

November 3, 2021

Mark Thomson
Deputy Research Director
Administrative Conference of the United States
VIA E-MAIL

Dear Mr. Thomson,

I read with great interest the Oct. 21 and now the Nov. 4 drafts of the ACUS recommendations for Technical Reform of the Congressional Review Act (CRA). While I agree with each of the three recommendations the Committee has drafted, I hope that there might be some enthusiasm, either in the current project or a follow-on one, for ACUS to consider one or more somewhat more fundamental recommendations for change in the CRA. I apologize for filing this comment late in your current process.

The attached article is largely about the trouble caused by the vague term in the CRA that enjoins an agency from reissuing a rule that is “substantially the same” as one that has been disapproved. My co-author and I argue that this term must fairly be read to mean roughly “a rule that has a similarly unfavorable cost/benefit ledger as the prior rule had;” we urge Congress to clarify this key provision whose misinterpretation has, among many other consequences, convinced my former agency (OSHA) to steer clear of the hazards of repetitive motion (“ergonomics”) for now 20 years despite its huge toll in the American workplace.¹

But I realize that “substantially the same” is probably a third-rail issue, and that some legislators might actually prefer the current confusion it creates. *Therefore, I offer this comment instead in order to urge ACUS to consider three other recommendations in our Admin Law Review article.* Please consider just pages 779-783 of the attached, where these recommendations are explained in somewhat greater detail than they are here:

- *Amend the CRA to allow Congress only to “sever” a portion of a final rule that it disapproves of.* This would allow non-controversial portions of a rule to stand, and might also reveal situations where only a minority of legislators oppose each of two wholly unrelated provisions in a rule, thereby allowing a majority to veto something that no plurality actually opposes.
- *Require or encourage Congress to offer a statement of rationale for its resolution of disapproval.* If “substantially the same” means *anything* other

¹ For disclosure purposes, I was OSHA’s chief regulatory official during the period leading up to the 2001 disapproval of the ergonomics rule under the CRA, although I had led the development of a prior version of the standard that I believe would not have faced as much reasoned opposition.

than the most draconian possible restriction, it would be a simple good-government activity for Congress to give the offending agency some clue what it might do to atone for its prior mistake(s).

- *Allow agencies the opportunity to explain themselves during the deliberation over a resolution of disapproval.* Although our analogy to the Confrontation Clause (see p. 783) may well be inapt, it may also seem odd to invalidate an agency's work in a proceeding that affords the transgressor no opportunity to respond to concerns that did not necessarily arise during notice and comment.

If the Committee is interested in any of these ideas, but wishes to defer discussion to a subsequent meeting or to a new project, I'd be happy to provide any more detail at any convenient time. Thank you for the opportunity to engage in this important work.

Best regards,

A handwritten signature in cursive script that reads "Adam M. Finkel".

Adam M. Finkel, Sc.D., CIH

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(affiliation for purposes of identification only)