

# LEGAL MEMORANDUM

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## The Reach of the Congressional Review Act

*Paul J. Larkin, Jr.*

### Abstract

*The Congressional Review Act allows Congress to invalidate an agency rule while satisfying the Bicameralism and Presentment requirements of Article I of the Constitution. A joint resolution of disapproval signed into law by the President invalidates the rule and bars an agency from thereafter adopting a substantially similar one absent a new act of Congress. Congress intended that the CRA apply broadly to whatever type of document an agency could use to strong-arm a regulated party into complying with the agency's views. Both regulations and interpretive rules fit under the umbrella of "rules" that Congress used to define the substantive scope of agency action. Congress also stated exactly when its opportunity to review and overturn a rule would commence: at the later of the date when the Federal Register publishes the rule or when the agency properly submits it to Congress. Together, those provisions enable Congress to reach back and review agency legislative and interpretive regulations that were never properly submitted to Congress under the CRA.*

### Reconsidering Administrative Agency Action

The Congressional Review Act of 1996 (CRA)<sup>1</sup> is Congress's most recent effort to trim the excesses of the modern administrative state. The act requires the executive branch to report every "rule"<sup>2</sup>—a term that includes not only the regulations an agency promulgates, but also its interpretations of the agency's governing laws—to the Senate and House of Representatives so that each chamber can schedule an up-or-down vote on the rule under the statute's fast-track procedure. The act was designed to enable Congress expeditiously to overturn agency regulations by avoiding the delays occasioned by

### KEY POINTS

- Congress may consider invalidating every "rule" that was submitted in compliance with Section 801 of the Congressional Review Act as long as the period specified by Section 802 has not expired.
- Congress may review and nullify every regulation or other "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy regulation or policy statement," including interpretive rules, policy statements, guidance documents, or anything similar, such as "Dear Colleague" letters, because those documents are "designed to implement, interpret, or prescribe law or policy."
- The clock does not start to run on Congress's special legislative review period until "the later of the date on which" the *Federal Register* publishes the rule or "Congress receives the report submitted under section 801(a) (1)."
- Accordingly, every regulation, policy statement, and the like that in Congress's opinion has not yet been properly submitted for its review remains open for invalidation today.

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**The Heritage Foundation**  
214 Massachusetts Avenue, NE  
Washington, DC 20002  
(202) 546-4400 | [heritage.org](http://heritage.org)

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the Senate’s filibuster rules and practices<sup>3</sup> while also satisfying the Article I Bicameralism and Presentment requirements,<sup>4</sup> which force the Congress and President to collaborate to enact, revise, or repeal a law.<sup>5</sup> Under the CRA, a joint resolution of disapproval signed into law by the President invalidates the rule and bars an agency from thereafter adopting any substantially similar rule absent a new act of Congress.<sup>6</sup>

Congress has resorted to the CRA only infrequently. Between the statute’s enactment in 1996 and 2011, agencies submitted more than 57,000 rules to Congress that led to 72 joint resolutions of disapproval, but only one became a law.<sup>7</sup> The infrequent use of the CRA is not surprising. The President can veto a joint resolution of disapproval,<sup>8</sup> and because the Office of Management and Budget (OMB) must review proposed agency regulations, the President is not likely to scuttle a rule that an agency adopts during his tenure.<sup>9</sup> Accordingly, the optimal time for Congress to invoke the act is during the early days of a new Administration.<sup>10</sup> That transition has happened only three times since the act became law, the third one taking place in January 2017.

The 115th Congress and new President Donald Trump may be interested in using the CRA to invalidate rules adopted by his predecessors. They may be particularly interested in eliminating many (if not all) “midnight regulations”—i.e., rules that were issued during the period when President Barack Obama was a lame duck. But Congress and President Trump also might be interested in invalidating other rules that agencies have promulgated since the act became law but did not submit to Congress as the CRA requires.<sup>11</sup>

Since 1996, federal agencies have promulgated thousands of new rules that imposed billions of dollars in costs on American industry.<sup>12</sup> During the presidential campaign, President Trump expressed concern that overregulation has handicapped industry’s ability to maintain existing jobs and generate new ones.<sup>13</sup> He seems willing to work with the Republican majorities in the new Congress to eliminate unjustified regulations in order to put more people to work.

Of course, President Trump could use executive orders to rescind or modify rules or policies adopted during the Obama Administration, but the repeal or revision of a regulation that has gone into effect must undergo the same Administrative Procedure Act

(APA)<sup>14</sup> notice-and-comment period that an agency must follow when initially adopting a rule.<sup>15</sup> The notice-and-comment process and the ensuing litigation, which will inevitably follow as the night follows the day, could put off for years the final resolution of the validity of a rule that neither Congress nor the President believes improves life for the American public. Moreover, if Congress were to pass and President Trump were to sign into law a joint disapproval resolution, the agency would be barred from readopting the rule absent an intervening change in federal statutory law. President Trump and Congress therefore might find that the CRA provides the best vehicle by which to eliminate what they see as unjustified economic burdens, partly because, in addition to eliminating the regulation, it would tie the hands of a regulatory agency in a future Administration headed by a Democratic President.<sup>16</sup>

Eight years, however, is a considerable period of time. The former President had Democratic majorities in both houses of Congress for only the first two years of his Administration. Once he lost that advantage, he and the agencies he oversaw as President increasingly resorted to the issuance of executive orders and agency interpretive rules or guidance documents to effect changes in the law.<sup>17</sup> He sought to achieve several controversial policy goals by resort to executive authority or an agency’s interpretation of an act of Congress rather than by reliance on the traditional legislative process, and some of those initiatives are by now several years old.<sup>18</sup>

Therefore, one question that has arisen is how far back Congress can reach to invalidate regulations adopted during the Obama Administration. According to the Congressional Research Service, the CRA enables Congress to reach back past November 8 to June 13, 2016, and use the CRA to invalidate any rule that was submitted to Congress on or after that date.<sup>19</sup> It turns out, however, that Congress may have more room to reach back even further and disapprove of agency regulations and policy statements than it first believed. The reason is that the event that triggers the CRA clock is the *later* of two events: (1) the publication in the *Federal Register* of a rule or (2) the submission to Congress of a report containing its text and description.

## The Provenance of Federal Agencies

In the 19th century, the foundation of the American economy transitioned from a predominantly

local, agricultural orientation to a national, industrial basis.<sup>20</sup> Congress decided to seek help when regulating this new beast by turning to “an old friend” and making “a new one.”<sup>21</sup> The old friend was the federal judiciary, to which Congress entrusted the task of interpreting new statutes such as the Sherman Antitrust Act.<sup>22</sup> The new friend was an administrative agency, a government entity that could be part legislator, part investigator, and part adjudicator. Selected for their impartiality and expertise, agency officials would implement the policies Congress enacted in statutes by promulgating regulations, investigating alleged wrongdoing in the form of a violation of the underlying statute or agency’s regulations, and resolving the very cases that it had investigated. The theory was that neither the states nor the Congress could answer every question raised by a national economy that continued to grow larger and more complex each year. So Congress empowered a new type of expert to make decisions in much the same way that we today authorize a physician to decide how best to treat a disease.

The first federal agency was the Interstate Commerce Commission, which was created in 1887.<sup>23</sup> But it was the 20th century that saw the massive increase in federal agencies that we have today. Beginning in 1914 with the establishment of the Federal Trade Commission<sup>24</sup> and picking up steam during the New Deal with such entities as the Securities and Exchange Commission, Congress created a host of new federal agencies.<sup>25</sup> Nor has Congress stopped in this century. Witness the birth of the Public Company Accounting Oversight Board as part of securities legislation enacted in 2010.<sup>26</sup> The result is a forest of federal agencies to govern some aspect of both commercial and non-commercial activities: “There are regulatory régimes for a host of subjects that previously had been left to governance through contract or tort law, but now are supervised through some combination of statutes, regulations, and adjudications.”<sup>27</sup>

And those agencies have been busy. With regard to “legislative regulations,” which, like statutes, govern governmental or private conduct, and “interpretive regulations” (and anything similar), which offer an agency’s opinion on the meaning of a statute, agencies have taken literally the motto (attributed to some Navy SEALs) that “Anything worth doing is worth overdoing. Moderation is for wimps.” If the number of agencies is like the number of trees in a

forest, the number of regulations, adjudications, and “guidance documents” they generate is like the number of leaves on the trees.<sup>28</sup> It is possible that the New Deal Congresses never envisioned the number of agency regulations, decisions, and opinions that we have today, but it is certain that we have them and that their number does not seem ever to grow smaller.

### **The Concern About the Ever-Growing and Smothering Effect of Federal Rules**

A lament often heard today is that American life is governed, not by the officials we elect every two, four, or six years, but by the political appointees and bureaucrats who staff the archipelago of government offices that make up the so-called fourth branch of government.<sup>29</sup> Those bureaus are the offspring of the Progressive Era belief that the complexities and problems of modern life cannot be satisfactorily analyzed and remedied by the now-ancient government adopted by the Founders. Progressives believed that new tools and new ideas were necessary for a new society. To devise the correct answers to life’s multifarious and complicated dilemmas, Progressives believed that we needed an equally complex matrix consisting of umpteen government problem-solvers.

The Progressives believed that those change agents must be unshackled from the anachronistic separation of powers restraints adopted by the Framers so that they can expeditiously implement modern solutions to modern problems. They must also be largely independent from political oversight and control so that partisan politics cannot prevent their scientifically based solutions from taking effect. And to discover those answers, they must be staffed by highly educated and trained specialists who are both empowered to use their expertise and protected against interference or retaliation from the political branches for devising the “right” answer to every problem, regardless of the public’s opposition to it.

In the years predating the Progressive Era, there were similar institutions to fill the role of Platonic Guardians.<sup>30</sup> They were called universities and businesses. (Individuals also did their fair share of innovation, but Progressives did not acknowledge the ability of average, everyday people to improve society, no matter how many of them did that job successfully for quite some time.) In the government, the institutions that arose to invent creative solutions to thorny problems are called administrative agencies. The principal difference between the

private and public problem-solving institutions is that only the latter can put you in jail, fine you, seize your property, or deny you a license to operate a business if you do not agree with their solutions. You can disagree with a professor or decline to do business with a company and go your own way if you think that you can build a better mousetrap, but no one can walk away once you're in the crosshairs of the government.

If you believe that reliance on public-sector experts is the perfect recipe not for separating the powers of government to protect the liberties of the people, but for separating the government from the people so that the former can redefine the liberties of the latter, you're spot on. Consider what two authors recently said about the self-perceived role of federal administrators:

[O]fficial Washington lives in its own inside-the-Beltway bubble, where Washingtonians converse with one another and rarely interact on an intellectual plane with Americans at large. We found that much of official and quasi-official Washington is content to think that ordinary Americans, and the politicians whom they send to Congress, are uninformed and misguided and that policy makers generally should ignore them. This is more or less what they do. America's governmental agencies, of course, cannot completely ignore the president and Congress, but to the extent possible they pursue policy agendas of their own and expect citizens to do what they are told. Indeed, one of the ongoing discussions in official Washington concerns how best to impel citizens to obey—is it steering, compulsion, or the currently fashionable term “nudging,” which means structuring alternatives to limit choices. Many officials exemplify what Aristotle called *ανυπευθυνος* (*anupeuthunos*, or civic irresponsibility). Translated literally, *ανυπευθυνος* refers to rulers who think they are too good to submit to public accountability.

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It may, to be sure, be true that many Americans know little about government and politics. But so what? Most patients know little about medicine, and most clients know little about the law. We expect, however, that doctors and lawyers will

exhibit a fiduciary responsibility toward those seeking their services. The ignorance of patients and clients is a reason to listen more carefully and explain more fully, not an excuse for dismissing them as unworthy of attention. A physician or attorney who regards those dependent upon their services as fools, and undertakes actions without taking much interest in their life circumstances and without giving much consideration to their needs and preferences, is guilty of medical or legal malpractice. Similarly, public servants who have disdain for the public they serve, and show little interest in the public's needs and wishes, are guilty of civic malpractice.<sup>31</sup>

Congress has largely been responsible for this state of affairs because it created those agencies and delegated to them the lawmaking, prosecutorial, and adjudicative powers that the Framers believed they had vested in the different branches created by Articles I, II, and III of the Constitution.<sup>32</sup> Presidents have relished those delegations because Presidents appoint the “[o]fficers of the United States” who head those agencies,<sup>33</sup> and those officials can orient their institutions toward policies that the Administration favors.<sup>34</sup> The Supreme Court of the United States has largely declined to place limits on what powers Congress may grant to administrative agencies, upholding every delegation that Congress has made over the past 80 years as long as Congress has identified an “intelligible principle” to guide the agency's rulemaking<sup>35</sup>—which unfortunately has come to mean, essentially, writing a grammatically correct sentence or two sprinkled with some statements remotely resembling a policy judgment.<sup>36</sup>

Because the Supreme Court offered Congress no help in this regard, Congress was forced to devise a strategy of its own. The first option that Congress chose was the legislative veto.

### **The Legislative Veto as a Device for Congressional Review of Agency Regulations**

Congress has a variety of tools at its disposal to curtail the proliferation of agency regulations. Congress must approve agencies' budgets each year, which gives Members the opportunity to change an agency's priorities, secure promises from senior agency officials about its work during the upcoming fiscal year, and publicly embarrass at budget hearings

agency officials whose organization has engendered public hostility. Every Member can also introduce legislation that would clip an agency's wings, and the Members' minatory presence can deter an agency from going on a frolic and detour of its own choosing. Atop that, Members have almost unlimited access to various media outlets, which are more than happy to report how "troubled" a particular Member is at the goings-on in a particular agency and how it has abused its authority in one manner or another. The Senate also has a weapon that the House of Representatives lacks: confirmation hearings. Senators can obtain concessions from officials as a condition of receiving their vote for the position to which they aspire.

And that is just what the Members can do. Every Member and every committee has staff that can negotiate with an agency's personnel over the direction it has taken or will take, and staff members who are dissatisfied with an agency's response are in a position to persuade their boss that an agency has "gone rogue."

But Congress decided not to rely entirely on jawboning, criticism, or legislation. As an additional means of reining in agencies, Congress came up with the legislative veto. A legislative veto would allow one or both chambers to veto a specific agency action that a majority found unjustified or unwise. These vetoes could take the form of a provision added to a statute or appropriations law granting one or both chambers the right to nullify executive action in much the same way that the President can veto a bill passed by both houses of Congress.<sup>37</sup>

### **The Supreme Court Invalidates the Legislative Veto**

Unfortunately for Congress, the legislative veto did not survive. In 1983, the Supreme Court ruled in *INS v. Chadha*<sup>38</sup> that a legislative veto was unconstitutional. In an opinion by Chief Justice Warren Burger, a majority of the Court agreed with President Ronald Reagan that Article I defines the process by which Congress may legislate and Congress cannot escape that constitutionally fixed procedure through a legislative veto.<sup>39</sup> The wisdom of the legislative veto, the Court added, was not a fit subject for judicial review. The Framers decided to leave policy questions to the political branches, with the federal courts empowered only to referee disputes and to throw a penalty marker only when Congress and the President broke one of the Constitution's rules.

### **The Congressional Review Act of 1996**

**Congress Remedies the Flaws in a Legislative Veto.** Troubled by its inability to restrain agencies' expansive power grabs, Congress adopted the bipartisan Congressional Review Act of 1996.<sup>40</sup> The CRA leaves untouched the process that the APA requires agencies to follow to promulgate a regulation. The CRA satisfies the Bicameralism and Presentment requirements that the Supreme Court found critical in its 1983 decision invalidating the "legislative veto"<sup>41</sup> while still giving Congress the ability to cabin agency overreach. The act achieves those results by granting Congress a limited period during which it can pass and present to the President a bill that would repeal a particular agency regulation.

The CRA directs federal agencies to submit a copy of any new "rule" to each house of Congress "[b]efore [the] rule can take effect."<sup>42</sup> The rule must be submitted as part of a "report" that includes its text and a concise description.<sup>43</sup> Each chamber must forward the report to the chairman and ranking member of the relevant standing committee with jurisdiction over the rule's subject matter.<sup>44</sup> If the committee does not vote to disapprove the rule in 20 legislative days, 30 Senators or Representatives can bring the matter to the Senate floor for limited debate and a vote.<sup>45</sup> Once the rule is before the entire Senate, the CRA ensures that a vote to invalidate the rule cannot be stalled in the Senate by virtue of its unique parliamentary procedures. There, the resolution can be brought up at any time; it is not subject to amendment, a point of order, or a motion to postpone its consideration; and debate is limited to a maximum of 10 hours split evenly between supporters and opponents of the resolution, which keeps a filibuster from preventing a vote on it.<sup>46</sup>

If a joint resolution of disapproval passes, it goes to the President for his signature or veto. If the President signs the joint resolution, the rule at issue is invalidated, and the agency cannot promulgate a new rule that is "substantially the same as" the one invalidated.<sup>47</sup> The CRA also states that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review."<sup>48</sup>

The CRA's terms and provisions raise a number of interesting legal issues.<sup>49</sup> For present purposes, the relevant ones are the following: (1) What is the meaning of a "rule," and (2) what is the "submission" that triggers the time period available to Congress to pass a joint disapproval resolution?

**The Definition of a “Rule.”** The text of the CRA is quite straightforward. Section 804(3) of Title 5 incorporates the definition of the identical term found in the APA,<sup>50</sup> a definition that has been recognized as quite broad.<sup>51</sup> The APA defines a “rule” as follows:

“[R]ule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]<sup>52</sup>

**The Importance of a “Submission.”** Here, too, the text of the CRA defines the relevant term. Section 802 provides (in part) as follows:

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

(b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

(2) For purposes of this section, the term “submission or publication date” means the later of the date on which—

(A) the Congress receives the report submitted under section 801(a)(1); or

(B) the rule is published in the Federal Register, if so published.

**The “Reach-Back” Potential of the CRA.** Read together, the above provisions lead to the following conclusions:

- Congress may consider invalidating every “rule” that was submitted in compliance with Section 801 as long as the period specified by Section 802 has not expired. As far as the substantive reach of the CRA goes, Congress may review and nullify every regulation or other “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy regulation or policy statement.” The latter clause includes *interpretive rules, policy statements, guidance documents, or anything similar, such as “Dear Colleague” letters* that some departments have issued in the past, because those documents are “designed to implement, interpret, or prescribe law or policy.”
- The clock does *not* start to run on Congress’s special legislative review period until “the *later* of the date on which” the *Federal Register* publishes the rule *or* “Congress receives the report submitted under section 801(a)(1).”
- Accordingly, *every* regulation, policy statement, and the like that in Congress’s opinion has not yet been properly submitted to Congress for its review remains open for invalidation *today*.

### **Congress Wanted the Congressional Review Act to Have a Broad Scope and to Require Federal Agencies to Bring Every Item Within Its Reach to Congress’s Attention**

**The “Rules” That Congress Can Review.** The principal argument to the contrary is that the above analysis is a bridge too far. The logical consequence of the above discussion is that Congress could invoke the CRA to invalidate any regulation or policy statement adopted *since the act went into effect in 1996*.<sup>53</sup> That interpretation, so the argument would go, is not what Congress had in mind. It would send the law into turmoil because no one would know what is and is not “good law” until years after it takes effect. Here, for example, the above interpretation would permit Congress to reach back *21 years* to void rules that have become part of the framework of our law. That result would impair every agency’s ability to

carry out its mandates and eviscerate private parties' legitimate, settled expectations.

That argument, however, is unpersuasive. The text and purposes of the CRA are to the contrary. The CRA uses exceptionally broad language to define the "rules" that an agency must submit to Congress.<sup>54</sup> Documents that are normally considered "regulations" clearly fit within the definition of a "rule," but so, too, are the interpretive rules that agencies often prepare. Those documents can have much the same effect as a regulation because of their *in terrorem* effect on regulated parties. Consider universities that receive federal funds. The Office of Civil Rights (OCR) at the Department of Education issued a "Dear Colleague" letter in 2011 that was clearly designed to direct the disciplinary procedures that colleges must adopt in order to comply with OCR's interpretation of federal law.<sup>55</sup> Fearful of losing the federal funds that universities receive from students in the form of tuition and from the federal government in the form of grants, numerous colleges capitulated to OCR's directive.

Agency documents with that effect certainly are among the type of agency statements "interpret[ing]... law or policy" that Congress would want to be able to review and potentially set aside. A later House subcommittee report seems to support the position that the term "rule" includes "interpretive rules" or policy statements:

***The Uncertainty of Which Rules Are Covered By the CRA.*** The framers of the Congressional review provision intentionally adopted the broadest possible definition of the term "rule" when they incorporated section 551(4) of the APA. As indicated previously, the legislative history of section 551(4) and the case law interpreting it make it clear that it was meant to encompass all substantive rulemaking documents—such as policy statements, guidance, manuals, circulars, memoranda, bulletins and the like—which as a legal or practical matter an agency wishes to make binding on the affected public.

That statement 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 the APA or any other statutorily required variation of notice-and-comment

procedures, but rather would 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." The framers of the legislation indicated their awareness of agencies' now widespread practice of avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other, non-legislative documents as a means of binding the public, either legally or practically, 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>56</sup>

The text of the CRA also refutes any argument that the "rules" covered by the act should be limited to what are normally called "regulations" or legislative rules. As noted, the CRA definition of a "rule" is sufficiently capacious to reach interpretive rules. Congress did classify rules into two categories: "major rules," meaning rules that OMB finds will have a material effect on the economy, and everything else.<sup>57</sup> Major rules cannot take effect for 60 days,<sup>58</sup> while non-major rules can go into effect in half that time.<sup>59</sup> That distinction, however, does not affect the definition of a "rule" or when it must be submitted to Congress; it affects only when a rule can take effect.<sup>60</sup> Congress knew how to craft an exception to the term "rule" when it thought that one was necessary, adopting three of them in the CRA. None of them takes interpretive rules out of the picture.<sup>61</sup>

That interpretation of "rule" also makes eminent sense. For some time now, to set forth their interpretation of federal law, agencies have followed the controversial practice of issuing "interpretive rules,"

which do not control private parties, instead of “legislative rules,” which do have such a binding effect.<sup>62</sup> The result is to leave affected parties in a bind. They cannot demand that an agency submit its interpretive rules through the APA notice-and-comment rulemaking process, which would allow them not only to influence the agency’s rulemaking, but also to challenge the rule in court if they are dissatisfied with the outcome.<sup>63</sup> They could wait until the agency takes an enforcement action to challenge the agency’s interpretation of a statute, but that option is a risky one. Twelve years before the CRA became law, the Supreme Court held in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*<sup>64</sup> that the courts must treat as binding an agency’s interpretation of an ambiguous statute.<sup>65</sup> Disregarding the prevailing rule—which had been that “[i]t is emphatically the province and duty of the judicial department to say what the law is”<sup>66</sup>—*Chevron* concluded that an agency’s interpretation of an ambiguous statute is controlling *even if a reviewing court would read the statute differently*.<sup>67</sup> The upshot is that *Chevron* essentially gave the law-interpreting function to agencies in a large number of instances, making it inordinately difficult for a private party to persuade a court to adopt its interpretation of a statute in an enforcement action. Under those circumstances, Congress wanted to be able to engage in vigorous oversight of an agency’s statutory interpretations in whatever form they took.

Finally, the above interpretation of the CRA is consistent with the Supreme Court’s interpretation of the analogous provisions in the APA. Congress adopted the APA in 1946 to regularize the process of agency lawmaking, to allow for public participation and comment on such efforts, and to ensure that agency rules would be subject to judicial review by an aggrieved party.<sup>68</sup> Rules are subject to the notice-and-comment period set forth in the APA, but “interpretive rules”—i.e., an agency’s interpretation of acts of Congress or the agency’s own regulations—are not. The Supreme Court so held in *Perez v. Mortgage Bankers Association*.<sup>69</sup> But the *Mortgage Bankers* case did not hold that an agency’s policy statements are not rules. The Court held only that an agency need not submit interpretive rules to APA notice-and-comment rulemaking because an entirely separate provision of the APA makes it clear that “the Act’s notice-and-comment requirement ‘does not apply...to interpretative rules.’”<sup>70</sup>

The *Mortgage Bankers* ruling therefore supports the interpretation of the CRA discussed above. As the Congressional Research Service has concluded:

Notably, the CRA adopts the broadest definition of “rule” contained in the APA, which is broader than the category of rules subject to notice and comment rulemaking. Thus, some agency actions that are not subject to notice and comment rulemaking under the APA, and thus may not be published in the *Federal Register*, may still be considered a rule under the CRA.<sup>71</sup>

#### **The Period Within Which Congress Can Act.**

The clock does *not* commence on Congress’s review period until “the *later* of the date on which” the *Federal Register* publishes the rule *or* the date on which “Congress receives the report submitted under section 801(a)(1).” Accordingly, any and every regulation, policy statement, and the like that in Congress’s opinion has not yet been properly submitted to Congress for its review remains open for invalidation even today—even ones that were published in the *Federal Register*. The text of the CRA makes that clear in several ways.

A rule may not take effect until it and the report required by Section 801(a)(1) are delivered to Congress (and the Comptroller General), and the time to introduce a joint resolution of disapproval for such a rule does not commence under Section 802(a) until the *later* of the date of *Federal Register* publication or the date that Congress receives the report pursuant to Section 801(a)(1).<sup>72</sup> It is illogical to conclude that the legislative review period *precedes* the time when Congress can introduce a resolution of disapproval. Moreover, the period of expedited review in the Senate governing such a resolution—a key feature of the CRA because it prevents a filibuster—is measured in Section 802(e) from the “submission or publication date,” which under Section 802(b)(2) “means the *later* of the date on which” Congress “receives the report submitted under 801(a)(1)” or publication, “if so published.”<sup>73</sup> Thus, the Senate’s expedited procedures cannot begin or end before the rule is received by Congress.<sup>74</sup> Accordingly, publication alone does *not* trigger the review period even if the *Federal Register* contains the text of the rule and “a concise general statement relating to the rule, including whether it is a major rule.” The rule must also be presented to Congress to start the clock running.



Why is that critical? Why must an agency also submit a published rule to Congress? The reason is that Congress directed each agency to give a copy of the rule's text (and other materials) to the Comptroller General<sup>75</sup> so that he could analyze it for Congress, an analysis that would include recommending whether the "report" complied with the CRA.<sup>76</sup> Congress would not have the Comptroller General's opinion to consider when reviewing the rule if publication in the *Federal Register* alone triggered the start of the review period. Atop that, the CRA directs agencies to "cooperate with the Comptroller General by providing information relevant to the Comptroller General's report" to Congress. The Comptroller General might find it necessary to consider information not published in the *Federal Register* when analyzing the rule for Congress. Using that publication date as the triggering event could hamper the work that Congress expected the Comptroller General to do before it could decide whether to leave the rule in place or torpedo it.

The above construction of the CRA is consistent with the purpose of that act. Congress decided that it needed an additional tool to review the work of agencies in addition to the budget process, oversight hearings, and nominations. Congress initially settled on the legislative veto as the tool it would use, but the Supreme Court scotched that notion in *Chadha*. Congress then turned to the CRA to try to reach the same goal that a legislative veto would have served, but in a way that avoided the roadblock imposed by the Supreme Court. Congress could not perform its oversight function if an agency could publish a rule and wait for the congressional review period to expire before submitting it to Congress. Only reading the CRA as discussed above prevents an agency from running out the clock.

What the CRA does not include is also significant. It pointedly does *not* adopt a statute of limitations that would deny Congress the opportunity to review a rule that was published in the *Federal Register* and has already taken effect but has not yet been submitted. Statutes of limitations did not exist at common law,<sup>77</sup> but they do today. Congress uses them to limit the ability of either the government or a private party to bring a case before a court for it to decide whether the defendant committed a civil wrong or a crime.<sup>78</sup> Congress does not always include a statute of limitations in a law creating private rights, and when that occurs, the federal courts will often look to relevant

state law.<sup>79</sup> But that approach is not a sensible one in this context. The CRA does not create private rights that can be enforced in federal court. It grants Congress an *institutional* right that is *not* subject to judicial review. Congress also specified *when* Congress may and must exercise that oversight opportunity, as well as when that period begins to run. Looking elsewhere to find a limit on Congress's oversight authority would frustrate the all-inclusive purpose of the CRA. Finally, because no private party has the authority that Article I gives to Congress—"[a]ll legislative Powers"—trying to identify a limitations period by resorting to private law would involve an entirely unguided reach into a grab bag of possibilities wholly unrelated to the problem that Congress addressed in the CRA.

Two final points: First, the CRA applies to rules promulgated by so-called independent agencies. The text of the act does not distinguish between those agencies and the ones traditionally under the direct and close supervision of the President, and there is no good reason to exempt them from congressional review. Second, appropriations acts for federal agencies directing them to devise and implement rules not yet submitted to Congress do not exempt those rules from the CRA's requirements. Congress can, of course, alter substantive law in an appropriations bill because Article I does not exempt appropriations bills from the "Bills" that can become "Law[s]." But Congress votes on appropriations bills under the assumption that the money authorized to be spent will be used only for lawful purposes.<sup>80</sup> An agency "rule"—even one that has been published in the *Federal Register*—that has not yet been submitted to Congress is, by the very terms of the CRA, not yet "in effect" and therefore should not be implemented by the agency during the relevant fiscal year until the CRA's requirements have been satisfied.

## Conclusion

The CRA provides Congress with an opportunity to invalidate an agency rule while satisfying the Article I Bicameralism and Presentment requirements. A joint resolution of disapproval signed into law by the President invalidates the rule and bars an agency from thereafter adopting a substantially similar one absent a new act of Congress. As the text of the act shows, Congress intended that the CRA apply broadly to whatever type of document an agency could use to strong-arm a regulated party into complying with the agency's views.

Both regulations and interpretive rules fit under the umbrella of “rules” that Congress used to define the substantive scope of agency action. At the same time, Congress was precise in stating exactly when its opportunity to review and overturn a rule would commence: at the later of the date when the *Federal Register* publishes the rule *or* when the agency properly submits it to Congress. Together, those provisions enable Congress to reach back and review agency legislative and interpretive regulations that were never properly submitted to Congress under the CRA.

—*Paul J. Larkin, Jr.*, is Senior Legal Research Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.

## Endnotes

1. 5 U.S.C. §§ 801-08 (2012). The Congressional Review Act of 1996 was enacted as Title II, Subtitle E, of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 871 (1996).
2. The term “rule” is defined below at text accompanying notes 50-52.
3. For an excellent discussion of the Senate’s filibuster rules and practices, see James I. Wallner & Ed Corrigan, *A Rules-Based Strategy for Overcoming Minority Obstruction of a Supreme Court Nomination*, HERITAGE FOUNDATION, BACKGROUNDER No. 3187 (Jan. 23, 2017), <http://thf-reports.s3.amazonaws.com/2017/BG3187.pdf>.
4. U.S. CONST. Art. I, § 7; Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law, and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL’Y 337, 356 (2015).
5. See *Clinton v. City of New York*, 524 U.S. 417 (1998); *INS v. Chadha*, 462 U.S. 919 (1983).
6. For discussions of the Congressional Review Act, see, e.g., STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON COMMERCIAL & ADMIN. L., 109TH CONG., INTERIM REPORT ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY 87-95 (2009) (hereafter INTERIM REPORT); Daren Bakst & James L. Gattuso, *The Stars Align for the Congressional Review Act*, HERITAGE FOUNDATION, ISSUE BR. No. 4640 (Dec. 16, 2016), <http://thf-reports.s3.amazonaws.com/2016/IB4640.pdf>; Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 83-84 (2006); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004); MAEVE P. CAREY ET AL., CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS (Nov. 17, 2016); Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 96 (1997); CURTIS W. COPELAND, CONG. RESEARCH SERV., R40997, CONGRESSIONAL REVIEW ACT: RULES NOT SUBMITTED TO GAO AND CONGRESS (Dec. 29, 2009); CURTIS W. COPELAND & RICHARD S. BETH, CONG. RESEARCH SERV., RL34633, CONGRESSIONAL REVIEW ACT: DISAPPROVAL OF RULES IN A SUBSEQUENT SESSION OF CONGRESS (Sept. 3, 2008); 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 (2010); Julie A. Parks, Note, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187 (2003); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051 (1999); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009).
7. Early in 2001, a Republican-controlled Congress passed and President George W. Bush signed a joint resolution of disapproval to invalidate an ergonomics regulation promulgated during the waning days of President Bill Clinton’s Administration. See *Ergonomics Rule Disapproval*, Pub. L. No. 107-5, 115 Stat. 7 (2001) (disapproving Ergonomics Program, 65 Fed. Reg. 68,261 (Nov. 14, 2000)); Bakst & Gattuso, *supra* note 6, at 2-3; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2385 (2001).
8. President Obama vetoed five of them. Carey et al., *supra* note 6, at 5 & n.19.
9. For instance, President Barack Obama vetoed five disapproval resolutions presented to him during the 114th Congress (2015-2016). CHRISTOPHER M. DAVIS & RICHARD S. BETH, CONG. RESEARCH SERV., AGENCY FINAL RULES SUBMITTED ON OR AFTER JUNE 13, 2016, MAY BE SUBJECT TO DISAPPROVAL BY THE 115TH CONGRESS, CRS INSIGHT, at 1 (Dec. 15, 2016), <https://fas.org/sgp/crs/misc/IN10437.pdf>.
10. See Carey et al., *supra* note 6, at 5; Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1002 (2001); see also Croston, *supra* note 6, at 910 (“[T]here are structural problems inherent in any model of congressional enforcement. [¶] First, because the agencies are in the Executive Branch and at least nominally under the President’s control, ‘Congress rarely is held accountable for agency decisions.’ If regulated entities are upset because agencies are passing secretive, burdensome rules without complying with the CRA, they will probably not take out their anger on Congress. They will blame the agencies, which are naturally at fault, and perhaps complain to the Office of Information and Regulatory Affairs (OIRA) or other executive actors. The general result is a congressional ‘lack of interest’ in CRA enforcement. [¶] In addition, as Kagan noted, the ‘partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power—or, what is almost the same thing, to deny authority to the other branches of government.’”) (footnotes omitted).
11. On January 30, 2017, President Trump signed an executive order designed to reduce burdensome regulations to spur economic growth. See Executive Order, *Reducing Regulation and Controlling Regulatory Costs* (Jan. 30, 2017); Editorial, *Trump Dams the Regulatory Flood*, WALL ST. J., Jan. 30, 2017, <https://www.wsj.com/articles/trump-dams-the-regulatory-flood-1485822874>; Damian Paletta & Michael C. Bender, *Trump Signs Executive Order to Cut, Restrict Regulations*, WALL ST. J., Jan. 30, 2017 (“President Donald Trump on Monday signed an executive order aimed at trimming federal regulations and slowing the approval of new ones, delivering on a campaign promise that White House officials believe will spur economic growth. [¶] The executive order will require two regulations to be eliminated for every new one created, administration officials said. They said it would be the biggest regulatory change since the Ronald Reagan administration. [¶] The order caps costs of new regulations for the remainder of the fiscal year and creates a budget process for new regulations in the next fiscal year, which begins in October. This budget, separate from the congressional appropriation process, will be set by the White House.”).
12. See, e.g., Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES, Aug. 13, 2016 (“The Obama administration in its first seven years finalized 560 major regulations—those classified by the Congressional Budget Office as having particularly significant economic or social impacts. That was nearly 50 percent more than the George W. Bush administration during the comparable period, according to data kept by the regulatory studies center at George Washington University.... And it has imposed billions of dollars in new costs on businesses and consumers.”), <https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html>; James Gattuso & Diane Katz, *20,642 New Regulations Added in the Obama Presidency*, DAILY SIGNAL (May 23, 2016) (“More than \$22 billion per year in new regulatory costs were imposed on Americans last year, pushing the total burden for the Obama years to exceed \$100

billion annually. That's a dollar for every star in the galaxy, or one for every second in 32 years."), <http://dailysignal.com/2016/05/23/20642-new-regulations-added-in-the-obama-presidency/>; James L. Gattuso & Diane Katz, *Red Tape Rising 2016: Obama Regs Top \$100 Billion Annually*, HERITAGE FOUNDATION, BACKGROUNDER No. 3127 (May 23, 2016) ("The addition of 43 new major rules in 2015 increased annual regulatory costs by more than \$22 billion, bringing the total costs of Obama Administration rules to an astonishing \$100 billion-plus in just seven years."), [http://www.heritage.org/research/reports/2016/05/red-tape-rising-2016-obama-regs-top-100-billion-annually?\\_ga=1.169049320.877125437.1470669435](http://www.heritage.org/research/reports/2016/05/red-tape-rising-2016-obama-regs-top-100-billion-annually?_ga=1.169049320.877125437.1470669435); Kimberley A. Strassel, *Obama's Midnight Regulation Express*, WALL ST. J., Dec. 22, 2016 ("According to a *Politico* story of nearly a year ago, the administration had some 4,000 regulations in the works for Mr. Obama's last year. They included smaller rules on workplace hazards, gun sellers, nutrition labels and energy efficiency, as well as giant regulations (costing billions) on retirement advice and overtime pay. [¶] Since the election Mr. Obama has broken with all precedent by issuing rules that would be astonishing at any moment and are downright obnoxious at this point."), <http://www.wsj.com/articles/obamas-midnight-regulation-express-1482451192>; Justin Sykes, AMERICANS FOR TAX REFORM, *Nearly 4,000 EPA Regulations Issued Under President Obama* (July 6, 2016) ("Since President Obama assumed office in 2009, the EPA has published over 3,900 rules, averaging almost 500 annually, and amounting to over 33,000 new pages in the Federal Register.... The compliance costs associated with EPA regulations under Obama number in the hundreds of billions and have grown by more than \$50 billion in annual costs since Obama took office. Such high costs, especially those related to the energy sector, ripple throughout the economy, impacting GDP, killing thousands of jobs, and increasing the cost of consumer goods."), <https://www.atr.org/nearly-4000-epa-regulations-issued-under-president-obama>.

13. A 2016 report by scholars at the George Mason University Mercatus Center concluded that the growth of federal regulations has cost the American economy trillions of dollars since 1980. See BENTLEY COFFEY, PATRICK A. MCLAUGHLIN & PIETRO PERETTO, GEO. MASON UNIV., MERCATUS CNTR., *THE CUMULATIVE COST OF REGULATIONS*, MERCATUS WORKING PAPER 2 (Apr. 2016) ("Our results show that economic growth has been dampened by approximately 0.8 percent per annum since 1980. Had regulation been held constant at levels observed in 1980, our model predicts that the economy would have been nearly 25 percent larger by 2012 (i.e., regulatory growth since 1980 cost GDP \$4 trillion in 2012, or about \$13,000 per capita.").
14. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. 501 *et seq.* (2012)).
15. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("The statute [*viz.*, the APA] makes no distinction...between initial agency action and subsequent agency action undoing or revising that action."); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (ruling that an agency must comply with the APA when rescinding a rule). The APA established a multistep procedure for "notice-and-comment rulemaking." To start, the agency must issue a "[g]eneral notice" of proposed rulemaking, which is ordinarily done by publication in the *Federal Register*. Next, the agency must give interested parties the opportunity to offer written submissions regarding the proposed rule, with the agency obliged to consider and respond to significant comments. When the agency promulgates its final rule, it must include "a concise general statement" of the rule's basis and purpose. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).
16. See Kimberly Strassel, *A GOP Regulatory Game Changer*, WALL ST. J., Jan. 27, 2017, <http://www.wsj.com/articles/a-gop-regulatory-game-changer-1485478085>; see also, e.g., Michael Barone, *Two Really Audacious Proposals for Trump and the Republicans*, AMER. ENTERPRISE INST. (Jan. 30, 2017), [http://www.aei.org/publication/two-really-audacious-proposals-for-trump-and-the-republicans/?utm\\_source=paramount&utm\\_medium=email&utm\\_content=AEITODAY&utm\\_campaign=013117](http://www.aei.org/publication/two-really-audacious-proposals-for-trump-and-the-republicans/?utm_source=paramount&utm_medium=email&utm_content=AEITODAY&utm_campaign=013117).
17. See, e.g., DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION'S ASSAULT ON THE RULE OF LAW* (2015).
18. The Obama Administration's immigration enforcement policy, Title IX disciplinary policy, and transgender bathroom policies are examples.
19. See Davis & Beth, *supra* note 6, at 2.
20. See, e.g., Larkin, *supra* note 4, at 361-62.
21. *Id.* at 361.
22. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2012)).
23. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (repealed).
24. Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 719 (codified as amended at 15 U.S.C. § 41 *et seq.* (2012)).
25. See, e.g., Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 408-09 (1989) ("The decade between 1930 and 1940 saw the creation of as many agencies—seventeen—as had been created in the entire period between the framing of the Constitution and the close of the nineteenth century.") (footnote omitted).
26. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
27. Larkin, *supra* note 4, at 363.
28. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 282-83 (2001) ("There have always been regulatory crimes, from the colonial period onward.... But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well. Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation.... Wholesale extinction may be going on in the animal kingdom, but it does not seem to be much of a problem among regulatory laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach."); Richard Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2441-42 (footnotes omitted) ("[A]t the federal level, Congress has virtually criminalized civil law by making criminal sanctions available for violations of otherwise civil federal regulatory programs. An estimated 300,000 federal regulations are now subject to criminal enforcement.").

29. Of course, another lamentation is that the unelected life-tenured federal court judges also run the nation more than elected officials do. That complaint, however, raises issues beyond the scope of this Legal Memorandum.
30. The term “Platonic Guardians,” which traces its lineage to Plato’s *Republic* and Juvenal’s *Satires*, is used today to refer to supposedly enlightened political overseers.
31. JENNIFER BACHNER & BENJAMIN GINSBERG, *WHAT WASHINGTON GETS WRONG* 10–11 (2016).
32. See Larkin, *supra* note 4, at 354–66.
33. See U.S. CONST. art. II, § 2, cl. 2 (the Appointments Clause) (“[The President]...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.); Larkin, *supra* note 4, at 369–70 (“The Constitution contemplates that Congress may create executive departments and give the President the power necessary to run them. The Constitution also assumes that the President may use lieutenants to enforce the law—the contrary assumption would require the President to perform the impossible—most of whom he or she (or another appointee) can select, many of whom must be approved by the Senate to hold office, most of whom he or she can remove from their positions. After all, Article I grants Congress the ‘power...to establish Post Offices and post Roads,’ but it does not require the President to deliver the mail himself.”) (footnotes omitted).
34. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (“It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the ‘force and effect of law.’”); *id.* at 295 n.18 (collecting cases); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) (ruling that an agency’s interpretation of an ambiguous statute is controlling); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (ruling that an agency’s interpretation of its own regulations is controlling unless it is inconsistent with the regulation’s text); *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–86 (2005) (ruling that an agency can receive *Chevron* deference even when it rejects its own earlier interpretation).
35. See Larkin, *supra* note 4, at 365–66.
36. See, e.g., Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J. L. & PUB. POL’Y 87, 87 (2010) (“If Academy Awards were given in constitutional jurisprudence, nondelegation claims against regulatory statutes would win the prize for Most Sympathetic Judicial Rhetoric in a Hopeless Case.”).
37. See Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2164 (2009) (“The problem of congressional control of the administrative state is not new. As early as the 1930s, members of Congress worried that wide delegations of administrative authority would leave the unelected bureaucracy politically unaccountable. Yet they also realized that Congress could not pass enough specific legislation to regulate the increasingly complex world. The legislative veto was seen as a partial solution to this dilemma. Congress would grant broad rulemaking authority to administrative agencies, but would reserve the ability to disapprove regulations that Congress disfavored. No single statute created an across-the-board legislative veto. Instead, over the course of sixty years, Congress enacted more than 200 federal statutes with individual legislative vetoes.”) (footnotes omitted).
38. 462 U.S. 919 (1983).
39. *Id.* at 944–59; see also *United States Senate v. FTC*, 463 U.S. 1216 (1987) (relying on *Chadha* to affirm a lower court holding that a two-House veto is unconstitutional); *Process Gas Group v. Consumer Energy Council*, 463 U.S. 1216 (1983) (same, one-House veto).
40. There are no committee reports on the CRA because the act did not go through the normal legislative process. A post-enactment joint statement by Representative David McIntosh and Senator Don Nickles stated that the sponsors sought to redress the balance between legislation and agency lawmaking that had gotten out of whack over the years. Copeland, *supra* note 6, at 2. Whether those statements offer valuable insight into the act’s meaning is debatable. Compare, e.g., *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (relying on post-enactment remarks of the bill’s sponsor) with, e.g., *CPSC v. GTE Sylvania*, 447 U.S. 102 (1980) (post-enactment legislative history is entitled to little weight).
41. See *supra* note 39.
42. 5 U.S.C. § 801(a)(1) (A) (“Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.”). The agency also must make additional information available to Congress and the Comptroller General. *Id.* § 601(a)(1)(B) (“On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—(i) a complete copy of the cost-benefit analysis of the rule, if any; (ii) the agency’s actions relevant to sections 603, 604, 605, 607, and 609; (iii) the agency’s actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.”).
43. 5 U.S. § 804(3) (incorporating by reference the definition of “rule” found in 5 U.S.C. § 551(4) (2012)).
44. 5 U.S.C. § 801(a)(1)(C). The Comptroller General also must prepare a report on each “major rule” to the relevant committees. 5 U.S.C. § 801(a)(2)(A) (“The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency’s compliance with procedural steps required by paragraph (1)(B).”).
45. 5 U.S.C.A. § 802(c) (“In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under

- subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.”).
46. 5 U.S.C. § 802(d) (“(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of. (2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order. (3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur. (4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.”).
  47. 5 U.S.C. § 801(a)(2)(A).
  48. 5 U.S.C. § 805.
  49. See, e.g., *Carey et al.*, *supra* note 6; *Rosenberg*, *supra* note 6, at 1052.
  50. 5 U.S. § 804(3) (incorporating by reference the definition of “rule” found in the Administrative Procedure Act, 5 U.S.C. § 551(4) (2012)).
  51. See, e.g., *Rosenberg*, *supra* note 6, at 1054 (“The legislative history of the APA indicates that the term is to be construed broadly: ‘[t]he definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well.’ The courts have recognized the breadth of the term, indicating that it encompasses ‘virtually every statement an agency may make,’ including interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, employee manuals and memoranda of understanding, among other types of actions. Thus, a broad range of agency action is potentially subject to congressional review.”) (footnotes omitted).
  52. 5 U.S.C. § 551(4) (2012).
  53. Because the text of the CRA does not indicate that it applies to “rules” adopted before the act became law, Congress would not be able to review and invalidate pre-act rules. See *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994) (ruling that statutes presumptively have only prospective effect).
  54. See *Cohen & Strauss*, *supra* note 6, at 102–03 (“Every action an agency takes that fits the Administrative Procedure Act’s (APA) definition of ‘rule,’ must be submitted to Congress for consideration under the review procedures. Even though major rules are, in some respects, singled out for more intensive analytical requirements and have their effective date delayed for some period of time, even policy statements, interpretative rules, and technical manuals face congressional review.... By requiring the submission of all regulatory actions meeting the APA definition of ‘rule’ in 5 U.S.C. § 551, a much broader category than rulemaking procedures apply to, Congress has spread its resources extremely thin.”) (footnote omitted); *Carey et al.*, *supra* note 6, at 6; *Rosenberg*, *supra* note 6, at 1066–67 (“The framers of the congressional review provision intentionally adopted the broadest possible definition of the term ‘rule’ when it incorporated the APA’s definition. As indicated previously, the legislative history of section 551(4) of the APA and the case law interpreting it clarifies it was meant to encompass all substantive rulemaking documents—such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like—which as a legal or practical matter an agency wishes to make binding on the affected public.”) (footnote omitted).
  55. See KC JOHNSON & STUART TAYLOR, JR., *THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA’S UNIVERSITIES* (2017).
  56. INTERIM REPORT, *supra* note 6, at 88 (footnote omitted).
  57. 5 U.S.C. § 804(2) (“The term ‘major rule’ means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.”).
  58. 5 U.S.C. § 801(a)(3) (“A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—(A) the later of the date occurring 60 days after the date on which—(i) the Congress receives the report submitted under paragraph (1); or (ii) the rule is published in the Federal Register, if so published; (B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—(i) on which either House of Congress votes and fails to override the veto of the President; or (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or (C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted.”); *id.* § 801(a)(4) (“Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).”).
  59. 5 U.S.C. § 801(a)(4) (“Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).”); *id.* § 553(d) (requiring a 30-day waiting period).
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60. See *Carey et al.*, *supra* note 6, at 10 (“Does the CRA Apply to Non-Major Rules? Yes. The CRA can be used to overturn any final rule, regardless of whether the rule is major.”) (bold-face deleted).
61. 5 U.S.C.A. § 804(3) (“The term ‘rule’ has the meaning given such term in section 551, except that such term does not include—(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”).
62. 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).
63. 135 S. Ct. 1199 (2015).
64. 467 U.S. 837 (1984).
65. *Chevron* established a two-step standard for judicial review of an agency’s interpretation of a statute. The first step is to ask whether Congress has answered the specific question in dispute. If so, its answer is dispositive. If not, the reviewing court must ask whether the agency’s reading of the law is reasonable. If so, the court must accept that interpretation even if the court would have construed the statute differently. The reason, the Court wrote, is that Congress presumably delegated to the agency rather than the courts the authority to construe an ambiguous law to make it work. *Id.* at 842–43.
66. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1802) (emphasis added).
67. *Chevron*, 467 U.S. at 843 (“If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”) (footnotes omitted).
68. See *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950) (“The [APA] was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.”).
69. 135 S. Ct. 1199 (2015).
70. *Id.* at 1206 (quoting 5 U.S.C. § 553(b)(A)).
71. *Carey et al.*, *supra* note 6, at 6.
72. 5 U.S.C. § 802 (“(a) For purposes of this section, the term ‘joint resolution’ means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: ‘That Congress disapproves the rule submitted by the \_\_\_\_\_ relating to \_\_\_\_\_, and such rule shall have no force or effect.’ (The blank spaces being appropriately filled in). (b)(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction. (2) For purposes of this section, the term “submission or publication date” means the later of the date on which— (A) the Congress receives the report submitted under section 801(a)(1); or (B) the rule is published in the Federal Register, if so published.”).
73. 5 U.S.C. § 802(b)(2) (emphasis added); see *id.* § 802(c)–(e)(e) (“(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar. (d)(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of. (2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order. (3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur. (4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate. (e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a rule— (1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or (2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.”).

74. See, e.g., *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973) (“We cannot interpret federal statutes to negate their own stated purposes.”). For the same reason, the CRA cannot be read to trigger congressional review based on publication by CNN or buried in an obscure portion of the agency website.
75. 5 U.S.C. § 801(a)(1)(B) (“On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—(i) a complete copy of the cost-benefit analysis of the rule, if any; (ii) the agency’s actions relevant to sections 603, 604, 605, 607, and 609; (iii) the agency’s actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.”).
76. 5 U.S.C. § 801(2) (“(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency’s compliance with procedural steps required by paragraph (1)(B). (B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General’s report under subparagraph (A).”).
77. CHARLES DOYLE, CONG. RESEARCH SERV., 7-5700, STATUTES OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW, at 1 (Oct. 1, 2012), <https://fas.org/sgp/crs/misc/RL31253.pdf>.
78. See, e.g., 18 U.S.C. §3282 (2012) (“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or information is instituted within five years next after such offense shall have been committed.”).
79. See *Wilson v. Garcia*, 471 U.S. 261, 266–67 (1985) (“The Reconstruction Civil Rights Acts do not contain a specific statute of limitations governing § 1983 actions—a void which is commonplace in federal statutory law.... When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so.”).
80. See *TVA v. Hill*, 437 U.S. 153, 190–91 (1978) (“When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.”).