

MEMO

TO: Members of the Senate Democratic Caucus
FROM: Senator Alex Padilla
DATE: May 19, 2025
SUBJECT: **Overturning the Senate Parliamentarian Regarding the Applicability of California's Clean Air Act Waivers Under the CRA**

The Senate has never voted to overturn the Presiding Officer (and thus the Parliamentarian) regarding the Congressional Review Act (CRA). Moreover, while the Senate has reversed the Presiding Officer on six occasions over the past 30 years, **the Senate has never voted to overturn the ruling of the Presiding Officer, known as the nuclear option, to allow a bill to pass on a majority vote** that otherwise would have been subject to the Senate's cloture rule and its 60-vote threshold.

Against its own precedent and a 2023 Government Accountability Office (GAO) opinion, the Trump Administration's Environment Protection Agency (EPA) submitted three of California's Clean Air Act waivers as "rules" under the CRA. The Senate's expert and nonpartisan Parliamentarian determined that resolutions on those waivers are not entitled to the CRA's expedited procedures, following GAO's determination that the waivers are not rules for purposes of CRA because the waivers are "orders" under the Administrative Procedure Act. If a majority of the Senate votes to overrule the Parliamentarian's decision, it would create new CRA precedent and effectively allow agencies to unilaterally submit any action as a "rule" to Congress (regardless of whether it is a rule) and trigger expedited Senate procedures and avoid a filibuster. **It would also be the first time in Senate history that a majority overruled the Parliamentarian to pass a bill by a majority vote, bypassing a filibuster.**

Procedural Background

In the Senate, any Senator can raise a point of order if the Senator believes the proceedings violate the established rules and precedents of the Senate. The Parliamentarian advises the Presiding Officer on whether the point of order is well taken. Whether or not the Senator (or Vice President) who is presiding personally agrees with the advice, the Presiding Officer almost always follows it.¹ Any Senator can appeal the ruling of the Presiding Officer, and if the ruling of the Presiding Officer is overturned by a majority vote, it sets a new precedent that changes how the Senate interprets its rules going forward.

Previous Instances of Overturning Decisions by the Presiding Officer

The Congressional Research Service identified 35 cases where the Senate voted to overturn the Presiding Officer (and thus typically the Parliamentarian) in the 60 years since 1965, with only six instances in the last 30 years. Some of the categories previously overturned are listed below:

- **Nominations:** In 2013, the Democratic majority voted to overturn the ruling of the Chair to allow cloture to be invoked on all nominations, except the Supreme Court, with a majority vote. In 2017, the Republican majority took a similar action regarding the cloture threshold for Supreme Court nominations, and again in 2019 to reduce post-cloture time on most nominations.
- **Germaneness and Rule XVI:** Of the 35 cases where the Senate overruled the Parliamentarian, more than half (19) occurred before 1995 and involved questions of germaneness of amendments or the application of Rule XVI prohibiting legislating on appropriations bills. Importantly, the underlying legislation still required 60 votes to overcome a filibuster, and so the overruling was

¹ It is possible for a Presiding Officer to ignore the Parliamentarian's determination and make a ruling that contradicts it. That ruling can then be appealed (including by noting that the Parliamentarian was disregarded). This option is extremely rare. In either case, however, the result is a vote on whether the full Senate will overturn the Parliamentarian's determination.

not particularly consequential. In some cases, the Senate later reversed some of those precedents.

- **Floor Tactics and Other Matters:** The remaining instances involve attempts to delay or prevent a vote on a bill or nomination, matter not in a committee's jurisdiction, the authority of conference committees, a Budget Act point of order in 1978, and whether "sense of the Senate" amendments are allowed to appropriations legislation.

The Senate's ultimate 60-vote legislative filibuster has never been bypassed – whether by a Presiding Officer ignoring the Parliamentarian's advice (as Vice President Hubert Humphrey did in 1969) or by the Senate voting to overturn a ruling of the Chair based on the Parliamentarian's guidance (as occurred in 2022). In both cases, while individual rulings deviated from or overruled the Parliamentarian, the fundamental rule requiring 60 votes to end debate on legislation remained intact. That would not be the case with respect to the three California waiver CRAs.

Similarly, the Senate has *never* voted to overturn the Parliamentarian's determination during reconciliation regarding the Byrd Rule.² Like the CRA, the Budget Act relies on the Parliamentarian to determine what legislation qualifies for expedited procedures.

Impacts on the CRA of Overriding the Parliamentarian's Determination

The Parliamentarian has played a key role in the implementation of the CRA since its adoption in 1996, policing the time and scope guardrails in the law. In the case of California's waivers, the Parliamentarian determined that an agency cannot simply submit an action as a rule (either by mistake or with intent to game the system) in order to trigger fast-track Senate procedures. Instead, the Parliamentarian applied the same process they have used many times when an agency fails to submit a rule under the CRA. In those instances, the Parliamentarian looks to GAO for a legal opinion to determine whether an agency action is a rule, and the related resolution is therefore entitled to expedited procedures. Just as GAO provides a check when an agency tries to dodge the CRA by withholding a rule, the Parliamentarian has determined GAO also provides a check when an agency tries to exploit the CRA by submitting something that is not actually a rule. This ensures the CRA process can't be abused in either direction and protects the legislative branch from executive overreach.

If the Parliamentarian's decision is overturned, along with paving the way to eliminate the filibuster for legislative matters, the CRA would then effectively apply to any action dating back to 1996 that an agency chooses to submit. Instead of using administrative procedures subject to judicial review, the current administration could, for example, submit broadcast licenses or vaccine approvals to Congress and trigger privilege in the Senate, thereby bypassing the filibuster. Any future administration could similarly submit past actions it does not support, such as permits for fossil fuel projects.

Conclusion

If a majority of the Senate votes to overrule the Parliamentarian's determination regarding these three California waivers, **it would be the first ever successful use of the so-called nuclear option to allow a bill to pass the Senate with a simple majority vote** that otherwise would be subject to cloture. It would also be the first time that the Parliamentarian would be overruled regarding the CRA and could allow executive branch agencies to trigger expedited Senate procedures on any matter dating back to 1996.

² In 1995, Majority Leader Bob Dole changed the Parliamentarian, after which the Parliamentarian altered budget reconciliation rules.