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Congressional Review Act Developments

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In response to the unprecedented use of the Congressional Review Act ("CRA") by the 115th Congress and the Trump Administration, the Center for Biological Diversity ("Center"), a nonprofit dedicated to wildlife conservation, filed a lawsuit in an Alaska federal court challenging the constitutionality of the Act.

The CRA is a statute that requires federal agencies to submit new regulations to Congress before those rules can take effect. As we have previously explained, the Act also, significantly, gives Congress the opportunity to pass a joint resolution of "disapproval," which nullifies the entire regulation at issue, leaving the rule with "no force or effect." The agency is also prohibited from later promulgating any rule that is "substantially the same" as the rejected rule.

The Center's lawsuit concerns the Federal Wildlife Services "Refugees Rule," 81 Fed. Reg. 52,247 (Aug. 5, 2016), which, according to the complaint, protects certain wildlife from "cruel and ecologically harmful predator control practices." The Refugee Rule was promulgated by the Obama Administration, and, because it was issued within 60 legislative days of the end of the 114th Congress, is subject to CRA review by the 115th Congress.

The lawsuit attacks the CRA on two fronts. *First*, it broadly challenges the "substantially the same" prohibition, arguing that Congress violated the constitutional separation of powers between the Executive and Legislative Branches by revoking a properly promulgated rule without amending the underlying statute through the legislative process. In other words, because Congress has delegated to the Department of the Interior the power to make certain regulations, Congress cannot, without amending the Department's substantive authorities, alter or revoke an action taken by the Executive Branch.

Second, the lawsuit argues that Congress lacks the power to revoke the Refugee Rule because the Rule falls under a specific exception, found in 5 U.S.C. § 808, to the CRA's requirement that regulations be submitted to Congress before they take effect: rules that concern a "regulatory program for a commercial, recreational, or subsistence activity related to hunting" do not require submission to Congress, and may take effect "at such time as the agency . . . determines." Thus, the Center argues, because no submission to Congress was required, the Rule was not subject to

disapproval.

This argument that Congress cannot revoke rules subject to Section 808 would also apply to regulations "for which an agency for good cause finds . . . that notice public procedure are impracticable, unnecessary, or contrary to the public interest," and thus do not require a submission to Congress under the CRA.

While it is too soon to determine whether this novel legal case has merit, a constitutional challenge to the CRA is significant. If federal courts determine that the "substantially the same" prohibition in the CRA is unconstitutional, many federal agencies would be free to reenact nullified rules in a similar fashion. Such a ruling would also likely trigger litigation to determine the meaning of "substantially the same," as well as a flurry of lobbying efforts to encourage (or discourage) agencies to re-promulgate rules similar to those overturned by Congress.

This is one of the first legal challenges to the CRA, since the statute, historically, has been rarely used: until the Trump Administration and the 115th Congress, only one rule had ever been nullified under the CRA. This Congress and Administration have made frequent and significant use of the CRA to reverse Obama Administration rules: 56 disapproval resolutions, affecting 32 rules have been introduced in Congress, and 15 resolutions have passed in at least one chamber. President Trump has already signed ten resolutions of disapproval into law.

While the 60-day window ("continuous session") since January 30 to introduce new CRA resolutions has passed for this Congress, each chamber has an ongoing window from the date of introduction to act on the dozens of CRA resolutions still pending. Pending resolutions that have not passed both chambers include resolutions concerning:

- the privacy rights of broadband customers
- requirements for offshore drilling off the Alaska coast
- the EPA's cross-state pollution rule and air quality initiatives
- endangered and threatened species policy
- emissions standards for the oil and natural gas sector
- IRS treatment of certain interests in corporations as stock or indebtedness
- rules governing drug testing for unemployment compensation applicants

The ongoing use of the CRA to overturn these and other regulations will be of interest to companies that support or oppose these rules or other rules facing congressional scrutiny.

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