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Judicial Review Under the Congressional Review Act

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Abstract

Neither Congress nor the President was subject to judicial review under the Administrative Procedure Act before the Congressional Review Act became law, and the CRA did not modify the APA in that regard. But an agency's rulemaking authority derives from other implementing statutes passed by Congress delegating such authority to that agency. Congress can foreclose judicial review under the APA by creating an alternative judicial review mechanism; it also might be able to eliminate judicial review entirely for statutory-based claims. The Due Process Clause, however, would entitle an aggrieved party to defend against an agency's reliance on any rule that had not yet become a "law" because the agency had not complied with the CRA's requirements. Because the CRA demands that an agency submit a new rule to Congress "[b]efore a rule can take effect," rules that have not been submitted in compliance with the CRA cannot justify the government's effort to deprive someone of life, liberty, or property.

The Congressional Review Act of 1996 (CRA) enables Congress expeditiously to nullify administrative rules that it finds unnecessary or unwise.[1] As explained in an earlier Heritage *Legal Memorandum* on the CRA,[2] the act requires federal agencies to report every new "rule" to the Senate and House of Representatives so that each chamber can review it and schedule an up-or-down vote to nullify it under the statute's fast-track procedures, which avoid the delays traditionally occasioned by the Senate's filibuster rules and practices. 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.[3]

Key Points

- The Congressional Review Act of 1996 (CRA) enables Congress expeditiously to nullify administrative rules that it finds unnecessary or unwise.
- A close reading of the text reveals that Congress sought to preclude judicial review only of any action taken by Congress or the President in connection with the CRA, not of actions taken by agencies.
- The CRA was designed to rein in administrative agencies, not courts. Both the text of the CRA and its underlying rationale show that the federal courts may adjudicate constitutional claims that might arise in connection with the CRA.

This paper, in its entirety, can be found at **http://report.heritage.org/lm202**

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The CRA was Congress's second structural attempt to rein in administrative agencies. Initially, Congress sprinkled throughout the U.S. Code "legislative vetoes"—provisions that allowed Congress (or sometimes simply either chamber) to nullify an agency action that it found wrongheaded. The legislative veto was a controversial device, however,[4] and in *INS v. Chadha*, the Supreme Court of the United States held that it is an unconstitutional attempt at lawmaking because it violates the Bicameralism and Presentment Clauses of Article I.[5] The CRA was Congress's response to *Chadha*. The act was designed so that Congress would possess the same authority to invalidate agency actions that it had under a legislative veto but would now exercise that power in a manner that satisfied the bicameralism and presentment requirements that the Supreme Court found critical in *Chadha*.

The CRA's terms and provisions raise a number of interesting legal issues.[6] One of them involves the act's judicial review provision. Section 805 of Title 5 speaks to that issue and appears to foreclose judicial review of any matter governed by the CRA, as some federal courts have held. A close reading of the text of the act read against its background reveals, however, that Congress sought to preclude judicial review only of any action taken *by Congress or the President* in connection with the CRA, not of actions taken *by agencies*.

Accordingly, a defendant in an enforcement action should be able to raise an agency's failure to comply with the CRA submission requirement as a basis for claiming that the "law" the defendant allegedly violated had not yet gone "into effect." Congress, in fact, could not preclude review of such a claim. The Fifth Amendment Due Process Clause prohibits the government from taking anyone's "life, liberty, or property without due process of law."[7] Whatever else that clause may mean, the minimum requirement it imposes is that there must be some "law" justifying the government's "depriv[ation]." A rule that has not yet gone into effect because the issuing agency has not yet complied with the CRA submission requirements cannot serve as a "law" that allows the government's action to go forward.

Judicial Review of Agency Action

The Administrative Procedure Act of 1946 (APA) regulates the process that agencies can use to issue regulations governing the day-to-day work of agencies and members of the public.[8] It also supplies private parties with a cause of action to sue an agency in federal court on the ground that a rule is arbitrary and capricious or exceeds the agency's statutory authority.[9] Parties seeking to challenge an agency rule ordinarily rely on the APA's mechanism for judicial review.[10] The APA also makes it clear, however, that Congress can preclude review under the APA through a different statute,[11] and sometimes Congress does so.[12]

A provision of the CRA appears to be a statute that precludes judicial review under the APA. The 15 words of Section 805 of Title 5 provide as follows: "No determination, finding, action, or omission under this chapter shall be subject to judicial review."[13] The question posed by Section 805 is quite simple: What does it mean? The answer, however, is a tad more complicated.

The Text of the CRA

The text of the CRA is the natural and best place to start. Before deciding what courts can and cannot do, it is helpful to see what an agency and Congress must do under the CRA to nullify a rule. There are several steps in that process.

The CRA Review and Repeal Process. The CRA review and repeal process works as follows: "Before a rule can take effect," the parent agency must submit to each House of the Congress and the Comptroller General a report containing a copy and description of the rule, its proposed effective date, and certain other information.[14] Although a "major rule"—that is, a rule with a material effect on the national economy—generally cannot take effect for 60 days, the President can advance the effective date if he makes one or more CRA-specified findings that justify urgency.[15]

Upon receipt of the agency's report, each chamber of Congress must provide copies to the chairman and ranking member of its standing committee with jurisdiction over the rule.[16] Within 15 days of his receipt of the agency's report, the Comptroller General must provide those committees with a report on each major rule that must say whether the agency has complied with its CRA responsibilities.[17] Fast-track procedures then can be used to force a vote on a joint resolution of disapproval.[18]

After 30 days, if the appropriate Senate committee has not sent the rule to the Senate floor for a vote, 30 Senators can accomplish that result by signing a discharge petition.[19] If one chamber receives a joint

resolution passed by the other, the receiving chamber must vote on the joint resolution it received.[20] If Congress enacts a joint resolution of disapproval,[21] the resolution goes to the President for his signature or veto. If the President signs the joint resolution, the "rule" is nullified, and the agency cannot later issue a "substantially similar" rule absent an intervening act of Congress.[22] If the President vetoes the joint resolution, the rule can go into effect unless his veto is overridden.

Now that we know how the process works for Congress and the President under Sections 801 and 802, we can turn to the judicial foreclosure provision of the CRA to see what role, if any, Congress intended the judiciary to play under Section 805.

The CRA Judicial Review Provision. The Supreme Court has never discussed Section 805, but a handful of lower federal courts have done so. There is no consensus, however, with respect to the proper interpretation of that provision. A majority of courts, including the D.C. and Tenth Circuit Courts of Appeals, have decided that the straightforward text of Section 805 bars them from reviewing the merits of a claim that an agency did not submit a rule to Congress even though the CRA clearly demands that action.[23] Those courts, however, have not scrutinized Section 805 in any depth. They have essentially limited their analysis to a reading of Section 805's text in isolation from the other provisions of the CRA, as well as its purpose.

By contrast, a few other lower courts, including the Second Circuit by implication,[24] have disagreed with the majority.[25] They have held that the text of Section 805 does not demand the odd, counterintuitive result that agencies may violate the CRA with impunity, thereby completely frustrating the CRA's purpose.[26] To them, Section 805 forecloses judicial review of *Congress's* actions once an agency has complied with the CRA without also precluding review of the question of whether *the rule-issuing agency* has complied with the CRA by submitting a report containing the rule to Congress. Those courts have the better view of the statute.

Section 805 is quite clear in one respect. It states that no "determination, finding, action, or omission under this chapter" is subject to review by a court. The CRA does not define those terms,[27] so under the traditional rules of statutory interpretation, they should be given their ordinary dictionary meaning.[28] Given those terms, Section 805 is exceptionally broad, possibly as broad as the English language would allow. The text reaches every "action" or "omission under this chapter"—which would appear to embrace anything that Congress could do or could fail to do—but also includes every "determination" or "finding," apparently in an effort to reach whatever else Congress might do that could not be characterized as an "action" or "omission." Accordingly, Section 805 would appear to reach every decision or step—including deciding or doing nothing at all—that could be associated with the CRA. No decision or judgment, no action of any kind, no failure to act or omission—nothing that could be done under the CRA would be eligible for judicial review. Accordingly, Section 805 seems quite straightforward regarding *what* is not subject to judicial review.

Where the act is unclear, however, is with respect to *whose* "determination, finding, action, or omission under this chapter" is not subject to judicial review. There are a limited number of possibilities because there are only a few parties who could take (or fail to take) a relevant action "under this chapter." They—the three most important players in this game—are (1) the rule-issuing agency, (2) Congress, and (3) the President. The "federal Agency promulgating [the] rule" at issue must "submit to each House of the Congress and to the Comptroller General a report" containing a copy and description of the rule, its proposed effective date, and certain other information, thereby giving Congress the opportunity to review the rule.[29] That report[30] goes to Congress, which may pass a joint resolution of disapproval to invalidate the rule. If both chambers pass the resolution (thereby satisfying the bicameralism requirement), the resolution goes to the President (thereby satisfying the presentment requirement). If the President signs the joint resolution, the "rule" is nullified, and the agency cannot later issue a "substantially similar" rule absent an intervening act of Congress.[31] If the President vetoes the resolution, Congress can override that veto, but an override requires a two-thirds vote of each house.[32]

The CRA also refers to a few other entities: (1) the chairman and ranking member of the congressional committee with jurisdiction over the rule, (2) each chamber of Congress, (3) the Comptroller General, and (4) the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget. None of those entities

plays a major role in the operation of the CRA, and they play only tertiary roles in the CRA process. The chairman and ranking member of the relevant committees serve only as recipients of the reports submitted by the rule-issuing agency.[33] Neither chamber of Congress acting alone can pass legislation.[34] The Comptroller General must provide Congress with a report analyzing the agency's report,[35] but the Comptroller General cannot take any action to advance or delay Congress's review and cannot vote on the passage of a disapproval resolution. Only Senators and Representatives may vote on a bill,[36] and they are chosen by the people of their state or district.[37] By contrast, the President appoints the Comptroller General,[38] and no member of the Senate or House of Representatives can also simultaneously serve as Comptroller General.[39] Accordingly, for purposes of the CRA, only the rule-issuing agency, Congress, and the President play an important role, which means that only one or more of those parties is the likely focus of the judicial-review preclusion, CRA Section 805.

Which of those three entities would Congress have wanted to immunize from judicial review? Start with Congress. It is eminently clear that Congress did not want any of its actions to be subject to judicial review. Congress expressly exempted itself from judicial review when it adopted the APA in 1946,[40] and the CRA carried forward the same exemption. CRA Section 804(1), Title 5, states that the term "Federal agency" has the same definition under that law that the APA uses for "any agency," and according to Section 551(a) of the same Title, Congress specifically excluded itself from the definition of that term. Another way to put it is that Congress expressly exempted itself from review when it passed the APA and did not add itself back into the APA judicial review process when it adopted the CRA. Congress's work product—"Law[s]"[41]—are subject to judicial review,[42] but not a "determination, finding, action, or omission under this chapter" or anything else that Congress (or any of its Members) may do.[43]

Now move to the President. Congress has not treated the President exactly as it has treated itself, but the Supreme Court has made up the difference. Congress did not expressly exempt the President from review under the APA by excepting him from the definition of an "agency," as it did for itself. But the Supreme Court held in *Franklin v. Massachusetts*,[44] four years before the CRA became law, that the term "agency" does not include the President.[45] The bottom line is that the APA does not subject the President's actions to judicial review, and the CRA does not add him back in either.

Who is left? The rule-issuing agency. A private party can sue an agency under the APA because the act creates a cause of action for parties injured by an agency's allegedly unlawful action.[46] An injured party can seek relief (other than money damages) if the agency has exceeded its statutory authority or acted in an arbitrary and capricious manner.[47]

The Purpose of the CRA

The above interpretation of the CRA also follows from the purposes that Congress intended the act to serve.[48] Congress enacted that law only after the Supreme Court held unconstitutional the "legislative veto" provisions that Congress traditionally had used to position itself to nullify an agency action that it (or sometimes simply either chamber) found wrongheaded. Once the Supreme Court closed off that route, Congress had to find another way to cabin agency excesses and mistakes. The CRA was designed to give Congress the same authority to invalidate agency actions that it had before, but this time to do so in a manner that satisfied the Article I bicameralism and presentment requirements that the Supreme Court found critical to the federal lawmaking process in *Chadha*. Before *Chadha* was decided, the three relevant parties were the rule-issuing agency, Congress, and the President. The CRA did not change that. The important parties for CRA purposes remain the rule-issuing agency, Congress, and the President.

The bottom line is this: The best reading of Section 805 is that it precludes judicial review of any decisions or actions taken *by Congress (including the Comptroller General) or the President* in connection with the CRA. While Congress did not want to expose its own actions to judicial review, Section 805 does *not* foreclose judicial review of a claim raised by a private party as a defense in an agency enforcement action that the rule the agency seeks to enforce never went into effect because the agency failed to comply with the CRA's requirements. In fact, it would violate the Fifth Amendment Due Process Clause to interpret the CRA in a manner that foreclosed a private party from raising that defense in an enforcement action.

Constitutional Limitations on Congress's Power to Foreclose Judicial Review

Supporters of preclusion of review statutes like Section 805 of the CRA ordinarily defend that decision on the basis of a "greater includes the lesser" form of argument. That is, they maintain that because Congress has the "greater" power not to pass the CRA at all, Congress necessarily has the "lesser" power to enact it but to exclude the courts from the enforcement process, leaving enforcement decisions and authority in the hands of Congress and the President. That argument is a sensible one in a broad range of cases.[49]

But it may not be persuasive in this one. Since 1953, when Harvard Law School Professor Henry Hart first discussed the issue of the extent of Congress's power over the jurisdiction of the federal courts in depth,[50] constitutional law scholars have vigorously debated whether Congress can preclude judicial review of a private party's claim that a government official has violated the Constitution.[51] The argument in favor of preclusion rests on two propositions: Under the Article I Necessary and Proper Clause, Congress can grant federal officials whatever authority they need to complete the government's business,[52] and under the Article III Judicial Vesting Clause, Congress can refuse to create lower federal courts at all and therefore can limit the jurisdiction of the ones it does create.[53] Together, the argument goes, Congress may deny lower federal courts jurisdiction over claims that a government official has acted unconstitutionally in order to ensure that government officials can perform their duties free from suit.

There is a strong argument, however, to the contrary. The authority granted to Congress by Articles I and III is limited by the restraints found elsewhere in the Constitution, particularly in the Bill of Rights. The Fifth Amendment Due Process Clause, for instance, provides that the government cannot deprive a private party of "life, liberty, or property without due process of law." If Congress cannot enact a statute directly authorizing a government official to violate that clause, the argument goes, Congress cannot indirectly achieve the same result by enacting a law foreclosing all judicial review of a claim that the government has acted unconstitutionally by violating that clause. Doing so would have the effect of leaving enforcement of the Due Process Clause completely up to Congress and the President, the very people whom the authors of the Due Process Clause knew were the ones most likely to violate its terms. That result, the argument concludes, is nonsensical.

It turns out, however, that the CRA does not require an answer to the question that Professor Hart broached more than 50 years ago. There is a presumption that the APA affords a private party the right to obtain judicial review of a claim that an agency has not complied with another law.[54] To be sure, the CRA modifies that presumption with respect to any "determination, finding, action, or omission," but Section 805 has that effect only insofar as one or more of those actions is done "under this chapter." An agency does not, however, promulgate any rules "under" the CRA; rather, it promulgates rules by relying on the substantive lawmaking authority that Congress granted the agency elsewhere in an implementing statute.[55] The text of Section 805, therefore, is not as clear as it might seem at first blush.

Atop that is another consideration. The Supreme Court has made it clear that it will not construe an act of Congress as foreclosing all judicial review of a constitutional claim unless the text of the relevant statute is pellucid in that regard.[56] That is critical here. Unlike the President, a federal agency has no inherent authority; it possesses only whatever power Congress has granted it.[57] Accordingly, as explained in detail below, an agency cannot infringe on someone's "life, liberty, or property" unless it can identify some "law" that justifies its action. The Due Process Clause is relevant here because it prevents an agency from acting in an *ultra vires* manner.[58] In order to understand why that is the case, it is first necessary to examine the history of the Due Process Clause to learn how it bears on this issue.

The History of the Due Process Clause. The Fifth Amendment Due Process Clause is a lineal descendant of Magna Carta.[59] In contrast to our Declaration of Independence, which was a statement of principles offered to justify a rebellion, Magna Carta was a peace treaty designed to end a civil war. Widely known for his tyrannical behavior,[60] King John provoked the English barons to rebel, and they gained the advantage by persuading the city of London to join their side. In 1215, politically weakened and recognizing that discretion is the better part of valor, King John agreed to the barons' demands in a meadow called Runnymede. Originally thought to be a failure because the civil war resumed shortly afterwards,[61] Magna Carta has become one of the foundational

documents of Anglo–American legal history. Later English law has treated Magna Carta as "'the Bible of the English Constitution.'"[62]

Article 39 is the best-known feature of Magna Carta.[63] Seeking to restore the customary rights of Englishmen and prevent the Crown from arbitrarily detaining and punishing someone not first adjudged guilty of a crime (a not-uncommon occurrence under King John),[64] Article 39 provided that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land."[65] Article 39 "was a plain, popular statement of the most elementary rights."[66] One scholar noted a century ago that "[t]he main point in this [document], the chief grievance to be redressed, was the King's practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his *curia*."[67] The guarantee that the Crown could administer punishment only in accordance with "the law of the land" meant, as Sir Edward Coke, one of the foremost legal scholars of his time, put it, that "no man [could] be taken or imprisoned, but *per legem terrae*, that is, by the common law, statute law, or custom of England."[68] Expressed in today's language, Article 39 protected "life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, *not* all individual rights), and property."[69]

Article 39 of Magna Carta later became a foundational part of American constitutional law. Familiar with Coke's legal theories,[70] the Founders saw Article 39 as exemplifying the principle of English constitutionalism that the Crown and Parliament were obligated to respect the "natural and customary rights recognized at common law."[71] The Framers' generation used the phrase "the law of the land" or "due process of law" in numerous important political documents, such as the Virginia Resolutions of 1769 and the Declaration and Resolves of the First Continental Congress of 1774, the Declaration of Independence, later-enacted state constitutions, and ultimately the Fifth Amendment.[72]

Like its ancestor term "the law of the land" in Magna Carta, the concept of "due process of law" binds the government to act according to law.[73] Most contemporary discussion of the Due Process Clause focuses on the debate about whether the clause should be limited to a procedural guarantee of fundamentally fair proceedings or should also embrace a substantive component that forbids arbitrary legislation.[74] What tends to be overlooked in that debate, however, is that the clause guarantees "due process of *law*." That last word is an important one. The ancestor of the clause, Article 39 of Magna Carta, obligated the government to act pursuant to "the law of the land" rather than the whims of the Crown. The barons had suffered under the latter for too long and rebelled precisely to force King John to comply with the common law before he could deprive anyone of his life, liberty, or property. The Founding Generation carried that principle forward into the Due Process Clause of the Fifth Amendment. If there is no "law" permitting the federal government—here, a federal agency—to trespass on a person's three protected interests, the government cannot lawfully do so. In that sense, the fundamental guarantee of the clause is that the government cannot make up the justifications for its actions as it goes along. Due process demands that there be some already-existing law for the government to infringe on someone's life, liberty, or property. Otherwise, the government's actions are inconsistent with the "due process of law" (or, as would have been said in 1215, "the law of the land").[75]

The Relevance of the Due Process Clause. That conclusion has important implications when it comes to the preclusion of judicial review. It is one thing to read a statute as precluding judicial review under the APA of (for example) an agency's decisions made outside the context of an enforcement action, which would simply channel a party's constitutional objections to an agency's action into a specific review mechanism that Congress decided was the best forum in which to consider such objections.[76] It is an entirely different matter, however, to interpret a statute as foreclosing *any* judicial review of a constitutional claim raised as a defense *in* a government enforcement action, particularly when the defendant has had no prior opportunity to raise that claim. The Supreme Court has been exceedingly reluctant to construe an act of Congress to deny a party any opportunity to assert a constitutional claim in that context.[77] The reason is that the federal courts are an integral component of our tripartite government, the ability to engage in judicial review is an essential feature of a federal court,[78] and those courts should not conclude that Congress and the President have combined to deny the courts any

opportunity to play their historic role unless no other conclusion is possible.

In the case of the CRA, another conclusion is possible. The text of the act demonstrates that it does not foreclose judicial review of constitutional claims. Section 806(b), the severability component of the CRA, states that "If any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby."[79] A severability provision would be completely unnecessary if a court could not hold a component of the CRA unconstitutional.[80] Put another way, it would make little sense to include a provision addressing the situation in which a court decided that the text or application of the CRA is "invalid" if no court could hold a component of the CRA unconstitutional. That interpretation of the CRA, moreover, makes eminent sense. The CRA was designed to rein in administrative agencies, not courts. Accordingly, both the text of the CRA and its underlying rationale show that the federal courts may adjudicate constitutional claims that might arise in connection with the CRA.[81]

The Bottom Line

Where does that leave us? It would seem that the following issues are *not* subject to judicial review:

- The decision to be made by each chamber regarding whether an agency has "submi[tted]" a satisfactory "report," as required by Section 801(a)(1)(A);
- The decision to be made by each chamber regarding whether and when an agency has "submi[tted]" to the Comptroller General the additional information required by Section 801(a)(1)(B);
- The decision to be made by each chamber regarding whether the Comptroller General has "provide[d]" a report that satisfies Section 801(a)(2)(A);
- The decision to be made by each chamber regarding whether the agency has satisfactorily provided the Comptroller General with the "information" required by Section 801(a)(2)(B);
- The decision to be made by each chamber regarding the application of CRA fast-track procedures to its floor debates, time for debate, and similar parliamentary procedures, as authorized by Section 802(b)(4);
- The decision to be made by each chamber regarding whether to pass the "joint resolution" authorized by Section 802;
- The determinations regarding whether 20 calendar days have passed since a report was sent to the Senate authorizing committee and whether 30 Senators have signed a petition to discharge the joint resolution for a floor vote, as authorized by Section 801(c);
- The decisions of the Senate committee chairman regarding compliance with the CRA, as set forth in Section 801(d);
- The determination by the President regarding whether the agency's rule should take effect immediately due to the need to avoid "an imminent threat to health or safety or other emergency," a need "for the enforcement of criminal laws," "demands of national security," or the requirement to comply with a statute "implementing an international trade agreement," as provided by Section 801(b)(2)(A) through (D); and
- The determination of the OIRA Administrator whether a rule is a "major" rule for purposes of Section 804(2).

By contrast, it would seem that the following issues *are* subject to judicial review:

- Whether an agency has "submi[tted]" a "report," as required by Section 801(a)(1)(A);
- If a joint resolution of disapproval has been signed into law, whether a later-issued rule is "substantially the same as" the one already disapproved, in accordance with Section 801(b)(2); and
- If a joint resolution of disapproval has been signed into law and a later-issued rule is "substantially the same as" the one already disapproved, whether "the reissued or new rule is specifically

authorized by a law enacted after the date of the joint resolution disapproving the original rule," in accordance with Section 801(b)(2).

The result, accordingly, is this: Regardless of whether a party can bring a pre-enforcement challenge to an agency rule on the ground that it never became law because the agency failed to comply with the CRA, that party should be able to raise the agency's noncompliance as a defense to an agency action seeking to enforce that rule.

Conclusion

Congress was clear in its statement as to *what* actions taken "under the CRA" were not subject to judicial review—any "determination, finding, action, or omission"—but unclear about *whose* actions would be precluded. The three relevant parties are the rule-issuing agency, the Congress, and the President. Congress did not adopt the CRA to permit the federal courts to review actions that it or the President took. Neither Congress nor the President was subject to judicial review under the APA before the CRA became law, and the CRA did not modify the APA in that regard.

By contrast, the remaining party—the rule-issuing agency—is one that Congress would not have intended to shield from judicial review. Parties injured by an agency rule before the CRA became law could sue the agency under the APA and obtain relief if the agency exceeded its statutory authority or acted in an arbitrary and capricious manner. The text of the CRA does not change that principle for agency actions that do not arise "under" the CRA. An agency's rulemaking does not rest on authority granted by the CRA; rather, its rulemaking authority comes from other implementing statutes passed by Congress delegating such authority to that agency.

It is true that Congress can foreclose judicial review under the APA by creating an alternative judicial review mechanism. Congress also might be able to eliminate judicial review entirely for statutory-based claims. The Due Process Clause, however, would entitle an aggrieved party to defend against an agency's reliance on any rule that had not yet become a "law" because the agency had not complied with the CRA's requirements. Whatever else the Due Process Clause may mean, it requires that an agency justify any deprivation of life, liberty, or property by relying on an existing law that entitles the government to the relief it seeks. The CRA demands that an agency submit a new rule to Congress "[b]efore a rule can take effect," so rules that have not been submitted in compliance with the CRA cannot justify the government's effort to deprive someone of life, liberty, or property.

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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, which in turn was Title II of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 871 (1996). Section 251 of the parent act added the CRA to Title 5 of the U.S. Code as a new Chapter 8.
2. *See* Paul J. Larkin, Jr., *The Reach of the Congressional Review Act*, Heritage Foundation, Legal Memorandum No. 201 (Feb. 8, 2017), http://www.heritage.org/sites/default/files/2017-02/LM-201_1.pdf.
3. For other discussions of the CRA, see, for example, 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*, The Heritage Foundation, Issue Brief 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., R-43992, 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); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247, 288–89 (1996); Note, *The Mysteries of the Congressional Review Act*, 122 Harv. L. Rev. 2162 (2009).
4. INS v. Chadha, 462 U.S. 919, 976 & n.12–14 (1983) (White, J., dissenting) (collecting authorities arguing pro and con on the constitutionality of the legislative veto).
5. *See* U.S. Const. art. I, § 7, cl. 2; *Chadha*, 462 U.S. at 943–59; *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).
6. *See*, *e.g.*, Carey *et al*., *supra* note 3; Rosenberg, *supra* note 3, at 1052.
7. *See* U.S. Const. amend. V ("No person shall be…deprived of life, liberty, or property without due process of law[.]").
8. A properly issued agency regulation has the force and effect of law. *See*, *e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 295 & n.18 (1979). An agency's interpretation of an ambiguous statute also binds the courts even if they would have read the statute differently. *See* Paul J. Larkin, Jr., *The World After* Chevron, Heritage Foundation, Legal Memorandum No. 186 (Sept. 8, 2016), http://thf-reports.s3.amazonaws.com/2016/LM-186.pdf; *see*, *e.g.*, 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).
9. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *id.* § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."); *id.* § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. [¶] In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.").
10. *See*, *e.g.*, Perez v. Mort. Bankers Ass'n, 135 S. Ct. 1199 (2015); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (both describing the APA judicial review process).
11. *See* 5 U.S.C. §§ 701(a) ("This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.").
12. *See*, *e.g.*, Elgin v. Dep't of Treasury, 567 U.S. 1 (2012) (ruling that the judicial review provisions of the Civil Service Reform Act of 1978, 5 U.S.C. § 1101 *et seq.* (2012), are exclusive); Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) (ruling that the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 *et seq.* (2012), prevents a district court from exercising subject-matter jurisdiction over a pre-enforcement challenge to the act); Lincoln v. Vigil, 508 U.S. 182 (1993) (ruling that the decision of the Indian Health Service to discontinue a particular program was "committed to agency discretion by law" and therefore not subject to judicial review under the APA, 5 U.S.C. § 701(a)

(2)); Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO, 498 U.S. 517, 531 (1991) (Stevens, Marshall & Blackmun, JJ., concurring in the judgment) (concluding that the text of a section of the Postal Reorganization Act, 39 U.S.C. § 410(a), forecloses judicial review under the APA of certain actions taken by the U.S. Postal Service).

13. 5 U.S.C. § 805 (2012).
14. 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."); *id.* § 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.").
15. 5 U.S.C. § 801(c)(1) ("Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.); *id.* § 801(c)(2) ("Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—(A) necessary because of an imminent threat to health or safety or other emergency; (B) necessary for the enforcement of criminal laws; (C) necessary for national security; or (D) issued pursuant to any statute implementing an international trade agreement."); *id.* § 801(c)(3) (' An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.").
16. 5 U.S.C. § 801(a)(1)(C) ("Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.").
17. 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)."); *id.* § 801(a)(2)(B) ("Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).").
18. *See The Mysteries of the Congressional Review Act*, *supra* note 3, at 2176–77 ("Though the executive may not be much more concerned about disapproval resolutions than about ordinary legislation, disapproval resolutions do benefit from a streamlined legislative process unavailable to ordinary legislation. Like all fast-track legislative procedures, the CRA is designed to ensure that political minorities are not able to use congressional procedure to hijack policy. That this feature of the CRA was seen as necessary provides useful evidence in contemporary debates about the legislative and regulatory processes.") (footnote omitted).
19. 5 U.S.C. § 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.").
20. 5 U.S.C. § 801(f) ("If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply: [¶] (1) The joint resolution of the other House shall not be referred to a committee. [¶] (2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but (B) the vote on final passage shall be on the joint resolution of the other House.").
21. 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."); *id.* § 802(d)(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."); *id.* § 802(d)(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.").
22. 5 U.S.C. § 801(b)(1) ("A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule."); *id.* § 801(b)(2) ("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 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."); *id.* § 801(f) ("Any rule that takes

effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.").

23. *See* Montanans for Multiple Use v. Barbouletos, 568 F.3d 225, 229 (D.C. Cir. 2009) ("That latter provision denies courts the power to void rules on the basis of agency noncompliance with the Act. The language of § 805 is unequivocal[.]"); Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007) ("The Congressional Review Act specifically precludes judicial review of an agency's compliance with its terms."); United States v. Carlson, 2013 WL 5125434, at *14–15 (D. Minn. Sept. 12, 2013), *aff'd*, 810 F.3d 544 (8th Cir. 2016); Montanans for Multiple Use v. Barbouletos, 542 F. Supp. 2d 9, 20 (D.D.C. 2008) (ruling that Section 805 precludes review of an agency's alleged noncompliance with the CRA), *aff'd* 568 F.3d 225 (D.C. Cir. 2009); New York v. Am. Elec. Power Serv. Corp., 2006 WL 1331543, at *13–14 (S.D. Ohio Mar. 21, 2006); *In re*: Operation of the Missouri River Sys. Litig., 363 F. Supp. 2d 1145, 1173 (D. Minn. 2004) (agency's determination under CRA that a rule is not a "major rule" is not subject to judicial review); Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd., 1998 WL 842181, at *7 & n.15 (W. D. Tex. June 25, 1998), *aff'd* 201 F.3d 551 (5th Cir. 2000); *cf*. United States v. Missouri, 2012 WL 2821928, at *3–4 (E.D. Mo. July 10, 2012) (ruling that Section 805 bars judicial review of the DEA's alleged noncompliance with the CRA but also ruling that it was unclear whether the CRA applied).
24. *See* NRDC v. Abraham, 355 F.3d 179, 201–02 (2d Cir. 2004) (considering CRA compliance claim without discussing Section 805).
25. *See* United States v. Reece, 956 F. Supp. 2d 736, 743–44 (W.D. La. 2013) (ruling that Section 805 does not bar review of a CRA noncompliance claim); Home Builders Ass'n of No. Cal. v. U.S. Fish & Wildlife Serv., 268 F. Supp. 2d 1197, 1234–35 (E.D. Cal. 2003) (rejecting a CRA noncompliance claim on the merits); United States v. Southern Indiana Gas & Elec. Co., 2002 WL 31427523, at *4–5 (S. D. Ind. Oct. 24, 2002); *cf*. United States v. Nasir, 2013 WL 5373691 (E.D. Ky. Sept. 25, 2013) (declining to decide whether Section 805 bars review of the claim that the DEA did not comply with the CRA when listing a controlled substance on the ground that the DEA complied with the CRA).
26. *See Southern Indiana Gas & Elec. Co*., 2002 WL 31427523, at *5 (ruling that if Section 805 precluded judicial review of an agency's failure to comply with the CRA, "agencies could 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 was 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. Moreover, the language of the statute precludes judicial review of a 'determination, finding, action, or omission under this chapter....'").
27. The CRA defines only three terms: "Federal agency," "major rule," and "rule." 5 U.S.C. § 804.
28. *See*, *e.g.*, Green v. Brennan, 136 S. Ct. 1769, 1791 (2016) ("When a word or phrase is left undefined...we consider its ordinary meaning.") (citation and internal punctuation omitted); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 (1st ed. 2012) ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation. It governs constitutions, statutes, rules, and private instruments.").
29. 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."); *id*. § 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."). The President can accelerate the effective date of the rule if he makes certain findings specified in the CRA. *See* 5 U.S.C. § 801(c)(1).
30. Supplemented with one prepared by the Comptroller General analyzing the agency's report. 5 U.S.C. § 801(a)(2)(A).
31. 5 U.S.C. § 802.
32. U.S. Const. art. I, § 7, cl. 2.
33. 5 U.S.C. § 801(a)(1)(C).
34. U.S. Const. art. I, § 7, cl. 2; INS v. Chadha, 462 U.S. 919 (1983).
35. 5 U.S.C. § 801(2)(A).
36. U.S. Const. art. I, § 7, cl. 2.
37. U.S. Const. art. I, § 2, cl. 1; *id*. amend. XVII.
38. 31 U.S.C. § 703(a)(1).
39. U.S. Const. art. I, § 6, cl. 2 (the Disqualification Clause).
40. *See* 5 U.S.C. § 804 ("For purposes of this chapter—(1) The term 'Federal agency' means any agency as that term is defined in section 551(1)."); *id*. § 551 ("For the purpose of this subchapter—(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress[.]").
41. U.S. Const. art. I, § 7, cl. 2.
42. And have been ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1802).

43. 5 U.S.C. § 805 (2012).
44. 505 U.S. 788 (1992).
45. *Id.* at 800–01 ("The APA defines 'agency' as 'each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia.' 5 U.S.C. §§ 701(b)(1), 551(1). The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.... As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements. Although the President's actions may still be reviewed for constitutionality...we hold that they are not reviewable for abuse of discretion under the APA[.]") (case citations omitted).
46. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."); *id*. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").
47. 5 U.S.C. § 706(1) & (2).
48. This *Legal Memorandum* only summarizes that background. For a longer discussion, see Larkin, *supra* note 2. 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. *See* 142 Cong. Rec. 6922–6926 (1996). 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).
49. An exception would be for instances in which Congress used an unlawful basis, such as race, to create an exemption.
50. *See* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).
51. *See generally* Paul M. Bator *et al*., Hart and Wechsler's The Federal Courts and the Federal System 366–428 (3d ed. 1988).
52. U.S. Const. art. I, § 8, cl. 18 ("[The Congress shall have Power] [t]o make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").
53. U.S. Const. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court , and in such inferior Courts as Congress may from time to time ordain and establish.").
54. *See*, *e.g.*, Sackett v. EPA, 566 U.S. 120, 130 (2012).
55. *See Southern Indiana Gas & Elec. Co.*, 2002 WL 31427523, at *5 ("Agencies do not make findings and determinations under this chapter; Congress, on the other hand, is required to make a number of findings and determinations under the CRA. Therefore, it is logical to interpret the judicial preclusion language as barring review of the determinations, findings, actions, or omissions made by Congress after a rule is submitted by an agency, but not extending the bar of judicial scrutiny to questions of whether or not an agency rule is in effect that should have been reported to Congress in the first place.").
56. *See*, *e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361, 373–74 (1974).
57. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act...unless and until Congress confers power upon it").
58. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("The third clause in which the Solicitor General finds seizure powers is that 'he shall take Care that the Laws be faithfully executed * * *.' That authority must be matched against words of the Fifth Amendment that 'No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.") (footnote omitted).
59. *See* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.' The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words."). For a discussion of the background to and purposes of Magna Carta, see, for example, 1 Blackstone, Commentaries *129–30; David Carpenter, Magna Carta (2015); Arthur L. Goodhart, "Law of the Land" (1966); J.C. Holt, Magna Carta (2d ed. 1992); A.E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968) [hereafter Howard,

The Road from Runnymede]; Magna Carta Commemoration Essays (Henry Elliott Malden ed., 1917); William Sharpe McKechnie, Magna Carta: A Commentary on the Great Charter of King John with an Historical Introduction (2d ed. 1914); Theodore F. T. Plucknett, A Concise History of the Common Law 22–25 (5th ed. 1956); R.H. Hemholz, *Magna Carta and the Ius Commune*, 66 U. Chi. L. Rev. 297 (1999); Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 Catholic U. L. Rev. (forthcoming 2017); C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 Colum. L. Rev 27 (1914).

60. *See* Gottfried Dietze, Magna Carta and Property 24 (1965) ("The rule of law, which had been confirmed by the Coronation Charter [of Henry II] and subsequent documents but had gradually faded away under John's predecessors, was now virtually replaced by the rule of one man [*viz*., John].") (footnote omitted); McKechnie, *supra* note 59, at 96 ("The power of the Norman kings might almost be described as irresponsible despotism, tempered by fear of rebellion."), 377 & n.1; Thomas Pitt Taswell-Langmead, English Constitutional History 102 (2012) ("In disposition and character John was an oriental despot, a tyrant of the worst order.... [John] was guilty of acts of cruelty rivaling those of Nero.") (footnote omitted).

61. King John objected to a provision in Magna Carta that established a council of barons to review and, if necessary, overrule any actions he took in violation of the charter. With the support of Pope Innocent III, John renounced Magna Carta, and a new civil war broke out, known as the First Baron's War. That war ended in 1216 with John's death. As a peace offering, John's son and successor Henry III reissued a shortened, revised version of Magna Carta known as the Charter of Liberties of 1216. The new charter quelled further conflict, and Henry III remained on the throne. Danny Danziger & John Gillingham, 1215: The Year of Magna Carta 253–63 (2003); James Wheaton, The History of the Magna Carta 8–9, 52–53 (2011).

62. Danziger & Gillingham, *supra* note 61, at 268 ("In 1770 William Pitt the Elder called it 'the Bible of the English Constitution'.... In 1956 the English judge, Lord Denning, described it as 'the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot'.").

63. See Danziger & Gillingham, *supra* note 61, at xiii ("The eloquence of those sentences [Chapter 39 and 40 of Magna Carta], the nobility and idealism they express, has elevated this piece of legislation to eternal iconic status."). Over time, Magna Carta's articles were renumbered when it was reissued, and what was originally Article 39 is now listed as Article 29. This *Legal Memorandum* will refer to the original numbering of that article.

64. McKechnie, *supra* note 59, at 377 & n.1.

65. Holt, *supra* note 59, at 461.

66. Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 Harv. L. Rev. 365, 373 (1891).

67. C.H. McIlwain, *supra* note 59, at 41.

68. 2 Edward Coke, Institutes of the Laws of England 45 (1798).

69. Shattuck, *supra* note 66, at 373 (footnote omitted). The Crown and Parliament have reaffirmed the core guarantees of Magna Carta on more than 40 occasions since 1215. In the 14th century, Parliament revised Magna Carta in two ways; one was important, the other was not. Parliament declared that the guarantees contained in Magna Carta were promised to the English people for all time, and any statute that infringed on those guarantees was declared to be null and void. In so doing, Parliament effectively elevated Magna Carta to the level of a constitution, or at least rendered it superior to any act of the Crown. In addition, Parliament changed the phrase "*per legem terrae*" or "the law of the land" to "due Process of Law." 28 Edw. III, c. 3 (1354), reprinted in The Statutes of the Realm 345 (Dawsons of Pall Mall 1963) (1810); *see* McKechnie, *supra* note 59, at 111; McIlwain, *supra* note 59, at 49. That revision, however, did not alter its meaning, effect, or significance. *See, e.g.*, Davidson v. New Orleans, 96 U.S. 97, 101 (1878) ("The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown."); Walker v. Sauvinet, 92 U.S. 90, 93 (1875) ("Due process of law is process due according to the law of the land."); *see also*, *e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986); Hovey v. Elliott, 167 U.S. 409, 415–17 (1897); Ralph V. Turner, Magna Carta 3 (2003); Max Radin, *The Myth of Magna Carta*, 60 Harv. L. Rev. 1060, 1063-68, 1075, 1090-91 (1947).

70. *See*, *e.g.*, Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (plurality opinion) ("Edward Coke['s]...Institutes 'were read in the American Colonies by virtually every student of law[.]'") (quoting Klopfer v. North Carolina, 386 U. S. 213, 225 (1967)); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585, 614 (2009) ("Because most of the American colonies were initially chartered and settled during the early seventeenth century, when Coke's career as a judge and member of Parliament was at its height, Coke exerted a strong influence on colonial law. A large number of seventeenth-century American lawyers studied law in England, where Coke's Reports and Institutes were a staple of legal education, just as they were in the American colonies until the publication of Blackstone's Commentaries in 1765.").

71. Gedicks, *supra* note 70, at 614.

72. *See*, *e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2633 & n.3 (2015) (Thomas, J., dissenting); Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (plurality opinion); Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855); Howard, The Road from Runnymede, *supra* note 59, at xi, 15–16, 211–15, 19, app. B, at 397 (listing colonial charters); 3 Joseph Story, Commentaries on the Constitution of the United States § 1789, at 547 (4th ed. 1873); Gedicks, *supra* note 70, at 622–23; H.D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 Colum. L. Rev. 1, 22 (1917).

73. *See* John Phillip Reid, The Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries 93 (2004) ("Rule-of-law belonged to the seventeenth and eighteenth centuries. It was the cornerstone of the jurisprudence of liberty when liberty was struggling to survive.").
74. *See* Larkin, *supra* note 59 (Manuscript at 2–11).
75. *See* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va. L. Rev. 493, 497 (1997) ("In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law. Judges and executive officers may not simply make up some method of proceeding and sentence someone to prison on that basis. This requirement that deprivation follow the rule of law is so fundamental that it is often forgotten, but there is good reason to believe that some version of it is the historical root meaning of due process.") (footnote omitted); McIlwain, *supra* note 59, at 30.
76. *See*, *e.g.*, Elgin v. Dep't of Treasury, 567 U.S. 1 (2012); Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) (both discussed *supra* at note 12); *cf*. Younger v. Harris, 401 U.S. 37 (1971) (ruling that federal courts cannot generally interfere with an ongoing state criminal prosecution even when a defendant raises a constitutional claim).
77. *See*, *e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361, 373–74 (1974).
78. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. [¶] So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").
79. 5 U.S.C. § 806(b).
80. Section 806(b) uses the term "invalid," not "unconstitutional," but that is a distinction without a difference. The only ground on which the CRA could be held "invalid" would be that it is unconstitutional, either on its face or as applied. That is true for two reasons. First, the federal courts cannot invalidate a statute on the ground that it is unwise; they must consider only whether it is constitutional. *See*, *e.g.*, INS v. Chadha, 462 U.S. 919, 944 (1980) ("We turn now to the question whether action of one House of Congress under § 244(c)(2) violates strictures of the Constitution. We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained[.]"); TVA v. Hill, 437 U.S. 153, 194–95 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto."). Second, the only authority superior to an act of Congress is the Constitution. *See Marbury*, 5 U.S. (1 Cranch) at 176–80 ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.... It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. [¶] Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.... [I]n declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank. [¶] Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts,* as well as other departments, are bound by that instrument.") (emphasis in original). Accordingly, the only basis on which a court can hold a statute "invalid" is that it is unconstitutional.
81. A party may not need to wait for the filing of a civil suit or criminal charge before challenging an agency's noncompliance with the CRA or bringing suit. As a rule, parties need not wait for enforcement proceedings before challenging final agency action where such proceedings carry the risk of "'serious criminal and civil penalties.'" U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807, 1815 (2016) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967)); *see also* Sackett v. EPA, 566 U.S. 120, 127 (2012) (parties need not wait for the government "to drop the hammer" of crippling civil liability before bringing suit under the APA).