



# 13.

## *The Congressional Review Act*

### Introduction

The Administrative Procedure Act (APA) was passed in 1946<sup>1</sup> and established in law the foundation for the modern administrative state. The statute's chief accomplishments—creating informal rulemaking for writing regulations, providing due process protections for agency formal adjudication, and setting standards for all administrative actions—make it one of the most important congressional enactments of the 20th century. Although it largely ratified the practice of executive branch policymaking that had emerged during the New Deal,<sup>2</sup> cementing this practice in statute was deemed critical. In particular, the express creation of the informal rulemaking process—even though it was constrained by notice and public comment and judicial review—would empower the federal bureaucracy when the formal rulemaking process was abandoned in the late 1970s. Almost all agencies found the formal process too slow and cumbersome to accommodate rapidly expanding congressional concerns around regulation of social, economic, health, welfare, and environmental issues. The universal adoption of informal rulemaking coincided with and fostered even greater proliferation of broad delegations of rulemaking authority to the executive bureaucracy. Regulatory lawmaking became the paramount hallmark of our administrative state.

Over the years, Congress was comfortable with its delegation strategy and reacted to appeals for regulatory reform by focusing on modifying existing processes and their impact on the concerned parties or stakeholders. It did so, for example, by mitigating the paperwork burden of regulations, lessening their impact on small businesses or other units of government, or imposing considerations of cost-benefit or cost efficiency on the regulatory decisionmakers. More specifically, Congress passed legislation including the Paperwork Reduction Act,<sup>3</sup> the Regulatory Flexibility Act,<sup>4</sup> the Unfunded Mandates Act,<sup>5</sup> and amendments to the Regulatory Flexibility Act.<sup>6</sup> But there is a consensus that few of the ostensible goals of these statutes have been achieved, in part because Congress gave the agencies sufficient discretion and loopholes to ensure that the reform statutes did not curb their ability to make their preferred regulatory decisions.<sup>7</sup>

At the same time, Congress has come under attack for repeatedly making open-ended grants of lawmaking powers to departments and agencies without assuming responsibility for overseeing the effects of such grants, and failing to take proper legislative actions where departments and agencies have abused those authorities. Some have also charged that Congress's inaction has allowed, even encouraged, the executive effectively to usurp Congress's oversight and control of the rulemaking process.

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1. Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946).

2. Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 232 (1986). *See also*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

3. Pub. L. 96-511, 94 Stat. 2812 (1980).

4. Pub. L. 96-354, 94 Stat. 1164 (1981).

5. Pub. 104-4, 109 Stat. 48 (1995).

6. Pub. L. 104-121, 110 Stat. 857 (1995).

7. *See e.g.*, Stuart Shapiro and Deanna Moran, *The Checkered History of Regulatory Reform Since the APA*, 19 NEW YORK UNIV. J. OF LEGIS. AND PUBLIC POLICY 141 (2016).

Congress sought to push back by passing the Congressional Review Act (CRA)<sup>8</sup> in 1996. The goal was to establish a mechanism by which Congress could review and overturn—through passage of joint resolutions of disapproval subject to fast-track legislative procedures—virtually all federal agency rules. The House and Senate sponsors of the CRA made clear that they were seeking to address claims that Congress had effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude over the last half century in implementing and interpreting congressional enactments. The sponsors noted,

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help redress the balance, reclaiming for Congress some of its policy making authority, without requiring Congress to become a super regulatory agency.<sup>9</sup>

The CRA sponsors recognized both the desire to restore congressional political accountability and the need to establish a scheme of collaborative control among the political branches. But the initial enthusiasm and expectations on the Hill waned quickly as doubts emerged over the review scheme's ability to rein in lawmaking through responsible, effective, and expeditious legislative oversight. Those doubts were later confirmed.<sup>10</sup> From April 1996 through June 2016 over 71,000 rules have been reported to Congress and have become effective, including some 1,415 major rules. During that period a total of 114 resolutions of disapproval concerning 70 rules were introduced, but only one was passed and signed by a president, an event that may have been *sui generis* because of the unique circumstances accompanying its passage.<sup>11</sup> Five disapproval resolutions were passed by both houses in the 114<sup>th</sup> Congress. President Obama vetoed each of them. Although President Trump has signed 13 resolutions into law since taking office, it is too early to determine whether these are merely 'symbolic' actions or reflect the beginning of a collaborative interbranch effort to more effectively utilize the CRA, or await a replacement review scheme, after the carryover period ends.<sup>12</sup>

By contrast, in the 10-year period from 1999 through 2008, Congress enacted at least 190 provisions of law that prohibited agencies from using federal funds to develop proposed rules, make a proposed rule final, or implement or enforce a final rule.<sup>13</sup>

Some maintain that simple agency awareness of the review scheme has had a significant impact on a number of major rules.<sup>14</sup> Others counter that the threat of passing a disapproval resolution, which is subject to presidential veto, is no greater than that of passing an ordinary bill, and that this is particularly so in light of the structural and interpretive impediments to the CRA's use, which are well known.<sup>15</sup>

The most prominent structural obstacles to the CRA's potential use are: the lack of a screening mechanism to identify reported rules that may require special congressional attention; the failure to provide an expedited consideration procedure in the House of Representatives comparable to that provided to the Senate; and that a joint resolution of disapproval of a significant or politically sensitive rule is likely to need a supermajority of both houses to be successful. Moreover, a number

8. The CRA was included as Subtitle E of the Small Business Regulatory Enforcement Act of 1996 (SBRFA), Pub. L. No. 104-121, 110 Stat. 857, 868 (codified at 5 U.S.C. §§ 801-808 (2006)).

9. Joint Explanatory Statement of House and Senate Sponsors, 142 Cong. Rec. 6922, 6926 (1996) [hereinafter *Legislative History*]. An identical joint statement of the Senate sponsors appears at 142 Cong. Rec. 8196-8201 (1996). Further references to the legislative history will utilize the earlier House insertion.

10. See, e.g., Daniel Cohen and Peter L. Strauss, *Congressional Review of Agency Rulemaking*, 49 ADMIN. L. REV. 95 (1996); Morton Rosenberg, *Whatever Happened to Congressional review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051 (1999).

11. Up-to-date data may be found at U.S. GOV'T ACCOUNTABILITY OFF., *Congressional Review Act*, <http://gao.gov/legal/congressional-review-act/overview>.

12. See the discussion at subsection C(2) *infra*.

13. CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34364, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS, (August 5, 2008). Copeland has revisited Congress's utilization of appropriations limitations as an alternative to disapproval resolutions and has found the practice has continued to date. See his case study, *The Presidential-Congressional Power Imbalance in Rulemaking*, at Part II *infra*.

14. See, e.g., Paul R. Verkuil, *The Wait Is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 925-26 (2007); H. COMM. ON THE JUDICIARY SUBCOMM. ON COM. AND ADMIN. LAW, JUDICIARY COMMITTEE, 109<sup>TH</sup> CONG., INTERIM REP. ON THE ADMINISTRATIVE LAW, PROCESS, AND PROCEDURE PROJECT FOR THE 21<sup>ST</sup> CENTURY, 1409-10 (Comm. Print No. 10) (presentation of Paul R. Verkuil) [hereinafter INTERIM REPORT].

15. Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2166-67 (2009) [hereinafter *Mysteries of the CRA*].

of critical interpretive issues remain to be resolved. These include the questions whether the failure to report a covered rule is subject to court review and sanction, and what rules are covered by the act.

Renewed interest in legislative review of agency rules since the 112<sup>th</sup> Congress has provided Congress with a clear opportunity to address the perceived flaws in the CRA and redefine its oversight role in the rule development process. The most recent discussion vehicle has been H.R. 26, the “Regulations From the Executive in Need of Scrutiny Act of 2017” (REINS Act). The bill would dramatically alter the rule review process by deeming all major rules reported to Congress as proposals that cannot become effective unless Congress passes a joint resolution of approval within a specified time period. The REINS Act passed the House on January 5, 2017, by a vote of 237-187, and awaits Senate action.<sup>16</sup> Although the November 2016 presidential election placed the White House in the hands of Republican President Donald Trump—and Republicans maintain control of both houses of Congress—it is not certain that the president would sign such legislation and cede back to Congress the virtually plenary power presidents have acquired over the administrative rule making process over the last 35 years.<sup>17</sup>

The sections that follow provide a detailed description of the CRA review scheme, how its sponsors expected it to operate, perceived impediments to its operation, and how it in fact has been utilized (including the very few successful uses of the CRA’s carryover period disapproval resolution authority). This chapter also examines proposals for reform, the REINS Act among them. It concludes by examining the need for the political branches to engage in a “collaborative enterprise” to review agency lawmaking, and provides suggestions for priority remedial actions that may be immediately installed by utilizing the internal rulemaking powers of each house to secure an effective review scheme.

## A. The Scheme of Review of Agency Rules under the CRA

### 1. Reporting Requirements

The CRA, codified at 5 U.S.C. §§ 801-808, requires that all agencies promulgating a covered rule must submit a report to each house of Congress and to the comptroller general that contains a copy of the rule, a concise general statement describing the rule (including whether it is deemed to be a major rule), and the proposed effective date of the rule. A covered rule cannot take effect if the report is not submitted.<sup>18</sup> Each house must send a copy of the report to the chairman and ranking minority member of each jurisdictional committee.<sup>19</sup> In addition, the promulgating agency must submit to the comptroller general: (1) a complete copy of any cost-benefit analysis; (2) a description of the agency’s actions pursuant to the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995; and (3) any other relevant information required under any other act or executive order. Such information must also be made “available” to each house.<sup>20</sup>

### 2. Rules Covered by the CRA

Adopting the definition found at 5 U.S.C. § 551(4), the CRA defines a “rule” as “the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy.”<sup>21</sup> The legislative history of Section 551(4) indicates that the term is to be broadly construed: “The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well.”<sup>22</sup> The courts have recognized

16. Similar versions of the REINS Act were passed in the 112<sup>th</sup> (H.R. 10 (2011)), 113<sup>th</sup> (H.R. 367 (2013)), and 114<sup>th</sup> (H.R. 427 (2015)) Congresses but received no Senate action.

17. See Andrew Rudalevige, *Congress Wants to Rein in Presidential Power. Will Trump Sign On?*, WASH. POST., Jan. 3, 2017, <https://washingtonpost.com/news/monkey-cage/wp/2017/01/03/congress-wants-to-rein-in-presidential-power-will-trump-sign-on/>.

18. 5 U.S.C. § 801(a)(1)(A) (2015).

19. 5 U.S.C. § 801(a)(1)(C) (2015).

20. 5 U.S.C. § 801(a)(1)(B) (2015).

21. 5 U.S.C. § 804(3) (2015) excludes from the definition “(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowance therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, or practice that does not substantially affect the rights or obligations on non-agency parties.”

22. U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 13 (1948); see also *Batterton v. Marshall*, 648 F.2d 694, 700-02 (D.C. Cir. 1980).

the breadth of the term, indicating that it encompasses “virtually every statement an agency may make,”<sup>23</sup> including interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, employee manuals and memoranda of understanding, among other types of actions. Thus a broad range of agency action is potentially subject to congressional review.<sup>24</sup>

### 3. The Roles of the Comptroller General and the OIRA Administrator

The comptroller general and the administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget have particular responsibilities with respect to a “major rule,” defined as a rule that will likely have an annual effect on the economy of \$100 million or more, increase costs or prices for consumers, industries or state and local governments, or have significant adverse effects on the economy. The determination of whether a rule is major is assigned exclusively to OIRA’s administrator.<sup>25</sup> If a rule is deemed major by the administrator, the comptroller general must prepare a report for each jurisdictional committee within 15 calendar days of the submission of the agency report required by Section 801(a)(1) or its publication in the Federal Register, whichever is later. The statute requires that the comptroller general’s report “shall include an assessment of the agency’s compliance with the procedural steps required by Section 801(a)(1)(B).”<sup>26</sup> The comptroller general has interpreted his duty under this provision relatively narrowly as requiring that he determine whether the prescribed action has been taken. In other words, he must determine whether a required cost-benefit analysis has been provided, and whether the required actions under the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and any other relevant requirements under any other legislation or executive orders were taken, but he need not examine the substantive adequacy of the actions.

### 4. Effective Dates of Major and Non-Major Rules<sup>27</sup>

The designation of a rule as major also impacts its effective date. A major rule may become effective on the latest of the following: (1) 60 calendar days after Congress receives the report submitted pursuant to Section 801(a)(1)<sup>28</sup> or after the rule is published in the Federal Register; (2) if Congress passes a joint resolution of disapproval and the president vetoes it, the earlier of when one house votes and fails to override the veto, or 30 calendar days after Congress receives the veto message; or (3) the date the rule would otherwise have taken effect (unless a joint resolution is enacted).<sup>29</sup>

Thus the earliest a major rule can become effective is 60 calendar days after the later of the submission of the report required by Section 801(a)(1) or its publication in the Federal Register, unless some other provision of the law provides an

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23. *Avoyelles Sportsmen’s League, Inc., v. Marsh*, 715 F.2d 897 (5<sup>th</sup> Cir. 1983).

24. *See, e.g., Chem. Service, Inc. v. EPA*, 12 F.3d 1256 (3d Cir. 1993) (memorandum of understanding); *Caudill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74 (4<sup>th</sup> Cir. 1993) (interpretative rules); *National Treasury Employees Union v. Reagan*, 685 F. Supp. 1346 (E.D. La 1988) (federal personnel manual letter issued by OPM); *New York City Employment Retirement Board v. SEC*, 45 F.3d 7 (2d Cir. 1995) (affirming lower court’s ruling that SEC “no action” letter was a rule within § 551(4)); *Guardian Federal S&L Ass’n v. Fed. Savings and Loan Insurance Corp.*, 589 F.1d 658 (D.C. Cir. 1978) (agency statements that clarify laws are rules under the APA); *Professional and Patients for Customized Care v. Shalala*, 56 F.3d 592, 601-02 (D.C. Cir 1995) (FDA Compliance Policy guide was a rule).

25. 5 U.S.C. § 804(2) (2015).

26. 5 U.S.C. § 801(a)(2)(A) (2015).

27. The CRA is a complex statute, and among its chief complexities is its use of at least four different ways to measure the passage of time to effectuate the different purpose of the review scheme: *calendar days*; *days of continuous session*, which excludes all days when either the House of representatives or the Senate has adjourned for more than three days; *session days*, which include only calendar days in which a chamber is in session; and *legislative days*, which end each time a chamber adjourns and begin each time it convenes after an adjournment. It is important to be aware that different measures may be applicable to the various stages—effective dates, initiation and action periods, and the carryover period—of the review process. *See* CURTIS W. COPELAND AND RICHARD S. BETH, CONG. RESEARCH SERV., RL34633, CONGRESSIONAL REVIEW ACT: DISAPPROVAL OF RULES IN A SUBSEQUENT SESSION OF CONGRESS (August 25, 2008).

28. The general counsel of the Government Accountability Office (GAO) has ruled that the 60-day period does not begin to run until *both* houses of Congress receive the required report. *See* ANTHONY H. GAMBOA, U.S. GOV’T ACCOUNTABILITY OFF., B-289880 (2002) (opinion letter to Hon. Edward M. Kennedy, Chairman, Senate Committee on Health, Education, Labor and Pensions from Anthony H. Gamboa, General Counsel). The situation involved a Department of Health and Human Services (HHS) major rule published in the Federal Register on January 18, 2002 with an announced effective date of March 29, 2002. The House of Representatives, however, did not receive the rule until February 14, 2002. HHS thereafter delayed the effective date of the rule until April 15, 2002, in an attempt to comply with the CRA. But the Senate did not receive the rule until March 15, 2002. The General Counsel determined that the rule could not become effective until May 14, 2002, 60 days following the Senate’s receipt, relying on the language of § 801(a)(1)(A) of the act requiring that a copy of a covered rule must be submitted “to *each* House of Congress” in order to become effective.

29. 5 U.S.C. § 801(a)(3) (2015).

exception for an earlier date. Three possibilities exist. Under Section 808(2) an agency may determine that a rule should become effective notwithstanding Section 801(a)(3) where it finds “good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>30</sup> Second, the president may determine that a rule should take effect earlier because of an imminent threat to health or safety or other emergency; to insure the enforcement of the criminal laws; for national security purposes; or to implement an international trade agreement.<sup>31</sup> Finally, a third route is available under Section 801(a)(5), which provides that “the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either house of Congress votes to reject a joint resolution of disapproval under Section 802.”<sup>32</sup>

All other rules take effect “as otherwise allowed by law” after having been submitted to Congress under Section 801(a)(4).<sup>33</sup> Under the APA, a final rule may go into effect 30 days after it is published in the Federal Register in final form.<sup>34</sup> An agency, in its discretion, may delay the effectiveness of a rule for a longer period; or it may put it into effect immediately if good cause is shown.

## 5. Rules That Have Become Effective and the Carryover Period

All covered rules are subject to disapproval even if they have gone into effect. Congress has reserved to itself a review period of at least 60 days. Moreover, if a rule is reported within 60 session days of adjournment of the Senate or 60 legislative days of adjournment of the House, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next session of the Congress.<sup>35</sup> Such held over rules are treated as if they were published on the 15<sup>th</sup> session day of the Senate and the 15<sup>th</sup> legislative day of the House in the succeeding session and as though a report under § 801(a)(1) was submitted on that date.<sup>36</sup> But a held over rule takes effect as otherwise provided.<sup>37</sup> The opportunity for Congress to consider and disapprove is simply extended so that it has a full 60 session or legislative days to act in any session. Congressional Research Service (CRS) studies have shown that in every session but two since 1996, the House starting point has determined the relevant date for CRA carryovers to the next session of Congress. The median starting point for all sessions has been June 25. However, the median starting point for second sessions (i.e., election years) is considerably shorter: June 7. The explanation, of course, is that both houses often adjourn early or recess early just prior to and/or after elections. The congressional calendar for 2016 indicated that the critical carryover date was again determined by the House, this time as June 15.

## 6. Effect of a Congressional Disapproval of a Rule

If a joint resolution of disapproval is enacted into law, the rule is deemed not to have had any effect at any time.<sup>38</sup> A rule that does not take effect, or is not continued because of passage of a disapproval resolution, may not be reissued in substantially the same form. Indeed, before any reissued or new rule that is “substantially the same” as a disapproved rule can be issued it must be specifically authorized by a law enacted subsequent to the disapproval of the original rule.<sup>39</sup>

30. Reviewing courts have generally applied the APA’s good cause exemption, from which this language is obviously taken, narrowly in order to prevent agencies from using it as an escape clause from notice and comment requirements. *See, e.g.,* *Action on Smoking and Health v. CAS*, 713 F.2d 795, 800 (D.C. Cir. 1987). However, since Section 805 precludes judicial review for any “determination, finding, action or omission under this chapter,” there could be no court condemnation of a good cause determination. But the rule would still be subject to congressional vacation and retroactive nullification.

31. 5 U.S.C. § 801(c) (2015).

32. In *Leisegang v. Sect’y of Veterans Affairs*, 312 F.3d 1368, 1373-1376 (D.C. Cir. 2002), the appeals court held that Section 801(a)(3) “does not change the date on which [a major rule] becomes effective. It only affects the date when the rule becomes operative. In other words, the CRA merely provides a 60-day waiting period before the agency may enforce the major rule so that Congress has the opportunity to review the regulation.” At issue in the case was the date from which certain veterans benefits would be calculated. The benefit statute provided that it would be the date of the issuance of the rule. The government argued that the CRA was a superseding statute and that the effective date was when the CRA allowed it to be operative. The appeals court agreed with the veterans that the date of issuance, as prescribed by the law, was determinative.

33. 5 U.S.C. § 801(a)(4) (2015).

34. 5 U.S.C. § 553(d) (2015).

35. 5 U.S.C. § 801(d)(1) (2015).

36. 5 U.S.C. § 801(d)(2)(A), (e)(2) (2015).

37. 5 U.S.C. § 801(d)(3) (2015).

38. 5 U.S.C. § 801(f) (2015).

39. 5 U.S.C. § 801(b)(2) (2015).

However, if a rule is subject to any statutory, regulatory, or judicial deadline for its promulgation and is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the joint resolution. Thus, disapproval of a mandated rule allows an agency to “try again,” guided presumably by the disapproval debate.<sup>40</sup>

## 7. Senate and House Procedures for Consideration of Disapproval Resolutions

Section 802(a) spells out the process for an up or down vote on a joint resolution of disapproval.<sup>41</sup> Such a resolution must be introduced within 60 calendar days (excluding days either house of Congress is adjourned for more than three days during a session of Congress) after the agency reports the rule to the Congress in compliance with Section 801(a)(1). Timely introduction of a disapproval resolution allows each house 60 session or legislative days to consider it through use of expedited consideration procedures. If the resolution passes, it allows retroactive nullification of an effective rule and limits the agency from promulgating a “substantially similar” rule without subsequent congressional authorization to do so by law.

The CRA provides an expedited consideration procedure for the Senate. If the committee to which a joint resolution is referred has not reported it out within 20 calendar days after referral, it may be discharged from further consideration by a written petition of 30 members of the Senate, at which point the measure is placed on the calendar. After committee report or discharge it is in order at any time for a motion to proceed to consideration. All points of order against the joint resolution (and against consideration of the measure) are waived, and the motion is not subject to debate, amendment, postponement, or to a motion to proceed to other business. If the motion to consider is agreed to, it remains as unfinished business of the Senate until disposed of.<sup>42</sup> Debate on the floor is limited to 10 hours. Amendments to the resolution and motions to postpone or to proceed to other business are not in order.<sup>43</sup> At the conclusion of debate an up or down vote on the joint resolution is to be taken.<sup>44</sup>

There is no special procedure for expedited consideration and processing of joint resolutions in the House. But if one house passes a joint resolution before the other house acts, the measure of the other house is not referred to a committee. The procedure of the house receiving a joint resolution “shall be the same as if no joint resolution had been received from the other House, but . . . the vote on final passage shall be on the joint resolution of the other House.”<sup>45</sup>

## 8. Judicial Review of Actions Taken under the CRA

Section 805 precludes judicial review of any “determination, finding, action or omission under this chapter.”<sup>46</sup> This would insulate from court review, for example, a determination by the OIRA administrator that a rule is major or not, a presidential determination that a rule should become effective immediately, an agency determination that “good cause” requires a rule to go into effect at once, or a question as to the adequacy of a comptroller general’s assessment of an agency’s report. The legislative history of this provision indicates that it was not meant to preclude a court challenge to the failure

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40. 5 U.S.C. § 803 (2015).

41. For an in-depth discussion of procedural issues that may arise during House and Senate consideration of disapproval resolutions, *see* RICHARD S. BETH, CONG. RESEARCH SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT (2001).

42. 5 U.S.C. § 801(d)(1) (2015).

43. 5 U.S.C. § 802(d)(2) (2015).

44. 5 U.S.C. § 802(d)(3) (2015). There is some question whether a motion to proceed is non-debatable because of the absence of language so stating. Arguably, the non-debatability of the motion is integral both to the scheme of the expedited procedure provisions as well as to the overall efficacy of the CRA’s statutory scheme and thus may be implied. Alternatively, debate on such a motion may be limited by Section 803(d)(2) which limits debate on joint resolutions, as well as “all debatable motions,” to 10 hours. Ultimately, a resolution of this question would be made by the Senate parliamentarian, or the Senate itself. However, at the commencement of the debate on S.J.Res. 6, to disapprove the ergonomics rule, the presiding officer declared that “The motion to proceed is not debatable. The question is on agreeing to the motion.” The motion was agreed to. 147 Cong. Rec. S 1831 (daily ed. March 6, 2001). At least one other precedent exists in which it was ruled that a motion to proceed to a budget resolution under the Budget Act was non-debatable despite the silence of the act on the matter. *See* 127 Cong. Rec. S 4871 (May 12, 1981).

45. 5 U.S.C. § 802(f)(1)(2) (2015).

46. 5 U.S.C. § 805 (2015).

of an agency to report a rule.<sup>47</sup> However, a majority of district and appellate court rulings have held that the preclusion provision applies to and prevents such challenges.

Finally, the law provides a rule of construction that a reviewing court shall not draw any inference from a congressional failure to enact a joint resolution of disapproval with respect to such rule or a related statute.<sup>48</sup>

## B. Utilization of the Review Mechanism Since 1996

### 1. Summary of Rules Reported, Resolutions Introduced, and Actions Taken

As of June 2016, the comptroller general had submitted reports pursuant to Section 801(a)(2)(A) to Congress on some 1,450 major rules.<sup>49</sup> In addition, the Government Accountability Office (GAO) had cataloged the submission of over 70,000 non-major rules as required by Section 801(a)(1)(A). To that date, 114 joint resolutions of disapproval have been introduced relating to 70 rules. Until the beginning of the 115<sup>th</sup> Congress only one rule, the Occupational Safety and Health Administration's ("OSHA") ergonomics standard, was disapproved (in March 2001), an action that some believe to be unique to the circumstances of its passage. Since that action no disapproval resolutions were passed by both houses and sent to the president until the 114<sup>th</sup> Congress, when five such disapprovals were voted by both houses despite presidential veto warnings. The president in fact vetoed each of them.<sup>50</sup> As of the end of March 2017, the 115<sup>th</sup> Congress has approved and the president has signed into law 13 disapproval resolutions.<sup>51</sup> The deadline for carryover rule disapprovals is May 9, 2017. There are potentially over 150 rules subject to the CRA's carryover veto authority.

Finally, it is significant to note that a CRS study has found that during the period 1998 through 2008 at least 190 proposed or effective rules were stayed by the limitations on appropriations in annual funding measures enacted during those years.<sup>52</sup>

### 2. The Ergonomics Rule Rescission

OSHA's ergonomics standard had been controversial since the publication of its initial proposal for rulemaking in 1992 during the Bush administration. OSHA circulated a draft proposal in 1994 which was met with strong opposition from business interests. An umbrella organization, the National Coalition on Ergonomics, formed to oppose its adoption. In 1995 OSHA circulated a modified draft proposal, particularly with respect to coverage and regulatory requirements. At the same time, congressional opposition resulted in appropriations riders that prohibited OSHA from promulgating proposed

47. See 142 Cong. Rec. 6907 (1996).

48. 5 U.S.C. § 801 (g)(2015).

49. See U.S. GOV'T ACCOUNTABILITY OFF. *supra* note 11 for updated reporting statistics. Between 1999 and 2009 GAO catalogued over 1000 rules, an average of over 100 per year, that had been published in the Federal Register that were neither reported to it nor to both houses of Congress as required. In 2010 GAO took direct action that reduced the number of unreported rules to four. Covered rules that are not required to be published in the Federal Register are rarely reported.

50. The five were: S.J. Res. 8 (NLRB Union Election rules); S.J. Res. 22 (EPA Clean Water rules); S.J. Res. 23 (EPA Greenhouse Gas rules); S.J. Res. 24 (EPA Carbon Pollution Emission Guidelines); and H.J. Res. 88 (Department of Labor Fiduciary rules).

51. The thirteen resolutions that have been signed into law are: H.R.J. Res. 37, a Defense Department / General Services Administration Federal Acquisition Rule (Pub. L. No. 115-11); H.R.J. Res. 38, disapproving an Interior Department rule known as the Stream Protection Rule (Pub. L. No. 115-5); H.R.J. Res. 41, a Securities and Exchange Commission rule relating to "Disclosure of Payments by Resource Extraction Issuers" (Pub. L. No. 115-4); H.R.J. Res. 40, relating to the implementation by the Social Security Administration of the NCIS Improvements Amendments Act of 2007 (Pub. L. No. 115-8); H.R.J. Res. 44, a Bureau of Land Management rule dealing with research management (Pub. L. No. 115-12); H.R.J. Res. 57, an Education Department rule regarding the Elementary and Secondary School Act of 1965, as amended (Pub. L. No. 115-13); H.R.J. Res. 58, dealing with an Education Department rule respecting teacher preparation issues (Pub. L. No. 115-14); H.J. Res. 42, a labor department rule relating to drug testing (Pub. L. 115-17); H.R.J. Res. 69, an Interior Department rule relating to "non-subsistence take of wildlife and public participation and closure procedures on national wildlife refuges" (Pub. L. No. 115-20); H.R.J. Res. 82, disapproving a labor department rule relating to "clarification of employees continuing obligation to make and maintain an accurate record of each recordable injury and illness" (Pub. L. No. 115-21); S.J. Res. 34, a Federal Communications Commission rule relating to "protecting the privacy of customers of broadcast and other telecommunications services" (Pub. L.No. 115-22); H.R.J. Res. 43, a Health and Human Services Department Rule relating to compliance with Title X requirements in selecting sub-recipients (Pub. L. No. 115-23); H.R.J. Res. 67, a Labor Department rule relating to savings arrangements established by qualified state subdivisions for non-government employees (Pub. L. No. 115-24).

52. See Copeland, *supra* note 13.

or final ergonomics regulations during the fiscal years 1995, 1996, and 1998.<sup>53</sup>

The riders did not prohibit OSHA from continuing its development work, however, which included questions related to whether scientific knowledge of ergonomics was adequate for rulemaking and whether the cost of implementation of a broad standard would be extraordinarily burdensome to industry. Congress mandated reports from the National Academy of Sciences which found a significant statistical link between workplace exposures and musculoskeletal disorders, but also noted that the exact causative factors and mechanisms were not understood. In 2000, congressional attempts to pass another appropriations rider, as well as stand-alone prohibitory legislation, failed. OSHA issued its final standard on November 14, 2000; it became effective on January 16, 2001.<sup>54</sup> Most employer responsibilities under the new standard, however, were not to begin until October 2001.

As soon as the rule was issued, two industry groups filed suit in the D.C. Circuit Court of Appeals. They challenged OSHA's authority to issue the rule, its failure to follow proper procedures, the rationality of its provisions, and the adequacy of its scientific and economics analyses. The intervening 2000 elections also altered the political situation, with one party taking control of the White House and both houses of Congress. Opponents of the standard introduced a resolution of disapproval under the CRA, S.J. Res. 16, on March 1, 2001. A discharge petition was filed on March 5. The Senate debated and passed the resolution the following day, by a vote of 56-44. The resolution was immediately sent to the House and that evening the House Rules Committee issued a rule for floor action the next day. After an hour of debate on March 7, the House passed H.J. Res. 35 by a vote of 223-206. The president signed the nullifying measure into law on March 20, 2001.<sup>55</sup>

The veto of the ergonomics standards could be seen as the product of an unusual confluence of factors and events: control of both houses of Congress and the presidency by the same party; these political actors' longstanding opposition, as well as that of broad components of the industry to be regulated, to the ergonomics standards; and the willingness and encouragement of a president seeking to undo a contentious, end-of-term rule from a previous administration. Indeed, it was presumed by some that THE CRA's future might be limited to presidential transitions that effected similar political realignments.<sup>56</sup>

But subsequent events made it appear that even an almost exact repeat of the circumstances that fostered the ergonomics rule rescission may be insufficient to impel congressional use of the CRA. In the concluding months of the George W. Bush administration, a concerted public effort was made to finalize rules, many controversial, so that they would become effective before President-elect Obama and a more heavily democratic-controlled Congress took office. The carryover provisions of the CRA offered the opportunity to disapprove of these so-called "midnight rules" in the same manner used to rescind the ergonomics rule. However, only one disapproval resolution was introduced during the carryover period,<sup>57</sup> which was never reported out of the House committee to which it was referred. Rather, the president and Congress chose traditional means to overturn certain of the rules. The president asked agencies to commence rulemaking proceedings to repeal some rules, and in at least one instance a midnight rule was overturned by a proviso in an omnibus appropriations bill that the president signed into law.<sup>58</sup> One commentator has suggested that as long as traditional executive and legislative vehicles are available to rescind midnight rules, Congress will not take up valuable floor time to deal with individual rules—particularly when Senate consideration can consume as many as ten hours—and the president will not ask them to do it if there are alternative administrative means to pursue. The author concludes that "[e]ven in transition periods, when the CRA is most likely to be effective, an outgoing Administration did not take steps to avoid its effect, and the incoming Administration did not see any benefit in using it."<sup>59</sup>

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53. In a close floor vote, the rider proposed for FY1997 was deleted.

54. 65 Fed. Reg. 68261 (Nov. 14, 2000).

55. P.L. No. 107-5, 115 Stat. 7 (2001).

56. See, e.g., *Mysteries of the CRA*, *supra* note 15, at 2167.

57. H.R.J. Res. 18, 111<sup>th</sup> Cong. (2009) (concerning a joint rulemaking by the Departments of Interior and Commerce dealing with interagency cooperation under the Endangered Species Act).

58. *Mysteries of the CRA*, *supra* note 15, at 2174-76.

59. *Id.* at 2176.



In that light, the passage of five disapproval resolutions of “hot button,” politically sensitive rulemakings during the 114<sup>th</sup> Congress in the face of certain vetoes in a presidential election year can be deemed of no more than symbolic significance. Similarly, the successful veto of perhaps a handful of carryover rules in the 115<sup>th</sup> Congress may also be viewed as purely symbolic. In some 55 legislative days the House has expedited the passage of 15 disapproval resolutions, allowing an hour of floor time for debate on each resolution. On passage, as required by the CRA, the House resolutions have been placed directly on the Senate calendar for action. The Senate has thus far expended 70 hours of floor time on the passage of 13 resolutions. In the 30 remaining legislative days for passage of carryover rule disapprovals it is difficult to imagine Senate leadership spending very much more valuable floor time on similar rules with little public interest, particularly when President Trump has issued directives to agencies to begin APA processes to repeal significant targeted rules. It would be surprising if more than a few more rules are vetoed in the time remaining for such actions.

### 3. Illustrations of Attempts to Use the CRA to Influence Agency Actions

In all other cases, if there is any discernible pattern to the introduced resolutions, it is to exert pressure on the subject agencies to modify or withdraw the rule, or to elicit support of other members. In some instances such efforts were successful; in others they were not. For example, H.J.Res. 67 (1997) was aimed at disapproving an OSHA rule setting occupational exposure limits on methylene chloride, a paint stripper used in the furniture and airplane industries. Its sponsor, Representative Roger Wicker, contended that the rule would harm small businesses without increasing protections for workers. The disapproval resolution never received a floor vote. But the congressman succeeded in effecting a compromise through the inclusion of provisions in the FY1998 Labor, HHS and Education appropriations measure,<sup>60</sup> which required OSHA to provide on-site assistance for companies to comply with the new rules without fear of penalty. Mr. Wicker is reported to have stated that he used the disapproval resolution as a vehicle to gather support from influential members, including the chairs of the House appropriations and commerce committees.<sup>61</sup>

The disapproval resolution mechanism was effectively utilized to suspend a highly controversial rulemaking by the then-Health Care Financing Administration (HCFA). In January 1998, HCFA issued a rule requiring that home health agencies (HHAs) participating in the Medicare program must obtain a surety bond that was the greater of \$50,000 or 15 percent of the annual amount paid to the HHA by the Medicare program. In addition, a new HHA entering the Medicare or Medicaid program after January 1, 1998 had to meet a capitalization requirement by showing it actually had available sufficient capital to start and operate the HHA for the first three months. The rule was issued without the usual public participation through notice and comment and was made effective immediately. Substantial opposition to the rule quickly surfaced from both surety and HHA industry representatives. HCFA attempted to remedy the complaints by twice amending the rule, in March and in June, but was unsuccessful in quelling the industry concerns. On June 10, Senator Kit Bond, for himself and 13 other co-sponsors, introduced S.J.Res. 50 to disapprove the June 1 HCFA rule. Within a short period, the disapproval resolution had garnered 52 sponsors. On June 17, a companion bill, H.J. Res. 123, was introduced in the House. Thereafter, according to press reports, members of the staffs of Senators Bond, Baucus, and Grassley (all members of the Senate Finance Committee with jurisdiction over the agency) met with HCFA officials and concluded an agreement that (1) the agency would suspend its June 1, 1998 rule indefinitely; (2) the committee would request a GAO report that would study the issues surrounding the surety bond requirement; (3) on completion and issuance of the GAO report, HCFA would work in consultation with the Congress on the surety bond requirement; and (4) any new rule would not be effective earlier than February 15, 1999, and would be preceded by at least 60 days prior notice. The agreement reportedly was memorialized in a June 26 letter to HCFA signed by Senators Bond, Baucus and Grassley.<sup>62</sup> The GAO report was issued on January 29, 1999, but the rule suspension was never lifted. No floor vote on the disapproval resolutions occurred in either house.

S.J. Res. 60 (1996) offers another illustration of the manner in which the review mechanism has been utilized. This resolution also concerned an HCFA rule, this one dealing with the agency’s annual revision of the rates for reimbursement of Medicare providers (doctors and hospitals), which normally would have been effective on October 1, 1996. HCFA,

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60. P.L. 105-78, 111 Stat. 1467.

61. See Allan Freedman, *GOP’s Secret Weapon Against Regulations: Finesse*, CQWEEKLY, September 5, 1998, at 2318-19.

62. *Id.* at 2319-20.

however, submitted the rule to Congress on August 30, 1996, and since it was a major rule, it could not go into effect for 60 days, or until October 29, which meant there would be a significant loss of revenues because the differential rate increases could not be imposed for most of the month of October. Section 801(a)(5), however, provides that if a joint resolution of disapproval is rejected by one house, “the effective date of a rule shall not be delayed by operation of this chapter...” On the morning of September 17, 1996, Senator Lott introduced S.J. Res. 60, and that afternoon, by unanimous consent, the resolution “was deemed not passed.”<sup>63</sup> The HCFA rule went into effect on October 1 as scheduled.

An interesting utilization of the CRA process that had an impact and resulted in an unusual outcome involved President George W. Bush’s restoration, on February 15, 2001, of President Reagan’s so-called Mexico City Policy. The policy limited the use of federal and non-federal monies by non-governmental organizations (NGOs) to directly fund foreign population planning programs that support abortion or abortion-related activities. President Clinton had rescinded the 1984 Reagan policy when he took office in January 1993.<sup>64</sup> A president’s authority to determine the terms and conditions on which such NGOs may engage in foreign population planning programs derives from the Foreign Assistance Act of 1961.<sup>65</sup> The provision vests the authority to make these determinations exclusively in the chief executive. President Reagan delegated his authority to make the determinations to the administrator of the U.S. Agency for International Development (USAID), who issued regulations that specified the conditions upon which grants would be given to NGOs. Thus, when the Mexico City Policy was rescinded in 1993, it was the AID administrator that did it, at the direction of President Clinton. When President Bush restored it in 2001, he did it in a directive to the AID administrator<sup>66</sup> who simply revived the old conditions by internal agency administrative action.

A number of Senate opponents of the policy filed a disapproval resolution, S.J. Res. 9, on March 20, 2001. The members sought to nullify the administrator’s action, reasoning that it was a covered rule under the CRA since the implementing action was taken by an executive agency official and not by the president himself, and thus was reviewable by Congress.<sup>67</sup> The president responded by rescinding his earlier directive to the AID administrator and thereafter issuing an executive order under his statutory authority to implement the necessary conditions and limitations on NGO grants.<sup>68</sup> The presidential action mooted the disapproval resolution and rendered a subsequent attempt to veto the rule by S.J. Res. 17 ineffective because the CRA does not reach such actions by the president.

A final interesting example of an attempt to use the CRA as a device to pressure agency conformity with asserted congressional policy designs involved the State Children’s Health Insurance Program (SCHIP), which is administered by the Centers for Medicare and Medicaid (CMS) in the Department of Health and Human Services (HHS). SCHIP is a program designed to cover the health care costs of uninsured children in families with income that is modest but too high to qualify for Medicaid. States receive federal matching funds and for years were given flexibility in designing their SCHIP programs, including consistently being granted waivers by CMS to cover uninsured families with incomes exceeding 200% of the federal poverty level (FPL).

In 2007 President Bush vetoed two authorization measures that would have effectively funded that expanded coverage. In August 2007, CMS issued a “clarification” letter to the officials who administer the state programs advising them that five discretionary strategies that had been utilized by states to prevent “crowd out” of private group health plans were now mandatory for states that expanded eligibility coverage above the effective level of 250% of the FPL. States had to amend their schemes by August 2008 “or CMS will pursue corrective action.” In September 2007, CMS rejected a New York state plan that would have raised the family eligibility to up to 400% of the FPL, relying on the August clarification letter.

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63. See 142 Cong. Rec. S10723 (daily ed. September 17, 1996).

64. Memorandum on the Mexico City Policy, 29 WEEKLY COMP. PRES. DOC. 88 (Jan. 22, 1993).

65. 22 U.S.C. § 2151b(b) and (f)(1) (2000).

66. Memorandum on Restoration of the Mexico City Policy, 37 WEEKLY COMP. PRES. DOC. 216 (Jan. 22, 2001).

67. Compare *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) and *Dalton v. Specter*, 511 U.S. 462, 469 (1993), holding that the president is not subject to the APA procedures since he is not expressly covered by its definition of agency, with *Chamber of Commerce v. Reich*, 74 F.3d 1311 (D.C. Cir. 1998) and *National Family Planning Council v. Sullivan*, 979 F.2d 227 (D.C. 1992), allowing challenges to agency actions that were issued pursuant to presidential directive.

68. 22 U.S.C. § 2151 b(b) and § b(f)(1) (2006).

CMS refused to acknowledge that the letter was a rule under the APA that either had to be reported to Congress under the CRA—as both CRS’s and GAO’s general counsel concluded it did—or promulgated pursuant to the notice and comment requirements of the APA, as asserted in a lawsuit filed by New York and three other states challenging the binding validity of the letter. Senator John D. Rockefeller, chairman of the subcommittee with jurisdiction over SCHIP, following a House hearing on the CMA action,<sup>69</sup> filed a disapproval resolution<sup>70</sup> with 49 co-sponsors. The resolution was never reported or discharged out of committee. In January 2009, with increased Democratic majorities in both houses, Congress passed authorization legislation for expanded funding of SCHIP. The bill contained no express mention of the contested eligibility requirements. The president signed it into law on February 4, 2009.<sup>71</sup> That same day, the president issued a presidential memorandum directing the secretary of HHS to withdraw the August 2007 letter. On June 30, 2010 New York State received CMS approval of its state plan amendment which raised family income eligibility up to 400% of the FPL retroactive to April 2009.

## C. Perceived CRA Structural and Interpretive Impediments

As has been indicated, apart from the flurry of carryover period disapprovals in 2017, in the 20 years since its passage, the CRA disapproval process has been used sparingly. Those supporting the wider use of the regulatory disapproval mechanism have raised several criticisms and questions concerning the process. These have included a need for a screening mechanism for submitted rules; the absence of an expedited procedure in the House of Representatives for consideration of disapproval resolutions; the deterrent effect of the need for a supermajority to overcome a veto; the uncertainty about which rules the law covers; and the judicial enforceability of its key requirements.

### 1. Lack of a Screening Mechanism to Pinpoint Rules That Need Congressional Review and the Need for a Supermajority; Proposals for Change; the REINS Act

Proponents of an expanded use of the CRA process have called for a screening mechanism that would alert committees to rules that may raise important or sensitive substantive issues. In their view, the lack of timely and meaningful substantive information prevents busy committees from prioritizing such issues.<sup>72</sup> As discussed above, the comptroller general’s reports on major rules are really just check lists for legally required agency tasks, not substantive assessments of whether those tasks were done properly or whether the rules accord with congressional intent.

It is rarely the case that jurisdictional committees or interested members lack knowledge of the *existence* of the most sensitive rules. Stakeholders, their lobbyists and public interest groups, among others, fill the notification gap. What critics say is absent is in-depth scrutiny and analysis of individual rules by an authoritative and presumably neutral source that could provide the basis for triggering meaningful congressional review. Opponents reject this argument and argue that the CRA, in its current form, is exactly what Congress intended, and that any lack of action under it does not equate to lack of knowledge of major rules.

Three distinct categories of reform proposals dealing with these concerns have abounded since the 105<sup>th</sup> Congress: establishment of an independent substantive screening body; creation of a joint congressional rulemaking review committee; and requiring that all agency major rulemaking efforts be deemed proposals that must be approved by passage of a law.<sup>73</sup>

#### *a. Independent Body Screening Proposals*

A number of proposals would establish an independent Congressional Office of Regulatory Analysis (CORA) modeled after the scheme of the Congressional Budget Office (CBO). The CORA would be headed by a director appointed by the

69. *Protecting Children’s Health Coverage Act of 2008: Hearing on H. R. 5998 Before the H. Comm. on Energy and Com. Subcomm. on Health*, 110<sup>th</sup> Cong., (2008).

70. S.J. Res. 44, 110<sup>th</sup> Cong. (2008).

71. Children’s Health Insurance Program Reauthorization Act of 2009, Pub. L. 111-3, 123 Stat. 8.

72. See INTERIM REPORT, *supra* note 14, at 81-84.

73. A detailed discussion of such proposals may be found in MORTON ROSENBERG, *THE CONGRESSIONAL REVIEW ACT AFTER 15 YEARS: BACKGROUND AND CONSIDERATIONS FOR REFORM* (2011), <https://www.acus.gov/sites/default/files/documents/COJR-Draft-CRA-Report-9-16-11.pdf>. See also INTERIM REPORT, *supra* note 14, at 81-84.

House speaker and the Senate majority leader for a term of four years, with service in the office limited to no more than three terms. The current review functions of the comptroller general under the CRA and the CBO under the Unfunded Mandates Act of 1995 would be transferred to the proposed CORA. The CORA regulatory analysis function would be primarily confined to reported major rules. Secondary authority would be assigned to committee requests for review of non-major rules; and tertiary priority would be given to individual member requests.

Supporters of the CORA model argue that an independent office of regulatory analysis would serve the congressional need for objective information necessary to evaluate agency regulations. In their view, a CORA would also provide credibility and impetus for wider utilization of the review mechanism. Further, by providing intensive review of certain major rules, it would forestall the possibility of OIRA's reluctance to provide an objective evaluation of agencies' regulations,<sup>74</sup> and make the regulatory process more rational and transparent. Those opposing the establishment of an office of this kind contend that creation of a new congressional bureaucracy for review purposes would be unnecessarily duplicative of what the agencies have already done. They raise doubts as to whether a CORA could provide the necessary assessments within the time frames of the CRA, and whether the appointment of a CORA director by the leadership of the House and Senate would make the office political in nature.<sup>75</sup> They also claim it would be extraordinarily expensive.

Congress agreed to a limited test of the CORA concept late in the 106<sup>th</sup> Congress with the passage of the Truth in Regulating Act of 2000.<sup>76</sup> That legislation established a three-year pilot project for the GAO to report to Congress on economically significant rules. Under this pilot program, whenever an agency published an economically significant proposed or final rule a chairman or ranking minority member of a committee of jurisdiction of either house of Congress could request the comptroller general to review the rule. The comptroller general was to report on each rule within 180 calendar days. The report had to contain an "independent evaluation" by the comptroller general of the agency's cost-benefit analysis. Only one request was ever made pursuant to the provision. That was submitted in January 2001 by the chairs of the jurisdictional committees of the House and Senate with respect to the Department of Agriculture's forest planning and roadless area rule. GAO advised the requesters that although the act authorized \$5.2 million per year for the program, no monies had been appropriated and it could not proceed with the request. No further action was taken on the request, and Congress never enacted an appropriation, thereby forestalling implementation of the project. It may be noted that the 180-day reporting period did not mesh at all with the time period under the CRA for consideration of rules subject to resolution of disapproval, although completed requests for analyses of *proposed* rules might coincide with such reviews. In any event, the pilot program established by the act expired in January 2004 and was never revived.

### ***b. Joint Congressional Committee Models***

In an apparent attempt to avoid the criticisms of the CORA model and to remedy some of the perceived impediments to the effectiveness of the CRA, proposals have been introduced which would amend the CRA by establishing a joint congressional committee with broad authority to investigate, evaluate and recommend actions with respect to the development of proposed rules, the amendment or repeal of existing rules, and disapproval of final rules submitted for review under the CRA. The responsibilities would have been in addition to the current statutory framework providing for review of new rules that are required to be reported. A version of such a joint committee proposal would permit the joint committee to recommend disapproval of new rules to jurisdictional committees. The joint committee would be capable of holding hearings, requiring the attendance of witnesses, and making rules regarding its organization and procedures. The bills also provided for an expedited consideration procedure in the House. The only part to be played by the joint committee in the rule review process would have been to recommend to jurisdictional committees that certain submitted new rules be subject to disapproval resolutions, thereby according deference to the current roles of jurisdictional committees. Downsides to such a committee include the considerable time necessary for members to consider its recommendations, the cost of developing requisite staff expertise, and the inherent potential for political influence, actual or perceived.

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74. *The Regulatory Right-to-Know Act and the Congressional Office of regulatory Analysis Act: Hearing on S. 59 Before the S. Comm. on Governmental Affairs*, 106<sup>th</sup> Cong. (1999) (testimony of Robert W. Hahn and Robert E. Litan, Brookings Institution), [https://www.brookings.edu/wp-content/uploads/2016/06/04\\_righttoknow\\_litan-1.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/04_righttoknow_litan-1.pdf).

75. *Id.*; see also Jennifer Coderre, *Senate Panel Continues Debate on Costs, Benefits of 'Regulatory Right-to-Know' Bills*, BNA DAILY NEWS REPORT, April 23, 1999, at A-30. Comments on CORA were attributed to Gary Bass of OMB Watch.

76. Truth in Regulating Act of 2000, P.L. 106-312, 114 Stat. 1248-50; 5 U.S.C. § 801 (2015).

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*c. Affirmative Approval Proposals/The REINS Act*

A third category of reform proposals would address most of the perceived impediments by requiring agencies to submit all final rules to Congress for affirmative approval by law before they could become effective. The 112<sup>th</sup> Congress saw the first introduction, and House passage, of perhaps the most ambitious and detailed version of such a review scheme. Under H.R. 10, the Regulations from the Executive in Need of Scrutiny Act of 2011 (REINS Act), all major rules that are reported to Congress would be treated as proposals which, if not approved within a specified period of time, cannot go into effect and cannot be proposed again in the same Congress. The H.R. 10 model has been followed in subsequent congresses.

The REINS Act would supplant the CRA. Rules designated “major” by the OIRA administrator must be reported to each house and the comptroller general and referred both to the appropriate jurisdictional committee and also to the House Judiciary and Senate Homeland Security and Governmental Affairs Committees. A major rule could become effective only upon enactment of a joint resolution of approval, which must be passed by the end of the 70th session day, or legislative day after Congress receives it. If not enacted within that period, the same rule could not be considered again in the same Congress. The president is authorized to make an emergency determination for certain specified exigent situations that would allow a rule to go into immediate effect, but for no longer than one 90-day period and doing so would not interrupt the statutory review process.

Both houses would have the same fast-track consideration procedure. If an approval resolution has not been acted upon by the referral committees within 15 session or legislative days, it is automatically discharged and placed on the respective house calendars. A vote on final passage must be taken within 15 session or calendar days thereafter. If a motion to proceed is agreed to, the resolution remains the sole business of the body until disposed of. Two hours of debate are allowed and the resolution is not subject to amendment. If one house acts before the other, the resolution passed by the other house will be the one voted on by the receiving house.

The REINS Act would also deal with non-major rules. The procedure and timing for consideration of non-major rules would track the CRA’s current model, which provides expedited fast-track consideration in the Senate, normal bill processing in the House, and placement on the calendar of the house receiving a passed disapproval resolution. However, the REINS Act would eliminate the current provision that a rule similar to a disapproved rule cannot be considered again unless Congress by law authorizes it.

Finally, the H.R. 10 model would have adopted two new provisions respecting judicial review. First, it would make clear that the judicial preclusion provision of Section 805 does not estop a court from determining that a rule that has not been reported is not effective. Second, Section 802(g) of the bill provides that congressional approval of a rule does not shield the rule from normal APA court review for substantive or procedural defects and may not be included in the record before a court reviewing the rule. The REINS Act proposal does not provide for a mechanism for independent screening and evaluation of reported major rules.

The House Judiciary Subcommittee on the Courts, Commercial and Administrative Law held hearings on the REINS Act on January 24 and March 8, 2011, which raised differing and contentious views on the constitutionality and practicality of the proposal.<sup>77</sup> The REINS Act passed the House on December 7, 2011 and was referred to the Senate Homeland Security and Governmental Affairs Committee for consideration. It was never acted upon in the Senate. Virtually identical versions of the REINS Act have been passed by the House in the 113<sup>th</sup>, 114<sup>th</sup> and 115<sup>th</sup> Congresses but also have not been acted upon by the Senate. As indicated previously, there is some doubt whether President Trump would sign legislation that would divest him of the virtually plenary powers he has inherited to control the exercise of the broad rule making authorities Congress has delegated to executive agencies over time.

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77. See *The REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the H. Judiciary Comm. Subcomm. on Courts, Commercial and Admin. Law*, 112<sup>th</sup> Cong. (2011) (testimony of Professor Sally Katzen and David McIntosh respectively opposing and supporting the constitutionality of affirmative approval mechanisms). See also Paul R. Verkuil, *Comment: Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 457 (1995) (proposing fast track legislative approval and limited judicial review); Stephen J. Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984) (suggesting legislative approval as a valid alternative to the legislative veto).

## 2. Lack of an Expedited Consideration Procedure in the House

Those unsatisfied with the present CRA review process argue that the absence of an expedited consideration procedure in the House of Representatives may well be a factor affecting use of the process in that body. This is because, as a practical matter, it means engaging the House leadership each time a rule is deemed important enough by a committee or group of members to seek speedy access to the floor. In view of the limits both on floor time and the ability to gain the attention of the leadership, it is argued that only the most well situated in the body will be able to gain access within the limited period of review.<sup>78</sup> It is also maintained that a perception that no action will be taken in the House might deter Senate action.

It has been suggested that this asymmetry may be reflective of the fact that the Senate has more procedural hurdles to majority rule than does the House, so the drafters of the CRA may have believed that fast-track procedures were only needed for the Senate.<sup>79</sup> The House parliamentarian speculated in 1997 that the CRA may have left out fast-track procedures for the House because the House Rules Committee can limit debate and expedite bills to the floor at its choosing.<sup>80</sup> One commenter, not inconsistent with the foregoing suggestions, contends that the “CRA is designed to ensure that political minorities are not able to use congressional procedure to hijack policy.”<sup>81</sup> The author argues that while it is well established that the House is a majoritarian institution, the House also recognizes that its committees are susceptible to capture by special interests. A prominent example cited is that if one house passes a disapproval resolution and sends it to the other house, it is placed on the calendar of that house rather than referred to one of its committees, and is the resolution that will be voted on. As a consequence, the author concludes, “[a]t the very least, Congress believes committee capture is real, because it adopted the CRA in part to circumvent committees.”<sup>82</sup>

It is interesting to note, then, that the proposed REINS Act would impose expedited procedures on both House and Senate consideration of *approval* resolutions, including automatic discharge from the committees of referral after 15 days, but reverts to the CRA model when non-major rules come under review. Since it is virtually certain that the REINS Act proposal has the imprimatur of the current House leadership, it can be speculated that at the heart of the difference is the sense of the leadership that an *approval* scheme warrants a fast track to ensure that a mere faction cannot bring executive agency rulemaking to a universal halt. But leaving the *disapproval* process to the vicissitudes of unanimous consent, suspension, special rule, or discharge petition, which may bring it to a grinding halt, is apparently acceptable because the effects are insular and confined within the House.<sup>83</sup>

## 3. The Uncertainty of the Effect of an Agency’s Failure to Report a Covered Rule to Congress

Section 801(a)(1)(A) of the CRA provides that “[b]efore a rule can take effect,” the federal agency promulgating such rule shall submit to each house of Congress and the comptroller general a report containing the text of the rule, a description of the rule, including whether it is a major rule, and its proposed effective date. The CRA contains no internal institutional mechanism to enforce compliance with its reporting requirement, but its legislative history appears to presume that private parties subject to unreported rules would be able to seek judicial relief from agency enforcement of ineffective rules.<sup>84</sup>

However, Section 805 states that “no determination, finding, action or omission under this chapter shall be subject to judicial review.” Early on, the Department of Justice (DOJ) broadly hinted that the language of Section 805 “precluding

78. The experience with respect to the repeal of the ergonomics standard, discussed *supra* at subsection C(2), would appear to bear this out.

79. See WILLIAM N. ESKRIDGE ET AL., *CASES AND MATERIALS ON LEGISLATION* 517 (4<sup>th</sup> ed. 2007).

80. See *Congressional Review Act: Hearing before the Subcomm. on Commercial and Administrative Law, H. Comm. on the Judiciary*, 105<sup>th</sup> Cong. 50 (1997) (testimony of Charles W. Johnson III, Parliamentarian, U.S. House of Representatives). This has in fact occurred with the expedited approval by the House of 13 disapproval resolutions in the first month of the 115<sup>th</sup> Congress.

81. *Mysteries of the CRA*, *supra* note 15, at 2176-77.

82. *Id.* at 2177-78.

83. Interview with House Parliamentarian John Sullivan, August 9, 2011.

84. *Legislative History*, *supra* note 9, at 6929 (1996) (“The [section 805] limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).”) The legislative history of Section of Section 805 is discussed and analyzed in MORTON ROSENBERG, *CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE* (2008), <http://research.policyarchive.org/18670.pdf>.

judicial review is unusually sweeping” so that it would presumably prevent judicial scrutiny and sanction of an agency’s failure to report a covered rule.<sup>85</sup> DOJ has succeeded with its preclusion argument in all but one of numerous federal appellate and district court rulings, which rested essentially on the plain meaning rule.<sup>86</sup> None of the opinions of those courts have come to grips with the seemingly unequivocal evidence of the contrary statements by the House and Senate sponsors of the CRA or the fact that such a reading of the act could render it ineffectual. In fact, it appears that the legislative history of the act was never briefed as an issue in these cases.

Commentators have suggested that the preclusive judicial reading of Section 805 renders the statute ineffectual and encourages agency non-reporting of covered rules.<sup>87</sup> A study by CRS indicates that in fact for a lengthy period a significant number of covered, published rules have not been reported.<sup>88</sup> It appears that Congress would be warranted in considering legislation that would clarify its original intention respecting judicial enforcement.

#### 4. The Uncertainty of Which Rules Are Covered by the CRA

The CRA’s drafters arguably adopted the broadest possible definition of the term “rule” when they incorporated Section 551(4) of the APA. As indicated previously, the legislative history of Section 551(4) and the case law interpreting it make clear that it was meant to encompass all substantive rulemaking documents, which may include policy statements, guidances, manuals, circulars, memoranda, bulletins and the like and which as a legal or practical matter an agency wishes to make binding on the affected public.

The legislative history of the CRA emphasizes that by adopting the definition of “rule” found at Section 551(4) the review process would not be limited only to rules required to comply with the notice and comment provisions of Section 553 of the APA, or any other statutorily required variations of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public. “The committee’s intent in these subsections is . . . to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties.”<sup>89</sup>

The legislation’s drafters were aware of agency practice of avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by issuing other documents as a means of binding the public, either legally or practically.<sup>90</sup> They noted that it was the intent of the legislation to subject just such documents to congressional scrutiny: “The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, ‘guidelines,’ and agency policy and procedure manuals. The committees admonish the agencies that the APA’s broad definition of ‘rule’ was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.”<sup>91</sup>

85. See letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Foiss, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at 9-11.

86. See *Texas Savings and Community Bankers Association v. Federal Housing Finance Board*, 1998 U.S. Dist. LEXIS 13470, 1998 WL842181 (W.D. Texas, June 15, 1998), *aff’d* 201 F.3d 551 (5<sup>th</sup> Cir. 2000); *United States v. American Electric Power Service Corp.*, 218 F. Supp. 3d 931, 949 (S.D. Ohio 2002); *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 228 (D.C. Cir. 2009) *cert. denied* 560 U.S. 296 (2010); *Via Christie Regional Medical Center v. Leavitt*, 509 F.3d 1259 (10<sup>th</sup> Cir. 2007); *United States v. Nasir*, 2013 U.S. Dist. LEXIS 138622 (E.D. Ky 2013); *United States v. Ameren, Mo.*, 2012 U.S. Dist. LEXIS 95065 (E.D. Mo. 2012); *Forsyth Memorial Hospital, Inc. v. Sibelius*, 667 F. Supp. 2d 143, 150 (D.D.C. 2009). *Cf.*, *United States v. So. Indiana Gas & Electric Co.*, 2002 U.S. Dist. LEXIS 20936 at 13-14, 55 ERC (BNA) 1597 (S.D. Ind. 2002) (noting in *dicta* that the holdings in *Texas Savings* and *American Electric Power* “would render the [CRA] ineffectual.”).

87. See, e.g., Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies’ Noncompliance with the Congressional Review Act*, 62 ADMIN. L. REV. 907, 908, 911, 915-17 (2010); Rosenberg, *supra*, note 10 at 1069-74.

88. CURTIS W. COPELAND, CONG. RESEARCH SERV., R40997, CONGRESSIONAL REVIEW ACT: RULES NOT SUBMITTED TO GAO AND CONGRESS (2009) (detailing over 1000 rules not received by GAO or both houses of Congress between 1999 and 2009). Also unresolved is the question whether an unreported rule that has been effective for many years is still subject to CRA disapproval if then reported. Would an argument founded on “staleness” or due process concerns trigger litigable issues?

89. *Legislative History*, *supra* note 9, at 6930.

90. This practice had been long recognized and criticized in administrative law commentaries. See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind The Public?*, 41 DUKE L.J. 1311 (1992). See also, U.S. GEN. ACCOUNTING OFF., GAO/GGD-98-126, FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES (1998).

91. *Legislative History*, *supra* note 9, at 6930.

It is likely that virtually all of the 70,000 non-major rules thus far reported to the comptroller general have been either notice and comment rules or agency documents required to be published in the Federal Register. It is certain that many (perhaps even thousands) of rules that the CRA's sponsors intended to be subject to review have not been submitted.<sup>92</sup> Identifying an exact number is difficult since such covered documents are rarely published in the Federal Register and thus may only come to the attention of committees or members serendipitously or through interest groups' complaints.

Nine such agency actions have come to the attention of committee chairmen and members and were referred to the comptroller general to determine whether they were covered rules. Utilizing the "legal and practical" impact standard suggested by CRA's sponsors, the comptroller general determined the actions to be covered rules in six of the nine cases.<sup>93</sup>

## 5. The Problem of Agency Non-Reporting

In December 2009 CRS issued a study that revealed that GAO had catalogued over 1,000 covered rules that it had not received between 1999 and 2009. Almost none of them were reported to both houses of Congress.<sup>94</sup> During each of those years, GAO monitored the Federal Register for published final substantive rules and compared it with rules it had actually received. A number of the unreported rules were rules deemed significant by OIRA. GAO notified OIRA on at least five occasions during this period about the lapses, provided it with lists of agencies and their unreported rules, and encouraged it to use the information to ensure agency compliance. It was not until November 2009 that OIRA directly contacted agencies advising them to comply. The e-mail went to all agencies and did not directly identify the non-compliant agencies or the unreported rules. Even with that notice, agency response was slight. In 2010 GAO changed its strategy and for the first time directly contacted non-reporting agencies. The effect was dramatic. In the next nine months the number of unreported rules dropped to four.<sup>95</sup>

There is no evidence that non-compliance was deliberate.<sup>96</sup> But clearly some systematic scheme of monitoring and reporting is necessary. GAO took on the task voluntarily in 1998 but never advised anyone in Congress of the emerging situation, except in its annual written testimony before Congress. If the solution is simply making an agency aware of its lapses, someone should be officially given the job of doing so. It certainly should be considered a task for a CORA or another screening body that may be created. And the task would be easier if the threat to the effectiveness of the unreported rule was meaningful.

In that vein, some attention also needs to be given to the difficult problem of identifying in the body of covered rules those agency document issuances that impose, legally or practically, new obligations and duties on the regulated public. Virtually no such documents will be published in the Federal Register. Likely the most effective means of identification will come from the affected public or concerned agency personnel. A confidential tip line could be considered, like those offered by agencies to whistleblowers, in whatever screening body that may be established in the future.

## D. Concluding Observations: Establishing a Collaborative Enterprise

In 2006 and 2007, if for no other reason than to maintain a credible congressional presence in the process of delegated administrative lawmaking, suggestions for at least modest legislative remediation of the perceived flaws in the CRA were presented in a number of forums. These included hearings held by the House Judiciary Subcommittee on Commercial and Administrative Law, a CRS symposium, CRS and GAO reports, published recommendations of the House Judiciary

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92. An investigation by the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Government Reform Committee revealed that 7,523 guidance documents issued by the Department of Labor, the Environmental Protection Agency, and the Department of Transportation which were of general applicability and future effect had not been submitted for CRA review during the period March 1996 through November 1999. See H. COMM. ON GOVERNMENTAL REFORM, NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS, H.R. REP. NO. 106-1009 (2000), <https://www.congress.gov/106/crpt/hrpt1009/CRPT-106hrpt1009.pdf>.

93. For a discussion of the details of the GC's determinations, see ROSENBERG, *supra* note 73.

94. See Copeland, *supra* note 13. The CRA provides that for a rule to become effective it must be reported to both GAO and the two houses of Congress.

95. Interview with Robert J. Cramer, Managing Associate General Counsel, August 15, 2011.

96. *Id.*



Committee, and academic writings.<sup>97</sup> Participating witnesses and panelists concurred that the role of Congress as the nation's dominant policy maker was being threatened by widespread agency evasion of notice and comment rulemaking requirements; the continued pressure for legislative enhancement of the trend toward substantive judicial review of agency rules; and the frequent calls for increased presidential control of agency rulemaking.

In particular, studies characterizing current rulemaking procedures as ossified conclude that rule promulgation has become too time consuming, burdensome, and unpredictable.<sup>98</sup> Academic critics assign blame to each of the branches for the increasingly ineffective implementation of statutory mandates, but often identify the courts as the chief culprits. The judiciary overly intrudes in agency decisionmaking, critics say, through interpretations and applications of the APA's arbitrary and capricious test.<sup>99</sup> They maintain that courts will find an agency to have violated its duty to engage in reasoned decisionmaking if its statement of basis and purpose contains any gap in data, or other analytical flaw, with respect to any issue. The commentators cite statistical indications that reviewing courts have been holding major rules invalid up to fifty percent of the time.<sup>100</sup> Preliminary findings from a study commissioned by the House Judiciary subcommittee suggest a far less successful challenge rate, but the perception that the courts are an obstacle has encouraged agencies to use alternative vehicles to make and announce far-reaching regulatory decisions.<sup>101</sup> For example, academic critics argue that agencies can use actions such as adjudication of individual disputes or so-called "non-rule" rules, where purportedly non-binding statements of policy are made in guidances, operating manuals, staff instructions, or similar agency public communications.<sup>102</sup>

These proposed solutions are essentially adjurations to the judiciary to modify or abandon its current doctrinal approach. For example, some scholars suggest that courts abolish the duty to engage in reasoned decisionmaking and instead conduct a review of rules to determine whether they violate clear statutory or constitutional constraints, or apply the *Chevron* deference more consistently and strictly.<sup>103</sup>

Commentators have also argued that fixing the CRA's structural and interpretive flaws is only part of the problem facing Congress. Another part, they claim, is lack of congressional interest in confronting and dealing with complex and sensitive policy issues that major rulemakings often present. During the CRS-sponsored symposium on "Presidential, Congressional, and Judicial Control of Rulemaking," one panelist, Professor Jack Beermann, expressed the view that making it easier for Congress to overturn an agency rule may come at a high political cost. He asked "Does Congress want to be in the position where [it is perceived] that everything an agency does is their responsibility since they've taken it on and reviewed it under this mechanism? ... Do they want to have that perception?" He concluded that "I think that this may just increase the blaming opportunities for Congress."<sup>104</sup>

97. See INTERIM REPORT, *supra* note 14; *Reauthorization of the Administrative Conference of the United States: Hearing Before the H. Comm. on the Judiciary Subcomm. on Com. and Adm. Law*, 109<sup>th</sup> Cong. (2007) [hereinafter *Reauthorization Hearing*].

98. See, e.g., Jerry L. Mashaw & David L. Harst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 275 (1987); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 ADMIN. L.J. AM. U. 81, 82-84 (1996) [hereinafter *Regulatory Reform*]; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) [hereinafter *Deossify Rulemaking*]; Richard J. Pierce, Jr., *Two problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300 (1988); Verkuil, *supra* note 77.

99. See, e.g., *Regulatory Reform*, *supra* note 98, at 83; *Deossify Rulemaking*, *supra* note 98, at 65-66.

100. See Peter H. Schuck & Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1022 (1990) (finding that during 1965, 1974, 1984 and 1985, reviewing courts upheld only 43% of agency rules); Patricia M. Wald, *Judicial Review; Talking Points*, 48 ADMIN. L. REV. 350 (1996) (noting that of 36 major rules reviewed by the District of Columbia Circuit during one year, 17 (or 47%) were remanded in part for reconsideration.)

101. *Reauthorization Hearing*, *supra*, note 97 (Testimony of Professor Jody Freeman). The study was never finalized or published.

102. See, e.g., Anthony, *supra* note 90; Robert A. Anthony, "Well You Want the Permit, Don't You?": *Agency Efforts to Make Non-legislative Documents Bind the Public*, 44 ADM. L. REV. 31 (1992); Michael Asimow, *California Underground Regulations*, 44 ADM. L. REV. 43 (1992).

103. See, e.g., Verkuil, *supra* note 77; Pierce, *supra* note 98; *Deossify Rulemaking*, *supra* note 98, at 71-93.

104. In subsequent writings Professor Beermann has argued that it is essential that Congress play a central role in rule review. See Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 BOSTON U. L. REV. 727, 758-61 (2009) ("For Congress to be truly responsible for the administrative state, it must monitor and supervise the process of administrative rulemaking and administrative policymaking more generally... Concerted attention by Congress to agency rules would increase the legitimacy of agency rulemaking, since Congress would be an active partner in the process and could not credibly feign surprise when confronted with an undesirable agency rule.").

Some of the commenters raised Congress's failure to understand and appreciate the nature of the stakes involved and the dangers inherent in failing to act decisively to resolve them. Professor Cynthia Farina has argued that the administrative lawmaking process's legitimacy is at the heart of the deossification, nondelegation and new presidentialism debates. Her insight that the regulatory process needs to be seen as a "collaborative enterprise" involving appropriate official actors and institutional practices could be a helpful guidepost moving forward.<sup>105</sup>



This chapter has identified structural and interpretive issues affecting use of the CRA. While there have been some instances of the law apparently influencing the implementation of certain rules, the threat of congressional scrutiny and disapproval has not proven to be a significant factor in agency rule development. The consistent use of appropriations limitations to stall rule development or the implementation of final rules, in contrast to the quite limited use of the CRA's formal disapproval process, is corroborative evidence of the ineffectiveness of the current review scheme. The first instance in which an agency rule was successfully negated was seen as a singular event not soon to be repeated. Indeed, when a new president took office in 2009 and his party had comfortable majorities in both houses, neither Congress nor the president saw a need to use the CRA against the purportedly offensive midnight rules of the outgoing administration. They turned instead to traditional APA processes and administrative practices to effect changes. Although a handful of disapproval resolutions have recently been enacted, they are narrow in scope, of minimal substantive importance, and will likely be seen as exercises in political symbolism. The view that the current CRA scheme provides no better rule review than the regular legislative process appears correct and needs to be addressed in an effective manner.

Presently, both houses of Congress and the White House are controlled by one political party. Although a common deregulatory inclination is evident, the political manner of achieving and maximizing that goal may be a subject of interbranch conflict. The House has long been committed to a REINS Act solution, one that would make all major rules simply proposals that require full legislative approval. The Senate has never taken a formal stance on that scheme. More importantly, enacting the REINS Act would severely diminish the long time accumulated, pervasive presidential control of agency rule making. It is not beyond the realm of reasonable possibility that President Trump will be reluctant to relinquish the measure of control that presidents now enjoy. If that proves true, the Congress needs to seriously consider ameliorative methods within their control, however incremental, that will move toward retrieval of its lost authority over the administrative law making process.

Continuance of the current status quo is politically, and constitutionally, unacceptable. One commenter has opined that if a rulemaking agency perceives that congressional review is only a remote possibility "it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road." Such an attitude is reinforced "so long as [the agency] believes that the president will support its rule."<sup>106</sup> That this observation has substance is reflected in a widely cited study by the former dean of the Harvard Law School and now Supreme Court Justice Elena Kagan.<sup>107</sup> Kagan suggests that when Congress delegates administrative and lawmaking power specifically to department and agency heads, it is at the same time making a delegation of those authorities to the president, unless the legislative delegation explicitly states otherwise. From this flows, she asserts, the president's prerogative to supervise, direct and control the discretionary actions of all agency officials. "A Republican Congress proved feckless in rebuffing Clinton's novel use of directive power—just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process," Kagan argues.<sup>108</sup> She explains that "[t]he reasons for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power—or, what is the same thing, to deny authority to the other branches of government."<sup>109</sup>

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105. Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J. OF L. & PUB. POLICY, 227, 232, 235, 238 (1998).

106. See Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1089-90 (2001).

107. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246 (2001).

108. *Id.* at 2314.

109. *Id.*

With these views in hand the case can be made that there is an urgent need to restore Congress's political accountability in order to shore up the administrative lawmaking process. An effective congressional rulemaking review process is an essential component of that restoration. Congress has the tools to accomplish that objective, either by a gradual, step-by-step process utilizing its internal rulemaking powers, or at once by a grand legislative accommodation. Either way, the ultimate goal should be the establishment of a "collaborative enterprise" between Congress and the executive. Such a resolution would rest on an understanding that broad delegations of lawmaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. It also would rest on an understanding that agency lawmaking is no less political in nature than congressional lawmaking—even in areas involving sophisticated issues of science and technology—and must draw on the acknowledged strengths and competences of both constitutional actors. Thus, when Congress speaks through legislation, whether by joint resolution of approval or disapproval, it is acting in its representative function and rendering political judgments that are presumptively reflective of the people's will. It is the defining exercise of democratic power.

The president, in a supervisory and managerial role, is best situated to perform his constitutional duty to ensure that the administrative bureaucracy is faithfully executing congressional directives. Where those directives are vague, it is implicitly the president's role to supply necessary substance and explanation. To assure that national programs are effectively and efficiently carried out, the president's encompassing presence in the agencies is welcome and legitimate. The chief executive should assist agencies in determining responsibilities, setting priorities, allocating limited resources, balancing competing policy goals, and resolving conflicting jurisdictions. But the president should not be the ultimate "decider" in our constitutional scheme.<sup>110</sup>

Any reformation of the current rulemaking review scheme must draw upon the lessons learned from the ineffective CRA and the insights supplied by the debates on ossification, non-delegation and the new presidentialism, which hopefully provide a framework for realizing a scheme for a collaborative enterprise. Earlier in this study I have noted that effective congressional oversight sustains and vindicates Congress's role in our constitutional scheme of separated powers and checks and balances. That scheme envisions and establishes a perpetual struggle for policy control between Congress and the executive. The framers of our Constitution had a basic distrust of government as a result of their colonial, early state, and Articles of Confederation experiences. This distrust motivated the structure of the federal government in the Constitution; that is, separating powers among the three branches to avoid concentrations and abuses and to facilitate "checks and balances" among branches.

In practice, the powers of the two political branches are too incomplete for one to gain total control of the departments and agencies of the executive branch. Legislative oversight is the mechanism that attempts to assure that Congress's will is carried out. A more complete and accurate picture, then, is not of congressional dominance, or of executive recalcitrance, but of a dynamic process of continuous sparring, confrontation, negotiation, and ultimate accommodation.

In this spirit a collaborative enterprise should be established respecting review of administrative lawmaking. The present scheme of review of the CRA should be revised to (1) review only major rules that would be subject to disapproval by joint resolution; (2) establish an independent CORA that would provide expert regulatory assessments of reported major rules for committee guidance; (3) provide for an expedited consideration procedure for the House of Representatives equivalent to that of the Senate; (4) assure that court review and sanction is available against enforcement of unreported rules; and (5) establish a rule of construction that allows courts to take into account the failure to veto a reviewed major rule. Most of these suggested reforms can be accomplished through the internal rulemaking powers of each house. Adoption of these suggested reforms would streamline the review process, make it more efficient and, most importantly, make it more credible as an effective and fair oversight mechanism. It would also avoid the virtual political impossibility of achieving presidential acquiescence to a REINS Act approval scheme.

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110. See Peter L. Strauss, *Foreword: Overseer, or 'The Decider'? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) ("[I]n ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role—like that of Congress and the courts—is that of overseer and not decider. These oversight responsibilities, in my judgment, satisfy the undoubted constitutional specification of a unitary chief executive, while avoiding ... executive tyranny.")

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in Part II:

Curtis W. Copeland: *The Presidential–Congressional Power Imbalance in Rulemaking*