The Heritage Foundation

LEGAL MEMORANDUM

No. 367 | DECEMBER 30, 2024

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

The Return of the Congressional Review Act

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KEY TAKEAWAYS

The Congressional Review Act empowers Congress expeditiously to review and nullify improvident agency rules.

Congress and the first Trump Administration proved that the CRA is a valuable tool with which to restrain the administrative state.

A revised CRA should specify that Congress may reject multiple rules by up-or-down vote and private parties may legally challenge failure to submit a rule to Congress.

Introduction: The Provenance, History, and Purpose of the Congressional Review Act

The number of pages in the *Federal Register* containing new rules promulgated annually by federal agencies greatly outpaces the corresponding number of pages in the *Statutes at Large* containing a year's new legislation.[1] Both major political parties are guilty.[2] One explanation for that imbalance is that Congress commonly punts to an agency the responsibility to decide important or divisive issues that have bewitched Members because of honest uncertainty over their resolution or entrenched partisan disagreement.[3] For that reason alone (although there are more), some administrations govern the nation via agency regulations or guidance documents instead of by legislation. The result is that "[a]gency rulemaking

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has effectively replaced congressional lawmaking as the primary mode of American governance."[4]

That phenomenon is likely to occur during the final year of an Administration as the outgoing President attempts to write his legacy into the history books, particularly as he or she turns the White House keys over to the incoming person belonging to the other major party. From at least the November of a presidential election year through the following January 20 when a new Administration takes office, agencies try to pass what have been termed "midnight rules" to carry forward into law policies that might not—or assuredly would not—be endorsed by the incoming President.[5] At such times, a federal statute known as the Congressional Review Act (CRA) might come into play to prevent an outgoing Administration from leaving above-ground or submerged mines to sink or obstruct the revisionary policies of the incoming Administration.[6]

Enacted in 1996 with bipartisan support,[7] the CRA was Congress's second major attempt through general legislation to corral agency governance through rules.[8] The first such device was the "legislative veto." Sprinkled through the U.S. Code were nearly 300 provisions that enabled both chambers of Congress, or sometimes merely one, to pass a resolution that had the effect of nullifying an agency rule or some other agency action.[9] Although the legislative veto was a politically attractive approach for all Members of Congress because it enhanced their legislative authority, it was a controversial mechanism because it appeared to conflict with the bicameralism and presentment requirements that Article I, § 7, requires before a "Bill" may become a "Law."[10] That is, congressional vetoes could permit one chamber of Congress to nullify a presumptively lawful agency action without the assent of the other chamber or the President even though Article I requires the agreement of all three to enact a law. Decades of debate in the academy produced no agreement on the legitimacy of that practice.[11] Eventually, a case reached the Supreme Court of the United States, which held in its 1983 decision in *INS v. Chadha* that the legislative veto is unconstitutional.[12] It took a while for Congress to respond to *Chadha*, but in 1996, the CRA ultimately became Congress's attempt to reassert control over the Fourth Branch of government.[13]

The CRA empowers Congress expeditiously to review and nullify improvident agency rules. It does so principally in two ways. *First*, it requires every agency to submit every new rule to the Comptroller General, the House of Representatives, and the Senate so that Congress has the opportunity, with the advice of the Comptroller General, to review the rule before it can take effect. *Second*, it creates a so-called fast-track process enabling Congress to

vote up or down on a joint resolution of disapproval of every new rule without the delay occasioned by Senate practices, particularly the filibuster.[14] A joint resolution passed by each chamber then goes to the President for his signature or veto. If the President signs it (or it is repassed by a two-thirds vote of each chamber following the President's veto), the statute nullifies the rule and bars an agency from later adopting any "substantially similar" rule absent the passage of a new act of Congress.[15]

Generally speaking, the CRA has not played a major role in cabining the reach and growth of the administrative state. From 1996 to 2019, more than 200 resolutions of disapproval were introduced, but only 20 became law.[16] After all, the White House Office of Management and Budget (OMB) reviews agency rules to ensure (inter alia) that they do not depart from the Administration's policies. The President therefore has the opportunity to reject a new rule before it goes into effect, thereby making it less likely that he or she would be willing to veto a congressional joint resolution of disapproval—which, in turn, makes it less likely that Congress would spend its time on a resolution that would be headed for a certain veto.[17]

But a different scenario occurs when a new Administration first comes into office with a majority of the House and Senate in the hands of the President's own party.[18] In that case, the President and Congress might conclude that a full regulatory housecleaning is necessary to eliminate the outgoing party's policies that the electorate rejected in the preceding November election.[19] The new Congress and President can use the CRA to claw back agency rules issued during the last year of the prior Administration.[20] We were in that position during the first Trump Administration and, now that the Biden Administration's interregnum is drawing to a close, are about to witness the same scenario arise during at least the first two years of the second Trump Administration.

In contrast to earlier transitions, during which the CRA was used successfully only once,[21] President-elect Donald Trump used the CRA with alacrity during his first term in office.[22] Interested in remaking the regulatory state to lift what he perceived as inefficient, burdensome, and unnecessary regulatory and permitting requirements,[23] he issued a series of executive orders designed to eliminate (or reduce to the extent possible) adverse effects on economic growth; prevent agency officials from engaging in *ultra vires* activities; and use a cost-benefit analysis to decide whether, and if so how, to regulate the public.[24] Atop that, however, the President signed 16 CRA joint resolutions of disapproval passed by Congress to nullify the effect of agency rules adopted during the Obama Administration.[25]

The Purpose, Operation, and Effect of the CRA

Congress designed the CRA to operate as closely to a legislative veto as the Supreme Court's *Chadha* decision would allow.[26] The CRA therefore accommodates the bicameralism and presentment requirements that *Chadha* requires. It does so by requiring the assent of each chamber of Congress and the President before a rule may be nullified. To do so, the CRA requires every agency, including so called independent agencies,[27] to submit to the Comptroller General and each chamber of Congress a copy of a new rule before it can take effect. That allows Congress, with the assistance of the Comptroller General, to review the rule's legality, wisdom, costs, and benefits before it can adversely affect anyone. If the House of Representatives and the Senate are each troubled by a rule, they can use an expedited procedure to pass a joint resolution of disapproval and submit it to the President. If he or she signs it, or if, after his or her veto, each chamber repasses the resolution by a two-thirds vote, the rule is deemed null and void. The CRA also provides that an agency may not repromulgate either that rule or one that is "substantially similar" unless and until a new substantive law justifying the rule takes effect.[28]

Accordingly, it is important to answer the following questions: (1) What "rules" trigger the operation of the CRA? (2) What happens once the act is engaged? (3) What is the effect of the President's decision to sign a joint resolution of disapproval? The next three subsections answer those questions.

What Is the Definition of a "Rule" for Purposes of the CRA?

The CRA incorporates the definition of the term "rule" found in the Administrative Procedure Act (APA),[29] which defines that term as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[30] Rules can take various forms: regulations, guidance documents, manuals, opinions, letters, and so forth. Whatever the particular format of an agency's discussion might take, numerous documents would qualify as "rules" for purposes of the CRA. While not every agency document or position is a "rule" for CRA purposes,[31] numerous parties—such as the federal courts,[32] the U.S. Department of Justice,[33] the Government Accountability Office (GAO),[34] the Congressional Research Service,[35] and various scholars[36]—have concluded that the term "rule" should be read and applied broadly to ensure that Congress can review any generally applicable implementation, interpretation, or prescription of law or policy by unelected agency officials before they can direct others with respect to what federal law prohibits, requires, or allows.

It makes sense to interpret the term "rule" in that broad sense given the purposes of the CRA.[37] Congress intended that the CRA would reach every agency document that sought to impose legal requirements on private parties.[38] Agencies commonly use a host of formal and informal memoranda to offer their positions on the interpretation of federal law and policy, and Members of Congress are savvy enough to be aware of that practice.[39] A narrow construction of "rule" would encourage agencies to disguise the import of their memoranda and even hide them from the public. That would prevent the public from learning about potential legal pitfalls or opportunities before it was too late and keep Congress from overseeing the operation of the agencies. That is important even though it is no longer the case, as it was when the CRA was passed, that the federal courts must defer to an agency's reasonable interpretation of a vague or ambiguous statute.[40] Even though an agency's interpretation of the law is not controlling on the courts, the *in terrorem* effect of an agency's views—particularly on individuals and small businesses, which cannot afford the expensive litigation necessary to challenge an agency's legal interpretation—militates in favor of ensuring that Congress has the opportunity to review an agency rule before it can have an adverse public effect.

What Happens Once an Agency Submits a New Rule to the Comptroller General and Congress?

The Clocks. The CRA creates an expedited process by which Congress can prevent stalling and quickly review and nullify a rule by passing a joint resolution of disapproval for the President's signature or veto.[41] That review process contains three different clocks that are triggered by the filing of a new rule with Congress and the Comptroller General.[42]

The first clock starts a 15-day period for the Comptroller General to analyze for Congress a "major rule"[43]—that is, a rule that would have a major effect on the economy.[44] As part of that analysis, the Comptroller General must determine whether the agency has complied with various specified acts of Congress and has completed a cost-benefit analysis of the new rule.[45] The second clock gives Congress 60 days to use the expedited process to decide whether to nullify a rule, except in cases of adjournment.[46] The third clock addresses the effective date of a new rule. It provides that, generally speaking, no rule may take effect until 30 days have passed since its submission.[47]

Given the running of those clocks, three issues become important: (1) When must an agency submit a new rule to Congress and the Comptroller

General? (2) What happens once that submission occurs? (3) How does the expedited congressional procedure work?

The Filing Date of the New Rule. The filing date of the agency's new rule with Congress and the GAO is critical to the operation of the CRA. The act provides that, before an agency "rule" can go "into effect," the issuing agency must submit the rule to the House of Representatives and Senate so that each chamber can review its effect and vote on a bill to nullify a particular action.[48]

The text of the CRA is clear about that condition. It provides as follows: "*Before a rule can take effect*, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing" the following elements: "(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule."[49] In addition, the CRA provides that the congressional review period "does not commence until 'the *later* of the date on which' the *Federal Register* publishes the rule or on which 'Congress *receives the report*' required by the Act."[50] The text of the CRA thus clearly states that the 60-day period for Congress to consider a rule does not commence unless and until an agency submits its report.

As one scholar has noted, "There is nothing particularly mysterious or complicated about this mandate" because "[t]he very first sentence" of the CRA "states that, 'Before a rule can take effect, the Federal agency promulgating'" the rule "*shall* submit to each House of the Congress and to the Comptroller General" a report containing certain specified items.[51] In short, an unsubmitted rule is not yet "in effect." Why? Because Congress wanted to ensure that an agency could not deny Congress its ability to nullify a rule by refusing to submit the rule to Congress. The contrary interpretation would nonsensically reward an agency for thumbing its nose at the CRA and Congress.[52]

The consequence of failing to submit a rule to Congress is that, because the clock never begins to run, Congress and the President can take advantage of the CRA's fast-track procedures to nullify a rule that was issued years earlier. For example, in 2018, the Article I and II branches combined to nullify a guidance document adopted by the Consumer Financial Protection Bureau in 2013.[53] This is significant because there are estimates that agencies have failed to submit thousands of rules to Congress.[54] Any unsubmitted rule is therefore a potential subject of a CRA nullification, regardless of how long ago it was adopted.[55]

The Debate and Vote on a Resolution of Disapproval. If a Member of Congress introduces a disapproval resolution, the bill will come up for a

vote pursuant to a "fast-track" procedure that avoids parliamentary delays, including (perhaps especially) a delay in committee or a Senate filibuster.[56] If both chambers pass the resolution, it goes to the President for his signature or veto in the same manner as any other "Bill" passed by Congress.[57]

What Happens When the President Signs a Joint Resolution of Disapproval?

If the President signs the resolution, or if Congress overrides his veto by the requisite two-thirds vote in each chamber, the rule becomes null and void. Moreover, to prevent agency shenanigans—such as issuing a new rule with only trivial or cosmetic changes—the CRA provides that an agency cannot re-adopt a nullified rule or a "substantially similar" one unless Congress passes new authorizing legislation justifying reissuance of the rule.[58] The reason is that the now-passed-into-law disapproval resolution amends the underlying statute on which the agency relied for its rule.[59] The disapproval resolution has the effect of adding a codicil to the underlying statute providing that "*Statute A* does not authorize the agency to issue *Rule X*." In fact, by prohibiting an agency from adopting a new rule that is "substantially similar" to the now-invalidated rule, Congress has created a buffer zone around the original rule to make it clear that Congress means business when it acts under the CRA.[60]

How to Improve the CRA

Congress could improve the CRA by revising it in (at least) two respects.

First, the text of the CRA contemplates that Congress will consider each agency rule on a stand-alone basis rather than combining them in order to save time.[61] It is uncertain whether the CRA authorizes Congress to package multiple agency rules into a single package "Bill" that would be subject to an up-or-down vote on the entire package.[62] Unlike some state constitutions,[63] Article I of the U.S. Constitution does not contain a "single subject" requirement,[64] and Congress often combines multiple topics into one bill.[65] Nonetheless, the CRA does refer to "*the* rule" when identifying one of the items that an agency must send to Capitol Hill, so there is some ambiguity in this regard. Accordingly, it would make sense for Congress to clarify this issue by revising the CRA to make it clear that Congress can draft a disapproval resolution that nullifies multiple agency rules in one "Bill."

Second, Congress should also make it clear that the federal courts may review an agency's refusal to comply with the CRA submission

requirements.[66] It should go without saying that, because an unsubmitted agency rule is not yet "in effect" if it has never been submitted to Congress, the courts—whose "province and duty," quite "emphatically," is to "say what the law is"[67]—should be able to decide whether, in an agency enforcement action or in a declaratory judgment action brought by an affected party, a particular agency rule is null and void because it has never been submitted to Congress as required by the CRA.[68] Nonetheless, some courts, including the United States Court of Appeals for the District of Columbia, have concluded that courts cannot review an agency's compliance with the CRA because that act forecloses judicial review of all such issues.[69] I have explained elsewhere why I find that this interpretation of the CRA (to be kind) is blinkered.[70] Congress could and should revise the CRA to make it clear that a court always may rule on an agency's compliance with an act of Congress—in this case, the CRA.

Conclusion

The Congressional Review Act enables Congress to review the work of the administrative state and, together with the President, expeditiously consider and reject any rule that an agency adopts. Once a new rule has been submitted to Congress, an agency may rely on the rule after the CRA review period has expired, but an agency cannot threaten or take an adverse action against anyone based on the purported authority found in an unsubmitted rule. The CRA's text and purposes demand that a rule never submitted to Congress cannot yet be deemed "in effect," regardless of the form that the rule might take. Put differently, an agency cannot run out the clock on Congress's time to review a rule that never started, because the clock never starts until the agency submits the rule as the CRA requires.

Working together seven years ago, Congress and the first Trump Administration proved that the CRA is a valuable tool with which to restrain the Leviathan. Given the second Trump Administration's continued interest in restraining improvident actions by unelected agency officials, it is likely that the first two branches will tango again—and perhaps on a grander scale.[71]

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I would like to thank John G. Malcolm, Paul J. Ray, and Roger Severino for valuable comments on an earlier draft of this *Legal Memorandum*. Any errors are mine.

Endnotes

1. "Now, in the 21st century, the administrative state wields vast power and touches almost every aspect of daily life. Among other things, it produces reams of regulations—so many that they dwarf the statutes enacted by Congress. As of 2018, the Code of Federal Regulations filled 242 volumes and was about 185,000 pages long, almost quadruple the length of the most recent edition of the U. S. Code. And agencies add thousands more pages of regulations every year." Kisor v. Wilkie, 588 U.S. 558, 629 (2019) (Gorsuch, J., concurring in the judgment) (footnotes omitted and text cleaned up). That comparison is even truer in 2024 than it was in 2019.
2. *See* Christopher DeMuth, *The Regulatory State*, Nat'l Affs., 70, 70 (Summer 2012) ("[T]he apparent partisan divide over regulations is illusory.... During the half-century before President Obama's election, the greatest growth in regulation came under Presidents Richard Nixon and George W. Bush.").
3. Remember then-President Barack Obama's quip that he could and would legislate by using his pen and phone. *See* Brendan Bordelon, *Obama Declares Congress Redundant: "I've got a pen, and I've got a phone,"* Daily Caller, Jan. 14, 2014, http://dailycaller.com/2014/01/14/obama-declares-congress-redundant-ive-got-a-pen-and-ive-got-a-phone-video/[https://perma.cc/LP9H-ZQS5].
4. Paul J. Larkin, Jr., *The Congressional Review Act and Judicial Review*, 39 Yale L. & Pol'y Rev. Inter Alia 1 (2021) [hereafter Larkin, *The CRA and Judicial Review*].
5. Examples would be the outgoing Biden Administration's DEI (diversity, equity, and inclusion); ESG (environmental, social, and governance); and transgender policies, as well as its weak attitude toward campus antisemitism. *See*, *e.g*., Yael Halon, *Ivy League Schools Should Be "Shaking in Their Boots" with Trump's Latest Nominee, Students Say*, Fox News, Dec. 13, 2024, https://www.foxnews.com/media/ivy-league-schools-should-shaking-boots-trumps-latest-nominee-students-say.
6. 5 U.S.C. §§ 801–08 (West 2024). The CRA was enacted as Title II, Subtitle E, of the Small Business Regulatory Enforcement Fairness Act of 1996, which was part of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 871 (1996). There is a considerable and growing body of CRA commentary. *See*, *e.g*., Cary Coglianese, *Solving the Congressional Review Act's Conundrum*, 75 Admin. L. Rev. 79, 82 n.11 (2022) (collecting authorities); Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 14–46 (2019). I have contributed to the resulting deforestation. *See*, *e.g*., Larkin, *The CRA and Judicial Review*, *supra* note 4; Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 Geo. J.L. & Pub. Pol'y 505 (2018) [hereafter Larkin, *Trump Administration and the CRA*]; Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 Harv. J. L. & Pub. Pol'y 187 (2018) [hereafter Larkin, *Reawakening the CRA*]; Paul J. Larkin, Jr., *Judicial Review Under the Congressional Review Act*, Heritage Found., Legal Memorandum No. 202 (2017); Paul J. Larkin, Jr., *The Reach of the Congressional Review Act*, Heritage Found., Legal Memorandum No. 201 (2017).
7. *See* 142 Cong. Rec. 8197 (1996) (statement of Sens. Nickles, Reid, & Stevens); *id*. at 6817 (statement of Sen. Levin); Note, *The Mysteries of the Congressional Review Act*, 122 Harv. L. Rev. 2162, 2165 (2009).
8. Congress always has the ability to restrain agency rulemaking by adding riders to appropriations bills that prohibit the expenditure of federal funds for the implementation or enforcement of a specified rule. Larkin, *Reawakening the CRA*, *supra* note 6, at 193–94. Appropriations laws have a limited lifespan, however, because they have effect for only a full or partial fiscal year, and a rider would need to be reinserted into any succeeding appropriations legislation for its effect to endure. Other informal congressional options to influence agencies or forestall (or mitigate) rules that are deemed unwise are the extraction of commitments from agency heads during their confirmation proceedings; public embarrassment during oversight hearings; and repeated, burdensome information requests. *See* INS v. Chadha, 462 U.S. 919, 955 n.19 (1983); Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 Fordham L. Rev. 1823, 1847 (2015) ("Congress possesses several 'soft law' tools for influencing agency behavior. For example, Congress has the power to place restrictions on the appointment and removal of agency personnel, to specify substantive or procedural restrictions on agency authority in an agency's enabling statute, to control an agency's budget through the appropriations process, to conduct oversight hearings scrutinizing agency behavior, and to impose deadlines on agency action. More informally, members of Congress can influence agency behavior through unofficial calls, letters, and other ex parte contacts with agency officials.") (footnotes omitted); Note, *supra* note 7, at 2165. Presidents also commonly order the withdrawal of pending rules or postpone the effective date of regulations that have already been published in the *Federal Register* so that their lieutenants can review and perhaps withdraw them. *See, e.g.*, Exec. Off. of the President, Memorandum from Andrew H. Card, Jr., for the Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001); William M. Jack, *Taking Care that Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 Admin. L. Rev. 1479, 1480–82 (2002). "The pattern is familiar, dating to the first hostile presidential transition from John Adams to Thomas Jefferson." Note, *supra* note 7, at 2162 (footnote omitted).
9. *See Chadha*, 462 U.S. at 1003–13 (White, J., dissenting) (collecting examples of statutes containing legislative vetoes); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2257 (2001). An informal oversight mechanism is what has been called the "fire alarm" system, "a set of procedures and practices that enable citizens and interest groups to monitor an agency and report any perceived errors to the relevant congressional committees.... The legislative sanctions backing up the system include new legislation, budget cuts, and embarrassing oversight hearings. If a fire alarm goes off, the committee can threaten and, if necessary, use one of these sanctions to bring the agency into submission. Through this mechanism, declares one political scientist, 'the Congress controls the bureaucracy, and the Congress gives us the kind of bureaucracy it wants.'" Kagan, *supra*, at 2258 (footnote omitted; quoting Morris P. Fiorina, *Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, *in* Congress Reconsidered 332, 333 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981)). Congress did not regularly use its legislative veto, but members and staff negotiated with agencies over the extent and contours of proposed agency rules "in the shadow of that sanction." Kagan, *supra*, at 2259 (footnote omitted).

10. U.S. Const. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.").
11. *Chadha*, 462 U.S. at 976 nn.12–14 (White, J., dissenting) (collecting authorities on both sides of the issue).
12. *Id.* at 944–59; *see also* Process Gas Grp. v. Consumer Energy Council, 463 U.S. 1216 (1983) (relying on *Chadha* to affirm lower court holdings that a two-house veto and a one-house veto are unconstitutional). *Chadha* noted that the informal options Congress regularly uses were not barred by its decision. *Chadha*, 462 U.S. at 955 n.19; *see supra* note 8.
13. Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 Admin. L. Rev. 1051, 1052 (1999) (noting the prior history of the CRA). Other options included requiring congressional and presidential approval of all rules or some subset of them (e.g., ones imposing above a certain dollar cost, such as $100,000,000, and rules whose violation would constitute a crime). *See*, *e.g.*, Julie A. Parks, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 Admin. L. Rev. 187, 189 n.14 (2003). Statutes imposing those requirements could and should be adopted to complement the CRA's requirements. Interestingly, the CRA might also help to overcome the delay of valuable legislation when congressional committees and executive agencies have been "captured" by the industries they oversee and regulate. *See* Note, *supra* note 7, at 2179–80.
14. "The biggest concern was the Senate parliamentary practices, so the CRA directly addresses and eliminates them as a roadblock to a vote. If the relevant Senate committee does not vote on the rule within twenty legislative days, thirty Senators can bring a joint resolution of disapproval to the floor. There, the resolution can be brought up for debate at any time. Debate is limited to a maximum of ten hours split evenly between supporters and opponents, stopping a filibuster; the resolution is not subject to amendment, a point of order, or a motion to postpone consideration; and there are no appeals to the full Senate from a ruling by the chair on points of procedure. A House-passed joint resolution is immediately referred to the full Senate. That process keeps the Senate from stalling." Larkin, *Reawakening the CRA*, supra note 6, at 202–03 (footnotes omitted).
15. Just as the legislative veto enabled congressional Members and staff to negotiate with agencies over proposed rules, CRA disapproval resolutions give Capitol Hill bargaining leverage that can be used in negotiations. Parks, *supra* note 13, at 203–04 & nn.83–91; Rosenberg, *supra* note 13, at 1058–59.
16. *See* Sam Batkins, *Congress Strikes Back: The Institutionalization of the Congressional Review Act*, 45 Mitchell Hamline L. Rev. 351, 363 (2019). One became law during the George W. Bush Administration, 16 became law during the first Donald Trump Administration, and three became law during the Joe Biden Administration. *Id*. at 363–86 & n.234; Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act,* 59 Harv. J. Legis, 279, 286–87 & n.34 (2022).
17. Bridget C.E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, 70 Am. U. L. Rev. 387, 396 (2020) ("This presentment process means that, as a practical matter, the CRA is only likely to be used to disapprove a rule in certain moments linked to a new presidential term. That is, disapproval of a rule under the CRA is most feasible immediately following an election where the White House changes parties and the incoming President is politically aligned with both chambers of Congress. Otherwise, a President would likely veto any congressional resolution to disapprove a rule from his own administration or that of a prior President from his party.") (footnotes omitted); Noll & Revesz, *supra* note 6, at 16; Note, *supra* note 7, at 2169–70. Of course, the public backlash against a particular new agency rule might be so great as to persuade the President that politics compels him to sign a congressional resolution disapproving a rule already approved by his OMB, but those occasions are likely to be few and far between.
18. *See* Dooling, *supra* note 17, at 396.
19. President George W. Bush signed the first joint disapproval resolution in 2001 to nullify an ergonomics rule adopted by the Department of Labor. *See* Ergonomics Program; Final Rule, 65 Fed. Reg. 68,262, 68,262 (Nov. 14, 2000) (to be codified at 29 C.F.R. pt. 1910) (regulating "the significant risk of employee exposure to ergonomic risk factors in jobs in general industry workplaces."), *disapproved by* Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001); *see* S.J. Res. 6, 107th Cong., 147 Cong. Rec. S1880–81 (daily ed. Mar. 6, 2001) (enacted) (statement of Sen. Nickles) ("Who is the legislator in OSHA who wrote this regulation? Who is going to hold them accountable? They are gone. As a matter of fact, the Clinton administration showed contempt of Congress and contempt of the new administration by trying to jam through this enormously complex, burdensome, and expensive regulation with 4 days left in their administration."); Statement on Signing Legislation to Repeal Federal Ergonomics Regulations, 37 Weekly Comp. Pres. Doc. 477 (Mar. 20, 2001) (publishing President Bush's support of the joint disapproval resolution: "This resolution is a good and proper use of the [Congressional Review] Act because different branches of our Government need to be held accountable."); Parks, *supra* note 13, at 188 & n.6.
20. "When Congress begins a new term, as it does after a presidential election, the statute provides that the review period restarts for anything finalized within the last sixty days of the last Congress, and that all the rules that were finalized within this period then become subject to review and disapproval by the new Congress for an additional seventy-five legislative days. Though the exact timing varies because the number of legislative days changes with each congressional calendar, this timing rule means that a new Congress may be able to target regulations issued under a prior administration dating back several months and that the new Congress may have a few months to pass the disapproval resolutions." Noll & Revesz, *supra* note 6, at 15–16 (footnotes omitted); Note, *supra* note 7, at 2169 ("Although described as a mechanism to allow Congress sufficient time to review all administrative action, the reachback provision has the practical effect of giving the succeeding President and Congress an opportunity to review and overturn the preceding administration's rules.") (footnotes omitted).

21. "Three inter-party transitions have occurred since the passage of the Congressional Review Act [from 1996 to 2017]: from Bill Clinton to George W. Bush; from George W. Bush to Barack Obama; and from Barack Obama to Donald Trump. In all three cases, the new president's party also controlled both chambers of Congress, thereby making Congressional Review Act disapprovals a realistic possibility. But prior to the Trump administration, the Act had been successfully used only once. In November 2000, while the results of the presidential election were still being contested, the Occupational Safety and Health Administration (OSHA) promulgated the Ergonomics Rule requiring employers to take measures to reduce ergonomic injuries in the workplace. [¶] But the Small Business Administration claimed that OSHA had vastly underestimated the cost to employers and vigorously objected to the rule. And in March 2001, after George W. Bush's election, the 107th Congress voted to overturn the regulation under the Congressional Review Act." Noll & Revesz, *supra* note 6, at 17 (footnotes omitted).
22. *See* Larkin, *Trump Administration and the CRA*, *supra* note 6, at 506–07; *see also*, *e.g.*, Clyde Wayne Crews, *Trump Regulations: Federal Register Page Count Is Lowest in Quarter Century*, Competitive Enterprise Inst. (Dec. 29, 2017), https://cei.org/blog/trump-regulations-federal-register-page-count-lowest-quarter-century [https://perma.cc/2JK7-PMEA]; James Freeman, *Rookie of the Year*, Wall St. J. (Dec. 29, 2017), https://www.wsj.com/articles/rookie-of-the-year-1514589049?mod=searchresults&page=1&pos=1 ("The largest rate cut in the history of the U.S. corporate income tax, along with individual tax cuts up and down the income scale, arrive on top of a year-long effort to reduce America's regulatory burden."); Ted Mann & Rebecca Ballhaus, *Trump Boasts of Success in Cutting Red Tape*, Wall St. J. (Dec. 14, 2017), https://www.wsj.com/articles/trump-boasts-of-success-in-cutting-red-tape-1513286752?mod=searchresults&page=1&pos=12; Andrew Rudalevige, *Regulation Beyond Structure and Process*, 34 Nat'l Affs. 93, 93–94 (Winter 2018); Editorial Bd., *The Great Rules Rollback*, Wall St. J. (Dec. 25, 2017), https://www.wsj.com/articles/the-great-rules-rollback-1514237372?mod=searchresults&page=1&pos=2 ("The results have been impressive. [Then-Director of the Office of Information and Regulatory Affairs Neomi] Rao reported this month that through Sept. 30 the Trump Administration had taken 67 deregulatory actions but only three new significant regulatory actions. That's a 22 to 1 ratio. She also reported that since fall 2016 more than 1,500 planned regulatory actions have been withdrawn or delayed. For fiscal 2018, the current agenda includes 448 deregulatory actions and 131 regulatory actions, a better than 3 to 1 ratio.").
23. "A longstanding criticism of the administrative state has been that it imposes unduly burdensome costs on the American economy through the issuance of a blizzard of unnecessary rules that stifle investment and reduce employment. That criticism has been advanced regardless of which political party occupies the White House. During the presidential campaign and initial period of his administration, President Donald Trump made clear that he intends to address that problem. In fact, he and senior members of his administration have vowed to remake the administrative state as we currently know it." Larkin, *Reawakening the CRA, supra* note 6, at 188–89 (footnote omitted).
24. *See*, *e.g.*, Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (Promoting Energy Independence and Economic Growth); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017) (Enforcing the Regulatory Reform Agenda); Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017) (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 8, 2017) (Core Principles for Regulating the United States Financial System); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (Reducing Regulation and Controlling Regulatory Costs); Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017) (Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects); Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 24, 2017) (Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal); Larkin, *Trump Administration and the CRA*, *supra* note 6, at 511 n.6.
25. Larkin, *Reawakening the CRA*, *supra* note 6, at 190. "In January 2017, as soon as the new administration and Congress were sworn in and with the clock ticking on the sixty-legislative-day limit, congressional Republicans got to work disapproving Obama-era regulations. Congress passed fourteen joint resolutions of disapproval, which were all signed by President Trump. The fourteen disapproved regulations included four environmental regulations as well as regulations covering diverse topics such as health care and limits on gun ownership for the mentally ill." Noll & Revesz, *supra* note 6, at 19–20 (footnotes omitted).
26. "The CRA falls between the quick-acting legislative veto and the deliberative process that Congress ordinarily uses to enact legislation. Like a legislative veto, the Act enables Congress to expeditiously nullify administrative rules that it finds unauthorized, unnecessary, or unwise before they can go into effect. Unlike a legislative veto, the CRA requires both houses of Congress to pass the identical joint resolution and the President to sign it (or Congress to override his veto) for a rule to be nullified. The CRA therefore satisfies the requirements of Article I described in *Chadha* while trying to preserve at least some of the expedition that the legislative veto afforded." Larkin, *Reawakening the CRA*, *supra* note 6, at 197–98 (footnote omitted).
27. "Does the CRA apply to rules promulgated by so-called independent agencies? The answer is yes. The text of the CRA does not distinguish between independent agencies and executive branch agencies, the ones traditionally under the direct and close supervision of the President. There is also no good reason to exempt independent agencies from congressional review. Congress's decision to create an independent agency shows only that Congress wanted to reduce *executive* control of the organization by restricting the President's authority to remove senior *officials.* It does not mean that Congress exempted the agency from *Congress's* ability to use the CRA to oversee and nullify an agency's *rules*. Independent agencies can abuse their regulatory authority no less than executive branch agencies, so Congress would have wanted to review their rules too. Finally, Congress, President Trump, and the GAO have also concluded that the CRA applies to executive and independent agencies alike." *Id*. at 214 (emphasis in original; footnotes omitted); *see id*. at 214 nn.83–85; Note, *supra* note 7, at 2182.
28. Larkin, *Reawakening the CRA*, *supra* note 6, at 191, 197–217.
29. "The [APA] divides agency action into two broad categories, rulemaking and adjudication. Rulemaking is agency process for formulating a 'rule,' 5 U.S.C. § 551(5), which is 'an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,' *id.* § 551(4). Adjudication is agency process for formulating an 'order,' *id.* § 551(7), which is a 'final disposition' in a 'matter other than rule making but including licensing[.]'" ITServe Alliance, Inc. v. United States Department of Homeland Security, 71 F.4th 1028, 1034–35 (D.C. Cir. 2023); United States v. Fla. East Coast Ry. Co., 410 U.S. 224, 244–45 (1973) (discussing the distinction between lawmaking in an "adjudication" versus a "rulemaking").

30. *See* 5 U.S.C. § 801 (2012) (incorporating the APA definition of a "rule" at 5 U.S.C. § 551(4) (West 2024) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing....")).
31. *See*, *e.g.*, Walmart Inc. v. U.S. Department of Justice, 21 F.4th 300, 308 (5th Cir. 2021) ("Walmart cites several 'rules,' but most of them derive not from official publications but from positions allegedly taken by the government in settlement negotiations with Walmart. Though there is room for disagreement about precisely what satisfies the definition of 'rule,' it surely does not include negotiating positions."); *id* at 309 (expressing doubt that "a 2007 [Drug Enforcement Administration] guidance letter recommending that opioid distributors report suspicious orders, a statement in the DEA Pharmacist's Manual that pharmacists need not fill 'doubtful, questionable, or suspicious' prescriptions, and a criminal complaint filed by DOJ arguing that the simultaneous prescription of certain drug combinations is never medically necessary" are "rules" for APA purposes).
32. *See*, *e.g.*, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 892 (1990) ("[T]he individual actions of the [Bureau of Land Management] identified in the six affidavits can be regarded as rules of general applicability...announcing, with respect to vast expanses of territory that they cover, the agency's intent to grant requisite permission for certain activities, to decline to interfere with other activities, and to take other particular action if requested."); FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 238 n.7 (1980); Walmart Inc. v. U.S. Dep't of Justice, 21 F.4th 300, 308 (5th Cir. 2021) ("Agencies make rules when they announce principles of general applicability and future effect."); *id*. at 308–09 (distinguishing *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001), and *W&T Offshore, Inc. v. Bernhardt*, 946 F.3d 227 (5th Cir. 2019), and concluding that an agency policy controlling the disposition of subsequent adjudications is a "rule" for APA purposes); Chem. Serv., Inc. v. Envtl. Monitoring Sys. Lab., 12 F.3d 1256, 1267 (3d Cir. 1993) ("The [Memorandum of Understanding] would appear to fit within the definition of a rule because EPA has entered into a statement of general applicability and future effect designed to implement the [Federal Technology Transfer Act of 1986]."); Shell Offshore, Inc. v. Babbitt, 238 F.3d 622 (5th Cir. 2001) (ruling that the U.S. Department of the Interior's policy change requiring oil company lessees of land on the outer continental shelf to petition the Federal Energy Regulatory Commission to review a filed tariff was a "rule" for purposes of the APA); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 908 (5th Cir. 1983) (concluding that the term "rule" is defined "broadly enough to include virtually every statement an agency may make," including "'non-binding agency policy statements and guidance documents interpreting existing rules.'"); Louisiana v. U.S. EPA, 712 F. Supp. 3d 820, 856 (W.D. La., 2024) (same).
33. *See* Tom C. Clark, U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 13 (1947) ("The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well.").
34. *See* U.S. Gov't Accountability Office, GAO-08-268T, *Congressional Review Act* 1–3 (2007) (Statement of Gary Kepplinger, General Counsel); Larkin, *Reawakening the CRA*, *supra* note 6, at 211. The Congressional Research Service has reached the same conclusion. *See* Richard S. Beth, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, Cong. Res. Serv., RL311690 (2001). The GAO's views on the meaning of the CRA are important in this regard because "Congress gave the Comptroller General the responsibility to analyze every major rule to learn whether the agency has complied with a variety of laws" other than the CRA, such as the Unfunded Mandates Reform Act of 1995, the Administrative Procedure Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act of 1980. *See* Larkin, *Reawakening the CRA*, *supra* note 6, at 199 n.28, 210–11. The GAO therefore is familiar with the laws governing federal agencies' work product. For a discussion of the GAO's role in the CRA process, see Dooling, *supra* note 17, at 400–17. Members of Congress have asked the GAO for its opinion as to whether a particular agency document is a "rule" for CRA purposes. For an example of such an opinion-seeking request and the GAO's answer, see Larkin, *Reawakening the CRA*, *supra* note 6, at 212–14.
35. *See* Morton Rosenberg, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade*, Cong. Res. Serv., RL30116, at 2–3 (2008) [hereafter Rosenberg, *CRA Update*].
36. *See* Cornelius M. Kerwin & Scott R. Furlong, Rulemaking: How Government Agencies Write Law and Make Policy 4–5 (4th ed. 2011) ("[T]he APA definition, interestingly, does not refer to subject matter other than 'law' and 'policy.' In this respect, the definition could not be written more broadly. No area of public policy is excluded.... Rules covered a large range of topics in 1946; in the early twenty-first century the scope is virtually limitless.... The definition clearly established an expansive relationship between rules, law, and public policy. The terms *implement, interpret*, and *prescribe* describe the fullest range of influence that a rule could have.") (emphasis in original); 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, 1320 (1992) ("[R]ules" include "legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidances, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others"); Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 Admin. L. Rev. 95, 97 (1997) ("This definition is broader than merely those rules subject to notice-and-comment rulemaking procedures under 5 U.S.C. § 553. It includes regulatory actions such as interpretative rules, technical amendments, grant rules, and rules that other laws exempt from 5 U.S.C. § 553."); Custis W. Copeland, *Implementation of the Congressional Review Act and Possible Reforms,* 40 Admin. & Rel. L. News 7 (Fall 2014); Rosenberg, *supra* note 13, at 1066–67 ("The framers of the congressional review provision intentionally adopted the broadest possible definition of the term 'rule' when it incorporated the APA's definition. As indicated previously, the legislative history of section 551(4) of the APA and the case law interpreting it clarifies it was meant to encompass all substantive rulemaking documents—such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like—which as a legal or practical matter an agency wishes to make binding on the affected public.") (footnote omitted); *see also* Maeve P. Carey et al., *The Congressional Review Act: Frequently Asked Questions*, Cong. Res. Serv., F43992, at 6 (2016) ("Notably, the CRA adopts the broadest definition of 'rule' contained in the APA, which is broader than the category of rules subject to notice and comment rulemaking. Thus, some agency actions that

are not subject to notice and comment rulemaking under the APA, and thus may not be published in the *Federal Register*, may still be considered a rule under the CRA.") (footnote omitted); Cohen & Strauss, *supra* note 36, at 102 ("Even though major rules are, in some respects, singled out for more intensive analytical requirements and have their effective date delayed for some period of time, even policy statements, interpretative rules, and technical manuals face congressional review."). I have reached that conclusion too. *See* Larkin, *Reawakening the CRA*, *supra* note 6, at 204–14, 235–47.

37. *See* Larkin, *Reawakening the CRA*, *supra* note 6, at 201–11.

38. The GAO seems to agree. In 2018, in response to a congressional inquiry, the GAO concluded that a 2013 guidance document—a document known as the final Interagency Guidance on Leveraged Lending, 78 Fed. Reg. 17,766, 17,770–76 (Mar. 22, 2013), issued jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation—was a "rule" for CRA purposes. Letter from Susan A. Poling, GAO General Counsel, to Senator Pat Toomey, Pub. B-329272, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation—Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending 2 (Oct. 19, 2017), https://www.gao.gov/assets/690/687879.pdf [https://perma.cc/ZG86-4Q9U]. The letter reveals that the GAO believes documents can be "rules" even if they only describe the factors an agency will consider when deciding whether to exercise its enforcement discretion. Numerous agencies likely issue such documents. Larkin, *Reawakening the CRA*, *supra* note 6, at 212–14. Moreover, the GAO also noted, unsubmitted agency guidance documents cannot serve as a legal basis for taking agency action. *Id*. at 214.

39. As revealed by the comments made by Members at the time of the CRA's passage. The CRA was not the subject of pre-enactment congressional hearings, a committee report, or extensive floor debate. The only CRA "legislative history" consists of a post-enactment joint statement by its sponsors. *See* 142 Cong. Rec. 8196 (1996) (Joint Statement of Senators Nickles, Reid, and Stevens); *id.* at 6922, 6929 (Joint Explanatory Statement of House and Senate Sponsors); *id.* at 6907 (Statement of Rep. David McIntosh).

40. Rules can be *legislative* or *substantive rules*, which create legally enforceable rights and duties, while other rules are *interpretive rules*, which ostensibly do no more than offer an agency's opinion or advice as to the meaning of a statute, regulation, or some other document. The issue of what, if any, deference a federal court must give to an agency's interpretation of a statute or an agency rule has been a controversial one. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court held that a court must defer to an agency's reasonable interpretation of an unclear or ambiguous statute. In June of this year, however, the Court overruled *Chevron* in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), ruling that a federal court must undertake a de novo review of a vague or ambiguous statute. Left undecided by the *Loper Bright* decision is whether an agency's interpretation of an agency's own "rule" is entitled to deference. Historically, the Supreme Court had given agencies near-plenary authority to construe their own rules. *See*, *e.g*., Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). *See generally* Paul J. Larkin, Jr. & Elizabeth Slattery, *The World After* Seminole Rock *and* Auer, 42 Harv. J.L. & Pub. Pol'y 625 (2019). In 2019, the Supreme Court in *Kisor v. Wilkey*, 588 U.S. 558 (2019), greatly tightened its willingness to afford agencies the first and last say on the meaning of their rules, but it still allowed for occasions when deference is appropriate. Yet, because the text of the APA applies to an agency's interpretation of a statute *and* its own rules, the rationale of *Loper Bright* should apply to an agency's construction of a rule or any other form of law. The Supreme Court, however, has not yet ruled on that precise issue.

41. The CRA does not apply retroactively and reach rules that were issued before it became law. Larkin, *Reawakening the CRA*, *supra* note 6, at 237; *see* Landgraf v. USI Film Prods., 511 U.S. 244, 265–80 (1994); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). Agencies have not submitted every rule to Congress. That is particularly true in the case of agency guidance documents. Larkin, *Reawakening the CRA*, *supra* note 6, at 237–38. That is important because agency rules cannot take effect if they have never been submitted to Congress, because there is no statute of limitations on when Congress may invoke the CRA, and because the common law latches doctrine does not apply to that act. *Id*. at 241–43.

42. The GAO General Counsel has concluded that the 60-day period does not begin to run until both houses of Congress have received the agency's report. Rosenberg, *CRA Update*, *supra* note 35, at 3 n.5.

43. 5 U.S.C. § 801(a)(2)(A) ("The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B)."); *id*. § 801(a)(2)(B) ("Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).").

44. 5 U.S.C. § 804 ("For purposes of this chapter…(2) The term 'major rule' means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.").

45. Among the laws that the Comptroller General considers when preparing his report are the following: the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. §§ 1501–07 (West 2024)); the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified at 5 U.S.C. ch. 5 (West 2024)); the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified as amended at 5 U.S.C. ch. 6 (West 2024)); the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501–21 (West 2024)). *See Congressional Review*

Act: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary, 105th Cong. 37–38 (1997) (statement of Robert P. Murphy, General Counsel, GAO) (so noting). Given the brief period available for its analysis, the GAO uses a checklist to conduct "a paper review of the processes employed in the rulemaking under applicable statutory and regulatory mandates." *Id*. at 2; *see also* Rosenberg, *CRA Update*, *supra* note 35, at 3, 18. The GAO has analyzed whether a particular agency memorandum or pronouncement is a "rule" for CRA purposes when members have sought its opinion. *See* Susan A. Poling, GAO, Opinion Letter on GAO's Role and Responsibilities Under the Congressional Review Act, at 7 n.36 (May 29, 2014); Carey et al., *supra* note 36, at 1–12, app. at 23–24 (listing opinions); *supra* note 34.

46. 5 U.S.C. § 801(d)(1) ("In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—(A) in the case of the Senate, 60 session days, or (B) in the case of the House of Representatives, 60 legislative days, before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress."); *id*. § 801(d)(2)(A) ("In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—(i) such rule were published in the Federal Register (as a rule that shall take effect) on—(I) in the case of the Senate, the 15th session day, or (II) in the case of the House of Representatives, the 15th legislative day, after the succeeding session of Congress first convenes; and (ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date."). Adjournment of a Congress suspends that period to prevent an agency from running out the clock. Larkin, *Reawakening the CRA*, *supra* note 6, at 191–200. Any extension of the review period does not excuse an agency's noncompliance with the submission requirement. 5 U.S.C. § 801(d)(2)(B) ("Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.").
47. 5 U.S.C. § 553(d). A rule can postpone the effective date for a longer period, and an agency can accelerate that date for "good cause." *Id.* § 553(d)(1)-(3). In the case of a "major" rule, *see supra* note 44, the period is 60 days.
48. *See supra* note 14.
49. 5 U.S.C. § 801(a)(1)(A) (emphasis added).
50. Larkin, *Reawakening the CRA*, *supra* note 6, at 215 (quoting 5 U.S.C. § 801(b)(2); emphasis added in Larkin, *Reawakening the CRA*).
51. 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 (2010). "These items include a copy of the rule, a concise statement explaining whether it is a 'major' rule under the CRA, the proposed effective date of the rule, and any regulatory analyses required by law." *Id*.; *see also* Batkins, *supra* note 16, at 361 ("While the CRA does not create a timeframe in which an agency must file its rule with Congress and the Comptroller General, it does provide that the rule will not become effective until it has been submitted.") (footnote omitted); Krishnakumar, *supra* note 8, at 1846–47 ("The CRA requires that before any administrative rule can take effect, the promulgating agency must submit a report with the text of the rule and the rule's concise general statement of basis and purpose to each house of Congress and the Comptroller General. The rule cannot go into effect until at least sixty days after Congress receives the report.") (footnotes omitted). The Government Accountability Office has agreed with the conclusion stated above in the text. *See* Letter from Susan A. Poling, GAO General Counsel, to Senator Pat Toomey, Pub. B-329272, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation—Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending 2 (Oct. 19, 2017), https://www.gao.gov/assets/690/687879.pdf [https://perma.cc/ZG86-4Q9U].
52. As I have explained earlier: "[T]he CRA submission requirement is an eminently sensible one" for several reasons: "Why must an agency not only publish a rule in the *Federal Register* but also submit a published rule to Congress? There are several reasons. First, Congress wanted to put the burden of notification on the agency rather than on its members, their staff, or the GAO. Congress could have made publication in the *Federal Register* the triggering date and relied on one of those three groups to follow the *Federal Register* regularly to see when every new agency rule is published. But that would have placed an additional demand on parties Congress likely thought already carried a heavy burden. [¶] Second, Congress directed each agency to give the Comptroller General a copy of every rule so that the GAO could analyze 'major' rules and report that analysis to each chamber. One element of that analysis is whether the agency had complied with several other federal laws and had performed a cost-benefit analysis. Congress considered the Comptroller General's analysis important and might have wanted to avoid the risk that it would not have that opinion if publication in the *Federal Register* alone triggered the review period. Atop that, the CRA directs agencies to 'cooperate with the Comptroller General by providing information relevant to the Comptroller General's report' to Congress. The Comptroller General might find an agency report incomplete, which would hamper its ability to analyze the rule for Congress. Using the *Federal Register* publication date as the triggering event could hinder the Comptroller General's ability to complete its analysis within the fifteen-day period set by the CRA. [¶] Third, reliance on *Federal Register* publication could create logistical difficulties at the end of a Congress, when members not re-elected to the next session (and their staff) would be leaving Capitol Hill for other pursuits. Given the prevalence of agencies' issuance of 'midnight rules,' Congress wanted to be able to restart the review clock in the new session without relying on departing members to act before leaving office. [¶] Fourth, a final agency rule would burden or benefit different private parties, so Congress may have believed that the burden of notification should rest on the party responsible for changing the status quo…." Larkin, *Reawakening the CRA*, *supra* note 6, at 215–16 (footnotes omitted).
53. As I have explained earlier: "Recently, the Senate, House of Representatives, and President Trump concluded that they can reach back well past the last 60 legislative days of the Obama Administration to nullify an agency rule. In 2013, the Consumer Financial Protection [Bureau] (CFPB) issued a guidance document requiring automobile dealers and lenders to consider the 'disparate impact' on minorities of car loans. The auto industry objected to the CFPB's conclusion because the relevant federal law—the Dodd–Frank Wall Street Reform and Consumer Protection Act—does not empower the CFPB to regulate motor vehicle sales. In April 2018, the Senate agreed, voting to nullify the CFPB's guidance document. The Senate's action was

important because it marked the first time that the chamber voted to nullify a rule that has been in effect for years and took the form of an informal guidance document rather than a legislative rule. The Senate's action opened up the possibility that the 115th Congress and the president would nullify agency rules, even ones issued in the form of guidance documents, that Congress and the president deem unlawful or unwise, even if they were promulgated long ago. The text and purposes of the CRA clearly authorize Congress to exercise that power. In fact, shortly after the Senate acted, the House of Representatives also passed a joint resolution of disapproval, and President Trump signed it into law, nullifying the CFPB rule. Accordingly, the Article I and II branches agree that an agency's violation of the CRA does not prevent Congress and the President from using that law to eliminate a noncompliant rule regardless of the form it takes and regardless that it may have been issued years ago." Larkin, *Trump Administration and the CRA*, *supra* note 6, at 510–12 (footnotes omitted).

54. *Id*. at 513. Of course, not all such rules are important ones. *Id*. Also, Congress and the President could decide to allow private parties to invalidate unsubmitted rules through the administrative process or via litigation initiated by private parties. *Id*. at 517–18.
55. When Congress chose to nullify the CFPB's five-year-old rule under the CRA, numerous parties noted that there was a vast array of unsubmitted rules adopted long ago that could now be challenged under that law. *See*, *e.g*., *id*. at 510 n.22 (collecting authorities).
56. "Like all fast-track legislative procedures, the CRA is designed to ensure that political minorities are not able to use congressional procedure to hijack policy." Note, *supra* note 7, at 2176–77. The CRA contains provisions that can prevent a Senate filibuster. 5 U.S.C. § 802(c)(e); *see* Cohen & Strauss, *supra* note 36, at 100–01; Note, *supra* note 7, at 2167–68. The House does not permit filibusters, so the act has no comparable procedures for that chamber.
57. 5 U.S.C. § 802(b)(2) ("A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."); *see* Larkin, *Reawakening the CRA*, *supra* note 6, at 203–04.
58. Larkin, *Reawakening the CRA*, *supra* note 6, at 198–204.
59. *Id*. at 244–46.
60. "Consider this hypothetical. Congress passes legislation providing that '*X* is mandatory'; the relevant agency issues a rule (whether legislative or interpretive—the difference does not matter) saying that '*X* means *X*1, *X*2, and *X*3'; Congress passes a joint resolution disapproving that rule; and the President signs the resolution into law. The resolution has the effect of deeming *X*1, *X*2, and *X*3 to be erroneous interpretations of *X*. That is, Congress by law has now revised the meaning of X to exclude *X*1, *X*2, and *X*3 as possible interpretations. Put another way, the effect of disapproval is the same as if Congress had passed a statute providing that '*X* is mandatory, but *X*1, *X*2 and *X*3 are not *X*. In fact, the resolution has an even broader effect. Because the agency cannot issue a new rule that is 'substantially the same' as the one Congress eliminated, *X*4 and (perhaps) *X*5 have also been deemed null and void to create a buffer zone around *X*1, *X*2, and *X*3 for substantially similar rules." *Id*. at 245–46 (footnote omitted).
61. *See* 5 U.S.C. § 802(a) (defining "joint resolution" and providing a template for disapproval resolutions); *id*. § 802(b)(2)(B) (referring to "*the* rule" (emphasis added)); *see also* Carey et al., *supra* note 36, at 4; Rosenberg, *CRA Update*, *supra* note 35, at 22–23; Note, *supra* note 7, at 2168 ("[D]isapproval resolutions can only be enacted as stand-alone measures, using a template provided in the statute.").
62. The CRA requires each agency to submit a "report" to Congress, not merely the "rule" itself. 5 U.S.C. § 801(a)(1)(A). The report must contain "(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule." *Id*. If an agency were to submit more than one rule in a single "report," the answer might be different. That approach would enable Congress to include a single "report" containing multiple rules within one joint resolution. Packaging more than one agency rule in a joint resolution, however, could materially alter political support for the resolution.
63. *See*, *e.g*., Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 Colum. L. Rev. 687 (2010).
64. *See* Clinton v. City of New York, 524 U.S. 417, 436–49 (1998), and *Chadha*, 462 U.S. at 946–52 (both describing the Article I lawmaking process).
65. For example, the Comprehensive Crime Control Act of 1984 (CCCA), Pub. L. No. 98-473, 98 Stat. 1976 (1984), not only was itself Title II of an omnibus appropriations act passed as one "Bill," H.J. Res. 648 (1994), but also combined the Bail Reform Act of 1984, Comprehensive Forfeiture Act of 1984, Controlled Substances Penalties Amendments Act of 1984, Insanity Defense Reform Act of 1984, and Sentencing Reform Act of 1984 into one title of one act with each different subject separately published in the U.S. Code. The Supreme Court upheld the constitutionality of the bail and sentencing reform laws without hinting that they were unconstitutional for having been combined into one act of Congress. *See*, *e.g*., Mistretta v. United States, 488 U.S. 361 (1989) (upholding the constitutionality of the Sentencing Reform Act of 1984); United States v. Salerno, 481 U.S. 739 (1987) (same, Bail Reform Act of 1984).
66. As I have previously argued. *See* Larkin, *The CRA and Judicial Review*, *supra* note 4; Larkin, *Reawakening the CRA*, *supra* note 6, at 217–32.
67. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *accord*, *e.g*., Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2257 (2024).
68. Larkin, *The CRA and Judicial Review*, *supra* note 4 ("To be sure, the evident purpose of CRA's Section 805 is to keep the courts from second-guessing decisions made by Congress and the President. But the interpretation offered here would not have that intrusive effect. Section 805 would still foreclose judicial review of all actions taken under the CRA *by Congress or the President*—viz., by everyone *other than the responsible agency*. In fact, the interpretation offered here is the only one that actually serves the purpose of the CRA because it empowers the courts to bring agencies to heel for their noncompliance with that statute. Otherwise, agencies can willfully break the law and in the process, thumb their noses at Congress and the courts. It is impossible to believe that Congress ordered the courts to 'see no evil' by an agency, or that it matters whether a private party

raises that claim in an answer or a complaint. When read as a whole, the CRA and the APA permit the courts to call out an agency for breaking the law.") (footnote omitted; emphasis in original); Larkin, *Reawakening the CRA*, *supra* note 6, at 219–22 ("Section 805 is quite clear in one respect. It states that no 'determination, finding, action, or omission under this chapter' is subject to review by a court.... Where the Act is unclear, however, is *whose* 'determination, finding, action, or omission under this chapter' is not subject to judicial review? There are a limited number of possibilities because there are only a few parties who could take (or fail to take) a relevant action "under this chapter."... Start with Congress. It is eminently clear that Congress did not want any of its actions to be subject to judicial review. Congress expressly exempted itself from judicial review when it adopted the APA in 1946, and the CRA carried forward the same exemption.... Now move to the President. Congress did not expressly exempt the President from review under the APA by excepting him from the definition of an 'agency,' but the Supreme Court has made up the difference. The Court held in *Franklin v. Massachusetts*, four years before the CRA became law, that the term 'agency' does not include the President.... Who is left? Only the rule-issuing agency. Did Congress intend the CRA to immunize the agency's action from judicial review? No. Congress sought to *curb* agency action through the CRA, not immunize it. Remember, before *Chadha*, Congress and the President were not subject to review under the APA. By contrast, an agency *was* subject to review under the APA for its unlawful actions before *Chadha*. The CRA also did not seek to change that arrangement; its goal was to *increase Congress's* oversight power, not *weaken* the judicial review power of *the courts*. Why would Congress have wanted to eliminate the historic role that courts have played in halting illegal agency actions? There is no persuasive reason for believing that Congress did. The CRA gave Congress fast-track authority so it could review an agency rule before it went into effect. Immunizing agencies from judicial review is unnecessary to make the CRA work or to achieve the CRA's purpose and would have been an irrational response to Congress's concern with agency overreaching. The bottom line is this: the best reading of Section 805 is that it precludes judicial review of any decisions or actions taken *by Congress (including the Comptroller General, who works for Congress) or the President* but does *not* foreclose judicial review of an agency's compliance with the Act.") (footnotes omitted; emphasis in original); *id*. at 247 ("The alternative, narrow view of the CRA noted above enables an agency to stiff arm Congress by refusing to submit a rule for Congress's review and waiting for the sixty-day review period to expire. That result would render the CRA a nullity, which is obviously not the role that Congress intended for the CRA. That result is also at odds with the text of the statute for the reasons given above. Congress has furthermore gone out of its way to address a scenario that might occur at the end of a term of Congress by providing a detailed mechanism for calculating the number of days that the new Congress would have to review a rule submitted with fewer than sixty legislative days remaining in the prior Congress. These provisions demonstrate that Congress did not want to lose the opportunity to review a rule simply because the agency submitted it late in a particular Congress. It therefore makes no sense to read the CRA as allowing the rule-issuing agency to ignore the Act by not submitting a rule at all.").

69. *Compare*, *e.g*., Kansas Natural Resources Coalition v. U.S. Dep't of Interior, 971 F.3d 1222, 1234–38 (10th Cir. 2023); Cntr. For Biological Diversity v. Bernhardt, 946 F.3d 553, 563–64 (9th Cir. 2019); Montanans for Multiple Use v. Barbouletos, 568 F.3d 225, 229 (D.C. Cir. 2009) (per Kavanaugh, J.); United States Am. Elec. Power Serv. Corp. 218 F. Supp. 2d 931, 948–49 (S.D. Ohio 2002) (all declining to review a challenge a rule under the CRA), *with*, *e.g*., Tugaw Ranches, LLC v. U.S. Dep't of Interior, 362 F. Supp. 3d 879, 881–88 (D. Idaho 2019) (rejecting CRA preclusion claim); *id*. at 885 (collecting cases allowing judicial review to go forward); Noll & Revesz, *supra* note 6, at 23 & n.106.

70. *See* Larkin, *The CRA and Judicial Review*, *supra* note 4; Larkin, *Reawakening the CRA*, *supra* note 6, at 217–32; *supra* note 68. Once the President signs a bill, it becomes a "Law" and is not subject to challenge on the ground that Congress should not have considered it under the CRA. A party cannot impeach the legitimacy of an act of Congress signed by the Speaker of the House and the President of the Senate. *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892) ("The signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses, through their presiding officers, to the president, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable.").

71. For an example, see https://www.youtube.com/watch?v=7ydRwCf9Qyw.