



Insight

No, the CRA Isn't Unconstitutional

SAM BATKINS | MAY 2, 2017

Recently, a group sued the Department of Interior arguing both that the Congressional Review Act (CRA) is unconstitutional and that the “Non-subsistence Take of Wildlife Rule,” was improperly repealed. To be brief, the CRA is constitutional and the wildlife rule was properly rescinded.

The lawsuit, filed by the Center of Biological Diversity, is frivolous. Throughout their complaint to the U.S. District Court in Anchorage, they somehow maintain the charade that when Congress rescinds a rule via the CRA, the president is not involved. However, President Trump has signed every resolution of disapproval, removing [13 regulations](#) to date.

First, some background on the basis of the lawsuit. Prior to 1983, Congress often overturned executive actions through votes in either in the U.S. House or Senate. However, after the 1983 case of *INS v. Chadha*, the Supreme Court held these “legislative vetoes” violated the constitutional demands of bicameralism and presentment. That is, a legislative veto does not have the authority of law. According to Articles I and II of the U.S. Constitution, making a law requires passage in both the House and Senate (bicameralism), and then the signature of the president (presentment).

To address the constitutional defects of the legislative veto, Congress passed the CRA. During the floor debate, Senator Don Nickles explicitly cited *INS v. Chadha* as a reason for a new legislative vehicle. He noted, “[T]he Supreme Court struck down as unconstitutional any procedure where executive action could be overturned by less than the full process required under the Constitution to make laws—that is, approval by both houses of Congress and presentment.”

Contrary to the frivolous lawsuit filed against the CRA, this is exactly what a CRA resolution of disapproval does. Both the House and Senate pass a resolution and the president signs it.

To claim Congress alone is stripping power away from the executive, when the president blesses each vote with a signature, is nonsensical. The CRA is not simply a legislative veto. It is Congress effectively amending its delegation of power to enforce a particular statute. As Senator Nickels noted, "In other words, enactment of a joint resolution of disapproval is the same as enactment of a law." The statute largely remains, but the agency's power to enforce the law is circumscribed. Congress and the president can change their mind on previous laws; they do so frequently and the CRA is just one vehicle available to legislators.

Here is a glance at the lawsuit against the CRA and why it's unfounded:

First, the main claim is the CRA violates the separation of powers because, "Congress purported to give itself authority to nullify an executive agency's exercise of its pre-existing statutory authority." The entire lawsuit makes it appear the CRA is all about Congress and its legislative veto and the president is somehow uninvolved. Indeed, the suit cites President Trump only once, but that citation is sufficient to doom the argument.

This is not Congress giving "itself authority;" it is Congress and the administration working together to pass a new law, solving the constitutional issue of bicameralism and presentment. According to the lawsuit, once statutory power is delegated to the executive branch, it can never be curbed, even with the blessing of both houses of Congress and the signature of the president.

Second, the lawsuit claims the CRA is unconstitutional because a resolution, "has not amended - pursuant to ... bicameralism and presentment - any of the underlying statutory mandates." But Congress and the executive have made amendments to their delegation of authority, which they are entitled to do, so long as they follow bicameralism and presentment. Remember, according to the drafters of the CRA, "a joint resolution of disapproval is the same as enactment of a law." For some reason, not supported by case law, the suit makes the claim that Congress cannot pass a new law that removes some of the authority of executive agencies, even with the blessing of the president.

Third, perhaps harkening back to the 2001 ergonomics rule that was rescinded via the CRA, but never re-proposed, the lawsuit claims a resolution, "creates a large and unconstitutional shadow effect, undermining Interior's rulemaking authority." Of course, that's the whole point of a CRA resolution, to pare back rulemaking authority. However, the drafters of the CRA [were clear](#) that certain rules could return after a CRA resolution of disapproval, despite this scary-sounding "shadow effect." A lot depended on the discretion ceded to agencies from the original statute. A CRA resolution merely reduces that discretion.

In fact, the CRA explicitly states the underlying mandates from statutes and judicial

decisions [remain in effect](#), just delayed for a year after a resolution of disapproval passes. The underlying statutory deadline is not removed, but the CRA does offer a one-year delay. This section ([803](#)) was never mentioned in the lawsuit.

Fourth, the suit argues that a “subsistence activity” under section 808 of the CRA takes effect at a time when the rule determines, and thus there is no requirement to submit a report to Congress, required under section 801. The lawsuit claims this bars Congress, in 2017, from reviewing the subsistence rule, because it was issued in 2016. The convoluted argument ends with this statement: “There was no Congressional Report submitted to Congress ... which is necessary to trigger a renewed opportunity for review in a new Congress.”

It appears that the Center for Biological Diversity is unfamiliar with the Government Accountability Office (GAO). [Here is the report](#) they claim does not exist. Here is the [official receipt](#) in the Congressional Record. There is also no record in the CRA or its congressional history that certain rules from the Department of Interior would be immune to repeal. Only actions from the Federal Reserve and the Federal Open Market Committee are exempt.

If the CRA were unconstitutional, one would imagine opponents of its use would have cited such concerns during congressional debate. However, after reviewing the Congressional Record during the 2001 ergonomics rule debate and the most recent debates in 2017, there does not appear to be any credible opponent of CRA resolutions arguing that the law itself is unconstitutional.

Finally, [some](#) have advanced the argument that CRA resolutions cannot be challenged in court. Presumably, this challenge to the constitutionality of the CRA would at least be heard, but there are claims that no court will hear a challenge to a new rule issued after a resolution of disapproval. This argument rests on section 801, which reads, “If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule.” However, the first part of the clause is instructive; it speaks only to courts being unable to infer intent from Congress not acting to repeal a rule under the CRA. Courts can’t assume the blessing of Congress if legislators fail to act.

The drafters of the CRA were clear that subsequent regulations following a resolution of disapproval could be challenged in court. Otherwise, what’s the point of the CRA if it can’t be enforced? A new administration could arrive and promptly issue an identical rule and Congress and affected parties would have no recourse. Senator Nickles noted, “In deciding cases or controversies properly before it, a court must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land.” Speaking

specifically to section 801, Senator Nickles stated, “The limitation in judicial review in no way prohibits a court from determining whether a rule is in effect.” It couldn’t be clearer. New regulations that might be “the same form” are subject to judicial review.

Conclusion

As Republicans learned during the Obama Administration, overturning legislation as unconstitutional is a steep hurdle. There is a short list of unconstitutional statutes, and unfortunately for this lawsuit, the CRA is not among them. Contrary to the suit, the CRA employs both bicameralism and presentment to rescind executive authority. That the president blesses this restraint of power with a signature is a feature of the CRA that corrected the deficiencies of the forgotten legislative veto. The CRA will survive this frivolous suit.