



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Technical Reform of the Congressional Review Act

Committee on Rulemaking

Proposed Recommendation for Committee | October 21, 2021

1 The Congressional Review Act (“CRA”)¹ allows Congress to enact joint resolutions
2 overturning rules issued by federal agencies. It also establishes special, fast-track procedures
3 governing such resolutions. This Recommendation aims to address certain technical flaws in the
4 Act and how it is presently administered.

The Hand-Delivery Requirement

5 The CRA provides that, before a rule can take effect, an agency must submit a report (an
6 “801(a) report”) to each house of Congress and the Comptroller General, who heads the
7 Government Accountability Office (“GAO”). Receipt of the 801(a) report by each house of
8 Congress and the Comptroller General also triggers the CRA’s special, fast-track procedures.

9 The CRA says nothing about how agencies must deliver 801(a) reports to Congress or the
10 Comptroller General. Congressional rules, however, currently require that 801(a) reports be
11 hand-delivered to both chambers of Congress. Although the House allows Members to
12 electronically submit certain legislative documents and the Comptroller General permits agencies
13 to electronically submit 801(a) reports, electronic submission currently not a valid means of
14 submitting 801(a) reports to Congress.

15 The hand-delivery requirement has been the subject of persistent criticism on the grounds
16 that it is inefficient and outdated. Recent events have also shown that it is sometimes
17 impracticable. For example, staffing disruptions related to the COVID-19 pandemic have, in
18 some instances, meant that congressional officials have not been present in the Capitol to receive
19 801(a) reports via hand-delivery.

¹ 5 U.S.C. §§ 801–08.



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Time Periods for Introducing and Acting on Resolutions Under the CRA

20 Another source of persistent criticism of the CRA concerns the time periods during which
21 Members of Congress may introduce and act on joint resolutions overturning agencies' rules.
22 Under the CRA, Congress's receipt of an 801(a) report begins a period of 60 days, excluding
23 days when either chamber adjourns for more than three days, during which any Member of either
24 chamber may introduce a joint resolution disapproving the rule.² Only rules submitted during this
25 period, sometimes called the "introduction period," are eligible for the CRA's special, fast-track
26 procedures.

27 Calculating the introduction period can be confusing because it runs only on "days of
28 continuous session"—that is, on every calendar day *except* those falling in periods when,
29 pursuant to a concurrent resolution, at least one chamber adjourns for more than three days. As a
30 practical matter, there is seldom a difference between 60 days of continuous session and 60
31 calendar days because recent Congresses have made regular use of *pro forma* sessions to avoid
32 adjournments of more than three days. Nevertheless, having to calculate the introduction period
33 according to days of continuous session rather than calendar days can mislead people unfamiliar
34 with the concept of days of continuous session or with recent Congresses' uses of *pro forma*
35 sessions. Moreover, because modern Congresses invoke *pro forma* sessions in a way that negates
36 almost any practical difference between days of continuous session and calendar days, the
37 CRA's use of days of continuous session to calculate the introduction period accomplishes little
38 beyond complicating the process of ascertaining the period's end date.

39 The introduction period is not the only complicated timing provision in the CRA.
40 Another—sometimes called the "lookback period"—provides that if, within 60 days of session in
41 the Senate or 60 legislative days in the House after Congress receives a rule, Congress adjourns
42 its annual session *sine die* (*i.e.*, for an indefinite period), the periods to submit and act on a
43 disapproval resolution "reset" in their entirety in the next session of Congress.³ In that next
44 session, the reset period begins on the 15th day of the session in the Senate and the 15th

² *Id.* § 802(a).

³ *Id.* § 801(d)(1).



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45 legislative day in the House. The lookback period thus ensures that Congress has the full periods
46 contemplated by the CRA to disapprove a rule, even if the rule is submitted near the end of a
47 session of Congress.

48 The lookback period is anomalous and difficult to ascertain for several reasons. Whereas
49 most of the time periods set forth in the CRA are calculated in calendar days, the lookback
50 period is calculated using Senate session days and House legislative days—terms of art with
51 which most people are unfamiliar.⁴ The lookback period is also unpredictable because House
52 legislative and Senate session days do not always correspond to each other, and the chambers
53 regularly modify their anticipated calendar of session or legislative days, often with little
54 advance notice. In addition, using legislative and session days to calculate the lookback period
55 means interested Members of Congress can strategically lengthen or shorten the period, either by
56 having legislative or session days extend for multiple calendar days or cramming several
57 legislative or session days into a single calendar day. Perhaps most troublesome: Whereas most
58 time periods under the CRA are calculated prospectively—that is, by counting forward from an
59 established starting date—the lookback period is calculated retrospectively—that is, by counting
60 backward from an end date that is not known until Congress adjourns *sine die*. The lookback
61 period’s retrospective quality makes it effectively impossible to calculate in real time because the
62 date on which the lookback period begins is only knowable once the period has closed. For those
63 and other reasons, the public, Members of Congress, congressional staff, and agencies sometimes
64 struggle to anticipate when the CRA’s lookback period will commence, or when it did
65 commence, during a given session of Congress. In recent years, the lookback period has tended
66 to commence between mid-July and early August, with the precise date varying from year to
67 year.⁵

⁴ A Senate session day is “[a] calendar day on which [the Senate] convenes and then adjourns or recesses until a later calendar day,” while a House legislative day commences when the House convenes and continues until the House adjourns. See RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RSCH. SERV., R42977, SESSIONS, ADJOURNMENTS, AND RECESSES OF CONGRESS 2, 6 (2016), <https://crsreports.congress.gov/product/pdf/R/R42977>.

⁵ See Jesse M. Cross, Technical Reform of the Congressional Review Act 35 (Oct. 8, 2021) (draft report to the Admin. Conf. of the U.S.)

Commented [MT1]: Note for Committee: At the suggestion of some Committee members, this language was transplanted from Recommendation 4. Other Committee members suggested supplementing the language here with language suggesting that the lookback period might start 90 days before January 20, along with a citation to ACUS Recommendation 2012-2, *Midnight Rules*. The Committee may wish to consider those further suggested changes at its next meeting.



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68 Complicating matters still further, the CRA’s key dates do not necessarily align in ways
69 that make sense. For instance, the CRA expressly provides that the introduction and lookback
70 periods commence when an 801(a) report is submitted to Congress. But other, related CRA time
71 periods—such as the periods for discharging a joint resolution from committee (the “discharge
72 period”) and for fast-tracking a rule through the Senate (the “Senate action period”)—commence
73 running only after Congress receives the report *and* the rule is published in the *Federal Register*.
74 This can lead to anomalous situations. Members might, for instance, timely introduce joint
75 resolutions of disapproval under the CRA and yet be unable to avail themselves of the CRA’s
76 fast-track procedures.

77 At present, problems with synchronizing related CRA time windows are addressed
78 primarily through interpretations from the Senate and House parliamentarians. For example, the
79 Senate parliamentarian has interpreted the lookback and introduction periods to commence only
80 after the 801(a) report has been submitted to Congress *and* the rule has been published in the
81 *Federal Register*, thereby harmonizing the starting dates for those periods with the starting dates
82 for the discharge and Senate action periods.

83 But relying on the parliamentarians’ interpretations creates its own problems. Chief
84 among them is that the interpretations are not always easily accessible by the public. Although
85 some of the parliamentarians’ interpretations are publicly available, many are not. Indeed, the
86 formal rulings of the Senate parliamentarian have not been published in decades. In the case of
87 the interpretations that are collected and published, moreover, most members of the public are
88 either unaware of the interpretations’ existence or unsure how to access them.

Initiating CRA Review of Actions for Which Agencies Do Not Submit 801(a) Reports

89 Still another criticism of the CRA concerns what Congress should do to enable CRA
90 review of agency actions for which agencies do not submit 801(a) reports. The CRA itself does
91 not say what to do in those situations, even though studies show they arise frequently.

92 Absent statutory text addressing the subject, Congress has adopted a process through
93 which it initiates review of such agency actions by requesting an opinion from the Government
94 Accountability Office (“GAO”). That process begins when Members or committees request a
95 GAO opinion on whether an agency action qualifies as “rule” under the CRA. If GAO concludes



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96 that the action amounts to a rule under the CRA, a Member of Congress or a committee provides
97 for publication of the GAO opinion in the *Congressional Record*. Publication in the
98 *Congressional Record* is then deemed to be the date that triggers the time periods for CRA
99 review of the agency action.

100 Although that process has worked tolerably well as a response to the problem of
101 unreported rules, it lacks a clear basis in the CRA’s text. There are also aspects of it that warrant
102 revisiting. For example, there is no time limit for using the current, *de facto* procedure, meaning
103 Congress might use it to subject a decades-old action to CRA review.

104 This Recommendation provides targeted, technical reforms to address many of the
105 criticisms just identified—including criticisms of the hand-delivery requirement, criticisms
106 prompted by the confusion surrounding key dates under CRA, and criticisms of the process for
107 initiating CRA review of agency actions for which agencies do not submit 801(a) reports.

RECOMMENDATION

Requiring Electronic Submission of Reports Required by 5 U.S.C. § 801(a)(1)(A)

- 108 1. Congress should amend 5 U.S.C. § 801(a)(1)(A) to provide that the reports required by
109 that provision (“801(a) reports”) be submitted to Congress and the Government
110 Accountability Office (GAO) electronically rather than by hard copy.
- 111 2. In the event Congress does not enact the amendment described in Paragraph 1, both
112 houses of Congress should modify their rules or policies to require electronic submission
113 of 801(a) reports.
- 114 3. In the event that Congress, in some manner, mandates electronic submission of 801(a)
115 reports, it should establish procedures governing how agencies may electronically submit
116 801(a) reports.

Simplifying and Clarifying the Procedures for Determining Relevant Dates Under 5



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U.S.C. §§ 801 and 802.

- 117 4. Congress should amend 5 U.S.C. § 801(d)(1) to set a fixed date after which, each year,
118 rules submitted to Congress under the Congressional Review Act (“CRA”) will be
119 subject to the CRA’s review process during the following session of Congress.
- 120 5. Congress should amend 5 U.S.C. § 802(a), which establishes the period during which
121 joint resolutions of disapproval under the CRA may be introduced, to either:
- 122 a. Eliminate the requirement that joint resolutions be introduced during a particular
123 period; or
- 124 b. Align the dates on which the period commences and ends with the period during
125 which the Senate may act on a proposed joint resolution of disapproval submitted
126 under the CRA.
- 127 6. Congress should review and, where appropriate, enact Parliamentary interpretations
128 that bear on calculating deadlines under the CRA, either as statutory law or as formal
129 rules of the houses. If Congress does not enact those interpretations as statutory law, it
130 should ensure that they are published in a manner that is accessible to the public.

Commented [MT2]: Note for Committee: Are there specific categories of interpretations that ought to be mentioned here, or is that too intricate?

Commented [MT3]: Note for Committee: These proposed edits were made at the very end of the Committee’s first meeting on this project. They are still in redline because the Committee agreed to revisit them at the outset of its next meeting.

Initiating Review of Agency Actions for Which Agencies Do Not Submit 801(a) Reports

- 131 7. Congress should amend Chapter 8 of Title 5 of the United States Code to provide a
132 mechanism for initiating congressional review under the CRA of agency actions for
133 which agencies do not submit 801(a) reports. In particular, Congress should enact the
134 process it currently relies on to initiate CRA review of such agency actions, whereby:
- 135 a. A Member or committee requests the opinion of the GAO on whether an agency
136 action qualifies as a “rule” under the CRA;
- 137 b. GAO issues an opinion as to whether the agency action in question qualifies as a
138 “rule” under the CRA;
- 139 c. If GAO concludes that the action amounts to a rule under the CRA, a Member of
140 Congress or a committee provides for publication of the GAO opinion in the



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- 141 *Congressional Record*; and
- 142 d. Publication of the GAO opinion in the *Congressional Record* is deemed to be the
- 143 date that triggers the time periods for CRA review of the agency action.
- 144 8. If Congress amends the CRA to enact the procedure described in Paragraph 7, it should
- 145 impose a time limit on its own use of that procedure.
- 146 9. If Congress amends the CRA to enact the procedure described in Paragraph 7, it should
- 147 permit legislators in both chambers to solicit a GAO opinion on whether a particular
- 148 agency action is a rule.
- 149 10. Congress should consider imposing a deadline on GAO for issuing requested opinions on
- 150 whether a particular agency action is a rule for purposes of the CRA.