

ESSAY

Use of the Congressional Review Act at the Start of the Trump Administration: A Study of Two Vetoes

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ABSTRACT

Once regarded as a legislative dead letter, the Congressional Review Act (“CRA”) gained new vitality in 2017 as President Trump and Republicans in Congress used the Act to veto more than a dozen regulations issued late in the Obama Administration. The reemergence of the CRA renewed debate over a vague provision at the heart of the Act: its prohibition against agencies reissuing regulations in “substantially the same form” as those regulations Congress vetoes.

This Essay analyzes the congressional debate over two CRA vetoes at the start of the Trump administration against existing hypotheses about the “substantially the same form” prohibition. Both of these vetoed regulations—one nullifying a Securities and Exchange Commission disclosure requirement for resource extraction companies and another nullifying a Department of Labor definition of jobs categories for which states can require drug testing of unemployment recipients—were issued pursuant to statutory mandate. The Essay concludes that these vetoes will likely force the courts to construe the meaning of “substantially the same form” and considers the factors that courts may weigh to determine the phrase’s meaning.

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INTRODUCTION

In late 2016, riding high after winning control of the presidency and Congress for the first time in twelve years, Republicans pledged to undo what they viewed as the regulatory excesses of the Obama Administration. To accomplish the task, they identified a potent weapon: the Congressional Review Act (“CRA”).¹

Passed twenty years earlier in the wake of the 1994 Republican Revolution, the CRA created a procedural fast track by which Congress can repeal agency regulations. Although prior to 2017 Congress had only used the law to repeal a rule once before,² the transition from a Democratic president to a Republican one created the conditions necessary to awaken the Act from its slumber. In the months after Donald Trump’s inauguration, Congress used the Act to veto fourteen agency regulations issued in the waning days of the Obama Administration.³

Beyond nullifying those regulations, the use of the CRA had another important effect: it barred the agencies that issued the vetoed rules from issuing new ones in “substantially the same form.”⁴ Be-

1 Congressional Review Act, 5 U.S.C. §§ 801–802 (2012).

2 See Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000), *disapproved* by Pub. L. No. 107-5, 115 Stat. 7 (2001).

3 Eric Lipton & Jasmine C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html> [<https://perma.cc/C7TJ-DQW9>].

4 5 U.S.C. § 801(b)(2).

cause the Act does not define this term and no court has construed it, the CRA resolutions create zones of uncertainty around agencies' ability to regulate in the areas of their authority pursuant to which they promulgated the original rules. Moreover, for rules issued under statutory mandate, the CRA prohibition leaves agencies in an unusual limbo, as they are required by law to regulate but are subject to an ill-defined limitation.

This Essay argues that congressional CRA actions at the beginning of the Trump Administration will likely force courts to construe the meaning of the CRA prohibition before the next presidential transition. Rather than attempt to provide a comprehensive definition of “substantially the same form,” this Essay reviews congressional debates over CRA vetoes and tests existing theories against the evidence from those debates. Part I reviews the history of the CRA, the motivations of its drafters, and attempts by commentators to provide a definition of “substantially the same form.” Part II reviews congressional action at the start of the Trump Administration and examines the debate over two rules—an SEC disclosure requirement for resource extraction companies and a Department of Labor determination of occupations that states can subject to drug testing in their unemployment compensation programs. Part III explains why no single definition of “substantially the same form” accounts for every congressional motivation for using the CRA and considers how courts might approach the question in response to likely litigation.

I. HISTORY OF THE CONGRESSIONAL REVIEW ACT

Tucked into the Contract with America Advancement Act of 1996,⁵ the CRA creates an expedited process by which Congress can veto final agency rules. Before a rule covered under the CRA can take effect, the agency promulgating it must submit it to both houses of Congress and the Comptroller General of the Government Accountability Office (“GAO”).⁶ If Congress passes a resolution of disapproval in the manner prescribed by the Act, the rule cannot take effect or continue,⁷ and the agency cannot issue a regulation in “substantially the same form” without express congressional authorization.⁸ This Part discusses the procedural advantages the CRA affords to congress-

⁵ Contract with America Advancement Act of 1996, § 251, Pub. L. No. 104-121, 110 Stat. 847, 868–74 (codified at 5 U.C.C. §§ 801–808 (2012)).

⁶ 5 U.S.C. § 801(a)(1)(A).

⁷ *Id.* § 801(b)(1).

⁸ *Id.* § 801(b)(2).

sional vetoes of certain regulations, the ambiguous prohibition against agencies reissuing vetoed regulations in “substantially the same form,” and the lessons of the only successful use of the CRA prior to 2017.

A. *Procedural Advantages of the CRA*

The CRA increases congressional oversight of agency rulemaking in two primary ways. First, the Act creates a reporting requirement that rulemaking agencies must fulfill before new rules can take effect. For every rule covered under the Act, the agency must submit to each house of Congress and the Comptroller General of the GAO a copy of the rule, along with other information, including a cost-benefit analysis and a statement about whether it is a major rule.⁹ While nonmajor rules can take effect after submission on a date chosen by the agency, the Act delays the effective date of major rules until sixty days after the Comptroller General produces a report on the rule or the rule is published in the Federal Register, whichever is later.¹⁰

Second, the Act creates a fast-track procedure by which Congress can adopt joint resolutions disapproving of agency rules. Substantively, the CRA procedure for enacting resolutions of disapproval does not differ from the regular lawmaking process outlined in Article I of the Constitution. The procedure therefore comports with *INS v. Chadha*,¹¹ in which the Supreme Court held unconstitutional those legislative veto provisions that did not require passage through both houses of Congress and presentment to the president for signature or veto.¹² Because *Chadha* forecloses any departure from the bicameralism and presentment requirements, the CRA instead affords several procedural advantages to resolutions of disapproval. Most importantly, in the Senate, the Act stipulates that all points of order against a resolution are waived, allowing the chamber to bypass a filibuster and pass a resolution by a simple majority.¹³ Additionally, the Act prescribes standard text for Congress to use in every resolution of disapproval.¹⁴ When one house of Congress passes a resolution and

⁹ *Id.* § 801(a)(1)(A)–(B). The Act defines a “major rule” as one that the Administrator of the Office of Information and Regulatory Analysis determines will likely result in “an annual effect on the economy of \$100,000,000 or more” or significantly affect prices or the economy in other ways. *Id.* § 804(2).

¹⁰ *Id.* § 801(a)(3)(A), (a)(4).

¹¹ 462 U.S. 919 (1983).

¹² *Id.* at 958.

¹³ 5 U.S.C. § 802(d)(1); MAEVE P. CAREY ET AL., CONG. RESEARCH SERV., R43992, CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 14 (2016).

¹⁴ 5 U.S.C. § 802(a). Every resolution of disapproval enacted pursuant to the CRA must state “[t]hat Congress disapproves the rule submitted by the ___ relating to ___, and such rule

transmits it to the other house, the receiving house must vote on the resolution as passed, without amendment.¹⁵

The Act generally requires the Senate to act within sixty session days of a rule's submission or publication to take advantage of expedited procedures in the chamber.¹⁶ However, for rules submitted close to the end of a congressional session—so-called “midnight rules”¹⁷—the Act extends the review period. When an agency submits a rule within sixty session or legislative days of the adjournment of a congressional session, the Act treats the rule as though the agency submitted it on the fifteenth day of the succeeding Congress, giving Congress sixty additional legislative or session days after that date to enact a resolution of disapproval pursuant to the CRA.¹⁸ Resolutions considered in the Senate during this timeframe will enjoy the Act's procedural advantages.¹⁹

Resolutions of disapproval enacted under the CRA do more than veto the targeted regulation; they also bind future agency action. When Congress vetoes a rule under the Act, the rule “may not be reissued in substantially the same form” unless the rule “is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”²⁰ The Act does not define the phrase “substantially the same form.”²¹ Nevertheless, it appears to contemplate that an agency might subsequently reissue a rule in some form after a veto. If the agency issued the original rule pursuant to a statutory deadline, the Act specifies that the deadline is moved forward to one year after the passage of the resolution of disapproval.²²

B. The Ambiguity of “Substantially the Same Form”

Commentators recognized soon after the CRA's passage that the ambiguity of “substantially the same form” would cloud the prospec-

shall have no force or effect,” and the blanks must be filled with the name of the agency and rule. *Id.*

¹⁵ *Id.* § 802(f).

¹⁶ *Id.* § 802(e)(1). The drafters of the CRA intended the term “session day” in the Senate, and “legislative day” in the House, to mean any calendar day on which that chamber is in session. 142 CONG. REC. 8198 n.1 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

¹⁷ See generally MAEVE P. CAREY, CONG. RESEARCH SERV., R42612, MIDNIGHT RULEMAKING (2012) (discussing the phenomenon of increased rulemaking near the end of a presidential administration).

¹⁸ 5 U.S.C. § 801(d).

¹⁹ See *id.* § 802(e)(2).

²⁰ *Id.* § 801(b)(2).

²¹ See CAREY ET AL., *supra* note 13, at 16–17.

²² 5 U.S.C. § 803(a).

tive effect of any enacted CRA resolution.²³ Most agree that a CRA disapproval limits an agency's rulemaking authority, even though it does not amend the statute under which the agency promulgated the vetoed rule.²⁴ However, there is little authoritative evidence as to the breadth of the limitation on agency authority or the factors that should determine whether a subsequent regulation is "substantially the same" as a vetoed one.²⁵ Moreover, the Act does not specify who holds the power to construe the meaning of "substantially the same."²⁶ The silence of the statutory scheme on these questions led critics and supporters of the CRA alike to predict that the responsibility for defining the phrase "substantially the same form" will ultimately fall to the courts.²⁷

The legislative debate that preceded the CRA provides few clues to resolve the ambiguity. In lieu of a formal legislative history, the Act's cosponsors published a postenactment joint statement, in which they explained that the prohibition against agencies issuing rules in "substantially the same form" gives the CRA teeth: without the provision, agencies could easily circumvent resolutions of disapproval.²⁸ Although the cosponsors provided no additional detail about the phrase's meaning, they suggested that the effect of a resolution might vary "depending on the nature of the underlying law that authorized

²³ See Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 104 (1997).

²⁴ See CAREY ET AL., *supra* note 13, at 21; Cohen & Strauss, *supra* note 23, at 104. *But see* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 245 (2017) (arguing that an enacted CRA resolution "must necessarily amend the underlying statute").

²⁵ See CAREY ET AL., *supra* note 13, at 16–17.

²⁶ See *id.* at 17.

²⁷ See Cohen & Strauss, *supra* note 23, at 104 ("[A] simple and unelaborated 'No!' withdraws from agencies a range of substantive authority that cannot be determined without subsequent litigation."); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1071–72 (1999) (arguing that Congress intended for courts to construe the meaning of "substantially the same form" to give effect to CRA vetoes). Although the CRA bars judicial review of any "determination, finding, action, or omission," 5 U.S.C. § 805, most observers agree that the bar applies only to congressional procedures and not the legal effect of enacted CRA resolutions. See Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 732 (2011); Rosenberg, *supra*, at 1071. *But see* *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009) (holding that section 805 "denies courts the power to void rules on the basis of agency noncompliance with the Act").

²⁸ 142 CONG. REC. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

the rule.”²⁹ If the law gave the agency discretion over whether to issue the rule or the substance of the rule, the agency could comply with a CRA resolution by issuing a “substantially different” rule or declining to issue a new rule at all.³⁰ In cases where the law required the agency to issue a rule but circumscribed its discretion over the rule’s substance, the cosponsors indicated that the legal effect of the veto would require further elaboration by the enacting Congress.³¹ In such cases, the cosponsors expected “the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency’s options or lack thereof.”³²

In the absence of statutory or judicial guidance construing “substantially the same form,” commentators have looked to the congressional intent behind the CRA to develop their own theories. While some argue that the prohibition broadly disables an agency from regulating in the issue area of the original rule,³³ others contend that the CRA does not require such a sweeping result. Adam M. Finkel and Jason W. Sullivan, for instance, analyzed the text of the statute and statement of its cosponsors against the antiregulatory political climate that produced the Act, concluding that Congress was primarily concerned with rules whose burdens on the economy outweighed their benefits.³⁴ Using cost-benefit analysis as a touchstone, Finkel and Sullivan argue that courts should construe “substantially the same form” narrowly to bar a subsequent rule only if the agency does not alter its cost-benefit analysis to make the rule substantially more cost-effective.³⁵ Michael J. Cole agrees that courts should use cost-benefit analysis as their touchstone, although he argues for a somewhat less deferential test of whether a subsequent rule is “substantially the same.”³⁶ Whereas Finkel and Sullivan argue that courts should apply *Chevron*³⁷ deference to agency determinations of whether a subse-

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See Larkin, *supra* note 24, at 245–46 (arguing that a CRA veto creates a “buffer zone” around the vetoed rule, depriving the agency of authority to issue any other rule similar enough to the original that its effect would be to nullify Congress’s disapproval).

³⁴ Finkel & Sullivan, *supra* note 27, at 740.

³⁵ See *id.* at 761–63.

³⁶ Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe “Substantially the Same,” and Decline to Defer to Agencies Under Chevron*, 70 ADMIN. L. REV. 53, 101 (2018).

³⁷ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

quent rule is “substantially the same” as a vetoed one,³⁸ Cole proposes that courts use the “arbitrary and capricious” standard to evaluate if agencies have altered the cost-benefit ratio enough to satisfy the CRA prohibition.³⁹

C. *The Use of the CRA to Veto the OSHA Ergonomics Rule*

For most of the CRA’s existence, the debate over the ambiguity at the heart of the Act remained almost entirely speculative. Because resolutions of disapproval require a presidential signature and an administration generally will not issue regulations with which it disagrees, CRA vetoes are likely to succeed only in periods following a presidential transition from one party to the other.⁴⁰ Indeed, the only successful use of the CRA between 1996 and 2017 came after just such a transition, when Congress vetoed the Occupational Safety and Health Administration (“OSHA”) workplace ergonomics rule in 2001.⁴¹ Issued at the tail end of the Clinton Administration, the rule would have required employers to implement programs to limit their workers’ exposure to risk factors associated with musculoskeletal disorders, and it generated an intense backlash from the business community.⁴²

Debate over the resolution disapproving the ergonomics rule revealed competing understandings among members of Congress of “substantially the same form.” Opponents of the resolution emphasized the CRA prohibition in their arguments, warning that repeal would permanently prevent OSHA from protecting workers from musculoskeletal disorders.⁴³ Proponents countered that OSHA could still issue an ergonomics rule later on, so long as, in the words of one Senator, the rule was “more cost effective.”⁴⁴ As Finkel and Sullivan note, however, political posturing likely colored interpretations of the phrase made just before the vote since opponents of the resolution had an incentive to make its effect seem more draconian, and propo-

³⁸ Finkel & Sullivan, *supra* note 27, at 752.

³⁹ Cole, *supra* note 36, at 101–05; see 5 U.S.C. § 706(2)(A) (2012).

⁴⁰ See Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2167 (2009). However, the CRA may also create an unheralded power to increase executive control over independent agencies. See *id.* at 2181–82.

⁴¹ See Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000), *disapproved by* Pub. L. 107-5, 115 Stat. 7 (2001); CAREY, *supra* note 17, at 11. The 114th Congress passed five resolutions of disapproval under the CRA, all of which were vetoed by President Obama. CAREY ET AL., *supra* note 13, at 5.

⁴² See Finkel & Sullivan, *supra* note 27, at 725–26.

⁴³ See, e.g., 147 CONG. REC. 2818 (2001) (statement of Sen. Kennedy).

⁴⁴ *Id.* at 2844 (statement of Sen. Nickles).

nents less so.⁴⁵ Tellingly, following the veto of the ergonomics rule, the two sides effectively switched positions, with veto proponents suddenly arguing for a broad interpretation to warn OSHA against issuing a new rule and veto opponents countering that the veto did not strip OSHA of its authority to regulate.⁴⁶

The ergonomics rule veto ultimately contributed little to understanding “substantially the same form” because of what OSHA did in the wake of the rule’s repeal: nothing. OSHA’s enabling statute gives the agency broad discretion to develop workplace safety standards, allowing the agency to choose inaction in response to the resolution of disapproval.⁴⁷ Because the agency did not attempt to reregulate in the ergonomics area, no court had occasion to construe the meaning of the law’s ambiguous phrase. Moreover, because the decision to regulate fell within OSHA’s discretion, the veto did not force courts to consider the prohibition’s effect if Congress repealed a rule it had required an agency to issue.⁴⁸

II. THE USE OF THE CRA AT THE START OF THE TRUMP ADMINISTRATION

In the wake of their unexpected sweep of the presidency and both houses of Congress in the 2016 election, Republicans quickly vowed to undo what they viewed as the Obama Administration’s regulatory overreach.⁴⁹ A Congressional Research Service memorandum issued shortly after the election concluded that under the CRA’s extended review period for “midnight regulations,” the incoming Congress could use the Act to veto rules submitted after May 30, 2016.⁵⁰ The memorandum identified nearly fifty major rules that qualified.⁵¹ The CRA played a critical role in advancing the Republicans’ deregulatory

⁴⁵ Finkel & Sullivan, *supra* note 27, at 737–38.

⁴⁶ *Id.* at 737–38, 738 n.135.

⁴⁷ 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords).

⁴⁸ Notably, although Finkel and Sullivan generally argue for narrowly construing “substantially the same,” they read the statement of the CRA cosponsors to signify that in cases where an underlying statute accords an agency no discretion over the substance of a rule, a CRA veto may entirely prevent an agency from issuing a new rule. Finkel & Sullivan, *supra* note 27, at 737.

⁴⁹ See Brian Naylor, *Trump Acts to Roll Back Regulations on Businesses*, NPR (Jan. 30, 2017, 10:49 AM), <https://www.npr.org/2017/01/30/512445032/trump-acts-to-roll-back-regulations-on-businesses> [<https://perma.cc/2XUQ-JU5V>].

⁵⁰ Memorandum from Maeve P. Carey et al., Cong. Research Serv., “Major” Obama Administration Rules Potentially Eligible to Be Overturned Under the Congressional Review Act in the 115th Congress 2 (Nov. 17, 2016), <https://fas.org/sgp/crs/misc/major-rules-cra.pdf> [<https://perma.cc/ADT2-VMBU>].

⁵¹ *Id.* at 4–9.

agenda because it allowed the party to avoid a Democratic filibuster in the Senate, where the Republicans held only fifty-two seats.⁵²

Over a four-and-a-half-month span at the start 2017, Congress exponentially increased the number of successful CRA resolutions as Republicans hacked away at the Obama Administration's rules. In total, President Trump signed fourteen resolutions of disapproval, nullifying rules on internet privacy⁵³ and background checks for mentally impaired individuals seeking to buy firearms,⁵⁴ among others.⁵⁵ This unprecedented flurry of activity under the Act prompted additional congressional debate over the prohibition against agencies issuing rules in "substantially the same form" as those vetoed. Notably, the prohibition played a role in congressional rejection of the only CRA resolution to fail during this period, which would have vetoed a Bureau of Land Management rule on natural gas flaring.⁵⁶ At least one Republican joining with Democrats to sink the resolution in the Senate cited his reluctance to deprive the agency of authority in the area.⁵⁷

Perhaps more important than what it revealed about individual members' understanding of the Act, however, is that Congress's use of the CRA at the start of 2017 likely increased the pace at which unanswered questions about the law will reach the courts. Two disapproved

⁵² See James Gattuso & Daren Bakst, *Stars Align for the Congressional Review Act*, HERITAGE FOUND. (Dec. 16, 2016), <http://www.heritage.org/government-regulation/report/stars-align-the-congressional-review-act> [<https://perma.cc/6Q7S-YRG4>].

⁵³ See *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, 81 Fed. Reg. 87,274 (Dec. 2, 2016), *disapproved by* Pub. L. No. 115-22, 131 Stat. 88 (Apr. 3, 2017).

⁵⁴ See *Implementation of the NICS Improvements Amendments Act of 2007*, 81 Fed. Reg. 91,702 (Dec. 19, 2016), *disapproved by* Pub. L. No. 115-8, 131 Stat. 15 (Feb. 28, 2017).

⁵⁵ Later that year, the Republicans added to their CRA haul by disapproving a Consumer Financial Protection Bureau rule on class-action arbitration clauses. See *Arbitration Agreements*, 82 Fed. Reg. 33,210 (July 19, 2017), *disapproved by* Pub. L. No. 115-74, 131 Stat. 1243 (Nov. 1, 2017). In 2018, Republicans used the CRA to veto a Consumer Financial Protection Bureau bulletin on third-party auto lenders' compliance with the Equal Credit Opportunity Act after the GAO concluded that the bulletin, although nonbinding, was a rule subject to the CRA. See *CONSUMER FIN. PROT. BUR., CFPB BULL. NO. 2013-02, INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT (2013)*, *disapproved by* Pub. L. No. 115-172, 132 Stat. 1290 (May 21, 2018).

⁵⁶ See *Waste Prevention, Production Subject to Royalties, and Resource Conservation*, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, and 3170).

⁵⁷ See Press Release, Senator John McCain, Statement by Senator John McCain on BLM Methane Recapture Rule (May 10, 2017), <https://www.mccain.senate.gov/public/index.cfm/press-releases?ID=F847AD1E-DD06-418A-9061-454B34B21BFE> [<https://perma.cc/ZF66-RR7U>] ("[P]assage of the resolution would have prevented the federal government, under any administration, from issuing a rule that is 'similar[.]'").

rules appear to be on an especially fast track to review: the Securities and Exchange Commission (“SEC”) resource-extraction rule and the Department of Labor drug-testing rule. The debate over those CRA resolutions may provide clues as to how courts will interpret the meaning of “substantially the same form” and the effect of a CRA veto of a rule issued pursuant to limited discretion.

A. *The SEC Resource-Extraction Rule*

In July 2016, the SEC published a final rule requiring energy companies to disclose annually payments to foreign governments related to commercial development of natural-resource extractions.⁵⁸ The rule marked the apparent culmination of a six-year legal and rulemaking battle. Congress had created the disclosure requirement in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”),⁵⁹ directing the SEC to issue rules governing the disclosure within 270 days of the law’s enactment.⁶⁰ After the American Petroleum Institute brought a successful challenge under the Administrative Procedure Act (“APA”)⁶¹ to the SEC’s initial rule,⁶² the agency repeatedly pushed back its deadline for issuing a new version. Oxfam America, the human rights organization, brought its own APA suit against the agency for unreasonably delaying the rule.⁶³ The court held that the agency had unlawfully withheld the rule, and the SEC agreed to an expedited schedule for promulgating a new rule.⁶⁴

The debate in Congress over the disapproval resolution focused largely on the merits of the underlying statutory disclosure requirement, with Democrats describing it as an important guard against corporate corruption and Republicans warning that it would put American companies at a competitive disadvantage.⁶⁵ However, echoing concerns from the debate over the Clinton ergonomics rule, opponents of the CRA resolution warned that its passage would completely disable the SEC from regulating in the issue area of the

⁵⁸ See Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,360 (July 17, 2016), *disapproved by* Pub. L. No. 115-4, 131 Stat. 9 (Feb. 14, 2017).

⁵⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, sec. 1504, 124 Stat. 1376, 2220–22 (codified at 15 U.S.C. § 78m(q) (2012)).

⁶⁰ 15 U.S.C. § 78m(q)(2)(A).

⁶¹ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

⁶² *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5, 8 (D.D.C. 2013).

⁶³ *Oxfam Am., Inc. v. SEC*, 126 F. Supp. 3d 168, 169–70 (D. Mass. 2015).

⁶⁴ See *id.* at 176.

⁶⁵ See, e.g., 163 CONG. REC. H848 (daily ed. Feb. 1, 2017) (statement of Rep. Hensarling); *id.* at H849 (statement of Rep. Waters).

original rule. One opponent argued that the bar on regulation in “substantially the same form” would “effectively prevent[] [the SEC] from ever fulfilling its statutory mandate in the Dodd-Frank Act.”⁶⁶ Barring the agency from issuing a new regulation, another argued, would create inconsistent standards for companies seeking to comply with the law because other nations had adopted disclosure requirements for resource-extraction payments similar to the one in Dodd-Frank.⁶⁷

Proponents of the resolution, also mirroring arguments from the ergonomics debate, contended that the resolution would not deprive the SEC of authority to issue a new rule that was less burdensome. The sponsor of the resolution in the House, Representative Bill Huizenga of Michigan, explained in a colloquy with another member, “what my resolution does, is it directs the SEC to go back to the drawing board.”⁶⁸ Indeed, proponents of the resolution repeatedly cited the SEC rule’s estimated annual compliance cost of \$591 million as potentially harmful to the national economy, suggesting that the SEC might be able to issue a less costly rule.⁶⁹ Underscoring the point, two Senators who supported the resolution concurred in a conversation during the Senate debate that the resolution would not repeal the underlying section of Dodd-Frank that created the disclosure requirement or the SEC’s obligation to promulgate a replacement.⁷⁰

B. The Department of Labor Drug-Testing Rule

The Department of Labor issued its final rule in August 2016 specifying jobs for which states could subject individuals to drug testing in administering their unemployment compensation programs.⁷¹ Congress had passed a law in 2012 allowing states to implement drug-testing requirements in their unemployment programs for those seek-

⁶⁶ *Id.* at H851 (daily ed. Feb. 1, 2017) (statement of Rep. Maloney).

⁶⁷ *See id.* at H849 (statement of Rep. Waters).

⁶⁸ *Id.* at H853 (statement of Rep. Huizenga). During the same debate, Rep. Huizenga told colleagues, “This is a vote to reset the regulatory process. Congress needs to send this flawed regulation back to the SEC drawing board and instruct the SEC to get the provision right[.]” *Id.* at H850.

⁶⁹ *See, e.g.*, 163 CONG. REC. H848 (daily ed. Feb. 1, 2017) (statement of Rep. Hensarling); *id.* at H851 (statement of Rep. Wagner); *id.* at H855 (statement of Rep. Tenney). Notably, the figure represented the SEC’s estimate of the upper boundary of the possible compliance cost. Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,360, 49,410 (July 17, 2016).

⁷⁰ *See* 163 CONG. REC. S635 (daily ed. Feb. 2, 2017) (colloquy of Sens. Isakson and Crapo).

⁷¹ *See* Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants, 81 Fed. Reg. 50,298 (Aug. 1, 2016), *disapproved* by Pub. L. No. 115-17, 131 Stat. 81 (2017).

ing jobs that regularly required such testing.⁷² The law provided that the Department would define the types of jobs covered.⁷³

The rule listed eight categories of occupations for which states could require testing, including jobs that required carrying a firearm, air traffic controllers, and public transportation workers.⁷⁴ In submitting the final rule for review, the Department said it was unable to complete a cost-benefit analysis because of a lack of reliable data about the likely costs to states that chose to administer programs or the potential benefits.⁷⁵ The Department referenced estimates from Texas, which claimed to show that savings on unemployment benefits far outweighed administrative costs, but declined to endorse the findings.⁷⁶

The cursory congressional debate over the resolution of disapproval differed significantly from the debates over the ergonomics and resource-extraction rules. Unlike those debates, in which members criticized agencies for regulating in an overly aggressive manner, proponents of the resolution of disapproval faulted the Department for failing to regulate more proactively pursuant to the authority Congress had conferred. By narrowly defining the class of occupations subject to the law, veto proponents charged, the Department had ignored the intent of Congress to permit widely applicable drug testing requirements.⁷⁷ In other words, proponents of the resolution of disapproval expressly indicated that they sought to overturn the rule so that the Department would replace it with a more expansive one.

Notably, neither side made mention of the CRA prohibition on the Department issuing a new rule in “substantially the same form” during debate over the resolution of disapproval. Proponents apparently did not view the prohibition as an obstacle to their ultimate policy goal, since they fully expected that the Department would issue a new rule that better reflected congressional intent.⁷⁸ Of course, the measure of a regulation’s burdensomeness is to some degree subjec-

⁷² Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, sec. 2105, § 303(l), 126 Stat. 156, 162–63 (codified at 42 U.S.C. § 503 (2012)).

⁷³ 42 U.S.C. § 503.

⁷⁴ Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants, 81 Fed. Reg. at 50,302.

⁷⁵ *Id.* at 50,301.

⁷⁶ *Id.*

⁷⁷ *See, e.g.*, 163 CONG. REC. H1201 (daily ed. Feb. 15, 2017) (statement of Rep. Kevin Brady).

⁷⁸ *See id.* at H1204 (statement of Rep. Yoho) (“This is a bad rule, and it needs to be repealed so the Department of Labor can go back to the drawing board and craft a rule that will

tive: some opponents apparently viewed the Obama Administration's narrow definition of eligible occupations as *more* burdensome because it inhibited state flexibility.⁷⁹ Nevertheless, only one senator—an opponent of the veto—even hinted during the debate at the uncertainty the veto might create, noting that passage of the resolution might “create bedlam, and make it impossible for States to move because they are in a sort of legal limbo.”⁸⁰

III. THE COMING JUDICIAL INTERPRETATION OF THE CRA

The Republicans' use of the CRA at the start of 2017, in addition to the repeal of more than a dozen Obama-era regulations, likely set in motion eventual judicial review of the Act's prohibition on the reissuance of rules in “substantially the same form.” The debates over the resource-extraction and unemployment-drug-testing rules suggest that neither the guidance provided by the Act's cosponsors nor the definitions proposed by commentators fully accounts for congressional motives in using the CRA. As a result, courts will likely construe the term using a different touchstone or seek to avoid the question altogether. This Part explains how litigation over the meaning of “substantially the same form” is likely to occur, describes the shortcomings of previous attempts to define the phrase, and concludes that an interpretation based on an anticircumvention test would be most faithful to the congressional purpose that motivated the CRA.

A. *The Likelihood of Litigation over the 2017 CRA Resolutions*

Under the predominant understanding of the Act, litigation over congressional use of the CRA at the start of the Trump administration would most likely arise after the next cross-partisan presidential transition. Democrats generally favored the vetoed regulations and reacted with outrage to their repeal.⁸¹ Should a future Democratic

actually strengthen the unemployment insurance, help the American worker, and ultimately strengthen the economy.”).

⁷⁹ See 163 CONG. REC. S1797 (daily ed. Mar. 14, 2017) (statement of Sen. Hatch).

⁸⁰ *Id.* at S1798 (statement of Sen. Wyden). Although the issue received scant discussion during the debate over the veto, some Republican lawmakers realized shortly after passing the resolution that the CRA might require passage of new legislation before the Department could issue a new regulation. See Michael Grunwald, *Is the GOP Drug-Testing Plan About to Backfire?*, POLITICO (Mar. 15, 2017, 4:54 PM), <https://www.politico.com/agenda/story/2017/03/is-the-gop-drug-testing-plan-about-to-backfire-000364> [<https://perma.cc/GQ6U-UUK5>].

⁸¹ See, e.g., Alex Byers, *Democrats Want to Make GOP Pay for Attacking Internet Rules*, POLITICO (Mar. 29, 2017, 8:01 PM), <https://www.politico.com/story/2017/03/online-privacy-democrats-net-neutrality-236669> [<https://perma.cc/4KZC-S5CN>] (describing Democrats' plans to focus on the repeal of broadband privacy rules in upcoming elections).

president seek to issue new regulations to replace those vetoed at the start of the Trump Administration, any party aggrieved by the regulation could challenge it under the APA⁸² and argue that the agency lacked the authority to issue the regulation because it is “substantially the same” as one that was vetoed.

The resource-extraction rule and unemployment-drug-testing rules, however, create paths to the courts even before a change in administration. The SEC and the Department of Labor issued those rules pursuant to congressional mandates.⁸³ While the veto of the resource-extraction rule supersedes the initial statutory deadline imposed on the agency, the CRA specifies that the agency must reissue the rule within a year of its repeal.⁸⁴ Once that deadline has passed, an interested party such as Oxfam could bring suit based on unreasonable delay and seek injunctive relief.⁸⁵ In defense, the SEC might argue that the CRA prohibition prevents it from issuing the regulation.

The unemployment-drug-testing rule’s path to the courts is even more straightforward. The Trump Administration, which supports the requirement, plans to reissue a rule that it feels better reflects Congress’s intent.⁸⁶ The new rule will likely define a much broader class of occupations for which states can require drug testing. If it does, an unemployed worker denied unemployment benefits by one of those states can challenge the Department’s regulation, arguing that the rule is invalid under the CRA because it is “substantially the same” as the rule Congress vetoed.

⁸² See 5 U.S.C. § 702 (2012) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

⁸³ See 15 U.S.C. § 78m(q)(2)(A) (2012); 42 U.S.C. § 503 (2012).

⁸⁴ 5 U.S.C. § 803(a).

⁸⁵ Cf. *Oxfam Am., Inc. v. SEC*, 126 F. Supp. 3d 168, 171, 176 (D. Mass. 2015) (holding Oxfam entitled to injunctive relief because the SEC “‘unlawfully withheld’ agency action”).

⁸⁶ See Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administrative Policy (Feb. 7, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/saphjr42h_20170207.pdf [<https://perma.cc/6GDU-U8H3>] (describing the Department’s rule as an “arbitrarily narrow definition” of eligible occupations). As part of its Fall 2017 regulatory agenda, the Department proposed a notice of proposed rulemaking for a reissued rule in June 2018. See *RIN Data: RIN No. 1205-AB81, Drug Testing by States for Purposes of Determining Unemployment Compensation Eligibility*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT (Fall 2017), <https://reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1205-AB81> [<https://perma.cc/M28P-VVJS>].

B. The Shortcomings of Previous Definitions of “Substantially the Same Form”

Although the debates over the resource-extraction and unemployment-drug-testing rules did little to resolve the ambiguity surrounding the phrase “substantially the same form,” they suggest that previous attempts to define the phrase failed to predict or appreciate the range of motivations by which Congress acts under the CRA. Congress appeared to reject a broad interpretation of “substantially the same form” that would completely forestall subsequent regulation in the same issue area as a vetoed rule. Proponents of both vetoes insisted that they wanted to send the agencies “back to the drawing board” to craft rules more acceptable to Congress.⁸⁷ While Finkel and Sullivan discounted such statements during the ergonomics debate,⁸⁸ veto proponents made identical statements about a rule whose underlying goals they mostly opposed and one whose underlying goals they supported, lending them credibility. Moreover, two Senators expressly rejected the claim that the veto of the resource-extraction rule would repeal the SEC’s statutory obligation to issue the rule.⁸⁹ Thus, if the CRA requires such a dramatic result, Congress appears not to have contemplated it.

Debate over the resource-extraction rule, however, shows that the CRA cosponsors’ expectation—that future Congresses would explain the options available to agencies that regulate pursuant to limited discretion—only partially materialized. While Congress appears to have assumed that the SEC was given enough discretion under Dodd-Frank to craft a “substantially different rule,”⁹⁰ the agency’s statutory mandate is fairly circumscribed, including specific reporting requirements and prescribed definitions.⁹¹ Given these limitations, the CRA cosponsors might have expected Congress to “make the congressional intent clear regarding the agency’s options or lack thereof.”⁹² Beyond proponents’ references to the rule’s compliance cost, however, the debate over the veto provides few clues as to how

⁸⁷ 163 CONG. REC. H853 (daily ed. Feb. 1, 2017) (statement of Rep. Huizenga); *id.* at H1204 (daily ed. Feb. 15, 2017) (statement of Rep. Yoho).

⁸⁸ See Finkel & Sullivan, *supra* note 27, at 738.

⁸⁹ 163 CONG. REC. S635 (daily ed. Feb. 2, 2017) (colloquy of Sens. Isakson and Crapo).

⁹⁰ See 142 CONG. REC. 8199 (1996) (“If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule.”) (joint statement of Sens. Nickles, Reid, and Stevens).

⁹¹ See 15 U.S.C. § 78m(q) (2012).

⁹² 142 CONG. REC. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

Congress expected the agency to exercise its discretion in rewriting the rule. Even if the agency regarded these scattered statements of legislators as useful guidance, it is unclear whether courts would look to such sparse legislative history as a useful guide to statutory construction.⁹³

Finally, while the narrower interpretation of “substantially the same form” using cost-benefit analysis as a touchstone seems well suited to explain the resource extraction rule’s veto, given proponents’ focus on the rule’s projected compliance cost,⁹⁴ it is less useful to understanding the debate over the unemployment-drug-testing rule. The Department of Labor, after all, did not conduct a cost-benefit analysis for the rule.⁹⁵ Indeed, the rule was not even classified as a major rule because its likely effect on the economy was too small.⁹⁶ Even if the Department had conducted a cost-benefit analysis, the veto proponents’ preference for greater drug testing suggests that they would accept a new rule that allows states to conduct more testing even if the rule cost more.⁹⁷ Congress’s prioritization of other goals in the debate over the drug-testing rule suggests that cost-benefit analysis cannot, on its own, provide the touchstone for interpreting “substantially the same form.”

C. Possible Alternatives Open to Courts

Because no proposed interpretation of “substantially the same form” accounts for the full range of congressional action under the CRA, courts will likely chart their own course. They could avoid the

⁹³ Indeed, the 2017 debates over the resource-extraction and unemployment-drug-testing vetoes seem to validate the old saying that construing a statute according to its legislative history “is like looking over a crowd and picking out your friends.” See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 648 (1990) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

⁹⁴ See Finkel & Sullivan, *supra* note 27, at 762.

⁹⁵ See Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants, 81 Fed. Reg. 50,298, 50,301 (Aug. 1, 2016), *disapproved* by Pub. L. No. 115-17, 131 Stat. 81 (Mar. 31, 2017).

⁹⁶ *Id.* at 50,300–01.

⁹⁷ Of course, expanded testing might produce a more favorable cost-benefit analysis if it resulted in the denial of unemployment benefits to more claimants. See *id.* at 50,301 (citing a Texas study showing that savings to the state far outweighed the costs of drug-testing administration). *But see* Alan Greenblatt, *Does Drug Testing Welfare Recipients Save Money?*, GOVERNING (July 2012), <http://www.governing.com/gov-does-drug-testing-welfare-recipients-save-money.html> [<https://perma.cc/S4HT-PC66>] (citing research that drug testing costs more than the savings it generates).

issue entirely by finding that the CRA's judicial-review provision precludes consideration of the question.⁹⁸ Previous holdings on the provision purporting to exclude judicial review, however, came in response to challenges based on agency noncompliance with the Act's reporting provisions.⁹⁹ Courts have not examined whether the bar on judicial review applies to the law's prohibition against agencies issuing regulations in "substantially the same form" as vetoed ones. They may be reluctant to hold that it bars review of the question, since it would render the prohibition unenforceable.¹⁰⁰

If courts reach the question, instead of choosing between breadth and narrowness, they might attempt to evaluate "substantially the same form" against a different touchstone: anticircumvention. The cosponsors of the Act explained the inclusion of the prohibition as a check against agency circumvention of CRA vetoes.¹⁰¹ A proper judicial construction of "substantially the same form" would not seek to detect some impermissible level of "sameness" in a subsequent regulation but would instead seek to answer the question of whether the new regulation evinces an intent by the agency to frustrate the will of Congress. Previous commentators have recognized the importance of anticircumvention in construing the CRA. Finkel and Sullivan explain their choice of a cost-benefit touchstone as the means to the ultimate end of determining whether an agency circumvented Congress's intent.¹⁰²

A broader anticircumvention analysis, however, would recognize that the phrase "substantially the same form" is ultimately meaningless on its own and can only be interpreted against the prior rule that Congress vetoed. Courts would look to a range of interpretive clues, including the text of the enabling statute, the agency's rationale for the original rule, and its representations about how it changed the new rule.¹⁰³ Thus, in some cases a regulation with a better cost-benefit ratio might actually be less faithful to Congress's veto, as in the case of the

⁹⁸ See 5 U.S.C. § 805 (2012).

⁹⁹ See, e.g., *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009); *Via Christi Reg'l Med. Ctr. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007); *Forsyth Mem'l Hosp. v. Sebelius*, 667 F. Supp. 2d 143, 150 (D.D.C. 2009).

¹⁰⁰ See Rosenberg, *supra* note 27, at 1071. Indeed, the authors of the CRA appear to have assumed that judicial review of such determinations would be available. See 142 CONG. REC. 8199 (1996) ("A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law.") (joint statement of Sens. Nickles, Reid, and Stevens).

¹⁰¹ 142 CONG. REC. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

¹⁰² See Finkel & Sullivan, *supra* note 27, at 760.

¹⁰³ The peculiar nature of CRA resolutions of disapproval, all of which are enacted with

unemployment-drug-testing rule. In cases in which the agency regulated pursuant to circumscribed authority, anticircumvention analysis would accord greater deference to the agency's representations, acknowledging that the agency remained bound by statutory mandate. Ultimately, the anticircumvention touchstone might act in practice like an "arbitrary and capricious" standard, albeit one that incorporated the unusual history of the CRA-responsive regulation.¹⁰⁴

CONCLUSION

The CRA is an unusual statute. Thwarted by the Supreme Court in its more ambitious attempts to rein in the regulatory state, Congress settled for placing a procedural thumb on the scale in favor of deregulation. The short-term advantage that the Act affords to each legislative veto, however, carries potentially long-term consequences for agency rulemaking authority that Congress did not fully explain. Now that Congress has set in motion a sequence of events that will likely force courts to fill in the gap at the heart of the CRA, courts should seek a flexible definition, using anticircumvention as a touchstone, to respect the legislative prerogatives that motivated the Act while avoiding anomalous results.

identical operative text and no explanation, *see* 5 U.S.C. § 802(a) (providing template for joint resolution), might make courts more amenable to using legislative history as an interpretive tool.

¹⁰⁴ *See* Cole, *supra* note 36, at 152–53 (arguing for arbitrary and capricious standard). To the extent the anticircumvention touchstone might result in weakening the CRA, it would only conform to the established pattern of Congress's stop-and-go efforts to rein in the regulatory state. *See* Stuart Shapiro & Deanna Moran, *The Checkered History of Regulatory Reform Since the APA*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 141, 143–44 (2016) (arguing that agencies have successfully subverted new requirements under regulatory reform statutes).