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# WHY THE CONGRESSIONAL REVIEW ACT SHOULD BE REPEALED

ALEX LIPOW\*

## INTRODUCTION

The Congressional Review Act (“CRA”) is a procedure that allows the political branches to quickly repeal certain regulations promulgated by administrative agencies without going through the arduous rule-making process traditionally required.<sup>1</sup> Although it had been successfully used only once before 2017, President Trump and Republicans in Congress used the CRA to repeal sixteen regulations in 2017 and 2018<sup>2</sup> while President Biden and Democrats in Congress used the CRA three times in 2021.<sup>3</sup> Because the CRA has been used rarely,<sup>4</sup> and its central provisions are barely adjudicated in the judiciary, there are interesting legal questions about how expansively the law may be used.<sup>5</sup>

Whatever the legal uncertainties, the CRA degrades the federal regulatory system generally, and it has undermined environmental regulatory governance in particular. Using environmental regulation as a prism, this Note argues that Congress should repeal the CRA. If framed properly, repealing the CRA could be seen as supporting the interests of both environmentalists and business interests as the nation confronts climate change. In that vein, Part I of this Note provides a background of the CRA, including its mechanics and history. Part II of this Note argues that the

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<sup>1</sup> 5 U.S.C. §§ 801–08.

<sup>2</sup> CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 6 (2020).

<sup>3</sup> Rachel Frazin, *Biden Nixes Trump Rules on Methane Emissions, Lending, Employment Discrimination*, THE HILL (June 30, 2021, 5:54 PM), <https://thehill.com/homenews/administration/560991-biden-nixes-trump-rules-on-methane-emissions-lending-employment> [<https://perma.cc/ZZ47-SHHZ>].

<sup>4</sup> *Id.*; CONG. RSCH. SERV., *supra* note 2, at 3.

<sup>5</sup> See, e.g., Kevin Chen, *Why Congress Should Repeal the Congressional Review Act*, HARV. ENV'T & ENERGY L. PROGRAM (Apr. 23, 2020), <https://eelp.law.harvard.edu/2020/04/why-congress-should-repeal-the-congressional-review-act/> [<https://perma.cc/4KBJ-57CR>]; Sarah Douglas, *Tugaw Ranches, LLC v. U.S. Department of the Interior: New Scrutiny of the Congressional Review Act in A Changing Political Landscape*, 44 HARV. ENV'T L. REV. 299, 320 (2020).

CRA should be repealed for three main reasons. First, the CRA was poorly drafted<sup>6</sup> and its future use will likely cause negative unintended consequences on the environment that may well take years to manifest. Environmentalists have better tools at their disposal to achieve their regulatory goals.<sup>7</sup> Additionally, this Note argues that the CRA creates uncertainty for stakeholders, including both environmentalists and corporate interests, while simultaneously making it difficult for any administration to create long-term impactful policies to address controversial issues.<sup>8</sup> Finally, the CRA has the potential to artificially stymie future legislation,<sup>9</sup> specifically impairing support for environmental bills.<sup>10</sup>

## I. BACKGROUND OF THE CRA

### A. *Overview of the CRA's Mechanics*

The CRA is a procedure that allows the political branches to quickly repeal certain regulations promulgated by administrative agencies without going through the arduous rule-making process traditionally required by the Administrative Procedures Act (“APA”).<sup>11</sup> Under the CRA, agencies must submit certain newly promulgated regulations to Congress.<sup>12</sup> Then, both chambers of Congress have sixty legislative days to pass resolutions “disapproving” the regulations.<sup>13</sup> Such disapproval resolutions affect regulations in their entirety—it is not possible for Congress to use the CRA to remove specific regulatory provisions.<sup>14</sup> Simple majorities in both

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<sup>6</sup> See, e.g., § 801(b)(2) (failing to provide a definition of “substantially the same form”); § 805 (declaring vaguely that “[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review.”).

<sup>7</sup> See, e.g., Oliver Milman, ‘Sloppy and Careless’: Courts Call Out Trump Blitzkrieg on Environmental Rules, THE GUARDIAN (Feb. 20, 2020, 6:00 PM), <https://www.theguardian.com/environment/2018/feb/20/donald-trump-epa-environmental-rollback-court-challenges> [<https://perma.cc/A2PE-MKMA>].

<sup>8</sup> See Bethany Davis Noll & Richard L. Revesz, *Regulatory Rollbacks Have Changed the Nature of Presidential Power*, REGUL. REV. (Mar. 16, 2020) [hereinafter Noll & Revesz (2020)], <https://www.theregreview.org/2020/03/16/davis-noll-revesz-regulatory-rollbacks-changed-nature-presidential-power/> [<https://perma.cc/9ZDM-TUY5>]; see generally Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1 (2019) [hereinafter Noll & Revesz (2019)].

<sup>9</sup> Noll & Revesz (2019), *supra* note 8, at 8.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> See §§ 801–08.

<sup>12</sup> § 801(a); CONG. RSCH. SERV., *supra* note 2, at 6–11.

<sup>13</sup> § 801(a)(3), (d).

<sup>14</sup> CONG. RSCH. SERV., *supra* note 2, at 5.

chambers are sufficient to pass such disapproval resolutions.<sup>15</sup> The disapproval resolutions are not subject to the filibuster and only require a maximum ten hours of floor debate time in the Senate.<sup>16</sup>

If the President signs the disapproval resolution or if Congress overrides a Presidential veto, the disapproved regulation cannot take effect.<sup>17</sup> And perhaps even more importantly, the executive branch cannot reissue regulations that are “substantially the same” as the disapproved regulation, unless it is “specifically authorized” by a later-enacted law.<sup>18</sup>

Although this legislative process is relatively straightforward, there is scant case law related to the CRA<sup>19</sup> and it is far from clear how the courts would interpret many of the CRA’s provisions.<sup>20</sup> Namely, as indicated above, whenever the CRA is used, federal agencies lose the authority to reissue regulations “substantially the same” to the rule repealed.<sup>21</sup> It is unclear what “substantially the same” means in practice.<sup>22</sup> For instance, what would happen if the CRA is used to repeal a regulation designed to reduce lead in drinking water? Is the federal government restricted from regulating *anything* related to drinking water or lead? Or should the interpretation be narrower?

These questions have not been thoroughly tested in court.<sup>23</sup> However, as aptly written in the *Colorado Natural Resources, Energy & Environmental Law Review*, if a federal agency is in a position to regulate an issue related to a rule struck down by the CRA, there are two approaches the agency might take:

First, it could try to change the rule, such that it is no longer “substantially the same.” . . . But an agency would have no way of knowing where the line between “different, but not *substantially* different” and “permissibly different” might lie. Overhauling the rule in an attempt to find that

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<sup>15</sup> *Id.* at 15.

<sup>16</sup> Scott A. Sinder et al., *Post-Election Considerations: The Congressional Review Act*, STEPTOE (Jan. 7, 2021), <https://www.stepto.com/en/news-publications/post-election-considerations-the-congressional-review-act.html> [<https://perma.cc/CP6P-ZZAG>].

<sup>17</sup> § 801(a)(3)(B), (c).

<sup>18</sup> § 801(b).

<sup>19</sup> See *infra* notes 55–60 and accompanying text.

<sup>20</sup> For a sample of the discourse debating how courts should interpret the CRA, see Chen, *supra* note 5, at 3–6; Douglas, *supra* note 5, at 319–20; Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL’Y 187, 218 (2018).

<sup>21</sup> Chen, *supra* note 5, at 1.

<sup>22</sup> *Id.*

<sup>23</sup> See *infra* notes 55–60 and accompanying text.

line might undermine the very purposes it had for passing the rule in the first place. Second, if an agency wants to try a more surgical approach and get Congress to authorize an updated yet substantially similar rule, the agency could try to identify the part of the rule Congress most strongly disapproved of . . . But without guidance from Congress as to which part of the rule it wants changed, this approach feels more like a game of Marco Polo than reasoned rulemaking.<sup>24</sup>

And even under these less-than-optimal scenarios, parties opposed to the rules would almost certainly bring suit based on the ambiguity.

Additionally, the CRA contains a provision excluding at least part of itself from judicial review.<sup>25</sup> The language is far from clear,<sup>26</sup> and commentators and lower courts are not certain if it limits judicial review to a particular portion of the CRA or the entire law.<sup>27</sup> Although it seems rather unlikely that appellate courts will interpret the language to limit the scrutiny of the entire CRA,<sup>28</sup> the contours of such a limitation could have a profound effect on the administrative state.

Finally, it is important to note that there are disagreements about what type of executive actions fall under the CRA's purview.<sup>29</sup> What beyond major regulations is included? Do guidance documents or Presidential memoranda apply? There are different interpretations.<sup>30</sup> While important, these questions do not fall under the scope of this Note because, regardless of how courts answer, the other substantive issues raised by the CRA will continue to effect major environmental rules.

#### B. *Legislative History of the Congressional Review Act*

Because there is scant case law related to the use of the CRA,<sup>31</sup> courts might look to the legislative history of the CRA itself to adjudicate

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<sup>24</sup> Eric Dude, *The Conflicting Mandate: Agency Paralysis Through the Congressional Review Act's Resubmit Provision*, 30 COLO. NAT. RES., ENERGY & ENV'T L. REV. 115, 121–22 (2019).

<sup>25</sup> § 805 (declaring vaguely that “[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review.”).

<sup>26</sup> *Id.*

<sup>27</sup> *See* Chen, *supra* note 5, at 5.

<sup>28</sup> *Id.* at 5–6.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *See infra* notes 55–60 and accompanying text.

future disputes that might stem from the CRA's use.<sup>32</sup> It is therefore important to note that Congress initially passed the CRA after the Supreme Court, in 1983, held that the legislative veto—a once popular provision that allowed Congress to block executive branch decisions without involving the President<sup>33</sup>—unconstitutionally infringed upon the President's enumerated powers.<sup>34</sup> More than a decade after the Court decision, Congress concocted the CRA as “a lawmaking procedure that would approximate a legislative veto as closely as [the Supreme Court] would allow.”<sup>35</sup> However, to ensure the Court did not strike down the CRA as unconstitutional, Congress gave the President veto power over disapproval resolutions passed under the CRA.<sup>36</sup>

But while the goal of the CRA is clear, Congress provided few formal legislative details as it passed it.<sup>37</sup> Indeed, the CRA actually passed as a provision in the larger Small Business Regulatory Enforcement Fairness Act of 1996.<sup>38</sup> The legislation's passage was so unceremonious that the Senate passed it by unanimous consent,<sup>39</sup> a procedure that allowed the chamber to pass the legislation without holding a full vote with all senators present.<sup>40</sup>

Realizing the potential problems caused by failing to provide legislative history,<sup>41</sup> weeks after the CRA had been signed into law the primary sponsors of the legislation submitted into the *Congressional Record* a statement that they hoped would “provide a detailed explanation and a legislative history” of the CRA and give “guidance to the agencies, the courts, and other interested parties when interpreting the [CRA's] terms.”<sup>42</sup> It is unclear how courts might weight this statement as it only reflects the views of a handful of Members of Congress (albeit the most important sponsors of the legislation) after the CRA had become law.<sup>43</sup> And

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<sup>32</sup> See Chen, *supra* note 5, at 3.

<sup>33</sup> GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 168 (8th ed. 2019).

<sup>34</sup> *Id.* at 168–77.

<sup>35</sup> Larkin, *supra* note 20, at 197.

<sup>36</sup> *Id.*

<sup>37</sup> Kevin Chen, *The Congressional Review Act's Legal Uncertainties*, HARV. ENV'T & ENERGY L. PROGRAM (2020), <https://eelp.law.harvard.edu/2020/05/the-congressional-review-acts-legal-uncertainties> [<https://perma.cc/4ZGM-AXDY>].

<sup>38</sup> Chen, *supra* note 5, at 2.

<sup>39</sup> *Id.*

<sup>40</sup> CONG. RSCH. SERV., RS20668, *HOW MEASURES ARE BROUGHT TO THE SENATE FLOOR: A BRIEF INTRODUCTION*, 1 (2019).

<sup>41</sup> See Chen, *supra* note 37.

<sup>42</sup> 142 CONG. REC. 8196–97 (1996).

<sup>43</sup> See Chen, *supra* note 5, at 3.

even if a court does find the statement persuasive, the statement does not provide a clearer understanding of what regulations are “substantially the same” under the CRA.<sup>44</sup> However, the statement does clarify that the sponsors viewed that “the limitation on judicial review [of the CRA] in no way prohibits a court from determining whether a rule is in effect.”<sup>45</sup> The sponsors also opined that “[in] deciding cases or controversies [involving the CRA] properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land.”<sup>46</sup> In the end, one thing is clear based on this history: when courts adjudicate cases involving the CRA, they have much to consider.

### C. *The Historical Role of the CRA*

Before 2017, the CRA had only been used successfully once.<sup>47</sup> However, things changed when President Trump took office and the Republicans took full control of the federal legislative and executive branches in 2017.<sup>48</sup> In the time Republicans retained unified control of Washington, they used the CRA to repeal sixteen regulations promulgated toward the end of the Obama administration.<sup>49</sup> These regulations touched a wide variety of issues,<sup>50</sup> including a rule designed to prevent coal mining pollution from entering rivers and streams and another rule amending regulations for National Wildlife Refuges in Alaska.<sup>51</sup> Four years later, President Biden and Democrats in Congress used the CRA to repeal three regulations, including a rule affecting how the federal government controls Methane emissions.<sup>52</sup>

To date, there has not been a significant decision from an appellate court affecting the substance of the CRA.<sup>53</sup> However, a few judges have reached different conclusions about the justiciability of the CRA.<sup>54</sup> Additionally, the U.S. District Court for the District of Alaska dismissed

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<sup>44</sup> See 142 CONG. REC. 8199.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> CONG. RSCH. SERV., *supra* note 2, at 6, 25–26.

<sup>48</sup> See *id.* at 6.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 25–26.

<sup>51</sup> *Id.*

<sup>52</sup> Frazin, *supra* note 3.

<sup>53</sup> Chen, *supra* note 5, at 5–6.

<sup>54</sup> Douglas, *supra* note 5, at 301.

a lawsuit that argued that the CRA unconstitutionally delegated executive authority.<sup>55</sup>

The lack of case law is not surprising given how rarely the CRA has been used.<sup>56</sup> Indeed, given the political realities, “there is virtually no chance that the President would sign a resolution of disapproval” eliminating regulations his own administration promulgated, “or that a two thirds majority could be assembled in each House to overturn a presidential veto.”<sup>57</sup> This, combined with the fact that Congress has only sixty legislative days after receiving a promulgated regulation to block it from taking force,<sup>58</sup> has ensured the CRA is used only after the rare Presidential transitions when “a President from one of the major parties is [immediately] succeeded by a President from the other major party, and the new President’s party also controls both Houses of Congress.”<sup>59</sup>

## II. WHY THE CONGRESSIONAL REVIEW ACT SHOULD BE REPEALED

Although some environmentalists have hoped to use the CRA to achieve their policy objectives,<sup>60</sup> intensifying the tug-of-war over regulations during Presidential transitions only further erodes the ability to govern. Instead, time, resources, political capital, and floor time in Congress should be used on the legislative process to pass bipartisan environmental laws and restore the administrative authority limited by the prior uses of the CRA. Environmentalists should also lobby administrative agencies to strategically implement other sensible environmental regulations. If done politically astutely, repealing the CRA could be seen as not harming the interests of either environmentalists or business interests.

The following arguments support this course of action. First, because the language in the CRA is so vague about: (1) what “substantially similar” rules are;<sup>61</sup> and (2) the parameters of judicial review of the

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<sup>55</sup> Steven M. Siros, *CRA Survives Constitutional Challenge—Are More Rules and Guidance at Risk of Disapproval?*, JENNER & BLOCK LLP (2018), <https://www.lexology.com/library/detail.aspx?g=621fd4ed-c4be-481d-be0f-2c3bd4d011c6> [<https://perma.cc/VM2C-RP6Y>].

<sup>56</sup> See Daniel A. Farber et al., *Reforming “Regulatory Reform”: A Progressive Framework for Agency Rulemaking in the Public Interest*, AM. CONST. SOC’Y (Oct. 2018), <https://www.acslaw.org/wp-content/uploads/2018/10/Oct-2018-APA-Farber-Heinzerling-Shane-issue-brief.pdf> [<https://perma.cc/VP7H-HXUT>].

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., Jean Chemnick, *How a Biden Administration Could Reverse Trump’s Climate Legacy*, SCI. AM. (July 21, 2020), <https://www.scientificamerican.com/article/how-a-biden-administration-could-reverse-trumps-climate-legacy/> [<https://perma.cc/4K7J-62TG>].

<sup>61</sup> See § 801(b)(2).

CRA,<sup>62</sup> continuing to use the CRA could have unintended judicial consequences.<sup>63</sup> The potential time, resources, and legal administrative authority lost on additional litigation would only erect new barriers to addressing climate change. Other, more effective methods such as the traditional rule-making process and cooperative litigation, should be considered instead.<sup>64</sup> Next, by allowing Congress to continue to veto rules, the CRA creates additional uncertainty for stakeholders, including both environmentalists and corporate interests, while simultaneously injecting additional politics into the already controversial and complicated rule-making process.<sup>65</sup> This will make it even more difficult for any administration to create long-term impactful policies to address climate issues. Finally, the CRA has the potential to artificially stymie future bipartisan landmark environmental legislation because its practical use is usually soon after a new President takes office.<sup>66</sup> This requires new Presidents to use political capital that could be used toward passing legislation during these critical periods.<sup>67</sup>

A. *The CRA's Ambiguity and Unintended Environmental Consequences Make It a Dangerous Vehicle for Environmentalists—the Administrative Procedures Act, Executive Power, and Cooperative Litigation Are Better Options*

Because the CRA has not faced substantial judicial scrutiny yet,<sup>68</sup> there are no definitive ways of interpreting its ambiguous language.<sup>69</sup> If the CRA is not repealed or amended, such interpretations have the potential to shape environmental regulations in ways not currently understood.<sup>70</sup> Environmentalists should be worried that the CRA's use, potentially including its use in ways initially perceived to be in the interests of environmentalists, could be turned on its head based on adverse judicial

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<sup>62</sup> See § 805.

<sup>63</sup> See Chen, *supra* note 5, at 1; see also Douglas, *supra* note 5, at 299.

<sup>64</sup> Milman, *supra* note 7; see, e.g., Lisa Friedman & John Schwartz, *Election and Supreme Court Fight Will Decide Trump's Environmental Legacy*, N.Y. TIMES (Sept. 25, 2020), <https://www.nytimes.com/2020/09/23/climate/trump-environment-courts.html> [<https://perma.cc/Y4Q9-YLRZ>].

<sup>65</sup> See Noll & Revesz (2019), *supra* note 8, at 72.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See *supra* notes 53–59 and accompanying text.

<sup>69</sup> Chen, *supra* note 5, at 1.

<sup>70</sup> *Id.*

rulings.<sup>71</sup> For instance, if Democrats use the CRA to repeal a rollback of an offshore drilling regulation, does that also block *any* future “substantially the same” regulations designed to limit offshore drilling? These issues have the potential not only to backfire on environmentalists, but related litigation would consume resources better served elsewhere. As one commentator put it, although the CRA “can offer [Democrats] a few ‘wins’ in the short term, the CRA . . . will produce a lot more losses over the long run.”<sup>72</sup>

Moreover, as time ticks on humanity’s ability to address climate change,<sup>73</sup> the ability to maximize all of an environmentalist President’s time to govern will be of the essence. If the CRA is mired in litigation, what happens to similar regulations in the pipeline as litigation moves forward? Would the government be able to at least start the time-consuming rule-making process<sup>74</sup> while suits are resolved? There is no clear answer, although it might depend upon the discretion of the litigation strategy and particular judges. But gambling with the precious time remaining to fight climate change supports neither good governance nor environmental politics. As United Nations Secretary-General Antonio Guterres said, “time is fast running out for us to avert the worst impacts of climate disruption and protect our societies from the inevitable impacts to come.”<sup>75</sup>

Instead of dealing with the nuances of the CRA, environmentalists and their allies should focus their regulatory ambitions on the traditional rule-making process and cooperative litigation. There are numerous opportunities.<sup>76</sup> For instance, as some have pointed out, the

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<sup>71</sup> See Sam Batkins, *Congress Strikes Back: The Institutionalization of the Congressional Review Act*, 45 MITCHELL HAMLINE L. REV. 351, 390 (2019).

<sup>72</sup> James Goodwin, *The Congressional Review Act Could be Put to Positive Short-Term Use, But It Should Still Be Repealed*, CTR. PROGRESSIVE REFORM (Aug. 20, 2020), <http://progressivereform.org/cpr-blog/congressional-review-act-could-be-put-positive-short-term-use-it-should-still-be-repealed/> [<https://perma.cc/Y99F-888N>].

<sup>73</sup> Denise Chow, *‘Time Is Fast Running Out’: World Meteorological Organization Warns Climate Efforts Are Falling Short*, NBC NEWS (Mar. 10, 2020, 4:31 PM), <https://www.nbcnews.com/science/science-news/time-fast-running-out-world-meteorological-organization-warns-climate-efforts-n1154701> [<https://perma.cc/T9ME-MHVD>].

<sup>74</sup> See generally CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW (2017).

<sup>75</sup> Chow, *supra* note 73.

<sup>76</sup> Friedman & Schwartz, *supra* note 64; Rebecca Leber, *The Quickest Way to Undo Trump’s Environmental Mess Isn’t as Easy as You’d Think*, MOTHERJONES (Jan. 8, 2021), <https://www.motherjones.com/environment/2021/01/the-quickest-way-to-undo-trumps-environmental-mess-isnt-as-easy-as-you-d-think/> [<https://perma.cc/G2T7-F6MD>]. See, e.g., Milman, *supra* note 7.

Trump administration was sloppy in drafting and codifying many regulations.<sup>77</sup> As environmentalists have brought suits against Trump rules, their track record of delaying or blocking the rules has been impressive.<sup>78</sup> For instance, as of late September 2020, “the Environmental Protection Agency [had] won only nine out of 47 cases in court under Mr. Trump, while the Interior Department [had] won four of 22.”<sup>79</sup> And the environmentalists’ success in court might only increase in a friendly administration eager to settle lawsuits from their allies to accommodate their shared policy goals.<sup>80</sup>

Some worry that the Trump administration’s footprint on the federal judiciary, especially the Supreme Court, might temper this success.<sup>81</sup> However, as California’s former Democratic attorney general (and President Biden’s new Secretary of Health and Human Services) put it, environmentalists are bolstered by “[t]he facts, the science and the law.”<sup>82</sup> This has borne out to some degree in the early days of the Biden administration.<sup>83</sup> Indeed, days after President Biden took office a three-judge panel at the D.C. Circuit struck down a Trump rule that would have “abolished rules that loosened the EPA’s implementation of ozone standards under the Clean Air Act.”<sup>84</sup> Additional victories are likely, especially as President Biden works to appoint other judges to appellate courts.<sup>85</sup>

Moreover, because President Trump used executive orders and Presidential memorandums instead of codifying regulations to implement much of his agenda,<sup>86</sup> President Biden can reverse many of those policies with the stroke of a pen.<sup>87</sup> Indeed, in his first sixteen days in office,

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Friedman & Schwartz, *supra* note 64.

<sup>80</sup> See Chemnick, *supra* note 60.

<sup>81</sup> Friedman & Schwartz, *supra* note 64.

<sup>82</sup> *Id.*

<sup>83</sup> See, e.g., Anya van Wagtenonk, *Trump’s Environmental Legacy Suffers Two Major Court Losses*, VOX (Jan. 30, 2021, 6:00 PM), <https://www.vox.com/2021/1/30/22258030/trump-environmental-legacy-epa-court-losses-ozone-secret-science> [<https://perma.cc/TA7L-F87W>].

<sup>84</sup> *Id.*

<sup>85</sup> See Jacqueline Thomsen, *How Trump Judges Are Poised to Shape Biden’s First Legal Challenges*, NAT’L L.J. (Mar. 18, 2021, 4:45 PM), <https://www.law.com/nationallawjournal/2021/03/18/how-trump-judges-are-poised-to-shape-bidens-first-legal-challenges/?slreturn=20210220225233> [<https://perma.cc/R4UN-7WFR>].

<sup>86</sup> See Ashlyn Still & Adrian Blanco, *A Visual Breakdown of Biden’s Barrage of Executive Actions in his First Weeks*, WASH. POST (Feb. 5, 2021), <https://www.washingtonpost.com/politics/interactive/2021/biden-executive-orders-breakdown/> [<https://perma.cc/U3RJ-VNBZ>].

<sup>87</sup> *Id.*

President Biden signed sixteen executive orders and Presidential memorandums “revok[ing] one or more Trump policies.”<sup>88</sup> Additionally, in President Biden’s second week in office, a federal judge in Montana held that the Trump administration improperly tried to sidestep the provisions in the APA to implement the so-called “Secret Science Rule” which would have “limited the [scientific] research some federal employees [could] use when conducting their work.”<sup>89</sup> Because the Trump administration did not implement the rule correctly, the court gave President Biden authority to properly use his executive power to change or eliminate the rule.<sup>90</sup>

While the tools above rely on judicial approval or assume that the environmentalist President’s predecessor was sloppy in using his executive power, there are other ways the new President can quickly block (or at least amend) regulations his predecessor tried to push through at the end of his term.<sup>91</sup> For instance, subject to legal limitations, Biden administration officials can “declin[e] to pursue or withdraw[] agency enforcement actions” initiated under President Trump.<sup>92</sup> This is common during Presidential transitions, and other environmental Presidents will have it at their disposal.<sup>93</sup>

In addition, as is traditional,<sup>94</sup> on his first day in office President Biden signed a “regulatory freeze” memorandum that:

ensure[s] that [his] appointees or designees have an opportunity to review any new or pending rules . . . Pursuant to the memo, rules that have been sent to the Office of the Federal Register but that have not yet been published must not be published until a department or agency head appointed or designated by the new administration reviews

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<sup>88</sup> *Id.*

<sup>89</sup> Eric Katz, *Judge Gives Biden Path to Quickly Repeal Trump’s ‘Secret Science’ Rule*, GOV’T EXEC. (Jan. 28, 2021), <https://www.govexec.com/management/2021/01/judge-gives-biden-path-quickly-repeal-trumps-secret-science-rule/171709/> [<https://perma.cc/YR24-T7S5>].

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., Tad Heuer et al., *Five Ways the Biden Administration Could Rescind or Reverse the Trump Administration’s Regulatory Actions*, FOLEY HOAG (Nov. 13, 2020), <https://foleyhoag.com/-/media/files/foley%20hoag/publications/white%20papers/five%20ways%20the%20biden%20administration%20could%20rescind%20or%20reverse%20the%20trump%20administrations%20regulatory%20actions.ashx> [<https://perma.cc/DWU5-3BGF>].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> John S. Marten et al., *Biden Administration Issues “Regulatory Freeze” Memo*, NAT’L L. REV. (Feb. 2, 2021), [https://www.natlawreview.com/article/biden-administration-issues-regulatory-freeze-memo#:~:text=On%20January%2020%2C%202021%2C%20the,pend ing%20rules%20\(the%20Memo\)](https://www.natlawreview.com/article/biden-administration-issues-regulatory-freeze-memo#:~:text=On%20January%2020%2C%202021%2C%20the,pend ing%20rules%20(the%20Memo)) [<https://perma.cc/33BA-CBJE>].

and approves the rule. In addition, the memo directs department and agency heads to consider postponing rules that have been published in the Federal Register but that have not yet taken effect to seek additional public comment on issues of fact, law and policy raised by the rules and thereafter to take appropriate action.<sup>95</sup>

While it is not yet clear how many regulations this memorandum influenced, it certainly has the potential to affect almost all aspects of American life.<sup>96</sup>

The downsides of the CRA and the power of regulatory tools described above might help to explain why during their window in 2021, President Biden and his Democratic majorities in Congress only repealed three regulations using the CRA (including only one environmental regulation).<sup>97</sup> This relatively small number was a significant surprise for many observers given that there were numerous rules that theoretically could have been repealed using the CRA,<sup>98</sup> including forty-eight at the Environmental Protection Agency and thirty-one at the Department of Interior.<sup>99</sup>

*B. The CRA Could Create Uncertainty for Stakeholders and Make It More Difficult to Craft Long-Term Environmental Regulations*

The CRA's ambiguity, along with the fact that the CRA allows the political branches to easily scrap recently promulgated regulations, creates

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Frazin, *supra* note 3.

<sup>98</sup> See, e.g., Sheila McCafferty Harvey et al., *The Return of the Congressional Review Act*, PILLSBURY (Jan. 19, 2021), <https://www.pillsburylaw.com/en/news-and-insights/congressional-review-act-cra-biden.html> [<https://perma.cc/8UVR-GNTA>]; Katelynn Bradley et al., *It's Back: The Congressional Review Act and Implications for Recent Environmental Rules*, BROWNSTEIN (Jan. 26, 2021), <https://www.jdsupra.com/legalnews/it-s-back-the-congressional-review-act-6025899/> [<https://perma.cc/E4NE-RHNA>]; Lawrence E. Culleen et al., *Trump's Environmental Regulatory and Deregulatory Agenda at Risk Due to COVID-19*, ARNOLD & PORTER (Apr. 8, 2020), <https://www.arnoldporter.com/en/perspectives/publications/2020/04/trumps-environmental-regulatory> [<https://perma.cc/4F4W-FVF9>]; Coral Davenport, *Democrats Eye Trump's Game Plan to Reverse Late Rule Changes*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/17/climate/trump-regulations-election.html> [<https://perma.cc/96RD-EBQE>].

<sup>99</sup> Benjamin J. Hulac, *Biden Moves Quickly to Restore Environmental Protections Eased by Trump*, ROLL CALL (Jan. 20, 2021, 6:00 AM), <https://www.rollcall.com/2021/01/20/biden-moves-quickly-to-restore-environmental-protections-eased-by-trump/> [<https://perma.cc/J4GS-35F4>].

uncertainty for stakeholders while making it more difficult for administrations to craft long-term policies to address contentious climate issues.<sup>100</sup> The uncertainties of the CRA should concern Democrats and environmentalists. Those who want to address climate change should not support a weakened administrative state.<sup>101</sup> Its expertise and speed (relative to Congress) is essential to adapt the environmental regulatory framework to meet the challenge.<sup>102</sup> Business interests, meanwhile, often support predictability. The CRA does not support that goal.<sup>103</sup>

The CRA has the potential to upend Presidential transitions and inject more partisanship into the administrative state.<sup>104</sup> This is because federal agencies, especially when working to promulgate rules close to a Presidential election or when there is divided government, must be cognizant that their work could be easily repealed with the CRA.<sup>105</sup> Congressional input has always been a part of the rule-making process, but some commentators believe that the threat of the CRA veto provides Congress with too much leverage.<sup>106</sup> Congress, with its hyper-partisanship and relatively few legislative sessions, simply injects another source of uncertainty into the regulatory process.<sup>107</sup> Indeed, as the country ramps up its efforts to reign in climate change,<sup>108</sup> it will need an apolitical bureaucracy to make decisions on policy and science, not political influences.<sup>109</sup> This regulatory work will almost certainly be controversial and complicated,<sup>110</sup> dictating that policy experts be given the space needed to address the complex issues and the rule-making process to ensure their work is beyond reproach.<sup>111</sup>

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<sup>100</sup> See Davenport, *supra* note 98.

<sup>101</sup> See Farber et al., *supra* note 56; Goodwin, *supra* note 72. *But see also* David Schoenbrod, *Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 244 (2020).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Noll & Revesz (2020), *supra* note 8.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Dude, *supra* note 24, at 122–23; THOMAS O. MCGARITY ET AL., CENTER FOR PROGRESSIVE REFORM, THE CONGRESSIONAL REVIEW ACT: THE CASE FOR REPEAL 1 (2018).

<sup>108</sup> Dude, *supra* note 24, at 122–23; MCGARITY ET AL., *supra* note 107, at 1.

<sup>109</sup> Dude, *supra* note 24, at 122–23; MCGARITY ET AL., *supra* note 107, at 1.

<sup>110</sup> See Kathy Wagner Hill, *The State of the Administrative State: The Regulatory Impact of the Trump Administration*, 6 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 25, 31–32 (2019).

<sup>111</sup> See Elaine Kamarck, *The Challenging Politics of Climate Change*, BROOKINGS (Sept. 23, 2019), <https://www.brookings.edu/research/the-challenging-politics-of-climate-change/> [<https://perma.cc/MP9F-ETTN>].

Business interests, meanwhile, have incentives to support repealing the CRA.<sup>112</sup> Business interests that support weakening the administrative state could have their efforts to eliminate regulations unwound using the CRA.<sup>113</sup> Additionally, research shows that the disapproval resolutions signed by President Trump were “haphazard at best, having little to do with the burdens created by individual regulations.”<sup>114</sup> Indeed, there was no “apparent connection between cost and the outcome of the congressional review process.”<sup>115</sup> This is not entirely surprising. As one commentator put it, “[t]he CRA is best understood as a legislative gimmick, as its real power comes from greasing the procedural skids so that attacks on commonsense protections can become law in a matter of just days or weeks with scant consideration or substantive debate, and almost no public scrutiny.”<sup>116</sup> While it is difficult to know conclusively how the Republicans decided to use the CRA in 2017, it seems likely that their behavior was largely political. Regardless, their actions did little to provide the strategic deregulation that business interests might have expected.

Moreover, the CRA could make it difficult for effected businesses to predict which administrative regulatory scheme they will need to follow.<sup>117</sup> Indeed, under the APA, federal agencies usually must accept formal input from stakeholders and weigh the potential costs of new rules.<sup>118</sup> Business interests are therefore entitled to provide their perspectives on rules and are given ample notice on how the regulatory regime might change.<sup>119</sup> Stakeholders are not guaranteed such input when Congress

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<sup>112</sup> *Id.*

<sup>113</sup> See James Goodwin, *The Congressional Review Act Is No Antidote for Critics of Regulation*, THE REGUL. REV. (May 30, 2017), <https://www.theregreview.org/2017/05/30/goodwin-congressional-review-act-no-antidote/> [<https://perma.cc/632H-YA5N>]. *But see also* W. Mike Jayne, *As Far As Reasonably Practicable: Reimagining the Role of Congress in Agency Rulemaking*, 21 FEDERALIST SOC' REV. 84, 92 (2020); Neil Bradley, *After the Successful Use of the Congressional Review Act, Here's Where Regulatory Reform Goes Next*, U.S. CHAMBER OF COMMERCE (May 17, 2017, 9:45 AM), <https://www.uschamber.com/series/above-the-fold/after-the-successful-use-the-congressional-review-act-here-s-where-regulatory> [<https://perma.cc/MD72-3S55>].

<sup>114</sup> See Jonathan H. Adler, *Will Democrats Learn to Love the Congressional Review Act?*, REASON (Jan. 23, 2021, 12:36 AM), <https://reason.com/volokh/2021/01/23/will-democrats-learn-to-love-the-congressional-review-act/> [<https://perma.cc/8867-VR6M>].

<sup>115</sup> Dan Farber, *The Controversial Congressional Review Act*, LEGALPLANET (Jan. 25, 2021), <https://legal-planet.org/2021/01/25/31298/> [<https://perma.cc/ZZW7-W2JN>].

<sup>116</sup> Daniel A. Farber, *Regulatory Review in Anti-Review Times*, 94 CHI.-KENT L. REV. 383, 398 (2019).

<sup>117</sup> MCGARITY ET AL., *supra* note 107, at 2.

<sup>118</sup> Noll & Revesz (2019), *supra* note 8, at 3–4.

<sup>119</sup> 5 U.S.C. §§ 500–96; *see* Farber, *supra* note 116, at 398.

uses the CRA.<sup>120</sup> And even if they do lobby Congress, they would need to secure a majority of Members to block the CRA's use, a tall task.<sup>121</sup> This inserts even more uncertainty for stakeholders, affecting their compliance regimes which can be quite costly.<sup>122</sup>

This is not to say that it will be easy to get entrenched business interests—who are often reflectively opposed to the administrative state and see the CRA as a way to influence government when their preferred candidates win office—to stand idly by as the CRA is repealed,<sup>123</sup> especially after the perceived success they enjoyed during the Trump administration.<sup>124</sup> These interests might be more amenable if their own priorities are repealed under the CRA.<sup>125</sup> Regardless, it will be up to stakeholders doing the difficult work of coming together and governing to make their interests align.

C. *The CRA Has the Potential to Artificially Stymie Future Bipartisan Landmark Environmental Legislation*

The CRA warps the political landscape and political calculus at the beginning of Presidential terms,<sup>126</sup> something which has a chance of obstructing bipartisan environmental legislation. Although federal agencies have expansive regulatory authority, generally they can only add, remove, or amend regulations through the arduous process set forth by the APA.<sup>127</sup> This process is time-consuming, expensive, and complicated.<sup>128</sup> Because a Presidential term is only four years, Presidents have an incentive to start the APA process as early as possible to ensure regulations are codified by the end of the term.<sup>129</sup> Otherwise, the next President could simply halt the rule-making process, thwarting his predecessor's efforts with the stroke of a pen.<sup>130</sup>

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<sup>120</sup> 5 U.S.C. § 553.

<sup>121</sup> See 5 U.S.C. §§ 801–08.

<sup>122</sup> Chen, *supra* note 5, at 10.

<sup>123</sup> Farber et al., *supra* note 56, at 21.

<sup>124</sup> See Jayne, *supra* note 113, at 92; Larkin, *supra* note 20, at 252.

<sup>125</sup> See Bradley, *supra* note 113.

<sup>126</sup> But see Adler, *supra* note 114.

<sup>127</sup> See Charles Tiefer & Kathleen Clark, *Deliberation's Demise: The Rise of One-Party Rule in the Senate*, 24 ROGER WILLIAMS U.L. REV. 46, 61–62 (2019); Noll & Revesz (2020), *supra* note 8.

<sup>128</sup> 5 U.S.C. §§ 500–96.

<sup>129</sup> See *id.*; CONG. RSCH. SERV., RL32240 *The Federal Rulemaking Process: An Overview* (2013); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 360–61 (2019).

<sup>130</sup> Noll & Revesz (2020), *supra* note 8.

However, the President must weight his regulatory agenda with his legislative agenda. Generally, a President's political and legislative power is at its apex at the beginning of his administration.<sup>131</sup> It is usually during that time the President is in the best position to pass the most consequential, and potentially bipartisan, legislation.<sup>132</sup> If that legislation is codified in federal law, the next President cannot substantially change the law without going to Congress.<sup>133</sup> However, by using the regulatory process to circumvent the legislative process to achieve policy goals early in his administration, especially when the rule addresses controversial issues, the President risks alienating stakeholders and lawmakers whose support is necessary to pass bipartisan legislation.<sup>134</sup>

President Biden faced criticism from such actors as he used executive orders early in his administration.<sup>135</sup> In response, President Biden felt the need to make it clear that he is "not making new law. [He's] eliminating [President Trump's] bad policy."<sup>136</sup> If Democrats had compounded on these concerns by using precious floor time in Congress debating the use of numerous CRA disapproval resolutions, they would have reduced the amount of time Congress used to craft other legislation,<sup>137</sup> something likely to have a longer legacy than any regulation.<sup>138</sup>

While the new President is already in a difficult position in determining how to approach the process at the beginning of his term,<sup>139</sup> the CRA has the potential to tip the scales.<sup>140</sup> In addition to the concerns listed above, the President must also worry that his successor will use the CRA

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Noll & Revesz (2020), *supra* note 8.

<sup>136</sup> See Aaron Blake, *The GOP's Oversimplified Pushback on Biden's Executive Actions*, WASH. POST (Jan. 21, 2021, 5:49 PM), <https://www.washingtonpost.com/politics/2021/01/21/gops-oversimplified-pushback-bidens-executive-actions/> [<https://perma.cc/5KJH-K9S2>]; *Ease Up on the Executive Actions, Joe*, N.Y. TIMES (Jan. 27, 2021), <https://www.nytimes.com/2021/01/27/opinion/biden-executive-orders.html> [<https://perma.cc/J8KW-3JFX>].

<sup>137</sup> Victor Reklaitis, *Biden Says He's 'Eliminating Bad Policy' While Signing Executive Orders on Immigration*, MARKETWATCH (Feb. 3, 2021, 9:04 AM), <https://www.marketwatch.com/story/biden-to-sign-executive-orders-on-immigration-rolling-back-trump-policies-11612282883> [<https://perma.cc/2RR2-K5SG>].

<sup>138</sup> See Stuart Shapiro, *Democrats' Use of Congressional Review Act Puts Filibuster Debate In New Light*, THE HILL (May 30, 2021, 10:30 AM), <https://thehill.com/opinion/white-house/556133-democrats-use-of-congressional-review-act-puts-filibuster-debate-in-new> [<https://perma.cc/AYX4-8DW8>].

<sup>139</sup> Sinder et al., *supra* note 16.

<sup>140</sup> *Id.*

to repeal regulations promulgated later in his term, giving him the incentive to start the rule-making process as early in his term as possible to ensure he is in a position to veto the CRA.<sup>141</sup> This time frame could alienate stakeholders at the same time a President has the greatest chance of passing important bipartisan environmental legislation.<sup>142</sup> By the same token, if the new President is able to use the CRA to repeal regulations promulgated toward the end of the prior administration, his actions are also likely to alienate stakeholders and lawmakers who supported that rule, making legislation even more difficult.<sup>143</sup> As one commentator put it the,

nakedly partisan exercise as passage of a CRA resolution of disapproval risks weakening Congress further by reinforcing its paralyzing state of dysfunction. With each resolution that is adopted, the mutual animosity and distrust between the two parties risks growing ever greater, incrementally broadening the existing partisan gap and putting future efforts at reaching across the aisle on bipartisan compromise just a little further out of reach.<sup>144</sup>

Unfortunately, under the status quo and the polarization and gridlock in Congress, and the President's incentives to use the CRA and rule-making process as early in his administration as possible, he is likely to be inclined to take the low hanging fruit and start regulating immediately.<sup>145</sup> While this serves the President's short-term policy goals, it does not create the type of long-standing and permanent laws necessary to address our pressing environmental concerns.<sup>146</sup> Instead, the regulatory landscape affecting climate change will continue in the current push and pull cycle

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *See id.*

<sup>144</sup> Sinder et al., *supra* note 16.

<sup>145</sup> James Goodwin, *The Congressional Review Act Is No Solution*, CENTER PROGRESSIVE REFORM (June 1, 2017), <https://progressivereform.org/cpr-blog/the-congressional-review-act-is-no-solution/> [<https://perma.cc/574K-9VBU>].

<sup>146</sup> *See* Ian Millhiser, *How Joe Manchin Can Make The Filibuster "More Painful" For The GOP Without Eliminating It*, VOX (Mar. 8, 2021, 12:14 PM), <https://www.vox.com/22260164/filibuster-senate-fix-reform-joe-manchin-kyrsten-sinema-cloture-mitch-mcconnell> [<https://perma.cc/5HBA-Z2G2>]. Given that Congress seems unlikely to abolish the legislative filibuster, some advocate for using the CRA as a substitute. If the gridlock in Congress proves intense, it may impossible for future Presidents to resist using the CRA to achieve their policy goals and to placate their party.

between pro-business and pro-environment administrations, wasting resources, and precious time.

#### CONCLUSION

The CRA is harmful to environmental good governance and should be repealed for three main reasons. First, central provisions in the CRA are ambiguous<sup>147</sup> and the CRA's future use could cause negative unintended consequences on the environment.<sup>148</sup> Environmentalists have better methods available to achieve their regulatory goals.<sup>149</sup> Next, the CRA creates uncertainty for both environmentalists and corporate interests, while at the same time making it difficult for any administration to create long-term impactful policies to address controversial climate issues.<sup>150</sup> Finally, the CRA has the potential to artificially stymie future legislation, specifically impairing support for environmental bills.<sup>151</sup> In the end, repealing the CRA has an unusual potential in Washington right now: improve environmental governance without angering partisans and business interests.<sup>152</sup>

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<sup>147</sup> Barry G. Rabe, *The Limitations of a Climate Change Presidency*, BROOKINGS (June 23, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/23/the-limitations-of-a-climate-change-presidency/> [<https://perma.cc/N9AZ-GN66>].

<sup>148</sup> See 5 U.S.C. § 801(b)(2); 5 U.S.C. § 805.

<sup>149</sup> See *supra* notes 68–75 and accompanying text.

<sup>150</sup> See *supra* notes 76–99 and accompanying text.

<sup>151</sup> See *supra* notes 101–26.

<sup>152</sup> See *supra* notes 127–47.