

The Senate's Midnight Rules Relief Act Would Bring Chaos, Not Relief

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The Midnight Rules Relief Act, approved by the Senate's Homeland Security and Governmental Affairs Committee on May 17, 2017, would turn the Congressional Review Act ("CRA") from a scalpel into a sledgehammer.¹ The CRA allows Congress to block recently issued regulations by passing a joint resolution of disapproval with a simple majority vote in each chamber, thus avoiding a Senate filibuster. Under current law, these resolutions can address only one rule at a time. The Midnight Rules Relief Act, however, would scrap that limit for rules issued in the final year of a President's term, permitting Congress to address multiple rules with a single resolution. As a result, dozens, hundreds, or even thousands of carefully designed regulations could be repealed in a single stroke, after minimal deliberation.

What's in the Bill

- The bill amends the Congressional Review Act to allow multiple rules to be blocked by a single resolution of disapproval, so long as those rules were issued in the final year of a President's term. Currently, each CRA resolution can encompass only one rule.
- In practice, this would enable Congress to simultaneously repeal thousands of regulations in one fell swoop, after only 10 hours of Senate debate.

The Midnight Rules Relief Act would allow the simultaneous repeal of thousands of rules, with minimal deliberation

Under typical legislative procedure, a bill is subject to potentially unlimited debate in the Senate, unless 60 Senators vote to invoke cloture and proceed to a final vote on the bill's substance.² The Congressional Review Act, enacted in 1996, allows the Senate to bypass this 60-vote hurdle when trying to block recently issued federal regulations.³ Under the CRA, the Senate has 60 "session days" after it receives official notice of a newly finalized rule to pass a resolution of disapproval.⁴ Debate on such a resolution is limited to a maximum of 10 hours, after which it can be passed by a simple majority,

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without a cloture vote.⁵ (To become law, the resolution must also be passed by the House, but, because the House has no filibuster and has always acted on a bare majority vote, no special procedure is necessary for CRA resolutions in the House.⁶)

Under current law, each CRA resolution may address only one regulation.⁷ The Midnight Rules Relief Act would scrap that restriction for rules issued in the final year of a President’s term. An unlimited number of such rules could be bundled in a single resolution, *without any increase in the maximum debate time*.⁸ In other words, Congress would be able to eliminate a thousand rules—rules that federal agencies deemed necessary to benefit the public and spent months, if not years, crafting—in the same 10 hours that are currently required to eliminate one rule.

A resolution that encompasses a thousand rules is not outside the realm of possibility. Although resolutions under the Midnight Rules Relief Act would still be limited to rules issued in the past 60 “session days,” that period can cover far more than 60 *actual* days. For instance, the Congressional Research Service estimated that any final rules submitted to Congress on or after June 13, 2016, would still be eligible for CRA repeal in 2017, several months after their finalization.⁹ Considering that the federal government typically issues between 2,500 and 4,000 rules each year,¹⁰ and assuming an equal distribution of regulatory activity throughout a year, it is conceivable that the rules covered by a 60-session-day window could number in the thousands.

The Midnight Rules Relief Act would have harmful unintended consequences

Once a regulation has been repealed with a CRA resolution, the agency that issued it is precluded not only from reissuing that rule but also from issuing any “new rule that is substantially the same” as the original.¹¹ The CRA does not explain when a rule can be considered “substantially the same” as another, and courts have not yet had an opportunity to weigh in on the meaning of this requirement.¹²

In 2000, for example, Congress used the CRA to repeal a set of workplace ergonomics standards issued by the Occupational Health and Safety Administration (“OSHA”).¹³ It remains unclear whether OSHA can legally issue a new ergonomics rule of narrower scope or lesser stringency, or if the agency is barred from imposing *any* ergonomics requirements absent new, express authorization from Congress. Perhaps as a result of this uncertainty, OSHA has never again tried to regulate ergonomics.

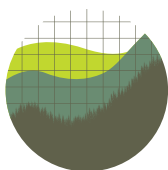
More recently, Congress passed a joint resolution disapproving of a Labor Department rule that permitted states to drug-test unemployment beneficiaries from a small number of occupations.¹⁴ The resolution’s supporters felt that broader testing should be allowed.¹⁵ But the CRA’s preclusion of substantially similar rules could bar the Labor Department from issuing a replacement list of occupations from which unemployment beneficiaries can be drug-tested.¹⁶ Thus, rather than leading to a more expansive testing regime, as the resolution’s supporters intended, the resolution might result in far *less* drug-testing.

By allowing Congress to repeal an unlimited number of rules simultaneously, without increasing required debate time, the Midnight Rules Relief Act would exponentially increase the risk of harmful unintended consequences from CRA resolutions.

*To learn more about the Midnight Rules Relief Act, please contact the
Institute for Policy Integrity at the New York University School of Law—derek.sylvan@nyu.edu.*

Endnotes

- ¹ See Midnight Rules Relief Act of 2017, S. 34, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/senate-bill/34/text>.
- ² UNITED STATES SENATE, FILIBUSTER AND CLOTURE, https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm (last visited April 5, 2017).
- ³ MAEVE P. CAREY ET AL., CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 1 (2016), available at <https://fas.org/sgp/crs/misc/R43992.pdf>.
- ⁴ *Id.* at 14.
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *Id.* at 13.
- ⁸ H.R. 21, 115th Cong. § 2 (2017).
- ⁹ Christopher M. Davis & Richard S. Beth, Congressional Research Service, IN10437, *Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress*, CRS INSIGHT, Dec. 15, 2016, available at <https://fas.org/sgp/crs/misc/IN10437.pdf>.
- ¹⁰ MAEVE P. CAREY, CONGRESSIONAL RESEARCH SERVICE, R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 1 (2016), available at <https://fas.org/sgp/crs/misc/R43056.pdf>.
- ¹¹ 5 U.S.C. § 801(b)(2).
- ¹² THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS, *supra* note 2, at 16-17.
- ¹³ *Id.* at 5.
- ¹⁴ Michael Grunwald, *Is the GOP drug-testing plan about to backfire?*, POLITICO, Mar. 15, 2017, <http://www.politico.com/agenda/story/2017/03/is-the-gop-drug-testing-plan-about-to-backfire-000364>.
- ¹⁵ *Id.*
- ¹⁶ *Id.*



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