



Administrative Conference Recommendation 2021-8

Technical Reform of the Congressional Review Act

Adopted December 16, 2021

The Congressional Review Act (CRA)¹ allows Congress to enact joint resolutions overturning rules issued by federal agencies. It also establishes special, fast-track procedures governing such resolutions. This Recommendation aims to address certain technical flaws in the Act and how it is presently administered.

The Hand-Delivery Requirement

The CRA provides that, before a rule can take effect, an agency must submit a report (an 801(a) report) to each house of Congress and the Comptroller General, who heads the Government Accountability Office (GAO). Receipt of the 801(a) report by each house of Congress and the Comptroller General also triggers the CRA's special, fast-track procedures.

The CRA says nothing about how agencies must deliver 801(a) reports to Congress or the Comptroller General. Congressional rules, however, currently require that 801(a) reports be hand-delivered to both chambers of Congress. Although the House allows members to electronically submit certain legislative documents and the Comptroller General permits agencies to electronically submit 801(a) reports, electronic submission is not generally regarded by Congress as an acceptable means of submitting 801(a) reports to Congress.

The hand-delivery requirement has been the subject of persistent criticism on the grounds that it is inefficient and outdated and results in exorbitant costs to federal agencies. Recent events have also shown that it is sometimes impracticable. For example, staffing disruptions related to

¹ 5 U.S.C. §§ 801–08.



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the COVID-19 pandemic have, in some instances, meant that agencies had difficulty delivering 801(a) reports by hand and congressional officials have not been present in the Capitol to receive 801(a) reports via hand-delivery.

Time Periods for Introducing and Acting on Resolutions Under the CRA

Another source of persistent criticism of the CRA concerns the time periods during which members of Congress may introduce and act on joint resolutions overturning agencies' rules. Under the CRA, Congress's receipt of an 801(a) report begins a period of 60 days, excluding days when either chamber adjourns for more than three days, during which any member of either chamber may introduce a joint resolution disapproving the rule.² Only rules submitted during this period, sometimes called the "introduction period," are eligible for the CRA's special, fast-track procedures.

Calculating the introduction period can be confusing because it runs only on "days of continuous session"—that is, on every calendar day *except* those falling in periods when, pursuant to a concurrent resolution, at least one chamber adjourns for more than three days. As a practical matter, there is seldom a difference between 60 days of continuous session and 60 calendar days because recent Congresses have made regular use of *pro forma* sessions to avoid adjournments of more than three days. Nevertheless, having to calculate the introduction period according to days of continuous session rather than calendar days can mislead people unfamiliar with the concept of days of continuous session or with recent Congresses' uses of *pro forma* sessions. Moreover, because modern Congresses invoke *pro forma* sessions in a way that negates almost any practical difference between days of continuous session and calendar days, the CRA's use of days of continuous session to calculate the introduction period accomplishes little beyond complicating the process of ascertaining the period's end date.

The introduction period is not the only complicated timing provision in the CRA. Another—sometimes called the "lookback period"—provides that if, within 60 days of session in

² *Id.* § 802(a).



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the Senate or 60 legislative days in the House after Congress receives a rule, Congress adjourns its annual session *sine die* (i.e., for an indefinite period), the periods to submit and act on a disapproval resolution “reset” in their entirety in the next session of Congress.³ In that next session, the reset period begins on the 15th day of the session in the Senate and the 15th legislative day in the House. The lookback period thus ensures that Congress has the full periods contemplated by the CRA to disapprove a rule, even if the rule is submitted near the end of a session of Congress.

The lookback period is anomalous and difficult to ascertain for several reasons. Whereas most of the time periods set forth in the CRA are calculated in calendar days, the lookback period is calculated using Senate session days and House legislative days—terms of art with which most people are unfamiliar.⁴ The lookback period is also unpredictable because House legislative and Senate session days do not always correspond to each other, and the chambers regularly modify their anticipated calendar of session or legislative days, often with little advance notice. In addition, using legislative and session days to calculate the lookback period means interested members of Congress can strategically lengthen or shorten the period, either by having legislative or session days extend for multiple calendar days or cramming several legislative or session days into a single calendar day. Perhaps most troublesome: Whereas most time periods under the CRA are calculated prospectively—that is, by counting forward from an established starting date—the lookback period is calculated retrospectively—that is, by counting backward from an end date that is not known until Congress adjourns *sine die*. The lookback period’s retrospective quality makes it effectively impossible to calculate in real time because the date on which the lookback period begins is only knowable once the period has closed. For those and other reasons, the public, members of Congress, congressional staff, and agencies sometimes

³ *Id.* § 801(d)(1).

⁴ A Senate session day is “[a] calendar day on which [the Senate] convenes and then adjourns or recesses until a later calendar day,” while a House legislative day commences when the House convenes and continues until the House adjourns. See RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RSCH. SERV., R42977, SESSIONS, ADJOURNMENTS, AND RECESSES OF CONGRESS 2, 6 (2016), available at <https://crsreports.congress.gov/product/pdf/R/R42977>.



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struggle to anticipate when the CRA's lookback period will commence, or determine when it did commence, during a given session of Congress.⁵

Complicating matters still further, the CRA's key dates do not necessarily align in ways that make sense. For instance, the CRA expressly provides that the introduction and lookback periods commence when an 801(a) report is submitted to Congress. But other, related CRA time periods—such as the periods for discharging a joint resolution from committee (the discharge period) and for fast-tracking a rule through the Senate (the Senate action period)—commence running only after Congress receives the report *and* the rule is published in the *Federal Register*. This can lead to anomalous situations. Members of Congress might, for instance, timely introduce joint resolutions of disapproval under the CRA and yet be unable to avail themselves of the CRA's fast-track procedures.

At present, problems with synchronizing related CRA time windows are addressed primarily through interpretations from the Senate and House Parliamentarians. For example, the Senate Parliamentarian has interpreted the lookback and introduction periods to commence only after the 801(a) report has been submitted to Congress *and* the rule has been published in the *Federal Register*, thereby harmonizing the starting dates for those periods with the starting dates for the discharge and Senate action periods.

But relying on the Parliamentarians' interpretations creates its own problems. Chief among them is that the interpretations are not always easily accessible by the public. Although some of the Parliamentarians' interpretations are publicly available, many are not. Indeed, the formal rulings of the Senate Parliamentarian have not been published in decades. In the case of

⁵ In recent years, the lookback period has tended to commence between mid-July and early August, with the precise date varying from year to year. *See* Jesse M. Cross, Technical Reform of the Congressional Review Act 35 (Oct. 8, 2021) (draft report to the Admin. Conf. of the U.S.). In setting a commencement date for the lookback period, Congress may wish to consider the relationship between the CRA and what are sometimes called midnight rules (that is, rules published in the final months of an administration). *See* Admin. Conf. of the U.S., Recommendation 2012-2, *Midnight Rules*, 77 Fed. Reg. 47802 (Aug. 10, 2012).



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the interpretations that are collected and published, moreover, most members of the public are either unaware of the interpretations' existence or unsure how to access them.

Initiating CRA Review of Actions for Which Agencies Do Not Submit 801(a) Reports

Still another criticism of the CRA concerns what Congress should do to enable CRA review of agency actions for which agencies do not submit 801(a) reports. The CRA itself does not say what to do in those situations, even though studies show they arise frequently.

Absent statutory text addressing the subject, Congress has adopted a process through which it initiates review of such agency actions by requesting an opinion from the GAO. That process begins when members of Congress or committees request a GAO opinion on whether an agency action qualifies as a “rule” under the CRA. If GAO concludes that it does, a member or a committee provides for publication of the GAO opinion in the *Congressional Record*. Publication in the *Congressional Record* is then deemed to be the date that triggers the time periods for CRA review of the agency action.

Although that process has worked tolerably well as a response to the problem of unreported rules, it lacks a clear basis in the CRA's text. There are also aspects of it that warrant revisiting. For example, there is no time limit for using the current, de facto procedure, meaning Congress might use it to subject a decades-old action to CRA review.⁶

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This Recommendation provides targeted, technical reforms to address many of the criticisms just identified—including criticisms of the hand-delivery requirement, criticisms

⁶ The role proposed for GAO in Paragraph 7 is applicable solely for purposes of triggering the expedited congressional review procedures under 5 U.S.C. § 802; it does not have any impact on when a rule is effectuated under 5 U.S.C. § 801. *Cf. Bowsher v. Synar*, 478 U.S. 714 (1986).



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prompted by the confusion surrounding key dates under CRA, and criticisms of the process for initiating CRA review of agency actions for which agencies do not submit 801(a) reports.

RECOMMENDATION

Requiring Electronic Submission of Reports Required by 5 U.S.C. § 801(a)(1)(A)

1. Congress should amend 5 U.S.C. § 801(a)(1)(A) to provide that the reports required by that provision (801(a) reports) be submitted to Congress and the Government Accountability Office (GAO) electronically rather than by hard copy.
2. In the event Congress does not enact the amendment described in Paragraph 1, both houses of Congress should modify their rules or policies to require electronic submission of 801(a) reports.
3. In the event that Congress, in some manner, mandates electronic submission of 801(a) reports, it should establish procedures governing how agencies may electronically submit 801(a) reports.

Simplifying and Clarifying the Procedures for Determining Relevant Dates Under 5 U.S.C. §§ 801 and 802.

4. Congress should simplify 5 U.S.C. § 801(d)(1) by setting a fixed month and day after which, each year, rules submitted to Congress under the Congressional Review Act (CRA) will be subject to the CRA's review process during the following session of Congress.
5. Congress should amend 5 U.S.C. § 802(a), which establishes the period during which joint resolutions of disapproval under the CRA may be introduced, to either:
 - a. Eliminate the requirement that joint resolutions be introduced during a particular period;
 - b. Align the dates on which the period commences and ends with the period during which the Senate may act on a proposed joint resolution of disapproval submitted



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under the CRA; or

- c. Align the date on which the period commences with the period during which the Senate may so act and provide that such period ends a fixed number of calendar days from such commencement.
6. Congress should review and, where appropriate, enact Parliamentary interpretations that bear on calculating deadlines under the CRA, either as statutory law or as formal rules of the houses. If Congress does not enact those interpretations into statutory law, it should ensure that they are published in a manner that is accessible to the public.

Initiating Review of Agency Actions for which Agencies Do Not Submit 801(a) Reports

7. If Congress continues the practice of requesting an opinion from the GAO on whether an agency action, for which the agency did not submit an 801(a) report, qualifies as a “rule” under the CRA to initiate the expedited process for congressional review outlined in 5 U.S.C. § 802, it should provide a transparent mechanism for doing so. To that end, Congress should amend Chapter 8 of Title 5 of the *United States Code* to enact the process it currently relies on to initiate CRA review (while clarifying that such amendment is solely for purposes of implementing 5 U.S.C. § 802). Under such process:
- a. Any member of Congress or committee may request the opinion of the GAO on whether an agency action qualifies as a “rule” under the CRA;
 - b. After soliciting views from the agency, GAO responds by issuing an opinion as to whether the agency action in question qualifies as a “rule”;
 - c. If GAO concludes that the action amounts to a rule under the CRA, any member of Congress or committee may provide for publication of the GAO opinion in the *Congressional Record*; and
 - d. Publication of the GAO opinion in the *Congressional Record* is the date that triggers the time periods for CRA review of the agency rule.
8. If Congress amends the CRA to enact the procedure described in Paragraph 7, it should impose time limits within which the steps in Paragraph 7 must be taken.