

Comment from Senior Fellow Alan Morrison on *Technical Reform of the Congressional Review Act*
December 6, 2021

I have comments only on the Congressional Review recommendation. One is my usual objection to the use of "deem" or its derivatives, In Recommendation 7(d) line 145, please strike "deemed to be" so that the sentence would read "Publication ... is the date that triggers the time period ..."

The other comment is more substantive and it relates to the parts of the recommendation dealing with the role of the GAO. As I understand the current law, when an agency does not send a report under section 801, there is no trigger starting the congressional clock running. There are two possible current interpretations of the law in that situation: the first is that the Act does not come into play and the agency rule is effective without regard to the Act. The second is that the time for Congress to act remains open until a proper report is filed. Neither approach seems consistent with the intent of the Act.

As I understand it, Congress has provided a third non-statutory option which involves the GAO serving as a trigger if it concludes that an agency should have filed a report, but did not. The problem with that is the GAO then is implementing the Act which is an executive function that it cannot perform (*Bowsher v. Synar*) or perhaps adjudicating a dispute (did the agency fail to comply with the Act), and it cannot do that either (*Chadha*).

I assume that most agencies make good faith efforts to comply with the Act and that there are very few cases in which there is a dispute about whether the agency has complied. I would also assume that, given the need for agencies to continue their funding and other relations with Congress, and given the likelihood that those affected by a rule that should have triggered a report under 801, will raise an objection and alert the appropriate committee of either or both Houses, one of them will then ask for a report, and the agency will comply. Thus, I would propose (if I could do so) that the recommendation as to GAO be changed to eliminate any recommendation that it have a determinative role in the triggering of the Act. For now, I ask that this topic be discussed at the plenary and in the meantime, the committee and others look into this issue.

Alan