Congressional Testimony
"Rulemakers Must Follow the Rules, Too: Oversight of Agency Compliance with the Congressional Review Act"

Before the U.S. House of Representatives
Committee on the Judiciary
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Commercial and Antitrust Law

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Good morning Mr. Chairman, Mr. Ranking Member, and other distinguished Members of the Subcommittee. Thank you for inviting me to testify on agency compliance with the Congressional Review Act (CRA).[1] With proper oversight, and judicial action if necessary, the Act has a tremendous, untapped potential to promote regulatory reform and governmental accountability. The enactment by Congress and the President of 14 resolutions of disapproval earlier this year is certainly noteworthy in itself, but full implementation and oversight of the CRA would yield many more significant dividends.

After more than 20 years of relative dormancy, Congress finally started to use the CRA as intended: to review hundreds of costly regulations and vote on whether to overrule a number of them. Congress's focus last winter and spring on about 200 "midnight" rules issued near the end of the Obama administration was sound, but there are more powerful ways for the current administration, Congress, and the courts to use the CRA to review and take action on hundreds of significant rules.

One facet of the CRA may be invoked in the first instance by the political branches to reexamine hundreds of older rules which are thought to be in effect but are not lawfully so. These are rules that were required to be submitted to Congress under the CRA but that still have not been delivered. Both the administration and Congress have a vital role in seeing that many beneficial or noncontroversial rules can finally go into effect lawfully—and that other problematic ones are reviewed and reconsidered.

This is the use of the CRA that Kimberley Strassel in *The Wall Street Journal* praised as a "regulatory game changer."[2] To understand these other uses of the CRA and the scope of the agency noncompliance problem, it is helpful to first review the CRA's key provisions and operation.

The Basic Operation of the Congressional Review Act

The first sentence of the CRA requires regulatory agencies to send every rule with a short report and other information about it to both Houses of Congress and the Government Accountability Office (GAO) *before the rule can lawfully go into effect*.[3] This trigger is explained in more detail below, but it is a critical change in law, without which the CRA would be unworkable. After the rules are formally submitted to Congress and GAO, each House can then schedule simple-majority, up-or-down votes on any rules it wants to disapprove, using fast-track congressional procedures.

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[1] I'd also like to thank my PLF colleague Thomas Berry for his editorial and drafting help with this testimony, Paul Larkin, Jr., for his brilliant scholarship on the CRA and sage advice on all matters, and these other PLF colleagues for their helpful comments on this testimony and work on our Red Tape Rollback Project: Jonathan Wood, Collin Callahan, Damien Schiff, Anthony Francois, and Jeff McCoy.

[2] Kimberley Strassel, "A GOP Regulatory Game Changer: Legal experts say that Congress can overrule Obama regulations going back to 2009," *The Wall Street Journal* (Jan. 26, 2017). Excerpts of Strassel's Potomac Watch column are available at https://www.redtaperollback.com/2017/01/27/2017214wsj-column-features-a-regulatory-game-changer/.

[3] 5 U.S.C. § 801(a)(1)(A). Additional detail about this "game changing" provision is provided further below, but no court has even hinted that this provision is ineffective. There is also no realistic prospect that the courts would disregard the objective meaning of this provision, including that it would effectively gut the CRA that was codified by Congress as the last chapter (chapter 8) of the Administrative Procedure Act (APA). See also Paul Larkin, Jr., "Report: The Reach of the Congressional Review Act," *Heritage Foundation* (Feb. 8, 2017), available at http://www.heritage.org/government-regulation/report/the-reach-the-congressional-review-act; Paul J. Larkin, Jr., "Reawakening the Congressional Review Act" at 19, forthcoming, *Harvard Journal of Law and Public Policy* (2017), draft manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007843.

The CRA consciously defines a “rule” very broadly to include both formal notice-and-comment regulations and informal agency statements regarding the interpretation or application of laws.[4] Although it does not apply to presidential executive orders or proclamations, it applies to almost any regulatory agency document that impacts the general public, including “Dear Colleague” letters and enforcement guidance documents, even if they were never published in the *Federal Register*. All such rules must be reported to Congress and may be overruled by the CRA’s streamlined procedures, whether they are determined to be “major” rules or not. However, major rules, as determined by the Office of Management and Budget (OMB), receive additional attention including reports by the GAO, and their effective date is usually extended during part of the congressional review period.

Special Congressional Procedures Governing Resolutions of Disapproval under the CRA

During the first 60 legislative or session days after a rule is received (the House uses the term “legislative day,” the Senate has “session days”), the CRA allows Congress to promptly overturn the rule without a Senate filibuster and with certain other expedited procedures that prevent the need for a House and Senate conference.[5] Senate floor debate can be no longer than ten hours, and a simple majority can vote (without debate) to reduce the floor consideration to any lesser time.[6]

A joint resolution of disapproval must be presented to the president for his signature or veto, satisfying the Bicameralism and Presentment requirements of Article I, section 7 of the Constitution. Enactment of such a resolution into law pursuant to the CRA kills the rule and prohibits an agency from adopting any “new rule that is substantially the same” without a new law authorizing it.[7]

If a rule is delivered to Congress within the last 60 legislative or session days of a congressional session, a new period of expedited review begins on the 15th legislative or session day of the next congressional session.[8] Because resolutions disapproving rules under the CRA must either secure the president’s signature or be passed in both Houses over his veto, the tool has thus far only overturned “midnight” regulations sent to Congress at the end of one administration and voted down and signed into law by the next president.

Overview of the Scope and Significance of Agency Noncompliance with the CRA

Countless hundreds of rules remain vulnerable because they were never delivered to Congress, as the CRA mandates, and as such, they are not lawfully in effect. That means many have been unlawfully enforced or wrongly relied upon in enforcement proceedings or criminal trials.

1. **The Number of Important Rules Impacted**

Independent scholars have counted thousands of rules from the Obama administration alone that were not sent to Congress as required by the CRA. A 2014 study by a scholar who worked for the Administrative Conference of the United States found approximately 1000 rules per year that were

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[4] 5 U.S.C. § 804(3). This provision is discussed in greater detail below and in the joint legislative history of the CRA, available at RedTapeRollback.com, https://www.redtaperollback.com/cra/legislative-history/.
[5] 5 U.S.C. § 802.
[6] 5 U.S.C. § 802(d)(2).
[7] 5 U.S.C. § 801(b).
[8] 5 U.S.C. § 801(d).

even published in the *Federal Register* and not sent to Congress.[9] Other studies conducted by GAO and CRS in the past ten years came to similar conclusions.[10] There is reason to think those estimates somewhat overestimate the noncompliance problem for rules published in the *Federal Register* (depending on how the databases were queried), but the agencies admitted their failure for many such rules each time GAO or CRS issued a report. The offending agencies then submitted a number of the noncompliant rules to Congress for the period of the study, but didn't seem to comply with the CRA much, if any, better in the next period.[11] Thus, there is every reason to think that many hundreds of rules published in the *Federal Register* since 2014 were not sent to Congress.

As for rules *not* published in the *Federal Register*, there were likely hundreds of them per year (for 21 years) that were wrongly not sent to Congress as the CRA requires. To my knowledge, no one has attempted to quantify that large subset of covered rules; thus no one can say for sure how many of them there are, but we think the noncompliance rate is higher for guidance documents not published in the *Federal Register*. Many guidance documents are admittedly inconsequential and create little harm, but our Red Tape Rollback coalition partners are discovering many extremely problematic guidance documents with significant negative effects on Americans that were not sent to Congress.

Even so, the number of rules deemed economically "major" or "significant" and not sent to Congress is especially surprising, because some of them have billion-dollar impacts. Brookings Institution scholars this year conducted a more careful, but limited, study that identified 348 economically "significant" rules that were published in the *Federal Register* and not sent to both Houses of Congress and GAO as required under the CRA.[12] Although that total is certainly newsworthy, the Brookings Institution study excludes many categories of rules covered by the CRA. The first are those which were published in the *Federal Register* but were not scored as "economically" significant. Many are socially, culturally, or otherwise harmful for many Americans. Second, and most importantly, the Brookings team did not even attempt to count the number of significant agency guidance documents, enforcement manuals, and the like that were not published in the *Federal Register*. They mistakenly believed this last category was unimportant because they failed to understand some legal implications of the agency's reliance on them in the past (the Brookings scholars disavowed legal expertise), even if Congress is unlikely to disapprove many of them in the future. Those consequences are discussed in the next subsection.

Economically significant rules and rules published in the *Federal Register* are a small subset of all rules covered by the CRA that were not properly submitted to Congress. Our informal coalition research suggests that the rate of noncompliance for agency guidance documents that interpret law is

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[9] Curtis W. Copeland, "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress," (July 15, 2014), available at https://www.redtaperollback.com/wp-content/uploads/2017/05/CurtisCopelandCongressionalReviewActManyRecentFinalRulesWereNotSubmittedtoGAOandCongress07-15-2014.pdf.

[10] See, e.g., CRS Report R40997, "Congressional Review Act: Rules Not Submitted to GAO and Congress," (Dec. 29, 2009), available at https://www.redtaperollback.com/wp-content/uploads/2017/04/CRS122909.pdf; U.S. Government Accountability Office, "Federal Rulemaking: Perspectives on 10 Years of Congressional Review Act Implementation," GAO-06-601T (March 30, 2006), available at http://www.gao.gov/assets/120/113245.pdf.

[11] How could this happen? Why didn't the agencies establish better procedures to comply with the CRA, at least with respect to rules they published in the *Federal Register*? How much harder can it be to send the rule to the *Federal Register* and the rule with its simple rule report to Congress and the GAO? How many thousands of rules published in the *Federal Register* were not sent to Congress since the last of these studies was concluded in 2014? And how many other rules published on agency websites and through other means during the last 21 years were never sent to Congress?

[12] Philip A. Wallach & Nicholas W. Zeppos, "How Powerful is the Congressional Review Act?" *Brookings Institution* (April 4, 2017), available at https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/.

even higher than for rules published in the *Federal Register*.[13] As the Campus Sexual Misconduct Dear Colleague Letter discussed in the previous footnote demonstrates, many guidance documents are terribly significant to the public (e.g., they can have life-changing consequences for those wrongly accused and denied due process) and yet are not classified as economically significant and are not always published in the *Federal Register*. That's one reason why the CRA requires that all agency statements that interpret law and have such impacts on the public must be submitted to Congress.

2. The Legal Significance of Agency Reliance on Invalid Guidance Documents

Although agency enforcement manuals and similar "guidance" documents published on agency websites are rarely sent to Congress as the CRA requires, the agencies still invoke them to deny permits and bring enforcement actions. And in litigation, agencies still try to insist that courts defer to them rather than rely on the statute alone. In some prominent cases Pacific Legal Foundation is litigating, including at least one that Members of Congress publicly supported this past summer, the current U.S. Department of Justice (DOJ) took the paradoxical position that a wetlands guidance document that was never sent to Congress was not a rule *and* that our client and the judge had to defer to it.[14] Why does the judge need to defer to an agency guidance document that interprets law—which is known as a type of "interpretive rule"—if it is not a rule?

In many other cases, it is equally plain that the federal government would have little or no chance of winning its case against the abused citizen if the judge didn't defer to the government's outlandish interpretation of law in a guidance document. It's bad enough that judges defer to guidance documents that did not receive public notice and comment, but many, if not most, of those guidance documents are invalid under the CRA.

Last year, Congress invited a Pacific Legal Foundation colleague to testify about one such case, with an astonishing interpretation of law from a guidance document. [15] The U.S. EPA and Army Corps

[13] For example, the Red Tape Rollback Project coalition never found a single "Dear Colleague Letter" issued by the Department of Education's Office of Civil Rights over several administrations that was ever submitted to Congress, as required by the CRA. Although not all of them are described on RedTapeRollback.com, we found at least a dozen controversial Dear Colleague Letters that were not sent to Congress, including the one on "Campus Sexual Misconduct" that Education Secretary Betsy DeVos rescinded just last week. See "Bulletin: Department of Education Issues New Interim Guidance on Campus Sexual Misconduct," *U.S. Department of Education* (Sept. 22, 2017), available at https://content.govdelivery.com/accounts/USED/bulletins/1b8b87c. It's good that Secretary DeVos issued an interim guidance to replace the one that was rescinded, but she doesn't acknowledge—and may still not know—that the "rescinded" guidance was never lawfully in effect, even though the prior administration wrongly used it to open federal investigations of colleges and universities and threaten the loss of significant federal funds. We have other examples of OCR guidance documents that were never sent to Congress at RedTapeRollback.com. See, e.g., "Dear Colleague Letter on Bullying," available at https://www.redtaperollback.com/rules/dear-colleague-letter-bullying/.

[14] Pacific Legal Foundation filed a Motion in Limine in *Duarte v. U.S. Army Corps of Engineers*, asking the judge to exclude any reference to or reliance on the agency's "Rapanos Guidance" that the federal government claimed provided the governing interpretation of the Clean Water Act at the time of the actions in question. The motion pointed out that the Rapanos Guidance, which was also an incorrect interpretation of a Supreme Court case we had won a few years earlier, was not lawfully in effect at the time of the relevant conduct because it was never sent to Congress. See Duarte's Motion in Limine #5 To Prohibit Reliance on Illegal 2008 Rapanos Guidance, *Duarte v. U.S. Army Corps of Engineers*, No. 2:13-cv-02095 (E.D. Cal., consent decree filed Aug. 15, 2017), available at https://pacificlegal.org/wp-content/uploads/2017/09/2008-Rapanos-Guidance-Motion-in-Limine-003.pdf. DOJ attorneys opposed the motion, asserting that the Rapanos Guidance was not a rule that had to be sent to Congress, but at the same time, it *was* a rule that the judge had to defer to. The case settled recently without a ruling from the judge on whether the guidance could be binding on our client and subject him to $45 million in damages, which sounds like a rule, but not be one that must be sent to Congress.

[15] "Hearing on Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States: Testimony of Damien Schiff," *Senate Committee on Environment and Public Works: Subcommittee on*

of Engineers issued the "Alaska Supplement" to their 1987 Wetlands Manual, in which they declared for the first time that permafrost in Alaska may in many cases be a "navigable water of the United States" subject to its jurisdiction and control. Permafrost is frozen soil, rock, or sediment. Though it contains frozen water for years at a time, an ordinary American would not think you could navigate a boat through it, or if it is a water covered by the Clean Water Act, that it would be subject to federal rather than state control.

The Alaska Supplement is an illegal interpretation of the Clean Water Act for multiple reasons: (1) it's an unreasonable interpretation of the Clean Water Act, even if promulgated lawfully, and (2) Congress forbade the Army Corps from issuing regional supplements unless it revised the entire 1987 Wetlands Manual, although the length of that ban is still being litigated. But there is an even simpler reason why the Alaska Supplement should not be invoked or relied upon by anyone: (3) the Alaska Supplement was never submitted to Congress as the CRA requires and was never in effect.

Regardless of how substantively wrong and invalid the Alaska Supplement is, it requires citizens to seek costly federal determinations or permits to use their frozen private land or risk fines and criminal charges. Indeed, this administration relies heavily on (and insists on judicial deference to) the Alaska Supplement in our litigation on behalf of the Tin Cup Co. Without the Alaska Supplement that first declared permafrost to be a potential "water" subject to federal jurisdiction, does anyone seriously think our client couldn't satisfy the plain meaning of the Clean Water Act? What words of the Clean Water Act would provide notice that Alaskan permafrost was a potential "water of the United States?" There is nothing except for that illegal Alaska Supplement. Nevertheless, the DOJ won't yield, and many other productive enterprises are being equally frustrated by agency officials who seek to increase their power and leverage over citizens through "guidance" documents.

Those who try to minimize federal agency failure to comply with the Congressional Review Act must admit that they haven't a clue how widespread the noncompliance has been for all covered rules—because no one has even attempted to count the thousands of agency guidance documents that are used to interpret law and affect the public that were not sent to Congress. Unless OMB orders the agencies to begin a careful review of their rules for this problem, it is hard to imagine arriving at a good estimate anytime soon. Our coalition research, however, has shown the noncompliance problem involves many such significant and controversial rules, and thus far, shows no sign of changing.

A few apologists for the agency failure have provided mistaken or misleading musings why they believe the estimate of economically major rule noncompliance is adequate, although I think 348 of those is nothing to sneeze at either. Most of those who minimize the larger agency noncompliance problem, including the Brookings scholars in the study mentioned above, don't seem to understand the legal significance of past and current reliance on invalid guidance documents. They minimize the failure to report many thousands of guidance documents because most can be withdrawn or changed by an agency without an extensive process. Thus, they believe there is no reason for the agencies to comply with the CRA and send these old rules to Congress now, since Congress is unlikely to overturn guidance documents the administration can fix on its own.

That reasoning misses two crucial points. First, changing the guidance documents is a possible, prospective remedy for a misguided or illegal guidance that misinterprets law, but that does not cure the years of abuse and illegal action in potentially thousands of past or ongoing enforcement matters and criminal trials that relied or still rely on those invalid interpretations of law. Secondly, Congress

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Fisheries, Water, and Wildlife (May 24, 2016), available at https://www.epw.senate.gov/public/_cache/files/f/4/f4c0904d-1d38-468e-bde4-a52a7aa25e26/1D2ACAB1291EAE0D4814DAE88F7B46EA.schiff-testimony.pdf.

may still have wanted (or want) to overturn the worst of them, even if it is just a few of them, or in the alternative, to use its funding or oversight authority to stop the worst abuses by other means.

CRA Background and Use Prior to 2017

To fully appreciate the scope of the agency noncompliance problem and the opportunities to correct it, it now helps to review the CRA's history and its operations in more detail. I've been fortunate to work with this Committee on the CRA several times, beginning with its inception.

In 1996, I was privileged to work for this House in the Government Reform and Oversight Committee as a subcommittee chief counsel to Chairman David M. McIntosh, who was the original House sponsor of the CRA. In that capacity, I was also the principal drafter for the House (including this Committee) on the final version of the CRA that was negotiated with the Senate and its bipartisan sponsors. That version was added to a larger legislative vehicle and became law with President Bill Clinton's signature.[16]

A joint explanatory statement from the bipartisan House and Senate sponsors was adopted, and identical versions were entered into the *Congressional Record* in the House and Senate in lieu of a conference committee report on the CRA.[17] That statement is further proof that the CRA was nonpartisan until very recently. Senator Harry Reid was not only a principal co-sponsor in 1996 and joined the statement in full, but he also cited the CRA as one of his major accomplishments in his farewell address to the Senate last December.[18]

Given my involvement at its birth, I continued to follow the Act's implementation—or lack thereof—primarily as a scholar at The Heritage Foundation. I was also pleased to testify before this Committee on the Tenth Anniversary of the Congressional Review Act.[19]

What a difference eleven years have made! At the hearing in 2006, the witnesses focused on why Congress had not used the CRA to overturn many rules. I testified that GAO's central repository of rules was a wonderful achievement that scholars could mine, but I shared the disappointment that Congress was not voting on many rule resolutions. A CRA resolution of disapproval must be signed by the president or enacted over his veto to become law. Congress was often discouraged from voting on resolutions of disapproval for rules it believed the president supported.

Nevertheless, the sponsors of the CRA did not think that the president would always veto a resolution of disapproval for a rule issued during his administration, for reasons including that such a

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[16] The Congressional Review Act of 1996 was Subtitle E of Title II, the Small Business Regulatory Enforcement Fairness Act of 1996. The CRA was itself codified as chapter 8 of the Administrative Procedure Act, 5 U.S.C. §§ 801–08 (2012). A readable section-by-section copy of the CRA is available at https://www.redtaperollback.com/cra/the-law/. RedTapeRollback.com is a coalition website with information on the CRA and its full implementation that Pacific Legal Foundation maintains.

[17] There were a few floor statements at the time of the CRA's passage, especially by Rep. David McIntosh, that provide important context, but the joint statement that Senator Don Nickles and Rep. Henry Hyde entered into their respective House's pages of the *Congressional Record* shortly after passage is considered the most complete legislative history for the CRA. A copy of that legislative history is available at RedTapeRollback.com at https://www.redtaperollback.com/cra/legislative-history/.

[18] Senator Harry Reid, "Farewell to the Senate," *Congressional Record*, Daily Ed. Vol. 162, No. 177 (Dec. 8, 2016), available at https://www.congress.gov/congressional-record/2016/12/8/senate-section/article/s6850-3?q=%7B%22search%22%3A%5B%22harry+reid+farewell%22%5D%7D&r=13.

[19] See "10th Anniversary of the Congressional Review Act: Hearing before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary," (March 30, 2006), available at https://www.govinfo.gov/content/pkg/CHRG-109hhrg26770/pdf/CHRG-109hhrg26770.pdf#page=27.

rule might have been issued by an agency that did not coordinate its rulemaking through OMB or that the president might welcome an opportunity to stop a rule that the agency credibly argued was required by a previous law. It was also thought that a president might simply reconsider a rule's merits if Congress voted to overturn it, or failing that, at least the president could not hide behind the claim that he was not accountable for the rule's issuance since it was required by some prior law.

In addition to increasing Congress's and the president's accountability for agency rules, it was hoped that the CRA would have positive, secondary effects on the rulemaking process. Unelected bureaucrats might actually factor in what the people's elected representatives might think of their hundred-million-dollar rules. Yet those effects were and are unlikely to be great if agency compliance with its reporting duties is negligent or if Congress does not oversee and invoke the law regularly.

Over the last ten years, GAO and OMB occasionally reminded the agencies that they were not reporting many hundreds of rules to Congress as the law required.[20] Yet prior to this year, only one rule was ever overturned by a resolution of disapproval, and that was at the beginning of the George W. Bush administration. The ergonomics rule, issued at the end of the Clinton administration, was the only rule overturned using a CRA resolution of disapproval in 2001.

And the CRA wasn't used to overturn another rule during the rest of the George W. Bush administration or at all during the Obama administration. What's even more interesting about that is that the Republican Bush administration was followed by a Democratic sweep in the White House and both Houses of Congress for two years. Apparently, there was not a single rule issued late in the George W. Bush administration that the Democratic leaders thought was worth overturning. Were the thousands of Bush administration rules uniformly great or did our elected leaders in 2008 simply think all regulations are worth protecting? That's unclear, but the last administration issued thousands more regulations with terrible effects and numbing frequency.

The CRA is Rediscovered

Due largely to the regulatory excess of the last administration, the CRA was "rediscovered" this year as an important regulatory reform tool. Many hundreds of rules submitted to Congress at the end of the Obama administration were eligible for disapproval. A target list of more than 200 important rules was compiled for review. Resolutions of disapproval were introduced for a few dozen. Fifteen of the most controversial rules received serious consideration, resulting in 14 resolutions passing and one failing by a slim margin in the Senate. This shows that careful deliberation went into deciding what rules to review carefully and how to vote on them.

That disproves the silly narrative that Republican Members of Congress reflexively vote to overturn any regulation that crosses their desks as well as the insulting and conspiratorial tale that big corporations control the process.[21] If supposed corporate fat cats who hate all regulations controlled Congress, as the detractors allege, why weren't 500 rules killed?

In all events, the fans of regulatory bureaucracy also believe that the CRA can't be used to review and overturn any further regulations this year. That is mistaken for a number of reasons. The CRA's potential to eliminate unreasonably costly or unauthorized regulations is not limited to

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[20] See Copeland, *supra* note 9, at 16 (noting that GAO confirmed in a letter to OIRA that it had "sent separate letters to each of the agencies that had missing rules, along with a listing of the rules that had not been received from each agency.").
[21] See Jonathan Wood & Todd Gaziano, "Three Cheers for the Congressional Review Act: It gives the public a measure of control over the bureaucrats who run their lives," National Review Online (June 29, 2017), available at http://www.nationalreview.com/node/449067/print.

"midnight" rules issued at the end of an administration. Regulatory agencies continue to issue regulations that Congress may disapprove and President Trump may sign, especially if the agency does not yet coordinate its rulemaking through OMB.

In my view, the President should require all regulatory agencies to coordinate their regulatory activities through OMB, whether they are considered independent for some purposes or not. At the present time, however, the Consumer Financial Protection Bureau does not do so. One of its more recent offenses is an anti-freedom of contract rule that would prohibit parties from entering into enforceable arbitration agreements in a broad area of commercial practice. That rule has been disapproved by the House and awaits a vote in the Senate.[22] If rejected by the Senate, there is every reason to hope that President Trump would sign the resolution and overturn the ill-considered rule.

But the regulatory agencies' failure to report many thousands of rules to Congress provides a more sweeping opportunity for reform. These are the rules that some people may honestly think are in effect but are not lawfully so. A further examination of the CRA suggests an orderly process is possible to review them, or failing that, a litigation strategy to finally enforce the law.

The Consequences for Not Sending Rules to Congress

As mentioned above, the first sentence of the CRA is the powerhouse and fulcrum on which the rest of the law hinges. It requires every agency issuing a rule to submit a short report on it to the House, Senate, and GAO "before [the] rule can take effect."[23] That report must contain the text of the rule and other information that is important to Congress in evaluating it, such as the agency's compliance with other regulatory reform laws and the actual content of any cost-benefit analysis that was performed on the rule.[24]

The effectiveness of certain covered rules is extended for another period during a portion of Congress's fast-track review period. Everyone understands that the fast-track review period, where bare majorities prevail, is central to the CRA's effectiveness. Congress required rules to be submitted to Congress prior to their effectiveness so that regulated parties would be better protected, so that its options to disapprove the rules would not be prejudiced, and so that it would not be begging the agency for more information on the rule while its fast-track review period was ticking away.

Because many agencies failed, for whatever reason, to report hundreds of rules to Congress as the CRA requires (especially guidance documents termed "regulatory dark matter" by one scholar),[25] such rules never lawfully took effect, even if agencies have been enforcing them as if they were in effect. Until they discover the error, agencies illegally enforcing such rules are probably not doing so in bad faith, but that does not change the status of the rules. Until they are formally sent to Congress, they are not lawfully in effect.

Consider, by analogy, if someone honestly forgets to file his tax return with the IRS, but mails a copy to another federal agency that is considering a small business loan. There are still consequences for that honest mistake. The IRS will almost always assess interest charges for any outstanding taxes

[22] See "House Votes to Undo Federal Consumer Bureau's Arbitration Rule," *Washington Times* (July 25, 2017), available at http://www.washingtontimes.com/news/2017/jul/25/house-votes-to-undo-consumer-financial-protection-/.
[23] 5 U.S.C. § 801(a)(1)(A).
[24] See 5 U.S.C. §§ 801(a)(1)(A)–(B).
[25] Wayne Crews, "Mapping Washington's Lawlessness: An Inventory of Regulatory Dark Matter 2017 Edition," *Competitive Enterprise Institute* (March 14, 2017), available at https://cei.org/content/mapping-washington%E2%80%99s-lawlessness-2017.

and may also assess penalties for missing the deadline, but regardless of anything else, the taxpayer must still file the delinquent tax return with the IRS. And once the taxpayer is made aware of his mistake, the IRS will be less likely to forgive any further delay in the formal filing of the tax return.

Besides a rule not lawfully going into effect until the rule report is sent to Congress, there are other consequences for an agency's failure to transmit such rules in a timely manner. Three consequences are discussed further below.

- First, the agency cannot accidentally or intentionally eliminate Congress's expedited review opportunity under the CRA by its delay in sending the rule to the Hill.
- Second, this administration and Congress have various options to withdraw, modify, or reconsider those rules never sent to Congress.
- Third, the courts should not defer to or rely on the rules for the period of time when the rules were not lawfully in effect.

Why "Constructive" Notice or Publication Is Not Sufficient to Eliminate Congress's Review

There are many good reasons Congress chose to make submission of a report on each rule to Congress a non-waivable requirement. Regardless of its motive, however, there are independent textual reasons why Congress's special review period in the CRA is not triggered by publication alone.

1. **Almost every trigger date in the CRA begins on the *later* date of publication (if required) or submission to Congress**. The CRA recognizes that publication of a rule is not always required, but formal submission to Congress is. The deliberate choice of the drafters of the CRA to make so much turn on the "submission" of rules to Congress and to separately define the "submission date" in the section on special Senate procedures cannot be satisfied by publication alone or other notice. Among other things:

   - Members of Congress cannot introduce resolutions of disapproval on rules just because they were published or became public. Section 802(a) defines the "joint resolutions" subject to special procedures as those introduced "in the period beginning on the date on which the report referred to in section 801(a)(1)(A) [that contains the rule] *is received by* Congress and ending 60 days thereafter." Thus, publication alone or other public notice can't trigger a resolution of disapproval.
   - The period for special procedures in the Senate to consider a resolution of disapproval in section 802 is tied to the "submission or publication date" of the rule, which is a term defined earlier in that section. Section 802(b)(2) states (with emphasis added) that it is the *later* of the two events:

     > For purposes of this section, the term "submission or publication date" means the ***later*** of the date on which—
     >
     > (A) the [sic] Congress receives the report submitted under section 801(a)(1); or
     > (B) the rule is published in the *Federal Register*, if so published.

   Something can't be the later of two events if one event has not occurred, and thus, publication alone is never sufficient. Once a rule is sent to Congress, even if it was published years ago, a joint resolution can then be introduced to disapprove it and special procedures exist for 60 legislative/session days after that submission date.

2. **If the CRA's expedited review period could expire before an agency formally submitted a rule to Congress, it would destroy the CRA.** The CRA was codified as chapter 8 of the Administrative Procedure Act (APA), and as such, it was intended to play a crucial role in administrative law reform. Cutting out its heart to forgive agency violations of law is not a reasonable solution to agency noncompliance. The submission requirement is not primarily about notice of the rule's existence, so "constructive notice" that a rule was published is not adequate either. Formal submission is required in the CRA for many important reasons:

   - Congress could not reasonably perform its oversight function under the CRA if an agency could publish a rule on its website or other obscure location and wait for the expedited congressional review period to expire before submitting it to Congress. That's why the expedited review clock only begins upon the rule's submission to Congress.
   - No one likes their work reviewed, but agency bureaucrats are especially resistant, as confirmed by their unseemly complaints when our elected representatives used the CRA to overturn 14 of "their" regulations this year. There would be a strong incentive to withhold even published rules from Congress if, by such action, the fast-track review period could be evaded. Any interpretation rewarding such conduct would destroy the CRA—even the basic use that was employed earlier this year.
   - Preventing a rule from going into effect before it is submitted to Congress protects regulated parties from enforcement before Congress has a chance to react to the rule and possibly act to overturn it. It isn't perfect protection, but it was the compromise that Congress enacted in the CRA. If non-submission to Congress is excused, that will effectively gut such protection.
   - Congress wanted GAO's help to evaluate all rules, and it required a GAO report on major rules. The CRA, section 802(a)(1)(B), requires agencies to provide GAO additional information on *all* rules, whether major or not, which Congress could consider as it reviews the rule. The onus is on the agencies to provide all the materials required in both subsections 801(a)(1)(A) and (B), not for GAO to hunt for rules the agency may have published and then beg for information on them—while Congress's special review period is ticking away.
   - Under the broad definition of a rule chosen for the CRA, section 804(3), many covered rules are not published in the *Federal Register*. The legislative history of the CRA is clear that the sponsors chose the broad definition to address the agency practice of evading notice-and-comment procedures through the use of such guidance documents. That major purpose of the act, to require submission to Congress of "regulatory dark matter," would be defeated if the submission requirement was not strictly enforced.
   - Agencies that require private parties to file voluminous reports, permit requests, and other documents with them under threat of criminal and civil penalties should follow the law themselves when Congress requires them to file all their rules with Congress. If any rule is important enough for an agency to use or cite against a citizen in any manner—or to urge a judge to defer to it—the agency should be required to send it to Congress and GAO first.

3. **Finally, Congress required certainty for something as important as suspending normal House and Senate rules, and it wanted that time period to be easily ascertainable by events in the House and Senate, not external events**. An interpretation of the CRA that allowed the special procedure clock to be triggered by publication or any means other than submission to each House and GAO would be atextual and render the special CRA procedures unworkable.

- With a tiny congressional staff compared to the staff of regulatory agencies, Congress did not want to have to track every agency rule on a daily basis itself while its limited review period ticked away.
- Many covered rules are never published in the *Federal Register*. If publication on a website or other "constructive notice" was wrongly deemed to satisfy the submission requirement, that triggering event and date would be highly uncertain. Would it be triggered by the posting of a Dear Colleague/Regulated Party letter on the agency website? Upon delivery to the regulated parties? What if the rule was first incorporated in an agency FAQ? What if congressional committee staff in one House received a copy of it? The list of alternatives would be long, uncertain, and unworkable. Besides, the agencies could then engage in various tactics to claim that a rule was really published in some obscure manner many months ago, and thus, that Congress's expedited review procedures had expired.
- After submission of each rule report to each House under 801(a)(1), it is forwarded to the chairman and ranking member of the relevant standing committee with jurisdiction over the rule's subject matter. If submission to one location in each House is not the trigger, would Congress hire hundreds of staff to forward every agency statement they can find? Who would rule on the sufficiency of that process?

How to Identify the Worst Rules Not Previously Sent to Congress

Pacific Legal Foundation has helped organize the "Red Tape Rollback" coalition, which is composed of national and state think tanks, scholars, public interest legal organizations, and other reform groups devoted to the full implementation of the CRA and related regulatory reform ideas. The coalition website, RedTapeRollback.com, highlights relevant news stories, scholarly reports, and other information on how Congress and the Trump Administration can use the CRA to review and improve many more regulations than previously thought.

RedTapeRollback.com also contains an interactive means for Congress and the public to determine if particularly problematic rules were ever sent to Congress—and a means for the public to let us know about them. Interest in this effort continues to grow.

In addition, RedTapeRollback.com contains a description of and links to some of the worst rules we have discovered that were never sent to Congress as required by the CRA, and as a consequence, are being enforced illegally. A few of them were described above (the Education Department's controversial Dear Colleague Letters, the EPA's and Army Corps' "Rapanos Guidance," and the same agencies' Alaska Supplement to the 1987 Wetlands Manual). Another witness at this hearing will testify about his organization's problems with another EPA rule that impacts six states.[26]

[26] In 2011, the U.S. EPA adopted a rule called, in the technical language of the Clean Water Act, a "total maximum daily load," for the entire Chesapeake Bay watershed, which spans portions of six states (Virginia, West Virginia, Delaware, Maryland, Pennsylvania, and New York) and the District of Columbia. Generally, TMDLs identify how much of a given pollutant a water body can assimilate without becoming impaired. Once they are adopted, states are usually responsible for implementing permits and regulations to keep water pollution in check. With the Chesapeake TMDL, however, EPA cut the states out of the process, adopting a micromanaging federal land use plan throughout the watershed. The unprecedented rule allocates potential pollution inputs among different industries, locations, land use types, and sources. As a result, the Chesapeake TMDL federalizes land use decisions across the entire six-state watershed. This undermines federalism and subjects landowners and local governments to the distant and bureaucratic control of the EPA. The controversial rule is obviously a rule of general applicability (it doesn't just apply to one or a few named entities) that applies the Clean Water

What's worse, the Departments of Interior and Agriculture are enforcing four very consequential notice-and-comment rules published in the *Federal Register* in 2015, with knowledge that they were never submitted to Congress. These four notice-and-comment rules attempt to restrict the use of 73 million acres of federal land in 10 states for the supposed protection of sage grouse habitat.[27] The federal rules not only stop many beneficial uses of the land, they actually harm the sage grouse by interfering with state and private conservation efforts.[28] Members of Congress from the Great Basin region may be particularly interested in overturning the two rules that govern that region.

Given the agencies' knowledge that they failed to send the Sage Grouse Rules of Decision (RODs) to Congress in 2015, it is troubling that they still have not done so. If the two agencies want to embrace them, they must still send them to Congress, perhaps with a presidential veto threat warning Congress not to overturn them (if they can secure it). The one thing they can't lawfully do is continue to enforce the RODs and not send them Congress. Any possible argument that the RODs and similar management plans are not rules under the CRA is frivolous.[29]

How OMB and Congress Can Oversee the CRA and Enforce the Law

Our coalition is developing a longer list of invalid rules that were never sent to Congress, but the administration has the primary responsibility to enforce the CRA and see that invalid rules are not

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Act to thousands of people and businesses. Thus, it is a rule covered by the CRA. It was never submitted to Congress and therefore is not in effect, should not be enforced, and could be disapproved by Congress under the CRA if it were ever submitted to Congress. For links to and about this rule, see "Chesapeake Bay Watershed Regulation," *RedTapeRollback.com*, available at https://www.redtaperollback.com/rules/chesapeake-bay-watershed-regulation/.

[27] In September of 2015, the Bureau of Land Management (BLM) and the U.S. Forest Service published four notice-and-comment rules termed "records of decision" (RODs) that abruptly changed the management of vast areas of federal land in 10 of 11 states with greater sage grouse habitat. See 80 FR 57639; 80 FR 57633; 80 FR 57333; 80 FR 57332. These RODs, which combine 98 federal land use plans into these "mega" sage grouse plans covering 67 million acres of federal land, represent a radical departure from how these lands have been managed during any period of history. A fifth ROD covering land near Lander, WY was issued a year prior. The RODs shift the management of these federal lands from their traditional and statutorily-mandated goal of "multiple use" (e.g., grazing livestock, recreation, oil, gas, timber and mining, and environmental protection) to more of a sage grouse-specific focus. As a result, the plans are estimated to cost as much as $7.7 billion annually and eliminate as many as 31,000 jobs. See, e.g., Economic Impact of 2013 BLM Sage Grouse Conservation Plan, Law Offices of Lowell E. Baier (March 1, 2014), available at https://www.westernenergyalliance.org/sites/default/files/Sage%20Grouse%20Economic%20Report%20-%20Final%20from%20Minuteman%20Press.pdf.

[28] See Brian Seasholes & Todd Gaziano, "Kill Regulations to Save the Sage Grouse: driving ranchers out of business could lead to habitat loss for the very bird the rules are designed to protect," National Review Online (Sept. 26, 2017), available at http://www.nationalreview.com/article/451740/kill-federal-regulations-save-sage-grouse.

[29] There is no reasonable doubt that the RODs in question and other federal resource management plans (RMPs) are rules under the text of the CRA and its broad definition of a "rule," the legislative history of the CRA, a GAO opinion on another RPM, and a Supreme Court opinion on an analogous matter. Not surprisingly, the GAO determined that the Tongass National Forest RMP was a rule under the CRA. GAO B-275178 (July 3, 1997). GAO has developed special expertise under the CRA, and its views should be given deference. Moreover, in a closely analogous land management context, the Supreme Court has described what constitutes a rule of general applicability under the APA, which is a narrower set of rules than covered by the CRA. For the Court, Justice Scalia wrote that decisions to revoke public land withdrawals were "rules of general applicability" under the APA because those decisions announce "with respect to vast expanses of territory that they cover, the agency's intent to grant requisite permission for certain activities, to decline to interfere with other activities, and to take other particular action if requested." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 892 (1990). Similarly, the RODs lay out the management policy for vast amounts of territory, including which uses will be allowed and which will be curtailed for the alleged benefit of the sage grouse. Finally, there is also no merit to the argument that the RODs are not rules because they are mere records of the underlying RMP decisions, which are the rules. The underlying RMPs haven't been sent to Congress either. Moreover, the federal litigation challenging the sage grouse actions confirms that the RODs are the final agency action, or "final rules," under the APA precedents.

enforced illegally. It also has the specialized manpower and resources to uncover hundreds more and make sure they are either lawfully reported to Congress to become effective, or withdrawn or revised.

The President has the constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const., art II, § 3. Various statutes and executive orders delegate the Director of the Office of Management and Budget (OMB) and its Administrator for the Office of Information and Regulatory Affairs (OIRA) the duty to assist the President in overseeing the issuance of agency regulations, especially to make sure regulatory reform laws and other procedural laws are followed. OMB/OIRA have issued some guidance to the agencies in the past on compliance with the CRA, but the widespread evidence of agency negligence, confusion, or resistance to CRA compliance strongly suggests a more thorough and sustained response by the responsible White House officials is required in the future.

Accordingly, the Trump Administration should direct all regulatory agencies to conduct an orderly review for unreported rules and to consult with OMB about the next step. That directive (whether by the President, the OMB Director, or OIRA Administrator) should contain more detailed guidance on what constitutes a rule under the CRA than has been provided in the past, and it should contain instructions on how to prioritize the review, possibly with different internal review deadlines for rules of varying types or importance.

The agencies should then consult with OMB after discovering unreported rules because Congress should not be burdened with reviewing those rules that the administration itself wants to withdraw or modify, assuming that is consistent with other laws, which will normally be the case. Consider the awful Department of Education, Office of Civil Rights "Dear Colleague Letters." The Department has already withdrawn two of them, and several others are just as bad or worse.

After consultation with OMB, the agency would have several options with regard to most rules. The first would be to report batches of rules to Congress that it wants to go into effect and does not want Congress to disapprove. Congress could still try to take action to disapprove them, but it would at least know the agency's position. If it tried to overturn one or more in this category, that would be a valuable enterprise in democratic action, but Congress would certainly be selective since it would need to secure the President's signature on any disapproval (or override his veto).

The second option is to submit certain rules to Congress with a request that it disapprove them, together with a statement of administration policy that the President would sign such disapproval. The agency necessarily would have to coordinate any submission of that type with OMB to secure the statement of administration policy on a presidential signature. Such officials should also consult House and Senate leaders on any rule submitted with the intent that it be disapproved, as they should with any legislative proposal they want Congress to enact into law.

It is unrealistic to think that any administration would flood Congress with requests for legislative action, even if they are for resolutions of disapproval that can be passed with expedited procedures. Even though House and Senate floor debate can be limited to an hour or two per resolution of disapproval (pursuant to a majority vote in the Senate), any congressional floor time is dear. Moreover, an administration would not send a rule to Congress asking for it to be disapproved unless there is a good chance that Congress would actually do so.

Even so, the executive branch might still have good reason to send some rules to Congress that it wants disapproved:

- Depending on the type of rule, it might take too many years for the administration to unravel them on its own.
- Certain rules might have been under a court or statutory mandate when first published, and it would be unclear what steps the agency would have to take to withdraw or modify it.
- It may want to clarify that no future administration could issue such a rule again, which is the result if the rule was disapproved with a CRA resolution signed by the president.
- It does not want to act on its own without congressional support.

1. "CRA 2.0"

Under either option one or two, a number of previously illegal rules would be sent to Congress. What our website labels CRA 2.0 is the option for Congress to finally use the expedited procedures to review and potentially disapprove the rule with fast-track procedures. Congress was previously denied the opportunity to use those unique CRA procedures, but submission of the rule to Congress will trigger the 60-legislative/session day review period. As explained earlier, Congress's "fast track" review clock doesn't begin until the later of the dates when the rule is published (if publication is required) and when Congress receives the report on it. When the administration submits many of these old rules to Congress, its expedited review period would finally start for those rules.

We use the term "CRA 2.0" even though the law hasn't changed. Although rules will be subjected to attention during a new (second) period after they were drafted, this will be Congress's first chance to act on the rule. As is true with a newly drafted rule that is submitted to Congress, it would have 60 legislative days in the House and 60 session days in the Senate after submission to vote on resolutions of disapproval under the CRA's streamlined procedures.

As explained in the last section of this testimony, no court could interfere with or ever second-guess the House's or Senate's interpretation of the CRA concerning its respective legislative procedures—both for constitutional reasons and because CRA section 805 also prohibits it. If any rule is overturned with a resolution of disapproval signed by the president, the CRA provides that it will be treated as if it had never gone into effect.[30] And the relevant agency would also be prohibited from issuing any rule "that is substantially the same" as the disapproved rule again without a new law authorizing it.[31]

As Paul Larkin has noted elsewhere, the CRA does *not* include a statute of limitations provision that would deny Congress the opportunity to review a rule that was published in the *Federal Register* and has supposedly taken effect but was not submitted to Congress for some time.[32] Congress adds statutes of limitation frequently when creating a private right of action, but it rarely adds them to limit its own oversight power. Statutes of limitation should not be read into a congressional oversight law to limit Congress's power unless they are clear and express.

Surely most rules belatedly reported to Congress will not be overturned, in part because many might be unobjectionable and the executive would ask that they be allowed to go into effect. Congress will weigh all political and other considerations in each case. Whether it is a good idea to act or not in a given case, there is no reasonable argument that Congress can't enact resolutions of disapproval for rules recently delivered simply because of the passage of time since their drafting.

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[30] 5 U.S.C. § 801(f).
[31] 5 U.S.C. § 801(b)(2).
[32] See Larkin, "Reach of the CRA," *supra* note 3; see also Larkin, "Reawakening the CRA," *supra* note 3, at 37.

- If there has been reliance, whether modest or extensive, on a rule that was not promptly submitted to Congress, the political branches will take that into account in deciding whether to kill the rule. The agencies have no excuse to rely on their own failure to submit a rule to Congress to defeat appropriate congressional review when that rule is later submitted.
- Private actors should confirm on GAO's public database as well as the public databases for the House and Senate whether a rule they care about was properly submitted. In the future, they have even more reason to do so—but only if the CRA's text is enforced.
- Those who oppose a destructive rule and want Congress to disapprove it have a reliance interest in the CRA being followed, and there is no way to satisfy that interest short of giving the CRA's text its original public meaning. A one-time backlog of rules not submitted to Congress should not be "solved" by destroying the effectiveness of the CRA for all time.
- As between citizens who face penalties for failing to abide by an illegal rule and those who invested money to comply with an illegal rule, the balance must be struck in favor of liberty and the rule of law.

2. "CRA 3.0"

What RedTapeRollback.com labels CRA 3.0 is an even more important and productive means for the Trump Administration to meet its aggressive regulatory reform goals. Thousands of rules thought to be in effect are not legally so. The administration should take responsibility for the great majority of the burdensome and counterproductive ones without bothering Congress.

As explained immediately above, the executive branch's first two options when it discovers rules never sent to Congress and GAO is to belatedly send them, preferably with a recommendation regarding which rules the agency wants to go into effect and which should be disapproved.

The third option is for the agency to announce (preferably in the same medium on which the rule first appeared) that a particular rule is being reevaluated and is not in effect during the period of executive branch review. That should eventually lead back to one of the other options. During any period of executive branch review and reconsideration, the agency has no lawful power to enforce or rely on the rule or guidance document. It *can't* do so unless and until it is submitted to Congress. Thus, the Department of Education, Office of Civil Rights should announce that all of the remaining "Dear Colleague Letters" (that have not already been withdrawn) are not in effect and won't be unless they are subsequently embraced and sent to Congress as the CRA requires.

Option three changes the bureaucratic dynamic, such that inertia is no longer on the side of keeping a rule in place and carrying on as usual until there has been time to reconsider it and replace it. Whether that is viewed as a good or bad result may vary, but there is no other conclusion except that a rule not sent to Congress is not lawfully in effect under the CRA. Enforcing or relying on a rule *known* not to be in effect is a gross abuse of power that the White House, particularly the officials in OMB/OIRA, have a duty to stop.

The fourth option, after initial consultation with OMB or a longer period of review, is for the agency to publish a notice stating that a particular rule is being modified or withdrawn. The procedural method to do so may vary depending on whether the rule at issue was a guidance document or one that received public notice and comment.

Most guidance documents can be modified or withdrawn easily without lengthy procedures. There is little reason for most guidance documents to be sent to Congress for review, unless the agency wants them to go into effect. Nevertheless, a select few guidance documents could be sent to Congress for their disapproval, including to block substantially similar rules in the future. Consider, for example, the Department of Education, Office of Civil Rights counterproductive, racialist "Dear Colleague" Letter that micromanages school discipline, harms minority students the most, and leads to greater school disruptions.[33] It would be great if OCR was banned from issuing a similar rule again in any administration without congressional authorization.

With regard to rules that underwent public notice-and-comment procedures, the agency would be prudent to issue an "interim final rule" and seek public comment on the proposed modification or final withdrawal—but even then the agency would have to announce that it is suspending enforcement of the old rule during the additional comment period. The Administrative Procedure Act (APA) normally requires an agency to undertake the same procedures to modify or withdraw a rule that were used to issue it, but that requirement might not apply to a rule that never lawfully went into effect for failure to comply with the CRA, which is the last chapter of the APA. Consider, for example, if a proposed rule was never finalized because it was stopped during the OMB or inter-agency review phase or it was never published in the *Federal Register*; its abandonment or modification at that stage might not require notice-and-comment procedures.

Yet there are no judicial rulings on whether a notice-and-comment type rule that never lawfully went into effect for failure to comply with the CRA could be withdrawn or modified without notice-and-comment procedures. Thus, it would usually be advisable for the agency to issue a new "interim final rule" that would announce that the old rule is not "in effect" or enforceable against third parties, as the CRA's plain language requires, and that notice-and-comment is being sought on the rule's modification or revocation. That notice-and-comment period would be particularly useful as a referendum on the costs and benefits of the agency's (unlawful) implementation of the rule up to that point. Such action should be respected by the courts, especially since the agency is undertaking a public review and comment process, not merely seeking a delay, and trying to comply with all chapters of the APA. The courts should also respect the interim final rule's suspension of enforcement of the old rule during that process.

Some applications of CRA 3.0 may be challenged, including instances when another statute or court order required the old-but-never-final rule to be issued by a certain date, but litigation under the APA likely will result no matter what options the administration selects. Regulated parties, public interest groups like Pacific Legal Foundation, and others may sue to enforce the plain meaning of the CRA, so the executive branch should prioritize agency compliance with law as its best defense.

For most discretionary rulemaking, especially for non-notice-and-comment rules, a CRA 3.0 withdrawal notice would be easily justified, if not legally required by the CRA, and should be upheld by the courts. And if the right path is unclear in some few situations, a "presumption of liberty" for the people should guide the decision.

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[33] See "Dear Colleague Letter on School Discipline," *RedTapeRollback.com*, available at https://www.redtaperollback.com/rules/dear-colleague-letter-school-discipline/. For further criticism of this rule, see Roger Clegg, "How the Obama DOJ's School-Discipline 'Guidance' Will Hurt Well-Behaved Kids," *NationalReview.com "The Corner" Blog* (Jan. 8, 2014), available at http://www.nationalreview.com/corner/367901/how-obama-dojs-school-discipline-guidance-will-hurt-well-behaved-poor-kids-roger-clegg; Hans Bader, "Race-Conscious Curbs on Suspensions Lead to Violence in New York and Other Cities," *Liberty Unyielding* (March 14, 2017), available at http://libertyunyielding.com/2017/03/14/race-conscious-curbs-suspensions-lead-violence-new-york-cities/.

Reasons for This Administration to Act Aggressively to Enforce the CRA

The demands on newly appointed OMB and OIRA officials are seemingly crushing. OIRA Administrator Neomi Rao has only been in office since July of 2017. Both she and OMB Director Mulvaney have few political appointees to help them. The predictable reaction to the CRA compliance problem from career bureaucrats, both in the agencies and in the White House, will be to falsely deny the problem, then try to minimize it, develop excuses why they should wait for court orders to act, stress the real and imagined consequences of taking action, call for more detailed study, and similarly delay, and delay, and delay.

In that situation, it is so easy for good people, such Administrator Rao, to let other daily "emergencies" crowd out the time to solve bigger problems that don't seem quite as time sensitive. OMB officials should resist that natural inclination and prioritize decisions and actions to solve the CRA compliance problems before they grow qualitatively worse—and on their watch.

The most important reason for OMB officials to correct these compliance problems is that the CRA and their oaths of office require it. Beyond that, this Administration should not let the legal violations of past administrations, negligent though they may have been, become the willful violations of their own. If they are concerned about agency and private reliance on invalid rules, these problems will only grow worse as time passes. Moreover, the reliance interests from the point of time when this problem became well known (earlier this year) until it is resolved will be exclusively the responsibility of this Administration. Taking prompt and aggressive action is surely needed. That will allow OMB to get ahead of the problem before third-party litigation makes things more complicated. In sum, further delay is neither just nor responsible.

Two additional policy reasons also support full implementation of the CRA this year. First, the Trump Administration can use the inertia-changing impacts of this review to help achieve its aggressive regulatory reform goals, especially if it declares that rules withdrawn during such review will count as rescinded rules for purposes of internal regulatory orders. Finally, if this administration does not take advantage of this opportunity, a future administration will, and they will do so with respect to rules this administration issued but did not send to Congress. That future administration will also do so with regard to older rules, but their decisions may not further the same policy objectives. The CRA noncompliance issue is potentially a one-time problem, but it will grow until some administration (on its own or under court order) engages in the one-time solution.

Department of Justice Oversight of Ongoing Enforcement Actions and Litigation

Whatever options the agencies, in consultation with OMB, decide to take to correct the past non-compliance problems regarding their rules, there needs to be a simultaneous review of ongoing enforcement actions and litigation that rely on the rules (whether formal rules or guidance documents) that were not lawfully in effect at the time of the alleged conduct by the private party at issue.

Unless it is contained in a separate directive, my proposed instruction to agencies to search for rules not previously sent to Congress in violation of the CRA should also include an instruction to consult with agency enforcement officials and DOJ on how to handle pending investigations, enforcement actions, and litigation that rely on rules that were not lawfully in effect when the alleged conduct took place. In most cases, the enforcement action or litigation may proceed under the relevant statute and other regulations. In some cases, the agencies may need to dismiss the action. In others, the situation may be unclear. But in all cases, the regulatory agency and DOJ must be directed that they cannot continue to rely on the rules for any period of time when they were not lawfully in effect.

Any other interpretation of the CRA, including an attempt to read the failure to submit rules to Congress as a "harmless error" or an unenforceable technicality, would render the CRA unworkable. It would also be a clear violation of constitutional due process protections. Due process "of law" requires valid law. There can be no due process of law if the rule the government relies upon was not valid. Whatever else the Trump Administration does, it should not compound the non-compliance problems of past administrations with more serious law violations of its own.

Court Enforcement: What Is and Is Not Subject to Judicial Review

If this Administration does not embrace the opportunity to review old rules and Congress's oversight cannot compel them to follow the law, I expect that private parties and public interest litigators like the Pacific Legal Foundation will do what any red-blooded American should: sue to enforce the CRA's provisions to protect our individual liberty. Collectively, the government could see hundreds of challenges.

Consequently, it is important to distinguish the limitation on judicial review in the CRA for congressional and OMB determinations from challenges to agencies for enforcing invalid rules.

1. No Judicial Review for Congressional Actions or Inactions

Congress is the final arbiter of whether resolutions of disapproval for rules submitted to Congress under the CRA, or for rules that *should have* been submitted to Congress,[34] qualify for the fast-track procedures of CRA. If there was doubt about a given agency statement or arguable rule, Congress is the final arbiter of determinations as they apply to its proceedings. The bottom line is this: if each House votes and passes a resolution disapproving a particular rule and the president signs it, that is a law.

No court can second-guess the procedures that led up to the final vote on a resolution of disapproval that has become a law; there are separate constitutional and statutory reasons for that. First, courts lack subject-matter jurisdiction to hear such a claim because the Rules Clause of the Constitution forbids courts from second-guessing Congress's application of its internal rules unless those rules violate some independent constitutional constraint. U.S. Const. art. I, § 5, cl. 2. The CRA violates no independent constitutional rule, since it requires bicameralism and presentment under article I, § 7. Second, the CRA itself prevents litigants from challenging congressional determinations and actions taken pursuant to the Act.

The CRA provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. Although Section 805 does not preclude all claims or legal theories arising under the CRA, it does bar challenges to *congressional* determinations and actions taken pursuant to the Act. *See, e.g.*, *United States v. Southern Ind. Gas and Elec. Co.*, No. IP99-1692-C-M/S, 2002 WL 31427523, at *6 (S.D. Ind. Oct. 24, 2002); Paul J. Larkin, Jr., *Judicial Review Under the Congressional Review Act*, Legal Memorandum No. 202 (Mar. 9, 2017).[35]

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[34] GAO has a practice under which it will offer its formal opinion as to whether a given agency statement is a rule under the CRA that should have been reported to Congress. The Congressional Research Service explains that the parliamentarians may consider such a conclusion by GAO to qualify as a triggering event that is the equivalent of submission to Congress. See "The Congressional Review Act: Frequently Asked Questions" at 8, *Congressional Research Service* (Nov. 16, 2016), available at https://fas.org/sgp/crs/misc/R43992.pdf.

[35]Available at http://www.heritage.org/the-constitution/report/judicial-review-under-the-congressional-review-act.

The CRA legislative history confirms that Congress intended to prevent second-guessing of its actions under the law. 142 Cong. Rec. S3683, S3686 (daily ed. Apr. 18, 1996) (Joint Statement for the record by Senators Nickles, Reid, and Stevens); 142 Cong. Rec. E571-01, E577 Congressional Record – Extension of Remarks Apr. 19, 1996) (Statement submitted by Representative Hyde). Congress chose language that ensured litigants could not flyspeck the process of adopting a resolution of disapproval. Larkin, *supra* at 3 ("Accordingly, Section 805 would appear to reach every decision or step . . . that could be associated with the CRA."). Specifically, Congress ensured that no court could "review whether Congress complied with the congressional review procedures in this chapter." 142 Cong. Rec. at S3686. The legislative history also explains that the same limitation on judicial review applies to the Office of Management and Budget's actions under the CRA. 142 Cong. Rec. at S3686. This limitation is consistent with other parts of the Administrative Procedure Act. Larkin, *supra* at 4 (explaining how actions by Congress and the president are excluded from judicial review under the Administrative Procedure Act).

2. Judicial Review is Proper for Agency Enforcement of Invalid Rules

Although Congress's and OMB's actions under the CRA are not subject to judicial review, courts do have jurisdiction to determine the legal effect of an agency's failure to submit a rule and to determine whether a subsequently adopted rule is substantially similar to a rule that was previously disapproved. *See* 142 Cong. Rec. at S3686 ("The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect.").

Few courts have interpreted the CRA's judicial-review provision. Some have interpreted Section 805 consistently with the legislative history and said that the provision does not bar review of an agency's failure to comply with the CRA. *Southern Ind. Gas*, 2002 WL 31427523, at *6 (Section 805 only precludes challenges to congressional action taken under the CRA); *United States v. Reece*, 956 F. Supp. 2d 736, 743 (W.D. La. 2013) (holding that Section 805 does not preclude a criminal defendant from seeking to dismiss an indictment for the Drug Enforcement Agency's alleged failure to comply with the CRA). Others have said that it precludes nearly any claim that requires an application of the CRA. *See Montanans for Multiple Use v. Barbouletos,* 568 F.3d 225, 229 (D.C. Cir. 2009); *Via Christi Reg'l Med. Ctr., Inc. v. Leavitt,* 509 F.3d 1259, 1271 n.11 (10th Cir. 2007). Still others have reviewed the provisions of the CRA when an agency has used the Act's requirements as a defense to the agency's actions. *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1370 (Fed. Cir. 2002), *amended on reh'g in part*, 65 F. App'x 717 (Fed. Cir. 2003); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004).

Although no court has ever allowed judicial review of Congress's application of its own procedures, which all concede is at the core of what section 805 precludes, Paul Larkin has provided a compelling and original analysis explaining why the courts should and would entertain judicial review over an agency's failure to comply with the requirements of the CRA. First, there is no doubt the CRA contemplates judicial review of *some* kind because it contains a severability and savings clause, which comes into effect "[i]f any provision of [the CRA] . . . is held invalid."[36] As Larkin explains, the presence of this severability clause "shows that Congress did not intend to foreclose the federal courts from adjudicating constitutional claims that could arise in connection with the CRA."[37] To believe otherwise is to conclude that the severability clause is meaningless surplusage.

[36] 5 U.S.C. § 806(b).
[37] Larkin, "Reawakening the CRA," *supra* note 3, at 29.

Since we know that the CRA must contemplate some type of judicial review, what is it that can be reviewed? The natural answer is agency action. The CRA was, after all, intended to curb agency action, not to immunize it. And the plain text and legislative history of the CRA supports this position. Judicial review is barred for all actions and omissions "under" the CRA but, as Larkin explains, the failure of an agency to properly promulgate a rule is not done "under" the CRA. "An agency does not promulgate any rules 'under' the CRA; rather it promulgates rules by relying on the substantive law-making authority that Congress granted the agency elsewhere in an implementing statute."[38]

Finally, any alternate reading of the CRA would raise serious constitutional due process concerns. When an agency promulgates and enforces a rule without legal authority, it is acting in an *ultra vires* manner. The history of the Due Process Clause, going all the way back to its philosophical forebear, Magna Carta, shows that the enforcement of such *ultra vires* laws is a core constitutional concern.[39] Due Process demands that if the government infringes on someone's life, liberty, or property, it must be legally authorized to do so. If the CRA were interpreted to entirely foreclose the rights of citizens to challenge that authority in court, it would raise the grave question whether that foreclosure violates the Due Process Clause. But fortunately, such an interpretation is neither necessary nor logical.

The Supreme Court has held that it will not read a statute to bar a constitutional claim, such as the due process claim that would be brought against enforcing a rule that was invalid at the time of the alleged conduct, unless the statute is clear that such claim is meant to be barred.[40] And even then, such a clear and express attempt to limit a constitutional claim would raise court hackles. The CRA not only does not contain the necessary clear bar on constitutional due process claims against an agency trying to enforce an invalid rule, but to the extent section 805 is ambiguous, the legislative history of the CRA makes Congress's intent clear to allow a claim of rule invalidity against an agency for failure to submit it to Congress.[41]

Conclusion

The CRA holds great promise as a tool to increase both congressional and presidential accountability for agency rules, but much less so if the agencies don't comply with it. Regardless of the reasons for agency noncompliance, with inattention and mistake the most likely reasons for those failures, the consequences are serious, including an unjust enforcement of rules against Americans that are not lawfully in effect. OMB and other White House officials have the responsibility in the first instance to correct these compliance problems going forward, as well as to address the one-time problem resulting from prior failures. Congress can play several key roles as well. This oversight hearing is an important step. The Legislative Branch can also review and act on older rules that are belatedly delivered to Congress, as the CRA still requires. But if the political branches won't enforce the law, we must look to the courts, which remain open to vindicate our rights, including the right not to have rules or other laws enforced against us that were never valid.

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[38] Larkin "Reawakening the CRA," *supra* note 3, at 29.

[39] See Larkin, "Reawakening the CRA," *supra* note 3, at 25–29.

[40] See *Webster v. Doe,* 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear.").

[41] See "Joint Statement for the Record by Senators Nickles, Reid, and Stevens" (1996) ("The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3)."), available at https://www.redtaperollback.com/cra/legislative-history/.