



NINTH CIRCUIT REJECTS ATTEMPT TO REVIVE WILDLIFE RULE VIA BROAD-BASED ATTACK ON THE CONGRESSIONAL REVIEW ACT

by Christopher Danley and Jeffrey Wood

In one of its last decisions of 2019, the U.S. Court of Appeals for the Ninth Circuit rejected efforts to reinstate an Obama-era regulation restricting Alaska’s predator-control programs at national wildlife refuges in the state. See *Center for Biological Diversity v. Bernhardt*, 946 F.3d 553 (9th Cir.) (“*CBD v. Bernhardt*”). Published in the Federal Register in the waning months of the prior administration, the so-called “Refuges Rule” was one of more than a dozen such regulations invalidated in the early weeks of the Trump Administration. To resurrect this fairly obscure regulation, Center for Biological Diversity (“CBD”) mounted a broad-based constitutional attack against the Congressional Review Act (“CRA”), the 23-year old statute that had been used to repeal a regulation just once prior to 2017. CBD filed its challenge within the Ninth Circuit, a historically friendly venue for environmental groups, but the plaintiff has, so far, been disappointed with the results.

Given the Ninth Circuit’s reputation for favoring challenges to the Trump Administration’s environmental agenda, some may be surprised to see this court affirm the legitimacy of the CRA in response to efforts to reinstate the Refuges Rule. In doing so, the Ninth Circuit has essentially quashed constitutional attacks on other CRA repeals as well. While this is a rare victory for the Trump Administration and its allies in Congress in the Ninth Circuit, the ruling is based on neutral, non-partisan principles and grounded in the Constitution’s design of separation of powers—a point that is emphasized in the opinion’s final paragraph where the court cites James Madison (*The Federalist* No. 47).

An Overview of the Congressional Review Act

Congress enacted the CRA as part of the Contract with America Advancement Act of 1996, which came from a broad package of legislative reform proposals made by Republican candidates for Congress during the thick of the 1994 midterm elections. The CRA, 5 U.S.C. §§ 801-08, provides a mechanism for Congress to review and disapprove federal regulations on an expedited basis. For starters, the CRA requires each federal agency to submit a report to Congress before a new rule can become effective. Once Congress has received the report, it has 60 days (more precisely, “60 session days” for the Senate and “60 legislative days” for the House of Representatives) in which to adopt a joint resolution disapproving the regulation. If the House and Senate pass the joint resolution in that timeframe and the President subsequently signs it into law, then the rule “shall not take effect (or continue).” *Id.* § 801(b)(1). Once Congress disapproves a rule, the agency may not issue another rule that is “substantially the same” unless specifically authorized by subsequent legislation. *Id.* § 801(b)(2). To guarantee that a legal challenge does not put final determination under the CRA into limbo, actions taken by Congress pursuant to the CRA are not “subject to judicial review.” *Id.* § 805.

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The CRA establishes a fairly simple process except for nuances inherent in the vagaries of the congressional calendar. The CRA's 60-day window is not actually based on a normal calendar; rather, the CRA's review period depends upon the number of days in which each respective chamber is actually convening at the Capitol (*i.e.*, "session days" for the Senate and "legislative days" for the House). Thus, in some instances, if a rule is promulgated in, say, the summer of the last year of a Congressional session, fewer than 60 days likely remain for *that particular Congress* to consider the rule under the CRA. This raises particular concerns about so-called "midnight regulations"—*i.e.*, those rules adopted by an outgoing administration at the tail end of a president's term in office. Absent a "carryover" provision, an outgoing administration could avoid the CRA repeal process altogether.

To address this concern, the CRA provides that, if Congress receives a rule report within the final 60 days of a Congressional session (or when it is not in session), then the 60-day time period in which to respond under the CRA does not *start* until the 15th day of *the next Congressional session*. *Id.* § 801(d)(1)-(2) (A). In practical terms, this means a new President and Congress of the same party are empowered to repeal a prior administration's regulations using the fast-track process set forth in the CRA. This is strong motivation for any administration to try to finalize high-priority regulations well outside the 60-day window.

The "Refuges Rule" and Disapproval under the CRA

The Refuges Rule was one of many rules the Obama Administration promulgated in the final half of 2016, and given its unpopularity with Alaska's congressional delegation, the Refuges Rule became a prime target for CRA repeal after the 2016 elections. Federal statutes enacted pursuant to Congress's power under the Property Clause of the Constitution (Art. IV, § 3, cl. 2) authorize the Department of the Interior to manage federal wildlife refuges for conservation, public use, and certain other purposes. States, of course, have broad power over fish and wildlife within their borders. From this overlay arose a conflict between federal restrictions on hunting wildlife on refuges and Alaskan state law, which permitted hunters to "take" big game predators such as bears and wolves, even on national wildlife refuges, in order to allow the population of other wildlife in the state to rebound.

The U.S. Fish & Wildlife Service (FWS), a sub-agency within the Interior Department, promulgated the "Refuges Rule" to prohibit Alaska's predator-control methods on federal lands. Though proposed in early January of 2016, the FWS did not finalize the Refuges Rule until August 2016 and did not submit the rule's report to Congress until October 5, 2016. Less than 60 "session days" of the Senate and 60 "legislative days" in the House would transpire from the time the rule report was submitted to the time the 114th Congress adjourned. Following the 2016 election, this time shortfall would prove fatal to the Refuges Rule (and various other regulations adopted in the second half of 2016). In early 2017, the House (convened as part of the 115th Congress) introduced a joint resolution disapproving the Refuges Rule (hereinafter, "Joint Resolution"). After its introduction, the House and Senate passed the Joint Resolution. The procedure authorized by the CRA in which to pass such legislation is so straightforward that the entire Joint Resolution consisted of only two short paragraphs:

Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to 'Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska.'

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Department of the Interior relating to 'Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska' (81 Fed. Reg. 52247 (August 5, 2016)), and such rule shall have no force or effect.

Pub. L. No. 115-20, 131 Stat. 86 (2017). President Trump quickly signed the Joint Resolution and, soon thereafter, the Department of the Interior amended its own regulations to rescind the Refuges Rule and revert to the prior regulations.

Ninth Circuit Upholds CRA

In April 2017, CBD filed a lawsuit in federal district court in Alaska seeking reinstatement of the Refuges Rule on constitutional and statutory grounds. The federal district court dismissed the case for lack of standing and failure to state a claim. And, on appeal, the Ninth Circuit made short work of the plaintiff's arguments.

First, the plaintiff asserted that the CRA's "reenactment" provision, which prohibits an agency from reenacting the same or similar rule after it is repealed, violates the "nondelegation doctrine." This doctrine, which has more recently begun to receive renewed interest (primarily among the conservative members of the U.S. Supreme Court), disfavors statutes that delegate legislative powers to agencies without clear, intelligible parameters. Environmental groups, which tend to favor robust agency powers, rarely invoke the doctrine. The Ninth Circuit did not, however, address the merits of the non-delegation argument because the plaintiff failed to show beyond mere speculation that the Refuges Rule would have been reinstated if the "reenactment" provision was invalidated. Without that showing of "injury," the plaintiff lacked standing to raise that particular claim. Standing, the court explained, must be established "for every claim [the plaintiff] wishes to challenge..."

Second, the plaintiff asserted that the CRA's disapproval provision as well as the use of the "Joint Resolution" violated the separation-of-powers principles found in the Take Care Clause of the Constitution (Art. II, § 3). This, too, is an atypical argument for an environmental group to raise. Under this provision of the Constitution, the President must "take Care that the Laws be faithfully executed." The plaintiff argued that, because Congress disapproved the Refuges Rules without also amending the underlying federal statutes governing management of wildlife refuges, the Interior Department was now unable to satisfy a constitutional duty to "faithfully execute" these statutes. The Ninth Circuit did not spend much ink on this argument either, explaining that "validly enacted legislation that requires an agency to take a specified action does not impinge on the Take Care Clause or violate separation-of-powers principles." The court also explained that a joint resolution passed by both the House and Senate and signed by the President obviously satisfies the Constitution's requirement of bicameralism and presentment, and was an effective amendment of prior legislation even if it was not specifically entitled in that manner. Even more, to plaintiff's detriment, the Ninth Circuit followed plaintiff's argument to its logical conclusion and found that, under the Constitution, the Interior Department was obligated to carry out the provisions of the Joint Resolution.

Last, the plaintiff contended that the CRA's disapproval process could only be triggered if an agency submitted a "report" to Congress *before the rule took effect*. In the case of the Refuges Rule, the Obama Administration submitted the report *after the rule took effect*. If accepted, this strained interpretation of the CRA could give any administration an easy path to prevent a subsequent administration from using the CRA disapproval process. However, before reaching this statutory argument, the Ninth Circuit considered whether the CRA expressly strips federal courts of jurisdiction to review CRA challenges like this. Though the court suggested that constitutional challenges to CRA resolutions still could be brought in federal court, challenges based on statutory grounds could not. Reasoning that it is the province of Congress to define the jurisdiction of the judiciary, the court held that it had no power to entertain the plaintiff's novel statutory arguments about the CRA resolution and the related rescission rule.

Even though the Ninth Circuit confined its ruling to the issues raised on appeal, the separation-of-powers principle informed the proceedings. The specific disagreements among the parties arose as to where those constitutional boundary markers separating the executive and legislative branches, and even

the legislative and judicial branches, are located. As summed up by the Ninth Circuit, “Congress’s efforts to exercise oversight of federal administrative agencies by means of the CRA” and Congress’s limiting of the courts’ jurisdiction to entertain certain CRA matters were within the structure of government set forth by the Constitution. Thus, even though the CRA has not been employed in any significant manner until recently, the legitimacy of the legislation should not be in doubt.

As for any further proceedings, the plaintiff in *CBD v. Bernhardt* may seek *en banc* review at the Ninth Circuit or even ask the Supreme Court to take up the case. However, while constitutional challenges may be given due consideration, plaintiff’s odds of success in further appeals seem low.

A “Refuge” for Future Rule Repeal Efforts

In April 2019, the White House Office of Management and Budget (OMB) took note of previous agency non-compliance with the CRA’s reporting requirement over the last two decades. Based on this history, some have put forward a textual-based theory that the CRA review period has yet to start for thousands of prior rules for which Congress never received a report from the relevant federal agency. If Congress chooses to take this position, there could be a significant impact on previous regulatory activity because many prior rules do not have reports that were submitted, whether due to bureaucratic oversight or other reasons.

While staying silent on this issue, the OMB nevertheless issued a directive to all federal agencies “reinforcing” agency obligations under the CRA. More specifically, the OMB directed federal agencies to forgo publishing new rules subject to the CRA until Congress had received a report on that rule. Thus, if followed, all published rules going forward will have reports lodged with Congress, which should eliminate any future uncertainty about potential exposure to CRA nullification. Also, to prevent future disputes over the CRA’s scope, the OMB directive clarified that the CRA process applies to “more than just notice-and-comment rules,” including other kinds of regulatory actions like guidance documents and policy statements. Currently, it appears that all federal rules are being reported to Congress before becoming effective, where applicable, and those reports are explicitly citing the CRA.

Even where the CRA process does not actually achieve repeal, it is a frequently employed device by both parties to express political displeasure to executive actions and to force tough votes for the other side of the political aisle. For example, in 2015, the Senate adopted a CRA resolution to repeal EPA’s Clean Power Plan, a key part of President Obama’s Climate Action Plan. President Obama was unlikely to sign any such resolution (although the Supreme Court eventually stayed implementation of the Clean Power Plan). Likewise, in October of 2019, Democratic senators were able to bring a joint resolution up for a full Senate vote on whether to disapprove the Trump Administration’s Affordable Clean Energy (ACE) rule, which had repealed the Clean Power Plan. That joint resolution did not pass in the Senate and the ACE rule became effective.

Of course, elections have consequences and the CRA is most effective when the same party is in charge of Congress and the White House. As the nation enters another presidential election year, environmental groups are undoubtedly targeting early 2021 as a viable opportunity to unwind some Trump-era regulations. In response, across the Trump Administration, agencies are working overtime to complete high-priority rulemakings as early as May 2020 in order to shield those rules from CRA-based attacks in early 2021. Indeed, the Trump Administration has successfully avoided the threat of CRA repeal in early 2021 for the new rule defining the “Waters of the United States” and a host of other regulatory reforms. But it seems likely that the Trump Administration will issue many rules—some unpopular with environmental groups—in late 2020. Regardless of the outcome of the 2020 elections, both parties have seemed to accept the CRA as a way to further their policy agenda. So, perhaps ironically, the plaintiff in *CBD v. Bernhardt* and its allies may soon come to more fully appreciate the Ninth Circuit’s rejection of its challenges to the CRA.