



# Issue Brief: Combating the Regulatory State Through Congressional Action

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*“If you put out a reg, it matters. I think that's really where the thrill comes from. And it is a thrill; it's a high...I love it; I absolutely love it. I was born to regulate. I don't know why, but that's very true. So as long as I'm regulating, I'm happy.”* – Martha Kent, Occupational Safety and Health Administration (OSHA)

## Introduction

Presidents, through federal regulatory agencies, have circumvented Congress to create law, undermining Article I of the Constitution, which delegates lawmaking authority only to Congress. This has allowed federal bureaucrats significant power to promulgate rules, including economically significant rules – those with an annual economic impact of \$100 million or more.

Sadly, both parties are responsible for this erosion of the separation of powers by surrendering their constitutional authority to the executive branch.

Near the very end of President George W. Bush's second term in January 2009, economist Veronique de Rugy challenged the assertion by then-President-elect Barack Obama that the two-term Republican had “take[n] a hands-off approach to regulation.” De Rugy lamented that the Bush administration, in fact, took a relatively heavy-handed approach to regulation.

“Some people still seem to think Republicans take a hands-off approach to regulation, probably because the party is always quick to criticize the burdens regulations place on businesses,” De Rugy explained. “But Republican rhetoric doesn't always match Republican policy.”

“In 2007, according to Wayne Crews of the Competitive Enterprise Institute, roughly 50 regulatory agencies issued 3,595 final rules, ranging from boosting fuel economy standards for light trucks to continuing a ban on bringing torch lighters into airplane cabins,” the libertarian economist noted. “Five departments (Commerce, Agriculture, Homeland Security, Treasury, and the Environmental Protection Agency) accounted for 45 percent of the new regulations.”<sup>1</sup>

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<sup>1</sup> Veronique de Rugy, “Bush's Regulatory Kiss-Off,” *Reason*, January 2009  
<https://reason.com/archives/2008/12/10/bushs-regulatory-kiss-off>



De Ruyg noted that though the number of new rules declined by 15 percent under the Bush administration, the cost of new major rules increased by 70 percent. "Overall, the final outcome of this Republican regulation has been a significant increase in regulatory activity and cost since 2001," she wrote. "The number of pages added to the *Federal Register*, which lists all new regulations, reached an all-time high of 78,090 in 2007, up from 64,438 in 2001."

According to the Congressional Research Service, between 2,500 and 4,500 final rules are published annually in the *Federal Register*. The Bush administration averaged 3,954 rules each year. Through 2015, the Obama administration averaged 3,602.

When President Obama was criticized for his regulatory binge, Cass Sunstein, then-administrator of the White House Office of Management and Budget's Office of Information and Regulatory Affairs, defended the administration's reliance on the regulatory state to enact its agenda.

"Contrary to a widespread misconception, and in part as a result of close attention to empirical evidence, there has been a decrease, not an increase, in federal rulemaking during this administration. During the first three years of the Obama administration, the number of final rules reviewed by OIRA and issued by executive agencies was actually lower than during the first three years of the Bush administration."<sup>2</sup>

The difference between the Bush administration and the Obama administration is the number of major rules. The Bush administration averaged 63. Including the 104 major rules finalized in 2016,<sup>3</sup> the Obama administration averaged roughly 84 major rules, or 674 major rules in eight years.

While some argue that the benefits of regulation outweighs the costs, the "bottom-up" approach the White House Office of Management and Budget (OMB) utilizes to determine these costs are specious, at best. In its draft report to Congress on the cost of regulation, the OMB, for example, states that the "aggregate annual benefits are estimated to be between \$269 and \$872 billion and costs between \$74 and \$110 billion."<sup>4</sup>

Clyde Wayne Crews explained the fault in the OMB's cost assessment, pointing to a previous report. "OMB's cost-benefit breakdown incorporates only rules for which both benefits and costs have been expressed in quantitative and monetary terms by

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<sup>2</sup> Cass Sunstein, "Why regulations are good — again," *Chicago Tribune*, March 19, 2012 [http://articles.chicagotribune.com/2012-03-19/opinion/ct-oped-0319-regs-20120319\\_1\\_regulation-baseball-scouts-requirements](http://articles.chicagotribune.com/2012-03-19/opinion/ct-oped-0319-regs-20120319_1_regulation-baseball-scouts-requirements)

<sup>3</sup> Sam Batkins, "Obama Administration Issued \$157 Billion In Midnight Regulation," American Action Forum, January 23, 2017 <https://www.americanactionforum.org/insight/obama-administration-issued-157-billion-midnight-regulation/>

<sup>4</sup> Office of Management and Budget, *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, December 14, 2016 [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative\\_reports/draft\\_2016\\_cost\\_benefit\\_report\\_12\\_14\\_2016\\_2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf)



agencies,” Crews wrote. “It omits numerous categories and cost levels of rules. Rules from independent agencies are entirely absent.”<sup>5</sup>

Crews noted that a 2010 study commissioned by the Small Business Administration found that regulation costs small businesses \$1.75 trillion.<sup>6</sup> The regulatory data reviewed for the study, which was the fourth in a now discontinued series, went through 2008. Crews’ study of the federal regulatory state estimated that costs exceeded \$1.8 trillion in 2015,<sup>7</sup> almost \$15,000 per household.

The economic costs of major rules are important, but equally of concern is the power that Congress has surrendered to the executive branch. Some Members of Congress see their cession of legislative power to the executive branch through the lens of earmarks, which both chambers have purportedly banned. Others, including Sen. Mike Lee (R-Utah), have noted that Congress has absolved itself of lawmaking responsibilities through the regulatory process.

“The authors of the Constitution made Congress the most powerful of the federal government’s three co-equal branches. Congress was designed both as the most powerful *and* the most accountable to the people,” Sen. Lee said in a speech on the need to restore Article I of the Constitution. “Consent of the governed in a republic depends on transparent policymaking by representative institutions. Congress’s embrace of this mandate is part of what has made America successful and exceptional.”

“Over the course of the twentieth century, and accelerating in the twenty-first, Congress has handed many of its constitutional responsibilities to the executive branch. Increasingly harmful federal laws are increasingly written by people who never stand for election, via processes contrary to those provided for in the Constitution, and, indeed, with the explicit purpose of excluding the American people from their government and shielding policymakers from popular accountability,” Sen. Lee added.<sup>8</sup>

Article I of the Constitution delegates all legislative authority to Congress, specifically enumerating powers in Section 8 to, among others, make all laws under, declare war, and borrow money on the credit of the United States. Congress does have the power to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

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<sup>5</sup> Clyde Wayne Crews, *Ten Thousand Commandments 2016: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute, May 3, 2016 <https://cei.org/10KC2016>

<sup>6</sup> Nicole V. Crain and W. Mark Cain, *The Impact of Regulatory Costs on Small Firms*, Small Business Administration Office of Advocacy, September 1, 2010 [https://www.sba.gov/sites/default/files/advocacy/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20\(Full\)\\_0.pdf](https://www.sba.gov/sites/default/files/advocacy/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full)_0.pdf)

<sup>7</sup> Crews, 2016

<sup>8</sup> Sen. Mike Lee, “Make Congress Great Again,” February 3, 2016 <https://www.lee.senate.gov/public/index.cfm/2016/2/make-congress-great-again>



The Constitution was meant to limit the size and scope of the federal government. The federal government, however, has grown so large that it's unclear exactly how many federal agencies exist.<sup>9</sup>

Congress has routinely handed over its powers to federal agencies. The Affordable Care Act, for example, is an approximately 2,700-page law. The secretary of the Department of Health and Human Services is given extraordinary power to implement the provisions of the 2010 health insurance "reform" law. In fact, the term "secretary shall" appears in the text of the law more than 860 times. The term "secretary may" appears nearly 320 times.

This is a symptom of a deeper pathology, one that should make Members of Congress, regardless of party, realize how truly irrelevant they have become over the course of the past several decades. There are avenues that Congress can take to reverse the trend in existing law, as well as legislation introduced in the 115th Congress.

## **Congressional Review Act**

In March 1996, the Republican-controlled Congress passed and President Bill Clinton signed the Contract with America Advancement Act, H.R. 3136, into law. The bill increased the statutory debt limit of the United States to \$5.5 trillion, increased the Social Security earnings limit, and contained several regulatory reforms.

Section 8 of the Contract with America Advancement Act sets forward the procedures by which Congress can review and disapprove of rules finalized by federal agencies. Known as the Congressional Review Act, the statute, 5 U.S. Code §§ 801-808,<sup>10</sup> requires federal agencies to submit rules to both chambers of Congress the Comptroller General of the United States, who runs the Government Accountability Office (GAO), for review.

In compliance with certain sections of 5 U.S. Code Chapter 6,<sup>11</sup> every federal agency promulgating a rule is required to several items with its report to each chamber of Congress and the GAO. These items include a cost-benefit analysis, a regulatory flexibility analysis, and the procedure for gathering comments. The promulgating federal agency must also show compliance with certain sections of 2 U.S. Code Chapter 25, the Unfunded Mandates Reform Act of 1995.<sup>12</sup>

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<sup>9</sup> Clyde Wayne Crews, "Nobody Knows How Many Federal Agencies Exist," Competitive Enterprise Institute, August 26, 2015 <https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist>

<sup>10</sup> Congressional Review of Agency Rulemaking, 5 U.S.C. Chapter 8, 1996 <https://www.law.cornell.edu/uscode/text/5/part-1/chapter-8>

<sup>11</sup> The Analysis of Regulatory Functions, 5 U.S.C. Chapter 5, 1980 <https://www.law.cornell.edu/uscode/text/5/part-1/chapter-6>

<sup>12</sup> Regulatory Accountability and Reform, 2 U.S.C. Chapter 25, Subchapter II, 1995 <https://www.law.cornell.edu/uscode/text/2/chapter-25/subchapter-II>



The chairman and ranking member in each chamber of the committee(s) of jurisdiction both receive copies of the report from the federal agency. The comptroller general is required to send a report on each major rule -- those with an annual economic impact of \$100 million or more -- to each committee of jurisdiction within 15 days of the submission of the major rule to Congress or publication date of the major rule in the *Federal Register*.

Congress has 60 legislative days, which can last more than one calendar day, to disapprove of the rule through a joint resolution, which generally is not subject to a filibuster in the Senate. The clock for the 60 legislative days begins running on the later of two days, either the date of the submission of the rule to Congress or its publication in the *Federal Register*.

If a rule is canceled through a resolution of disapproval, the promulgating federal agency is prohibited from promulgating a rule that is substantially the same.<sup>13</sup>

Since its passage in March 1996, the Congressional Review Act has seen only limited use. Between the 104th Congress and the 114th Congress, 121 resolutions of disapproval under the Congressional Review Act (CRAs) were introduced.

#### **Resolutions of Disapproval Under the CRA Introduced by Congress**

<b>Congress</b>	<b>RoD</b>	<b>Congress</b>	<b>RoD</b>	<b>Congress</b>	<b>RoD</b>	<b>Congress</b>	<b>RoD</b>
<b>104th</b>	2	<b>107th</b>	13	<b>110th</b>	11	<b>113th</b>	8
<b>105th</b>	6	<b>108th</b>	9	<b>111th</b>	13	<b>114th</b>	27
<b>106th</b>	5	<b>109th</b>	4	<b>112th</b>	23	<b>115th</b>	N/A

Out of the 121 resolutions of disapproval between the 104th Congress and 114th Congress, 34 have been aimed at an EPA rule and 21 have been introduced against a rule promulgated by the Department of Health and Human Services (HHS) or an agency it oversees, such as the Centers for Medicare and Medicaid Services (CMS). Ten have been introduced to target a rule promulgated by the Federal Communications Commission (FCC).

Eight of these CRAs have received votes in the House and 18 have received votes in the Senate. Six have received votes in both chambers and been presented to the president for his signature. Only one has become law.<sup>14</sup>

<sup>13</sup> Congressional Review of Agency Rulemaking, 5 U.S.C. § 801(b)(2)

<sup>14</sup> These figures do not include CRAs in the 115th Congress, which began at noon on January 3, 2017. The 115th Congress has already passed several CRAs that are expected to become law and cancel regulations finalized under the Obama administration between June 13, 2016 and January 20, 2017.



In March 2001, President George W. Bush signed a resolution of disapproval, S.J.Res. 6, into law.<sup>15</sup> The resolution struck down the Department of Labor's ergonomics rule, which would have cost employers \$4.5 billion annually.<sup>16</sup>

### Action on CRA Resolutions in Congress

Congress	Date	Bill	Sponsor	Agency	House	Senate	President
107th	3/1/2001	S.J.Res. 6	Sen. Don Nickles (R-Okla.)	OSHA/Labor	Passed	Passed	Signed
108th	7/15/2003	S.J.Res. 17	Sen. Byron Dorgan (D-N.D.)	FCC	N/A	Passed	N/A
109th	2/14/2005	S.J.Res. 4	Sen. Kent Conrad (D-N.D.)	USDA	N/A	Passed	N/A
109th	6/29/2005	S.J.Res. 20	Sen. Patrick Leahy (D-Vt.)	EPA	N/A	Passed	N/A
110th	3/5/2008	S.J.Res. 28	Sen. Byron Dorgan (D-N.D.)	FCC	N/A	Passed	N/A
111th	1/21/2010	S.J.Res. 26	Sen. Lisa Murkowski (R-Alaska)	EPA	N/A	Passed	N/A
111th	5/11/2010	S.J.Res. 30	Sen. Johnny Isakson (R-Ga.)	NMB	N/A	Passed	N/A
112th	9/21/2010	S.J.Res. 39	Sen. Mike Enzi (R-Wyo.)	CMS/HHS	N/A	Passed	N/A
112th	2/16/2011	S.J.Res. 6	Sen. Kay Bailey Hutchison (R-Texas)	FCC	N/A	Passed	N/A
112th	2/16/2011	H.J.Res. 37	Rep. Greg Walden (R-Ore.)	FCC	Passed	N/A	N/A
112th	2/16/2012	S.J.Res. 36	Sen. Mike Enzi (R-Wyo.)	NLRB	N/A	Passed	N/A
112th	2/16/2012	S.J.Res. 37	Sen. Jim Inhofe (R-Okla.)	EPA	N/A	Passed	N/A
112th	9/11/2012	H.J.Res. 118	Rep. Dave Camp (R-Mich.)	OFAACF/HHS	Passed	N/A	N/A
114th	2/9/2015	S.J.Res. 8	Sen. Lamar Alexander (R-Tenn.)	NLRB	Passed	Passed	Vetoed
114th	9/17/2015	S.J.Res. 22	Sen. Joni Ernst (R-Iowa)	EPA	Passed	Passed	Vetoed
114th	10/26/2015	S.J.Res. 23	Sen. Mitch McConnell (R-Ky.)	EPA	Passed	Passed	Vetoed
114th	10/26/2015	S.J.Res. 24	Sen. Shelley Moore Capito (R-W.V.)	EPA	Passed	Passed	Vetoed
114th	12/10/2015	S.J.Res. 28	Sen. John McCain (R-Ariz.)	USDA	N/A	Passed	N/A
114th	4/19/2016	H.J.Res. 88	Rep. Phil Roe (R-Tenn.)	Labor	Passed	Passed	Vetoed

At the time of its passage, lawmakers hailed the Congressional Review Act, which was the product of the work of Sens. Don Nickles (R-Okla.) and Harry Reid (D-Nevada), as a substantive means to target major rules and restore congressional power. Then-House Judiciary Committee Chairman Henry Hyde (R-Ill.) declared, “[I]t is important to emphasize that this approach means that Congress must be prepared to take on greater responsibility in the rulemaking process. If during the review period, Congress identifies problems in a proposed major rule prior to its promulgation, we must be prepared to take

<sup>15</sup> Ben Liberman, “Clinton’s Last-Minute Environmental Regs: More Targets for the Congressional Review Act,” Competitive Enterprise Institute, March 26, 2001 <https://cei.org/studies-point/clinton%E2%80%99s-last-minute-environmental-regs-more-targets-congressional-review-act>

<sup>16</sup> Vol. 147 Cong. Rec. 28 (2001)



action. Each standing committee will have to carefully monitor the regulatory activities of those agencies falling within their jurisdiction.”<sup>17</sup>

The limited use of the Congressional Review Act has made the law largely arcane and obscure. Since the passage of the law, Congress has seen divided government in all but six years. Naturally, because the White House Office of Management and Budget’s Office of Information and Regulatory Affairs reviews all rules developed by federal agencies, Presidents have protected their regulatory agendas.

The Department of Labor and Occupational Safety and Health Administration (OSHA) published the one final rule successfully canceled through CRA. The final rule was published during the Clinton administration. President George W. Bush signed the CRA into law that canceled it. President Barack Obama vetoed five CRAs in the 114th Congress, including one to cancel the Environmental Protection Agency’s Clean Power Plan.<sup>18</sup>

The CRA has seen some new life in the opening weeks of the 11th Congress. Resolutions to cancel President Obama’s midnight rules are quickly moving through both chambers of Congress, and the White House has released several statements of administration policy indicating that President Donald Trump will sign them into law. Still, the shortcomings of the CRA have been exposed in the law’s 21-year history. But there is another legislative avenue Congress can explore to enhance the CRA.

## **Canceling Rules Not Submitted to Congress**

In a recent editorial, Kimberley Strassel suggested that Congress could cancel rules that were never submitted for review under the Congressional Review Act. The notion isn’t without merit. As mentioned in the previous section, the clock for the 60 legislative days to take action on a rule under CRA begins running on the later of two days, either the date of the submission of the rule to Congress or its publication in the *Federal Register*.

“There are rules for which there are no reports,” Strassel wrote. “And if the Trump administration were now to submit those reports—for rules implemented long ago—Congress would be free to vote the regulations down.”

“It turns out the CRA has a[n] expansive definition of what counts as a ‘rule’—and it isn’t limited to those published in the Federal Register. The CRA also applies to ‘guidance’ that agencies issue,” she added.<sup>19</sup>

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<sup>17</sup> 142 Cong. Rec. 45 (1996)

<sup>18</sup> Timothy Cama, “Obama vetoes GOP push to kill climate rules,” The Hill, December 29, 2015 <http://thehill.com/policy/energy-environment/263805-obama-vetoes-gop-attempts-to-kill-climate-rules>

<sup>19</sup> Kimberley Strassel, “A GOP Regulatory Game Changer,” Wall Street Journal, January 26, 2017 <https://www.wsj.com/articles/a-gop-regulatory-game-changer-1485478085>



What the Trump administration would have to do is formally submit the report on a rule to Congress for review under CRA. But which rules haven't yet been submitted to Congress for review? Final major rules published during the Obama administration were almost certainly submitted to Congress for review. It's unclear that how many minor rules and guidance weren't submitted.

The Government Accountability Office (GAO) does keep a list of reports submitted to Congress for major rules,<sup>20</sup> as required by the CRA. Again, the CRA isn't limited to only major rules, and the costs of minor rules do add up. The GAO database is searchable, allowing users to look for minor rules submitted for review.

## **Regulations from the Executive in Need of Scrutiny Act**

While the Congressional Review Act is a valuable tool under the right set circumstances, the 1996 law alone is not enough on its own to restore Article I. The Regulations from the Executive in Need of Scrutiny (REINS) Act would, however, give teeth to the Congressional Review Act.

The REINS Act would subject major rules -- those with an annual impact of \$100 million or more -- to congressional approval. Both chambers would have to vote on a proposed rule within 70 legislative days and the president would have to sign it before enforcement can begin. If a resolution is not passed, the rule cannot take effect.

The REINS Act was first introduced in 111th Congress by then-Rep. Geoff Davis (R-Ky.)<sup>21</sup> and then-Sen. Jim DeMint (R-S.C.).<sup>22</sup> Because Democrats controlled both chambers of Congress, it was never brought up for a vote.

The REINS Act was reintroduced in the 112th Congress by Rep. Davis<sup>23</sup> and Sen. Rand Paul (R-Ky.).<sup>24</sup> In December 2011, the House, under Republican control, passed the REINS Act by a vote of 241 to 184.<sup>25</sup> It never received a vote in the Democratic-controlled Senate.

Rep. Todd Young (R-Ind.) sponsored the REINS Act in the 113th Congress.<sup>26</sup> Once again, Sen. Paul carried the bill in the Senate.<sup>27</sup> The bill passed the House, this time by a vote of 232 to 183.<sup>28</sup> The Senate, still controlled by Democrats, never brought the bill to the floor.

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<sup>20</sup> Government Accountability Office, "Recently Issued Reports on Federal Agency Major Rules," Retrieved February 14, 2017 <http://gao.gov/legal/congressional-review-act/overview>

<sup>21</sup> H.R. 3765, 111th Congress (2009) <https://www.congress.gov/bill/111th-congress/house-bill/3765/>

<sup>22</sup> S. 3826, 111th Congress (2010) <https://www.congress.gov/bill/111th-congress/senate-bill/3826/related-bills>

<sup>23</sup> H.R. 10, 112th Congress (2011) <https://www.congress.gov/bill/112th-congress/house-bill/10>

<sup>24</sup> S. 299, 112th Congress (2011) <https://www.congress.gov/bill/112th-congress/senate-bill/299>

<sup>25</sup> H.R. 10, Roll Call 901, December 7, 2011 <http://clerk.house.gov/evs/2011/roll901.xml>

<sup>26</sup> H.R. 367, 113th Congress (2013) <https://www.congress.gov/bill/113th-congress/house-bill/367>

<sup>27</sup> S. 15, 113th Congress (2013) <https://www.congress.gov/bill/113th-congress/senate-bill/15/>

<sup>28</sup> H.R. 367, Roll Call 445, August 2, 2013 <http://clerk.house.gov/evs/2013/roll445.xml>





The REINS Act was reintroduced by Rep. Young<sup>29</sup> and Sen. Paul<sup>30</sup> in the 114th Congress. The House version passed by a vote of 243 to 165.<sup>31</sup> Though controlled by Republicans in the 114th Congress, the Senate never even so much as attempted a motion to proceed, the most basic of procedural votes to begin consideration of legislation, on the REINS Act.

With a Republican now in the White House, the REINS Act was reintroduced in the 115th Congress with a sense of optimism. Rep. Doug Collins (R-Ga.) sponsored the bill in the House,<sup>32</sup> and it was quickly moved through the lower chamber, passing by a vote of 237 to 187.<sup>33</sup> Sen. Paul is carrying the bill in the Senate.<sup>34</sup>

There were two floor amendments included in the version of the REINS Act that passed the House in the 115th Congress.

An amendment offered by Rep. Luke Messer (R-Ind.) would require each federal agency promulgating a new rule to identify and repeal an existing rule or multiple rules to offset the cost of the new rule.<sup>35</sup> The amendment passed by a vote of 235 to 185.<sup>36</sup>

Another amendment offered by Rep. Steve King (R-Iowa) would require Congress to review all federal rules over a ten year period.<sup>37</sup> Each agency would send a minimum of 10 percent of its rules to Congress for review. Congress could extend the rule or sunset it. The King amendment passed by a vote of 230 to 193.<sup>38</sup>

## Constitutional Hurdles

There is speculation that some unknown entity could challenge the constitutionality of the Congressional Review Act. In 1983, the Supreme Court struck down Section 244(c)(2) of the Immigration and Nationality Act that allowed one chamber of Congress to veto an administrative action. The Supreme Court, in *Immigration and Naturalization Service v. Chadha*, determined that the legislative veto provision ran afoul of bicameralism and the Presentment Clause of Article I.

Born in British-controlled Kenya to Indian parents, Jagdish Chadha was a stateless individual. He legally immigrated to the United States on a student visa and attended Bowling Green University. In 1972, when Chadha's visa expired, the Immigration and Naturalization Service (INS) ordered that he be deported. Kenya, which won its independence from the United Kingdom in 1963, wouldn't receive him.

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<sup>29</sup> H.R. 427, 114th Congress (2015) <https://www.congress.gov/bill/114th-congress/house-bill/427/>

<sup>30</sup> S. 226, 114th Congress (2015) <https://www.congress.gov/bill/114th-congress/senate-bill/226/>

<sup>31</sup> H.R. 427, Roll Call 482, July 28, 2015 <http://clerk.house.gov/evs/2015/roll482.xml>

<sup>32</sup> H.R. 26, 115th Congress (2017) <https://www.congress.gov/bill/115th-congress/house-bill/26>

<sup>33</sup> H.R. 26, Roll Call 23, January 5, 2017 <http://clerk.house.gov/evs/2017/roll023.xml>

<sup>34</sup> S. 21, 115th Congress (2017) <https://www.congress.gov/bill/115th-congress/senate-bill/21>

<sup>35</sup> H.Amdt. 3, 115th Congress (2017) <https://www.congress.gov/amendment/115th-congress/house-amendment/3>

<sup>36</sup> H.Amdt. 3, Roll Call 12, January 5, 2017 <http://clerk.house.gov/evs/2017/roll012.xml>

<sup>37</sup> H.Amdt. 13, 115th Congress (2017) <https://www.congress.gov/amendment/115th-congress/house-amendment/13>

<sup>38</sup> H.Amdt. 13, Roll Call 21, January 5, 2017 <http://clerk.house.gov/evs/2017/roll021.xml>



After the INS suspended Chadha's deportation, the House disapproved of the action, forcing the INS to resume expulsion proceedings. Chadha's challenge eventually worked its way through federal courts, culminating in the Supreme Court case that bears his name. By striking down the legislative veto in Section 244(c)(2) of the Immigration and Nationality Act, Chadha was spared deportation.

On behalf of the majority, Chief Justice Warren Burger wrote, "The prescription for legislative action in Art. I, § 1 -- requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives -- and § 7 -- requiring every bill passed by the House and Senate, before becoming law, to be presented to the President, and, if he disapproves, to be repassed by two-thirds of the Senate and House -- represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure. This procedure is an integral part of the constitutional design for the separation of powers."<sup>39</sup>

Justices Lewis F. Powell, Jr. and William Rehnquist dissented in *Chadha*. After the Supreme Court ruled in his favor, Chadha became an American citizen.<sup>40</sup>

While the CRA is different from Section 244(c)(2) of the Immigration and Nationality Act because joint resolutions require approval from both chambers of Congress and presentment to the executive branch, a recent news story highlighted the outrage of bureaucrats who were disheartened to see their work canceled through the 1996 law.<sup>41</sup>

In the story, Joe Pizarchik, who ran the Department of the Interior's Office of Office of Surface Mining Reclamation and Enforcement throughout the Obama administration, said, "My biggest disappointment is a majority in Congress ignored the will of the people" as lawmakers canceled the rules. Remember, Members of Congress are elected, and voters have given control of legislative branch to Republicans. Federal bureaucrats, on the other hand, are not elected."

Still, Pizarchik speculated on a potential legal challenge to the CRA, saying, "I believe there's a good chance that, in a legal challenge, that a court will overturn Congress' actions here as an unconstitutional usurpation of the executive branch's powers."

Pizarchik doesn't provide a rationale for such a legal challenge to the CRA. The CRA allows Congress to pass a resolution canceling a rule, but it has to be signed into law by a president in order for the rule to be nullified. In this case, the executive branch is

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<sup>39</sup> 462 U.S. 919 (1983)

<sup>40</sup> Lena Williams, "Faces Behind Famous Cases," *The New York Times*, June 19, 1985  
<http://www.nytimes.com/1985/06/19/garden/faces-behind-famous-cases.html>

<sup>41</sup> Alex Guillen and Marianne Levine, "Swift repeal of Obama rules leaves former staffers steaming," Politico, February 11, 2017 <http://www.politico.com/story/2017/02/congress-rules-purge-trump-234922>



involved in the equation. Absent veto-proof majorities in the House and Senate, the presidential veto would preserve a regulation.

If the REINS Act were to become law, its constitutionality may also come into question. The REINS Act, however, is carefully crafted to avoid the bicameral and Presentment Clause conflicts to which Section 244(c)(2) of the Immigration and Nationality Act succumbed in *Chadha*.

Writing in a constitutional defense of the REINS Act, Jonathan Adler explained, “As then-Judge Stephen Breyer explained in a 1984 lecture, a congressional authorization requirement could replicate the function of the legislative veto invalidated in *Chadha* without the veto’s constitutional infirmity. By observing the formal requirements for legislation in Article I, he explained, congressional oversight of agency activity could be maintained without violating constitutional principles of separation of powers. Harvard Law School’s Laurence Tribe likewise concluded at the time that such a requirement would be constitutional, even if he also thought it would be a bad idea.”

“In some respects the REINS Act is more limited than Breyer’s proposal for congressional resolutions of approval for regulatory measures or the unicameral legislative vetoes at issue in *Chadha*, further blunting any potential constitutional concerns. In contrast to those procedures, the REINS Act would only require congressional approval for so-called ‘major rules.’ Before *Chadha*, the unicameral legislative veto often operated as a replacement for targeted ‘private bills’ affecting the interests of a few. However, those regulations subject to the REINS Act would, by definition, be those that have broader impacts on large segments of the country, if not the nation as a whole. Only those rules deemed to be ‘economically significant’ are covered, and such rules are a small, but important, portion of federal regulatory activity,” Adler added.<sup>42</sup>

Unlike Section 244(c)(2) of the Immigration and Nationality Act, neither CRA or the REINS Act violate the principles of bicameralism or the Presentment Clause.

## Appendix

**Table 1: Total Number of Major Rules Published**

Year	Rules	Year	Rules	Year	Rules	Year	Rules
1976	N/A	1986	N/A	1996	N/A	2006	56
1977	N/A	1987	N/A	1997	61	2007	61
1978	N/A	1988	N/A	1998	76	2008	95

<sup>42</sup> Jonathan Adler, *Placing 'REINS' on Regulations: Assessing the Proposed REINS Act*, Faculty Publications, 2013 <http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1507>



<b>1979</b>	N/A	<b>1989</b>	N/A	<b>1999</b>	51	<b>2009</b>	84
<b>1980</b>	N/A	<b>1990</b>	N/A	<b>2000</b>	77	<b>2010</b>	100
<b>1981</b>	N/A	<b>1991</b>	N/A	<b>2001</b>	70	<b>2011</b>	80
<b>1982</b>	N/A	<b>1992</b>	N/A	<b>2002</b>	51	<b>2012</b>	68
<b>1983</b>	N/A	<b>1993</b>	N/A	<b>2003</b>	50	<b>2013</b>	81
<b>1984</b>	N/A	<b>1994</b>	N/A	<b>2004</b>	66	<b>2014</b>	81
<b>1985</b>	N/A	<b>1995</b>	N/A	<b>2005</b>	56	<b>2015</b>	76

Source: Congressional Research Service<sup>43</sup>

(Notes: Major rules are defined as having an annual economic impact of \$100 million or more. The total number of major rules were not kept prior to the passage of the Congressional Review Act of 1996.)

**Table 2: Total Number of Final Rules Published**

<b>Year</b>	<b>Rules</b>	<b>Year</b>	<b>Rules</b>	<b>Year</b>	<b>Rules</b>	<b>Year</b>	<b>Rules</b>
<b>1976</b>	7,401	<b>1986</b>	4,589	<b>1996</b>	4,937	<b>2006</b>	3,718
<b>1977</b>	7,031	<b>1987</b>	4,581	<b>1997</b>	4,584	<b>2007</b>	3,595
<b>1978</b>	7,001	<b>1988</b>	4,697	<b>1998</b>	4,899	<b>2008</b>	3,830
<b>1979</b>	7,611	<b>1989</b>	4,714	<b>1999</b>	4,684	<b>2009</b>	3,503
<b>1980</b>	7,745	<b>1990</b>	4,334	<b>2000</b>	4,313	<b>2010</b>	3,573
<b>1981</b>	6,481	<b>1991</b>	4,416	<b>2001</b>	4,132	<b>2011</b>	3,807
<b>1982</b>	6,288	<b>1992</b>	4,155	<b>2002</b>	4,167	<b>2012</b>	3,708
<b>1983</b>	6,049	<b>1993</b>	4,369	<b>2003</b>	4,148	<b>2013</b>	3,659
<b>1984</b>	5,154	<b>1994</b>	4,876	<b>2004</b>	4,101	<b>2014</b>	3,554
<b>1985</b>	4,843	<b>1995</b>	4,713	<b>2005</b>	3,943	<b>2015</b>	3,410

Source: Congressional Research Service<sup>44</sup>

**Table 3: Pages Added to the *Federal Register***

<b>Year</b>	<b>Pages</b>	<b>Year</b>	<b>Pages</b>	<b>Year</b>	<b>Pages</b>	<b>Year</b>	<b>Pages</b>
<b>1976</b>	57,072	<b>1986</b>	47,418	<b>1996</b>	69,368	<b>2006</b>	78,724
<b>1977</b>	65,303	<b>1987</b>	49,654	<b>1997</b>	68,530	<b>2007</b>	74,408

<sup>43</sup> Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register*, Congressional Research Service, October 4, 2016 <https://fas.org/sgp/crs/misc/R43056.pdf>

<sup>44</sup> Ibid.



<b>1978</b>	61,261	<b>1988</b>	53,376	<b>1998</b>	72,356	<b>2008</b>	80,700
<b>1979</b>	77,498	<b>1989</b>	53,842	<b>1999</b>	73,880	<b>2009</b>	69,643
<b>1980</b>	87,012	<b>1990</b>	63,620	<b>2000</b>	83,294	<b>2010</b>	82,480
<b>1981</b>	63,554	<b>1991</b>	67,716	<b>2001</b>	67,702	<b>2011</b>	82,415
<b>1982</b>	58,494	<b>1992</b>	62,928	<b>2002</b>	80,332	<b>2012</b>	80,050
<b>1983</b>	57,704	<b>1993</b>	69,688	<b>2003</b>	75,798	<b>2013</b>	80,462
<b>1984</b>	50,998	<b>1994</b>	68,108	<b>2004</b>	78,852	<b>2014</b>	78,796
<b>1985</b>	53,480	<b>1995</b>	67,518	<b>2005</b>	77,777	<b>2015</b>	81,402

Source: *Federal Register*<sup>45</sup>

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<sup>45</sup> *Federal Register*, "Federal Register Pages Published, 1936-2015," Retrieved February 4, 2017  
<https://www.federalregister.gov/uploads/2016/05/stats2015Fedreg.pdf>