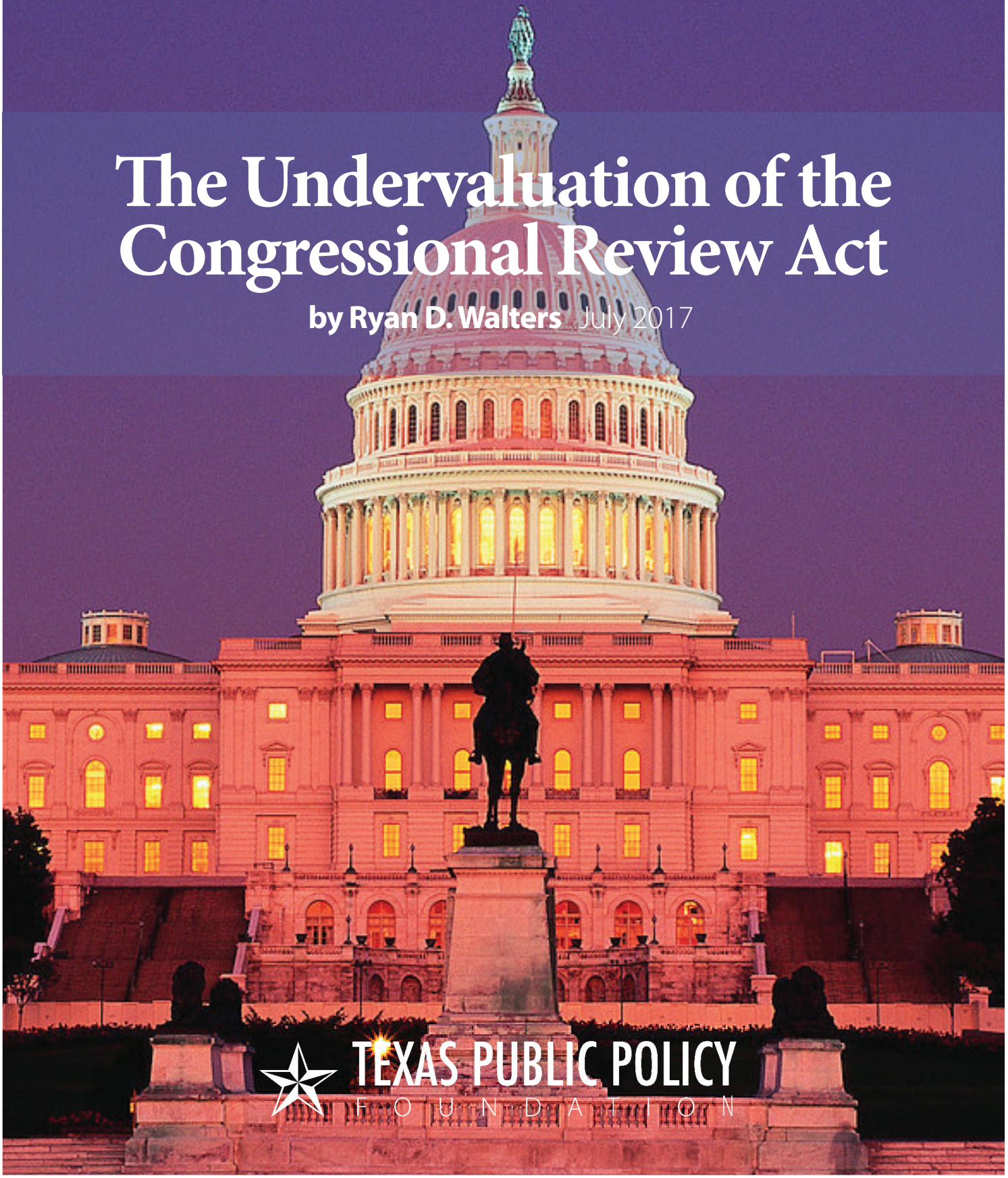
Texas Public Policy Foundation

The Undervaluation of the Congressional Review Act

by Ryan D. Walters July 2017



TEXAS PUBLIC POLICY FOUNDATION

July 2017

Texas Public Policy Foundation
by Ryan D. Walters

Table of Contents

The Undervaluation of the Congressional Review Act

by Ryan Walters, Attorney

Enacted into law on March 29, 1996, the Congressional Review Act[1] ("CRA" or the "Act") had, with one exception in 2001,[2] lain largely dormant.[3] That changed this year with unprecedented activity by Congress to use the CRA to nullify administrative regulations enacted during the now-defunct administration of President Barack Obama.[4] This paper explains how there may be even further opportunities for using the CRA to overcome legislative gridlock and administrative inertia.

KEY POINTS

- When its prerequisites are met, the Congressional Review Act prevents a Senate minority from delaying the legislative process when a majority wants to nullify agency rules.
- The Congressional Review Act may be used to nullify agency rules issued long ago if those rules have not yet been sent to Congress and the GAO.
- Agencies have been lax in complying with the requirements of the Congressional Review Act such as submitting copies of rules to both houses of Congress and the GAO.

Executive Summary

Congress has a limited period to act on regulations adopted by the previous administration under the CRA; it was earlier calculated that "Congress ha[d] until May 9 to overturn regulations issued between June 13, 2016 and January 3, 2017."[5] However, there has also been recent discussion that, due to the failure of agencies to submit rules to both houses of Congress, as required by the CRA, the clock has not started ticking for Congress to act under the CRA regarding many administrative actions taken much earlier than June 13, 2016.[6] If this is a valid theory, the CRA could be used to nullify a much larger pool of agency actions.[7] Furthermore, President Trump may be able to find that the failure of agencies under past administrations to follow the requirements of the CRA relating to submitting copies of their rules to Congress and the Government Accountability Office ("GAO") means that any such rules never went into legal effect.

The CRA mandates that federal administrative agencies transmit, with very limited exceptions, all final rules to each house of Congress and the GAO before they can take effect.[8] For a limited period of time after Congress receives any such rule, any member of Congress may introduce a joint resolution[9] to nullify the rule. If the joint resolution is passed by each house and signed into law by the president, it is nullified; if it is vetoed, Congress may overturn the veto with a two-thirds vote in each house. Legislative action under the CRA moves under expedited procedures in the Senate to prevent delay or obstruction; most notably, it is not subject to filibuster.

If the joint resolution is ultimately enacted, the targeted rule may not take effect (or continue in effect). Even provisions that had become effective would be retroactively negated. Any rules nullified by action under the CRA may not be reissued in "substantially the same" form, without subsequent specific authorization by Congress.[10] Finally, the CRA prohibits judicial review of any "determination, finding, action, or omission under this chapter."[11]

Agencies have failed to submit a large number of covered rules to both houses of Congress and GAO, as required by the CRA. This may provide an opportunity to use the Act in novel circumstances to nullify a potentially larger number of rules promulgated farther back in time.

Administrative Actions Subject to Disapproval Under the CRA

As stated above, the CRA requires federal agencies to submit their covered final rules to both houses of Congress and GAO before they can take effect. Specifically, the CRA states that:

> 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[12] a report containing—(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.[13]

At the same time, the agency must provide a copy of the rule's cost-benefit analysis (if any is required) as well as any relevant documents relating to requirements of the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and "any other relevant information or requirements under any other Act and any relevant Executive orders."[14] The administrator of the Office of Information and Regulatory Affairs (OIRA), in the Office of Management and Budget (OMB) in the executive branch, has the exclusive statutory responsibility for determining whether a rule is "major," which is defined as a rule that will likely have a significant annual effect on the economy ($100 million or more), impose a major increase in costs or prices for consumers, industries or state and local governments, or have other significant adverse effects on the economy.[15]

The sole statutory duty imposed by the CRA on the Comptroller General of GAO is to prepare a report for each relevant congressional committee for any rule it receives from an agency that has been designated a "major rule" by OIRA. Within 15 calendar days of a major rule's submission or publication in the Federal Register (whichever is later), GAO must make a report to the relevant committees of jurisdiction, assessing the compliance of the agency issuing the rule with its reporting requirements under the CRA. GAO's report does not contain an independent analysis of the substance of the rule but is a mere checklist of whether the agency has performed the statutorily mandated actions.[16]

The CRA may be used to nullify both major and nonmajor rules. The sole effect of a rule being designated as a major rule is that the Act delays the effective date of such a rule to 60 calendar days after it is submitted to Congress and GAO or after its publication in the Federal Register, whichever is later.[17] Non-major rules go into effect 30 days after final publication in the Federal Register,[18] but no earlier than the rule's submission to Congress and GAO.[19]

The sole statutory duty imposed by the CRA on the Comptroller General of GAO is to prepare a report for each relevant congressional committee for any rule it receives from an agency that has been designated a "major rule" by OIRA.

The universe of agency actions subject to the CRA is much larger than rules enacted after notice-and-comment rulemaking or formal adjudications. The CRA defines a "rule" as having the same meaning as in the Administrative Procedure Act (APA), which defines a "rule" 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 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.[20]

This definition in "[t]he APA defines the term 'rule' broadly enough to include virtually every statement an agency may make."[21]

The joint statement by the congressional sponsors of the CRA emphasized the breadth of the definition of agency actions subject to the Act, 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 nonagency parties."[22]

It has been noted that "[t]he courts have recognized the breadth of the term ['rule'], indicating that it encompasses

virtually every statement an agency may make, 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."[23]

The president himself is not an "agency,"[24] and his actions are therefore not subject to disapproval under the CRA. However, if a president delegates his authority to a covered agency, actions taken pursuant to that authorization are subject to the Act.[25] As an example, in 2001 President George W. Bush's administration had reinstated President Reagan's "Mexico City Policy" limiting funding of international organizations that support abortion. This action was taken pursuant to authority granted to the president by statute, but the U.S. Agency for International Development had reinstated the policy through a delegation from the president. A number of senators filed a resolution to disapprove the action; in response, President Bush revoked the delegation to the agency and implemented his statutory authority himself via executive order, taking the action outside of the purview of the CRA.[26]

The CRA also covers the actions of independent agencies.[27] Such agencies include the Federal Communications Commission, the Federal Energy Regulatory Commission, the Federal Trade Commission, the National Labor Relations Board, and the Securities and Exchange Commission.[28] Most notably, any rules issued by the independent Bureau of Consumer Financial Protection would be subject to disapproval under the CRA;[29] this agency is headed by an Obama-appointed director until July 2018.

Timeliness to Proceed Under the CRA

Under the CRA, a joint resolution of disapproval may be initiated in either house as soon as a rule is received by Congress, but no later than 60 days after that date, "excluding days either House of Congress is adjourned for more than three days during a session of Congress," i.e., a continuous session. Because the CRA starts this countdown upon Congress receiving the reports from the agency, the time frames for Congress to submit a disapproval resolution for those rules that have not been submitted in this manner have yet to commence.[30]

Once introduced, the resolution is referred to the relevant committees with jurisdiction of the particular house of Congress.[31] There are no expedited procedures under the CRA for the House of Representatives, making the cooperation of its leadership necessary. The House considers the resolution as set forth by a special rule reported from the Committee on Rules.[32]

There is an expedited procedure in the Senate empowering 30 senators to submit a petition to discharge a pending CRA resolution from the relevant Senate committee if it has not been reported out within 20 calendar days after the regulation's submission and publication.[33] Once reported out of committee, the resolution is privileged and not subject to delaying tactics, including amendments or filibusters, and floor debate is limited to a maximum of 10 hours.[34] The Senate has 60 session days (i.e., days when the Senate is actually in session) from the date a rule is submitted to Congress and GAO or published in the Federal Register (whichever is later) to use these expedited procedures and act on a joint resolution to nullify the rule.[35]

If Congress adjourns its annual session sine die[36] fewer than 60 legislative days in the House of Representatives or 60 session days in the Senate after a rule has been submitted to it pursuant to the CRA, then the initiation period for both houses and the action period for the Senate under the Act is extended to the next session.[37] Any such rule originally submitted during the previous session is treated as if it had been published in the Federal Register on the 15th legislative day (or session day in the Senate) in the new session.[38]

Parliamentary Procedure Under the CRA

A disapproval resolution must be in the specific form required by the Act. The text may only identify the subject of the rule and the agency submitting it, and state that Congress disapproves the rule and that it shall have no force or effect.[39] This limits the procedures of the Act available only for joint resolutions to disapprove a submitted rule as a whole, rather than a mere part of it.

Although the CRA provides expedited procedures to prevent the standard bottlenecks in the legislative process,

> [f]or the stages of committee and initial floor consideration, the expedited procedures in the CRA apply to the Senate alone. First, the Act attempts to ensure that the Senate will be able to act on the disapproval resolution whether or not the committee of referral reports it. Regardless of when the resolution is introduced, a procedure to discharge the committee from its consideration becomes available beginning

> 20 calendar days after the rule has been both submitted to Congress and published in the Federal Register. If 30 Senators submit a petition for the purpose, the measure is automatically discharged and placed on the calendar, from which it may be called up for floor consideration.[40]

If the committee is in favor of the disapproval resolution, it may mark it up and report it before the waiting period for 30 senators to discharge it from committee ends, or even after that period if the discharge procedure has not been used.[41] Once the committee reports the resolution, or it has been discharged, the resolution goes on the Senate calendar, and a senator may move to proceed to its consideration.[42]

As for another standard delaying tactic, namely amendments:

> The CRA does not expressly forbid consideration of amendments in committee, … it does prohibit amendments on the Senate floor. A committee can only recommend amendments, which become part of the measure only if adopted on the floor. Because the statute precludes the adoption of amendments on the floor, any recommended by the committee will be moot. For this reason, the committee will in practice find little purpose in acting on amendments to a disapproval resolution, and its markup will presumably consist only of consideration.[43]

Once a disapproval resolution is on the calendar, a Senator may move to proceed with its consideration.[44] While "[t]he general procedure of the Senate already permits a motion to consider any measure on the calendar, [it is normally only permitted] only after it has met certain layover requirements[, but the CRA] has the effect of waiving these layover requirements."[45]

The Act's procedures prevent otherwise standard obstacles to the Senate legislative process regarding consideration of a disapproval resolution. Once the motion to proceed is pending, the CRA prohibits a motion to postpone the disapproval resolution's consideration, a motion to amend it, or a motion to proceed to consider some other business —as well as any other points of order that could otherwise be raised against the resolution or its consideration.[46] This hurdle may only be overcome if the Senate gives unanimous consent.[47] In addition, debate is limited to 10 hours, equally divided between supporters and opponents, effectively nullifying the filibuster.[48] In

To review, the CRA provides expedited procedures to consider a disapproval resolution in the Senate, barring a minority of senators (or Senate leadership) from preventing action.

fact, any senator may move to limit the time for debate further, and this motion is not subject to debate.[49] Any appeal from a ruling of the chair during consideration of a disapproval resolution (or motion to proceed to its consideration) also may not be debated.[50] At the end of the allotted debate time, the Senate automatically proceeds to vote on the resolution. The only intervening action permitted is a single quorum call, which may take place if any senator requests it.[51]

As with a bill, joint resolutions can only be sent to the president if both houses have agreed on an identical measure:

> If each house initially passes its own disapproval resolution, even if the texts are identical, neither can yet go to the President, for neither has been agreed to by both chambers. To prevent this situation, the Congressional Review Act provides that when either house adopts a disapproval resolution and sends it to the other, the receiving house must hold it at the desk, rather than refer it to committee. This action retains the received resolution in a status in which it is available for floor action. The Act then provides that, after the receiving house later considers a disapproval resolution of its own, it shall vote not on its own measure, but instead on the resolution already received from the other house. In this way both houses take final action on the same measure; if both adopt it, the requirements for presentation to the president are satisfied.[52]

To review, the CRA provides expedited procedures to consider a disapproval resolution in the Senate, barring a minority of senators (or Senate leadership) from preventing action. There are no such expedited procedures in the House, making cooperation of the leadership of that body essential; there, strict time frames for initiating disapproval resolutions and for acting on them if the expedited procedures of the CRA are utilized. However, because those periods do not begin until the relevant rule has been submitted to both houses of Congress and to GAO,

careful planning in submitting previously unsubmitted rules to those entities can maximize the ability to nullify targeted rules.

Judicial Review of Acts Through the CRA

Under the APA, agency action is typically subject to review in the courts "except to the extent that … statutes preclude judicial review."[53] The CRA has an explicit clause precluding judicial review.[54]

Regulated parties have sometimes argued that the agency rules being enforced against them are not legally in effect, because the agency did not submit the rules to Congress and GAO, as required by the CRA.[55] The overwhelming majority of courts to address this argument have rejected it, holding that courts could not review rules for compliance with the reporting requirements of CRA due to the clause precluding judicial review.[56] There is a good argument that these courts are wrong: namely, the entire purpose of the CRA to enable Congress to disaffirm agency rules would be undermined if courts were not permitted to refuse enforcement of rules violating the reporting requirements.[57]

As one expert on the Act explained:

> [T]he statutory scheme appears geared toward congressional review of all covered rules at some time; and a reading of the statute that allows for easy avoidance would seem to defeat that purpose. Interpreting the judicial review preclusion provision to prevent court scrutiny of the validity of administrative enforcement of covered but non-submitted rules appears to be neither a natural nor warranted reading of the provision. Section 805 speaks to "determination[s], finding[s], action[s], or omission[s] under this chapter," a plain reference to the range of actions authorized or required as part of the review process. Thus, Congress arguably did not intend … to subject to judicial scrutiny its own internal procedures, the validity of presidential determinations that rules should become effective immediately for specified reasons, the propriety of OIRA determinations whether rules are major or not, or whether the Comptroller General properly performed his reporting function. These are matters that Congress can remedy by itself. From one perspective, the potential of court invalidation of enforcement actions based on the failure to submit covered rules is necessary to assure compliance with submission requirements.[58]

Shortly after the Act was passed, the principal Senate and House sponsors published a Joint Explanatory Statement in the Congressional Record providing a detailed explanation of the reviewability of agency compliance with the CRA:

> The 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).[59]

Nevertheless, the majority judicial view on the breadth of the "no judicial review" clause may in some ways be advantageous to address any attempts by the Trump administration or Congress to determine whether a rule has yet to go into legal effect because of a past agency failure to comply with the reporting requirements.

First, as the majority view has rejected attempts to cabin the reach of the clause to restrict judicial review to internal congressional actions, if the Trump administration decided to refuse to enforce rules that it finds never went into effect because of a failure to follow CRA reporting requirements, this refusal should not be subject to judicial review in a subsequent lawsuit. In other words, because courts have refused to review agency compliance with CRA's reporting requirements in order to determine the validity of the rule in question, agency determinations that rules are not in effect because of the reporting requirements were not complied with under the CRA should similarly be non-reviewable.

Second, the CRA was enacted under the power of each house to "determine the Rules of its Proceedings."[60] If the Trump administration were to submit the required reports to each house and GAO for rules adopted long ago without following those reporting requirements, Congress itself could determine that the CRA permits it to utilize its expedited procedures even with regard to such rules, and that determination would likely not be reviewable either.[61] This point is important to the debate over whether Congress can reach back to nullify rules adopted far earlier than the commonly understood June 13, 2016 deadline if the CRA reporting requirements were not met when those rules were adopted.

Determining Whether a Particular Rule Was Submitted to GAO and Both Houses of Congress

Recall that agencies are required to submit their rules

to both houses of Congress and GAO before their rules can go into effect[62] and that receipt of those rules and accompanying reports triggers the time frames for Congress to use the provisions of the CRA to disapprove such a rule. Thus, it is necessary to be able to determine whether or not those submissions were made. Notice of each house's receipt of rules submitted by agencies pursuant to the CRA can be searched for in the "Executive Communications" section of the daily Congressional Record.[63] GAO also has a database that can be searched for submissions it has received.[64]

Formerly, GAO consulted its database for the covered final rules that had been submitted to it by agencies pursuant to the CRA, and checked it against rules published in the Federal Register.[65] GAO would notify the OIRA about published rules that it had not received from the agencies.[66] Between 1997 and November 2011, agencies submitted around 3,600 rules to GAO annually, which was only 88 percent of the amount of rules published in the Federal Register.[67]

Over a range of the period between 1999 and 2010, GAO sent OIRA five letters pointing out over 1,000 substantive final rules that GAO had not received recently. GAO also sent separate letters to each of the delinquent agencies.[68] GAO stopped its review of comparing the rules it received with those published in the Federal Register in November 2011, sending its final follow-up letter to OIRA in March 2012.[69] This review, which had not been legally required, was dropped due to reductions in GAO's budget.[70]

During its checks through 2011, GAO found hundreds of covered rules that had not been submitted, and notified OIRA, and sometimes the relevant agencies about this deficiency.[71] A researcher found that after this cross-checking ended, there was a significant reduction in the percentage of rules submitted to GAO that had been published in the Federal Register: in 2012 and 2013, the rate dropped from 88 percent to just 71 percent, and the first half of 2014 (the final period examined by the researcher) saw it drop to below 50 percent.[72]

Recently, a free-market advocacy group has compiled a list of hundreds of economically significant rules that were published in the Federal Register but never received by both houses of Congress.[73]

Between 1997 and November 2011, agencies submitted around 3,600 rules to GAO annually, which was only 88 percent of the amount of rules published in the Federal Register.

Note that even these analyses of agencies' failure to comply with the CRA understate the level of noncompliance. First, the former compilation looks only at the required submissions to GAO; to comply with the Act, the agencies must also submit the rules to each house of Congress. Second, both compilations look only to rules published in the Federal Register. However, the rules required to be submitted to GAO and each house of Congress include a far larger universe of agency activity than rules required to be published in the Federal Register. It is far likelier that agencies would neglect to comply with the reporting requirements for less formal rules, such as statements of policy.

Conclusion

The Congressional Review Act explicitly requires agencies to submit covered rules to both houses of Congress and the Government Accountability Office before the rules go into effect. Moreover, CRA-covered rules include a much larger universe of activities than rules adopted pursuant to formal adjudication or notice-and-comment rulemaking.

President Trump may be able to instruct the relevant agencies to submit these rules to Congress for disapproval under the CRA.[74] This would result not only in the rule being nullified without having to go through any rulemaking process, but would also prevent a future administration from issuing any substantially similar rules in the future. Furthermore, the Trump administration may be able to instruct any agencies to cease enforcement of any rule that was not submitted to Congress as required by the CRA, and such an action would likely not be subject to judicial review.

Endnotes

[1] 5 U.S.C. §§ 801-808.

[2] S.J.Res. 6, 107th Congress (2001), disapproving the rule submitted by the Department of Labor relating to ergonomics (became Pub.L. 107–5 on March 20, 2001).

[3] Congress passed five joint resolutions under the Act during the Obama administration, but President Obama vetoed them all. H.J.Res. 88, 114th Cong. (Department of Labor rule "Definition of the Term 'Fiduciary'; Conflict of Interest Rule— Retirement Investment Advice"); S.J.Res. 8, 114th Cong. (National Labor Relations Board rule "Representation-Case Procedures"); S.J.Res. 22, 114th Cong. (Environmental Protection Agency rule "Clean Water Rule: Definition of 'Waters of the United States"); S.J.Res. 23, 114th Cong. (Environmental Protection Agency rule "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units"); S.J.Res. 24, 114th Cong. (Environmental Protection Agency rule "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units").

[4] *See* *CRAs: The Complete List* ("The House has passed 15 CRAs, 13 have passed the Senate, and 11 have been signed into law"). Since that list was compiled, President Trump has signed three more joint resolutions passed pursuant to the Congressional Review Act: H.J.Res. 43, 115th Congress (2017), providing for congressional disapproval of the final rule submitted by secretary of health and human services relating to compliance with title X requirements by project recipients in selecting subrecipients (became Pub.L. 115–23 on April 13, 2017); H.J.Res. 67, 115th Congress (2017), disapproving the rule submitted by the Department of Labor relating to savings arrangements established by qualified state political subdivisions for non-governmental employees (became Pub.L. 115–24 on April 13, 2017); and H.J. Res. 66, 115th Congress (2017), disapproving the rule submitted by the Department of Labor relating to savings arrangements established by states for non-governmental employees (became Pub. L. 115-35 on May 17, 2017).

[5] Restoring the People's Voice in Regulations, Senate Republic Policy Committee.

[6] *See* Kimberly A. Strassel, "A GOP Regulatory Game Changer," *Wall Street Journal*, January 26, 2017.

[7] The White House has indicated that it is examining the plausibility of reaching back to use the CRA to nullify regulations where agencies failed to satisfy the reporting requirements of the Act. *See* Press Briefing on the Congressional Review Act, April 5, 2017.

[8] 5 U.S.C. § 801(a)(1)(A).

[9] Joint resolutions move through Congress in the same manner as bills. *See* Legislation, Laws, and Acts. ("Joint resolutions are designated H.J. Res. or S.J. Res. and are followed by a number. Like a bill, a joint resolution requires the approval of both Chambers in identical form and the president's signature to become law. There is no real difference between a joint resolution and a bill. The joint resolution is generally used for continuing or emergency appropriations. Joint resolutions are also used for proposing amendments to the Constitution; such resolutions must be approved by two-thirds of both Chambers and three-fourths of the states, but do not require the president's signature to become part of the Constitution.").

[10] 5 U.S.C. § 801(b)(2).

[11] 5 U.S.C. § 805.

[12] The Comptroller General is the head of GAO. *See* U.S. Government Accountability Office, Office of the Comptroller General.

[13] 5 U.S.C. §801 (a)(1)(A).

[14] 5 U.S.C. §801(a)(1)(B).

[15] 5 U.S.C. § 804(2).

[16] 5 U.S.C. § 801(a)(1)(C); Richard S. Beth, Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act, at p. 10, RL31160, October 10, 2001.

[17] 5 U.S.C. § 801(a)(3).

[18] 5 U.S.C. § 553(d).

[19] 5 U.S.C. § 801(a)(4).

[20] 5 U.S.C. §551(4). However, the CRA specifically excludes from coverage:

> (A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, 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, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

5 USC §804(3).

[21] *Avoyelles Sportsmen's League, Inc., v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983).

[22] Joint Explanatory Statement of House and Senate Sponsors, 142 Cong. Rec. 6922 (1996).

[23] Morton Rosenberg, *The Critical Need for Effective Congressional Review of Agency Rules: Background and Considerations for Incremental Reform*, at p. 6 (citations omitted), July 18, 2012, Report Prepared for the Administrative Conference of the United States, (citing *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 (4th 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. Federal Savings and Loan Insurance Corp.*, (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)).

[24] *Franklin v. Massachusetts*, 505 U.S. 788, 800 ((1992); *Dalton v. Specter*, 511 U.S. 462, 469 (1993).

[25] Chamber of Commerce v. Reich, 74 F. 3d 1311 (D.C. Cir. 1998); *National Family Planning Council v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).

[26] Described in Morton Rosenberg, *The Critical Need for Effective Congressional Review of Agency Rules: Background and Considerations for Incremental Reform*, at pp. 15-16, July 18, 2012, Report prepared for the Administrative Conference of the United States.

[27] 142 CONG. REC. 6907 (1996) (statement of Rep. McIntosh); Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 96 (1997).

[28] 44 U.S.C. § 3502(5).

[29] *See* Thomas Pahl, "How Washington will decide the consumer watchdog's fate," The Hill, January 26, 2017.

[30] 5 U.S.C. § 802(a) ("For purposes of this section, the term 'joint resolution' means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: 'That Congress disapproves the rule submitted by the __ relating to __, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in).").

[31] 5 U.S.C. § 801(a)(1)(C).

[32] *See* Curtis W. Copeland and Richard S. Beth, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, at p. 5, Aug. 25, 2008, RL34633.

[33] 5 U.S.C. § 802(c); Curtis W. Copeland and Richard S. Beth, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, at p. 5, Aug. 25, 2008, RL34633.

[34] 5 U.S.C. § 802(e); Curtis W. Copeland and Richard S. Beth, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, at p. 6, Aug. 25, 2008, RL34633.

[35] 5 U.S.C. § 802(e).

[36] "[A]djournment sine die" is defined as "[t]he end of a legislative session 'without day.' These adjournments are used to indicate the final adjournment of an annual or the two-year session of a Congress." *See* United States Senate Glossary.

[37] 5 U.S.C. § 801(d).

[38] 5 U.S.C. § 801(d).

[39] 5 U.S.C. § 802(a).

[40] Richard S. Beth, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, at p. 12, RL31160, October 10, 2001.

[41] *Id*. at p. 12.

[42] *Id*.

[43] *Id*.

[44] 5 U.S.C. § 802(d)(1).

[45] Richard S. Beth, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, at p. 13, RL31160, October 10, 2001.

[46] *Id*. at pp. 13-14.

[47] *Id*. at p. 14.

[48] *Id*. at p. 15.

[49] *Id*.

[50] 5 U.S.C. § 802(d)(4).

[51] 5 U.S.C. § 802(d)(3).

[52] Richard S. Beth, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, at p. 15, RL31160, October 10, 2001.

[53] 5 U.S.C. § 701(a).

[54] 5 U.S.C. § 805 ("No determination, finding, action, or omission under this chapter shall be subject to judicial review.").

[55] 5 U.S.C. § 801(a)(1)(A) ("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—(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.").

[56] *See Montanans for Multiple Use v. Babouletos*, 568 F. 3d 225, 228 (D.C. Cir. 2009); *Via Christie Regional Medical Center v. Leavitt*, 509 F. 3d 1259, 1271 n. 11 (10th Cir. 2007); *Texas Savings and Community Bankers Assoc. v. Federal Housing Finance Board*, 1998 WL842181, *7 & n.15 (W.D. Tex. June 25, 1998); *United States v. American Electric* Power *Service Corp.*, 218 F. Supp. 2d 931, 948-49 (S.D. Ohio 2002).

[57] One court has so found. *See United States v. Southern Indiana Gas and Electric Co.,* 2002 WL 31427523, **4-6 (S.D. Ind. Oct. 24, 2002) (finding the "no judicial review" clause to be ambiguous, and determining that the best interpretation consistent with the purpose of the CRA is that the failure of an agency to submit a rule to Congress or GAO is judicially reviewable, and further finding this interpretation bolstered by legislative history); *cf. King v. Burwell*, 135 S.Ct. 2480, 2496 (2015) ("Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."); *id*. at 2492 (looking "to the broader structure of the Act to determine [] meaning" and rejecting alternate interpretation in favor of one that "produces a substantive effect that is compatible with the rest of the law.").

[58] Morton Rosenberg, *The Critical Need for Effective Congressional Review of Agency Rules: Background and Considerations for Incremental Reform*, at p. 28, July 18, 2012, Report prepared for the Administrative Conference of the United States.

[59] 142 Cong. Rec. 6929 (1996).

[60] U.S. Const. art. I, § 5, cl.2.

[61] In addition to the broad "no judicial review" clause preventing any second-guessing of congressional determinations under the CRA, the Supreme Court has held that when it comes to the power of each house to determine the rules of its proceedings, "[n]either do the advantages or disadvantages, the wisdom or the folly, of such a rule present any matters for judicial consideration." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

[62] 5 U.S.C. § 801(a)(1)(A).

[63] *See* Maeva P. Carey, Alissa M. Dolan, & Christopher M. Davis, *The Congressional Review Act: Frequently Asked Questions*, at p. 11, R43992, November 17, 2016.

This database of rules received by Congress is accessible at https://www.congress.gov/search?q={%22source%22:%22communications%22}

[64] Accessible at http://gao.gov/legal/congressional-review-act/overview

[65] *See* Curtis W. Copeland, *Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress*, at p. 2, July 15, 2014.

[66] *Id*. at p. 2.

[67] *Id*.

[68] *Id*. at pp. 14-16.

[69] *Id*. at p. 16.

[70] *Id*. at pp. 16-17.

[71] *Id*. at p. 46.

[72] *Id*.

[73] *See Hundreds of Important Rules Vulnerable To Repeal Under the Congressional Review Act*, Cause of Action Institute. The Pacific Legal Foundation is also compiling a database of unreported rules. *See Unreported Regulations: Rules Not Sent to Congress.*

[74] Alternatively, even if the Trump administration failed to submit these rules to Congress, members could seek official determinations by GAO that a particular rule was never properly submitted pursuant to the CRA requirements. Publication of that determination in the Congressional Record has sufficed to trigger the period for initiating a joint resolution of disapproval qualifying for the expedited procedures under the Act. *See* Maeva P. Carey, Alissa M. Dolan, & Christopher M. Davis, *The Congressional Review Act: Frequently Asked Questions*, at p. 11, R43992, November 17, 2016.

About the Author

Ryan Walters is an attorney with the Center for the American Future at the Texas Public Policy Foundation. He is admitted to practice law in the State of Ohio. Prior to joining the Foundation, Ryan served as Assistant Attorney General in the Employment Law Section of the Office of the Ohio Attorney General where he defended the State of Ohio in federal litigation and administrative proceedings.

He has also been a staff attorney at the 1851 Center for Constitutional Law in Columbus, Ohio, a public-interest law firm promoting limited government, freedom of speech, and the rights of taxpayers and property owners. Earlier in his career, Ryan was a commercial litigator at two international law firms in Ohio, and in-house counsel for a publicly traded energy company in Orange County, California.

Ryan received his undergraduate degree in economics and political science from The Ohio State University, and his Juris Doctor from the University of Michigan Law School; while a law student, he served as a summer fellow at the Buckeye Institute for Public Policy Solutions, a free-market think tank in Columbus, Ohio. Ryan also earned a Master of Laws from the University of California, Berkeley, School of Law, concentrating on constitutional law; his thesis was awarded High Honors and he served as an officer with the Boalt Hall Chapter of the Federalist Society.

About the Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

TEXAS PUBLIC POLICY FOUNDATION

901 Congress Avenue | Austin, Texas 78701 | (512) 472-2700 | (512) 472-2728 fax | www.TexasPolicy.com