This is the third in a series of blog posts examining the possible application of the Congressional Review Act (CRA) to California's waivers under the Clean Air Act allowing the state to issue its own emissions standards for motor vehicles. The first post is here. The second post is here.

Another possible implication of applying the CRA to California's waivers under the Clean Air Act is that it might open the door to a severe curtailment of the Senate filibuster. As noted in our prior posts, application of the CRA to the California waivers would be very controversial. The Government Accountability Office (GAO), which is the audit and investigatory arm of Congress, has twice considered that the waivers are not rules subject to the CRA. So, applying the CRA to the waivers by Congress would require overruling the GAO. That in itself is unusual.

But the key question will be, once the CRA resolution is considered by the Senate, whether the Senate parliamentarian concludes that the CRA does not apply to the waivers. If the Senate parliamentarian decides to rely on the GAO decisions and reject application of the CRA to the waivers, the majority of the Senate (as it can always do) can choose to override the decision of the parliamentarian and proceed regardless. That is the "nuclear option" that has been used in the past to narrow the scope of the filibuster – for instance to exempt Presidential and judicial nominees from the filibuster, as has been done on multiple occasions over the past decade.

Using the nuclear option in the setting of the Congressional Review Act would be a major escalation. Use of the nuclear option for nominations only impacts internal Senate proceedings and does not directly impact the public. But using it to overturn the California waivers would directly impact the legal rights of California and other states. Because EPA would be unable to issue a future "substantially the same legislation," use of the Congressional Review Act would also in effect amend the Clean Air Act by limiting the waiver power. This would be the first use of the nuclear option to change a substantive statute.

Whether the Parliamentarian allowed the waiver to be overturned or was reversed through the nuclear option, a precedent will have been set for loose interpretation of the Congressional Review Act. At a minimum, other types of orders will be exposed to the risk of overturning as we discussed in the prior post. But if the Senate is willing to pay fast-and-loose with the order/rule distinction, why not other parts of the statute? The next step could be to bend the statutory time limits on review under the statute, or even its limitation to agency (rather than presidential)

actions.

Use of the Congressional Review Act in this setting might seem like a “win” for legislative power. But of course, the impetus to review the California waiver came from the President, not from within Congress. If the executive branch were to repeal the waiver, it would have to justify its action and face judicial review. So it will also set a precedent for Presidents to shortcut the procedures applying to the executive branch by arm-twisting Congress to break its own rules.