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Revisiting the Congressional Review Act

Jesse M. Cross

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REVISITING THE CONGRESSIONAL REVIEW ACT

*by: Jesse M. Cross**

Abstract

It now has been over 25 years since Congress first enacted the Congressional Review Act, an effort to reclaim congressional oversight of agency rulemaking in a post-Chadha world. For many years, the CRA remained a relatively obscure statute, but an explosion in use has now transformed it into an important component of our administrative state. This has made it imperative for those both within and without Congress to understand the law. Yet the real-world operation of the CRA remains little understood.

This Article attempts to shed light on this opaque yet consequential statute. Drawing on interviews with governmental and private actors, it provides an inside look into the real-world operation of CRA review. In so doing, it discovers implementation practices that would surprise even those with detailed knowledge of the letter of the law.

These discoveries change our understanding of the CRA's strengths, weaknesses, and possibilities—and the Article explores the lessons offered by these discoveries. These include lessons for statutory reform, with the Article identifying aspects of the law that should be addressed by Congress to promote good governance under the Act. They also include lessons for partisan actors, uncovering unknown opportunities for creative use of the CRA, often to offset manipulative uses that have emerged in recent years. Through this analysis, the Article provides insights into the CRA that will be necessary as the law continues to play an unexpectedly important role in congressional oversight of the administrative state.

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* Associate Professor, University of South Carolina School of Law. The author is grateful to Molly Reynolds, Bridget Dooling, and the many interviewees who volunteered information for this Article.

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I. INTRODUCTION

It now has been over a quarter of a century since the enactment of the Congressional Review Act ("CRA"), an oversight mechanism designed to enable Congress to disapprove agency rules.[1] The CRA creates a streamlined legislative procedure for the enactment of such disapprovals, thereby allowing Congress to act expeditiously on them without the threat of a Senate filibuster.[2] In this way, the CRA provides a mechanism for Congress to reclaim some congressional oversight of agency rulemaking in a post-*Chadha* world.[3]

For many years, the CRA remained a relatively obscure statute. In its first decade, the law was successfully invoked only once,[4] and many predicted that the conditions needed for its use would not repeat.[5] These predictions have proven false: the statute has been successfully used 19 times since 2016,[6] a relative explosion in usage, including use by presidents of both parties.[7] This sudden rise in usage has created a situation unexpected in prior periods: one in which the CRA is an active and important component of our administrative state.

If the CRA continues in this role, then it will be increasingly important for those both within and without Congress to understand the law. To date, this has been a significant challenge. The text of the CRA is silent on many issues, and it is confusing on others. As a result, a significant burden has been shifted onto actors inside Congress,

1. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. §§ 801–808).

2. 5 U.S.C. § 802.

3. *Id.* § 801(b), (f).

4. *See* Act of Mar. 20, 2001, Pub. L. No. 107-5, 115 Stat. 7.

5. *See* MORTON ROSENBERG, CONG. RSCH. SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE (2008), https://fas.org/sgp/crs/misc/RL30116.pdf [https://perma.cc/6N4L-JSVY].

6. *See Congressional Review Act*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/legal/other-legal-work/congressional-review-act [https://perma.cc/UBE3-UHJL] (listing disapprovals through Trump administration); Richard L. Revesz, *Using the Congressional Review Act to Undo Trump-Era Rules*, BLOOMBERG LAW (Aug. 30, 2021, 3:00 AM), https://news.bloomberglaw.com/environment-and-energy/using-the-congressional-review-act-to-undo-trump-era-rules [https://perma.cc/7M3Q-NN3H] (listing Biden administration disapprovals).

7. *See Congressional Review Act*, *supra* note 6; Revesz, *supra* note 6.

the Government Accountability Office ("GAO"),[8] and executive agencies to shape the real-world implementation of the law. Few of these actors publicize their interpretations and practices, however. As a result, the version of the CRA that exists in practice—the version implemented on a daily basis—has remained opaque. This has presented significant challenges for all interested in the law—including institutional reformers looking to understand and improve the CRA, as well as strategic partisan actors interested in maximizing the opportunities afforded by the law.

This Article attempts to shed light on that opaque CRA universe. To that end, interviews were conducted with governmental and private actors regarding the modern-day operation of the CRA. These were supplemented with research into the origins of the CRA and the evolving implementation of the Act. Based on this research, the Article provides a detailed inside look into the real-world operation of the CRA. In many instances, it discovers implementation practices that would surprise even those with the most detailed knowledge of the law that exists on the page. These implementation practices change our understanding of the CRA's strengths, flaws, and strategic possibilities. The Article illuminates these dimensions of the CRA. In so doing, it hopes to ensure that this increasingly important oversight tool is better understood in the coming quarter-century than it has been in the last.

The Article also explores the lessons that can be gained from these insights into the real-world implementation of the CRA. To this end, it first examines the lessons the Article holds for institutional reformers interested in good governance. This portion of the Article is based on a report drafted for the Administrative Conference of the United States ("ACUS"),[9] which provided the foundation for formal recommendations that ACUS approved and submitted to Congress earlier this year.[10] It specifically develops an assessment of three potential good-governance reforms that have gained increasing attention inside Congress, which propose to (1) eliminate the CRA hand-delivery requirement for agency rules; (2) simplify and clarify key timelines for congressional action under the Act; and (3) formalize a process for initiating CRA review when agencies fail to submit rules to Congress.

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8. "Effective July 7, 2004, the GAO's legal name was changed from the General Accounting Office to the Government Accountability Office." Chuck Young, *Government Accountability Office: What's in a Name?*, U.S. GOV'T ACCOUNTABILITY OFF. (Apr. 4, 2014), https://www.gao.gov/blog/2014/04/04/government-accountability-office-whats-in-a-name.

9. *See generally* JESSE M. CROSS, ADMIN. CONF. OF THE U.S., TECHNICAL REFORM OF THE CONGRESSIONAL REVIEW ACT (2021), https://www.acus.gov/sites/default/files/documents/CRA%20Final%20Report%2011.30.21.pdf [https://perma.cc/P5TB-5VD9] (suggesting technical reforms to the Congressional Review Act).

10. *See generally* Administrative Conference Recommendation 2021–8, 87 Fed. Reg. 1719 (Jan. 12, 2022) (adopting recommendations to address technical flaws in the Congressional Review Act).

In each case, the Article discovers institutional dynamics and realities that recommend Congress pursue these reforms—and that also offer insights into the details Congress should include (and avoid) in the process.

The Article also examines the lessons that its insights into CRA operations provide for strategic partisan actors. In recent years, there has been heightened interest in thinking about creative or unorthodox ways to strategically use the CRA. By uncovering previously unknown CRA implementation practices, this Article reveals further opportunities for creative use of the statute. Ironically, a main benefit of these creative uses is their ability to offset those previously proposed, thereby neutralizing efforts by past partisans to expand the CRA beyond its intended purview. These include tools for exempting midnight rules from subsequent CRA review, as well as for preventing CRA review of rules promulgated in the distant past.

The Article proceeds in four Parts. It begins in Part II with a detailed overview of the CRA. There, it explains the three interlocking elements of the statute—elements designed to work in tandem to empower congressional oversight of agency rulemaking. Throughout, Part II identifies not only key statutory components, but also the original goals of its sponsors, as well as implementation practices that have subsequently altered the operation of those components. In so doing, Part II attempts to give a comprehensive overview of this inadequately understood statute.

Parts III and IV then move from description to analysis, exploring the lessons that can be gained from the Article's insights. Part III begins this project, examining the lessons for institutional reformers interested in good governance. Part IV examines the lessons for strategic partisan actors.

After a quarter of a century, the CRA is poised to play an unexpectedly consequential role in congressional oversight of the administrative state. If so, it will be increasingly important to understand the law in practice—both to improve it, and also to maximize it. This Article attempts to provide the tools to do just that.

II. Background: The Congressional Review Act

On March 29, 1996, the Contract with America Advancement Act of 1996 was enacted into law.[11] A bipartisan accomplishment, the legislation passed the Republican-controlled 104th Congress with sizeable majorities before being signed into law by President Clinton.[12]

11. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847.

12. *See H.R. 3136—Contract with America Advancement Act of 1996*, Congress.gov, https://www.congress.gov/bill/104th-congress/house-bill/3136/actions [https://perma.cc/B5SU-N6ZS] (noting final House vote of 328-91 and Senate passage

Title II of the Act, known as the Small Business Regulatory Enforcement Fairness Act of 1996, included a provision adding a new chapter to title 5 of the U.S. Code (where it sits alongside other provisions regulating the modern administrative state, such as the Administrative Procedure Act).[13] It is this additional chapter of title 5, which was itself the beneficiary of bipartisan support,[14] that is commonly referred to as the Congressional Review Act.[15]

Describing the purpose of this new chapter, legislators spoke of a desire to reassert a measure of congressional power over the administrative state.[16] As a joint statement of the committees of jurisdiction for the legislation observed:

> Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.[17]

Explaining the mechanism that the CRA would use to accomplish this inter-branch goal, the joint statement then observed: "This [chapter] allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects."[18] Or, as one of the Act's key supporters in Congress put it, the CRA would "provide a formal Congressional review process of regulations issued by Federal agencies." [19] The goal was to empower Congress to reclaim some oversight of modern administrative power—and the method was

by unanimous consent); *see also* 142 Cong. Rec. 6922 (1996) (statement of Rep. Hyde) (giving procedural history).

13. *See* 142 Cong. Rec. 6926 (1996) (statement of Rep. Hyde) (describing provision as "add[ing] a new chapter to the Administrative Procedure Act").

14. *See* 142 Cong. Rec. 6815 (1996) (statement of Sen. Nickles) ("The Congressional Review Act before us is similar to S. 219, the Regulatory Transition Act that passed the Senate 100–0 a year ago this week.").

15. *See* 5 U.S.C. § 801. This chapter is popularly known as the "Congressional Review Act."

16. *See also Congressional Review Act: Hearing Before the Subcomm. on Com. & Admin. L., H. Comm. on the Judiciary*, 110th Cong. 26 (2007) [hereinafter *2007 CRA Hearing*], https://www.govinfo.gov/content/pkg/CHRG-110hhrg38764/pdf/CHRG-110hhrg38764.pdf [https://perma.cc/Y5SY-9L39] (statement of Sally Katzen, Visiting Professor, George Mason University School of Law) ("[T]he CRA was intended to serve an extraordinarily important function, namely, to reassert congressional accountability for what has become known as the administrative state.").

17. 142 Cong. Rec. 6926 (1996).

18. *Id.*

19. 142 Cong. Rec. 6815 (1996) (statement of Sen. Nickles). Senator Nickles had been a sponsor of S. 219 the year prior, which was an important prototype for the CRA. *S.219 - Regulatory Transition Act of 1995*, Congress.gov, https://www.congress.gov/bill/104th-congress/senate-bill/219 [https://perma.cc/WKE6-RBNY].

to establish a procedure whereby Congress would have a meaningful opportunity to review agency rules.[20]

In the design of this procedure, Congress faced judicially imposed limits that it had not confronted in earlier decades. For much of the twentieth century, Congress had enacted statutes that empowered one or both chambers of Congress, acting without presidential involvement, to reject individual agency rules. By the mid-1970s, Congress had enacted nearly 200 such "legislative veto" statutes, thereby providing Congress with an efficient method of disapproving administrative rulemaking that it disliked.[21] In 1983, however, the Supreme Court declared in *INS v. Chadha* that the legislative veto was an unconstitutional method of bypassing presidential presentment.[22] As a result of this holding, the architects of the CRA were faced with a particular challenge: to develop a mechanism that would allow Congress to act with the expediency needed to respond to agency rulemaking, yet to retain the elements of bicameralism and presentment that the Court had required in *Chadha*.[23]

In response to this challenge, the drafters of the CRA elected to create a "fast-track" or "expedited" congressional procedure for the review of agency rules.[24] Much like the legislative veto, this approach had a long track record in Congress. As Molly Reynolds has charted, the method first appeared in Congress in the mid-1800s,[25] was first used in policymaking in 1939,[26] and was increasingly used in the last half-century (with over 160 such procedures being enacted since

20. *See also 2007 CRA Hearing*, *supra* note 16, at 10 (statement of Mort Rosenberg, Specialist in American Public Law, Congressional Research Service) ("[The Act's purpose] is to set in place an effective mechanism to keep Congress informed about the rulemaking activities of Federal agencies and to allow for expeditious congressional review and possible nullification of particular rules.").

21. *See* Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1086 n.127 (2001) ("Between 1932 and 1975, Congress passed 196 statutes that authorized 295 veto-type procedures, often giving either house, or even the oversight committee of either house, the power to reject an agency rule." (citing James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 324 (1977))).

22. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983).

23. *See* 142 CONG. REC. 6926 (1996) ("Congress has considered various proposals for reviewing rules before they take effect for almost twenty years. . . . [*Chadha*] narrowed Congress' options to use a joint resolution of disapproval. The one-house or two-house legislative veto (as procedures involving simple and concurrent resolutions were previously called), was thus voided.").

24. Molly Reynolds has argued for calling such statutes "majoritarian exceptions," as they expedite procedure by returning Congress to simple majoritarian thresholds—an "exception" to supermajoritarian standards. *See* MOLLY E. REYNOLDS, EXCEPTIONS TO THE RULE: THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE 9–10 (2017).

25. *Id.* at 14.

26. *Id.* at 19. Reynolds cites a concurrent resolution for this initial appearance, which does not require presidential presentment.

1969).[27] In these statutes, Congress often retains the key traits of bicameralism and presentment, yet it removes internal legislative hurdles and vetogates that can delay or prevent the enactment of federal legislation. Since legislative procedure beyond the basic bicameralism-and-presentment requirement is mostly entrusted to each chamber under Article I, section 5, this approach does not run afoul of the limits expounded in *Chadha*.[28] Fast-track legislation therefore provided the drafters of the CRA with an option that, while limited in its ability to overcome the hurdles of bicameralism and presentment, at least could create a pathway for congressional review of agency rules that was somewhat less cumbersome than the traditional congressional process.

To apply this expedited approach to agency rulemaking, the architects of the CRA outlined a statutory scheme with three key elements:

(1) Required submission of agency rules.

(2) Delayed rule implementation.

(3) Expedited congressional review process for overturning rules.

Each of these elements warrants further consideration.

A. *Required Submission of Agency Rules*

First, the CRA requires an agency to submit a brief report ("801(a) report") on every rule it promulgates to each chamber of Congress and to GAO, which includes submission of the rule itself.[29] This submission requirement applies to a notably broad universe of actors. To define this set of actors, the statute borrows a definition of "Federal agency" from the Administrative Procedures Act ("APA") that is particularly inclusive,[30] a choice that one legislator explained by remarking, "[i]t is essential that this regulatory reform measure include every agency, authority, or entity that establishes policies affecting all or any segment of the general public."[31] The chosen definition therefore captures entities such as independent agencies, government corporations, and actors that may not conduct rulemaking under section

27. *Id.* at 2 (identifying 161 procedures enacted between 1969 and 2014). For a recent proposal arguing for a new such statute to address the major questions doctrine, see Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL'Y 773 (2022).

28. U.S. CONST. art. I, § 5 ("Each House may determine the Rules of its Proceedings . . . .").

29. 5 U.S.C. § 801(a)(1)(A).

30. *Id.* § 804(1); *see also* 142 CONG. REC. 6929 (1996) ("The committees intend this chapter to be comprehensive in the agencies and entities that are subject to it.").

31. 142 CONG. REC. 6908 (1996).

553(c) of the APA.[32] As the Congressional Research Service ("CRS") has explained, however, "[f]ollowing precedent in interpreting the APA, the CRA does not cover actions of the President, such as executive orders and presidential proclamations."[33]

The definition of covered "rules" is similarly broad.[34] Aiming to capture any agency action that impacts the general public, the CRA borrows the APA definition of "rule," which courts have construed broadly.[35] Reaching beyond legislative rules,[36] this definition additionally captures agency publications such as interpretive rules, policy statements, and other publications that are often characterized as guidance documents.[37] However, rules pertaining to monetary policy are wholly excluded from the Act's coverage.[38] And the statute is silent on the actor that determines whether an agency action constitutes a "rule" for purposes of the statute[39]—a silence that has generated disputes[40] and led to the implementation challenges discussed in Section III.B. Nonetheless, the definition unquestionably captures a staggering array of agency actions; as of January 2022, agencies had submit-

32. *See* 142 CONG. REC. 6907 (1996) (noting that "[t]he objective is to cover each and every entity in the executive branch" and identifying these covered actors).

33. MAEVE P. CAREY & VALERIE C. BRANNON, CONG. RSCH. SERV., IF11096, THE CONGRESSIONAL REVIEW ACT: DEFINING A "RULE" AND OVERTURNING A RULE AN AGENCY DID NOT SUBMIT TO CONGRESS 1 (2019), https://crsreports.congress.gov/product/pdf/IF/IF11096 [https://perma.cc/9QYB-YZTQ].

34. *See* 142 CONG. REC. 6930 (1996) ("The committees intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review."). GAO accordingly has interpreted the term broadly. *See* MAEVE P. CAREY & VALERIE C. BRANNON, CONG. RSCH. SERV., R45248, THE CONGRESSIONAL REVIEW ACT: DETERMINING WHICH "RULES" MUST BE SUBMITTED TO CONGRESS 21–22 (2019), https://crsreports.congress.gov/product/pdf/r/r45248 [https://perma.cc/YE9F-UM8T] ("In many of these opinions, GAO has defined the term 'rule' as used in the CRA expansively.").

35. ROSENBERG, *supra* note 5, at 2–3 ("The courts have recognized the breadth of the term, indicating that it encompasses 'virtually every statement an agency may make' . . . ." (quoting Avoyelles Sportsmen's League, Inc., v. Marsh, 715 F.2d 897, 908 (5th Cir. 1983))).

36. 142 CONG. REC. 6929 (1996) ("In some instances, federal entities and agencies issue rules that are not subject to the traditional 5 U.S.C. §553(c) rulemaking process. However, the committees intend the congressional review chapter to cover every agency, authority, or entity covered by subsection 551(1) that establishes policies affecting any segment of the general public.").

37. *See* CAREY & BRANNON, *supra* note 33, at 1 (noting coverage of "interpretive rules and general statements of policy—categories that may encompass agency actions that are sometimes referred to as guidance documents.").

38. 5 U.S.C. § 807.

39. *See* Tongass Land Management: Joint Hearings Before the S. Comm. on Energy and Nat. Res. and the H. Comm. on Res., 105th Cong. 20 (1997) [hereinafter Tongass Hearing] ("[The CRA] does not provide any identification of who is to decide what a rule is, unlike the issue of whether a rule is a major rule or not, which, as [former OIRA Administrator] Ms. Katzen pointed out, has been assigned to her.").

40. *See* Bridget C.E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, 70 AM. U. L. REV. 387, 403 (2020) (noting early testimony by OIRA Administrator proposing that "it is the agency promulgating the regulation that has . . . [this] responsibility").

ted approximately 90,000 rules to GAO under the Act,[41] with thousands more likely never submitted.[42]

For a narrower subset of agency rules, known under the statute as "major rules," agencies also must submit to GAO (and make available to each chamber) documentation showing that the rule was developed and promulgated in compliance with various rulemaking requirements.[43] In practice, this submission requirement is made via a standard two-page form issued to the agencies by OMB.[44] This second submission requirement relies upon a definition of "major rules" from President Reagan's Executive Order 12291[45]—a definition that Congress chose partly to ensure that it reached beyond notice-and-comment rulemaking, given congressional frustration with past agency circumvention of notice-and-comment requirements.[46]

The statute is explicit that the Administrator of the Office of Information and Regulatory Affairs ("OIRA") decides if a rule meets this "major rule" definition.[47] It was hoped that the Administrator could make consistent, centralized determinations for agencies and would retain the prior interpretations she had applied under the aforementioned Executive Order.[48] This determination by the Administrator,

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41. The GAO database chronicles 87,786 rules submitted to GAO under the Act as of May 2023 (database available at https://www.gao.gov/legal/other-legal-work/congressional-review-act?processed=1&type=all&priority=all#s-skipLinkTargetForMainSearchResults) [https://perma.cc/AJ2W-FGHG]. It also has been reported that roughly 5,700 additional rules were submitted before GAO established its database. *See* Curtis W. Copeland, Cong. Rsch. Serv., R40997, Congressional Review Act: Rules Not Submitted to GAO and Congress 6 n.34 (2009), https://www.everycrsreport.com/files/20091229_R40997_9c378c3e951a9a0272213d2ac51818214ed85029.pdf [https://perma.cc/N6PK-ETMD].

42. *See infra* notes 192–99.

43. 5 U.S.C. § 801(a)(1)(B).

44. On OMB development of form (after congressional prodding, and in consultation with GAO), see Carey & Brannon, *supra* note 34, at 18. GAO has interpreted this provision as only requiring agencies to complete a checklist attesting that the agency has performed requisite tasks. *See* Richard S. Beth, Cong. Rsch. Serv., RL31160, Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act 8 (2001), https://crsreports.congress.gov/product/pdf/RL/RL31160 [https://perma.cc/6E6C-2Y3T].

45. 5 U.S.C. § 804(2); *see also* 142 Cong. Rec. 6930 (1996) ("The definition of a 'major rule' in subsection 804(2) is taken from President Reagan's Executive Order 12291."). Rules promulgated under the Telecommunications Act of 1996 and the amendments made by that Act are exempted. 5 U.S.C. § 804.

46. *See* 142 Cong. Rec. 6907 (1996) (statement of Rep. McIntosh) ("We intend the term 'major rule' to be broadly construed, particularly the nonnumerical factors contained in the new subsection 804(2) (B) and (C)."); *id.* ("All too often, agencies have attempted to circumvent the notice and comment requirements of the Administrative Procedure Act by trying to give legal effect to general policy statements, guidelines, and agency policy and procedure manuals.").

47. 5 U.S.C. § 804(2).

48. 142 Cong. Rec. 6930 (1996) ("The committees believe that centralizing this function in the Administrator will lead to consistency across agency lines. Moreover, from 1981–93, OIRA staff interpreted and applied the same major rule definition under E.O. 12291. Thus, the Administrator should rely on guidance documents pre-

like many determinations under the CRA, is not judicially reviewable.[49]

The CRA contemplated that GAO would rely partly upon this submission to develop a report to Congress on each "major rule."[50] GAO must submit this report not later than 15 calendar days after the 801(a) report is submitted to Congress and the relevant rule is published in the Federal Register.[51] This report from GAO, along with the submissions from agencies, would alert Congress to new rulemaking—and empower it with basic information about that rulemaking.[52] In so doing, it would provide Congress with information that could awaken legislators to any concerns that might lead them to overturn the rulemaking under the provisions of the Act discussed in *infra* Section C.

B. *Delayed Rule Implementation*

As the second major component of the Act, the CRA imposes two timing delays upon implementation of agency rules. First, it stipulates that an agency rule may not take effect until the agency has submitted the 801(a) report to GAO and each chamber of Congress.[53] An exception is made for certain rules related to hunting, fishing, and camping, as well as for rules with respect to which an agency makes a good cause determination that notice-and-comment procedures are unnecessary.[54] This "good cause" exception is taken from the APA,[55] where it has been narrowly construed by courts[56]—and there is indication

pared by OIRA during that time and previous major rule determinations from that Office as a guide in applying the statutory definition to new rules.").

49. 5 U.S.C. § 805.

50. *Id.* § 801(a)(2)(A); *see also* CAREY & BRANNON, *supra* note 34, at 18 (noting that agency report includes "most of the information required to be included in GAO's major rule report.").

51. 5 U.S.C. § 801(a)(2)(A). For each CRA timing requirement that, like this one, is defined with reference to the date on which the 801(a) report is submitted to Congress and the relevant rule is published in the Federal Register, if these events do not occur on the same date, then the timing requirement is measured by reference to whichever of the described actions occurs later. *See id.* § 802(a)(2) (defining "submission or publication date" for CRA purposes as the later of these two described dates).

52. *See* MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 3 (2021), https://sgp.fas.org/crs/misc/R43992.pdf [https://perma.cc/5ZK2-UFYD] (noting that these "provisions of the CRA may be viewed as helping to increase congressional awareness of federal agency actions").

53. 5 U.S.C. § 801(a)(1)(A).

54. *Id.* § 808.

55. *See id.* § 553(b)(3)(B); *see also* 142 CONG. REC. 6928 (1996) ("This 'good cause' exception in subsection 808(2) is taken from the APA and applies only to rules which are exempt from notice and comment under subsection 553(b)(B) or an analogous statute.").

56. ROSENBERG, *supra* note 5, at 4 n.6.

that Congress similarly wanted agencies to apply it narrowly in the CRA context.[57]

In addition to this statutorily imposed delay on rule implementation, the CRA also imposes a further delay on the effectiveness of major rules. In general, the CRA provides that major rules may not take effect until at least 60 calendar days after the 801(a) report has been submitted to Congress and the rule published in the Federal Register.[58] However, this window can be lengthened if the President vetoes a CRA disapproval of the rule (in an effort to provide Congress with sufficient opportunity to override the veto)[59] or if the rule otherwise would take effect at a later date.[60] The major rule delay window also can be shortened if: (1) either chamber rejects a joint resolution of disapproval of the rule under the CRA;[61] (2) the President determines by executive order (and submits written notice to Congress) that the rule qualifies for one of several emergency rulemaking categories;[62] or (3) any of the aforementioned exceptions for hunting, fishing, and camping rules or for "good cause" exemptions applies.[63]

The effectiveness delays under the statute work in conjunction with subsection 553(d) of the APA, which requires publication of most substantive rules at least 30 days prior to their effective date.[64] To assist with the tracking of the submission dates that are used to initiate the CRA effectiveness delays, notice of each chamber's receipt of an 801(a) report is published in the sections of the daily Congressional Record devoted to "Executive Communications."[65] Congressional receipt also is entered into a database that can be searched using Con-

57. *See* 142 CONG. REC. 6907 (1996) ("The good cause exception in section 808(2) is borrowed from the chapter 5 of the Administrative Procedure Act and applies only to rules which are exempt from notice and comment under section 553. Even in such cases, the agency should provide for the 60-day delay in the effective date unless such delay is clearly contrary to the public interest.").

58. 5 U.S.C. § 801(a)(3)(A).

59. *Id.* § 801(a)(3)(B). The statute provides an extension of the delay window of 30 session days, unless either chamber holds a failed override vote on the veto, in which case the rule may take effect immediately.

60. *Id.* § 801(a)(3)(C).

61. *Id.* § 801(a)(5).

62. *Id.* § 801(c). These categories include: that the rule is necessary due to imminent threat to health or safety or other emergency, for the enforcement of criminal laws, or for national security; or is issued pursuant to any statute implementing an international trade agreement. *Id.*

63. *Id.* § 808.

64. *Id.* § 553(d).

65. CAREY & DAVIS, *supra* note 52, at 12.

gress.gov.[66] GAO notes its receipt of rules in a database on its website.[67]

There has been significant dispute over whether, if an agency implements a rule prior to the CRA-stipulated effectiveness delays, judicial review is available to render the rule ineffective. In the aforementioned joint committee statement for the legislation, it was indicated that such review was meant to be available, notwithstanding a statutory provision prohibiting judicial review of certain elements of the statute.[68] While courts have been inconsistent on the question,[69] they have been inclined to find that judicial review is barred.[70] This prohibition on judicial review is discussed further in *infra* Section II.D.

C. *Expedited Review Process*

Finally, the CRA creates an expedited process for Congress—and, specifically, for the Senate—to access during consideration of a joint resolution to disapprove an agency rule.[71] That process applies to joint resolutions that both: (1) contain specific language provided in the CRA;[72] and (2) are introduced during a specified period ("introduction period").[73] With respect to the latter requirement, the statute specifies that the introduction period begins with the receipt of the 801(a) report from the agency by Congress[74] and ends 60 calendar days thereafter (excluding any adjournments of more than three days

66. *Id.* (noting that these communications can be found under the "House Communications" and "Senate Communications" categories at the bottom left side of the homepage).

67. GAO's rules database is available at https://www.gao.gov/legal/other-legal-work/congressional-review-act [https://perma.cc/YR4U-ZF93].

68. 142 CONG. REC. 6929 (1996) ("The limitation on a court's review . . . however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law.").

69. *See 10th Anniversary of the Congressional Review Act: Hearing Before the Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary*, 109th Cong. 34–35 (2006) [hereinafter *10th Anniversary of the Congressional Review Act*] (statement of Todd F. Gaziano, Esq., Senior Fellow in Legal Studies & Director for Legal & Judicial Studies, Heritage Foundation) (noting conflicting rulings); ROSENBERG, *supra* note 5.

70. *See* Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 23 (2019) ("Most courts that have ruled on this question have interpreted the provision to bar review of claims that agencies failed to comply with the Congressional Review Act's reporting requirement.").

71. 5 U.S.C § 802(d). The statute is explicit that section 802 is an exercise of each chamber's rulemaking power. *See id.* § 802(g). Such language appears consistently in expedited procedure statutes. For a critical evaluation of rules in statute, see, for example Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003).

72. 5 U.S.C. § 802(a) (requiring the resolution to state: "That Congress disapproves the rule submitted by the ____ relating to ____, and such rule shall have no force or effect.").

73. *Id.*

74. *Id. But see infra* Section III.A.2 (noting that the Senate Parliamentarian also has required Federal Register publication in practice to begin this window).

by either chamber).[75] When a joint resolution satisfies these conditions, it benefits from the unique Senate procedural track created by the CRA.

That procedural track has a number of benefits. First, after the typical referral to the committee of jurisdiction,[76] a petition of 30 Senators may discharge the resolution from the committee after 20 calendar days (measured from when the 801(a) report is submitted to Congress and the rule is published in the Federal Register).[77] This sets a higher bar than most expedited procedure rules, which often allow bills to go directly to the chamber floor, to discharge automatically after a fixed period, or to be discharged on motion by any Senator.[78] In this regard, the committee discharge provision more closely resembles the cloture petition requirements than a typical fast-track procedure. Nonetheless, it ensures that popular discharge petitions cannot be stymied by a hostile committee. The tradeoff of this virtue is that the provision may reduce the opportunity for committee consideration—however, this policy likely has relatively minor costs, given the fact that Senate committees do not generally have the ability to amend and improve the disapproval resolution anyhow.[79]

After committee consideration, the resolution is placed on the Senate calendar,[80] and a motion to proceed to its consideration is in order.[81] As CRS has explained before, this has the effect of waiving certain layover requirements that typically would apply and create delay.[82] It also underscores that, at least in theory, the Senate may call up the resolution, even though the motion to consider typically is informally reserved to the Majority Leader.[83] This motion to proceed is not made privileged by the statute, an anomaly for a statute with expedited procedures, but other elements of the CRA nonetheless have

75. *Id.* On the practical impact of this three-day window, see BETH, *supra* note 44, at 3 (noting that "weekend days will count toward the initiation period, but district work periods will not").

76. 5 U.S.C. § 802(b)(1).

77. *Id.* § 802(c).

78. BETH, *supra* note 44, at 10 (explaining that "[t]his provision appears to have no close analog among other Senate procedures" in fast-track procedure statutes for this reason).

79. *Id.* at 10–11 ("Because the statute precludes the adoption of amendments on the floor, any recommended by the committee will be moot. For this reason, the committee will in practice find little purpose in acting on amendments to a disapproval resolution, and its markup will presumably consist only of consideration.").

80. 5 U.S.C. § 802(c).

81. *Id.* § 802(d)(1).

82. *See* BETH, *supra* note 44, at 11 ("The general procedure of the Senate already permits a motion to consider any measure on the calendar, but only after it has met certain layover requirements. Inclusion of this special provision in the expedited procedure has the effect of waiving these layover requirements.").

83. *Id.*

the effect of rendering it privileged anyway.[84] The statute does explicitly prohibit a variety of motions with respect to this motion to proceed, including motions to amend it (which Senate rules generally would prohibit anyhow),[85] as well as motions to proceed to consider other business (which would displace the first motion).[86] While not mentioned by the CRA, the resolution also could be brought up for consideration by unanimous consent.[87] Typically, the Majority Leader would obtain this consent.[88]

If the Senate agrees to the motion to proceed, the resolution itself is considered under procedural rules that similarly limit opportunities for delay. The resolution remains the unfinished business of the Senate until disposed of,[89] and motions to proceed to consider other business are not allowed,[90] nor are motions to postpone consideration.[91] In practice, these rules mean that unanimous consent is required to move on to other business—and that, even in such a situation, the resolution will automatically recur unless the unanimous consent agreement provides otherwise.[92] Amendments to the resolution also are prohibited, as are motions to recommit—prohibitions that work in tandem to ensure that the Senate does not modify the text of the resolution[93] (although there is no prohibition on amendment by unanimous consent, as in some fast-track statutes).[94] Appeals of procedural rulings are non-debatable,[95] and overall debate is limited to 10 hours.[96] After debate, one quorum call is allowed (in order to prevent strategies that might allow opponents to quickly dispose of the resolu-

84. *See* 142 CONG. REC. 6815 (1996) (statement of Sen. Nickles) ("Under the Senate procedures, the motion to proceed to the joint resolution is privileged and is not debatable."); *see also* BETH, *supra* note 44, at 11–12 ("The Act does not explicitly make the disapproval resolution privilege. . . .Senate precedents, however, indicate that if a statute establishes a time limit for the consideration of a specified measure, the provision has the effect of rendering the measure privileged.").

85. *See* BETH, *supra* note 44, at 11.

86. *See id.*

87. *See id.* ("As with any other measure, of course, a disapproval resolution could also be brought up for consideration by unanimous consent, which would usually be obtained by the Majority Leader.").

88. *Id.*

89. 5 U.S.C. § 802(d)(1).

90. *Id.* § 802(d)(2).

91. *Id.*

92. *See* BETH, *supra* note 44, at 12.

93. 5 U.S.C. § 802(d)(2); *see also* BETH, *supra* note 44, at 12 ("The Senate sometimes uses the motion to recommit in such a way as to effect an amendment.").

94. BETH, *supra* note 44, at 12 ("Also, some expedited procedures explicitly prohibit the Senate from suspending a prohibition on amendment by unanimous consent, but no such additional safeguard appears in the Congressional Review Act.").

95. 5 U.S.C. § 802(d)(4).

96. *Id.* § 802(d)(2). It is this ten-hour limit that prevents filibusters on joint resolutions, as this limit precludes the need for cloture. *See* CAREY & DAVIS, *supra* note 52, at 16.

tion),[97] and all other dilatory actions are prohibited prior to a vote.[98] Taken together, these procedural limitations have one especially important implication: they prevent a filibuster of either the motion to proceed or of the resolution itself. As a result, only a simple majority is needed for the resolution to pass the Senate.

The expedited Senate committee and floor procedures are available only for a limited period ("Senate action period"). Generally, that period ends 60 session days after the 801(a) report has been submitted to Congress and the rule published in the Federal Register.[99] However, the statute provides that this period is extended when the 801(a) report is submitted 60 Senate session days or House legislative days before the end of a congressional session ("look-back period").[100] In this situation, an additional Senate action period begins on the 15th session or legislative day of the subsequent congressional session.[101] This additional period again extends for 60 Senate session days.[102] (The introduction period also restarts with the look-back period, but the effectiveness delay does not.)[103]

The CRA also outlines a unique procedure for when a resolution passes one chamber. In that instance, rather than the resolution being referred to a committee in the second chamber, that chamber holds the resolution at the desk, thereby making it available for floor consideration.[104] The vote of the second chamber is also automatically applied to the resolution already passed by the first chamber, even if debate was held on a separate resolution.[105] This is the only provision of the CRA that impacts House procedure,[106] and it is the lone procedure that applies even beyond the Senate action period.[107]

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97. Beth, *supra* note 44, at 12 ("Absent this provision, . . . it might become impossible to stop the Senate from disposing of a disapproval resolution quickly, by voice vote, when few Senators were on the floor. It might also become impossible to secure a roll call vote under these conditions, because not enough Senators might be on the floor to second a demand for one.").

98. 5 U.S.C. § 802(d)(3).

99. *Id.* § 802(e).

100. *Id.* § 801(d)(1). In practice, the Senate Parliamentarian also has required Federal Register publication to occur by this date in order to prevent such extension. *See infra* Section III.A.

101. *Id.* § 801(d)(2).

102. *Id.*; § 802(e)(2).

103. *See* § 801(d) (applying look-back only to "section 802" policies).

104. *Id.* § 802(f)(1); *see also* Beth, *supra* note 44, at 13 ("[The] receiving house must hold it at the desk, rather than refer it to committee. This action retains the received resolution in a status in which it is available for floor action.").

105. 5 U.S.C. § 802(f)(2).

106. This may be because the House Rules Committee can always expedite consideration. *See Congressional Review Act: Hearing Before the Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary*, 105th Cong. 50 (1997) [hereinafter 1997 *CRA Hearing*] (testimony of Charles W. Johnson III, Parliamentarian, U.S. House of Representatives).

107. *See* § 802(e) (applying action period limitation only to "the procedure specified in subsection (c) or (d)").

If a CRA resolution is enacted, the rule it addresses is prohibited from taking effect.[108] In the case that the rule had taken effect prior to resolution enactment, the rule is prohibited from having continued effect,[109] and it is treated as though it never took effect.[110] In practice, therefore, the regulation that preceded the disapproved rule again takes effect.[111] Once a rule is disapproved under the CRA, agencies also are prohibited from promulgating "substantially the same" rule in the future, absent subsequent congressional authorization.[112] The breadth of this final prohibition has been contested.[113] If the agency was under a statutory deadline to promulgate the disapproved rule, that deadline is automatically extended to the date that is one year from the enactment of the disapproving CRA resolution.[114]

D. *Judicial Review*

The CRA also contains several provisions that structure the role of courts in the CRA review process. Most notably, as mentioned above, the statute prohibits judicial review of any "determination, finding, action, or omission" under the CRA.[115] Additionally, the statute prohibits courts from inferring any intent of Congress from its failure to enact a CRA resolution with respect to any rule.[116]

E. *Usage History*

Through the various components outlined above, the provisions of the CRA collaborate to provide a unique, filibuster-proof legislative mechanism that Congress can use to disapprove agency rules. For much of its history, this mechanism did not get much use by Congress, however. In the first 20 years of the Act's existence, it was successfully used by Congress only once, when the newly seated 107th Congress used it in 2001 to overturn a controversial ergonomics rule issued by the Department of Labor under the outgoing Clinton administration.[117] Beyond this isolated instance, Congress typically preferred during this period to address disfavored agency rulemaking through

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108. *Id.* § 801(b)(1).
109. *Id.*
110. *Id.* § 801(f).
111. *See* Noll & Revesz, *supra* note 70, at 14 ("After a disapproval, the regulation that was in effect immediately before the disapproved rule again becomes the effective regulation.").
112. § 801(b)(2).
113. *See, e.g.*, Dooling, *supra* note 40, at 398–99 (noting contestation). On additional challenges agencies confront when implementing this provision, see Cary Coglianese, *Solving the Congressional Review Act's Conundrum*, 75 ADMIN. L. REV. 79 (2023).
114. § 803.
115. *Id.* § 805.
116. *Id.* § 801(g).
117. *See* Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001).

other avenues, such as appropriations riders.[118] This does not mean that the CRA offered no benefits to Congress during this period; several commentators have noted that the Act may be useful to legislators even in the absence of any success in overturning agency rulemaking.[119] As a strategy to reject agency rules, however, the Act seemed to provide little utility.

This perception changed in 2017 with the arrival of the 115th Congress. In this Congress, Republican majorities in both chambers—paired with a newly-elected Republican President—turned to the CRA to address a host of rules issued by the outgoing Obama administration. Within five months of the 115th Congress being seated, it had successfully used the CRA mechanism to overturn 14 rules issued in 2016.[120] Later, this Congress would successfully invoke the CRA twice more—once to overturn a Bureau of Consumer Financial Protection ("CFPB") rule issued in July 2017 and once to overturn a CFPB rule issued in 2013.[121]

This trend in successful deployment of the CRA disapproval mechanism continued, albeit not as ambitiously, four years later with the arrival of the 117th Congress. In this instance, the election of a Democratic President, along with Democratic majorities in both chambers, provided an opportunity to revisit rulemaking conducted by the outgoing Trump administration. The 117th Congress used this opportunity to overturn three agency rules in June 2021, rejecting rules issued by the Environmental Protection Agency, the Equal Employment Opportunity Commission, and the Office of the Controller of the Currency.[122] As a result, the CRA process has to date been successfully invoked 20 times—19 of which have occurred in the past 7 years, including by both political parties.[123]

The CRA, therefore, has experienced a dramatic increase in usage in recent years. This makes it particularly important for Congress to revisit the CRA to determine how the Act can be revised to optimally achieve its original goals. The remaining Parts of this Article consider several proposed revisions that hold significant promise in this regard.

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118. *See* CAREY & DAVIS, *supra* note 52, at 26 n.153 (Congress initially used this appropriations tool with respect to the ergonomics rule before ultimately disapproving it via CRA process.).

119. *See infra* notes 241–48.

120. *See Congressional Review Act*, *supra* note 6 (listing disapprovals, along with rulemaking date and disapproval date).

121. *See id.*

122. *See* Revesz, *supra* note 6.

123. *See* Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001); *Congressional Review Act*, *supra* note 6 (listing disapprovals, along with rulemaking date and disapproval date); Revesz, *supra* note 6.

III. Lessons: Good Governance

There are several aspects of the CRA that, 25 years after its enactment, have been revealed by experience to warrant consideration for reform. This Article's investigation into the real-world operations of the CRA offers a valuable perspective on the merits of such reforms—and on the policy details that should accompany these reforms. This Part examines three such reforms that are supported by good-governance principles, and that therefore hold potential appeal for institutional reformers. These are: (1) simplification of timelines for congressional action under the Act; (2) formalization of a process for initiating CRA review when agencies fail to submit rules; and (3) elimination of the CRA hand-delivery requirement for agency rules. Each is examined below.

A. *Timing and Deadlines*

A first potential area of promising CRA reform relates to the various time periods created under the Act. To establish an expedited process for reviewing agency rules, the CRA relies upon a series of specified time periods.[124] These periods establish windows of time during which agencies must refrain from implementing rules, or during which Congress has access to specific legislative processes.[125] While these time periods are consistent on a number of metrics—many of them refer to a 60-day period, for example—they also differ in various ways. This can include the event that triggers the beginning of the time period, as well as the manner in which days are counted within it. Figure 1, below, provides an overview of some of the key time periods under the CRA.

124. *See* 5 U.S.C. §§ 801(a)(2)(A), (a)(3), (d), 802(a), (c), (e).
125. *See id.*

FIGURE 1: CRA TIME PERIODS

Section	**Function**	**Calculation: Relevant Action from Agency**	**Calculation: Window Length: Units**	**Calculation: Window Length: # of Units**	**Window Can Lengthen?** *(Beyond length in calendar days)*	**Window Can Shorten?** *(Beyond length in calendar days)*
801(a)(2)	GAO Report Deadline	Congress receives report & rule published in Fed. Reg.	calendar days	15	no	no
801(a)(3)	Major Rule Effectiveness Delay	Congress receives report & rule published in Fed. Reg.	calendar days	60*	no*	no*
801(d)	Look-Back Period	Report "was submitted"**	Session days / legislative days	60	yes	yes
802(a)	Introduction Period	Congress receives report***	calendar days, excepting 3+ day adjournments	60	yes	no
802(c)	Can Discharge from Committee	Congress receives report & rule published in Fed. Reg.	calendar days	20	no	no
802(e)	Senate Fast-Track Window	Congress receives report & rule published in Fed. Reg.	Senate session days	60	yes	yes

* This window may be lengthened by presidential veto or if the rule otherwise would take effect at a later date. It also may be shortened or skipped if: (1) a chamber vote on a joint resolution fails, (2) the President makes a determination that it falls in an urgent rulemaking category specified in statute, or (3) it is an exempt rule as specified in section 808.[126] (Telecommunications rules by definition are not major rules, and therefore also are effectively exempt.)[127]

** In practice, the Senate Parliamentarian also has required publication in the Federal Register.[128] Agency action here also serves a dif-

126. *Id.* § 801(a)(5) (joint resolution); *id.* § 801(c) (presidential determination); *id.* § 808 (section 808 exemption).

127. § 804(2).

128. *See* 164 CONG. REC. S6380 (daily ed. Sept. 28, 2018) (statement of Sen. Wyden) (noting Parliamentarian request for agency confirmation in writing that rule

ferent role than in other time windows: it does not start the window (which is calculated by counting backwards from the date of sine die adjournment), but rather is the action that must occur within the time window in order for an additional expedited window to open in the next session of Congress.

*** In practice, the Senate Parliamentarian also has required publication in the Federal Register.[129]

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In the design of these time windows, the architects of the CRA sought to advance (and balance) three different values. Two of these values work in opposite directions. On the one hand, the CRA architects sought to provide Congress with sufficient time to meaningfully consider and act upon CRA joint resolutions. The legislative history repeatedly speaks to this goal.[130] It is a goal that the CRA protected by ensuring that its time windows were not too short. On the other hand, the drafters of the CRA also looked to ensure that, within a reasonably short amount of time, there was closure to the CRA process. As CRS has put it, the CRA "contemplates a speedy, definitive and limited process."[131] The legislative history speaks to several reasons why this was desired—including prevention of needless delay of agency action[132] and allowing regulated entities to achieve closure and proceed with confidence about the governing rules.[133] This competing value counseled toward ensuring that time windows under the CRA were not too long or open-ended.

Meanwhile, a third value did not necessarily counsel toward longer or shorter windows. This was the value of a coherent, clear, interactive statutory system. It was a value the CRA's drafters hoped would emerge from various elements of statutory structure, such as from the

would not be published in Federal Register; demonstrating that additional verification is required in the instances publication is not in the Federal Register).

129. *See id.*

130. 142 Cong. Rec. 6907 (1996) (statement of Rep. McIntosh) ("The 60-day period [for the effectiveness window] was selected to provide a more meaningful time within which Congress could act to pass a joint resolution before a major rule went into effect."); *id.* (emphasizing importance of "Congress . . . [having] a meaningful opportunity to act on such joint resolutions"); 142 Cong. Rec. 6928 (1996) (noting desire "to give Congress an adequate opportunity to deliberate and act on joint resolutions of disapproval"); *id.* (noting purpose of look-back period as ensuring both chambers "have adequate time to consider a joint resolution in a given session").

131. Rosenberg, *supra* note 5, at 24.

132. *See, e.g.*, 142 Cong. Rec. 6928 (1996) (noting goal of "ensuring that major rules could go into effect without unreasonable delay").

133. *See id.* at 6927–28 (voicing desire for closure to process "before regulated parties must invest the significant resources necessary to comply with a major rule"); *id.* at 6928 (noting that "it would be preferable for Congress to act during the delay period so that fewer resources would be wasted"); *id.* at 6907 (noting that "it would be preferable for the Congress to act before outside parties are forced to comply with the rule").

creation of aligned time windows. This goal is evident in the statutory design: it rarely is an accident when four separate provisions refer to an identical date calculation (60 days) or reference the same date trigger (congressional receipt and Federal Register publication).[134] And, indeed, key legislators noted in the legislative history that this was an intentional element of CRA's design.[135] They repeatedly commented, for example, on the attempted alignment of the time window delaying major rule effectiveness ("delayed effectiveness period") with the Senate action period.[136] Unlike the aforementioned statutory goals, this objective did not rely upon time windows being sufficiently long or short; rather, it relied upon these windows aligning (or otherwise working in complementary fashion) with each other.

Of these different values, Congress plainly was least successful in its effort to achieve the third value—i.e., in designing time windows to create a coherent, clear, interactive statutory system. For example, the desired alignment of time windows has proven largely illusory, as the use of different measurement units (e.g., calendar days versus session days) has given the CRA a veneer of window alignment, but a lack of substantive alignment.[137] While the Act's success in creating time windows that achieve its other two objectives may be debatable, therefore, its failure on this count seems undeniable.

This failure in the design of the CRA also has undermined a fourth value that is integral to the CRA's operational success, yet that did not receive full attention in Congress's public discussion of the Act. This was the value of simplicity. In the intervening years, scholars have noted the dizzying complexity created by the statute's various time windows, describing the Act as presenting an "unusually complex set of action periods and deadlines"[138] and a "tangled web of date and time calculations [that] create[s] uncertainty over the effectiveness of rules."[139] Inside Congress, this complexity has led to regular confusion about the measurement of individual windows and the interactions between multiple windows.[140]

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134. *See id.* at 6928 (illustrating how this goal apparently contributed to Congress's choice of a 60-day effectiveness window over a 45-day window).

135. *See id.*

136. *See* 142 CONG. REC. 6907 (1996) (remarking that "it is contrary to the policy of this legislation that major rules take effect before Congress has had a meaningful opportunity to act on such joint resolutions"); *id.* at 6928 (noting that "it would be best for Congress to act pursuant to this chapter before a major rule goes into effect"); *id.* at 6927–28 ("The reason for the delay in the effectiveness of a major rule beyond that provided in APA subsection 553(d) is to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule.").

137. BETH, *supra* note 44, at 5 (discussing the effects of the use of different measurement units to count time periods).

138. *Id.* at 1.

139. Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 110 (1997).

140. *Id.* at 107–09.

To address this complexity and its attendant confusion—as well as the Act's failure to create a coherent, integrated statutory system—reformers should consider simplifying the various time windows under the Act. This project should focus on reducing the presence of multiple misaligned time windows under the CRA, as well as transitioning to methods of time measurement that provide enhanced ease and clarity of calculation for observers. In so doing, the goal should be to target those windows that are outliers and that cannot sufficiently justify their variance by recourse to the Act's other goals. These outlier windows might be remedied either by: (1) changing the manner in which they are calculated, such as by better aligning them with other CRA windows; or (2) removing them altogether. In weighing these reform options, the goal should be to reduce complexity and promote clarity in a manner that does not undermine the Act's first two goals (viz., provision of meaningful consideration time to Congress; timely closure for agencies and regulated entities).

In a survey for outlier CRA windows, and particularly for outliers that pose heightened versions of this complexity problem, two stand out: the look-back period and the introduction period. Each is considered below.

1. Look-Back Period

One time window that warrants reconsideration is the window used to determine whether a rule submitted in one session of Congress will be subjected to an additional CRA disapproval window in the next session (i.e., the "look-back period").[141] This look-back period has several features that not only render it an outlier among the CRA's time windows, but that also make it uniquely difficult to calculate and implement. These problems arise from: (1) the agency action deemed relevant under the window; (2) the unit of time calculation used for purposes of the window; and (3) the use of retroactive calculation under the window. Each warrants some consideration.

First, with respect to relevant agency action: unlike most other CRA windows, the relevant agency action under the look-back period is declared by the statute to be submission of the 801(a) report to Congress alone (i.e., without a corresponding requirement of Federal Register publication).[142] There may have originally been some logic to this choice: the CRA provides a matching window for the introduction of CRA joint resolutions,[143] and so the look-back period arguably is calculated to protect a post-introduction period in which Congress can

141. 5 U.S.C. § 802(d).
142. *Id.* § 801(d)(1).
143. *Id.* § 802(a).

sufficiently consider a resolution.[144] By creating a statutory scheme in which two pieces of the process potentially operate with a distinct starting date from all others, however, the CRA plainly creates the possibility of heightened confusion and complexity under the statute.

These complexity concerns have not materialized under the CRA, however, because the Senate Parliamentarian has imposed a creative interpretation upon both the look-back period and the introduction period. Under that interpretation, publication in the Federal Register is required (along with receipt of the 801(a) report) to begin each period.[145] On the one hand, that interpretation helpfully avoids the complex situation in which the beginning of either period is misaligned with the beginning of the other CRA procedural windows. However, it introduces another form of complexity and opacity into the CRA, creating a situation in which familiarity with statutory text is insufficient to understand the Act's real-world operation (and, in fact, is somewhat misleading). This particularly is a problem for congressional outsiders, who may lack access to information about parliamentarian decisions. In the process of aligning the start of the introduction and look-back periods with the start of other CRA windows, in other words, the Senate Parliamentarian decision has rendered the statutory text of the CRA somewhere between opaque and misleading. Whatever its merits, this has not helped with the pursuit of a transparent, simple statutory scheme.

Second, unlike most CRA time windows (which are calculated in calendar days), the look-back period is calculated in session or legislative days.[146] This is even more anomalous than it first appears, as Congress's use of pro forma sessions has effectively made the introduction period into a calendar-date calculation, thereby matching most of the Act's other time window calculations. Not only does this introduce complexity by adding an anomalous method of calculation into the CRA (and one that may be different for each chamber), but it also adds complexity by using an unpredictable and highly variable method of calculation, as each chamber may decide (with little notice) to modify its anticipated calendar of days in session.[147] Moreover, because

144. *See* 142 CONG. REC. 6928 (1996) (noting the purpose of the look-back window is to ensure both chambers "have adequate time to consider a joint resolution in a given session").

145. Relatedly, the Senate Parliamentarian has shown some reluctance to begin the Senate action window without some additional agency verification in instances in which the agency rule is not to be published in the *Federal Register*. *See* 164 CONG. REC. S6380 (daily ed. Sept. 28, 2018) (statement of Sen. Wyden) (noting Parliamentarian request for agency confirmation in writing that rule would not be published in Federal Register).

146. *See supra* Table 1, (listing four time periods calculated via calendar days, two calculated in whole or in part via session days, and one calculated via calendar days excepting three-plus day adjournments).

147. *The Legislative Process: Calendars and Scheduling*, LIBR. OF CONG., https://www.congress.gov/legislative-process/calendars-and-scheduling [https://perma.cc/

legislative or session days are artificial and malleable, and because they are controlled by interested actors (viz., congressional chambers), they theoretically are vulnerable to strategic manipulation; each chamber could strategically lengthen or shorten the look-back period by having legislative or session days extend for multiple calendar days, or by fitting several into a single calendar day.[148] The look-back period is one of only two CRA windows to have a unit of calculation that is subject to this form of two-way uncertainty (i.e., one that theoretically allows the window to be both lengthened and shortened from its baseline by strategic congressional action).[149] While this last possibility does not seem to have been realized to date, it highlights the uncertainty and complexity that attends this method of calculation.

In other words, it is simple for those both inside and outside Congress to calculate calendar days. It is somewhere between difficult and impossible for them to calculate session or legislative days, at least in advance. By relying upon the latter method of calculation, the look-back window thereby generates significant uncertainty and confusion in the real-world experience of the CRA.

Third, further complexity is added by the anomalous direction in which days are counted for the look-back period. For other CRA time periods, the relevant window is calculated by counting a provided number of days (or session days, etc.) forward from a given start date.[150] By contrast, the look-back period is calculated by counting a provided number of session days back from a given ending date.[151] This retrospective quality makes the look-back period effectively impossible to calculate in real time; the date on which the window begins cannot be known until the window's conclusion. This is quite different from the prospective windows that are typical under the statute—windows in which the only uncertain date is the ending date, and in which even that date at least: (1) is known upon its arrival; and (2) can be predicted with increasing certainty as it approaches.

The look-back period therefore is anomalous in several ways. Moreover, its anomalies generate particularly difficult and opaque calculations, thereby dramatically increasing uncertainty and confusion under the CRA. This raises the question: might this window be simplified in a manner that does not undermine the other core goals of the CRA?

Q6M5-XCQ6] (discussing how the chambers of Congress may control their own calendars and schedules).

148. *See infra* Part IV (discussing the possibility of strategic use of the CRA).

149. *See* 5 U.S.C. § 801(a)(3); s*ee id.* § 802(e) (legislating the other Senate fast-track window besides § 801(a)(3)); *see id.* (discussing the creative use of the CRA and fast-track periods). The effectiveness delay window for major rules also possesses two-way variability, but that variability is triggered only by specified statutory exceptions, not by sub-statutory manipulation of the unit of date calculation. *See id.*

150. *Id.* § 801(a)(3)(A).

151. *Id.* § 801(d).

One solution, as noted above, would be to remove this window entirely.[152] However, this plainly would undermine the goals of the CRA. Unlike certain procedural windows under the CRA which arguably are quasi-redundant,[153] the look-back period is the sole mechanism that protects Congress's interest in having a meaningful, uninterrupted opportunity to review agency rules that are issued late in a congressional session. Congress does admittedly have such an opportunity regardless of the look-back period when it transitions into the second session of a Congress; the personnel within the legislature does not change during that transition, and so a fixed body of legislators does essentially retain a continuous period of time to review agency rules regardless of the look-back period.[154] As a result, the look-back period presumably could be removed for these session transitions with little harm. However, wholesale removal of the look-back period—including for transitions into the first session of a new Congress—plainly would undermine this goal of the CRA.

Since removal of the look-back period appears problematic, it is necessary to consider whether modifications to the window might prove more appealing. This Article recommends one such modification: establishing in statute a fixed date on which, going forward, the look-back period is declared to begin.[155] This modified approach to the look-back period holds significant potential to simplify and clarify the operation of the CRA, while also preserving a meaningful opportunity for congressional deliberation and action.[156]

The benefits this modification could provide in terms of simplicity and clarity are obvious. Unlike under the current CRA, actors both within and beyond Congress would know ex ante when the look-back period will begin each session, and therefore would know which rules will be subject to potential CRA review in a subsequent session. Those within Congress will no longer need to endlessly seek real-time estimates of this window from nonpartisan staff within Congress, a process that currently puts this staff in the unenviable position of making prognostications based on chamber calendars that are subject to change. It is difficult to imagine a clearer approach, or one more easily administered, than use of a date certain for this purpose.

Of course, some might see this increased clarity as a detriment. When clarity is provided regarding the start of the look-back period, executive agencies will know with certainty that they can evade CRA review in a subsequent session by submitting an 801(a) report by a

152. *See supra* conclusion of Section III.A (discussion of removal of outlier review windows).

153. *See infra* note 167 and accompanying text.

154. A "Congress" is a label applied to the two-year period between congressional elections. A "session" of Congress refers to a one-year period.

155. *See infra* Section III.A. (discussing the advantages and challenges associated with a fixed date beginning to the window of review).

156. *See infra* Section III.A.

fixed date. This would allow the agencies to strategically time their rule development to avoid such review. Yet, while this may be a politically understandable concern, it is a difficult one to defend as logical under the values of the CRA. No evidence suggests that the CRA look-back period was strategically designed to be opaque in the effort to entrap executive agencies in additional reviews due to unexpected calculations of this window. And if agencies are able to submit their 801(a) reports on a timeline that permits the current session of Congress adequate time to meaningfully consider the report, that suffices to accomplish the Act's goals—even if the agency submitted that report sooner than it otherwise might have. It therefore is difficult to understand how this objection can be defended as grounded in the principles the CRA seeks to advance.

It therefore seems apparent that increased clarity for the look-back period is desirable, at least from a system-level perspective, and that use of a fixed date to begin this window would provide such clarity. However, it may not be obvious that this approach will adequately preserve another CRA value: namely, providing Congress with the time necessary to engage in meaningful review of rules. After all, the transition to a fixed date for the look-back period would remove two protections for a robust deliberation window. These are the protections provided against: (1) early *sine die* adjournment of a session of Congress; and (2) a concluding period to a congressional session that has abnormally few session or legislative days. Each warrants some consideration.

First, the current calculation of the look-back period protects a full period of congressional deliberation from any abnormally early *sine die* adjournment of Congress. It accomplishes this by establishing what the Act considers to be an adequate consideration window (viz., 60 legislative or session days) and counting backwards from the date of sine die adjournment to identify the applicable consideration window. In this way, the CRA ensures that the duration of the look-back period remains constant, even as the date of Congress's *sine die* adjournment changes. By contrast, a pivot to the use of a fixed date to begin the look-back period would sacrifice this form of constancy, creating a situation where an abnormally early *sine die* adjournment would translate to a comparatively short look-back period (as the beginning of the window would remain constant, while the end of the window would move earlier).

However, there are at least four reasons why concern about this issue is less than compelling. First, the date of *sine die* adjournment has significantly stabilized in recent Congresses.[157] With Congress moving toward a consistent January 3 adjournment date, a chamber

157. *See Dates of Sessions of the Congress*, U.S. SENATE, https://www.senate.gov/legislative/DatesofSessionsofCongress.htm#2015 [https://perma.cc/A7PQ-CXDH] (showing a consistent adjournment date of January 3rd since 2017).

has adjourned before January only twice in the last ten years—and it has not once adjourned during this period before mid-December.[158] In the last fifteen years, a chamber has adjourned before mid-December only once (in 2006).[159] A chamber has not had a November adjournment date since 2002.[160] Congress always could return to greater variation in *sine die* adjournment dates, of course. Nonetheless, its current practice suggests that a fixed beginning date for CRA look-back periods would not lead to significant variation in the duration of these windows, given the stability of Congress's recent *sine die* adjournment dates.

Second, there is bound to be a tradeoff between improved clarity for the look-back period, on the one hand, and preservation of a rigid deliberation period in this window, on the other. So long as the date of *sine die* adjournment remains variable and unknown in advance, either the start date or the duration of the look-back period also must remain variable and uncertain. By placing this variability on the start date of the window, rather than its duration, the architects of the CRA created a system that has proven frustrating both within and beyond Congress. If there is a desire to remedy this and bring greater clarity to the start date of the window, then some sacrifice in clarity on window duration is unavoidable—and a seemingly tolerable tradeoff.

Third, this tradeoff seems particularly tolerable because the default window that Congress has protected via the look-back period is exceedingly long. Here, Congress has ensured that it will have an additional opportunity (in a subsequent session) to review any rule that it has had less than 60 legislative or session days to examine and consider (assuming this examination process commences with submission of an 801(a) report to Congress on the rule). This is an exceedingly long window of time for Congress to have for consideration of a joint resolution to disapprove a rule; for example, it only took a week for the ergonomics rule that Congress disapproved to go from introduction to passage by both chambers.[161] Consequently, there is reason to think that Congress will have ample time to consider any joint resolutions of disapproval even if, due to a transition to a fixed date to begin the look-back period, the window occasionally is shortened by an early *sine die* adjournment.

Fourth, it is necessary to honestly ask whether the purported value of preserving a robust deliberation window even is meaningful in the context of the look-back period as it operates today. The look-back provision in section 801(d) consistently has been invoked by Con-

158. *Id.*
159. *Id.*
160. *Id.*
161. The joint resolution for this rule was introduced on March 1, 2001, passed the Senate March 6, and passed the House March 7. S.J. Res. 6, 107th Cong. (2001) (enacted).

gress—but not because a prior Congress was interested in disapproving a rule yet ran out of time, thereby requiring the subsequent Congress to continue the work of the prior Congress.[162] Rather, it has been a useful tool because the intervening election changed the political party in control of the government, thereby ushering in a new Congress (and President) that wished to overturn rules that the prior Congress (and President) had no interest in reviewing or overturning.[163] In modern practice, therefore, the look-back period protects a value that rings relatively hollow: namely, the ability of a party whose presidential administration is issuing midnight rules to immediately review and reject those same rules. Since the look-back period has transitioned in practice away from protecting any window for congressional review that Congress itself seems to find meaningful, it is difficult to see why that value—now largely fictitious—should be cited to override competing values that still are meaningful in the present-day operation of the CRA (viz., clarity and predictability in implementation).[164]

For these reasons, concerns about *sine die* adjournment ultimately do not seem to override the benefits that could attend a transition to a fixed date to begin the look-back period. Similar logic applies to the second form of deliberation protection that, admittedly, would be sacrificed in this transition: namely, protection against a congressional session that concludes with abnormally few session or legislative days. By creating a look-back period that is counted in session or legislative days, the CRA currently prevents a situation where, although Congress has ample calendar days in which to review a rule, it has insufficient days in session to engage in meaningful deliberation on a joint resolution of disapproval. A transition to a fixed-date initiation of the look-back period would remove this protection; if a chamber were to be out of session for an abnormally large number of days subsequent to the fixed initiation date, this would indeed reduce the number of days in session that Congress would have available to consider the rule (and nonetheless lack access to a subsequent review window in the next session).

For many of the reasons already mentioned in the discussion of *sine die* adjournment, however, this concern is largely unpersuasive. As before, some tradeoff between clarity and protection of a deliberation window is unavoidable; the deliberation window currently is longer than necessary; and the deliberation protected by the look-back period is almost entirely fictitious. All these reasons counsel in favor of a

162. *See* CAREY & DAVIS, *supra* note 52, at 6.

163. *See, e.g.*, Revesz, *supra* note 6 (detailing the Biden administration's use of the CRA to undue the Trump administration's rules).

164. On the broad need to reconceive structural features in light of party alignment in the modern era, see generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2311–12 (2006).

pivot to a fixed start date, even if this has some potential to periodically prevent Congress from having a full deliberation window of 60 continuous legislative or session days. Moreover, the number of days a chamber is in session is controlled by that chamber; it therefore is unconvincing for a chamber to object that it lacked deliberation time with a rule simply because it had itself chosen not to hold session for an abnormally large number of days at the end of a congressional session.

If concerns about transitioning to a fixed initiation date are unpersuasive, then the next question is: how should this fixed date be determined? Perhaps the best option, and the one that best preserves the balance of values enshrined in current CRA practice, is one that simply codifies the average date on which the look-back period has begun in recent years. For these purposes, it may be instructive to focus on the last decade of experience, since *sine die* adjournment practices have particularly stabilized during this period. Over this decade, the average date on which the look-back period has begun has been August 2.[165] A policy choice is raised by the fact that, in practice, the look-back period typically is invoked in presidential election years—and over the last decade, the average date on which the window has begun for this subset has been July 18.[166] It therefore would be wise for Congress to select a date somewhere within the range demarcated by these two data points. Doing so would provide Congress with a look-back period that matches the one it has had in practice for the last decade—and therefore one that should not provide any jarring transition or any erosion of values currently protected by actual CRA practice.

2. Introduction Period

The second time window under the CRA that is anomalous, and that has unique features that add particular complexity to the law, is the introduction period. This window, it will be recalled, establishes the period during which joint resolutions of disapproval can be introduced under the CRA.[167] This window is an outlier in the CRA with respect to both: (1) the relevant agency action to initiate it; and (2) its manner of time calculation. Each of these outlier features appears today to be operating in a manner that not only adds complexity and opacity to the CRA, but also that likely differs from its intended functioning by the Act's architects. As such, it is a strong candidate for revision.

It is worth considering each of these outlier features. First, as already discussed in Section A, the CRA specifies that the introduction

165. Interview with Congressional Staffers (2021).
166. *Id.*
167. 5 U.S.C. § 802(a).

period begins with a particular event: namely, congressional receipt of the 801(a) report from the agency. Along with the look-back period, the introduction period is theoretically the only other time window under the Act that begins with submission of the 801(a) report alone, rather than also requiring publication in the Federal Register (where applicable). Unlike the look-back period, however, the introduction period interacts with the other expedited procedures in the CRA in an attempt to create a coherent, step-by-step legislative process (introduction, committee consideration, floor debate, etc.). Having one piece of that process potentially operate with a distinct starting date from the others creates the possibility of heightened confusion and complexity under the statute.

Once again, these concerns have not materialized because the Senate Parliamentarian has stipulated that, in practice, publication in the Federal Register is required (along with receipt of the 801(a) report) to begin the introduction period. As with the application of this policy to the look-back window, its application to the introduction window helpfully aligns the start dates of the various CRA procedural windows—yet, in so doing, also undermines the transparency and accessibility of the statutory scheme, particularly for those who lack regular access to the chamber Parliamentarians. In this regard, the introduction window (like the look-back window) adds significant opacity and complexity to the real-world operation of the Act.

The introduction period also is abnormal in its manner of time calculation. It is the lone CRA time period in which time is calculated in calendar days but with adjournments of greater than three days by either chamber excepted.[168] An outlier at least in theory, this novel time calculation creates an array of complex possibilities. Consider, for example, how this interacts with the Senate action period, which is calculated in Senate session days. Both refer to a baseline period of 60 days—yet, due to their differing calculations, the following permutations are possible:

- The Senate is out of session for periods of less than four days - the introduction period continues while the Senate action period freezes. This may lead to the introduction period expiring before the Senate action period.
- The Senate holds multiple session days in a single calendar day - the Senate action period proceeds faster than the introduction period. This may lead to the Senate action period expiring before the introduction period.

168. On the practical effect of this rule, see Beth, *supra* note 44, at 3 ("Normally, in other words, weekend days will count toward the initiation period, but district work periods will not.").

- The House adjourns for longer than three days - the introduction period freezes while the Senate action period continues.[169] This may lead to the Senate action period expiring before the introduction period.

These theoretical complexities notwithstanding, however, the unique manner of time calculation for the introduction period has not generated this level of complexity in practice. This is because the novel feature of time calculation for the introduction period—its pausing for lengthy adjournments—has been rendered largely irrelevant by modern congressional practice. Today, Congress makes regular use of pro forma sessions in order to avoid adjournments of greater than three days—a practice adopted primarily to block opportunities for recess appointments by the President.[170] As a result, the calculation of the introduction period is not regularly paused in the contemporary Congress by reason of adjournment. This functionally makes the introduction period tend to operate on a calendar day basis, a fact that brings it into harmony with most of the other CRA windows (which similarly operate on a calendar date basis). As before, however, this functional alignment comes at a price. First, it means that the plain letter of the CRA again is misleading to the uninitiated, as the Act's operation cannot be discerned by those who do not know how it interacts with detailed changes in congressional practice and procedure. Second, it means that this window no longer serves the functional goals envisioned by its drafters. After all, there is little functional difference between adjournments and recesses with strategically deployed pro forma sessions, yet the policies drafters attached to the former have not carried over to the latter. As a result, the unique manner of calculating time under the introduction period now appears to be a source of legalistic complexity that lacks functional utility.

The introduction period therefore appears to be another dimension of the CRA that not only is an outlier, but that has unique features that particularly heighten the complexity and opacity of the Act. This again raises the question of whether the window should be eliminated or reformed. Here, a number of policy options present themselves to Congress. These include: (1) removing the introduction period entirely; (2) aligning the introduction period with the Senate action period; and (3) making the introduction period available only for a fixed number of calendar days.

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169. § 802(a); *see also* BETH, *supra* note 44, at 3 ("Any day that either house is in adjournment during a recess of more than 3 days does not count toward this time limit.").

170. HENRY B. HOGUE, CONG. RSCH. SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 8–9 (2015), https://crsreports.congress.gov/product/pdf/RS/RS21308 [https://perma.cc/7KBX-3VSW].

First, unlike the look-back period, it does appear that outright removal of the introduction period is a plausible policy option. This approach plainly would have the upside of simplifying time calculations under the CRA, as it would eliminate one of several overlapping time windows that must be tracked under the current statute. It also would bring clarity to the statute by eliminating a window with a practical operation that does not always align with its statutory appearance. The important question, of course, is whether these benefits are offset by any countervailing concerns. Consequently, it is important to consider whether the policy might have ramifications that could undermine the other goals of the CRA.

Such ramifications could result in two ways. First, there is the risk of ramifications created by the removal of the front-end limitation on the introduction of joint resolutions. Today, the introduction period ensures that joint resolutions of disapproval under the CRA are not introduced until Congress receives an 801(a) report on the rule. For rules considered in a new session due to the operation of the look-back period, it ensures that any joint resolution is not introduced before the 15th session day. If the introduction period were removed, these constraints would vanish—and so Members could introduce joint resolutions of disapproval before receipt of an 801(a) report or the 15th session day.

However, it is difficult to see how early introduction could produce problematic consequences within Congress. No subsequent procedural element under the CRA is tethered to the date of introduction, and so allowing for early introduction of a joint resolution would not provide a strategic opportunity for Members to bring a premature close to other windows of consideration under the CRA. And it does not appear that the interaction that would indeed occur between these two features—viz., earlier introduction, but consistent application of other procedural windows—generates concerns. For example, since the date of possible committee discharge is not tied to the introduction date, perhaps early introduction of a joint resolution would afford a committee more time with a resolution than it otherwise would have available. However, this does not appear to be a problem, as additional consideration time in this instance does not translate into an ability of the committee to "hold up" consideration of a resolution. After all, the absolute date on which the resolution could be discharged from committee would remain unchanged. In this way, it is difficult to pinpoint any meaningful downside to removal of the front-end limitation on introduction.

If there is any concern regarding the removal of the introduction period, it perhaps would be about the risk created by removal of the back-end limitation on the introduction of joint resolutions. Absent that constraint, a joint resolution of disapproval could be introduced at any time—including years after a rule has been issued. However,

such a resolution would not have access to the primary procedural benefit of the CRA: the Senate action period (i.e., the window for expedited consideration in the Senate). That expedited consideration window closes 60 session days after receipt of an 801(a) report and publication in the Federal Register, regardless of the date of introduction.[171] Rather, the only procedural benefit that would remain for late-introduced resolutions would be the CRA cross-chamber reconciliation procedure.[172] Today, that procedure already remains available to resolutions years after the expedited-procedure window has closed; however, it remains available only for resolutions introduced during the introduction period.[173] By contrast, if the introduction period were removed, it presumably would become available to resolutions introduced at any time. That arguably is not a significant policy change—the benefit of access to the reconciliation process is so minimal, and the policy change so minor insofar as it simply extends access to a process already available on an open-ended basis to those who introduce within the introduction period, that it is difficult to see this as a meaningful shift. As such, there do not appear to be significant downsides to the removal of the introduction period—on either the front or back end of that window. Congress, therefore, may want to consider simply removing this window from the CRA, thereby further simplifying and clarifying the Act's operation.

However, it is possible that wholesale removal of the introduction period will raise concerns for some. Perhaps there is worry that any widening of the availability of the reconciliation process under the Act will create additional uncertainty for regulated actors. Or perhaps there is simply a desire to retain some introduction period because most expedited procedure statutes do include such a window. If removal is unappealing for these (or other) reasons, Congress may instead want to consider other ways to simplify the introduction period. One such option would be simply to align it with the Senate action period. On the front end, this would formally prevent Congress from introducing a joint resolution of disapproval until a rule was published in the Federal Register—a modification that would not effectuate any substantive change since, as already mentioned, the Parliamentarian already interprets the CRA to require such publication before introduction. On the back end, this policy change functionally would tend to provide Congress with a small additional window of time in which to introduce a resolution (as Senate session days do not pass as

171. 5 U.S.C. § 802(e).

172. *Id.* § 802(f). Congress, of course, may override an agency rule at any time via the standard legislative process.

173. *See* Cohen & Strauss, *supra* note 139, at 107–08 ("No provision, however, restrains the period within which Congress must act, so long as a resolution of disapproval is introduced within the qualifying period—a period that itself may end days or weeks after '60 calendar days' of section 801(a)(3)(A) have expired.") (emphasis omitted).

quickly as calendar days, even typically with extended adjournments excepted). This would provide some minor additional uncertainty for regulated actors, who would not have closure under the Act until the Senate action period closed. Again, however, the chamber action needed to preserve the full Senate action period at present is so minimal (viz., introduction of a joint resolution) that it is difficult to see this as a significant change. The time window that is vital to the Act's benefits—the Senate action period—would remain unchanged under this approach. And the benefits of simplicity under the Act would essentially equal those provided by a wholesale repeal of the introduction period, as it would remove the need for an independent calculation of an introduction period apart from the calculation of the Senate action period.

A final policy option would be to create a fixed introduction period that is measured in calendar days. Such a window would provide the sought-after clarity and ease of calculation, while also enhancing (rather than detracting from) the sense of closure that could be provided to regulated actors. However, these benefits would come with a corresponding tradeoff of slightly reducing Congress's opportunity for action, particularly in the (admittedly unlikely) event that Congress adjourns for extended periods of time. It also would do less than the aforementioned policy options to reduce complexity under the CRA, insofar as it would continue to require relevant actors to calculate an introduction period that is separate from the Senate action period and the delayed effectiveness period. In fact, this reform essentially would leave the practical operation of the CRA unchanged; its benefit would be mostly in the simplicity provided by aligning the text of the CRA with its real-world operation. That alone may be a significant benefit, but it might not match the level of simplification achieved by the other potential reforms to the introduction period considered above.

3. Additional Time Periods

This Article does not offer any recommended revisions to other time periods under the CRA, such as the Senate action period or the delayed effectiveness period. Admittedly, there are reasons why the Senate action period in particular might also be a candidate for reform. Calculated in Senate session days, it is at odds with the calculation of the many various windows that operate on a calendar-day basis—most notably the effectiveness window, where alignment could provide significant benefits.[174] The use of session days, as explained above, introduces particular uncertainty into real-time efforts to calculate CRA windows, as this manner of calculation is subject to two-way uncertainty. And it is unlikely that any joint resolution requires 60 session days to receive proper consideration, especially given that the

174. *See supra* notes 133–34.

text of the resolution is fixed by statute and therefore does not permit modification of the sort that can warrant extended legislative consideration.[175] These factors do make the Senate action period a plausible candidate for revision. Such a revision might look to convert the Senate action period to calendar days, and might do so by looking to the average calendar-day duration of this window at the beginning of a new presidency, in a manner similar to one of the calculations proffered in Section A for a revised look-back period.

However, there may be particular concern with altering the Senate action period. Due to its vital benefit of providing a fast-track workaround to filibuster efforts, this window presumably is one with respect to which Congress wishes to guard its window of meaningful opportunity for deliberation and action particularly carefully. In contrast to the situation with the look-back window, such arguments for meaningful opportunity of review would ring true with respect to the Senate action period, where the time window actually does continue to protect a period of useful congressional deliberation and consideration—and thereby advance a core value of the CRA. And while 60 Senate session days is ample time to consider any individual joint resolution, the desire to balance the review of numerous rules with other important actions (e.g., presidential appointments) at the beginning of a new presidency and Congress may create time pressures in aggregate that make Congress particularly protective of a robust and flexible Senate action period.[176] And for CRA time periods occurring outside this look-back period scenario, subjection of the Senate action period to a calendar date calculation might invite strategic agency action to undermine the congressional opportunity for meaningful review, such as by submitting 801(a) reports at the beginning of an August recess of Congress.[177] Reforms to the Senate action period therefore could plausibly prove especially detrimental to a countervailing value enshrined in the CRA (viz., preserving ample opportunity for congressional deliberation), even if these reforms could add significant simplicity and clarity to the Act.

The Senate action period also may not necessarily raise concerns equal to those identified with respect to the look-back and introduction windows. While its method of calculation is somewhat unpredict-

175. *See* 5 U.S.C. § 802(a) (specifying text of joint resolution).

176. *See, e.g.*, Noll & Revesz, *supra* note 70, at 21 ("[F]uture administrations will have to weigh using limited Senate time for confirming presidential appointments against using that time for Congressional Review Act disapprovals."). In 2017, it appeared that Republicans also may have considered more joint resolutions, but for time constraints under the Senate action period. *Id.* at 20.

177. *But see 2007 CRA Hearing*, *supra* note 16, at 51 (statement of Sally Katzen, Visiting Professor, George Mason University School of Law) ("Based on my experience, I believe there would be very little attempt to manipulate the timing of the issuance of rules—it is difficult enough to navigate the various substantive and procedural requirements and the pressures that inevitably develop from both proponents and opponents of a proposed rule.").

able due to its use of session days, this period does not have certain features that make these other windows particularly frustrating for various actors (e.g., retroactive calculation; unanticipated interaction with contemporary chamber practices). While a wholesale attempt to redesign the CRA process might reconsider the Senate action period, therefore, the benefits sought via technical reform legislation to an already-extant process might well be achievable simply by reforming the look-back and introduction periods, and by leaving this more consequential and controversial CRA window intact.

The delayed effectiveness period appears to be an even less worthy candidate for reform. There already is admirable clarity in its calculation, which (for major rules) extends 60 calendar days from the date of an 801(a) report submission and Federal Register publication.[178] Moreover, the architects of the CRA cautioned specifically against modification of this window, which apparently was subject to detailed negotiation and compromise. They remarked:

> Such action [by courts to modify the effectiveness window] would be contrary to the many express provisions governing when different types of rules may take effect. Such court action also would be contrary to the committees' intent because it would upset an important compromise on how long a delay there should be on the effectiveness of a major rule. The final delay period was selected as a compromise between the period specified in the version that passed the Senate on March 19, 1995 and the version that passed both Houses on November 9, 1995.[179]

This cautionary note from the CRA drafters, plus the fact that the delayed effectiveness period provides little implementation complexity (beyond its basic misalignment with the Senate action period), seems to provide sufficient reason to focus technical reforms elsewhere under the Act.

4. Codification of Parliamentarian Interpretations

Finally, Congress might consider one additional reform that would not require substantive changes to any of the CRA time windows, yet that nonetheless could increase clarity of operations under the CRA. This reform would codify in statute the various interpretations of the CRA that the Senate Parliamentarian has adopted since the statute was enacted. This would bring significant clarity to the operation of the statute for actors both inside and outside Congress who may not be familiar with these interpretations. This would be particularly valuable because the Senate Parliamentarian has not made available written, updated precedents since 1992, thereby making it particularly difficult for those who lack informal access to the Parliamentarian to

178. 5 U.S.C. § 801(a)(3).
179. 142 Cong. Rec. 6928 (1996).

glean the details of its modern-day operation.[180] This reform effort could focus on interpretations that bear on the time windows under the CRA, which might include the following Parliamentarian-determined policies:

- Federal Register publication is required to begin the introduction window and look-back window for a CRA joint resolution (as discussed above).
- If the rule at issue is not required to be published in the Federal Register, submission to GAO (in addition to submission to Congress) may be required to begin CRA time windows.
- Due to Senate policies against conducting any business during pro forma sessions,[181] CRA time windows do not begin until an 801(a) report is referred in the Senate, not just received by Congress.
- If an applicable time window expires when the Senate is not in session, a "hold harmless" policy is applied allowing for one day of additional action on a CRA joint resolution upon the Senate's return.
- If Congress attempts and fails to enact a CRA joint resolution in one session, no look-back period is available in the subsequent session.[182]
- It appears (though not entirely clear) that it is considered impermissible for the Senate to take action on a CRA joint resolution on the same day as discharge from committee, except by unanimous consent.[183]
- In the event that the look-back periods of the two chambers differ, the period with the earlier start date will be the period used by both chambers.
- For purposes of calculating the look-back period, the date of adjournment is counted as an applicable session or legislative day.
- Various rules regarding whether each time window is construed to begin on the date of relevant action specified in statute or on the first day after such specified action.

This codification of parliamentarian interpretations also potentially could extend beyond policies regarding CRA time windows. For example, the details of the petition for committee discharge, which have been modeled after a cloture motion, arguably also could benefit from

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180. FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE, S. DOC. NO. 101-28 (1992), https://www.govinfo.gov/app/details/GPO-RIDDICK-1992 [https://perma.cc/EY9C-32J6].

181. 77 AM. JUR. 2D *Powers and Duties; Execution of Laws—Recess Appointments* § 21 (2023) (noting that generally the Senate chooses against conducting business during pro forma sessions).

182. On the strategic possibilities this interpretation creates, see *infra* Part IV.

183. *See* discussion *supra* Section II.C.

such codification.[184] The prohibition on preambles to CRA joint resolutions also could be made explicit, as could the fact that motions to proceed are non-debatable. Regardless of the scope, however, codification of at least some additional procedural details could reduce the opacity of the CRA for unfamiliar actors.[185]

If codification proves an unappealing option, any publication of these parliamentarian interpretations likely would prove useful. Indeed, even publication in this Article may perhaps assist the uninitiated—one reason why an effort has been made above to collect and list relevant interpretations. Publication by a congressional office presumably would make such interpretations more readily accessible, however, as those impacted by the statute could be expected to check work bearing Congress's imprimatur first in the effort to understand the statute. Codification would go even further in this regard, making the details of CRA operation apparent on the face of the statute itself—thereby rendering them especially visible to those attempting to understand the CRA via its plain text. For this reason, it may be worth considering whether at least some of these interpretations rise to the level of warranting not only publication, but statutory inclusion.

Codification of parliamentarian interpretations presumably would not hard-wire these rules in ways that might make it more difficult for Congress to undo them at a later date. The CRA is explicit that, while included in statute, its procedural elements are an exercise of chamber rulemaking power—and therefore are always subject to alteration via single-chamber action, pursuant to each chamber's constitutional prerogative.[186] Indeed, Congress typically has viewed statutory provisions of this type simply as recognitions of the inalienable constitutional power of each chamber to unilaterally modify its rules at any time, and courts typically have declined to enter the fray on this issue.[187] Consequently, while codification would promote informal parliamentarian interpretations to the status of chamber rules, it presumably would not constrain the ability of a single chamber to modify or override those policies in the future.[188] As such, codification could provide increased CRA transparency without reducing chamber flexibility—a seemingly good proposition.

184. For an example of these details, see Carey & Davis, *supra* note 52, at 16.

185. For another proposal to codify an informal practice sanctioned by parliamentarian interpretation, see *infra* Section III.B.

186. 5 U.S.C. § 802(g); *see also* U.S. Const. art. I, § 5 (rulemaking power of each chamber). Inclusion of this provision is common in expedited procedure statutes. *See* Bruhl, *supra* note 71, at 363–65.

187. *See* Bruhl, *supra* note 71, at 365–70. The narrow exception apparently has been that the House has sometimes viewed itself as unable to modify a statutory chamber rule within the same session that the rule was enacted. *See id.* at 367.

188. This is reinforced by the prohibition on judicial review. *See* 5 U.S.C. § 805.

B. *Codifying Congressional Initiation*

A second problem that has emerged under the CRA relates to its method for initiating Congress's expedited procedures. As explained above, the CRA uses a specific agency action—submission of an 801(a) report to Congress (typically along with publication of the rule in the Federal Register)—as a trigger to begin the time periods for expedited congressional review.[189] This raises a troubling question: what happens if an agency does not submit an 801(a) report for a rule? The CRA is silent about this situation.[190] Through this silence, it creates the possibility that agencies might evade expedited congressional review of their rules under the CRA simply by defying their submission requirement for 801(a) reports, thereby never beginning the expedited congressional review process.[191]

The concern that agencies might fail to submit 801(a) reports for rules—and might thereby raise this dilemma of rules potentially evading CRA review—is more than hypothetical. Studies and investigations have repeatedly confirmed that agencies fail to submit hundreds,[192] if not thousands,[193] of 801(a) reports for relevant rules each year. This problem has persisted for the duration of the CRA; it was documented as early as 1997[194] and as recently as 2019.[195] Moreover, there are reasons to think that, if anything, these assessments

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189. *See supra* Table 1 (outlining the triggering action or actions for each CRA time period).

190. *See* 5 U.S.C. §§ 801–08.

191. *See* CAREY & BRANNON, *supra* note 34, at 21 ("Because submission of rules is key to Congress's ability to use the CRA, if an agency does not submit a rule to Congress, this could potentially frustrate Congress's ability to review rules under the act.").

192. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-601T, FEDERAL RULEMAKING: PERSPECTIVES ON 10 YEARS OF CONGRESSIONAL REVIEW ACT IMPLEMENTATION 4 (2006) (stating that "roughly 200 nonmajor rules per year [are] not filed with our office"); CURTIS, *supra* note 41, at 10 (noting an average of 150 per year are not submitted to GAO as chronicled in GAO-OIRA letters covering seven years in the 1998–2008 period).

193. *See, e.g.*, H.R. REP. NO. 106-1009, at 37–39, 242–43 (2000) (finding for the period of March 1996 through November 1999 that 7,523 guidance documents issued by the EPA, Department of Labor, and Department of Transportation were not submitted); *2007 CRA Hearing*, *supra* note 16, at 10 (statement of Morton Rosenberg, Specialist in American Public Law, Congressional Research Service) ("Furthermore, not nearly all the rules defined by the statute as covered are reported for review. The number of . . . covered rules is likely to be significantly more than the number that are actually submitted for review.").

194. *See, e.g.*, CAREY & BRANNON, *supra* note 34, at 18 n.173 (citing *1997 CRA Hearing*, *supra* note 106, at 134 (1997)) ("One witness, administrative law scholar Peter Strauss, noted that many agency actions that fall outside of the scope of what agencies publish in the *Federal Register* as part of regular notice-and-comment rulemaking proceedings, were not being submitted."); *see also* Federal Agency Rules Filed Under Congressional Review Act Following General Accounting Office Review of Unfiled Rules, 63 Fed. Reg. 71672 (Dec. 29, 1998) (finding over 300 non-major rules not submitted that had been issued between October 1, 1996, and December 31, 1997).

have been overly optimistic about agency compliance.[196] Non-major rules in particular have been a problem in this regard.[197] And while there is some reason to think that at least some agency noncompliance has been due to good-faith errors and oversights by agencies,[198] a GAO examination found that agency justifications often were plainly founded on error or mis-assessment.[199] The result is that agencies regularly defy a key assumption built into the CRA—namely, that an 801(a) report would be submitted to Congress for each rule.

If these submission failures were to allow agencies to evade rule review under the CRA, it plainly would undermine the goals of the Act. The CRA was intended to empower Congress to conduct a comprehensive review of agency rules that affect the public. As a subcommittee interim report put it in 2006:

> The plain, overarching purpose of the review provision of the CRA was to assure that all covered final rulemaking actions of agencies would come before Congress for scrutiny and possible nullification through joint resolutions of disapproval. . . . [T]he statutory scheme is geared toward Congressional review of all covered rules at some time; and a reading of the statute that allows for easy avoidance defeats that purpose.[200]

195. *See* CAREY & BRANNON, *supra* note 33, at 1; H. COMM. ON OVERSIGHT & GOV'T REFORM, 115TH CONG., SHINING LIGHT ON REGULATORY DARK MATTER 2, 4 (2018) [hereinafter SHINING LIGHT] (noting few agency guidance documents submitted). *But see* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 192, at 4 (suggesting "compliance improved over time").

196. *See* ROSENBERG, *supra* note 5, at 26 (noting that failures to submit rules not reported in Federal Register likely are never noticed); *see also 10th Anniversary of the Congressional Review Act*, *supra* note 69, at 24 (statement of Todd F. Gaziano, Esq., Senior Fellow in Legal Studies & Director for Legal & Judicial Studies, Heritage Foundation) ("I actually think that the incidence of noncompliance may be higher than that which GAO has been able to record. Anecdotal evidence and investigation by other Committees of this House has suggested as much.").

197. *See* CAREY & BRANNON, *supra* note 33, at 1; *see generally* SHINING LIGHT, *supra* note 195; *10th Anniversary of the Congressional Review Act*, *supra* note 69, at 5 (statement of J. Christopher Mihm, Managing Director for Strategic Issues, U.S. Government Accountability Office); *id.* at 30 (statement of Todd F. Gaziano, Esq., Senior Fellow in Legal Studies & Director for Legal & Judicial Studies, Heritage Foundation). *But see* COPELAND, *supra* note 41, at 17 (noting CRS study finding 22 of 181 "significant" rules not submitted to GAO for fiscal year 2009).

198. *See* CAREY & BRANNON, *supra* note 34, at 21 (noting agencies "may be unaware that many other types of actions are covered").

199. *See 10th Anniversary of the Congressional Review Act*, *supra* note 69, at 53 (letter from J. Christopher Mihm, Government Accountability Office, to Christopher B. Cannon, Chairman of Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary & Melvin L. Watt, Ranking Member of Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary) ("[W]hen we looked at the impact of the rules, it was clear that they had a substantial effect on the rights or obligations of nonagency parties.").

200. SUBCOMM. ON COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REPORT ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY 92–93 (Comm. Print No. 10 2006).

Numerous statutory provisions in the CRA speak to this goal—ensuring, for example, that even major rules exempted from the Act's longer effectiveness delays are still subject to the CRA review process.[201] Congress plainly intended to provide an opportunity for review of all covered rules. If agency noncompliance with the 801(a) submission requirement translated into an easy escape from such review, it would significantly compromise this basic premise of the CRA.[202]

To prevent this situation from occurring, Congress has developed an ad hoc process for the initiation of CRA reviews when agencies fail to submit 801(a) reports. Under this process, a Member or committee can request the GAO's opinion on whether an agency action qualifies as a "rule" under the CRA.[203] In response, GAO issues an opinion providing its answer to this question.[204] If GAO concludes that the agency action amounts to a "rule," Members of Congress provide for publication of the GAO opinion in the *Congressional Record*.[205] The parliamentarians then regard the date of this publication as providing the relevant initiation date for CRA time periods, effectively replacing submission of the 801(a) report (and, where applicable, Federal Register publication).[206] Through this process, as GAO recently explained, "Congress has used GAO opinions to cure the impediment created by the agency's failure to submit the rule, protecting its review and oversight authorities."[207]

Congress has developed this ad hoc process over a number of years. GAO issued its first legal opinion in response to a member inquiry about CRA applicability in September of 1996, just months after the CRA was enacted.[208] Members first introduced a joint resolution following such a GAO opinion in 2008, thereby inaugurating (after some debate) the practice of using GAO opinion publication as the initia-

201. *See* ROSENBERG, *supra* note 5, at 31 (explaining rules subject to exemptions under sections 808 and 804(2) and that "all such rules must ultimately be submitted for review.").

202. *See* Dooling, *supra* note 40, at 416 ("If an agency fails to fulfill its legal obligation to notify Congress of its rule, that essentially deprives Congress of its ability to exercise oversight."); *see also* CAREY & BRANNON, *supra* note 34, at 21 (outlining this process).

203. CAREY & BRANNON, *supra* note 34, at 21.

204. *Id.*

205. CAREY & DAVIS, *supra* note 52, at 13.

206. CAREY & BRANNON, *supra* note 34, at 2.

207. U.S. Gov't Accountability Off., Opinion Letter on Applicability of the Congressional Review Act to Revenue Procedure 2018-38 (Nov. 30, 2018), https://www.gao.gov/assets/b-330376.pdf [https://perma.cc/UT73-YM2A] (on whether Internal Revenue Service Revenue Procedure 2018-38 is a "rule" under the CRA).

208. Letter from Robert P. Murphy, Gen. Couns., U.S. Gen. Accounting Off., to Larry E. Craig, Chairman, Subcomm. on Forests and Pub. Land Mgmt. of the S. Comm. on Energy & Res., GAO-B-274505 (Sept. 16, 1996), https://www.gao.gov/assets/370/365493.pdf [https://perma.cc/H7XV-PVUR].

tion date for CRA time periods.[209] The House passed a joint resolution following a GAO opinion for the first time in 2012,[210] and Congress overturned a rule pursuant to a GAO opinion for the first time in 2018.[211] As of 2020, GAO had issued 30 opinions,[212] concluding that the relevant agency action was a rule 17 times (i.e., 57% of the time).[213]

The role that GAO performs in this process, whereby it issues opinions on whether an agency action constitutes a "rule" under the CRA, is not a responsibility that the CRA explicitly assigns to GAO.[214] Instead, GAO performs this function as part of its general role as an adviser to Congress—a role in which GAO regularly issues opinions in response to specific Member and committee inquiries.[215] In this capacity, GAO issues formal legal opinions pertaining to a variety of topics.[216] It is only due to members of Congress making use of this general GAO function—and the practice of the parliamentarians deferring to the assessments GAO offers—that Congress has found a sub-statutory solution to the CRA's silence about what results when an agency fails to submit an 801(a) report for a rule.

1. The Argument for Codification

It would be wise for Congress to formalize this GAO responsibility into the statute of the CRA, along with its consequence for expedited procedures. Two insights support this conclusion. First, the GAO-

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209. S.J. Res. 44, 110th Cong. (2008). On debate surrounding this joint resolution's use of the GAO opinion as a timing trigger, see CAREY & BRANNON, *supra* note 34, at 24 n.199.

210. H.R.J. Res. 118, 112th Cong. (2012); *see also* CAREY & BRANNON, *supra* note 34, at 24.

211. S.J. Res. 57, 115th Cong. (2018); *see also* CAREY & BRANNON, *supra* note 34, at 24.

212. Dooling, *supra* note 40, at 405 (noting 29 instances as of December 2020); *see* U.S. Gov't Accountability Off., Opinion Letter on Applicability of the Congressional Review Act to Fair Housing Act Guidance on Assistance Animals (Dec. 17, 2020), https://www.gao.gov/products/b-331171 [https://perma.cc/5TPH-BEE].

213. Dooling, *supra* note 40, at 405 (reporting 16 such conclusions out of 29 opinions issued by December 2020). This counts multiple opinions in the same letter separately. *Id.* at 405 n. 84.

214. The only responsibility placed upon GAO by the CRA is the obligation to submit a report to committees of jurisdiction on major rules. 5 U.S.C. § 801(a)(2)(A); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-268T, CONGRESSIONAL REVIEW ACT 2 (2007), https://www.gao.gov/assets/gao-08-268t.pdf [https://perma.cc/MFK9-7S6P] ("CRA is silent as to GAO's role relating to the nonmajor rules.").

215. *See Tongass Hearing*, *supra* note 39 (noting that CRA opinions are "done in our role as adviser to the Congress," in this case "in response to the request of three chairmen of congressional committees"). On the congressional practice of lodging inquiries with GAO, see U.S GOV'T ACCOUNTABILITY OFF., GAO-19-1SP, PERFORMANCE AND ACCOUNTABILITY REPORT 5 (2018) (noting that in fiscal year 2018, GAO "received 786 requests for work from . . . the standing committees of the Congress").

216. *See* Dooling, *supra* note 40, at 394 (noting CRA opinions as part of the GAO's broader "legal opinion function").

driven process that Congress has created for itself is a logical one—and one that appears to function reasonably well in practice. Second, there are benefits that would result from taking this practice, which now transpires at a sub-statutory level, and codifying it into law.

To begin, there appears to be little reason to revise the ad hoc process that Congress has created. To initiate CRA review in the absence of an agency submission, some actor inevitably must make an initial determination that an agency action qualifies as a "rule" under the CRA.[217] GAO is well-positioned to be that actor for a variety of reasons. For one thing, the institutional strengths of GAO position it to perform this function in an effective and consensus-building manner. GAO has an admirable reputation for independence[218]—a reputation only bolstered by its history of CRA opinions where it has concluded in nearly half of its inquiries that agency actions were not rules.[219] GAO also has a strong tradition of defending its conclusions in thorough, well-argued written publications—a tradition of reasoned adjudication that gives its assessments a quasi-judicial dimension of legitimacy.[220] This tradition is buttressed by its decision-making processes, such as proactively seeking the views of the relevant agency prior to issuance of any opinion on a rule.[221] And its longstanding preference for transparency leads it to publish most of its work products[222]—a practice it has similarly extended to its GAO opinions and that makes its assessments more predictable and understandable.[223] These institutional features of GAO make it an appealing actor to handle CRA determinations that can implicate the delicate relationship between the branches of government—particularly compared to other congressional offices, which often tend toward confidentiality

217. The CRA is silent about who makes this determination. This differs with its treatment of "major rules"—a categorization it explicitly assigns to the OIRA Administrator. *See* 5 U.S.C. § 804(2).

218. *See* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. Pa. L. Rev. 1541, 1587–94 (2020); Dooling, *supra* note 40, at 402 ("This is particularly the case because of the GAO's reputation as a reasonably independent, expert fact finder and arbiter.").

219. Dooling, *supra* note 40, at 405.

220. *Id.* at 410–11 ("This reason-giving, somewhat akin to the reason-giving that an agency provides in its proposed and final rules or that a judge provides in his opinions, could similarly be a way to bolster the legitimacy of the GAO's actions.").

221. *See* U.S. Gov't Accountability Off., GAO-06-1064SP, Procedures and Practices for Legal Decisions and Opinions (2006), www.gao.gov/products/GAO-06-1064SP [https://perma.cc/JY2E-KHH8].

222. *See* Cross & Gluck, *supra* note 218, at 1593 ("With respect to its analyses and methodology, the office's work is structured by transparency. GAO publishes nearly all of its reports and studies for public consumption—even if members of Congress would prefer the reports to be suppressed.").

223. *See* Dooling, *supra* note 40, at 410–11 (noting these virtues and their role in reinforcing GAO's legitimacy).

practices that can make rulings appear cryptic and confusing to outsiders.[224]

Entrusting GAO with this responsibility also makes sense because, as mentioned above, it dovetails with GAO's existing statutory role and responsibilities to Congress—a fact that made GAO amenable to performing this function in the first place. As Bridget Dooling put it: "Given the GAO's other legal work to prepare legal opinions and decisions on federal bid protests, appropriations law, and other matters, legislators made a reasonable choice [in using GAO for this CRA function]."[225] GAO therefore assumed this responsibility not only with institutional strengths that recommended it, but also with specific experience developing legal opinions of the sort required for these CRA determinations.

Using GAO for this role also makes sense because, at this point, GAO has a quarter-century of experience with the analysis required to make these determinations. This GAO experience extends well beyond the thirty opinions the Office has issued in response to Member CRA inquiries. Since the earliest days of the CRA, GAO has voluntarily maintained a database that chronicles agency submissions under the Act.[226] Partly to evaluate the comprehensiveness of this database, GAO also has conducted annual reviews of the Federal Register to identify rules that fall within the CRA, yet with respect to which agencies failed to submit an 801(a) report.[227] As with the database itself, GAO has conducted such reviews essentially since the CRA was enacted.[228] While GAO limited the annual review in 2012 to major rules,[229] the ongoing practice of conducting such a review—which requires GAO to make determinations of whether agency actions con-

224. For a breakdown of the differing transparency practices of nonpartisan congressional offices, see Cross & Gluck, *supra* note 218, at 1625–28.

225. Dooling, *supra* note 40, at 402.

226. *See 10th Anniversary of the Congressional Review Act*, *supra* note 69, at 5 (statement of J. Christopher Mihm, Managing Director for Strategic Issues, U.S. Government Accountability Office); COPELAND, *supra* note 41, at 6 (2009), https://www.everycrsreport.com/files/20091229_R40997_9c378c3e951a9a0272213d2ac51818214ed85029.pdf [https://perma.cc/577B-ZM2H] ("When agencies submit rules to GAO, GAO enters them into a publicly available database that it maintains on its website.").

227. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 214, at 3 ("GAO has conducted yearly reviews to determine whether all final rules covered by CRA and published in the Federal Register were filed with GAO. . . . Additionally, GAO monitors the Federal Register daily for major rules under CRA to ensure that we receive all such rules.").

228. *See, e.g.*, U.S. GEN. ACCT. OFF., GAO/T-OGC-98-38, CONGRESSIONAL REVIEW ACT: IMPLEMENTATION AND COORDINATION (1998), https://www.gao.gov/assets/t-ogc-98-38.pdf [https://perma.cc/XE8B-7U5A] (reviewing rules published in Federal Register from October 1, 1996, to July 31, 1997).

229. CAREY & BRANNON, *supra* note 34, at 20.

stitute "rules" under the CRA—nonetheless has given GAO a wealth of experience with these pivotal CRA determinations.[230]

Finally, assignment of this task to GAO is logical because it defers to congressional wisdom and preferences. Through the ad hoc process it has constructed, Congress has shown its preference for the actor it prefers to empower with this CRA determination. By respecting that congressional choice, use of GAO is respectful of the fact that Members of Congress may have insights about the comparative benefits and drawbacks of using different potential actors—insights that may be inaccessible to congressional outsiders. These might include Members' comparative trust in different institutional actors, as well as their assessments of which actors can best balance the task with existing workloads. Deference to Congress's choice holds the potential to capture that institutional wisdom and leverage it to an optimally functioning CRA.

For these reasons, it makes sense to continue GAO's role as the actor that determines whether an agency action is a "rule," and that thereby initiates applicable time periods under the CRA when agencies fail to submit 801(a) reports. Moreover, there are good reasons to codify this practice in statute, rather than simply allowing it to continue as an informal, sub-statutory process. Three of these reasons are particularly worth noting.

First, as discussed in Section III.A, the myriad CRA elements that rely on informal parliamentarian interpretations make the statute maddeningly inaccessible to those (both within and without Congress) who do not have extensive insider experience with its implementation. This problem is exacerbated by the lack of any recent publication of Senate parliamentary precedents.[231] Nowhere is this more true than with respect to the GAO practice of initiating time windows under the Act—a significant policy, and one completely invisible to those who rely on statutory text to understand the CRA. Formal enactment of this policy would put relevant actors on notice of the process of determining whether an agency action is a "rule" despite the absence of an 801(a) report—and of the fact that a broader universe of agency actions might be covered than they otherwise might realize or expect.

Second, the absence of a statutory mandate for this GAO function presumably means that at any point, GAO might voluntarily stop performing it. Bridget Dooling has noted that, as the CRA has become more frequently used and more politically controversial, the incen-

230. *See id.* at 23 ("The question of whether an agency action is a rule under the CRA is also a question of whether it should be submitted; arguably, then, GAO is addressing a very similar question in its opinions on whether certain agency actions are covered as it was in its initial reports to OIRA on agency compliance with the submission requirement.").

231. *See* RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28 (1992), https://www.govinfo.gov/app/details/GPO-RIDDICK-1992 [https://perma.cc/EY9C-32J6].

tives for GAO to extricate itself from the CRA process increase.[232] Codification of GAO's role could remove any concern about this possibility, ensuring that GAO continues to serve this important function under the CRA—even as the Act becomes more popular (and potentially more polarizing).

Third, the amount of time it takes GAO to respond to congressional CRA inquiries under the current approach can vary significantly. In one recent instance, for example, GAO responded nearly three months after an inquiry by the chairman and ranking member of the Senate Armed Services Committee.[233] These delays can be frustrating when they relate to agency rules that Congress wishes to address with some expediency. Presumably, this delay in GAO responses today occurs partly because GAO prioritizes work that it is statutorily required to perform—which, of course, does not currently include its CRA determinations. Simply by codifying this GAO responsibility, therefore, Congress may induce GAO to prioritize its CRA work, leading to GAO responses that are more consistently timely.

Codification of this GAO role should not raise constitutional problems. Under this approach, the codified policy would simply provide that, in the absence of a submitted 801(a) report, each chamber will treat the *Congressional Record* publication of a GAO determination that an agency action is a "rule" as an event that triggers access to the expedited process outlined in section 802 of the CRA. By specifying this, Congress can clarify that a GAO determination is not a determination for purposes of section 801(a) of the CRA, which determines whether or when a rule is effective.[234] Rather, because the determination would be purely for purposes of section 802, its sole consequence would be as a condition precedent to Congress having access to specified chamber procedures. That is a consequence for Congress's internal cameral rules and operations—functions constitutionally entrusted to each chamber of Congress.[235] Since this would be an exercise of Congress's rulemaking power, the limits outlined in *Chadha* would be inapplicable, as those limits apply specifically to Congress's legislative power—i.e., its power to bind actors beyond Congress.[236] Nor would concerns raised by *Bowsher v. Synar* be applicable—concerns limited

232. Dooling, *supra* note 40, at 411.

233. U.S. Gov't Accountability Off., Opinion Letter on Applicability of the Congressional Review Act to Ligado Amendment to License Modification Applications (Aug. 13, 2020), https://www.gao.gov/products/b-332233 [https://perma.cc/KH8V-Q4H6] (issuing response on August 13, 2020, to request noted as filed on May 22, 2020).

234. *See generally* 5 U.S.C. § 801(a).

235. U.S. CONST. art. I, § 5.

236. As the Court put it in *Chadha*, the analysis is driven by "whether [the relevant actions] contain matter which is properly to be regarded as legislative in its character and effect," Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983) (quoting S. REP. NO. 54-1335, at 8 (1897)), and whether it "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney

to GAO functions that have the effect of commanding executive-branch action (and that therefore are executive in character), not functions that have consequences exclusively for internal congressional practice.[237] In sum, while actions with ramifications outside of Congress (e.g., binding outside parties; commanding executive-branch actors) may raise constitutional concerns absent bicameralism and presentment, actions that have only internal procedural ramifications for Congress are squarely entrusted to Congress, and they may involve determinations by such congressional offices as the chambers deem appropriate. Use of GAO opinions as a trigger for CRA time periods, an action of the latter type, should be constitutionally unproblematic.[238]

2. Recommended Ancillary Policies

Based on the foregoing analysis, the codification of GAO's current role in the CRA process appears both logical and constitutional. As such, Congress should consider adopting it. And if Congress does take this approach, it also should strongly consider adopting several related, ancillary policies.

First, under this formalized CRA initiation process, it would be wise for Congress to make the option to solicit a GAO opinion available to legislators in both chambers. This would be a logical extension of the core structure of the CRA—a statute that, in its original design, envisioned legislators in each chamber as having equal ability to introduce joint resolutions of disapproval under the CRA.[239] This introduction policy aimed to let either chamber initiate congressional deliberation over rules.[240] Allowing either chamber to solicit a GAO opinion for purposes of initiating CRA review would extend that policy, applying it to the anomalous situation where an agency has failed to submit an 801(a) report.

Admittedly, this proposed ancillary policy would create the seemingly odd situation in which legislators in the House of Representatives could initiate (albeit indirectly) a finite window for expedited

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General, Executive Branch officials and [private parties], all outside the Legislative Branch," *id.*

237. *See* Bowsher v. Synar, 478 U.S. 714, 733 (1986) ("The executive nature of the Comptroller General's functions under the Act is revealed in § 252(a)(3) which gives the Comptroller General the ultimate authority to determine the budget cuts to be made. Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation . . . the directive of the Comptroller General as to the budget reductions . . . .").

238. *See also* Dooling, *supra* note 40, at 404–05 ("Ultimately, however, the Constitution gives Congress authority over its own procedures. If Congress wants to rely on the GAO's legal opinions, that choice probably cannot be successfully challenged.").

239. 5 U.S.C. § 802(a).

240. *See generally id.*

procedures that, under the CRA, exist solely in the Senate.[241] Yet this should not be viewed as a significant problem. The CRA already envisions Senate expedited procedures that become available upon agency submission of 801(a) reports and publication of rules in the Federal Register. As such, the CRA does not envision the Senate as controlling the time periods for its access to expedited CRA procedures. Moreover, a core goal of the CRA initiation process was to enable expeditious and timely review of agency rules. The option to initiate CRA review via a GAO opinion would exist specifically for instances where agencies have had the opportunity to submit an 801(a) report, yet failed to do so—an option that, by definition, will be used at a later date than that envisioned by the CRA.[242] Allowing the Senate to unilaterally add further delay to the initiation of these time windows, and to do so in spite of the House's desire for expeditious action, therefore seems to be the policy option that is out of step with the values enshrined in the CRA.

Allowing the House to initiate a CRA review also makes sense because such initiation is useful to Members of Congress for reasons beyond its procedural ramifications. Commentators have noted that use (or threatened use) of this initiation power can generate information on agency actions,[243] incentivize agency compliance with statutory requirements and congressional policy preferences,[244] enhance legisla-

241. Unlike some other expedited procedure statutes, the CRA does not provide for any procedures in the House other than via its reconciliation mechanism. *See generally id.* § 802.

242. This assumes that the GAO-initiated option, because it would be made available only for rules an agency fails to submit, would become available only after a reasonable opportunity for agency submission has passed. For the manner in which the Senate Parliamentarian has addressed initiation of windows in the face of agency failure to take prerequisite actions, see 164 CONG. REC. S6380–81 (daily ed. Sept. 28, 2018) (statement of Sen. Ron Wyden) (noting parliamentarian request for agency confirmation in writing that a rule would not be published in the Federal Register as a prerequisite to the Senate action window opening without such publication).

243. *See 10th Anniversary of the Congressional Review Act*, *supra* note 69, at 6 (statement of J. Christopher Mihm, Managing Director for Strategic Issues, U.S. Government Accountability Office) ("[A]s we have found in our review of the information generated on Federal mandates under [the Unfunded Mandates Reform Act], the benefits of compiling and making information available on potential Federal actions should not be underestimated."); *id.* at 24 (statement of Todd F. Gaziano, Esq., Senior Fellow in Legal Studies & Director for Legal & Judicial Studies, The Heritage Foundation) (citing purpose of CRA "to advance public record-keeping of agency rulemaking" and "better catalogue the corpus of agency rules that affect the public").

244. *See 1997 CRA Hearing*, *supra* note 106, at 2 (statement of Rep. Gekas) (arguing that CRA "will make sure, in my judgment, that the agencies will be more careful, more predicting, in the outcome of their rules as they go about the business of promulgating same"); SUBCOMM. ON COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REP. ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY 72–73 (Comm. Print No. 10 2006); *10th Anniversary of the Congressional Review Act*, *supra* note 69, at 24 (statement of Todd F. Gaziano Esq., Senior Fellow in Legal Studies & Director for Legal & Judicial Studies, The Heritage Foundation); *2007 CRA Hearing*, *supra* note 16, at 26

tive accountability for agency rulemaking,[245] increase opportunities for public engagement with rulemaking,[246] spur future opportunities to overturn rules via congressional action,[247] clarify CRA boundaries,[248] signal engagement to constituents,[249] and establish a record of opposition to administration activity.[250] In fact, these extra-procedural benefits may be what truly makes the CRA non-duplicative with other forms of congressional action to overturn rules, such as appropriations riders.[251] It is difficult to see why this suite of benefits should not be afforded to both chambers in the absence of a submitted 801(a) report, just as they are when an agency does submit such a report (and publishes the relevant rule in the Federal Register). Providing the House with the power to solicit GAO opinions on CRA matters would enable this.

As a second ancillary policy, Congress should consider imposing a deadline on GAO for its issuance of requested CRA legal opinions. In the past, as already noted, there has been significant variation in the lengths of delay for GAO answers to congressional CRA inquiries.[252] This variation has the potential to frustrate Congress' desire for expe-

(statement of Sally Katzen, Visiting Professor, George Mason University School of Law); *10th Anniversary of the Congressional Review Act*, *supra* note 69, at 6 (statement of J. Christopher Mihm, Managing Director for Strategic Issues, U.S. Government Accountability Office); Dooling, *supra* note 40, at 415; CAREY & DAVIS, *supra* note 52, at 3.

245. *See 10th Anniversary of the Congressional Review Act*, *supra* note 69, at 25 (statement of Todd F. Gaziano, Esq., Senior Fellow in Legal Studies & Director for Legal & Judicial Studies, The Heritage Foundation) (noting a purpose "to enhance legislative accountability for agency rulemaking").

246. *See* 142 CONG. REC. 6926 (1996) ("Congressional review gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules.").

247. *See* ROSENBERG, *supra* note 5, at 15 ("In all other cases, if there is any discernible pattern to the introduced resolutions, it is to exert pressure on the subject agencies to modify or withdraw the rule, or to elicit support of Members, which in some instances was successful."); Dooling, *supra* note 40, at 415 (noting one function as to signal "to other legislators or political actors as part of larger debates and negotiations").

248. *See* Dooling, *supra* note 40, at 414 (noting "genuine uncertainty" as a factor motivating legislator inquiries).

249. *See id.* at 415 (noting capacity to signal "to constituents and other public stakeholders, as a way to show action").

250. *See* CAREY & DAVIS, *supra* note 52, at 3 (noting that CRA "provides for a relatively straightforward process through which a Member can make clear his or her opposition to a rule"); REYNOLDS, *supra* note 24, at 193 (documenting Senate use in 2015–16 to "give their members a chance to go on record in opposition to the Obama administration's priorities").

251. *See, e.g.*, *10th Anniversary of the Congressional Review Act*, *supra* note 69, at 31 (statement of Todd F. Gaziano, Esq., Senior Fellow in Legal Studies & Director for Legal & Judicial Studies, The Heritage Foundation) ("One reason Congress may not have used the CRA as often as anticipated is that Congress has other tools at its disposal, such as legislative riders on appropriations bills, to accomplish the same end.").

252. *See generally* Congressional Review Act, *supra* note 6.

ditious action on agency rules, as well as the desire of private actors for closure and certainty of regulatory actions. Simply codifying GAO's obligation to provide these answers may help expedite this GAO process, as discussed above.[253] Yet Congress can further ensure that this GAO process is conducted expeditiously by making explicit its expected response time, thereby providing GAO with a bright-line time constraint that can guide its CRA reviews.

A third ancillary policy Congress ought to consider is a time limitation on its own ability to use the GAO-initiated process for CRA review. Absent such a limitation, Congress theoretically could use this process to initiate reviews for any rule with respect to which an agency had failed to submit an 801(a) report—even a rule issued decades prior. Indeed, some commentators recently advocated for Congress to use the ad hoc initiation process in precisely this manner,[254] and Congress did use this process in 2018 to reject a rule issued in 2013.[255] As Bridget Dooling has documented, this 2018 action corresponded with a broader trend of Congress requesting GAO legal opinions with respect to rules issued significantly farther back in time.[256]

There are several reasons why Congress should consider curtailing this emerging practice. Most importantly, it should do so because the practice undermines a key value of the CRA. As CRS has aptly observed, the Act "contemplates a speedy, definitive and limited process."[257] It does so as part of its effort to provide regulated entities with closure and certainty, allowing them to move forward with confidence about the rules that will govern their activities without concern about CRA review, as previously discussed.[258] As several commentators have noted, an unlimited window for Congress to utilize the

253. *Id.*

254. *See* Kimberley A. Strassel, *A GOP Regulatory Game Changer*, WALL ST. J. (Jan. 26, 2017, 7:48 PM), https://www.wsj.com/articles/a-gop-regulatory-game-changer-1485478085 [https://perma.cc/CLU3-E99N]; Jonathan Wood & Todd Gaziano, *Three Cheers for the Congressional Review Act*, NAT'L REV. (June 29, 2017, 8:00 AM), https://www.nationalreview.com/2017/06/congressional-review-act-finally-some-accountability-washington [https://perma.cc/9UAH-WW3J] (arguing that the review period could still be initiated for many rules for which agencies had not submitted 801(a) reports).

255. *See* S.J. Res. 57, 115th Cong. (2018). For the overturned rule, see CONSUMER FIN. PROT. BUREAU, CFPB BULL. 2013-02 (2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf [https://perma.cc/T8HX-D7E2].

256. Dooling, *supra* note 40, at 407 (noting beginning in 2017 a nearly tenfold change in average days before legal opinion requested, from 89 to 842 days, with one requested 2944 days later).

257. *See* ROSENBERG, *supra* note 5, at 24.

258. Dooling, *supra* note 40, at 416 ("The tradeoffs are somewhat analogous to those presented by statutes of limitations, most notably reliance interests. With a statute of limitations, valid claims trade off against the ability for parties to move forward. In the rulemaking context, members of the public may have invested resources or made other decisions in reliance upon the contents of an agency action that the GAO later opines is a rule and is therefore suddenly vulnerable.").

GAO-driven review process undermines these values.[259] This unlimited window threatens to introduce radical uncertainty into established regulatory regimes—something the CRA sought to avoid. To preserve this value under the CRA, it therefore is logical to delimit the temporal scope of this policy.

Imposing a time constraint on the GAO-initiated process also is logical because, absent such a constraint, agencies might be induced to overwhelm Congress with a deluge of submissions. A constant concern with the CRA is the possibility of agencies overwhelming Congress with paper.[260] If GAO-initiated review existed without a time limit, there would be strong incentives for agencies to review their history of rulemaking for unsubmitted rules and, to prevent later CRA review of these rules, submit all such rules to Congress immediately (particularly during periods in which parties controlling Congress are sympathetic to existing regulatory regimes). As Part III discussed, congressional offices are already managing a daunting administrative task in handling the volume of CRA submissions—a burden Congress should look to lessen, not exacerbate. Agencies submitting every action that might possibly constitute a "rule" tracing back to the late-1990s, yet that was not previously submitted, would be antithetical to this goal. So would an approach to GAO initiation that, going forward, encourages agencies to submit every action that might possibly constitute a "rule," even where the agency genuinely believes it does not. Yet an open-ended congressional opportunity for GAO-initiated review, by creating tremendous regulatory uncertainty for unsubmitted rules, would incentivize precisely that approach.

It also makes sense to impose a time constraint on GAO-initiated review for the same reason that statutes of limitations often are used in the judicial context: it prevents factfinding inquiries that are exceedingly difficult to conduct accurately after the passage of significant time.[261] Even for rules issued recently, it may sometimes be

259. *Id.* at 407 ("This span of time is important because Congress limited the reach of the CRA to a set period of time—and the longer the rule is vulnerable, the more it strains the idea that the CRA provides Congress with limited time to review the rule."); Seidenfeld, *supra* note 21, at 1084 ("The statutory architecture of fast-track review manifests an intent that such motions be made shortly after the agency issues its rule.").

260. *See, e.g.*, H. COMM. ON GOV'T REFORM, NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS: SEVENTH REPORT, H.R. REP. NO. 106–1009, at 541–42 (2000), https://www.congress.gov/106/crpt/hrpt1009/CRPT-106hrpt1009.pdf [https://perma.cc/7QD5-Q8S2] (noting concerns with feasibility of agency submission of all guidance documents, as "when the subcommittee asked only three agencies for a subset of their guidance documents produced since 1996, it received compendiums totaling over 7,000 documents").

261. For a broader comparison to statutes of limitations, see Dooling, *supra* note 40, at 416–17 ("This question is worth additional consideration, perhaps borrowing from statutes of limitations and other analogous doctrines to shed light on the dilemma. With statutes of limitations, for example, the clock can start again in certain situations. So, too, with the CRA?").

difficult to establish or refute a claim that a rule in fact was submitted (or was lost in the mail system, for example). An inquiry into such an issue for a rule from the late 1990s poses a significantly more daunting task—one that would seemingly invite contestation and inter-branch disagreement and conflict. Providing a time limitation would forestall this sort of difficult and divisive evidentiary inquiry.

Finally, many of the rules that agencies fail to submit may be instances of published guidance for regulated parties.[262] This category of agency action is especially likely to fall on the borderline of the CRA's definition of a "rule." Many view published guidance of this sort as beneficial; it advises all regulated parties about the agency's intended application of the law rather than making such insights differentially available only to those parties with heightened access to informal communicative channels with the agency.[263] If uncertainties about the CRA's coverage of published guidance translate into a radical, open-ended instability of such guidance, however, one could reasonably expect agencies simply to move away from issuing this form of guidance.[264] This would be an unfortunate consequence for both agencies and regulated parties—and one that Congress would be wise to forestall via time limits on the GAO-initiated process of CRA review. For a variety of reasons, therefore, it would be wise for Congress to limit the availability of this review process.

There is one last ancillary policy that Congress also may wish to consider: it may want to provide GAO with additional resources to support this newly formalized CRA role. With the codification of this GAO obligation, there presumably will be a heightened expectation for GAO to issue its opinions in a timely manner, as discussed above. There also may be some increase in the use of this GAO-driven process as additional actors become aware of it as a policy option. These factors may increase the workload for GAO as its current role under the CRA is formalized. GAO apparently has indicated in the past that it has concerns about an expanded CRA workload given its resource limitations.[265] To address this concern, Congress may wish to pair its

262. *10th Anniversary of the Congressional Review Act*, *supra* note 69, at 10, 12 (statement of J. Christopher Mihm, Managing Director for Strategic Issues, U.S. Government Accountability Office) (noting that most rules not submitted appear to be non-major rules); *id.* at 30 (statement of Todd F. Gaziano, Esq., Senior Fellow in Legal Studies & Director for Legal & Judicial Studies, The Heritage Foundation).

263. For a thorough discussion of published guidance that includes analysis of these beneficial dimensions for regulated parties, see, for example, NICHOLAS R. PARRILLO, ADMINISTRATIVE CONFERENCE OF THE U.S., FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE (2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf [https://perma.cc/CE4B-XSK5].

264. *See, e.g.*, H.R. REP. NO. 106–1009, at 542.

265. *See* COPELAND, *supra* note 41, at 22 ("Both GAO and OIRA have, however, indicated to CRS that they currently have limited resources to take on additional responsibilities for CRA compliance enforcement."); *see also* CROSS, *supra* note 9.

formal expansion of GAO responsibilities with a corresponding expansion of GAO resources.

C. *Electronic Report Submissions*

Finally, while many institutions have transitioned to using electronic documents (both inside and outside the federal government), Congress still receives 801(a) reports in hard copy. A number of factors argue in favor of a change to electronic submission of these 801(a) reports. This Section considers the benefits that such a transition could afford, and it evaluates potential concerns with this policy change—concerns it ultimately finds unpersuasive, but that it acknowledges might counsel toward concurrent adoption of identifiable ancillary policies.

1. Benefits

A transition to electronic submission of 801(a) reports likely would provide a number of notable benefits. First, electronic submission might provide an opportunity to reduce the significant administrative burdens imposed by the CRA. The CRA tripled executive communications to Congress, resulting in a staggering increase in the volume of documents Congress must process.[266] As previously noted, approximately 90,000 rules have been submitted under the CRA as of October 2021.[267] This volume of submissions is received in addition to all other executive communications, adding thousands of documents annually to an already formidable workload for Congress.[268]

That workload is borne by a small cadre of individuals. Responsibility for receiving, cataloguing, referring, and transmitting these documents falls to each chamber's parliamentarian and clerk offices.[269] The House Parliamentarian's office consists of 13 individuals, and the

266. *2007 CRA Hearing*, *supra* note 16, at 6 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives) (noting that "executive communications have roughly tripled").

267. *See supra* note 41 and accompanying text.

268. The House Parliamentarian has testified that in the last Congress prior to the CRA, "the executive departments transmitted 4,135 communications to the Speaker that warranted referral to committee." *2007 CRA Hearing*, *supra* note 16, at 5 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives).

269. *10th Anniversary of the Congressional Review Act*, *supra* note 69, at 41 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives) ("The Speaker delegates to the Parliamentarian the task of identifying committees of referral . . . the sheer volume of them affects not only the parliamentarians who must assess their subject matter but also the clerks who must move the paper and account for dates of transmittal."). In the clerk's office, this task belongs primarily to the Legislative Resource Center. *See id.* at 50 (referring to "the movement of the paper and the tracking of submittal dates and so forth, the things that the clerk's office has to do with the flow" and "the Legislative Resource Center and the others who have to move this paper").

Senate Parliamentarian's office consists of three individuals.[270] These individuals handle the entirety of their offices' responsibilities, which of course extend far beyond CRA duties. The House Office of the Clerk and the parallel portion of the Secretary of the Senate's office are similarly small. In the House clerk's office, for example, just two individuals have responsibility for handling all communications to the chamber.[271]

Explaining the ramifications of the CRA for such offices, one House Parliamentarian remarked: "For a small operation like ours [the paperwork burden of the CRA] is more significant than might meet the eye."[272] And, indeed, there is significant agreement that paperwork under the CRA imposes troubling burdens on these offices. This concern has been echoed by Members of Congress,[273] former administrative officials,[274] and academics.[275] These observers have described CRA submissions as creating "a deluge of paperwork"[276] and "flood of paperwork"[277] for the parliamentarians and clerks, one that has imposed "significant administrative bur-

270. Cross & Gluck, *supra* note 218, at 1600.

271. *See 2007 CRA Hearing*, *supra* note 16, at 7–8 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives) (describing the role of the "[t]wo clerks whose sole duty it is to process communications to the House" in the CRA process).

272. *Id*. at 32 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives).

273. *See, e.g.*, *id.* at 2 (statement of Hon. Linda T. Sánchez, Rep. of California, Chairwoman, Subcomm. on Com. & Admin. L.) ("[T]he parliamentarians and the clerk's office in the House and Senate have experienced a deluge of paperwork."); *id.* at 34 (statement of Hon. Chris Cannon, Rep. of Utah, Ranking Member, Subcomm. on Com. & Admin. L.) ("And so, we find ourselves with an administrative process that does not take into consideration the vast amount of activity that individual bureaucrats and cumulatively agencies have to participate in. And in that mix, I know that our parliamentarian has a huge burden.").

274. *Id.* at 29 (statement of Sally Katzen, Visiting Professor, George Mason University School of Law) ("[T]here are concerns about the administrative burden on the Parliamentarian (and others) resulting from the flood of paperwork that is generated by the Act's requirements.").

275. *See, e.g.*, Cohen & Strauss, *supra* note 139, at 103 ("Congress has spread its resources extremely thin.").

276. *2007 CRA Hearing*, *supra* note 16, at 2 (statement of Hon. Linda T. Sánchez, Rep. of California, Chairwoman, Subcomm. on Com. & Admin. L.).

277. *Id.* at 29 (statement of Sally Katzen, Visiting Professor, George Mason University School of Law).

dens"[278] and "a huge burden"[279] on the offices and has "spread [Congress's] resources extremely thin."[280]

To a certain extent, this administrative burden admittedly will persist so long as agencies must submit all rules to Congress. And, as a solution to this problem, a pivot to electronic submissions is only one possible solution among several. Past reformers have sometimes suggested more drastic reforms, such as reducing or eliminating submissions to Congress.[281] A transition to electronic submissions would have less of an impact upon administrative burdens than such an alternative approach.

Nonetheless, it appears that use of electronic submissions would provide material improvement in this regard, as the administrative burden imposed by the CRA is especially acute when submission is made via paper documents. The process often begins with a confused agency employee or courier wandering the Capitol Visitor Center, a large stack of documents in hand, hoping to find the correct physical office in which to submit them.[282] From there, as the House Parliamentarian explained in a 2007 hearing:

> These couriers often require a hand-receipt from somebody on the staff of the Speaker or the Parliamentarian. . . . [E]ach communication must be logged in by the Office of the Parliamentarian.
>
> In addition to date-stamping each submission, the Office of the Parliamentarian tries to retain outer packaging or other contact information in case the rule—as is not infrequently the case—must be returned to the agency for failure to comply with the CRA or to conform to standards regarding communications transmitted to the Speaker. After documenting the receipt of a communication, a parliamentarian must annotate the committee of referral on each rule.

278. *Id.* at 1 (statement of Hon. Linda T. Sánchez, Rep. of California, Chairwoman, Subcomm. on Com. & Admin. L.); *see also* H.R. REP. NO. 110-700, at 3 (2008) ("[T]hose charged with implementing this Act have faced significant administrative burdens."); SUBCOMM. ON COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REP. ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY 105 (Comm. Print No. 10 2006) (noting "the paperwork burden on the Parliamentarian's office").

279. *2007 CRA Hearing*, *supra* note 16, at 34 (statement of Hon. Chris Cannon, Rep. of Utah, Ranking Member, Subcomm. on Com. & Admin. L.).

280. Cohen & Strauss, *supra* note 139, at 103.

281. *See, e.g.*, *10th Anniversary of the Congressional Review Act*, *supra* note 69, at 38 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives) (suggesting an approach targeted at "a more selective universe of rulemaking actions"); Cohen & Strauss, *supra* note 139, at 102–03 ("The great volume of regulatory actions that Congress will theoretically be called upon to consider means, in most cases, that Congress will fail to provide useful guidance on agency implementation of statutes.").

282. *See* H.R. REP. NO. 110-700, at 4 (noting that "agencies must often resort to having copies of their rules hand-delivered by courier to the House and Senate").

> Every few days, a parliamentarian calls the staff of the Clerk to advise that another batch of submissions is ready to be processed. Two clerks whose sole duty it is to process communications to the House then transport the communications—often voluminous enough to require a hand-truck—to their office, where they are counted and sorted. The clerks then enter all the relevant information regarding each rule and its referral into a database and transmit the same information to the Government Printing Office (for printing in the Congressional Record) and to the Legislative Information Service. Finally, the clerks hand-deliver each rule to the committee of referral.[283]

Summarizing the challenges posed by repeating this process thousands of times each year, the Parliamentarian added: "This flow of paper poses a significant increment of workload for a range of individuals. . . . [T]he sheer volume of [paper] affects not only the parliamentarians who must assess their subject matter but also the individuals who must move the paper and account for dates of transmittal."[284]

Numerous actors who have investigated this issue have concluded that a pivot to electronic submissions would help alleviate this burden, at least somewhat. The aforementioned House Parliamentarian has remarked that electronic submissions would "make more efficient the movement of the paper and the tracking of submittal dates," "materially assist [those] who have to move this paper," and potentially "speed up the referral process."[285] Another former House Parliamentarian concluded that it could "reduce the amount of sheer paperwork that we and the bill clerks undergo every day."[286] Similar conclusions have been proffered by a former Administrator of OIRA[287] and a

283. *2007 CRA Hearing*, *supra* note 16, at 7–8 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives); *see also* Kathleen E. Marchsteiner, Cong. Rsch. Serv., R46661, Strategies for Identifying Reporting Requirements and Submitted Reporting to Congress 10 (2021), https://fas.org/sgp/crs/misc/R46661.pdf [https://perma.cc/4K8V-DBDQ] ("Written reports due to Congress in general are typically submitted as Executive Communications (ECs). The House and Senate Executive Clerks' Offices record the EC submissions and create an abstract to be published in the *Congressional Record*. The actual documents are then given to the congressional committees to which they have been referred by the House or Senate Parliamentarian's Office.").

284. *2007 CRA Hearing*, *supra* note 16, at 7 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives).

285. *10th Anniversary of the Congressional Review Act*, *supra* note 69, at 50 (statement of John V. Sullivan, Parliamentarian, United States House of Representatives); *see also 2007 CRA Hearing*, *supra* note 16, at 32 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives) (testifying of electronic submission, "I think that would be a step" toward reducing paperwork burden); *id.* (noting that "digital is better than analogue in that case"); *id.* at 45 ("That probably would reduce the hours devoted to the referral of CRA communications by a small, but material, amount.").

286. *1997 CRA Hearing*, *supra* note 106, at 50 (statement of Charles W. Johnson, House Parliamentarian).

287. *2007 CRA Hearing*, *supra* note 16, at 27 (statement of Sally Katzen, Visiting Professor, George Mason University School of Law) ("With electronic processing the

House subcommittee.[288] As the former OIRA Administrator remarked: "I am aware that well designed automated systems generally provide significant benefits in terms of both time and operating costs."[289] Such an approach to the CRA, she added, could provide similar benefits without diminishing the notice that Congress receives of pending rules—a virtue that distinguishes it from proposals to eliminate submissions altogether.[290]

In addition to potentially reducing administrative burdens under the Act, a transition to electronic submissions also would provide a second benefit: it would assist with timeliness concerns. As Part II explained, the CRA attaches consequences to the date on which rules are submitted to Congress. This date determines when rules may become effective (for both major[291] and non-major[292] rules), as well as when Congress may introduce disapproval resolutions[293] and when the Senate may use its expedited procedures.[294] As a result, it is important for agencies to have a manner of submitting rules to Congress that is expeditious—and one where congressional receipt is easily tracked and confirmed. In this regard, paper submissions have proved frustrating. Submission by mail can create delays, and the possibility of submissions getting lost via mail introduces troubling uncertainty into the process. This is why agencies often have used couriers and hand-receipts for submissions—a cumbersome solution to the risks and problems of submission by mail.[295] Yet this use of couriers can

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burden on the parliamentarian would be reduced, but systematic and timely notice to the Committees would remain.").

288. Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary, 109th Cong., Interim Rep. on the Administrative Law, Process and Procedure Project for the 21st Century 105 (Comm. Print No. 10 2006) (summarizing testimony that "the paperwork burden on the Parliamentarian's office as well as the uncertainties of proper receipt by Congress and timely redirection to the appropriate committees, and other problems with paper submissions, would be relieved by electronic submissions").

289. *2007 CRA Hearing*, *supra* note 16, at 50 (statement of Sally Katzen, Visiting Professor, George Mason University School of Law).

290. *Id.* at 30 ("With electronic processing, the burden on the Parliamentarian would be reduced, but systematic and timely notice to the committees of agency actions within their jurisdiction would remain.").

291. 5 U.S.C. § 801(a)(3)(A)(i).

292. *Id.* § 801(a)(1)(A).

293. *Id.* § 802(a).

294. *Id.* § 802(e)(1); *see also 10th Anniversary of the Congressional Review Act*, *supra* note 69, at 41 n.3 (statement of John V. Sullivan, Parliamentarian, United States House of Representatives) ("Because of the need to track this interval, the date of receipt of a rule submitted pursuant to the CRA is published in the Congressional Record. With most other executive communications, only the date of referral to committee is published.").

295. *2007 CRA Hearing*, *supra* note 16, at 7 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives) ("Many agencies transmit their communications by courier to ensure timely receipt. These couriers often require a hand-receipt from somebody on the staff of the Speaker or the Parliamentarian.").

pose its own challenges—for example, by rendering submission difficult during interruptions in congressional operations, as discussed further below.[296]

Electronic submissions would provide real benefits in this regard. For agencies, submissions would be far easier to transmit and track, thereby lessening the Act's burden on agencies. The resulting ease of submission also might make agencies more likely to submit all covered rules, thereby providing a non-confrontational strategy to boost agency compliance with CRA requirements.[297] Since electronic communications typically bear a time-and-date stamp, agencies particularly would benefit from improved clarity about the all-important date of submission. For Congress, meanwhile, electronic submissions would make the tracking of submission dates easier and less cumbersome.[298] It also would enable further electronic transmission of rules to the appropriate committees, which the CRA directs to occur "[u]pon receipt of a report"—a responsibility that places further burdens upon the clerks and parliamentarians, and one that electronic transmission could minimize.[299] And by untethering receipt of documents from physical in-person transmission, electronic submission would provide new opportunities for congressional actors to receive timely notice of submitted rules when not physically in the Capitol. Commentators inside and outside of Congress have affirmed the timeliness-related benefits of electronic submission.[300]

As another benefit, electronic submission of 801(a) reports also might prevent delays in the implementation of rules. Congress frequently rejects and returns agency 801(a) reports for a variety of rea-

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296. *See infra* notes 302–11 and accompanying text.

297. *See* BRANNON & CAREY, *supra* note 34, at 20 (suggesting noncompliance "is likely due in large part to the practical difficulty of submitting the substantial number of agency statements that qualify as rules"). On agency under-submitting of qualifying rules, see *supra* Section III.B.

298. *See 10th Anniversary of the Congressional Review Act*, *supra* note 69, at 50 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives) ("It certainly would make more efficient the movement of the paper and the tracking of submittal dates and so forth, the things that the clerk's office has to do with the flow.").

299. 5 U.S.C. § 801(a)(1)(C); *see also* SUBCOMM. ON COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REP. ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY 105 (Comm. Print No. 10 2006) (noting witness testimony that "timely redirection to the appropriate committees" would be aided by electronic submissions); *2007 CRA Hearing*, *supra* note 16, at 30 (statement of Sally Katzen, Visiting Professor, George Mason University School of Law) (noting that electronic submission would preserve "systematic and timely notice to the committees").

300. *See* INTERIM REP. ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY, at 105 (citing "[t]he House Parliamentarian and other witnesses and symposia panelists" as indicating that electronic submissions would address "the uncertainties of proper receipt by Congress and timely redirection to the appropriate committees," among other issues).

sons, including lack of proper signatures and missing enclosures.[301] Under the current submission process, such rejection necessitates additional transportation of physical documents between agencies and Congress. As the House Modernization Committee has noted, this "can lead to delays in the regulatory implementation process," as proper submission is a prerequisite to implementation.[302] Electronic submission holds promise to remedy this problem for several reasons. First, electronic submission presumably will entail waiving or modifying certain congressional signature requirements, thereby reducing the number of rejected submissions. Second, a pivot to electronic submissions may provide the opportunity to standardize submission practices and forms across agencies, thereby further reducing rejected submissions. Third, the simultaneity of electronic communications means that, even in the instance that submissions are rejected, it may be possible to quickly remedy the submission defects and re-submit without the delay that attends physical submissions.

The aforementioned benefits of electronic submission have long been known.[303] In addition to them, there are several benefits that have become apparent only recently. For example, recent events have underscored the value that electronic reports might provide with respect to the continuity of congressional and agency operations. In the past several years, Congress has experienced two separate events that significantly disrupted its physical operations. First, the events of January 6, 2021, led to a massive disruption of physical operations in the Capitol—including via the ransacking of hard-copy documents in the Senate Parliamentarian's office.[304] While such events will hopefully not recur, this event did highlight the vulnerability created by a reliance upon physical documents and the havoc that any disruption to the physical space of the Capitol can wreak upon a CRA system tethered to paper documents.[305] Second, and perhaps more illuminat-

301. *See* H.R. REP. NO. 110-700, at 4 (2008) ("Rules are frequently returned to the agency, delaying their implementation, for failing to comply with the CRA or these other congressional requirements."); *id.* at 4 n.25 ("For example, agency submissions to the House of Representatives are often rejected because they lack a valid original signature on the transmittal letter, do not have a completed Congressional Review Act Form with an original signature, or are missing pertinent enclosures.").

302. SELECT COMM. ON MODERNIZATION OF CONG., FINAL REPORT, H.R. REP. NO. 116-562, at 201 (2020), https://www.govinfo.gov/content/pkg/GPO-CRPT-116hrpt562/pdf/GPO-CRPT-116hrpt562.pdf [https://perma.cc/WCE6-TNT7]; *see, e.g.*, Procedures and Guidance; Implementation of the Government Paperwork Elimination Act, 65 Fed. Reg. 25508, 25515–16 (proposed May 2, 2000) (discussing the benefits to agencies in implementing electronic signatures and electronic transactions).

303. *See, e.g.*, Procedures and Guidance; Implementation of the Government Paperwork Elimination Act, 65 Fed. Reg. at 25515–16.

304. Philip Elliott, *The Breach of the Capitol Spooked Us—As It Should Have*, TIME (Jan. 7, 2021, 2:49 PM), https://time.com/5927664/capital-siege-trump-supporters/ [https://perma.cc/23WM-9BMT].

305. On the difficulty of complying with congressional hand-delivery requirements in the wake of January 6 (as well as after the emergence of COVID-19), see also

ing, the COVID-19 pandemic has given rise to a prolonged period in which physical workspaces throughout the country, including the Capitol, have been disrupted. According to persons interviewed for this Article, pandemic-related disruptions meant that, in some instances, congressional officials were not present in the Capitol to receive CRA submissions via the typical in-person submission process. As a result, some agencies pivoted to mail submissions[306]—a process attended by the uncertainties and delays of mail submission discussed above. This CRA experience tellingly contrasts with the experience of agencies in domains where, as the House Modernization Committee noted, agencies have more successfully "ensur[ed] continuity of operations" during the pandemic.[307] As the Committee observed: "The quick transition to digital signatures allowed many executive branch operations to continue throughout the COVID-19 crisis."[308] A transition to electronic 801(a) reports could provide for a similar continuity of operations in the CRA process in the event that the ongoing pandemic, or similar future events, again disrupt physical operations in the Capitol.

The pandemic also produced changes in GAO policy that are instructive. Unlike Congress, GAO has long accepted electronic submission of 801(a) reports—a capacity it has possessed since 1999.[309] In earlier years, few agencies made use of this option.[310] Due to the pandemic, however, GAO began requiring electronic submission of 801(a) reports.[311] In light of this change to GAO policy, congressional use of electronic submissions would have several added benefits. First, it would align current submission requirements between Congress and GAO, thereby allowing agencies to follow a single submission protocol for 801(a) reports. Second, it would prevent agencies from reverting to paper submissions to GAO in the event that, at a future date, GAO removes its electronic submission mandate—a reversion that otherwise might be expected because, in the past, agencies have submitted paper copies to GAO primarily to standardize submissions

Mikaela Lefrak, *Some 60 D.C. Laws Were in Limbo Because Officials Can't Hand-Deliver Them to Congress*, NPR (Feb. 2, 2021), https://www.npr.org/local/305/2021/02/02/962885976/some-60-d-c-laws-were-in-limbo-because-officials-can-t-hand-deliver-them-to-congress [https://perma.cc/HZB4-EB2C].

306. Interview with Congressional Staffers (2021).

307. H.R. Rep. No. 116-562, at 201.

308. *Id.*

309. U.S. Gov't Accountability Off., *supra* note 214, at 3 (statement of Gary Kepplinger, General Counsel) ("GAO has been able to receive agency rules and reports electronically since 1999, although only a handful of agencies have used this method to transmit rules.").

310. *Id.*

311. *Congressional Review Act*, *supra* note 6 ("Due to the Coronavirus pandemic and recommendations to practice social distancing, many GAO staff are working remotely. Therefore, agencies should send their submissions to rulesc@gao.gov. Until further notice, GAO will not accept submissions by regular mail or fax.").

across Congress and GAO.[312] Third, it would transfer agencies to a mode of submission to which they already are accustomed, given their experience with electronic GAO submissions. Indeed, it seems difficult for agencies to argue that this change in policy would impose any significant new burdens on them, since it would merely require them to extend a method of report submission that they already are using with GAO. This underscores a point that others have made before: that, because many agencies also regularly submit rules to the Federal Register electronically, a pivot to electronic CRA submissions would impose little additional agency burden.[313]

2. Concerns

Notwithstanding the benefits that might accompany a transition to electronic submission of 801(a) reports, there are countervailing concerns that warrant consideration. Most generally, there may simply be concern that a novel mode of submission always can pose unforeseen hurdles and challenges. However, the pandemic produced changes in Congress that may lessen this concern about electronic submissions. In April 2020, pandemic concerns led the House to adopt electronic submission of legislative documents, a shift from its prior in-hand delivery requirements.[314] Implementation of this policy gave key CRA actors—including the House Parliamentarian's Office and the House Office of the Clerk—experience with electronic submissions.[315] As a result, these and other actors have gained additional experience with development and implementation of policies around the use of elec-

312. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 214, at 3 (statement of Gary Kepplinger, General Counsel) ("Our conversations with agencies indicate that this is attributable, in part, to the fact that the House of Representatives and the Senate require paper copies to be submitted to fulfill the agency's obligation under CRA."); *see also* COPELAND, *supra* note 41, at 20 n.106.

313. *See, e.g.*, Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 239 (2018) ("Sending electronic copies of rules to Congress when they are sent to the Government Printing Office for publication in the *Federal Register* scarcely burdens anyone.").

314. 166 CONG. REC. E357 (daily ed. Apr. 10, 2020), https://www.govinfo.gov/content/pkg/CREC-2020-04-10/html/CREC-2020-04-10-pt1-PgE357-2.html [https://perma.cc/N82L-2PC5] (statement of Nancy Pelosi regarding electronic submission of floor documents) ("Beginning Tuesday, staff must electronically submit all Floor documents—including bills, resolutions, co-sponsors and extensions of remarks—to a dedicated and secure email system, rather than deliver these materials by hand to staff in the Speaker's Lobby or Cloakrooms.").

315. *See Quick Guide to the Electronic Submission of Legislative Documents*, MAJORITY LEADER (Apr. 2020) [hereinafter *Quick Guide*], https://www.majorityleader.gov/sites/democraticwhip.house.gov/files/quick-guide-electronic-submissions.pdf [https://perma.cc/9PJK-LYPV?type=Standard] (requiring submissions for hopper to be emailed to House Clerk); 166 CONG. REC. E357 (daily ed. Apr. 10, 2020) (noting policy developed in consultation with Offices of the Clerk and the Parliamentarian, and stating that the "Clerk's Office will send out detailed guidance on where and how to submit materials").

tronic signatures,[316] timing of submissions,[317] and manner of electronic submissions.[318] The House additionally moved to remote committee proceedings in May 2020, a policy that entailed new permissions for electronic signatures and Clerk attestation of committee subpoenas.[319] This experience has been sufficiently successful that the House Modernization Committee has recommended retaining and expanding elements of it beyond the pandemic.[320] Presumably, this experience can inform any transition to electronic submission of 801(a) reports.

Admittedly, the Senate did not make a similar transition to electronic submissions. However, the concerns that have animated the Senate's reluctance in this regard hold little relevance for 801(a) reports. Most notably, the Senate has long resisted policy changes that might reduce opportunities for collegial interactions and relationships among Senators.[321] While a past House Parliamentarian once voiced similar concerns about the effects of electronic 801(a) submissions,[322] it seems unlikely that such a policy would meaningfully reduce face-to-face Senator interactions. After all, unlike other forms of legislative business, in-person submission of 801(a) reports generates only interactions between congressional staff and agency couriers, not between legislators. And even though the Senate has not embraced electronic document submissions, it presumably would still reap the benefits of the House experience with them—particularly because submission standards likely would be standardized across chambers.

Other concerns that might sometimes apply to electronic document transmissions similarly do not translate to the CRA context. For example, use of electronic platforms often can raise concerns about cybersecurity.[323] Unlike many other governmental documents and

316. *Quick Guide*, *supra* note 315.

317. *See id.* at 2 ("Only those submissions emailed 15 minutes before convening, during the session, and 15 minutes after adjournment will be accepted and processed."); 166 CONG. REC. E357 (daily ed. Apr. 10, 2020) ("Electronic submissions will be accepted when the House is in pro forma session, as well as 15 minutes immediately before and after.").

318. *See* 166 CONG. REC. E357 (daily ed. Apr. 10, 2020).

319. *See* H.R. Res. 965, 116th Cong. (2020).

320. *See* SELECT COMM. ON MODERNIZATION OF CONG., FINAL REPORT, H.R. REP. NO. 116-562, at 33 (2020), https://www.govinfo.gov/content/pkg/GPO-CRPT-116hrpt562/pdf/GPO-CRPT-116hrpt562.pdf [https://perma.cc/WCE6-TNT7] ("The House should make permanent the option to electronically submit committee reports.").

321. *See generally 10th Anniversary of the Congressional Review Act*, *supra* note 69, at 50.

322. *Id.* (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives) ("I'm personally leery about going virtual on anything. . . . [W]e constantly try to impress on them notion of Jeffersonian collegiality and the importance of Members being together in the flesh. So crossing the threshold of a virtual submission I would want to be very cautious about that.").

323. *See, e.g.*, Scott R. Anderson & Margaret L. Taylor, *Congress Dawdles on Remote Voting*, BROOKINGS (May 12, 2020), https://www.brookings.edu/blog/techtank/

proceedings, however, 801(a) reports are not confidential.[324] As such, typical concerns about security breaches seem inapt. And, as always, the assessment of risk regarding transmission problems—whether due to accident or malicious actors—is a comparative one, not an absolute one. In light of the risks and errors that can accompany submission via hard copy, especially in a period when submission often is made via mail, it seems difficult to view electronic submission as a comparatively risky option.

Several other concerns with electronic submission of 801(a) reports are slightly more compelling—but these concerns appear manageable via ancillary policy choices. For example, a transition to electronic submissions undoubtedly makes submission easier for agencies. As noted above, this can have a positive effect: agencies regularly fail to submit reports for covered rules, and electronic submission may improve compliance with submission requirements. However, reducing the burden imposed by submission also creates the possibility of agencies over-submitting to Congress. This might undermine the goal of reducing the administrative burden for the small offices that handle 801(a) reports in Congress, exposing them to an even larger flood of paperwork.[325] This concern is heightened by preliminary evidence suggesting that the transition to electronic bill introduction in the House has notably increased the volume of introduced bills. However, the temptation for agencies to over-submit may be minimal, given that GAO has regarded submission as a tacit agency admission that a rule is covered by the CRA, and that agencies may wish to resist the setting of precedents that grant the CRA a wide purview.[326] Moreover, Congress may be able to adopt additional policies that limit the risk of agency over-submission, as discussed in Section III.B.2.[327]

Another plausible concern with electronic submission similarly relates to administrative burden. While Congress has increased its experimentation with electronic documents, the House Clerk still could rightly observe in 2020 that "the work of Congress continues to be

2020/05/12/congress-dawdles-on-remote-voting/ [https://perma.cc/Q579-TVRT] (noting that some in Congress voiced cybersecurity concerns during discussions on remote voting).

324. Notice typically has already been given of the rules being submitted. *See e.g.*, 5 U.S.C. § 801(a)(1)(A).

325. *See 1997 CRA Hearing*, *supra* note 106, at 138 (prepared statement of Peter L. Strauss, Betts Professor of Law, Columbia University) (suggesting that even full compliance "would impose significant aggregate costs, well beyond their possible benefit").

326. *See* Letter from Thomas H. Armstrong, Gen. Couns., U.S. Gov't Accountability Off., to Hon. Charles E. Schumer, Sen., U.S. Senate & Hon. Ron Wyden, Sen., U.S. Senate (Sept. 15, 2020), https://www.gao.gov/assets/710/709404.pdf [https://perma.cc/NMG2-EUK5] (concluding agency submission of an 801(a) report "obviates the need for [GAO] to make that determination [of a rule] here").

327. *See supra* notes 254–63 and accompanying text.

driven by paper."[328] Chamber rules and precedents continue to require paper submissions for a universe of congressional communications that extend beyond CRA submissions. By transitioning to electronic submission of 801(a) reports in isolation, Congress would establish a situation in which executive communications would be received through multiple channels (i.e., electronic for CRA submissions; hard copy for other submissions). The management of these simultaneous channels might add to administrative burden, and it also might generate agency confusion and error (with submissions using the incorrect channel). For this reason, Congress may want to consider 801(a) reports not in isolation, but rather as part of a potential transition to electronic submission for a broader universe of congressional submissions—an approach that would harness the benefits of electronic submission without generating the challenges of a two-channel submission system. However, even if Congress does consider 801(a) reports in isolation, it seems unlikely that the burdens imposed by this aspect of electronic submissions outweigh the significant benefits outlined above.

As a final matter, even if it is acknowledged that Congress should transition to electronic submission of 801(a) reports, it may not be clear why statutory amendment is necessary to accomplish this goal. The CRA simply directs that agencies "shall submit" their 801(a) reports to each chamber and to GAO, without specifying any particular manner of submission.[329] That language would seem broad enough to permit electronic submission, and indeed, as noted above, GAO has long regarded this language as permitting electronic submission of 801(a) reports to it.[330] Congress elsewhere has used this statutory phrase to capture electronic submission requirements, both in enacted[331] and pending legislation.[332] Moreover, legislative history for the CRA indicates that Congress viewed the statutory directive as sufficiently broad to permit submissions in other forms than hard copy (such as by "telefax")[333] and that Congress assumed agencies would

328. U.S. HOUSE OF REPRESENTATIVES, OFF. OF THE CLERK, 116TH CONG., ADOPTING STANDARDIZED FORMATS FOR LEGISLATIVE DOCUMENTS 1 (2020), https://modernizecongress.house.gov/imo/media/doc/Adopting%20Standardized%20Formats%20for%20Legislative%20Documents.pdf [https://perma.cc/3WSR-ZUPV].

329. 5 U.S.C. § 801(a)(1)(A).

330. *See supra* notes 302–10 and accompanying text.

331. *See* 10 U.S.C. § 284(h)(1) (requiring that "the Secretary of Defense shall submit to the appropriate committees of Congress a written and electronic notice" on various matters); *id.* § 284(h)(3) (providing that "the Secretary [of Defense] shall submit to the appropriate committees of Congress a report . . . in written and electronic form").

332. *See* H.R. 2485, 117th Cong. (2021) (directing that agencies "shall submit" congressionally-mandated reports to the Director of GPO for purposes of posting on online portal).

333. 142 CONG. REC. 6927 (1996) (statement of Rep. Hyde) ("If no other means of delivery is possible, delivery of the rule and related report by telefax to the Speaker of

work with report recipients to establish mutually agreeable submission methods.[334] These various indicia of congressional intent all suggest that, even under existing statutory language, electronic submission of 801(a) reports might be legally permissible.[335]

However, this situation is complicated by congressional rules and precedents. Pursuant to its constitutional rulemaking power,[336] Congress has long required various submitted documents to bear an original signature, a requirement that effectively necessitates submission via hard copy.[337] That baseline policy has sometimes been modified via rule or Speaker policy (as discussed above with respect to the Covid-19 pandemic),[338] and it presumably could be so modified for CRA submissions as well. Nonetheless, at least one past parliamentarian has suggested that a change to statutory text might be necessary to effectuate a change for the CRA, at least insofar as the goal is to require (versus merely permit) electronic submissions.[339] Ultimately, the success of any reform in this area presumably will depend on persuasiveness with the parliamentarians—a situation owing both to Congress's ultimate power over its rulemaking[340] and to the CRA's prohibition on judicial review.[341] A change in statute would provide the parliamentarians with a particularly strong, overriding indication of congressional intent to accept electronic submissions, longstanding

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the House, the President of the Senate, and the Comptroller General shall satisfy the requirements of subsection 801(a)(l)(A).").

334. With respect to information submitted to GAO under section 801(a)(1)(B), for example—which contained an identical "shall submit" mandate—the joint statement remarked: "The committees expect that GAO and OMB will work together to develop, to the greatest extent practicable, standard formats for agency submissions." *Id.* at 6929. GAO and OMB did ultimately collaborate on this, after significant additional congressional prodding of OMB. *Id.*

335. Of course, the prohibition on judicial review under section 805 of the CRA means that any dispute over the sufficiency of performance based on manner of submission presumably would be left to the political branches. *See id.* (statement of Rep. Hyde) ("Nor may a court review whether Congress complied with the congressional review procedures in this chapter.").

336. *See* U.S. CONST. art. I, § 5.

337. *See* H.R. REP. NO. 111-150, at 2 (2009) ("[A]gencies must often resort to hand-delivering the required materials by courier to the House and Senate, in order to comply with the CRA and the standards regarding communications transmitted to Congress."); SELECT COMM. ON MODERNIZATION OF CONG., FINAL REPORT, H.R. REP. NO. 116-562, at 201 (2020), https://www.govinfo.gov/content/pkg/GPO-CRPT-116hrpt562/pdf/GPO-CRPT-116hrpt562.pdf [https://perma.cc/WCE6-TNT7] ("Congress . . . still requires 'wet signatures' on many official documents, which can lead to delays in the regulatory implementation process."); *id.* at 201 n.220 ("The House Parliamentarian requires wet signatures, in compliance with the Congressional Review Act.").

338. *See supra* notes 302–05 and accompanying text.

339. *10th Anniversary of the Congressional Review Act*, *supra* note 69, at 50 (statement of Hon. John V. Sullivan, Parliamentarian, United States House of Representatives) ("I assume that [establishing a requirement for electronic submission] might require that you visit the statutory text.").

340. U.S. CONST. art. I, § 5.

341. 5 U.S.C. § 805.

signature requirements notwithstanding. For this reason alone, it makes sense to use statutory amendment as the tool to effectuate any desired shift to electronic submissions.

There also are further practical reasons that counsel in favor of a statutory solution. First, this approach would ensure a uniform submission standard across chambers. This would bring a variety of practical benefits, such as enabling simultaneous submission (and thereby assisting with tracking important dates under the CRA) and development of a standard submission format (e.g., cover sheet or reporting template). A rule-based approach might not provide this beneficial uniformity, as rulemaking occurs separately in each chamber.[342] Second, this statutory approach would forestall any potential agency pushback or insistence upon continued paper submissions (which, for reasons outlined above, agencies could arguably comply at least with CRA statutory requirements, if not with chamber rules regarding acceptable submissions).[343] Third, the CRA is already a challenging statute for parties to navigate, even for those familiar with it, specifically because many compliance details were developed at the sub-statutory level, as explained in Section III.B. Given this, it would be wise for Congress to move toward increasing the share of CRA rules that are encoded in statute. Legal and practical reasons therefore conspire to make change via statute a wise path if Congress does indeed choose to pursue electronic submissions.

IV. Lessons: Strategic Behavior

Over the past several years, there has been growing interest in creative or unorthodox uses of the CRA. Here, legal commentators have looked for opportunities to strategically utilize the CRA—and to do so in ways that, while likely not envisioned at its inception, nonetheless are possible under the language of the CRA. In this regard, the CRA joins the broader universe of legislation with fast-track congressional procedures (most notably, legislation creating the budget reconciliation process), which similarly has received greatly expanded interest in recent years.[344]

Two proposals for creative use of the CRA have been particularly notable. First, as already noted, several commentators in 2017 promi-

342. *See* U.S. Const. art. I, § 5.

343. On agency and OMB resistance to congressional and GAO efforts to standardize submissions in the past, see Rosenberg, *supra* note 5, at 28 (describing OMB resistance to collaboration with GAO on standardized submission format, until directed to so collaborate via congressional rider).

344. Most major legislation passed in recent years has been via this reconciliation process. *See, e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 219 (2010); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (using reconciliation for parts of Affordable Care Act); Budget Fiscal Year, 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, 148–49, 181.

nently argued that Congress might use its ad hoc initiation process to conduct CRA review of rules that were years (or even decades) old.[345] These commentators contended that, technically, each rule is subject to a review window.[346] That window commences when the rule either: (1) is submitted to Congress by the agency; or (2) is confirmed a rule via GAO inquiry.[347] Consequently, it could be argued that rules never submitted to Congress still were vulnerable to a review triggered by GAO inquiry—regardless of how long ago those rules were promulgated.[348] The CRA therefore might be used to conduct fast-track review of agency rules that long ago became a fixed part of the legal landscape—something certainly not envisioned by the CRA's drafters, but that might be politically appealing in certain situations.[349] Taking advantage of this strategic possibility, Congress in 2017 increasingly began requesting GAO legal opinions with respect to rules issued significantly farther back in time,[350] and it used this process in 2018 to reject a rule issued five years prior.[351]

More recently, Jody Freeman and Matthew Stephenson proposed another creative use of the CRA. In an opinion piece in the Washington Post in 2021,[352] as well as a companion law review article the following year,[353] they argued for a maneuver whereby the CRA could be used to overturn judicial interpretations of statutes or otherwise clarify or change statutory law. Under this maneuver, an agency first would promulgate a rule that adopts an undesirable interpretation of the relevant statute.[354] Congress then would use the CRA to disapprove the rule—thereby not only preventing the rule from taking effect, but presumably reverting to the rule that preceded it (even if rejected for non-constitutional reasons by a court) and also prohibiting the agency from issuing a rule that is "substantially the same" in the future.[355] In this way, the CRA disapproval mechanism might become a backdoor strategy to approve desired policies, without a filibuster-proof Senate majority.

345. *See supra* note 254 and accompanying text.

346. *See id.*

347. *Id.*

348. *Id.*

349. *See* discussion *supra* Section III.B.

350. *See* Dooling, *supra* note 40.

351. *See* S.J. Res. 57, 115th Cong. (2018). For the overturned rule, see CONSUMER FIN. PROT. BUREAU, *supra* note 255.

352. Jody Freeman & Matthew Stephenson, *How a Little-Known Law Might Help Protect the 'Dreamers*,*'* WASH. POST (Aug. 6, 2021, 9:00 AM), https://www.washingtonpost.com/opinions/2021/08/06/how-little-known-law-might-help-protect-dreamers/ [https://perma.cc/RB9P-SV6L].

353. Jody Freeman & Matthew Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279 (2022).

354. *Id.*

355. *See id.*; 5 U.S.C. § 801(b)(2).

For those interested in such creative uses of the CRA, this Article may provide further insights. The foregoing pages have revealed previously unknown details of CRA implementation within Congress—and these elements of the CRA mechanism could potentially be used by reformers. Ironically, as this Part will explain, the primary such use might be to offset the creative strategies of others.

Consider the current use of the CRA to review midnight rulemaking by outgoing administrations. As previously discussed, this has become the primary use of the CRA.[356] With the arrival of a new President and Congress, new partisan majorities in Congress (along with a sympathetic new administration) have repeatedly sought to overturn rules promulgated by the outgoing administration.[357] To this end, partisans have made strategic use of the look-back period, using it to initiate a new CRA review period and thereby leverage new majorities to reject a rule promulgated by a prior administration.

Research for this Article revealed a caveat to the availability of this strategy. As previously explained, the Senate Parliamentarian has interpreted the look-back period not to apply when, in the preceding session, the Senate held a failed CRA vote on the rule.[358] This Parliamentarian interpretation raises a strategic possibility for outgoing partisans. These actors presumably are concerned about the possibility of incoming partisans using the CRA to reject their midnight rules. To forestall this, the outgoing Senate majority could pursue a three-step process to: (1) initiate CRA review on such midnight rules; (2) hold a vote; and (3) vote against overturning the rule. Under existing precedent, the Senate Parliamentarian presumably would interpret the failed overturn vote as eliminating the option to initiate a new review window upon the arrival of the incoming majority. In this way, an outgoing majority might effectively eliminate the CRA as a strategic tool for incoming partisans, in the subsequent session, to overturn midnight rules.

This Senate Parliamentarian interpretation makes sense, it should be noted. The look-back period was meant to guarantee that Congress has an adequate opportunity to consider whether to overturn a rule.[359] When the Senate has held a vote to overturn a rule (including a failed vote), it presumably had an adequate opportunity for review. As a result, there is little reason under the logic of the CRA for the look-back mechanism to be available with respect to such rules.

356. *See* discussion *supra* Section II.E.

357. *Id. See generally* Strassel, *supra* note 254, at 1 ("Republicans are eager to use the law, and House Majority Leader Kevin McCarthy this week unveiled the first five Obama rules that his chamber intends to nix."); *Congressional Review Act*, *supra* note 6 (listing disapprovals, along with rulemaking date and disapproval date).

358. *See* discussion *supra* Section III.A.1.

359. *See supra* note 144 and accompanying text.

If partisans were to employ this strategy to protect midnight rules, it would not provide unlimited protection. Importantly, this strategy relies on the continued application of existing Senate precedent. It is possible that intense partisan pressure inside Congress might lead parliamentarians to reconsider or narrow this interpretation as partisans look to leverage it strategically. Or perhaps an incoming majority simply would override the parliamentarian interpretation and establish new parliamentary precedent to reopen the look-back period for these midnight rules. Such efforts are not unheard of in Congress—yet they are relatively uncommon, and this strategy at least would provide another layer of protection for midnight rules.

Strategic partisan actors also might employ a second strategy to protect at least some midnight rules. As previously explained, the collection of midnight rules that are vulnerable to CRA review by incoming majorities is determined by the look-back period.[360] Only those rules submitted (and published in the Federal Register) during the look-back period are available.[361] That look-back period is calculated in legislative or session days—artificial congressional constructs that need not align with calendar days.[362] Presumably, an outgoing majority in a chamber therefore could "gavel in" and "gavel out" many session or legislative days in a single calendar day near the end of a session, thereby steadily shrinking the look-back window. In this way, it might protect numerous rules from subsequent CRA review.

Finally, there are potential strategies to prevent review of rules that are years old. The vulnerability of these rules to review has been predicated on the fact that such rules have never been subject to a CRA review window. If there is concern that important prior rules never underwent this review, partisans might consider simply subjecting such rules to a review window when sympathetic majorities or administrations could easily prevent the CRA review process from resulting in the rule being overturned. This could be accomplished by the agency submitting the rule to Congress or else by Congress submitting the rule to GAO for determination of its status as a rule. The latter path may be more prudent, as the former might be viewed as a tacit admission by the agency that the rule potentially lacked legal effect prior to the submission, whereas the latter would not have that effect for reasons discussed in Section III.B. This presumably would open a review period at a time when CRA review did not threaten to overturn the rule—and, in so doing, would block any subsequent effort to open a belated review of the rule at a more hostile period.

Notably, all of these strategic options are concordant with the original vision of the CRA. Two counteract a strategy whereby the look-back period has been repurposed from a deliberation-protecting tool

360. *See* discussion *supra* Section III.A.1.
361. *See id.*
362. *Id.*

into a partisan weapon. One counteracts a strategy whereby CRA review, a process that was meant to have quick closure for regulated entities, is remade into an open-ended process that could provide decades of uncertainty. Each therefore functions to return the CRA to its intended sphere of operation. In this regard, the strategies outlined here differ from the creative CRA uses proposed by others—uses that genuinely look to use CRA strictures to extend the law into new, unintended domains. That does not mean that such uses are necessarily problematic. However, it does mean that the strategies proposed here are on particularly sure footing regarding the goals they pursue.

V. Conclusion

The Congressional Review Act arguably has never been more consequential. Once largely dormant, it has been invoked with increased frequency in recent years—by both major political parties. If the statute is to take on increased significance in the coming years, Congress would do well to ensure that it is updated to accomplish its objectives effectively, fairly, and efficiently. The reforms outlined in this Article will not remedy every shortcoming of the Act in this regard, of course. Nor will the strategic possibilities it highlights. Nonetheless, they may provide a foundation for that project, as they outline a set of reforms and insights that draw upon the lessons afforded by a quarter century of experience under the statute. With them, Congress can better equip itself to use the tool of the CRA to review agency rulemaking in the coming years—and to thereby maintain its vital oversight function within the modern administrative state.