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U.S. Senate Disapproves California's Clean Air Act Waivers – Effectively Teeing Up a Complex Battle in the Courts.

In my May 6, 2025, blog post I discussed the U.S. House of Representatives May 1 resolution ostensibly passed pursuant to the Congressional Review Act (CRA) to overturn President Biden's Clean Air Act "waiver" related to California's vehicle emission mandates. The next step was consideration of the same issue in the U.S. Senate, action on which had to occur before the June 1, 2025, deadline.

The Senate's May 22, 2025, passage of its own disapproval resolution completes the Congressional action, for now, in the attempt to repeal California's electric vehicle mandate.[1]

And the Senate's action skirts guidance from the Senate Parliamentarian as well as the non-partisan General Accountability Office (GAO) (aka the "Congressional watchdog") that both concluded that the CRA did not provide the Congress with the authority to overturn the Biden-era waiver because the waivers are not "rules" but rather are adjudicatory orders issued pursuant to the Administrative Procedure Act (APA). Specifically, after an extensive analysis of the CAA preemption waivers, the Notices of Decision that the Environmental Protection Agency (EPA) submitted as "rules to Congress" and the limitations of the CRA, the GAO concluded in a letter to Congress:

> In these circumstances, our view is that our prior analysis and conclusion in B-334309 that the [California] Advanced Clean Car Program Waiver Notice was not a rule for purposes of CRA (because it was an order under APA) would apply to the three notices at issue here.

Senate Employs the Nuclear Option. To avoid direct confrontation with the Senate's Parliamentarian's interpretation, Senate Majority Leader John Thune (R-S.D.) set up an elaborate series of procedural votes to allow the Senate to settle the controversial question of what qualifies under the CRA; an action that is typically referred to as the "nuclear option." Historically used to avoid a filibuster, the nuclear option allows the majority party to use a simple majority vote to overturn a point of order and thus avoid existing procedural constraints.[2]

Thus, Republicans avoided a Senate floor confrontation over the Parliamentarian's interpretation of the CRA by sending the question about what qualifies under the CRA back to the full Senate.

Senator Shelley Moore Capito (R-W.Va.), Chairman of the Senate Environment and Public Works (EPW) Committee, authored the joint resolution and applauded the Senate's action stating:

> Today, the Senate voted to end California's EV mandate and send my joint resolution of disapproval under the CRA to President Trump's desk. . . . I'm proud to have led this effort to protect American workers and consumers from this radical and drastic policy.

Senate Minority Leader Chuck Schumer (D-N.Y.) said, "By weaponizing the CRA, Republicans … cross a point of no return for the Senate, expanding what this chamber can do with a majority threshold."

Next Steps – EPA Rescission – and The Courts? Based on the joint resolution, the EPA will likely rescind the Biden-era waiver and thus stop California (and the 11 other Section 177 states that have embraced similar limits) from implementing the electric vehicle mandates.

Is There Judicial Review Under the CRA? Not for Congressional Action. But, What About Agency Action?

Ultimately, the legal question as to whether the Congress is acting properly pursuant to the authority of the CRA may end up in court; but there are hurdles.

Section 805 of the CRA states: "No determination, finding, action, or omission under this chapter shall be subject to judicial review." Thus, courts will not review matters falling within the scope of Section 805 but will instead leave the resolution of these CRA-related issues to the political branches.

Courts disagree, however, regarding which CRA-related matters are within Section 805's scope. A wide range of actions are clearly barred from judicial review. Most courts have interpreted Section 805 to broadly prohibit judicial review of claims alleging CRA violations. But a few courts conclude that certain types of CRA-related claims can be reviewed by courts.

What about judicial review of agencies' compliance with the CRA? One appellate court drew a distinction between statutory and constitutional claims, concluding that Section 805 barred it from reviewing a claim premised on compliance with the CRA, but did not prevent it from considering a constitutional challenge to a joint resolution of disapproval enacted under the CRA. *See Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 561 (9th Cir. 2019). Although the appellate court ultimately rejected both arguments made by the plaintiffs, the panel took the time to consider whether the joint resolution of disapproval failed to comply with the constitutional requirements of bicameralism and presentment, and that the subject joint resolution interfered with the executive branch's constitutional duty under the Take Care Clause to ensure that laws are faithfully executed. *Id.* at 562,

And as the U.S. Supreme Court said in *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 9 (2012), the general rule is that statutes that would deny courts the ability to review constitutional claims raise constitutional concerns themselves. Courts will interpret laws barring judicial review to allow constitutional challenges "unless Congress explicitly directs otherwise." *Id.*

The Ninth Circuit in *Biological Diversity* noted that Section 805 does not expressly foreclose review of constitutional claims. 946 F.3d at 561. Therefore, the court ruled that Section 805 did not bar its review of the plaintiff's constitutional challenge – although the court ultimately rejected the claim on its merits.[3]

The Courts Will Have to Address the GAO's Take on the Topic

The GAO provided a detailed discussion of the CRA authority in its March 6, 2025, letter that responded to a request from Senators Sheldon Whitehouse (D-R.I.), Alex Padilla (D-C.A.), and Adam Schiff (D-C.A.) to the Comptroller General dated February 21, 2025, asking for a legal decision as to whether the EPA's Clean Air Act preemption waivers and Notices of Decision that the EPA submitted as rules to Congress and GAO in late February 2025 are rules subject to the CRA. The letter states in part:

> EPA did not submit CRA reports to Congress or GAO for any of the Notices of Decision when they were initially issued on April 6, 2023, and January 6, 2025, and **each notice states that CRA does not apply because the relevant action is not a rule for purposes of the Act**. . . . We determined that the Advanced Clean Car Program Waiver Notice was **not a rule under CRA** because it did not meet the APA definition of a rule. We concluded that the notice was, instead, an "order" under APA. (Emphasis added.)

And further, referring back to its 2023 determination,

> We also concluded that **even if the Advanced Clean Car Program Waiver Notice met the APA definition of a rule**, it would still not be subject to CRA because of CRA's exclusion of rules of particular applicability. B-334309, Nov. 30, 2023.
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> A rule of particular applicability is addressed to an identified entity and also addresses actions that entity may or may not take, taking into account facts and circumstances specific to that entity. B-334309, Nov. 30, 2023 (citing B-334995, July 6, 2023).
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> We noted that the notice concerned a specific entity – California – and addressed a statutory waiver specific to California's Advanced Clean Car Program; therefore, the notice would be a rule of particular applicability. B-334309, Nov. 30, 2023. (Emphasis added.)

The GAO then addresses what happens if Congress passes disapproval resolutions:

> If Congress were to treat the EPA Notices of Decisions as rules under CRA and subsequently enact resolutions of disapproval, **there is a question as to the precise effect those resolutions would have.**

> As described above, if a resolution of disapproval is enacted, then the rule has no force or effect. 5 U.S.C. § 801(b)(1). However, two of the three Notices of Decision submitted by EPA to Congress, the Low NOX Waiver Notice and the Advanced Clean Cars II Waiver Notice, appear to merely notify the public of previously issued decision documents granting California the requested preemption waivers and, in the Low NOX Waiver Notice, the requested authorization for its regulations. . . EPA did not include the underlying decision documents in its submission to Congress and GAO. In contrast, the Advanced Clean Trucks Waiver Notice, like the Advanced Clean Car Program Waiver Notice we examined in B-334309, appears to be the decision document. See 88 Fed. Reg. at 20688 (stating that EPA "is granting . . . California['s] . . . requests for waivers").
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> **Accordingly, if Congress were to enact resolutions disapproving the Low NOX Waiver Notice or the Advanced Clean Cars II Waiver Notice under CRA, it is unclear whether or how those resolutions would affect the underlying waivers and authorizations.** (Emphasis added.)

Both the House and Senate have acted. Now, back to the EPA – will it rescind the waiver? And the courts – does Congress have the authority it claims under the CRA?

This blog was drafted by John Watson, an attorney in the Spencer Fane Denver, Colorado, office. For more information, visit www.spencerfane.com

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[1] *See* my earlier blog discussing California's unique vehicle emission standards promulgated pursuant to federal Clean Air Act.

[2] *See* „The Senate and the Nuclear Option„

[3] For a more detailed examination of relevant cases (updated as of November 2021), *see* "The Congressional Review Act (CRA): Frequently Asked Questions," Congressional Research Service.