. REGULATORY STUDIES CNTR, <https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/CRA%20Tracker%205-23-18.pdf> [https://perma.cc/NYY7-73XP].

18. See Larkin, *supra* note 1, at 204 & n.43.

19. 5 U.S.C. §§ 801–02 (2012); Larkin, *supra* note 1, at 199–200.

disregards the text and purposes of the CRA.²⁰ They make clear that the congressional review period does not commence unless and until an agency files a new rule with each house of Congress. *A fortiori*, the review term also cannot expire before Congress has an opportunity to analyze a new rule. Otherwise, an agency could defy the CRA by refusing to submit the rule for potential rescission and proceeding as if Congress had reviewed the rule and declined to invalidate it. Congress enacted the CRA to cabin agency excesses in rulemaking, not to encourage it, so any construction of the CRA that would nullify the congressional review period would be entirely nonsensical.²¹

Recently, the Senate, House of Representatives, and President Trump concluded that they can reach back well past the last 60 legislative days of the Obama Administration to nullify an agency rule.²² In 2013, the Consumer Financial Protection Board (CFPB) issued a guidance document requiring automobile dealers and lenders to consider the “disparate impact” on minorities of car loans.²³ The auto industry objected to the CFPB’s conclusion because the relevant federal law—the Dodd-Frank Wall Street Reform and Consumer Protection

20. See 5 U.S.C. § 802(b)(2) (“For purposes of this section, the term ‘submission or publication date’ means the later of the date on which—(A) the Congress receives the report submitted under section 801 (a)(1); or (B) the rule is published in the Federal Register, if so published.”); Larkin, *supra* note 1, at 215 (“The time to introduce a joint resolution of disapproval does not commence until the *later* of the date of *Federal Register* publication or the date that Congress receives the report. It would be silly to conclude that the legislative review period *precedes* the date that Congress can introduce a resolution of disapproval. Moreover, the period of expedited review in the Senate—a key feature of the CRA because it prevents a filibuster—is measured from the ‘submission or publication date,’ which ‘means the later of the date on which’ Congress ‘receives the report’ or it is ‘published.’ It would also be witless to conclude that the Senate’s expedited procedure ends before Congress receives the rule. Accordingly, publication alone does not trigger the review period. To start the clock the rule must also be presented to Congress and the Comptroller General.”) (footnote omitted). The Government Accountability Office General Counsel has concluded that the sixty-day period does not begin to run until both houses of Congress have received the agency’s report. MORTON ROSENBERG, CONG. RES. SERV. RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 3 n.5 (2008).

21. Larkin, *supra* note 1, at 204–17.

22. See, e.g., Kevin Freking, *GOP’s Regulatory Fight Goes to Another Level over Car Loans*, ASSOCIATED PRESS (Apr. 18, 2018), <https://www.apnews.com/dd7ef0a5d583473a948b9e0eaaff92ee> [<https://perma.cc/4AH7-7LLA>]; Reuters, *Senate Votes to Undo Consumer Bureau’s Auto Guidance*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/reuters/2018/04/18/us/politics/18reuters-usa-congress-autolending.html>; Editorial, *Racial-Profiling Rule Reversal*, WALL STREET J. (Apr. 19, 2018) [hereinafter *Racial-Profiling Rule Reversal*], <https://www.wsj.com/articles/racial-profiling-rule-reversal-1524179354?mod=searchresults&page=1&pos=3>; Yuka Hayashi, *Senate Votes to End Auto-Loan Anti-Discrimination Rule*, WALL STREET J. (Apr. 18, 2018) [hereinafter Hayashi, *Senate Ends CFPB Rule*], <https://www.wsj.com/articles/senate-votes-to-end-auto-loan-anti-discrimination-rule-1524078961?mod=searchresults&page=1&pos=8>; Yuka Hayashi, *GOP Readies to Kill CFPB’s Auto-Loan Rule Using Newly Expanded Tool*, WALL STREET J. (Apr. 17, 2018) [hereinafter Hayashi, *Newly Expanded Tool*], <https://www.wsj.com/articles/senate-moves-toward-killing-cfpb-rule-on-auto-lending-discrimination-1523991013>; Joseph Lawler, *Senate Republicans Open New Front in War on Regs*, WASH. EXAMINER (Apr. 18, 2018), <https://www.washingtonexaminer.com/policy/economy/senate-republicans-open-new-frontier-in-war-on-regulations> [<https://perma.cc/5KFT-VAAU>].

23. See Consumer Fin. Prot. Bd., *Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act*, Bulletin 2013-02 (Mar. 21, 2013).

Act²⁴—does not empower the CFPB to regulate motor vehicle sales.²⁵ In April 2018, the Senate agreed, voting to nullify the CFPB’s guidance document. The Senate’s action was important because it marked the first time that the chamber voted to nullify a rule that has been in effect for years and took the form of an informal guidance document rather than a legislative rule.²⁶ The Senate’s action opened up the possibility that the 115th Congress and the president would nullify agency rules, even ones issued in the form of guidance documents, that Congress and the president deem unlawful or unwise, even if they were promulgated long ago.²⁷ The text and purposes of the CRA clearly authorize Congress to exercise

24. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at scattered provisions of the U.S. Code).

25. *Racial-Profiling Rule Reversal*, *supra* note 22 (“Dodd-Frank explicitly prohibits the CFPB from regulating auto dealers. But former director Richard Cordray evaded the ban by regulating auto-financing as a way to dun dealers. He alleged dealers discriminated against minorities by charging them higher interest rates, though he had no proof since auto dealers are prohibited from collecting racial data. As a substitute for evidence of actual discrimination, Mr. Cordray racially profiled borrowers by using their last names and addresses—e.g., someone who lives in Compton with the last name of Jones must be black. In 2013 Mr. Cordray issued guidance requiring auto lenders and dealers to consider the “disparate impact” of loans.”); Hayashi, *Newly Expanded Tool*, *supra* note 21 (“The GOP and the industry have long sought to roll back the regulation, which they see as a leading example of the CFPB’s regulatory overreach, criticizing the agency’s attempt to regulate auto dealers. While the CFPB has authority over auto lenders, the 2010 Dodd-Frank Act specifically excluded auto dealers from the bureau’s jurisdiction. Critics also questioned the methodology the agency used to identify discrimination. The government used a combination of last names and addresses to make educated guesses about whether borrowers were likely to be minorities.”).

26. Hayashi, *Newly Expanded Tool*, *supra* note 22 (“Since last year, GOP lawmakers have used a legislative mechanism called the Congressional Review Act more than a dozen times to kill regulations enacted during the final months of the Obama administration. But this is the first time the tool is used to target a regulation that has been in effect for several years, a development made possible by a new interpretation by the U.S. Government Accountability Office. Responding to a Republican request in December, the GAO opined that the CFPB had erred by implementing the auto-lending policy through guidance, rather than a formal rule subject to a lengthy rulemaking process, making it eligible for a fresh congressional review.”); Lawler, *supra* note 21 (“What makes the auto lending CRA vote unusual, though, is that the regulation is not an official rule. Instead, it was a guidance bulletin that the CFPB issued five years ago.”).

27. See Freking, *supra* note 22 (“The legislative battle extends beyond the terms of car loans, however. Opponents warned that the GOP’s fight against government regulations entered a new phase and the Senate vote could be the first of many efforts to nullify agency bulletins and guidance letters issued over the years. Such guidance conveys to the public how regulators interpret existing law and what steps industries should take to comply.”); Hayashi, *Newly Expanded Tool*, *supra* note 21 (“‘Republicans feel they have opened up a pretty rich vein here, given this interpretation from the GAO allows them to put at risk regulations that have been in place for years, if not decades,’ said Charles Gabriel, president of Capital Alpha Partners LLC, a policy research firm. ‘Other potential targets include environmental and energy rules, he said.’”); Lawler, *supra* note 21 (“In trying to rein in the CFPB via the resolution, Republicans may be setting a precedent for cutting out more agency regulations, including ones that might have been going on for long periods The precedent set by the resolution raises the prospect that Congress, in theory, could reach back years to stop regulatory practices.”); Alan Rappeport, *Senate Votes to Ease Restrictions on Auto Lending Discrimination*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/us/politics/senate-auto-lending-discrimination.html> (Ron Dennis of Americans for Financial Reform, an advocacy group: “Lawmakers have also opened the door to challenging longstanding agency actions that are crucial to protecting workers, consumers, civil rights, the environment and the economy.”); Reuters, *supra* note 21 (“David Rosen, a spokesman for the consumer-protection group Public Citizen,

that power.²⁸ In fact, shortly after the Senate acted, the House of Representatives also passed a joint resolution of disapproval,²⁹ and President Trump signed it into law, nullifying the CFPB rule.³⁰ Accordingly, the Article I and II branches agree that an agency's violation of the CRA does not prevent Congress and the President from using that law to eliminate a noncompliant rule regardless of the form it takes and regardless that it may have been issued years ago.

Accordingly, the question going forward will be not whether Congress and President Trump *can* nullify nonsubmitted legislative and interpretative rules adopted long ago, but will be whether Congress *should* eliminate particular rules. If the 115th Congress takes that opportunity during its remaining days, it and the president would be able to add to the regulatory reform that they have already achieved via their past use of the CRA and President Trump's executive orders. A game plan is helpful to move forward in that regard. The next section offers one that could prove useful.

II. THE TRUMP ADMINISTRATION AND CONGRESS' PAST USE OF THE CONGRESSIONAL REVIEW ACT

As noted, the Trump Administration collaborated with Congress to nullify 15 rules. If that exercise called for a grade, the Trump Administration would receive an "A." Before Trump was sworn into office, Congress and the President had combined to use the CRA on only one occasion to repeal an agency rule. That occurred during the early days of the Administration of George W. Bush, when he signed a joint resolution of disapproval invalidating an ergonomics rule adopted in the waning days of the Clinton Administration.³¹ Trump's early strategy signaled a belief that his Administration would use the CRA aggressively to eliminate rules that hamper employment and investment.

Since then, however, the Trump Administration has generally been largely—and curiously—silent. The text and purposes of the CRA make it clear that a rule not submitted to Congress is not yet in "effect" and therefore cannot justify

said the vote sets a dangerous deregulatory precedent. 'This allows Congress to overturn regulatory protections that have been in place for years or even decades,' Rosen said of the resolution.'").

28. The CRA allows Congress to nullify any agency "rule" that was never submitted to the Senate and House of Representatives, as required by the CRA, regardless of whether the rule is a "legislative" rule or an "interpretative" rule. Larkin, *supra* note 1, at 204–14. Agencies often issue interpretative rules in the form of guidance documents, opinion letters, "Dear Colleague" letters, manuals, plans, and the like. *Id.* at 205. All are covered by the definition of a "rule" for purposes of the CRA. *Id.* at 204–14. In addition, the CRA gives Congress the authority to nullify any agency rule that was never submitted to Congress. Congress can reach back as far as the date that the CRA became law. *Id.* at 214–32.

29. Andrew Ackerman, *Congress Overturns Rule Targeting Racial Discrimination in Auto Lending*, WALL STREET J. (May 8, 2018), <https://www.wsj.com/articles/congress-overturns-obama-era-auto-loan-rule-1525813277?mod=searchresults&page=1&pos=1>.

30. *Congressional Review Act*, *supra* note 17; Reuters, *Trump Signs Congressional Resolution Overturning Auto Lending Rule* (May 21, 2018), <https://www.reuters.com/article/us-usa-house-autolending/trump-signs-congressional-resolution-overturning-auto-lending-rule-idUSKCN11M25V> [<https://perma.cc/6DER-GR85>].

31. Sam Batkins & Adam J. White, *Should We Fear "Zombie" Regulations?*, REGULATION, Summer 2017, at 16.

government action infringing on a person's liberty or property interests. The Trump Administration could submit to Congress today any rules that were published in the Federal Register but had never been submitted to Congress since the CRA became law in 1996. The Administration signaled early last year that it would make an aggressive use of the CRA, so its inactivity since then is quite curious. Given the Trump Administration's stated interest in "deconstruction of the administrative state,"³² it is surprising that the Administration has not pushed Congress to review a large number of rules adopted during earlier administrations. It raises the obvious question: Why?

One possible explanation is that only a few agency rules were not submitted to Congress as required by the CRA. That is a possible, but not likely explanation for the Administration's inaction. The exact number of unsubmitted rules is a matter of some conjecture, but the number is likely to be considerable. Different parties, including the Government Accountability Office (GAO), have analyzed or estimated the relevant number. For example, the GAO concluded that agencies had failed to submit more than 1,000 rules to Congress between 1999 and 2009.³³ Others have estimated that there are hundreds or thousands of rules that still have not been filed with Congress and the Comptroller General.³⁴ Whatever the exact number is, the likelihood is virtually nil that there is a null set of important regulations that agencies did not submit to Congress. That is particularly true when you remember that the reach of the CRA is quite broad, taking in whatever types of guidance documents an agency might develop.³⁵

A more likely explanation is political in nature. It might be the case that Trump Administration officials know that a potentially large number of rules—particularly agency guidance documents—were never submitted to Congress and therefore are not the law, even though agencies treated them as such over the course of the past three administrations. Aware of that fact, senior officials in the agencies, at the Office of Management and Budget, and elsewhere in the White House might be torn about how to proceed. Although the mistakes occurred before they became responsible for running the government, they might fear that acknowledging the problem

32. See Larkin, *supra* note 1, at 189 n.3 (quoting White House Chief Strategist Steve Bannon).

33. *Id.* at 237–38.

34. *Id.* at 237–38 n.167; MAJORITY STAFF REPORT, HOUSE COMM. ON OVERSIGHT AND GOV'T REFORM, SHINING LIGHT ON REGULATORY DARK MATTER 10 (Mar. 2018) ("The information obtained by the Committee shows, of the more than 13,000 guidance documents identified, agencies sent only 189 to Congress and GAO in accordance with the CRA. To be sure, not all of the more than 13,000 guidance documents disclosed to the Committee necessarily qualify as a rule under the CRA. However, many of these guidance documents would likely qualify as rules under the CRA's capacious definition." (footnote omitted)).

35. *Id.* at 5 ("Guidance generally covers the latter two categories: statements of policy and interpretative rules. Statements of policy include agency statements issued to advise the public, prospectively, of how the agency plans to exercise its authority or to inform the public how it may comply with the law and applicable regulations." Interpretative rules are statements from an agency that are issued to advise the public of how the agency interprets the statutes it administers and the regulations it has promulgated." (footnotes omitted)); Larkin, *supra* note 1, at 204–14. The CFPB auto-lending rule discussed above is just one example.

now would leave them holding the bag. The resulting heat that they would take in the media and on Capitol Hill, they might have decided, could jeopardize other, higher priority items on their agenda. The result is a decision that leaves matters in place for the time being, perhaps until, as explained below, a court agrees with the Administration's position.

Another possible explanation stems from the changed dynamics in the Senate. The CRA requires that a majority of each house of Congress pass a resolution of disapproval to rescind an agency rule. In 2017, the Republican Party held a majority of the seats in the House of Representatives and the Senate, which enabled the Trump Administration to be successful in its early use of the CRA. The lineup in Congress, however, is not the same today that it was early last year.

The Republican majority in the House is effectively the same today as it was early in 2017, but the Republican majority in the Senate is not. That majority was a small one to begin with—52 to 48—and it has weakened since 2017. In a special election held late in 2017 to replace former Senator Jeff Sessions of Alabama, a Republican, the Democratic candidate won, leaving the Republican Party with just a two-vote majority, 51-49. The illness of Senator John McCain has also kept him from voting in the Senate, making the divide effectively 50-49. The result is that, assuming a party-line vote by the Democratic Senators (who, with a few individual exceptions, have opposed any use of the CRA), any one Republican Senator can sink a disapproval resolution if he or she disagrees with it on the merits or uses the opportunity to make an outrageous demand for some privilege of the President's (*e.g.*, the right to select a senior administration official).

It may be that Mitch McConnell, the Republican Senate Majority Leader, has decided not to seek a vote on any additional disapproval resolutions because he no longer feels confident that he has a majority to pass one out of the Senate. If so, it is possible that Senator McConnell communicated his reluctance to Mick Mulvaney, the Director of the Office of Management and Budget (OMB) or Neomi Rao, the Administrator of the Office of Information and Regulatory Affairs, a component of OMB. One or both, in turn, might have decided not to send new rules to Congress for disapproval because it fears losing a battle over a rule.

III. THE TRUMP ADMINISTRATION AND CONGRESS' POTENTIAL USE OF THE CONGRESSIONAL REVIEW ACT

If all that is true, that might explain why the Trump Administration has decided not to pursue aggressive use of the CRA until after the 2018 congressional elections in the hope that the Republican Party will remain in the majority in both the Senate and House after the November vote. There are steps that the Trump Administration could take in the meantime, however, that would position the Administration and Congress to move expeditiously against unsubmitted rules either now or beginning in January 2019. This section discusses those steps.

A. Step 1: Identify the Rules

The first step is the natural one: identify the rules that prior administrations did not send to Congress, as the CRA requires.³⁶ There likely are multiple ways to accomplish that task, but here is one approach that might work. President Trump or OMB Director Mulvaney could direct the head of every agency to satisfy that requirement by preparing three lists: (1) one that contains every rule that the agency has adopted during the relevant time period, (2) a second list with all of the rules published in the Federal Register, and (3) the third list containing all of the rules submitted to Congress in compliance with the CRA. Together, those lists would define the universe of rules that the Trump Administration might potentially want to rescind or revise.³⁷

B. Step 2: Categorize the Rules

The next step is to categorize the rules not submitted to Congress. There are (at least) four potential categories that can be used: (1) Rules that the Administration would like Congress to invalidate, (2) rules to which the Administration does not object, (3) rules that the Administration can and will rescind on its own, and (4) rules that the Administration would like to see held invalid, but will leave that job to the federal judges presiding over private-party litigation challenging the legality of agency rules. Placing each rule in one category or the other enables the Administration to decide how best to eliminate the rule: by partnering with Congress, by acting on its own, or by leaving the task to private parties and the courts.

Category 1: Rules that the Trump Administration Wants Congress to Nullify

The first category would consist of rules that the Trump Administration considers unsound and would like to see Congress rescind. The Administration submitted 16 rules for Congress to nullify under the CRA, and Congress agreed with the President on 15 of them.³⁸ There might well be others that the Administration would like to see suffer the same fate.

Having Congress enact a joint resolution of disapproval for the President's signature would have the effect not only of eliminating the rule, but also of demonstrating the Administration's commitment to regulatory accountability and use of

36. It is possible that the Trump Administration has already completed or undertaken this step, as well as the ones mentioned below. Cf. MAJORITY STAFF REPORT, *supra* note 35. The Administration has not said publicly that it has finished that enterprise, so the following discussion will proceed from the premise that no Administration official has collected all the potential rules.

37. Technically, only the first and third lists would be necessary for this purpose. Including the second list, however, might turn up rules that the agency would not otherwise have identified as belonging to the first list or elicit an explanation of why items on the second list were not filed with Congress. Moreover, OMB might want to consider providing agencies with guidance on the meaning of a "rule" to ensure that agencies conduct the type of broad search that the statutory definition of that term demands.

38. *Congressional Review Act*, *supra* note 17. The Senate took up CFPB Bulletin 2013-2 on its own.

the CRA to prune unnecessary or unwise rules. It would have the additional benefit of preventing an agency from repromulgating the same or similar rule absent intervening congressional authorizing legislation. The reason is that the CRA bars an agency from later adopting the same or a substantially similar rule once Congress and the President have nullified the original one. The effect would be the same as if Congress and the President had signed a law saying that the rule was an erroneous implementation or interpretation of the underlying statute.

Once the Administration has decided what should fit into Category 1, there is an additional step to take: namely, the Administration should rank the rules in their order of importance. A rule that is unwise and imposes \$5 billion in costs on the economy or society is far more important than a rule that is also unwise but imposes only \$5 million in similar costs. The Administration might want to see Congress eliminate the former and the latter, but the former is more important and therefore should be far ahead of the latter rule in the queue that the Administration creates for Congress's review under the CRA. Why? Even the expedited procedures established by the CRA take up some time, and there are numerous matters that the Senate must expend time handling, such as nominations, oversight hearings, substantive legislation, the budget, and appropriations bills. It would be a mistake for an unwise \$5 million rule to delay Congress's consideration of an unsound \$5 billion rule. The ordinal ranking of rules in order of their importance is a critical task to complete the compilation of Category 1.

Rather than submit all of those rules at once, the Administration should submit them serially over time. Why? The CRA allows for up to ten hours of debate on each rule. Submitting, say, dozens of rules to Congress at one time would overwhelm each chamber. There are only so many hours in the day—let alone the *legislative* day—to conduct business. As a practical matter, sending too many rules to Congress would keep the House or the Senate from being able to nullify any of the submitted rules.

That problem can easily be avoided, however, if the Administration works with the Offices of the Speaker of the House and of the Senate Majority Leader to schedule Congress's consideration of rules in a reasonable manner. Spreading out the submission of rules—for example, by submitting only a few rules per week—might slightly delay the process of reviewing and voting on them, but it would enable the Administration and Congress to consider each rule that the Trump Administration wishes to see Congress nullify.

Category 2: Rules that the Trump Administration Does Not Want Congress to Nullify

The Trump Administration might not want Congress to nullify every non-submitted rule. The Administration might conclude that some may be worthwhile or anodyne from a policy perspective. It might find others undesirable but not worth the expenditure of political capital necessary to persuade Congress to spend time nullifying them. That conclusion, however, does not mean that the Administration should leave the rule in existence. The Administration is responsible for governing,

which requires compliance with the law, and rules not yet submitted to Congress are not the “law,” even though the agencies may act as if they are. The Administration has the duty to comply with the CRA. Administration officials should see to the invalidation of the rule, submit it to Congress, and watch it go into effect once the congressional review period has passed, or revoke the rule pursuant to the process set forth in the Administrative Procedure Act (APA). The Administration cannot expect Congress, the courts, or the public to take seriously its stated commitment to the rule of law if the Administration is willing to ignore its own officials’ noncompliance. Accordingly, Category 2 would consist of rules that have never been submitted to Congress, but the effective operation of which the Trump Administration would like to see go into effect.³⁹

Category 3: Rules that the Trump Administration Will Repeal Itself

Category 3 consists of regulations that have already gone into effect because the issuing agency completed the APA notice-and-comment process and submitted the rule to Congress as required by the CRA. Those rules are not subject to review under the CRA, so the Administration must either repeal the rules via the APA process or persuade Congress to overturn them outside of the special CRA fast-track procedure.

There will also be various documents, such as guidance or opinion letters, adopted perhaps years ago that agencies have issued without undergoing notice and comment. The APA does not create a cumbersome process to repeal such publications,⁴⁰ so an agency can easily reject their interpretation of the law, agency policy, or agency procedure, withdraw them, and issue new interpretations. The Administration has begun this APA process to repeal several rules that fall into this category, such as the “Waters of the United States” rule, the EPA’s Clean Power Plan, and others.⁴¹ The Administration has also already rescinded other rules, such as the Transgender Bathroom Rule, that could be repealed without undergoing the APA notice-and-comment process.⁴²

39. Because it does not object to those rules becoming law, the Administration can submit all of them to Congress at once.

40. See *Perez v. Mort. Bankers Ass’n*, 135 S. Ct. 1199 (2015).

41. See Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017) (“Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule”); Timothy Puko, *EPA to Withdraw Power Plant Rules*, WALL STREET J. (Oct. 9, 2017), <https://www.wsj.com/articles/epa-to-withdraw-power-plant-rules-1507580639>; Eli Stokol, *Trump, EPA Move to Rescind Obama Administration’s Clean Water Rule*, WALL STREET J. (June 27, 2017), <https://www.wsj.com/articles/trump-epa-move-to-rescind-obama-Administrations-clean-water-rule-1498586400>.

42. See Jeremy W. Peters et al., *Trump Rescinds Rule on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>.

Category 4: Rules that the Trump Administration Will Leave to Private Parties to Challenge in Litigation

The final category consists of rules that the Administration may leave to private parties to challenge in litigation. There likely are numerous rules that burden the investment, expansion, and hiring decisions made by companies each day. Private businesses would rather see the federal government eliminate unnecessary rules, and they do not care whether the President, Congress, or both accomplish that result. Their concern is with the efficiency of their own operations, not the government's. In addition, litigation is costly, so firms would rather avoid that expense if the government is willing to bear the cost of eliminating a rule itself.

But that will not happen in every case, or perhaps even in many. Majority Leader Mitch McConnell might have difficulty cobbling together 50 Senators to invalidate a rule. President Trump might find his requests rebuffed by the House. He and his advisors might not be able to agree whether a particular rule is worth the time and effort involved in the CRA process. Or a dozen other factors might make it infeasible for him and Congress to do what each one would prefer to see done regarding regulatory reform. The result is that there might be rules that neither the President nor Congress wants to see in effect, but about which they cannot do anything in the time allotted and with the resources available to them.

Those rules might fit into the last category. Category 4 would consist of rules that the Administration and Congress leave to private parties to challenge in court. The APA gives private parties a cause of action to challenge agency actions not authorized by law. A company injured by a rule never submitted to Congress can bring suit against the agency under that law and ask the federal courts to decide that the rule is not "in effect."

A potential obstacle is that the CRA contains a section that appears to bar private parties from bringing suit against the government on the ground that an agency did not submit a rule under the CRA. Section 805 of the CRA states, "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review."⁴³ A close reading of that provision, however, discloses that it bars a court from reviewing a "determination, finding, action, or omission" by Congress or the President himself, not the rule-issuing agency.⁴⁴ Otherwise, an agency would be able to violate the CRA with impunity by declining to submit a rule to Congress. That would make nonsense of the statute. It also would violate the Constitution by authorizing government agencies to act in a lawless manner.⁴⁵ A reading of the CRA that limits judicial review in the manner noted above avoids both of those problems.

43. 5 U.S.C. § 805 (2012).

44. See Larkin, *supra* note 1, at 217–32.

45. See *id.* at 223–30.

This, however, raises a question: Why this category should exist at all? If the Trump Administration believes that a particular agency memorandum of some type is a “rule,” that the rule should have been submitted to Congress under the CRA, and that, because it was not, the rule therefore is not in effect, why should the Administration leave the matter to private parties to litigate, rather than repeal the rule? Why, in other words, would the Administration leave the burden of having the rule declared invalid to private parties instead of shouldering that responsibility itself?⁴⁶

That is a sensible question, the answer to which is political, not legal. The Trump Administration has numerous items on its agenda, and eliminating non-submitted rules likely is not high on the list of the Administration’s priorities. Atop that, there is a limit to how much political heat the Administration is willing to generate at any one time for changing the policies of its predecessors. As noted above, the Administration may not be willing to bear the political cost of announcing that hundreds or thousands of agency guidance documents issued over the past two decades are invalid. Even if the Administration is willing to pay that price, it may first want one or more federal courts to agree with its interpretation of the CRA. Why? Because those decisions would offer the Administration a shield against some of the political blowback that will occur. The Administration may find it easier to defend a decision rescinding numerous agency memoranda if it can point to federal court opinions holding those memoranda to be of no force and effect.

That strategy may offend parties who believe that the government should always be willing to admit when it makes a mistake and to rectify its errors whatever the cost may be. But politicians are not purists. Governance is practical and must consider the costs of changing course. If that explains why the Trump Administration has not been more aggressive in its challenge to agency policies it inherited, perhaps we will see the Administration change its position once some private parties win a few cases in court.⁴⁷

CONCLUSION

The CRA gives the new Administration and Congress the opportunity both to invalidate agency rules promulgated by an outgoing Administration and to reject rules that an agency never submitted to Congress. Taking advantage of that opportunity requires some internal analysis by the new Administration and coordination with Congress to identify the particular rules that a new President wishes to see held invalid and to ensure that the House and Senate have time on their

46. See Jonathan Wood, *Asking Agencies to Follow the Rules Isn't Asking Too Much*, PAC. LEGAL FOUND. (Apr. 11, 2018), <https://pacificlegal.org/asking-agencies-to-follow-the-rules-isnt-asking-too-much/> [<https://perma.cc/GMP6-CPMZ>].

47. Some parties, such as the Pacific Legal Foundation, a private public-interest organization, have brought such lawsuits already. See *Tugaw Ranches, LLC v. U.S. Dept. of Interior*, No. 18-cv-00159 (D. Id. complaint filed Apr. 11, 2018); *Kansas Natural Resource Coalition v. U.S. Dept. of Interior*, No. 18-cv-01114 (D. Kan. complaint filed Apr. 11, 2018).

calendars to accommodate his wishes. The problems are either practical or political; they do not raise any difficult legal issues. The interesting question is why the Trump Administration has stalled in its effort to use the CRA to remake the administrative state. Perhaps, we will learn the answer during the remaining days of the 115th Congress or during the next one.