

Backdoor Nuclear Option: Why it Matters For Us All if the Senate Overrules the Parliamentarian, Overturns the Filibuster, and Violates the CRA

What Is Happening Now

On May 1 and 2, the House voted in favor of three Congressional Review Act (CRA) resolutions that aim to repeal waivers issued during the previous administration by the U.S. Environmental Protection Agency (EPA) to the state of California, which allows California to set protective pollution standards for certain vehicles under the Clean Air Act (CAA) without being preempted by EPA's national standards.

The Government Accountability Office (GAO) has twice found, and the Senate Parliamentarian has reaffirmed, that these waivers are not "rules" under the CRA and thus not eligible for repeal under the CRA's simple majority procedure.

It will violate the Congressional Review Act's plain language and intent if the Senate follows the House and moves these resolutions to the floor to skirt the filibuster. One of the Resolutions, H.J.Res.88, related to "California State Motor Vehicle and Engine Pollution Control Standards; Advanced Clean Cars II; Waiver of Preemption; Notice of Decision," received 35 Democratic votes - a concerning indication that there is bipartisan support to move this problematic resolution forward.

Make no mistake: what happens next is not just about pollution standards or the CRA. It could open the door for Senators to skirt the filibuster on virtually all other matters and pass harmful measures with just a simple majority.

The State of Play

These three resolutions of disapproval, having passed the House last week, could now move to the Senate. The CRA primarily impacts the Senate's rules of procedure by including specific timelines for Congress to use to repeal rules that enable the Senate to circumvent the filibuster and hold majority votes on these Resolutions of Disapproval.

Dangerous Precedent

Overruling the parliamentarian and using fast-track CRA procedures for something that clearly is outside the bounds of the CRA would set a dangerous precedent that could lead to further abuses. Ultimately, the ramifications of using the CRA in these specific instances could extend far beyond just the waivers themselves and open a "Pandora's box" that will allow for future attempts to misuse, violate, and abuse the CRA.

These clear preconditions to using the CRA reflect congressional intent to ensure that use of the CRA to bypass the filibuster is limited and narrow. Ignoring the rules in this context will essentially eliminate the filibuster on de-regulatory matters.

This means open season on the commonsense safeguards that keep us safe and healthy.

Beyond regulatory matters and the CRA, what the Senate chooses to do next has big implications. The merits of the current Senate rules and filibuster system that typically require a 60-vote threshold are a matter of robust debate - but as it currently stands, this is not an

optional system that Senators can pick and choose when to follow and when to disregard to suit their agenda.

These rules, and the Senate parliamentarian's authority to determine what is and is not subject to a simple majority voting threshold, will be particularly important as Congress prepares to take up Trump's signature legislative agenda utilizing the reconciliation process. As with the CRA process, reconciliation's fast-track procedures come with strict rules. A willingness to flout the parliamentarian and violate the CRA could indicate a willingness to flout the parliamentarian and violate reconciliation rules next.

What is the Congressional Review Act (CRA)?

The CRA is a law that enables Congress to block certain kinds of administrative actions by executive and independent Agencies by using a special form of legislation known as a joint resolution of disapproval. Importantly, Congress always has the power to enact legislation blocking existing regulations. Instead, the purpose of the CRA is to make it easier for Congress to block agency actions by temporarily suspending some of Congress's self-imposed impediments on the legislative process, including, most notably, the filibuster. This is significant because it allows regulations to be undone by a simple majority, rather than the usual 60-vote threshold in the Senate.

Key Provisions of the CRA

The CRA was enacted to provide Congress the ability to review, and potentially repeal, recently issued regulatory actions on an expedited basis that bypasses the filibuster in the Senate. Yet, for Congress to use the CRA's special set of parliamentary procedures to disapprove, and thus repeal, a particular regulatory action, that action must meet the explicitly defined criteria in the CRA that members of Congress agreed upon when they enacted the CRA. Put another way, the fast-track procedures under the CRA also come with strict rules regarding what it can be used to repeal - and what it cannot.

First, and most importantly, the regulatory action being repealed must be a "rule" as defined in the CRA, which largely adopts the definition of "rule" from the Administrative Procedure Act (APA). If a regulatory action is not a "rule" under the CRA, Congress cannot use the law to repeal it. Second, the CRA involves tight deadlines that only allow rules to be targeted if finalized during a narrow "lookback period" in the last administration and only during a short "carryover period" in the new Congress. Once those time periods expire, Congress cannot use the CRA to repeal those "rules."

Disputes among members of Congress regarding the CRA's applicability to agency actions have arisen previously. In such cases, members have turned to the GAO as a neutral third party for resolving these disputes. As mentioned above, the GAO has twice determined that the CA waiver is not a "rule." If Congress were to proceed with using the CRA against the CA waiver, it would mean that future GAO determinations would no longer carry the same weight and undermine the important role the GAO plays as a neutral third party. It would rob Congress of a valuable resource for resolving internal disputes and could lead to government agencies either refusing to submit regulations and preventing Congress from voting on actions that are subject to the CRA or allowing Congress to vote on agency actions that are not subject to the CRA.

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What Groups Need to Do

Groups need to reach out to their allies in Congress. [Overruling the parliamentarian is unacceptable](#). Senators must make clear that these CRAs should not come to the Senate floor. Senate process and procedure hangs in the balance.