

**The Congressional Review Act After 15 Years: Background and  
Considerations for Reform**

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## Introduction

The enactment of the Congressional Review Act (CRA)<sup>1</sup> in 1996 established a mechanism by which Congress can review and disapprove virtually all federal agency rules. The House and Senate sponsors of the legislation made clear the fundamental institutional concerns that they were addressing by the Act:

“As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulations are often more complex by several orders of magnitude. As more and more of Congress’ legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help redress the balance, reclaiming for Congress some of its policy making authority, without requiring Congress to become a super regulatory agency.”<sup>2</sup>

The recognition of the CRA sponsors of both the desire to restore congressional political accountability and the need to establish a scheme of control that would be a collaborative effort of the political branches is evident. But the initial enthusiasm and expectations on the Hill waned quickly as doubts of the efficacy of the review scheme as a vehicle to control agency lawmaking through responsible, effective, and expeditious legislative oversight soon emerged and was confirmed.<sup>3</sup> Since April 1996 some 57,697 rules have been reported to Congress, including 1,029 major rules, and have become effective. During that period a total 72 resolutions of disapproval concerning 49 rules were introduced, but only one has been passed an event that may have been *sui generis* because of the unique circumstances accompanying its passage. In contrast, in the 10 year period 1999 through 2008, Congress enacted at least 190 provisions of law that

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<sup>1</sup> The CRA was included as Subtitle E of the Small Business Regulatory Enforcement Act of 1996 (SBRFA), Pub. L. No. 104-121, 110 Stat. 857, 868 (codified at 5 U.S.C. 801-808 (2006)).

<sup>2</sup> Joint Explanatory Statement of House and Senate Sponsors, 142 Cong. Rec. 6922, 6926 (1996)(Legislative History). An identical Joint Statement of the Senate sponsors appears at 142 Cong. Rec. 8196-8201 (1996). Further references to the Legislative History will utilize the earlier House insertion.

<sup>3</sup> See, e.g., Daniel Cohen and Peter L. Strauss, “*Congressional Review of Agency Rulemaking*,” 49 ADMIN. L. REV. 95 (1996); Morton Rosenberg, “*Whatever Happened to Congressional review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*,” 51 ADMIN.L. REV. 1051 (1999)(Rosenberg).

prohibited the expenditure of federal funds by agencies from developing proposed rules, from making a proposed rule final, or from implementing or enforcing a final rule.<sup>4</sup>

Some maintain that despite the virtual absence of formal veto actions, a number of major rules have been affected by agency awareness of the review mechanism and argue that the review scheme has had a significant impact. Others counter that the potential passage of a disapproval resolution, which is subject to presidential veto, is no greater than the threat of passage of an ordinary bill, and that this is particularly so in light of the structural and interpretive impediments to the CRA's use, which are well known.

The most prominent structural obstacles to its potential use are the lack of a screening mechanism to identify reported rules that may require special congressional attention; the failure to provide an expedited consideration procedure in the House of Representatives comparable to that provided to the Senate; and that a joint resolution of disapproval of a significant or politically sensitive rule is likely to need a supermajority of both Houses to be successful. Moreover, a number of critical interpretive issues remain to be resolved. These include the questions whether the failure to report a covered rule is subject to court review and sanction; what rules are covered by the Act; and what is the scope of the CRA's limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of the rule.

Renewed interest in legislative review of agency rules in the 112<sup>th</sup> Congress will provide Congress with a clear opportunity to address the perceived flaws in the CRA and redefine its oversight role in the rule development process. The discussion vehicle in all likelihood will be H.R. 10, the "Regulations From the Executive in Need of Scrutiny Act of 2011" (REINS Act), which would dramatically alter the rule review process by deeming all major rules reported to Congress as proposals that cannot become effective unless Congress passes a joint resolution of approval within a specified legislative time period. Hearings on the bill were held before the House Judiciary Subcommittee on Courts, Commercial and Administrative Law in January and March 2011. A companion measure, S. 299, was introduced in the Senate in February 2011.<sup>5</sup>

Part 1 of this Report will provide the Conference with a detailed description of the statutory review scheme and how its sponsors expected it to operate. Part 2 will describe how it in fact has been utilized, through statistical evidence, anecdotal examples of attempted use of the mechanism as a means to influence agency action, and an assessment of the import of the 2001 annulment of OSHA's ergonomics rule, the only veto action ever taken under the Act. In Part 3 particular perceived impediments to

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<sup>4</sup> Curtis W. Copeland, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, CRS Report RL34364 (August 5, 2008).

<sup>5</sup> The 112th Congress has thus far seen a high level of interest in regulatory reform proposals. In addition to H.R. 10, there have been 21 bills introduced in the House and Senate in the area, including a measure, H.R. 214, to create a Congressional Office of Regulatory Analysis. See "*Regulatory Reform Legislation in the 112<sup>th</sup> Congress*," CRS Report No. R41834, August 24, 2011, by Curtis W. Copeland.

effective Of the review scheme will be addressed and assessed in depth. It will also discuss past proposals for reform and review and assess in detail the REINS Act reform scheme. Part 4 will discuss and evaluate options that may be considered to make legislative review effective, expeditious and fair. Lessons learned from state experiences will be explored and evaluated for their transferability to the federal milieu. The Report will conclude with a discussion of the need for the political branches to engage in a “collaborative enterprise” in the review of agency lawmaking and the authors suggestions of priority actions to secure an effective review scheme.

## **1. The Scheme of Review of Agency Rules Under the CRA**

### **(a) Reporting Requirements**

The congressional review mechanism, codified at 5 U.S.C. §§ 801-808, and popularly known as the Congressional Review Act (CRA), requires that all agencies promulgating a covered rule must submit a report to each House of Congress and to the Comptroller General (CG) that contains a copy of the rule, a concise general statement describing the rule (including whether it is deemed to be a major rule), and the proposed effective date of the rule. A covered rule cannot take effect if the report is not submitted.<sup>6</sup> Each House must send a copy of the report to the chairman and ranking minority member of each jurisdictional committee.<sup>7</sup> In addition, the promulgating agency must submit to the CG (1) a complete copy of any cost-benefit analysis; (2) a description of the agency’s actions pursuant to the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995; and (3) any other relevant information required under any other act or executive order. Such information must also be made “available” to each House.<sup>8</sup>

### **(b) Rules Covered by the CRA**

Section 804(3) adopts the definition of “rule” found at 5 U.S.C. 551(4) which provides that the term rule “means the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy.”<sup>9</sup> The legislative history of Section 551(4) indicates that the term is to be broadly construed: “The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well.”<sup>10</sup> The courts have recognized

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<sup>6</sup> 5 U.S.C. § 801 (a)(1)(A).

<sup>7</sup> 5 U.S.C. § 801 (A)(1)(C).

<sup>8</sup> 5 U.S.C. § 801 (1)(B).

<sup>9</sup> 5 U.S.C. § 804 (3) excludes from the definition “(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowance therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, or practice that does not substantially affect the rights or obligations on non-agency parties.”

<sup>10</sup> Attorney General’s Manual on the Administrative Procedure Act 13 (1948); *See also Batterton v. Marshall*, 648 F. 2d 694, 700-02 (D.C. Cir. 1980).

the breadth of the term, indicating that it encompasses “virtually every statement an agency may make,”<sup>11</sup> including interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, employee manuals and memoranda of understanding, among other types of actions. Thus a broad range of agency action is potentially subject to congressional review.<sup>12</sup>

### **(c) The Roles of the Comptroller General and the OIRA Administrator**

The Comptroller General and the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget have particular responsibilities with respect to a “major rule,” defined as a rule that will likely have an annual effect on the economy of \$100 million or more, increase costs or prices for consumers, industries or state and local governments, or have significant adverse effects on the economy. The determination of whether a rule is major is assigned exclusively to the Administrator of OIRA.<sup>13</sup> If a rule is deemed major by the OIRA Administrator, the CG must prepare a report for each jurisdictional committee within 15 calendar days of the submission of the agency report required by Section 801(a)(1) or its publication in the Federal Register, whichever is later. The statute requires that the CG’s report “shall include an assessment of the agency’s compliance with the procedural steps required by Section 801(a)(1)(B).”<sup>14</sup> The CG has interpreted his duty under this provision relatively narrowly as requiring that he determine whether the prescribed action has been taken, i.e., whether a required cost-benefit analysis has been provided, and whether the required actions under the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and any other relevant requirements under any other legislation or executive orders were taken, not to examine the substantive adequacy of the actions.

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<sup>11</sup> *Avoyelles Sportsmen’s League, Inc., v. Marsh*, 715 F.2d 897 (5<sup>th</sup> Cir. 1983).

<sup>12</sup> *See, e.g., Chem Service, Inc. v. EPA*, 12 F.3d 1256 (3d Cir. 1993)(memorandum of understanding); *Caudill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74 (4<sup>th</sup> Cir. 1993)(interpretative rules); *National Treasury Employees Union v. Reagan*, 685 F. Supp 1346 (E.D. La 1988)(federal personnel manual letter issued by OPM); *New York City Employment Retirement Board v. SEC*, 45 F.3d 7 (2d Cir. 1995)(affirming lower court’s ruling that SEC “no action” letter was a rule within § 551(4)); *Guardian Federal S&L Ass’n v. 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).

<sup>13</sup> 5 U.S.C. § 804 (2).

<sup>14</sup> 5 U.S.C. § 801(a)(2)(A).

#### (d) Effective Dates of Major and Non-Major Rules <sup>15</sup>

The designation of a rule as major also affects its effective date. A major rule may become effective on the latest of the following scenarios: (1) 60 calendar days after Congress receives the report submitted pursuant to Section 801(a)(1)<sup>16</sup> or after the rule is published in the Federal Register; (2) if Congress passes a joint resolution of disapproval and the President vetoes it, the earlier of when one House votes and fails to override the veto, or 30 calendar days after Congress receives the veto message; or (3) the date the rule would otherwise have taken effect (unless a joint resolution is enacted).<sup>17</sup>

Thus the earliest a major rule can become effective is 60 calendar days after the later of the submission of the report required by Section 801(a)(1) or its publication in the Federal Register, unless some other provision of the law provides an exception for an earlier date. Three possibilities exist. Under Section 808(2) an agency may determine that a rule should become effective notwithstanding Section 801(a)(3) where it finds “good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>18</sup> Second, the President may determine that a rule should

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<sup>15</sup> The CRA is a complex statute, and among its chief complexities is its use of at least four different ways to measure the passage of time to effectuate the different purpose of the review scheme: *calendar days*; *days of continuous session*, which excludes all days when either the House of representatives or the Senate has adjourned for more than three days; *session days*, which include only calendar days in which a chamber is in session; and *legislative days*, which end each time a chamber adjourns and begin each time it convenes after an adjournment. It is important to be aware that different measures may be applicable to the various stages-effective dates, initiation and action periods, and the carryover period-of the review process. See Curtis W. Copeland and Richard S. Beth, CRS Report RL34633, *Congressional review Act: Disapproval of Rules in a Subsequent Session of Congress* (August 25, 2008).

<sup>16</sup> The General Counsel of the Government Accountability Office (GAO) has ruled that the 60-day period does not begin to run until *both* Houses of Congress receive the required report. See B-289880, April 5, 2002, opinion letter to Hon. Edward M. Kennedy, Chairman, Senate Committee on Health, Education, Labor and Pensions from Anthony H. Gamboa, General Counsel. The situation involved a Department of Health and Human Services (HHS) major rule published in the Federal Register on January 18, 2002 with an announced effective date of March 29, 2002. The House of Representatives, however, did not receive the rule until February 14, 2002. HHS thereafter delayed the effective date of the rule until April 15, 2002, in an attempt to comply with the CRA. But the Senate did not receive the rule until March 15, 2002. The General Counsel determined that the rule could not become effective until May 14, 2002, 60 days following the Senate’s receipt, relying on the language of § 801(a)(1)(A) of the act requiring that a copy of a covered rule must be submitted “to *each* House of Congress” in order to become effective.

<sup>17</sup> 5 U.S.C. § 801(a)(3).

<sup>18</sup> Reviewing courts have generally applied the Administrative Procedure Act’s good cause exemption, from which this language is obviously taken, narrowly in order to prevent agencies from using it as an escape clause from notice and comment requirements. See, e.g., *Action on Smoking and Health v. CAS*, 713 F.2d 795, 800 (D.C. Cir. 1987). However, since Section 805 precludes judicial review for any “determination, finding, action or omission under this chapter”, there could be no court condemnation of a good cause determination. But the rule would still be subject to congressional vacation and retroactive nullification.

take effect earlier because of an imminent threat to health or safety or other emergency; to insure the enforcement of the criminal laws; for national security purposes; or to implement an international trade agreement.<sup>19</sup> Finally, a third route is available under Section 801(a)(5) which provides that “the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under Section 802.”<sup>20</sup>

All other rules take effect “as otherwise allowed by law” after having been submitted to Congress under Section 801(a)(4).<sup>21</sup> Under the Administrative Procedure Act, a final rule may go into effect 30 days after it is published in the Federal Register in final form.<sup>22</sup> An agency, in its discretion, may delay the effectiveness of a rule for a longer period; or it may put it into effect immediately if good cause is shown.

#### **(e) Rules That Have Become Effective and the Carryover Period**

All covered rules are subject to disapproval even if they have gone into effect. Congress has reserved to itself a review period of at least 60 days. Moreover, if a rule is reported within 60 session days of adjournment of the Senate or 60 legislative days of adjournment of the House, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress.<sup>23</sup> §801(d)(1). Such held over rules are treated as if they were published on the 15<sup>th</sup> session day of the Senate and the 15<sup>th</sup> legislative day of the House in the succeeding session and as though a report under § 801(a)(1) was submitted on that date.<sup>24</sup> But a held over rule takes effect as otherwise provided.<sup>25</sup> The opportunity for Congress to consider and disapprove is simply extended so that it has a full 60 session or legislative days to act in any session.

#### **(f) Effect of a Congressional Disapproval of a Rule**

If a joint resolution of disapproval is enacted into law, the rule is deemed not to have had any effect at any time.<sup>26</sup> A rule that does not take effect, or is not continued

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<sup>19</sup> 5 U.S.C. § 801(c).

<sup>20</sup> In *Leisegang v. Sect’y of Veterans Affairs*, 312 F.3d 1368, 1373-1376 (Fed. Cir. 2002), the appeals court held that Section 801(a)(3) “does not change the date on which [a major rule] becomes effective. It only affects the date when the rule becomes operative. In other words, the CRA merely provides a 60-day waiting period before the agency may enforce the major rule so that Congress has the opportunity to review the regulation.” At issue in the case was the date from which certain veterans benefits would be calculated. The benefit statute provided that it would be the date of the issuance of the rule. The government argued that the CRA was a superseding statute and that the effective date was when the CRA allowed it to be operative. The appeals court agreed with the veterans that the date of issuance, as prescribed by the law, was determinative.

<sup>21</sup> 5 U.S.C. § 801 (a)(4).

<sup>22</sup> § 553(d).

<sup>23</sup> 5 U.S.C. § 801 (d)(1).

<sup>24</sup> 5 U.S.C. § 801 (d)(2)(A), (e)(2).

<sup>25</sup> 5 U.S.C. § 801 (d)(3).

<sup>26</sup> 5 U.S.C. § 801 (f).



because of passage of a disapproval resolution, may not be reissued in substantially the same form. Indeed, before any reissued or new rule that is “substantially the same” as a disapproved rule can be issued it must be specifically authorized by a law enacted subsequent to the disapproval of the original rule.<sup>27</sup> However, if a rule is subject to any statutory, regulatory, or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the joint resolution. Thus, disapproval of a mandated rule allows an agency to “try again,” guided presumably by the disapproval debate.<sup>28</sup>

### **(g) Senate and House Procedures for Consideration of Disapproval Resolutions**

Section 802(a) spells out the process for an up or down vote on a joint resolution of disapproval.<sup>29</sup> A joint resolution of disapproval must be introduced within 60 calendar days (excluding days either House of Congress is adjourned for more than three days during a session of Congress) after the agency reports the rule to the Congress in compliance with Section 801(a)(1). Timely introduction of a disapproval resolution allows each House 60 session or legislative days to consider it through use of expedited consideration procedures, and if passed, allows retroactive nullification of an effective rule, and the limitation on an agency from promulgating a “substantially similar” rule without subsequent congressional authorization to do so by law.

The law provides an expedited consideration procedure for the Senate. If the committee to which a joint resolution is referred has not reported it out within 20 calendar days after referral, it may be discharged from further consideration by a written petition of 30 Members of the Senate, at which point the measure is placed on the calendar. After committee report or discharge it is in order at any time for a motion to proceed to consideration. All points of order against the joint resolution (and against consideration of the measure) are waived, and the motion is not subject to debate, amendment, postponement, or to a motion to proceed to other business. If the motion to consider is agreed to, it remains as unfinished business of the Senate until disposed of.<sup>30</sup> Debate on the floor is limited to 10 hours. Amendments to the resolution and motions to postpone or to proceed to other business are not in order.<sup>31</sup> At the conclusion of debate an up or down vote on the joint resolution is to be taken.<sup>32</sup>

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<sup>27</sup> 5 U.S.C. § 801(b)(2).

<sup>28</sup> 5 U.S.C. § 803. See discussion *infra* at 32-36.

<sup>29</sup> For an in-depth discussion of procedural issues that may arise during House and Senate consideration of disapproval resolutions, see Richard S. Beth, CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth, October 10, 2001.

<sup>30</sup> 5 U.S.C. § 801 (d)(1).

<sup>31</sup> 5 U.S.C. § 802(d)(2).

<sup>32</sup> 5 U.S.C. § 802(d)(3). There is some question whether a motion to proceed is non-debatable because of the absence of language so stating. Arguably, the non-debatability of the motion is integral both to the scheme of the expedited procedure provisions as well as to the overall

There is no special procedure for expedited consideration and processing of joint resolutions in the House. But if one House passes a joint resolution before the other House acts, the measure of the other House is not referred to a committee. The procedure of the House receiving a joint resolution “shall be the same as if no joint resolution had been received from the other House, but . . . the vote on final passage shall be on the joint resolution of the other House.”<sup>33</sup>

### **(h) Judicial Review of Actions Taken Under the CRA**

Section 805 precludes judicial review of any “determination, finding, action or omission under this chapter.” This would insulate from court review, for example, a determination by the OIRA Administrator that a rule is major or not, a presidential determination that a rule should become effective immediately, an agency determination that “good cause” requires a rule to go into effect at once, or a question as to the adequacy of a Comptroller General’s assessment of an agency’s report. The legislative history of this provision indicates that this preclusion of judicial review was not meant to apply to a court challenge to a failure of an agency to report a rule. However, district and appellate court rulings have held that the preclusion provision applies to and prevents such challenges.<sup>34</sup>

Finally, the law provides a rule of construction that a reviewing court shall not draw any inference from a congressional failure to enact a joint resolution of disapproval with respect to such rule or a related statute.<sup>35</sup>

## **2. Utilization of the Review Mechanism Since 1996**

### **(a) Summary of Rules Reported, Resolutions Introduced, and Actions Taken**

As of August 15, 2011, the Comptroller General had submitted reports pursuant to Section 801(a)(2)(A) to Congress on 1,029 major rules.<sup>36</sup> In addition, GAO had cataloged

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

<sup>33</sup> 5 U.S.C. § 802(f)(1)(2).

<sup>34</sup> See discussion *infra* at pp 23-26.

<sup>35</sup> 5 U.S.C. § 801 (g).

<sup>36</sup> General Accounting Office, Reports on Federal Agency Major Rules, which may be found at <http://www.gao.gov/decisions/majrule/majrule.htm>. Between 1999 and 2009 GAO catalogued over 1000 rules, an average of over 100 per year, that had been published in the Federal Register

the submission of 56, 668 non-major rules as required by Section 801 (a)(1)(A). To date, 72 joint resolutions of disapproval have been introduced relating to 49 rules. One rule, the Occupational Safety and Health Administration's ("OSHA") ergonomics standard, was disapproved in March 2001, an action that some believe to be unique to the circumstances of its passage. Two other rules have been disapproved by the Senate. One, the Federal Communication Commission's 2003 rule relating to broadcast media ownership was disapproved by the Senate during the 108<sup>th</sup> Congress but was never acted upon by the House. The second, a 2005 Department of Agriculture rule relating to the establishment of minimal risk zones for introduction of bovine spongiform encephalopathy (Mad Cow Disease) was disapproved on March 3, 2005, but its counterpart, H.J. Res. 23, was not acted upon by the House. A third joint resolution, S.J. Res. 20, seeking disapproval of a rule promulgated by the Environmental Protection Agency to delist coal and oil-direct utility units from the new source category list under the Clean Air Act, was defeated in the Senate by a vote of 47-51 on September 13, 2005. Also, two motions to proceed to Senate floor consideration of disapproval resolutions were defeated in the 111<sup>th</sup> Congress: S.J. Res. 30, concerning a National Mediation Board rule involving representation election procedure, on September 23, 2010 by a vote of 43-56; and S.J. Res. 39 concerning a HHS/CMS interim final rule regarding group health plans and health insurance plans implementing the Patient Protection and Affordable Care Act, on September 29, 2010, by a vote of 40-59.

One House joint resolution, H.J. Res. 37, seeking disapproval of a 2010 Federal Communications Commission rule concerning the preservation of open internet and broadband industry practices, was passed by the House on April 8, 2011, by a vote of 240-179. Its Senate counterpart, S.J. Res. 6, has not been acted upon. An Appendix to this Report provides a chronological chart detailing the dates, sponsors, subjects and actions taken on the introduced resolutions.

Finally, it is important to note that a CRS study has found that during the period 1998 through 2008 at least 190 proposed or effective rules were stayed by the limitations on appropriations in annual funding measures enacted during those years.<sup>37</sup>

### **(b) The Ergonomics Rule Rescission**

OSHA's ergonomics standard had been controversial since the publication of its initial proposal for rulemaking in 1992 during the Bush Administration. OSHA circulated a draft proposal in 1994 which was met with strong opposition from business interests and the formation of an umbrella organization, the National Coalition on Ergonomics, to oppose its adoption. In 1995 OSHA circulated a modified draft proposal, particularly with respect to coverage and regulatory requirements. At the same time, congressional opposition resulted in appropriations riders that prohibited OSHA from promulgating proposed or final ergonomics regulations during the fiscal years 1995, 1996, and 1998.<sup>38</sup>

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that were neither reported to it or to both Houses of Congress as required. In 2010 GAO took direct action that reduced the number of unreported rules to four. See discussion, *supra*, at pp. .Covered rules that are not required to be published in the Federal Register .are rarely reported.

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<sup>38</sup> In a close floor vote, the rider proposed for FY1997 was deleted.

The riders did not prohibit OSHA from continuing its development work, however, which included questions related to whether scientific knowledge of ergonomics was adequate for rulemaking and whether the cost of implementation of a broad standard would be extraordinarily burdensome to industry. Congress mandated reports from the National Academy of Sciences which found a significant statistical link between workplace exposures and musculoskeletal disorders, but also noted that the exact causative factors and mechanisms are not understood. In 2000, congressional attempts to pass another appropriation rider, as well as stand-alone prohibitory legislation, failed, and on November 14, 2000, OSHA issued its final standard which became effective on January 16, 2001.<sup>39</sup> Most employer responsibilities under the new standard, however, were not to begin until October, 2001.

As soon as the rule was issued two industry groups filed suit in the Court of Appeals for the District of Columbia Circuit challenging OSHA's authority to issue the rule, its failure to follow proper procedures, the rationality of its provisions, and the adequacy of its scientific and economics analyses. The intervening 2000 elections also altered the political situation with the election of a President and effective control of both Houses of Congress in the same political party. Opponents of the standard introduced a resolution of disapproval under the CRA, S.J.Res. 16, on March 1, 2001. A discharge petition was filed on March 5, and debate on and passage of the resolution in the Senate occurred on March 6 by a vote of 56-44. That evening the House Rules Committee issued a rule for floor action the next day, and after an hour of debate H.J.Res. 35 was passed on March 7 by a vote of 223-206. The President signed the nullifying measure into law on March 20, 2002.<sup>40</sup>

In sum, the veto of the ergonomics standards could be seen as the product of an unusual confluence of factors and events: control of both Houses of Congress and the presidency by the same party; the longstanding opposition by these political actors, as well as by broad components of the industry to be regulated, to the ergonomics standards; and the willingness and encouragement of a President seeking to undo a contentious, end-of-term rule from a previous Administration. Indeed, it was presumed by some that its future might be limited to presidential transitions that effected similar political realignments.<sup>41</sup>

But it appears that even in an almost exact repeat of the circumstances that fostered the ergonomics rule rescission may be insufficient to impel congressional use of the CRA. In the concluding months of the George W. Bush Administration, a concerted public effort was made to finalize rules, many controversial, so that they would become effective before President-elect Obama and the soon-to-be increasing Democratically-controlled Congress took office. As a consequence, the opportunity was presented for disapproval of the midnight rules through the carryover provisions of the CRA in the same manner used to rescind the ergonomics rule. However, only one disapproval

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<sup>39</sup> 65 Fed. Reg. 68261 (2000).

<sup>40</sup> P.L. 107-5.

<sup>41</sup> See, e.g., Note, "*The Mysteries of the Congressional Review Act*," 122 HARV. L. REV. 2162, 2167 (2009)(Mysteries of the CRA).

resolution was introduced during the carryover period<sup>42</sup> which was never reported out of the House committee to which it was referred. Rather, the President and Congress chose traditional means to overturn certain of the rules. The President asked agencies to commence rulemaking proceedings to repeal some rules; and in at least one instance a midnight rule was overturned by a proviso in an omnibus appropriations bill that the President signed into law.<sup>43</sup> A commentator has suggested that as long as traditional executive and legislative vehicles are available rescind midnight rules, Congress will not take up valuable floor time to deal with individual rules, particularly when Senate consideration can consume as many as ten hours; and the President will not ask them to do it if there are alternative administrative means to pursue, concluding that “[e]ven in transition periods, when the CRA is most likely to be effective, an outgoing Administration did not take steps to avoid its effect, and the incoming Administration did not see any benefit in using it.”<sup>44</sup>

### **(c) Illustrations of Attempts to Use the CRA to Influence Agency Actions**

In all other cases, if there is any discernible pattern to the introduced resolutions, it is to exert pressure on the subject agencies to modify or withdraw the rule, or to elicit support of other Members, which in some instances were successful, and in others not. For example, H.J.Res. 67 (1997) was aimed at disapproving an OSHA rule setting occupational exposure limits on methylene chloride, a paint stripper used in the furniture and airplane industries. Its sponsor, Representative Roger Wicker, contended that the rule would harm small businesses without increasing protections for workers. The disapproval resolution never received a floor vote. But the Congressman succeeded in effecting a compromise through the inclusion of provisions in the FY1998 Labor, HHS and Education appropriations measure<sup>45</sup> which required OSHA to provide on-site assistance for companies to comply with the new rules without fear of penalty. Mr. Wicker is reported to have stated that he used the disapproval resolution as a vehicle to gather support from influential Members, including the chairs of the House Appropriations and Commerce Committees.<sup>46</sup>

The disapproval resolution mechanism was effectively utilized to accomplish the suspension of a highly controversial rulemaking by the then-Health Care Financing Administration (HCFA). In January 1998, HCFA issued a rule requiring that home health agencies (HHAs) participating in the Medicare program must obtain a surety bond that is the greater of \$50,000 or 15 percent of the annual amount paid to the HHA by the Medicare program. In addition, a new HHA entering the Medicare or Medicaid program after January 1, 1998, had to meet a capitalization requirement by showing it actually had

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<sup>42</sup> H.J. Res. 18, 111<sup>th</sup> Cong., concerning a joint rulemaking by the Departments of Interior and Commerce dealing with interagency cooperation under the Endangered Species Act.

<sup>43</sup> *Mysteries of the CRA*, supra, 122 HARV. L. REV. at 2174-76 .

<sup>44</sup> *Id.* at 2176.

<sup>45</sup> P.L. 105-78.

<sup>46</sup> See Allan Freedman, “GOP’s Secret Weapon Against Regulations: Finesse,” *CQ Weekly*, September 5, 1998, at 2318-19 (Freedman).

available sufficient capital to start and operate the HHA for the first three months. The rule was issued without the usual public participation through notice and comment and was made immediately effective. Substantial opposition to the rule quickly surfaced from both surety and HHA industry representatives. HCFA attempted to remedy the complaints by twice amending the rule, in March and in June, but was unsuccessful in quelling the industry concerns. On June 10, Senator Bond, for himself and 13 other co-sponsors, introduced S.J.Res. 50 to disapprove the June 1 HCFA rule. Within a short period, the disapproval resolution had garnered 52 sponsors. On June 17, a companion bill, H.J. Res. 123, was introduced in the House. Thereafter, according to press reports, members of the staffs of Senators Bond, Baucus, and Grassley (all members of the Senate Finance Committee with jurisdiction over the agency) met with HCFA officials and concluded an agreement that (1) the agency would suspend its June 1, 1998 rule indefinitely; (2) a General Accounting Office report would be requested by the committee that would study the issues surrounding the surety bond requirement; (3) on completion and issuance of the GAO report, HCFA would work in consultation with the Congress about the surety bond requirement; and (4) any new rule would not be effective earlier than February 15, 1999, and would be preceded by at least 60 days prior notice. The agreement reportedly was memorialized in a June 26 letter to HCFA signed by Senators Bond, Baucus and Grassley.<sup>47</sup> The GAO report was issued on January 29, 1999, but the rule suspension was never lifted. No floor vote on the disapproval resolutions occurred in either House.

Another illustration of the manner in which the review mechanism has been utilized is shown by S.J. Res. 60 (1996), concerning another HCFA rule, this one dealing with the agency's annual revision of the rates for reimbursement of Medicare providers (doctors and hospitals), which normally would have been effective on October 1, 1996. HCFA, however, submitted the rule to Congress on August 30, 1996, and since it was a major rule, it could not go into effect for 60 days, or until October 29, which meant there would be a significant loss of revenues because the differential rate increases could not be imposed for most of the month of October. Section 801(a)(5), however, provides that if a joint resolution of disapproval is rejected by one House, "the effective date of a rule shall not be delayed by operation of this chapter..." On the morning of September 17, 1996, Senator Lott introduced S.J. Res. 60, and that afternoon, by unanimous consent, the resolution "was deemed not passed."<sup>48</sup> The HCFA rule went into effect on October 1 as scheduled.

An interesting utilization of the CRA process that had an impact and resulted in an unusual outcome, involved President George W. Bush's restoration, on February 15, 2001, of President Reagan's so-called Mexico City Policy, which limited the use of federal and non-federal monies by non-governmental organizations (NGOs) to directly fund foreign population planning programs which support abortion or abortion-related activities. President Clinton had rescinded the 1984 Reagan policy when he took office in January 1993.<sup>49</sup> A President's authority to determine the terms and conditions on which such NGOs may engage in foreign population planning programs derives from the

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<sup>47</sup> Freedman, *supra* note 46, at 2319-20.

<sup>48</sup> See 142 Cong. Rec. S 10723 (daily ed. September 17, 1996).

<sup>49</sup> 29 Weekly Comp. Pres. Doc. 88 (1993).

Foreign Assistance Act of 1961.<sup>50</sup> The provision vests the authority to make these determinations exclusively in the Chief Executive. President Reagan delegated his authority to make the determinations to the Administrator of the U.S. Agency for International Development (AID), who issued regulations that specified the conditions upon which grants would be given to NGOs. Thus, when the Mexico City Policy was rescinded in 1993, it was the AID Administrator that did it, at the direction of President Clinton. When President Bush restored it in 2001, he did it in a directive to the AID Administrator<sup>51</sup> who simply revived the old conditions by internal agency administrative action.

A number of Senate opponents of the policy filed a disapproval resolution on March 20, 2001, S.J. Res. 9, to nullify the Administrator's action, reasoning that it was a covered rule under the CRS since the implementing action was taken by an executive agency official and not by the President himself, and thus was reviewable by Congress.<sup>52</sup> The President responded by rescinding his earlier directive to the AID Administrator and thereafter issuing an executive order under his statutory authority to implement the necessary conditions and limitations on NGO grants.<sup>53</sup> The presidential action mooted the disapproval resolution and rendered a subsequent attempt to veto the rule by S.J. Res. 17 ineffective because the CRA does not reach such actions by the President.

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

In 2007 President Bush vetoed two authorization measures that would have effectively funded that expanded coverage. In an August 2007 CMS issued a "clarification" letter to State program administering officials advising them that five discretionary strategies that had been utilized by states to prevent "crowd out" of private group health plans were now mandatory for states that expanded eligibility coverage above the effective level of 250% of the FPL. States had to amend their schemes by August 2008 "or CMS will pursue corrective action." In September 2007 CMS rejected a New York State plan that would

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<sup>50</sup> 22 U.S.C. § 2151b(b) and § b(f)(1) (2000).

<sup>51</sup> 37 Weekly Comp. Pres. Doc. 216 (2001).

<sup>52</sup> Compare *Franklin v. Massachusetts*, 505 U.S. 788, 800 ((1992) and *Dalton v. Specter*, 511 U.S. 462, 469 (1993), holding that the president is not subject to the APA procedures since he is not expressly covered by its definition of agency, with *Chamber of Commerce v. Reich*, 74 F. 3d 1311 (D.C. Cir. 1998) and *National Family Planning Council v. Sullivan*, 979 F.2d 227 (D.C. 1992), allowing challenges to agency actions that were issued pursuant to presidential directive.

<sup>53</sup> 22 U.S.C. § 2151 b(b) and § b(f)(1) (2006).

have raised the family eligibility to up to 400% of the FPL, relying on the August clarification letter.

CMS refused to acknowledge that the letter was a rule under the Administrative Procedure Act (APA) that either had to be reported to Congress under CRA, as was concluded in opinions issued by the Congressional Research Service and the Office of the General Counsel of GAO, or promulgated pursuant to the notice and comment requirements of the APA, as asserted in a lawsuit filed by New York and three other states challenging the binding validity of the letter. Senator John D. Rockefeller, chairman of the subcommittee with jurisdiction over SCHIP, following a House hearing on the CMA action,<sup>54</sup> filed a disapproval resolution<sup>55</sup> with 49 co-sponsors. The resolution was never reported or discharged out of committee. In January 2009, with increased Democratic majorities in both Houses, Congress passed authorization legislation for expanded funding of SCHIP, that contained no express mention of the contested eligibility requirements, which the President signed into law on February 4, 2009.<sup>56</sup> That same day the President issued a Presidential Memorandum directing the Secretary of HHS to withdraw the August 2007 letter. On June 30, 2010 New York State received CMS approval of its state plan amendment which raised family income eligibility up to 400% of the FPL retroactive to April 2009.

### **3. Perceived CRA Structural and Interpretive Impediments**

As has been indicated, in the 15-plus years since its passage, the CRA process has been used sparingly. Several criticisms and questions concerning the process have been raised by those supporting the wider use of the regulatory disapproval mechanism. These have included a need for a screening mechanism for submitted rules; the absence of an expedited procedure in the House of Representatives for consideration of disapproval resolutions; the deterrent effect of the need for a supermajority to overcome a veto; the uncertainty about which rules the law covers; the judicial enforceability of its key requirements; and the effect of a rule nullification on future agency rulemaking in the same area, all of which, individually and cumulatively, critics believe, have introduced uncertainties and impediments to the use of the process.

#### **(a) Lack of a Screening Mechanism to Pinpoint Rules That Need Congressional Review; Proposals for Change; the REINS Act**

Proponents of an expanded use of the CRA process have called for a screening mechanism that would alert committees to rules that may raise important or sensitive substantive issues. In their view, the perceived lack of timely and informative substantive information prevents busy committees from prioritizing such issues. The Comptroller General's reports on major rules serve only as check lists as to whether legally required

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<sup>54</sup> Hearing on H. R. 5998, Protecting Children's Health Coverage Act of 2008, 110<sup>th</sup> Cong., 2d Sess. (May 15, 2008).

<sup>55</sup> S.J. Res. 44, 110<sup>th</sup> Cong., filed July 17, 2008.

<sup>56</sup> Pub. L. 111-3.



agency tasks have been done and not as substantive assessments of whether they were done properly or whether the rules accord with congressional intent.

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

### *i. CORA Proposals*

Some support for an independent substantive screening body was signaled by the introduction by Representative Sue Kelly of H.R. 1704 in the 105<sup>th</sup> Congress, a bill that would have established a Congressional Office of Regulatory Analysis.<sup>57</sup> The bill was referred to the House Judiciary and Governmental Reform and Oversight Committees, both of which favorably reported differing versions of the legislation.<sup>58</sup> Rep. Kelley indicated that the absence of such a screening body was a cause of congressional inaction under the CRA.

In my opinion, this [lack of action] can be explained in large part because of the fact that nearly all of Congress's information about the impact of new regulations comes from the agencies who are developing them. This information is often unreliable because agencies have a vested interest in downplaying any negative aspects of the regulation they have proposed. As a result, Congress is at a disadvantage when trying to determine just how a particular regulation will impact the economy, making it that much more difficult to implement the CRA.<sup>59</sup>

Both versions would have established an independent Congressional Office of Regulatory Analysis (CORA) to be headed by a director appointed by the House Speaker and the Senate Majority Leader for a term of four years, with service in the office limited to no more than three terms. The current review functions of the Comptroller General under the CRA and the Congressional Budget Office under the Unfunded Mandates Act of 1995 would have been transferred to the proposed CORA. The Judiciary Committee's version, in addition to having the Office make "an assessment of an agency's compliance

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<sup>57</sup> A companion bill, S. 1675, was introduced in the Senate by Senators Shelby and Bond. 143 Cong. Rec. S1007 (daily ed. February 25, 1998).

<sup>58</sup> See H. Rept. 105-441, Parts 1 and 2 (105<sup>th</sup> Cong., 2d Sess.) (1998).

<sup>59</sup> Testimony of Rep. Sue Kelly before the Subcommittee on National Economic Growth, Natural resources, and Regulatory Affairs, House Committee on Government reform and Oversight, "H.R. 1704, Congressional Office of Regulatory Analysis creation Act," 105<sup>th</sup> Cong., 2d Sess. 6 (1998).

with the procedural steps for ‘major rules’” required by the CRA, directed the proposed CORA to “conduct its own regulatory impact analyses of these ‘major rules.’”<sup>60</sup>

The bill as reported by the Government Reform Committee would have allowed the CORA director to use “any data and analyses generated by the Federal agency and any data of the Office” in analyzing the submitted rule. Both bills provided that a similar analysis of non-major rules was to be conducted when requested to do so by a House or Senate Committee or by individual Members of either House. First priority for the conduct of such analyses was given to all major rules. Secondary priority was assigned to committee requests. Tertiary priority was given individual Member requests. Finally, under the Judiciary Committee version, the report was to be furnished within 45 days after Congress received notification of the rule. The Governmental Reform bill would have allowed 30 days. H.R. 1704 received no floor action during the 105<sup>th</sup> Congress. A bill closely similar to H.R. 1704, H.R. 214, has been introduced in the 112<sup>th</sup> Congress.

Supporters of the CORA model argue that an independent office of regulatory analysis would serve the congressional need for objective information necessary to evaluate agency regulations. In their view, a CORA would also provide credibility and impetus for wider utilization of the review mechanism. Further, by providing intensive review of certain major rules, it would forestall the possibility of OIRA’s reluctance to provide an objective evaluation of agencies’ regulations,<sup>61</sup> and make the regulatory process more rational and transparent. Those opposing the establishment of an office of this kind contend that creation of a new congressional bureaucracy for review purposes would be unnecessarily duplicative of what the agencies have already done as well as extraordinarily expensive, raise doubts as to whether a CORA could provide the necessary assessments within the time frames of the CRA, and whether the appointment of a CORA director by the leadership of the House and Senate would make the office political in nature.<sup>62</sup> The requirement of the Judiciary Committee’s version that a CORA do its own cost-benefit analysis from scratch could be pointed to as an unknown cost factor, as well as a task that may not be possible to perform adequately within the allotted 45 days.

Congress agreed upon a limited test of the CORA concept, late in the 106<sup>th</sup> Congress, with the passage of the Truth in Regulating Act of 2000.<sup>63</sup> That legislation established a three year pilot project for the General Accounting Office (now renamed the Government Accountability Office (GAO)) to report to Congress on economically significant rules. Under this pilot program, whenever an agency published an economically significant proposed or final rule a chairman or ranking minority member

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<sup>60</sup> § 4 (a)(3)(A).

<sup>61</sup> Robert W. Hahn and Robert A. Litan , “The Regulatory Right-to-Know Act and the Congressional Office of regulatory Analysis Act, “ Joint testimony before the Senate Committee on Governmental Affairs, April 1999, at [http://brookings.edu/~media/Files/re/testimonies/1999/04\\_righttoknow\\_litan.pdf](http://brookings.edu/~media/Files/re/testimonies/1999/04_righttoknow_litan.pdf).

<sup>62</sup> Ibid; and Jennifer Coderre, “Senate Panel Continues Debate on Costs, Benefits of ‘Regulatory Right-to-Know’ Bills,” BNA Daily News Report for executives, April 23, 1999, p. A-30. Comments on CORA were attributed to Gary Bass of OMB Watch.

<sup>63</sup> P.L. 106-312, 114 Stat. 1248-50, 5 U.S.C. § 801 note.

of a committee of jurisdiction of either House of Congress could request the Comptroller General (CG) to review the rule. The CG was to report on each rule within 180 calendar days. The report had to contain an “independent evaluation” by the CG of the agency’s cost-benefit analysis. There is only one request ever made pursuant to the provision. That was submitted in January 2001 by the chairs of the jurisdictional committees of the House and Senate with respect to the Department of Agriculture’s forest planning and roadless area rule. GAO advised the requesters that although the Act authorized \$5.2 million per year for the program, no monies had been appropriated and it could not proceed with the request. No further action was taken on the request, and Congress never enacted an appropriation, thereby forestalling implementation of the project. It may be noted that the 180-day reporting period did not mesh at all with the time period under the CRA for consideration of rules subject to resolution of disapproval, although completed requests for analyses of *proposed* rules might coincide with such reviews. In any event, the pilot program established by the act expired in January 2004.

In the 109<sup>th</sup> Congress, Representative Sue Kelly introduced H.R. 1167, which would have made permanent the authority of Congress to request GAO to perform regulatory analyses. The proposed new Truth in Regulating Act (TIRA), if enacted as a permanent responsibility of the GAO, did not appear to provide a specific appropriation to require agency performance of the vested task, as was the case when it was previously established as a “pilot project.” The act would have, in effect, established an unfunded mandate. Although GAO currently does (and historically has always done) some reviews of agencies’ rules at Members’ requests under its current appropriations, both the volume and nature of the reviews under this proposal would likely have been substantially different and might have affected its ability to conduct other agency reviews. A similar bill, H.R. 725, would also have made TIRA permanent and would have authorized up to \$5 million for the reviews but was never acted on.

#### *ii. Joint Congressional Committee Models*

In an apparent attempt to avoid the criticisms of the CORA model and to remedy some of the perceived impediments to the effectiveness of the CRA, Representative Ginny Brown-Waite introduced H.R. 3356, the Joint Administrative Procedures Committee Act of 2003, in the 108<sup>th</sup> Congress which would have amended the CRA by establishing a joint congressional committee with broad authority to investigate, evaluate and recommend actions with respect to the development of proposed rules, the amendment or repeal of existing rules, and disapproval of final rules submitted for review under the CRA.<sup>64</sup> The responsibilities would have been in addition to the current statutory framework providing for review of new rules that are required to be reported. A new provision would permit the joint committee to recommend disapproval of new rules to jurisdictional committees. The Judiciary Committee referred it to its Subcommittee on Commercial and Administrative Law. No action was taken by either Committee. Representative Brown-Waite’s proposal was reintroduced in the 109<sup>th</sup> Congress as H.R. 3148 but again received no action.

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<sup>64</sup> See introductory remarks on the measure at 147 Cong. Rec. H 2454 (daily ed. October 21, 2003).

Another bill, H.R. 576, introduced by Representative Ney in the 109<sup>th</sup> Congress, was similar in many respects to H.R. 3148, but quite different in certain fundamental ways. Both would have created a 24-member House-Senate joint committee capable of holding hearings, requiring the attendance of witnesses, and making rules regarding its organization and procedures. Both also provided for an expedited consideration procedure in the House. Significant differences appear, however, with respect to the roles assigned to the joint committees. Under H.R. 3148, the current process established by the CRA for congressional review of new agency rules would have been maintained: required reports on new rulemakings would be submitted to each House and such reports sent to the jurisdictional committees of each House for action. Rules required to be reported would also be sent to the joint committee. Special rules were provided for discharge from committees in the Senate and, under proposed H.R. 3148, from House committees. Expedited procedures are in effect for floor proceedings in each House. The only part to be played by the joint committee in this rule review process under H.R. 3148 would have been to recommend to jurisdictional committees that certain submitted new rules be subject to disapproval resolutions. Deference to the current roles of jurisdictional committees was also maintained under H.R. 3148 with respect to the new duties given to the joint committee to selectively review existing federal agency rules in effect before the enactment of the CRA and existing major rules of federal agencies promulgated since April 1996.

Under H.R. 576, the joint committee, rather than the jurisdictional committees of each House, would have received the report of covered rules submitted for review by federal agencies as well as cost-benefit analyses and other materials. Jurisdictional committees would receive copies of these materials from the joint committee. GAO was to submit its report on major rules to the joint committee, not the jurisdictional committees concerned. Major rules could have taken effect no earlier than 60 days after the rule was published in the *Federal Register* or was received by the joint committee. Joint resolutions of disapproval were to be reported by the joint committee to the respective Houses for action. The joint committee could also report “by bill ... recommendations with respect to matters within the jurisdiction of their respective Houses which are referred to the joint committee or otherwise within the jurisdiction of the joint committee.” It would appear, then, that the joint committee would have had the predominant role in the congressional review process, which might inject a highly controversial institutional issue - diminution of the role of jurisdictional committees, as well providing a prime target for interest group lobbying.

### *iii. Affirmative Approval Proposals/The REINS Act*

A third bill related to rule review, introduced by Representative Hayward in the 109<sup>th</sup> Congress, was H.R. 931 which would have prohibited any regulation proposed by a federal agency from going into effect until a bill enacted under expedited consideration procedures applicable to the rule was signed into law. The term “regulation” was given the broad meaning of the term “rule” as defined in 5 U.S.C. § 551(4). The bill did not specifically reference the existent CRA process. In fact, it would have superseded it and required rulemaking agencies to seek approval of all covered “regulations.” There was no

provision for congressional processing in a timely and expeditious manner the potentially huge number of proposed regulations.

But most recently, the 112<sup>th</sup> Congress saw the introduction of perhaps the most ambitious and detailed proposal to enhance congressional oversight and control of agency rulemaking. Under H.R. 10, the Regulations from the Executive in Need of Scrutiny Act of 2011 (REINS Act), all major rules that are reported to Congress would be treated as proposals which, if not approved within a specified period of time, cannot go into effect and cannot be proposed again in the same Congress. The REINS Act is appropriately treated here with proposed screening mechanisms because it reflects a determination that all rules designated as major must be scrutinized.

The REINS Act would supplant the CRA. Rules designated by the OIRA Administrator as major must be reported to each House and the CG and referred to the appropriate jurisdictional committee and also to the House Judiciary and Senate Homeland Security and Governmental Affairs Committees. A major rule can become effective only upon enactment of a joint resolution of approval which must be passed by the end of 70 session or legislative days after receipt by Congress. If not enacted within that period, the same rule cannot be considered again in the same Congress. The President is authorized to make an emergency determination for certain specified exigent situations that would allow a rule to go into immediate effect, but for no longer than one 90 day period, and does not interrupt the statutory review process.

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

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

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

Hearings on the REINS Act were held by the House Judiciary's Subcommittee on the Courts, Commercial and Administrative Law on January 24 and March 8, 2011,

which raised differing and contentious views on the constitutionality and practicality of the proposal.<sup>65</sup>

### **(b) Lack of an Expedited Consideration Procedure in the House**

Those unsatisfied with the present CRA review process argue that the absence of an expedited consideration procedure in the House of Representatives may well be a factor affecting use of the process in that body since, as a practical matter, it will mean engaging the House leadership each time a rule is deemed important enough by a committee or group of Members to seek speedy access to the floor. In view of the limits both on floor time and the ability to gain the attention of the leadership, it is argued that only the most well situated in the body will be able to gain access within the limited period of review.<sup>66</sup> It is also maintained that a perception that no action will be taken in the House might deter Senate action.

It has been suggested that this asymmetry may be reflective of the fact that the Senate has more procedural hurdles to majority rule than does the House, so the drafters of the CRA may have believed that fast-track procedures were only needed for the Senate.<sup>67</sup> The House Parliamentarian speculated in 1997 that the CRA may have left out fast-track procedures for the House because the House Rules Committee can limit debate and expedite bills to the floor at its choosing.<sup>68</sup> One commenter, not inconsistent with the foregoing suggestions, contends that the “CRA is designed to ensure that political minorities are not able to use congressional procedure to hijack policy.”<sup>69</sup> The author argues that while it is well established that the House is a majoritarian institution, the House also recognizes that its committees are susceptible to capture by special interests. A prominent example cited is that if one House passes a disapproval resolution and sends it to the other House, it is placed on the calendar of that House, and not referred to one its committees, and is the resolution that will be voted on. As a consequence, the author concludes, “At the very least, Congress believes committee capture is real, because it adopted the CRA in part to circumvent committees.”<sup>70</sup>

It is interesting to note, then, that the proposed REINS Act, described above, would impose expedited procedures on both House and Senate consideration of *approval* resolutions, including automatic discharge from the committees of referral after 15 days, but reverts to the CRA model when non-major rules come under review. Since it is virtually certain that the REINS Act proposal has the imprimatur of the current House leadership, it can be speculated that at the heart of the difference is the sense of the leadership that an *approval* scheme warrants a fast track to ensure that a mere faction

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<sup>65</sup> See discussion, *infra*, at pp.41-44

<sup>66</sup> The experience with respect to the repeal of the ergonomics standard, discussed *supra* at pp. 10-11 would appear to bear this out.

<sup>67</sup> See William N. Eskridge, et al., *Cases and Materials on Legislation* 517 (4<sup>th</sup> ed. 2007).

<sup>68</sup> See Congressional Review Act: Hearing before the Subcomm. on Commercial and Administrative Law, H. Comm. on the Judiciary, 105<sup>th</sup> Cong. 50 (1997) (testimony of Charles W. Johnson III, Parliamentarian, U.S. House of Representatives).

<sup>69</sup> *Mysteries of the Congressional Review Act*, *supra*, 122 HARV. L. REV. at 2176-77.

<sup>70</sup> *Id.* at 2177-78.

cannot bring executive agency rulemaking to a universal halt. But leaving the *disapproval* process to the vicissitudes of unanimous consent, suspension, special rule, or discharge petition, which may bring it to a grinding halt, is apparently acceptable because the effects are insular and confined within the House.<sup>71</sup>

### (c) The Uncertainty of the Effect of an Agency's Failure to Report a Covered Rule to Congress

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

However, Section 805 states that “no determination, finding, action or omission under this chapter shall be subject to judicial review.” Early on the Department of Justice (DOJ) broadly hinted that the language of Section 805 “precluding judicial review is unusually sweeping” so that it would presumably prevent judicial scrutiny and sanction of an agency’s failure to report a covered rule.<sup>72</sup> DOJ succeeded with its preclusion argument in two early federal district court rulings, and more recently in two appeals court decisions, which rested essentially on the plain meaning rule. None of the opinions of those courts came to grips with the seemingly unequivocal evidence of the contrary statements by the House and Senate sponsors of the CRA or the fact that such a reading of the Act could render it ineffectual. In fact, it appears that the legislative history of the Act was never briefed as an issue in these cases.

Commentors have suggested that the preclusive judicial reading of Section 805 renders the statute ineffectual and encourages agency non-reporting of covered rules.<sup>73</sup> This section reviews the rationale of the court rulings, the contrasting evidence of the statements of the sponsors of the CRA, and the indication that a significant number of covered, published rules have not been reported<sup>74</sup>, and concludes that Congress would be warranted in considering legislation that would clarify its original intention respecting judicial enforcement.

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<sup>71</sup> Interview with House Parliamentarian John Sullivan, August 9, 2011.

<sup>72</sup> See letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at pp 9-11 (DOJ Memorandum).

<sup>73</sup> See, e.g., Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies' Noncompliance with the Congressional review Act*, 62 Admin. L. Rev. 907, 908, 911, 915-17 (2010)(Croston); Rosenberg, *supra*, n. 3 at 1069-74.

<sup>74</sup> Curtis W. Copeland, *Congressional Review Act: Rules Not Submitted to GAO and Congress*, CRS report No. R40997 (December 29, 2009)(detailing over 1000 rules not received by GAO or both Houses of Congress between 1999 and 2009)(Copeland Study).

*i. The Case Law on Judicial Enforcement of Failures to Report*

In *Texas Savings and Community Bankers Assoc. v. Federal Housing Finance Board*,<sup>75</sup> three thrift associations and two of their trade associations sued the Federal Housing Finance Board challenging one of its policies regarding the home mortgage lending industry. The plaintiffs argued, *inter alia*, that the policy was a rule required to be reported to Congress under the CRA and the failure to report it precluded its enforcement. The Government argued that Section 805 was a blanket preclusion of judicial review. In response to plaintiff's contention that Section 805 only precluded review of any "determination, finding, or omission" by Congress, the court held that "the statute provides for no judicial review of any 'any determination, finding, action or omission under this chapter,' not 'by Congress under this chapter.' The court must follow the plain English. Apparently, Congress seeks to enforce the [CRA] without the able assistance of the courts."<sup>76</sup> The court made no reference to the scheme of the act or its legislative history.

The Texas district court's "plain meaning" rationale was cited with approval by an Ohio district in *United States v. American Electric Power Service Corp.*<sup>77</sup> That case was one of many involving extensive litigation by the Environmental Protection Agency (EPA), begun in the mid-1990's, to establish the extent to which a power plant or factory may alter its facilities or operations without bringing about a "modification" of that emission source so as to trigger the Clean Air Act's New Source Performance Standards and pre-construction "new source review."<sup>78</sup> Among the issues common in those cases, and raised in this case, was whether EPA's determination to initiate litigation enforcement after many years of no enforcement was a substantive change that had to be reported to Congress under the CRA. It was among 123 affirmative defenses raised by defendants, nine coal-fired power plants in Ohio, Virginia, and West Virginia, which the Government moved to dismiss. Citing the *Texas Savings* case approvingly, the district court agreed "that the language of Section 805 is plain" and that "[d]eparture from the plain language is appropriate in the 'rare cases [in which] the literal application of a statute would produce a result demonstrably at odds with the intention of its drafters ... or when the statutory language is ambiguous.' ... In all other cases, the plain meaning of the statute controls."<sup>79</sup> The court did not indicate whether it had attempted to discern whether there was any evidence of congressional intent at odds with the court's plain meaning reading. It did, however, provide an alternative rationale: "Furthermore, this Court is not convinced that the instant enforcement action amounts to rulemaking which would be covered by 5 U.S.C. 801 *et. seq.*, in the first instance," without elaboration.<sup>80</sup>

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<sup>75</sup> 1998 U.S. Dist. LEXIS 13470, 1998 WL842 181 (W. Texas), *aff'd* 201 F.3d 551 (5<sup>th</sup> Cir. 2000).

<sup>76</sup> *Id.*

<sup>77</sup> 218 F. Supp. 3d 931 (S.D. Ohio 2002).

<sup>78</sup> For background on the legal development of the issue, see CRS Report RS21424, *Air Pollution: Legal Perspectives on the "Routine Maintenance" Exception to New Source Review*, by Robert Meltz.

<sup>79</sup> *American Electric Power*, 218 F. Supp. 2d at 949.

<sup>80</sup> *Id.*



In *United States v. Southern Indiana Gas and Electric Co.*,<sup>81</sup> the court faced the same issue in a motion for summary judgment by the power company defendant. Rejecting the *Texas Savings* and *American Electric Power* precedents, it found that Section 805 is ambiguous and susceptible to two possible meanings: that Congress did not intend for any court review of an agency's compliance with the CRA or that Congress only intended to preclude judicial review of its own determination, findings, actions or omissions made under the CRA *after* a rule had been submitted to it for review. Adopting the first alternative, argued for by the Government and adopted by the *Texas Savings* and *American Electric Power* courts, would, according to the court, allow agencies "to evade the strictures of the CRA by simply not reporting new rules and courts would be barred from reviewing their lack of compliance. This result would be at odds with the purpose of the CRA, which is to provide a check on administrative agencies' power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism, and to read it to preclude a court from reviewing whether an agency rule is in effect that should have been reported would render the statute ineffectual."<sup>82</sup> The court found that the post-enactment legislative history<sup>83</sup> "buttresses the 'limited scope' of the CRA's judicial review provision" but was careful to acknowledge that "the lack of formal legislative history for the CRA makes reliance on this joint statement troublesome." However, the court made it clear that "this court reached its conclusion about the limited scope of the judicial review provision of the CRA based on the text of the statute and overall purpose of the act. The legislative history only serves to further reinforce the Court's conclusion."<sup>84</sup>

In 2007 and 2009 federal appeals courts summarily dismissed claims that rules relied on by defendant agencies were not reported to Congress and were therefore unenforceable. In *Montanans for Multiple Use v. Barbouletos*<sup>85</sup> the D.C. Circuit rejected a challenge to a forest management plan promulgated by the U.S. Forest Service on the ground that the "language of Section 805 is unequivocal and precludes judicial review of this claim." The same clear language rationale supported a footnote dismissal of a similar

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<sup>81</sup> 2002 U.S. Dist. LEXIS 20936; 55 ERC (BNA) 1597 (S.D. Ind. 2002).

<sup>82</sup> 2002 U.S. Dist. LEXIS 20936 at 13-14.

<sup>83</sup> The Joint Explanatory Statement of House and Senate Sponsors are identical explanations by the legislative sponsors of the scope and intent of the CRA's provisions that appeared in the daily editions of the Congressional record on April 18 and 19, 1996, some three weeks after SBRFA passed and was signed into law. In the absence of committee hearings and report, and in light of the sparse commentary during floor debate, these explanations represent the most authoritative contemporaneous understanding of the provisions of the law. The permanent edition of the Congressional Record for the 104th Congress, published five years after the passage of the CRA, places the Senate sponsors joint explanation on the date it originally appeared in the daily edition. The House sponsors Joint Explanation, however, is now placed in the Record as part of the final days floor debate. The differing type face indicates it was a later insertion. It is therefore correctly treated as post-enactment legislative history and will be treated as such in this Report's discussion.

<sup>84</sup> *Id.* note 82 at 15-16 and note 3.

<sup>85</sup> 568 F. 3d 225, 228 (D.C.Cir. 2009).

challenge by the 10<sup>th</sup> Circuit in *Via Christie Regional Medical Center v. Leavitt*.<sup>86</sup> There was no discussion in either ruling of the CRA's legislative history.

## *ii. The Scheme of the CRA Supports Court Enforcement*

It is certainly arguable that the *Southern Indiana* court's view of the limited preclusiveness of Section 805 is plausible.<sup>87</sup> A potentially stronger case can be made from a closer analysis of the text and structure of the Act taken as a whole. Although the court was correct as a general matter that post-enactment legislative history normally is given less weight, there are a number of Supreme Court rulings that recognize that under certain circumstances, arguably applicable here, contemporaneous explanations of key provisions' intent have been found to be an "authoritative guide" to a statute's construction. In one instance the Court relied on an explanation given eight years after the passage of the legislation.

The plain, overarching purpose of the review provision of the CRA was to assure that all covered final rulemaking actions of agencies would come before Congress for scrutiny.<sup>88</sup> The scheme provides for the delayed effectiveness of some rules deemed innately important ("major rules"),<sup>89</sup> and temporarily waives the submission requirement of Section 801 for rules establishing, modifying, opening, closing or conducting a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping; or for a rule an agency "for good cause" finds that notice and public procedure are impractical, unnecessary, or contrary to the public interest.<sup>90</sup> Rules promulgated pursuant to the Telecommunications Act of 1996 are excluded from the definition of "major rule." But all such rules must ultimately be submitted for review. And while the scheme anticipates that some (or even most) rules will go into effect before a joint resolution of disapproval is passed, the law provides that enactment of a joint resolution terminates the effectiveness of the rule and that the rule will be treated as though it had never taken effect.<sup>91</sup> Further, a rule that has been nullified cannot be reissued by an agency in substantially the same form unless it is specifically authorized to do so by law after the date of the disapproval.<sup>92</sup>

The review scheme also requires a variety of actions by persons or agencies in support of the review process, and time for such actions to be scrutinized by both Houses to implement the scheme. Thus, the Comptroller General must submit a report to Congress on each major rule submitted within 15 calendar days after its submission or

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<sup>86</sup> 509 F. 3d 1259, 1271 n. 11 (10<sup>th</sup> Cir. 2007).

<sup>87</sup> See Crostan, *supra*, n. 73.

<sup>88</sup> "This legislation establishes a government-wide congressional review mechanism for most new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects." Legislative History, *supra* note 2, at 142 Cong. Rec. 6926.

<sup>89</sup> 5 U.S.C. § 801(a)(3).

<sup>90</sup> 5 U.S.C. § 808.

<sup>91</sup> 5 U.S.C. § 801(b)(1), 801(f).

<sup>92</sup> 5 U.S.C. § 801(b)(2).

publication of the rule;<sup>93</sup> the Administrator of OIRA determines whether a rule is a “major rule,”<sup>94</sup> and after a rule is reported the Senate has 60 session days, and the House 60 legislative days, to pass a disapproval resolution under expedited procedures.<sup>95</sup> But Congress has preserved for itself a period of review of at least 60 session or legislative days. Therefore, if a rule is reported within 60 session days of the Senate (or 60 legislative days of the House) prior to the date Congress, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next session of Congress.<sup>96</sup>

Thus the 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, as is more fully described below, 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.

If Section 805 is read so broadly, it would arguably render ineffective as well the Section 801(b)(2) prohibition against an agency promulgating a new rule that is “substantially the same” as a disapproved rule unless it “is specifically reauthorized by a law enacted after” the passage of a disapproval resolution. It is more than likely that a determination whether a new or reissued rule is “substantially the same” as a disapproved rule is one that a court will be asked to make.<sup>97</sup> Congress appears to have contemplated (and approved) judicial review in this and other situations when it provided in Section 801(g) that “[i]f Congress does not enact a joint resolution of disapproval under Section 802 respecting a rule, no court or agency may infer any interest of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.”

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<sup>93</sup> 5 U.S.C. § 801(a)(2)(A).

<sup>94</sup> 5 U.S.C. § 804(2).

<sup>95</sup> 5 U.S.C. § 802.

<sup>96</sup> § 801(d)(1).

<sup>97</sup> The disapproval of the ergonomics rule underlines a possible need for judicial review in certain instances where enforcement is necessary and appropriate to support the statutory scheme. That rule, which was broad and encompassing in its regulatory scope, raises the question as to how far can the agency go before it reaches the point of substantial similarity in its promulgation of a substitute. This issue is addressed in the next section.

#### **(d) The Legislative History of the CRA's Preclusion Provision**

The legislative history of the CRA confirms this view of the limited reach of the Act's judicial review preclusion language. A key sponsor of the legislation, Representative McIntosh, explained during the floor debate on H.R. 3136 that "Under Section 8(a)(1)(A), covered rules may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress."<sup>98</sup>

Shortly thereafter, the principal Senate and House sponsors of the CRA published a Joint Explanatory Statement in the Congressional Record providing a detailed explanation of the provisions of the Act which serves as its authoritative legislative history. The Joint Explanatory Statement is clear as to the scope and limitation of the judicial review provision:

##### **Limitation on judicial review of congressional or administrative actions**

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter". Thus, the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings". U.S. Const. Art. I, §5, cl. 2, which includes each house being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determinations or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval", or by implication, when it has not yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. 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).<sup>99</sup>

In sum, there is substantial evidence in the structure of the CRA and the expressed intentions of the sponsors of the legislation that judicial sanction of agency failures to report covered rules was integral to the scheme of congressional review of rules and would warrant congressional remedial legislation to clarify the situation. The need for

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<sup>98</sup> 142 Cong. Rec. 6907 (1996).

<sup>99</sup> 142 Cong. Rec. 6929 (1996).

such clarification appears buttressed by the revelation of the significant number of unreported rules in the last decade.<sup>100</sup>

### (e) The Uncertainty of Which Rules Are Covered By The CRA

The drafters of the Congressional Review Act arguably adopted the broadest possible definition of the term “rule” when they incorporated Section 551(4) of the APA. As indicated previously,<sup>101</sup> the legislative history of Section 551(4) and the case law interpreting it make clear that it was meant to encompass all substantive rulemaking documents, which may include policy statements, guidances, manuals, circulars, memoranda, bulletins and the like and which as a legal or practical matter an agency wishes to make binding on the affected public.

The legislative history of the CRA emphasizes that by adoption of the Section 551(4) definition of rule, the review process would not be limited only to coverage of rules required to comply with the notice and comment provisions of Section 553 of the APA or any other statutorily required variations of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: “The committee’s intent in these subsections is . . . to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties.”<sup>102</sup>

The drafters of the legislation indicated their awareness of the practice of agencies avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other documents as a means of binding the public, either legally or practically,<sup>103</sup> and noted that it was the intent of the legislation to subject just such documents to congressional scrutiny: “The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, ‘guidelines,’ and agency policy and procedure manuals. The committees admonish the agencies that the APA’s broad definition of ‘rule’ was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.”<sup>104</sup>

It is likely that virtually all the 56,668 non-major rules thus far reported to the Comptroller General have been either notice and comment rules or agency documents required to be published in the Federal Register. It is certain that perhaps thousands of rules that were intended by the legislations sponsors have not been submitted for

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<sup>100</sup> See Copeland Study, *supra*, n.74.

<sup>101</sup> See footnotes 9-12, *supra*, and accompanying text.

<sup>102</sup> Join Explanatory Statement of House and Senate Sponsors, *supra* n.2, at 142 Cong. Rec. 6930.

<sup>103</sup> This practice had been long recognized and criticized in administrative law commentaries. See, e.g., Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind The Public?, 41 DUKE L.J. 1311 (1992). Cf. also, General Accounting Office, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules, GAO/GGD-98-126 (August 1998).

<sup>104</sup> Legislative History, *supra* n. 2, at 142 Cong. Rec. 6930

review.<sup>105</sup> Defining an exact number is difficult since such covered documents are rarely published in the Federal Register and thus may come to the attention of committees or Members serendipitously or through complaints of interest groups.

Nine such agency actions have come to the attention of committee chairmen and Members and were referred to the Comptroller General for determinations whether they were covered rules. In six of the nine cases the CG determined the action documents to be covered rules, in all cases utilizing “legal and practical” impact standard suggested by CRA’s sponsors.<sup>106</sup>

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<sup>105</sup> An investigation by the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs (Government Reform) which revealed that 7,523 guidance documents issued by the Department of Labor, the Environmental Protection Agency, and the Department of Transportation which were of general applicability and future effect had not been submitted for CRA review during the period March 1996 through November 1999. See “Non-Binding Legal Effect of Agency Guidance Documents,” [http://www.congress.gov/cgi-lis/cpquery/T?&report=hr1009&dbname=cp106&H.Rept. 106-1009, 106<sup>th</sup> Cong., 2<sup>nd</sup> Sess. \(2000\).](http://www.congress.gov/cgi-lis/cpquery/T?&report=hr1009&dbname=cp106&H.Rept.106-1009,106<sup>th</sup>Cong.,2<sup>nd</sup>Sess.(2000).)

<sup>106</sup> For example, in a letter to the Honorable John D. Rockefeller, IV, Chairman, Senate Subcommittee on Health Care, Committee on Finance, and the Honorable Olympia Snowe, Ranking Minority Member, Senate Subcommittee on Health Care, Committee on Finance, B-316048 April 17, 2008 the GAO General Counsel stated that an August 17, 2007 letter issued by the Centers for Medicare and Medicaid Services (CMS) to state officials concerning the State Children’s Health Insurance Program (SCHIP) was “a rule that must be submitted for review under the CRA before it can take effect because it is a statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy with regard to the SCHIP program.” See also, a letter to Honorable Lane Evans, Ranking Minority Member, House Committee on Veterans’ Affairs, B-292045 (May 19, 2003) (Department of Veterans Affairs memorandum terminating the Department’s Vendee Loan Program is not a rule that must be submitted to Congress because it is exempt under Section 804(3)(B) and (C) as a rule relating to “agency management” or “agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”); letter to Honorable Ted Strickland, B-291906 (February 28, 2003) (Department of Veterans Affairs memorandum instructing all directors of health care networks to cease any marketing activities to enroll new veterans in such networks is excluded from CRA coverage by Section 804(3)(C) which excludes “any agency rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”); letter to Honorable Doug Ose, Chairman, House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, Committee on Government Reform, B-287557 (May 14, 2001)(Department of Interior’s Fish and Wildlife Service’s Trinity River “Record of Decision” is a rule covered by the CRA because it is an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy and is an “agency action[] that substantially affect[s] the rights and obligations of outside parties.”); letter to the Honorable James A. Leach, Chairman, House Banking Committee, B-286338 (October 17, 2000)(Farm Credit Administration’s national charter initiative held to be a rule under the CRA); letter to Honorable David M. McIntosh, Chairman, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform and Oversight, B-281575 (January 20, 1999) (EPA “Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits” held to be covered because it created new, mandatory steps in the procedure for handling disparate impact assessments which gave recipients new rights they did not previously possess for obtaining complaint dismissals, a substantive alteration of the previous regulation.); letter to Honorable

Believing such instances to be only a small portion of unreported agency actions, GAO, at the behest of the House Government Reform and Oversight Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, engaged in discussions with the Office of Management (OMB) during 1998 for the creation of a uniform reporting form for use by agencies in reporting covered rules to the CG, and for the promulgation of an OMB guidance document covering such matters falling under the review provision as the definition of a covered rule, reporting requirements, the good cause exemption, and the consequences of failing to report a rule, among others. The failure to issue such a guidance prompted insertion of the following directive in the FY1999 appropriation for OMB: “OMB is directed to submit a report by March 31, 1999, to the Committees on Appropriations, the Senate Committee on Governmental Affairs, and the House Committee on Government Reform and Oversight that . . . issues guidance on the requirements of 5 U.S.C. § 801(a)(1) and (3); § 804(3), and § 808(2), including a standard new rule reporting form for use under Section 801(a)(1)(A)-(B).”<sup>107</sup> OMB issued the guidance on March 30, 1999, which included a standard form for reporting.

The guidance, still applicable and unamended, makes it clear that a covered rule must be reported in order to become effective. But it does not address the possibility that certain agency documents that may be perceived by the regulated public as legally binding may also have to be reported. Following the completion of an investigation that revealed that 7,523 guidance documents issued by three agencies over a period of three and a half years had not been submitted for CRA review, the Subcommittee concluded that OMB, “has failed to substantially comply with that statutory directive.”<sup>108</sup>

#### **(f) The Problem of Agency Non-Reporting**

In December 2009 the Congressional Research Service issued a study that revealed that GAO had catalogued over 1,000 covered rules that it had not received between 1999 and 2009, almost all of which were not reported to each House of Congress.<sup>109</sup> During each of those years GAO monitored the Federal Register for

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Conrad Burns, B-278224 (November 10, 1997) (the American Heritage River Initiative announced by the Council on Environmental Quality was not a covered rule because it was established by presidential executive order and direction and the President is not an “agency” under the APA and is not subject to the provisions of the APA); letter to Honorable Ted Stevens, Chairman, Senate Appropriations Committee, et al, B-275178 (July 3, 1997) (Tongass National Forest Land and Resources Management Plan held an agency statement of general applicability and future effect that implements, interprets, and prescribes law and policy); letter to Honorable Larry Craig, Chairman, Senate Committee on Energy and Resources, B-274505 (September 16, 1996) (memorandum of Secretary of Agriculture concerning the Emergency Salvage Timber Sale Program held to be a covered rule because it is of general applicability and interprets and implements the statutory program).

<sup>107</sup> P.L. 105-277, Division A, title III.

<sup>108</sup> See <http://www.congress.gov/cgi-lis/cpquery/T?&report=hr1009&dbname=cp106&> H.Rept. 106-1009, *supra* n. 80 at 4-5.

<sup>109</sup> See “*Congressional Review Act: Rules Not Submitted to GAO and Congress*,” CRS Report No. R40997, December 29, 2009, by Curtis W. Copeland. The CRA provides that for a rule to become effective it must be reported to both GAO and the two houses of Congress.

published final substantive rules and compared it with rules it had actually received. A number of the unreported rules were rules deemed significant by OIRA. GAO notified OIRA on at least five occasions during this period about the lapses and provided it with lists of agencies and their unreported rules and encouraged it to use the information to ensure agency compliance, but it was only in November 2009 that OIRA directly contacted agencies advising them to comply. The e-mail went to all agencies and did not directly identify the non-compliant agencies or the unreported rules. Even with that notice agency response was slight. In 2010 GAO changed its strategy and for the first time directly contacted non-reporting agencies. The effect was dramatic. In the last nine months the number of unreported rules has dropped to four.<sup>110</sup>

There is no evidence that non-compliance was deliberate.<sup>111</sup> But it appears essential that some systematic scheme of monitoring and reporting is necessary. GAO took on the task voluntarily in 1998 but never advised anyone in Congress of the emerging situation except in its annual written testimony before Congress. If the solution is simply making an agency aware of its lapse, someone should be officially given the job of doing it. It certainly should be considered a task for a CORA or other screening body that may be created. And the task would be easier if the threat to the effectiveness of the unreported rule was a reality.

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

**(g) The Uncertainty of the Breadth of the Prohibition Against an Agency’s Promulgation of a “Substantially Similar” Rule After the Rule Has Been Vetoed**

Enactment into law of a disapproval resolution has several important consequences. First, a disapproved rule is deemed not to have had any effect at any time. Thus, even a rule that has become effective for any period of time is retroactively negated.<sup>112</sup> Second, a rule that does not take effect, or is not continued because of the passage of a disapproval resolution, cannot be “reissued in the same form” nor can a “new rule” that is “substantially the same” as the disapproved rule be issued unless such action is specifically authorized by a law enacted subsequent to the disapproval of the original rule.<sup>113</sup> The full text of this provision states:

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

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<sup>110</sup> Interview with Robert J. Cramer, Managing Associate General Counsel, August 15, 2011.

<sup>111</sup> *Id.*

<sup>112</sup> 5 U.S.C. § 801(f).

<sup>113</sup> 5 U.S.C. § 801(b)(2).



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.

Finally, if a rule that is subject to any mandatory statutory, regulatory or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the disapproval resolution.<sup>114</sup> Effectively, this means that if a statutorily mandated rule is vetoed, the agency must “try again,” apparently guided by the floor debates on its rescission.

Opponents of a disapproval resolution process may argue that successful passage of a resolution may disable an agency from ever promulgating rules in the “area” covered by the resolution without future legislative reauthorization since a successful disapproval resolution must necessarily bring down the entire rule. Or, at the very least, it may be contended that any future attempt by the agency to promulgate new rules with respect to the subject matter will be subject to judicial challenge by regulated persons who may claim that either the new rules are substantially the same as those disapproved or that the statute provides no meaningful standard to discern whether a new rule is substantially the same and that the agency must await congressional guidance in the form of a statute before it can engage in further rulemaking in the area. The practical effect of these understandings, then, may be to dissuade an agency from taking any action until Congress provides clear authorization.

A review of the CRA’s statutory scheme and structure, the contemporaneous congressional explanation of the legislative intent with respect to the provisions in question, the lessons learned from the experience of the March 2001 disapproval of the OSHA ergonomics rule, and the application of pertinent case law and statutory construction principles, suggests three conclusions.

(1) It is doubtful that Congress intended that all disapproved rules would require statutory reauthorization before further agency action could take place. For example, as is discussed above, it appears that Congress anticipated further rulemaking, without new authorization, where the statute in question established a mandatory deadline for promulgating implementing rules in a particular area. In such instances, the CRA extends the deadline for promulgation for one year from the date of disapproval.

(2) A close reading of the statute, together with its contemporaneous congressional explication, arguably provides workable standards for agencies to reform disapproved regulations that are likely to be taken into account by reviewing courts. Those standards would require a reviewing court to assess both the nature of the rulemaking authority vested in the agency that promulgated the disapproved rule and the specificity with which the Congress identified the objectionable portions of a rule during the floor debates on disapproval. An important factor in any judicial assessment may be the CRA’s recognition of the continued efficacy of mandated statutory deadlines for promulgating specified rules by extending such deadlines for one year after disapproval.

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<sup>114</sup> 5 U.S.C. § 803.

(3) The novelty of the issue, the uncertainty of the weight a court may accord the post enactment congressional explanation, and the current judicial inclination to give deference to the “plain meaning” of legislative language, make it difficult to anticipate what a court is likely to hold.

Since Congress can apparently only disapprove a rule as a whole, rather than pinpointing any particular portions, there may be no sound basis for the agency to act without further legislative guidance where a rule deals exclusively with an integrated subject matter. The statute gives no indication as to how an agency is to discern what actions would be “substantially the same” and it would run the risk of a successful court challenge if it guessed incorrectly. It might be further argued that even if the agency promulgates new rules, which of course would again be subject to CRA scrutiny, and Congress did not act to disapprove the new rules, that would not provide the necessary reauthorization since Section 801(g) of the act provides as a rule of construction that in the event of the failure of Congress to disapprove a rule “no court ... may infer any intent of Congress from any action or inaction of the Congress with regard to such, related statute, or joint resolution of disapproval.”

It is fundamental that statutory language is the starting point in any case of statutory construction. In recent years, the Supreme Court has shown a strong disposition to hold Congress to the letter of the language it uses in its enactments. In its ruling in *Barnhart v. Sigmon Coal Co.*<sup>115</sup> the Court advised that the first step “is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”<sup>116</sup> “The inquiry ceases ‘if the statutory language is unambiguous and the statutory scheme is coherent and consistent.’”<sup>117</sup> In such cases, the Court has held, resort to “legislative history is irrelevant to the interpretation of an unambiguous statute.”<sup>118</sup> In *Barnhardt* the Court warned, “parties should not seek to amend [a] statute by appeal to the Judicial Branch.”<sup>119</sup>

The plain meaning rule, however, is not an unalterable, rigid rule of construction and has been held inapplicable where it would “lead to an absurd result,”<sup>120</sup> or “would bring about an end completely at variance with the purpose of the statute.”<sup>121</sup> “It is ‘a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme’ ... Thus it is a more faithful construction of [a statute] to read it as a whole, rather than as containing two unrelated parts. It is the classic judicial task of construing related statutory provisions

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<sup>115</sup> 534 U.S. 438 (2002).

<sup>116</sup> *Id.* at 450.

<sup>117</sup> *Id.*

<sup>118</sup> *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808-09 n.3. *Accord Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v. Daas*, 198 F.2d 1167, 1175 (9<sup>th</sup> Cir. 1999), *cert. denied* 531 U.S. 999 (2000).

<sup>119</sup> 534 U.S. at 462.

<sup>120</sup> *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

<sup>121</sup> *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1978).

to make sense in combination.”<sup>122</sup> In the instant situation, it is not likely that a court would hold that the “substantially the same” language of Section 801(b)(2) is unambiguous, either on its face or in the context of the statutory scheme. The direction of the provision is not a self-enforcing mandate; it clearly requires a further determination whether rules have been reissued in “substantially the same form” or whether a new rule is “substantially the same” as the one disapproved. The ambiguity raised appears to be who makes those determinations and on what basis.

The language of the provision, however, does not naturally or ineluctably lead to the conclusion that no further remedial rulemaking can take place unless Congress passes a new law. This reasoning is buttressed by Section 803(a) which contemplates that agency rulemaking must take place after a disapproval action if the authorizing legislation of the agency mandates that rules disapproved had to have been promulgated by a date certain. That provision extends the deadline for promulgation for one year “after the date of enactment of the joint resolution,” not one year after Congress reauthorizes action in the area. A reasonable conclusion is that Congress understood that after disapproval, an agency, if it was under a mandate to produce a particular rule, had to try again. The question then is, how was it to perform this task. The answer may lie in the legislative history of the Act.

As has been indicated, there is no detailed expression of its legislative history, apart from floor statements by key House and Senate sponsors, before its passage by the Congress on March 28, 1996 and its signing into law by the President on March 29. Thereafter, the principal sponsors of the legislation in the Senate (Senators Nickles, Reid and Stevens) and House (Representative Hyde) submitted identical joint explanatory statements for publication in the Congressional Record “intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act’s terms.”<sup>123</sup> Although it is a post-enactment explanation of the legislation, it is likely to be accorded some weight as a contemporaneous, detailed, in-depth statement of purpose and intent by the principal sponsors of the law.<sup>124</sup>

The Joint Explanatory Statement directly addresses a number of issues that may arise upon enactment of a disapproval resolution and attempts to provide guidance for both Congress and agencies faced with repromulgation questions. At the outset, the Statement notes that disapprovals may have differing impacts on promulgating agencies depending on the nature and scope the rulemaking authority that was utilized. For example, if an agency’s authorizing legislation did not mandate the promulgation of the disapproved rule, and the legislation gives the agency broad discretion, the sponsors deemed it likely that the agency has the discretion whether or not to promulgate a new rule. On the other hand, the Statement explains that “if an agency is mandated to promulgate a particular rule and its discretion is narrowly circumscribed, the enactment

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<sup>122</sup> *United States v. Wilson*, 290 F.3d 347 (D.C. Cir. 2002) (holding, *inter alia*, that it is appropriate for a court to look at the history and background against which Congress was legislating).

<sup>123</sup> Legislative History, *supra*, n. 2.

<sup>124</sup> *Se, e.g., North Haven Bd. of Education v. Bell*, 456 U.S. 512, 530-31 (1982); *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220 n.23 (1983); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984).

of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule.”<sup>125</sup> Arguably, a congressional mandate to issue regulations that is not narrowly focused would still be operative. But how would the agency be guided in that circumstance? The Statement addresses that very question: it is the obligation of Congress during the debate on the disapproval resolution “to focus on the law that authorized the rule and make the congressional intent clear regarding the agency’s options or lack thereof after the enactment of a joint resolution of disapproval.”<sup>126</sup> Thereafter, “the agency must give effect to the resolution of disapproval.”<sup>127</sup> The full statement on the issue is as follows:

### **Effect of Enactment of a Joint Resolution of Disapproval**

Subsection 801(b)(1) provides that “A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.” Subsection 801(b)(2) provides that such a disapproval rule “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.” Subsection 801(b)(2) is necessary to prevent circumvention of a resolution disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency’s options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency’s responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

The congressional experience with the disapproval of the OSHA ergonomics standard provides a useful lesson. This rule became the first, and only, rule to be disapproved thus far under the CRA. The principal sponsor of the resolution, Senator Jeffords, at the outset of the debate addressed the issue whether disapproval would disable OSHA from promulgating a new rule. Senator Jeffords referred to the above-discussed Joint Statement and noted that OSHA “has enormously broad regulatory authority,” citing pertinent sections of the OSH Act providing expansive rulemaking authority. The Senator concluded that “I am convinced that the CRA will not act as an impediment to OSHA *should* the agency decide to engage in ergonomics rulemaking.”<sup>128</sup>

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<sup>125</sup> Legislative History, *supra* note 2 at 142 Cong. Rec. 6929.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 147 Cong. Rec. S 1832-33 (daily ed. March 6, 2001) (emphasis added).

What Senator Jeffords apparently understood was that while the agency had broad authority to promulgate rules, there was no congressional mandate to issue an ergonomics rule in the underlying law. As a consequence it was possible that no further rulemaking would occur, as implied by a letter to Senator Jeffords from Secretary Chao which indicated that a new rulemaking was only one of many options available to the Department should the rule be disapproved.<sup>129</sup> OSHA made it clear on April 5, 2002, that no rulemaking was in the offing. On April 17, 2002, Senator Breaux and 26 co-sponsors, many of whom had voted in favor of the disapproval resolution, introduced S. 2184, which would have directed the Secretary of Labor to promulgate a new ergonomics rule and specified in detail what should be included, what should not be included, and what evidence should be considered. Section 1(b)(4) of the bill deems the direction to issue the rule “a specific authorization by Congress in accordance with Section 801 (b)(2)” of the CRA.

An interesting contrast with the ergonomics situation was the consideration given by the key Senate sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>130</sup> as to whether to introduce a CRA disapproval resolution with respect to rules issued by the Federal Election Commission (FEC) on July 17, 2002. The Act required that the FEC promulgate rules implementing the soft money limitations and prohibitions of Title I of the act no later than 90 days after its date of enactment.<sup>131</sup> The Senate sponsors believed that the new rules, which became effective on November 6, 2002, undermined the BCRA’s ban on the raising and spending of soft money by federal candidates and officeholders and on national party use of soft money. Since the FEC was mandated to promulgate rules to implement the BCRA by a date certain, it could have been argued that, in contrast with the general discretion OSHA has with respect to whether to issue any ergonomics standard, if Congress disapproved the FEC’s soft money rule, the agency would be obligated to undertake a new rulemaking (to be completed within a year after the disapproval resolution was signed into law) that would reflect congressional objections to the rule. At the same time, in accordance with the understanding of the Joint Statement, it would have been arguably incumbent on Congress in its debates on any such resolution to clearly identify those provisions of the rule that were objectionable as well as those that are not. The sponsors decided to introduce a disapproval resolution but it was never acted upon.

Whether this line of argument would suffice to withstand a challenge in the courts cannot be answered with any degree of certainty. Foreseeable obstacles may be the novelty of the issue; the amount of weight, if any, that a court will accord the post-enactment congressional explanation of the CRA; and the current inclination of the courts to give deference to the plain meaning of statutory language and to eschew legislative history. A new rule may be challenged on grounds of lack of authority as a consequence of the disapproval resolution either because Congress failed to articulate its objections to the rule, thereby providing no standards for the agency to apply in its rulemaking, or that

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<sup>129</sup> 147 Cong. Rec. at S 1832.

<sup>130</sup> P.L. 107-55, 116 Stat. 81 (March 27, 2002).

<sup>131</sup> § 402 (c)(2).

the new rules were “substantially the same” as the old, disapproved rules and therefore invalid under the CRA.

The Joint Statement declares that it is the congressional intent to make clear and specific identification of the options available to the agency, including identification of objectionable provisions in the proposed rule during the floor debates. In this way Congress could provide an agency clear and direct guidance as to what it expects in the repromulgation process as well as a possible defense to a challenge based on the “substantially the same” language of the CRA.

#### **4. Options and Considerations for Reform**

In 2006 and 2007 suggestions for at least modest legislative remediation of the perceived flaws in the CRA, if for no other reason than to maintain a credible congressional presence in the process of delegated administrative lawmaking, were presented in a number of forums. These included hearings held by the House Judiciary Subcommittee on Commercial and Administrative Law, a symposium held by the Congressional Research Service (CRS Symposium), CRS and GAO reports, published recommendations of the House Judiciary Subcommittee, and academic writings.<sup>132</sup> Participating witnesses and panelists concurred that the role of Congress as the nation’s dominant policy maker was being threatened by widespread agency evasion of notice and comment rulemaking requirements; the continued pressure for legislative enhancement of the trend toward substantive judicial review of agency rules; and the frequent calls for increased presidential control of agency rulemaking.

In particular, studies characterizing current rulemaking procedures as ossified concluded that rule promulgation has become too time consuming, burdensome, and unpredictable.<sup>133</sup> The thrust of the academic critics, which assigns blame to each of the branches for the increasingly ineffective implementation of statutory mandates, often identifies the courts as the chief culprits because of judicial intrusions in agency decision-making through interpretations and applications of APA’s arbitrary and capricious test.<sup>134</sup>

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<sup>132</sup> See Interim Report on “The Administrative Law, Process, and Procedure Project for the 21<sup>st</sup> Century.” House Subcommittee on Commercial and Administrative Law, Judiciary Committee, 109<sup>th</sup> Cong. 2d Sess. (December 2006)(Committee Print No. 10)(Interim Report); Hearing, (Reauthorization of the Administrative Conference of the United States,) before the House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, 109<sup>th</sup> Cong., 2d Sess. (September 2007)(Reauthorization Hearing).

<sup>133</sup> See, e.g., Jerry L. Mashaw & David L. Harst, Regulation and Legal Culture: The case of Motor Vehicle safety, 4 YALE J. ON REG. 275 (1987); Thomas O. McGarity, Some Thoughts on “Deossifying” the Rulemaking Process, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., The APA and Regulatory Reform, 10 ADMIN. L. J. AM. U. 81, 82-84 (1996)(Regulatory Reform); Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59 (1995)(Deossify Rulemaking); Richard J. Piece, Jr., Two problems in Administrative Law; Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking, 1998 DUKE L.J. 300; Paul R. Verkuil, Comment: Rulemaking Ossification-A Modest Proposal, 47 ADMIN. L. REV 453 (1995).

<sup>134</sup> See, e.g., Regulatory Reform, supra note 133, at 83; Deossify Rulemaking, supra note 133, at 65-66.

Reviewing courts, it was maintained, will now find an agency to have violated its duty to engage in reasoned decision-making if its statement of basis and purpose is found to contain any gap in data or flaw in stated reasoning with respect to any issue. The commentators cite statistical indications that reviewing courts have been holding major rules invalid up to fifty percent of the time.<sup>135</sup> Preliminary indications of a study commissioned by the House Judiciary Subcommittee, however, appears to suggest a far less successful challenge rate, but the consequence of the perceived actions of the reviewing courts has been the encouragement of agencies to utilize alternative vehicles to make and announce far-reaching regulatory decisions.<sup>136</sup> It was also argued that agencies can use actions such as adjudication of individual disputes or so-called “non-rule” rules, where purportedly non-binding statements of policy are made in guidances, operating manuals, staff instructions, or like agency public communications.<sup>137</sup> However, the proposed solutions of these scholars are essentially adjurations to the judiciary to modify or abandon current doctrinal courses. For example, some scholars suggest that courts abolish the duty to engage in reasoned decision making and instead conduct a review of rules to determine whether they violate clear statutory or constitutional constraints, or apply the *Chevron* defense more consistently and strictly.<sup>138</sup>

It was also argued that only part of the problem facing Congress is fixing the CRA’s identifiable structural and interpretive flaws. Part, it is said, may also be attributable to a lack of congressional interest in confronting and dealing with complex and sensitive policy issues that major rulemakings often present. During the CRS-sponsored symposium on “Presidential, Congressional, and Judicial Control of Rulemaking”, one panelist, Professor Jack Beermann, expressed the view that making it easier for Congress to overturn an agency rule may come at a high political cost. He asked “Does Congress want to be in the position where [it is perceived] that everything an agency does is their responsibility since they’ve taken it on and reviewed it under this mechanism? ... Do they want to have that perception?” He concluded that “I think that this may just increase the blaming opportunities for Congress.”<sup>139</sup>

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<sup>135</sup> See Peter H Schuck & Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984, 1022 (1990)(finding that during 1965,1974, 1984 and 1985, reviewing courts upheld only 43% of agency rules); Patricia M. Wald, *Judicial Review; Talking Points*, 48Admin L. Rev. 350 (1996) (noting that 36 major rules Reviewed by the District of Columbia Circuit during one year, 17 or 47% were remanded in part for reconsideration.) .

<sup>136</sup> Reauthorization Hearing, *supra* note 132 (Testimony of Professor Jody Freeman). The study was never finalized or published.

<sup>137</sup> See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like - Should Federal Agencies Use Them to Bind the Public?* 41 DUKE L.J. 131 (1992); Robert A. Anthony, “Well You Want the Permit, Don’t You?”: Agency Efforts to Make Non-legislative Documents Bind the Public, 44 ADM. L. REV. 31 (1992); Michael Aismow, *California Underground Regulations*, 44 ADM. L. REV 43 (1992).

<sup>138</sup> See, e.g., Verkuil, *supra*, 133; Pierce, *supra* at note 133, *Deossify Rulemaking*, at 71-93.

<sup>139</sup> In subsequent writings Professor Beermann has argued that it is essential that Congress play a central role in rule review. See, Jack M. Beermann, *The Turn Toward Congress in Administrative Law*,” 89 BOSTON U. L. REV. 727, 758-61 (2009)(“For Congress to be truly responsible for the administrative state, it must monitor and supervise the process of administrative rulemaking and

Some of the commentators saw a failure of the Congress to understand and appreciate the nature of the stakes involved and the dangers inherent in failing to act decisively to resolve them. Professor Cynthia Farina has argued that it was the legitimacy of the administrative lawmaking process that is at the heart of the deossification, nondelegation and new presidentialism debates. Her insight as to the necessity of viewing the legitimacy and operational effectiveness of the regulatory process as a “collaborative enterprise” involving the appropriate official actors and institutional practices may be seen by some as an informing guidepost for action.<sup>140</sup>

The following discussion of possible legislative reform options emanates from a variety of sources including proposals offered by the House Judiciary Subcommittee in its “Interim Report,”<sup>141</sup> academic commentary, legislative hearings, a Congressional Research Service (CRS) symposium,<sup>142</sup> CRS and GAO reports, an examination of an exhaustive survey of individual state experiences with legislative and executive rulemaking review programs,<sup>143</sup> and the author’s experience in assisting in Congress’s implementation of the Act. The accompanying comments and considerations are intended to reflect a neutral assessment of options’ feasibility, both practically and politically, that would be efficient, fair and effective to both political branches. The options range from comprehensive revisions of the current review scheme to amendments and/or additions to the present scheme that would ameliorate or remove the perceived impediments to effective review. Where possible, necessary amendments or additions to the current scheme that can be accomplished by utilization by the rulemaking powers of each House will be noted. It is also premised on the understanding that no one option alone is likely provide an optimal solution; two or more options together may be necessary.

1. *Amend the CRA to require the reporting and review of only “major rules.”* This option was suggested by witnesses and panelists as a means limiting the screening burden on committees and on the assumption that only “major rules” are likely to raise significant congressional review issues. By giving Congress a much smaller universe of rules to consider, it would make it easier for Congress to identify rules that require congressional action.<sup>144</sup> It has also been suggested that if Congress thought rule review that is so focused would engender respect from the courts for its actions, it would provide

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administrative policymaking more generally....Concerted attention to by Congress to agency rules would increase the legitimacy of agency rulemaking, since Congress would be an active partner in the process and could not credibly feign surprise when confronted with an undesirable agency rule.”).

<sup>140</sup> Cynthia R. Farina, “Undoing the New Deal Through the New Presidentialism,” 22 HARV. J. OF L. & PUB. POLICY, 227, 232, 235, 238 (1998).

<sup>141</sup> *Supra* note 132.

<sup>142</sup> *Id.* at 1392-1414.

<sup>143</sup> Jason A. Schwartz, 52 *Experiments with regulatory review: The Political and Economic Inputs Into State Rulemakings* (Institute for Policy and Integrity, NYU Law School, Report No. 6, November 2010)(State Experiences).

<sup>144</sup> Interim Report, *supra* note 132, at 1410 (presentation of Paul R. Verkuil). See also Paul R. Verkuil, *The Wait is Over: Chevron as the Stealth Vermont Yankee II*, 75 Geo. Wash. L. Rev. 921, 926 (2007) (Verkuil).



even more incentive to focus its efforts on the CRA process. That, in turn, could result in courts treating a congressional failure to enact a disapproval as an indication their “hard look” standard of review<sup>145</sup>

However, standing alone, the proposal does not address the critical impediment issues identified above, such as the need for fast track consideration in the House and a screening and evaluation mechanism for reported rules. It also raises additional concerns. At present, the CRA allows only the Administrator of OIRA to designate which rules are to be deemed “major.” Moreover, even a rule that may be conceded to be “minor,” in the sense of its having minimal economic impact, may well have significance to congressional constituencies. It also eliminates review of non-rule rules that were of such importance to the CRA sponsors. A further difficulty would be designating a determiner that is politically acceptable and constitutionally appropriate. The Supreme Court’s ruling in *INS v. Chadha*,<sup>146</sup> the legislative veto case, likely precludes authorizing legislative committees or officers from selecting particular rules and ordering agencies to report them for review and possible veto. In view of the practical and legal problems, it may well be that the current requirement of blanket rule reporting, perhaps supplemented by a screening body, such as a joint committee on rule review or a CORA, discussed more fully below, would be more acceptable.

*2. Amend the CRA to require that all covered agency rules be reported as proposals for a two-tiered review process: major rules could only become effective with passage of a joint resolution of approval; non-major rules would become effective on the failure to pass a disapproval resolution within a stated period of time.* This is essentially the currently pending REINS Act proposal with a modified consideration of non-major rules. All covered rules would be deemed proposals subject to review. As under the REINS Act, major rules would be automatically introduced for approval and there would be expedited consideration procedures for both Houses and the failure to pass an approval resolution for a major rule within 70 legislative or session days disallows the proposal, which cannot be considered again in the same Congress. Departing from the REINS Act, non-major rules would not be automatically introduced but would require of 30% of the membership of each House to subject it to disapproval within 30 days. If such a petition is not timely filed, the rule is deemed approved. If the petition is filed, it is subject to the same fast-track consideration in both Houses, for a disapproval vote. A disapproved rule would be deemed never to have been effective and could not be re-submitted for the remainder of that Congress. But there is no prohibition on re-submittal of the same or similar rule at any future time. Of necessity, a screening mechanism would have to be concurrently established. Rules approved by resolution would not be subject to judicial review except for constitutional challenge.

Such an approval scheme would provide Congress with both optimal, but not overwhelming, leverage over the agency rule development process and direct, highly visible accountability for agency regulatory actions. It would also provide an appropriate

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<sup>145</sup> Ibid, Verkuil at 924-27.

<sup>146</sup> 462 U.S. 919 (1983).

differentiation and speedy consideration process for both major and non-major rules. Apart from the probability of a presidential veto, the proposal will face a number of significant, but surmountable, legal, practical and political challenges.

*Is the proposal for affirmative approval constitutional?* During the initial hearing on the REINS Act, Professor Sally Katzen presented a two pronged constitutional attack on the proposal. First, that the bill, in requiring both houses to approve a regulation before it can become law, effectively allows a legislative veto that was explicitly disallowed by the Supreme Court in *INS v. Chadha*.<sup>147</sup> As in *Chadha*, she argues, “one house alone would stop final agency action from becoming effective” through action or inaction. Second, she argues that the proposal would impermissibly upset the balance of powers among the political branches. Requiring approval of all major rules is seen as an aggrandizement by Congress of powers of the executive and an unconstitutional interference with the President’s constitutional obligation to see to it that the laws are faithfully executed. “For over a century, the executive branch has taken care to faithfully execute the laws by, among other things, developing and issuing regulations implementing legislation.”<sup>148</sup>

To the contrary, however, here the Congress will be acting under its constitutionally-vested rulemaking prerogative under Article, I, section 5, clause 2 of the Constitution which authorizes “each House [to] determine the rules of its proceedings. . .”<sup>149</sup> This power has been construed broadly by the courts. The Supreme Court has held that where neither express constitutional restraints nor fundamental rights are ignored:

[a]ll matters of method are open to the determination of the House. . . The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.<sup>150</sup>

More recently in *Nixon v. United States*,<sup>151</sup> the Court held a challenge to the Senate’s interpretation and exercise of its impeachment powers by the establishment of a committee to hear evidence against Judge Nixon, and to make a recommendation to the full Senate, to be non-justiciable. The court found that there was “a textually demonstrable constitutional commitment of the issue to [the Senate]; or a lack of judicially discoverable and manageable standards for resolving [the issue].”<sup>152</sup> The lower federal appellate courts have been similarly deferential.<sup>153</sup> In other words, each chamber

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<sup>147</sup> 462 U.S. 919 (1983).

<sup>148</sup> Hearings before the House Subcommittee on Courts, Commercial and Administrative Law on “The REINS Act-Promoting Jobs and Expanding Freedom By Reducing Needless Regulations,” January 24, 2011 (Testimony of Professor Sally Katzen).

<sup>149</sup> U.S. Const. art. I, §5, cl. 2.

<sup>150</sup> *United States v. Ballin*, 144 U.S. 1, 5 (1892).

<sup>151</sup> 506 U.S. 224 (1993).

<sup>152</sup> *Id.* at 224 (quoting *Baker v. Carr*, 369, U.S. 186, 217, (1962)).

<sup>153</sup> See e.g., *United States v. Rostenkowski*, 59 F. 3d. 129 (D. C. Cir. 1995). The D. C. Circuit

of Congress has complete discretion to make its own rules as long as the rules do not violate the Constitution. The Rulemaking Clause is textual authority to control how and when legislation will be considered, and since all approval resolutions will be enacted into law, there appears to be a no other conflicting constitutional power.

Neither the Supreme Court's landmark ruling in *Chadha*,<sup>154</sup> holding a one-House legislative veto violates of the Constitution's exclusive lawmaking requirements, nor any of its progeny,<sup>155</sup> are to the contrary. Indeed, *Chadha* is directly supportive of the approval mechanism proposed. The constitutional defect of the legislative veto disclosed by the *Chadha* Court was that Congress sought to exercise its legislative power without complying with the constitutionally mandated requirements for lawmaking: bicameral passage and presentation to the President for his signature or veto. There, and in two subsequent cases,<sup>156</sup> the Court found unlawful legislative actions that sought to accomplish the reversal of exercises of executive actions taken pursuant to lawfully-delegated authority without presentation to the President.

But the *Chadha* Court also noted several provisions of the Constitution allowing legislative actions that do not have to comply with the Presentation Clause,<sup>157</sup> and in

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explained that :

Where. . . a court cannot be confident that its interpretation [of a House rule] is correct, there is too great a chance that it will interpret the Rule differently than would the Congress itself; in that circumstance the court would effectively be making the rules – a power the Rulemaking Clause reserves to each House alone. . . Though that Clause may be most directly concerned with the question, it does not support the doctrine of the separation of powers or authorize a court to set to naught the allocation of authority in the Rulemaking Clause

*Id.* at 1306-07: *Skaggs v. Carle*, 110 F. 3d. 831, 863 (D. C. Cir. 1997) (denying member standing to challenge rule) (citing *Rostenkowski*).

<sup>154</sup> 462 U.S. 919 (1983).

<sup>155</sup> See, e.g., *Metropolitan Wash. Airport Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1981) (finding board of review composed of members of Congress that could exercise veto power over operational decision of Airports Authority unconstitutional); *Hechinger v. Metropolitan Wash. Airports. Auth.*, 36 F. 3d. 97 (D.C. Cir. 1994) (reconstituting review board that could recommend but not veto Airports Authority operational decisions); *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F. 3d. 821 (D.C. Cir 1993) (finding arrangement whereby Congress appointed two of its officers as non-voting *ex officio* members of the Commission could attend business meetings of the agency unconstitutional), *cert. denied*, 513 U.S. 88 (1994).

<sup>156</sup> See *United States Senate v. FTC*, 463 U.S. 1216 (1987) (affirming lower court holding that two-House veto of rules invalid); *Process Gas Group v. Consumer Energy Council*, 463 U. S. 1216 (1983) (affirming lower court holding that one-House veto of rules invalid).

<sup>157</sup> See *Chadha*, 462 U. S. at 955 (noting the House of Representatives' sole power to initiate impeachments, U.S. Cons., art. 1, §2, cl. 5; the Senate's sole power to conduct trial following impeachment on charges initiated by the House and convict following trial, U.S. Cons. art. 1, §3, cl. 6; the Senate's sole and unreviewable power to approve or disapprove Presidential appointments, U.S. Cons. art. 11, §2, cl. 2; and the Senate's sole and unreviewable power to ratify treaties negotiated by the President, U.S. Cons. art. 11, §2, cl. 2).

addition identified “another ‘exception’ to the rule that congressional action having the force of law be subject to the bicameral requirement and the Presentation Clauses. Each House has the power to act alone in determining the specified internal matters, Article 1, section 7, clauses 2 and 3, and section 5 clause 2.”<sup>158</sup> The noted section 5, clause 2, of course, provides in pertinent part that “[e]ach House may determine the rules of its proceedings. . . .” The *Chadha* Court also took pains to reaffirm its ruling in *Sibbach v. Wilson & Co.*,<sup>159</sup> upholding the validity of legislative “report and wait” provisions.<sup>160</sup> The Court therefore recognized that the exercise of the rulemaking power may have an incidental impact outside the legislative branch. However, as long as its predominant focus is internal, it is a constitutional exercise of that authority.

*The proposed mechanism is novel.* The Court in *Mistretta v. United States*,<sup>161</sup> explicitly dismissed the notion that congressional attempts at innovation in structuring administrative arrangements are neither unconstitutional nor inappropriate.<sup>162</sup> The proposed affirmative review scheme, however, is not novel. It is modeled after legislative decisional processes specifically designed to deal with politically-sensitive policymaking issues with dispatch on a take it or leave it as a whole basis after providing members with sufficient background information and time for public deliberation.<sup>163</sup> Moreover, distinguished scholars in the area have suggested its key provision for legislative approval of rules and limited judicial review of such approvals.<sup>164</sup>

*The review mechanism makes all rulemaking advisory which will diminish the and their incentive to produce the best possible rules.* The contrary is more likely to be the case. Congress will continue to delegate lawmaking authority (and certainly no less broadly), and the agencies prodded by a likely energized and empowered Executive, as well as by the usual array of interest groups, will continue to promulgate rules. Rulemaking will continue to be among the most important games in town. What will change is the incentive on all the actors to craft rules that will achieve congressional acceptability.

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<sup>158</sup> *Id.* at 953 n. 21.

<sup>159</sup> 312 U.S. 1 (1941).

<sup>160</sup> 462 U.S. at 935 n. 9.

<sup>161</sup> 488 U.S. 361 (1989).

<sup>162</sup> *Id.* at 385.

<sup>163</sup> *See, e.g.*, Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, sec. 2908 (b), 104 Stat. 1808 (codified at 10 U.S.C. 2687 (2006)(military base closings); 19 U.S.C. secs. 2191-2193 (2006)(international trade agreements); Reorganization Act of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (codified at 5 U.S.C. 909-912(2006)(presidential reorganization plans)Budget Control Act of 2011, Pub. L. 112-25, Title IV, 125 Stat.259-266 (2011)(establishment of Joint Select Committee on Deficit Reduction to propose a deficit reduction bill subject up or down vote).

<sup>164</sup> *See, e.g.*, Verkuil, *supra* note 133, at 457 (proposing fast-track legislative approval and limited court review); Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984)(suggesting legislative approval as a valid alternative to legislative veto).

*Such a mechanism will effect too great a shift in the balance of political power between Congress and the President.* The proposal is better seen as a restoration of proper balance. Under the scheme, ultimate decision-making responsibility for important issues of national policy by Congress will be clear, highly visible, discrete, well defined and thereby subject to unprecedented substantive scrutiny and evaluation by the voting public. At the same time, it is unlikely that the President will sit on his hands. He has his own review process that can be reinvigorated by the stroke of his pen to meet the challenge of the new congressional authority. The President's authority and opportunities to influence (but not displace) rule development in agencies is well-established in law<sup>165</sup> and practice.<sup>166</sup>

*Special interests will have the added advantage of another bite at the apple during congressional review.* Whatever added advantage to the already formidable ability for interests groups to influence the legislative process that may be posited, the proposed mechanism can provide several new safeguards to protect the integrity of the review scheme. First, if neutral regulatory evaluation is to be provided by an independent CORA or by the GAO, it can serve as a shield against special interest importunings and a check on blind capitulation. Together with the built-in requirement for floor deliberation of significant rules, a legislative process is created that is transparent and focused on a defined, discrete policy issue. What is being created is a vehicle whose purpose is forcing political accountability in setting national priorities, not the establishment of a Nocturnal Council composed of philosopher kings. Second, the subject rule will be a product of a participatory agency decisional process and close presidential scrutiny and screening in which interest groups have had their say and will provide another informational basis with which to test the congressional regulatory evaluation. Special interest will always manage to have their day. But this "second bite" opportunity will likely be seen in practice as less intrusive and more democratic than the vagaries of court review.

*This review scheme will take up too much scarce and valuable legislative time.* The easy answer to that is, what better or more important use of member time can there be? In fact, the added legislative workload is not likely to be onerous. The average number of "major" rules reviewed and reported by OIRA since the enactment of the CRA is about sixty per year, a figure that has remained relatively consistent since the institution of modern presidential review in 1981.<sup>167</sup> However, the objection is not without merit. Floor

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<sup>165</sup> See, e.g., *New York v. Reilly*, 969 F. 2d. 1147, 1152 (D.C. Cir. 1992) (noting that agency's reevaluation of its views in light of the President's Council on Competitiveness advice did not taint rulemaking in absence of evidence that agency decision-makers failed to exercise their over expertise in promulgating the final rules); *Sierra Club v. Costle*, 657 F. 2d. 298 (D.C. Cir. 1981) (upholding legitimacy of direct presidential discussion with agency officials during the post-comment period of informal rulemaking).

<sup>166</sup> See McGarity, *supra* note 133 at 1405-06, 1429 (describing extent and techniques of presidential influence under Executive Orders 12,291 and 12,498).

<sup>167</sup> Between 1981 and 1990 the average number of final rules promulgated each year was forty, with a high of fifty in 1982 and a low of twenty-seven in 1984. See Office of Management and Budget, *Regulatory Program of the United States: April 1, 1991 – March 31, 1992*, at 706 (1992). Since the enactment of the CRA in 1996, the yearly average of major rules reviewed by the

time is scarce and valuable, and the necessity to consider and vote upon each every major rule could become unduly onerous. It was on such grounds that ACUS in 1977 recommended against a proposal that would have given an option of vetoing regulations issued under APA notice and comment procedures.<sup>168</sup> If that was a weighty consideration then, it is at least equally so today.

*There is insufficient certainty that proposed major rules will be acted upon in a timely manner.* The current REINS Act proposal provides that a proposed rule must be enacted within 70 days. All proposals must survive a motion to proceed. Moreover, the expedited consideration procedures that would be in place are enacted under the rulemaking power of each House and may be displaced in any particular instance by a unilateral action of either House.

*The proposed REINS Act allows for APA review of an approved rule and directs there be no court consideration of the approval action.* This would appear anomalous and contrary to the underlying reasons for congressional approval review, an apparent avoidance of legislative accountability and continued encouragement of substantive judicial review.

3. *By a concurrent resolution establish a joint committee to act as a clearinghouse and screening mechanism for all covered rules.* Such a committee would be advisory only, reporting to jurisdictional committees for both Houses its findings with respect to reported rules and recommendations, when appropriate, for action on joint resolutions of disapproval. The joint committee would be authorized to request reports on submitted rules from GAO assessing such matters as the cost and benefits, cost effectiveness, and legal authority of the subject rule. None of the foregoing would require the passage of legislation requiring presidential approval.<sup>169</sup> Witnesses at the Judiciary Subcommittee's hearings and panelists at the CRS symposium concluded that the establishment of a joint congressional committee to screen rules and recommend action to jurisdictional committees in both Houses could provide the coordination and information necessary to inform both bodies sufficiently and in a timely manner to allow them to take actions under current law. The internal rules of each House could be amended to impose priority consideration for reporting or discharge of jurisdictional committees to which disapproval resolutions are referred. The balanced nature of such a joint committee and its lack of substantive authority might provide a way to allay political concerns regarding "turf" intrusions.

There may be several downsides of such a joint committee. The volume of rules could be enormous what with 60 or more major rules per year, several thousand non-major rules, and an unknown number of requests for determinations whether an agency

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Comptroller Central has been sixty-four. See General Accounting Office, *supra* note 45. Perhaps as many as half that number reflects routine but costly annual rulemakings, such as social security, Medicare, and Medicaid reimbursement upgrades, which are non-controversial.

<sup>168</sup> See ACUS Recommendation 77-1, "Legislative Veto of Administrative Regulations."

<sup>169</sup> However, an appropriation to cover the costs of GAO's new assessment tasks is likely necessary.

issuance is a covered rule. This kind of workload would require a large and expert professional staff at the joint committee or by a CORA or by GAO. In the past GAO has been reluctant to take on this task. It would also demand the attention of joint committee members to make many sensitive and time consuming determinations. Putting the entire review task solely on the joint committee and its staff may make it very difficult to meet necessarily reasonable time limits for action difficult. Finally, the screening task will also inevitably expose committee members to intense special interest lobbying during the consideration of sensitive rules. The potential for conflict of interest may be unacceptable.

The state experience is instructive, but does not provide anything near definitive guidance for a legislative model for the federal milieu. State rulemaking is generally not as voluminous, complex or “cost-impactive” as its federal counterpart. But often legislative reviewers lack the time, resources or analytic expertise necessary for adequate scrutiny. State legislative rule review schemes, when they are not purely advisory, tend to have enforcement mechanisms that would not pass federal constitutional muster such as rule suspension powers and legislative vetoes. While almost all state legislatures have some additional review powers, only 28 use some form of dedicated review committee to exercise those powers. Such committees often have ill-defined criteria for legislative review. While a few states have only advisory powers, many have experimented with more powerful review tools. Eight states allow for some form of expedited disapproval mechanism. In six, a formal objection from the legislature or review committee will shift the burden at any subsequent trial on the rules validity. In 18 states, new rules either can be, or are automatically are, temporarily suspended 16 states employ some form of legislative veto or mandatory approval to allow for legislative review, sometimes for up to several months if the legislature is not in session. In 12 states some other entity has review power over rules. They are typically designed to be independent bodies insulated from political influence. They typically have circumscribed, limited jurisdictions, although four have more generalized authority over new rules.<sup>170</sup> It is difficult to generalize from the state experiences.

4. *By a concurrent resolution establish a Congressional Office of Regulatory Analysis (CORA).* The CORA would be modeled after the Congressional Budget Office (CBO) as an independent support body of the legislature. Its sole purpose and focus would be regulatory analysis and other screening tasks, including making determinations whether agency issuances, such as guidances and policy statements, are covered rules needing review. It could be an adjunct to a joint committee or a complete substitute for one. Like CBO, its political independence and expert professional staff would add legitimacy and respect for its analyses and recommendations. It would be funded through the annual legislative appropriation. A benchmark for the amount funding that may be necessary effectively support a CORA could be that provided to the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA), its regulatory analysis analog in the executive branch. OIRA does not have a specific line item in the budget, so its funding is part of OMB’s appropriation. In 2000 that figure was \$5.2 million, the amount authorized (but never appropriated) to fund the pilot GAO

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<sup>170</sup> See State Experiences, *supra*, note 138, at 90-91,119-21.

regulatory analysis program under the Truth in Regulation Act of 2000.<sup>171</sup> Currently OIRA has a staff of 30 desk officers and branch chiefs that review about 3000 agency information collection requests each year and between 500 and 700 significant rules each year.<sup>172</sup>

5. *Amend the CRA to direct that reports to Congress and GAO of covered rules are to be submitted electronically to GAO, and that GAO would publish reports weekly in the Congressional Record.* The House Parliamentarian and other witnesses and symposium panelists indicated that the paperwork burden on the Parliamentarian's office, as well as the uncertainties of proper receipt by Congress and timely redirection to the appropriate committees, and other problems with paper submissions, could be relieved by electronic submissions. The House has passed such legislation several times, most recently in the 111<sup>th</sup> Congress, but it never has been acted upon by the Senate.<sup>173</sup> There is no indication, however, that publication in the Congressional Record, by itself, will resolve the problem of properly informing committees and members of the basis and need for close scrutiny of particular rules.

6. *Amend the CRA to make it clear that failing to report a covered rule renders that rule unenforceable and subject to judicial sanction.* Proponents of the CRA consider this lack of an enforceable reporting requirement a key factor undermining the purposes of the CRA. The REINS Act proposal contains such an enforcement provision.

7. *By internal rule of each House establish that the failure of an agency to report a covered rule will subject the agency's annual appropriation to a point of order that may reduce the salary of an agency head or diminish a funding request.* In the event Congress does not pass a clarification that failure to report a covered rule is judicially enforceable or a court does not recognize the justiciability of that issue, Congress should have such a remedial threat. A model of such a provision appeared in Section 6 of S. 266, 109<sup>th</sup> Congress. It provided that it would not be in order for either House to consider an appropriation for an agency if the GAO had found that the agency had violated an expenditure provision prohibited by law "unless the appropriation for salary and expenses for the head of the relevant agency contains a provision reducing the salary of the head by an amount equal to the illegal expenditure identified by" GAO. An agency failure to report found by a CORA or GAO could result in a percentage reduction of an agency heads salary.

8. *Amend the CRA to provide that if a rule is disapproved, an agency is prohibited from repromulgating only those provisions of the rule that the review process and floor debates on disapproval clearly identify as objectionable.* Such a qualification to the CRA review process appears to comport with the legislative intent of the sponsors of the CRA. If the option of creation of a joint committee were adopted, it could be mandated to identify the discrete problems of the rule that were objectionable. That would obviate the

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<sup>171</sup> See discussion, *supra*, at p.18-19.

<sup>172</sup> See Curtis W. Copeland, *Federal Rulemaking: The Role of the Office Information and Regulatory Affairs*, CRS Report RL32397, June 9, 2009, at p.28.

<sup>173</sup> See H. R. REP. NO. 111-150 (2009), Congressional Review Act Improvement Act, House Committee on the Judiciary, accompanying H.R. 2247.



necessity of legislative amendment to re-establish agency authority in an area after passage of a disapproval resolution.

## Concluding Observations: Establishing a Collaborative Enterprise

This Report identifies structural and interpretive issues affecting use of the CRA. While there have been some instances of the law apparently influencing the implementation of certain rules, the limited utilization of the formal disapproval process in the 15 years since its enactment is substantial evidence that its perceived flaws have substantially reduced the threat of possible congressional scrutiny and disapproval as a factor in agency rule development. The consistent use appropriations limitations to stall rule development or the implementation of final rules is corroborative evidence of the ineffectiveness of the current review scheme. The one instance in which an agency rule was successfully negated is likely a singular event not soon to be repeated. Indeed, when a new President took office in 2009 and his party had comfortable majorities in both Houses, neither Congress nor the Chief Executive saw a need to use the CRA against the purportedly offensive midnight rules of the outgoing Administration. The view that the current CRA scheme provides no better rule review than the regular legislative process appears correct.

Presently, one House of the Congress is in the hands of the opposing political party, the rules of the previous Administration are no longer subject to the CRA, and the current Administration appears to be establishing firm control of the agency rulemaking process through its administration of Executive Order 12,866.<sup>174</sup> One commenter has opined that if the perception of a rulemaking agency is that the possibility of congressional review is remote “it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road,” an attitude that is reinforced “so long as [the agency] believes that the president will support its rule.”<sup>175</sup> That this observation has substance is reflected in a widely cited study by the former dean of the Harvard Law School and now Justice of the Supreme Court, Elena Kagan.<sup>176</sup> Kagan suggests that when Congress delegates administrative and lawmaking power specifically to department and agency heads, it is at the same time making a delegation of those authorities to the President, unless the legislative delegation specifically states otherwise. From this flows, she asserts, the President’s prerogative to supervise, direct and control the discretionary actions of all agency officials. The author states that “a Republican Congress proved feckless in rebuffing Clinton’s novel use of directive power—just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan’s use

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<sup>174</sup> See, e.g., Changes in the OMB Regulatory Review Process by E.O. 13422, CRS Report RL33862, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, by Curtis W. Copeland, August 17, 2007; Rebecca Adams, Graham Leaves OIRA With a Full Job Jar, *CQ Weekly*, January 23, 2006; U.S. GAO. Rulemaking: OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews, GAO-03-929 (September 2003); Stephen Power and Jacob M. Schlesinger, Redrawing the Lines: Bush’s Rule Czar Brings Long Knife to New Regulations, *Wall St. Journal*, 6/12/02 at A1; Rebecca Adams, Regulating the Rulemakers: John Graham at OIRA, *CQ Weekly*, 2/23/02 at 520-526.

<sup>175</sup> See Mark Seidenfeld, “The Psychology of Accountability and Political Review of Agency Rules”, 51 *DUKE L.J.* 1059, 1089-90 (2001).

<sup>176</sup> *Presidential Administration*, 114 *Harv. L. Rev.* 2246 (2001) (Kagan).

of a newly strengthened regulatory review process.”<sup>177</sup> She explains that “[t]he reasons for for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power- or, what is the same thing, to deny authority to the other branches of government.”<sup>178</sup>

Kagan goes on to effectively deride the ability of Congress to restrain a President intent on controlling the administration of the laws:

Presidential control of administration in no way precludes Congress from conducting independent oversight activity. With or without a significant role, Congress can hold the same hearings, engage in the same harassment, and threaten the same sanctions in order to influence administrative action. Congress, of course, always faces disincentives and constraints in its oversight capacity as the Article earlier has noted. Because Congress rarely is held accountable for agency decisions, its interest in overseeing much administrative action is uncertain; and because Congress’s most potent tools of oversight require collective action (and presidential agreement), its capacity to control agency discretion is restricted. But viewed from its simplest perspective, presidential control and legislative control do not present an either/or choice. Presidential involvement instead superimposes an added level of political control onto a congressional oversight system that, taken on its own and for the reasons just given, has notable holes.<sup>179</sup>

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

The President, in his supervisory and managerial role, is best situated to perform his constitutional duty to ensure that the administrative bureaucracy is faithfully

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<sup>177</sup> Kagan at 2314.

<sup>178</sup> Id.

<sup>179</sup> Kagan at 2374.

executing congressional directions. Where those directives are typically vague and require the supplying of substantive content and explanation, the presidential role is implicitly expanded. To assure that national programs are effectively and efficiently carried out, the Chief Executive's encompassing presence in the agencies is welcome and legitimate. The Chief Executive assists the agencies in leading the discussion with respect to setting priorities, allocating limited resources, balancing competing policy goals, resolving conflicting jurisdictions and responsibilities of agencies.

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

In practice, the powers of the two political branches are too incomplete for one to gain total control of the departments and agencies of the executive branch. Legislative oversight is the mechanism that attempts to assure that Congress's will is carried out. A more complete and accurate picture, then, is not of congressional dominance, or of executive recalcitrance, but of a dynamic process of continuous sparring, confrontation, negotiation, and ultimate accommodation.<sup>180</sup>

In this spirit a collaborative enterprise should be established respecting review of administrative lawmaking. The scheme of review of the CRA should be amended to (1) review only major rules that would be subject to disapproval by joint resolution; (2) establish a CORA that would provide expert regulatory assessments of reported major rules for committee guidance; (3) provide for an expedited consideration procedure for the House of Representatives equivalent to that of the Senate; (4) assure that court review and sanction is available against enforcement of unreported rules; (5) establish a rule of construction that allows courts to take into account the failure to veto a reviewed major rule.

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<sup>180</sup> Morton Rosenberg, *When Congress Come Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry*, 63-65 (The Constitution Project, 2009).

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