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## THE MYSTERIES OF THE CONGRESSIONAL REVIEW ACT

When President George W. Bush came into office, one of his Administration's first actions was to delay and withdraw the last-minute regulations that President Clinton had enacted in his final weeks in office.<sup>1</sup> And as President Bush's term came to an end, his staff took steps widely viewed as intended to ensure the Obama Administration would have a more difficult time undoing Bush's rules than the Bush Administration had undoing Clinton's eight years earlier.<sup>2</sup> The pattern is familiar, dating to the first hostile presidential transition from John Adams to Thomas Jefferson.<sup>3</sup> But President Bush's 2001 transition was the first to contend with a new wrinkle: the Congressional Review Act<sup>4</sup> (CRA), a 1996 law that was intended to make it easier for Congress to overturn administrative action. In practice, the CRA mechanism is most relevant in times of presidential transition.<sup>5</sup> In 2001, President Bush became the first President to use the CRA — to overturn the Clinton Administration's ergonomics rule. In 2008, although

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<sup>1</sup> See Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, The White House, to Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001), in 66 Fed. Reg. 7702 (Jan. 24, 2001); William M. Jack, Comment, *Taking Care that Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1484 (2002). Ultimately, the Bush Administration finalized without amendment the vast majority of Clinton-era rules that it had delayed under the Card memorandum. See Jason M. Loring & Liam R. Roth, Empirical Study, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1458–59 (2005).

<sup>2</sup> See Memorandum from Joshua B. Bolten, Chief of Staff, The White House, to Heads of Executive Departments and Agencies (May 9, 2008), available at [http://www.federaltimes.com/blogs/fedtimes/wp-content/uploads/2008/12/bolten\\_memo.pdf](http://www.federaltimes.com/blogs/fedtimes/wp-content/uploads/2008/12/bolten_memo.pdf); Matthew Madia, *For Bush-Era Regulations, the Clock Is Ticking*, OMB WATCH, May 28, 2008, <http://www.ombwatch.org/node/3703>.

<sup>3</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>4</sup> 5 U.S.C. §§ 801–808 (2006).

<sup>5</sup> See RICHARD S. BETH, CONG. RESEARCH SERV., THE CONGRESSIONAL REVIEW ACT AND POSSIBLE CONSOLIDATION INTO A SINGLE MEASURE OF RESOLUTIONS DISAPPROVING REGULATIONS 1 & n.5 (2009), available at [http://assets.opencrs.com/rpts/R40163\\_20090126.pdf](http://assets.opencrs.com/rpts/R40163_20090126.pdf). This insight receives only passing mention in the existing literature on midnight regulation. See, e.g., Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1002 (2001) (“Because the president can veto resolutions disapproving rules under the CRA, it is unlikely to be used frequently . . . except in circumstances where a new President seeks to block rules issued by a prior administration.”); see also Loring & Roth, *supra* note 1, at 1449. The CRA does explicitly privilege periods of transition in one respect: any regulation finalized within the last two months of a session of Congress is treated as if it were finalized fifteen legislative days after the succeeding session of Congress begins. 5 U.S.C. § 801(d). Therefore, any regulation finalized in the final two months — or longer depending on how legislative days are counted — of the outgoing administration may be disapproved by the new Congress, even if the rule has already gone into effect.

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it took steps to ensure its last-minute, or “midnight,” rules would not be easily overturned, the Bush Administration could do little to obstruct the use of the CRA against its rules.<sup>6</sup> Whether the Bush Administration had anything to worry about — that is, whether the Congressional Review Act plays a meaningful role in the legislative and regulatory processes — is the subject of this Note.

In barest outline, the Congressional Review Act permits Congress to enact a “resolution of disapproval,” which if passed by both houses of Congress and signed by the President — or two-thirds majorities in both houses to overcome a presidential veto — would overturn any rule promulgated by a federal administrative agency.<sup>7</sup> Described in this fashion, as it is most commonly described, the CRA mechanism appears to do precious little. It has merely recreated the constitutionally defined procedure for Congress to enact a law. The CRA, then, presents several mysteries: Why would the CRA create a new legislative process identical to the one prescribed in Article I of the Constitution? Why would Congress believe the CRA process — involving majority votes in both houses of Congress — would be more efficient than unilateral executive action that could achieve the same end? Ultimately, why does such a thing as the Congressional Review Act exist?

The conventional view of the Congressional Review Act is that it grants Congress special power in its perpetual battle with the executive and that this power is always latent, a mechanism that lurks in the background of the regulatory process.<sup>8</sup> The CRA grants Congress no such power. However, the CRA does create some effective power, though not in the forms regularly ascribed to it. First, the law gives successor Presidents and Congresses, when acting together, an easier route to overturn the midnight rules of an outgoing administration. Second, the law imposes new restraints on the so-called “independent” agencies. That the CRA mechanism has never been used to overturn independent agency rules suggests those agencies are not as independent from the President as they are thought to be. That the CRA has been used only once to overturn a midnight rule suggests that traditional means of lawmaking — ordinary legislation and notice-and-comment rulemaking — are not as ossified as many believe. Finally, that the CRA was viewed as necessary at all speaks to a widespread belief, justified or not, in the ossification and dysfunction of the administrative process.<sup>9</sup>

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<sup>6</sup> As described in Part II.B, *infra*, the Bush midnight rules were neither structured to avoid rescission, nor could they have been, given how far back the CRA reachback mechanism extends.

<sup>7</sup> 5 U.S.C. § 801.

<sup>8</sup> See sources cited *infra* note 35.

<sup>9</sup> But see Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rule-making from 2001–2005*, 38 ENVTL. L. 767 (2008); Anne Joseph O'Connell, *Political Cycles of*

Part I of this Note describes the origins of the Congressional Review Act and the conventional view of its purpose. Part I concludes that the CRA provides Congress special power principally in times of presidential transitions. Part II shows, through the experiences at the beginning and end of the Bush Administration, that even in times of presidential transitions, when the CRA might be most effective, the Act is little needed. Having concluded that traditional explanations of the CRA are inadequate, Part III seeks to explain why the CRA exists and what effective power it creates. These are the powers to avoid minority capture and to exercise executive control over the so-called “independent” agencies.

### I. TRADITIONAL NOTIONS OF THE CONGRESSIONAL REVIEW ACT

The Congressional Review Act emerged from a particular historical context: an attempt by Congress to reassert authority over administrative agencies after having been stripped of the legislative veto power.<sup>10</sup> The CRA has continued to be viewed in this context, as a tool in interbranch skirmishes, despite its apparent ineffectiveness in this regard. This Note aims to correct this misperception. First, this Part sketches the origins of the Act and the development of this traditional view of its role. Then this Part explains how the CRA disapproval mechanism functions and how even an optimistic view of its efficacy limits its power primarily to periods of presidential transition.

The problem of congressional control of the administrative state is not new. As early as the 1930s, members of Congress worried that wide delegations of administrative authority would leave the unelected bureaucracy politically unaccountable.<sup>11</sup> Yet they also realized that Congress could not pass enough specific legislation to regulate the increasingly complex world.<sup>12</sup> The legislative veto was seen as a partial solution to this dilemma.<sup>13</sup> Congress would grant broad rulemaking authority to administrative agencies, but would reserve the ability to disapprove regulations that Congress disfavored. No single statute created an across-the-board legislative veto. Instead, over the course of sixty years, Congress enacted more than 200 federal statutes with individual legislative vetoes.<sup>14</sup> But in 1983, in *INS v.*

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*Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 964 (2008).

<sup>10</sup> See 142 CONG. REC. 8197 (1996) (statement of Sens. Nickles, Reid, and Stevens).

<sup>11</sup> See JESSICA KORN, *THE POWER OF SEPARATION* 4–5 (1996).

<sup>12</sup> Cf. *INS v. Chadha*, 462 U.S. 919, 968 (1983) (White, J., dissenting).

<sup>13</sup> See *id.*

<sup>14</sup> Veto provisions varied from statute to statute. Some required disapproval by both the Senate and House of Representatives for agency action to be overturned. Some required the disap-

*Chadha*,<sup>15</sup> the Supreme Court invalidated those provisions, holding that they violated the constitutional separation of powers. Overturning administrative action amounts to a legislative act, and the Constitution permits Congress to exert legislative authority only in the manner prescribed by Article I: passage by both houses of Congress (bicameralism) and signature or veto by the President (presentment).<sup>16</sup>

Supporters of the legislative veto predicted that *Chadha* would lead to the wholesale restructuring of the administrative state: Congress would be unwilling to maintain the existing wide grants of authority to the executive without a legislative veto and would therefore withdraw that authority.<sup>17</sup> Jessica Korn has persuasively argued that *Chadha* had less influence than predicted because the legislative veto was a less useful tool of congressional control than had been popularly believed.<sup>18</sup> The legislative veto, when available, was rarely used. Less formal means of congressional control, such as officer confirmation and oversight hearings, the appropriations process, and reporting requirements, were more effective<sup>19</sup> and generally rendered formal legislative vetoes unnecessary. The *Chadha* Court made clear that these nonlegislative forms of oversight remained available to Congress.<sup>20</sup> Despite its limited effectiveness, Korn concludes, the legislative veto had great political value to members of Congress intent on demonstrating to constituents that they were overseeing an otherwise unchecked federal bureaucracy.<sup>21</sup>

On March 29, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act of 1996,<sup>22</sup> part of the “Contract with America” legislative agenda that congressional Republicans rode to victory in the 1994 midterm elections. Subtitle E of the Act was known as the Congressional Review Act, which had bipartisan support in Congress.<sup>23</sup> The CRA was conceived as a means to shift power from the executive to Congress in a manner consistent with *Chadha*. But, like the legislative veto, the CRA may be more about signaling to

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proval of only a single house. Many statutes even permitted disapproval by the action of only a single congressional committee. Joseph Cooper, *The Legislative Veto in the 1980s*, in CONGRESS RECONSIDERED 364, 365–67 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 3d ed. 1985).

<sup>15</sup> 462 U.S. 919.

<sup>16</sup> *Id.* at 951.

<sup>17</sup> *See, e.g., id.* at 968 (White, J., dissenting).

<sup>18</sup> KORN, *supra* note 11, at 33–34.

<sup>19</sup> JOEL D. ABERBACH, KEEPING A WATCHFUL EYE 135 tbl.6-2 (1990) (calculating the effectiveness of various methods of congressional oversight).

<sup>20</sup> *See Chadha*, 462 U.S. at 955 n.19.

<sup>21</sup> KORN, *supra* note 11, at 42–43.

<sup>22</sup> Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified at 5 U.S.C. §§ 801–808 (2006); 15 U.S.C. § 657 (2006)).

<sup>23</sup> *See* 142 CONG. REC. 8197 (1996) (statement of Sens. Nickles, Reid, and Stevens); *id.* at 6817 (statement of Sen. Levin).

constituents and agencies Congress's intentions to police the bureaucracy, than about creating any new effective power over the agencies. Senators Don Nickles (R-Okla.), Harry Reid (D-Nev.), and Ted Stevens (R-Alaska) wrote in a joint statement, "This legislation will help to redress the balance [between the branches], reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency."<sup>24</sup> Senator Carl Levin (D-Mich.) said that the CRA would provide Congress with new power to oversee regulation. No longer would discouraged constituents be forced to petition or sue the agency. "Now we are in a position to do something ourselves," Senator Levin said.<sup>25</sup> "If a rule goes too far afield from the intent of Congress in passing the statute in the first place, we can stop it. That's a new day, and one a long time in coming."<sup>26</sup>

Obviously, the CRA did not accomplish the impossible feat that the Senators' rhetoric claimed for it: reshaping the constitutional separation of powers while still remaining within the Constitution's bounds. The CRA's effect was far more modest. The Act provided that before any rule may take effect the agency must submit it to Congress.<sup>27</sup> "Major" rules may not take effect for sixty days, during which period Congress may enact a joint disapproval resolution, invalidating the rule.<sup>28</sup> A disapproval resolution is enacted by majority vote in both houses and presentment to the President, or by a two-thirds vote in both houses to override a presidential veto.<sup>29</sup> No doubt this procedure sounds familiar. Indeed, the senators admitted they were not giving themselves any power they did not already possess: "[E]nactment of a joint resolution of disapproval is the same as enactment of a law."<sup>30</sup>

Those familiar with administrative law scratch their heads when they hear how little the CRA accomplishes.<sup>31</sup> After all, the Adminis-

<sup>24</sup> *Id.* at 8197 (statement of Sens. Nickles, Reid, and Stevens).

<sup>25</sup> *Id.* at 6817 (statement of Sen. Levin).

<sup>26</sup> *Id.*

<sup>27</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>28</sup> *Id.* § 801(a)(3). A major rule — consistent with Executive Order 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006), which institutes OMB review of major rules — is one with an annual effect of \$100 million or more on the economy, a "major" impact on prices, or other "significant adverse" effect on the economy. 5 U.S.C. § 804(2). OMB determines whether a rule is major for purposes of the CRA, and OMB's determination is not subject to judicial review. *See id.* §§ 804–805.

<sup>29</sup> 142 CONG. REC. 8197 (statement of Sens. Nickles, Reid, and Stevens).

<sup>30</sup> *Id.*

<sup>31</sup> *See, e.g.*, Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84 (2006) ("Substantively, the CRA is unnecessary because Congress always had the power to legislatively override agency rules."); *cf.* Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 289 (1996) ("It is unclear, however, how much this provision would add, since Congress can already enact legislation to prevent any and all regulations

trative Procedure Act<sup>32</sup> had since 1946 required that final rules be published at least thirty days before their effective date,<sup>33</sup> during which period Congress is free to use the ordinary legislative process to overturn any regulation before it is effective.<sup>34</sup> Could this “new day,” in Senator Levin’s words, be merely a time when Congress has given itself sixty days, instead of thirty, to overturn major rules? In the public rhetoric of 1996, and indeed since then, this was the purported major accomplishment of the Congressional Review Act: Congress being able to overturn executive action.<sup>35</sup> Of course, Congress always had this power, unaltered by the CRA. Although not apparently envisioned in such a way, the CRA is primarily only relevant in times of transition. No President would, under ordinary circumstances, sign a disapproval resolution disavowing a regulation that his own government had just enacted. CRA disapproval resolutions are most likely to be enacted at the beginning of a new administration, when both the new administration and Congress disapprove of the prior administration’s midnight regulation.<sup>36</sup>

Though the most heralded features of the CRA accomplish little, other elements of the Act give it some teeth.<sup>37</sup> The consequences of

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from becoming law. . . [A] new statutory provision for congressional review adds nothing to Congress’ existing authority.”)

<sup>32</sup> 5 U.S.C. §§ 551–559, 701–706.

<sup>33</sup> *Id.* § 553(d).

<sup>34</sup> See 142 CONG. REC. 6815 (statement of Sen. Nickles) (“As all of my colleagues are well aware, the Congress at any time can review and change, or decide not to change, rules or their underlying statutes.”).

<sup>35</sup> See, e.g., Vernon Mogensen, *State or Society? The Rise and Repeal of OSHA’s Ergonomics Standard*, in WORKER SAFETY UNDER SIEGE 108, 131 (Vernon Mogensen ed., 2006) (“[T]he CRA gives Congress and the president the unprecedented power to overturn newly enacted regulations.”); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1726 (2004) (“[A]lthough Congress has only once formally invoked its power to block a rule, the power to do so has nonetheless cast a substantial shadow.”); Paul R. Verkuil, *The Wait Is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 924–27 (2007); Cindy Skrzycki, *Will Congress Wake Up to Its Rule-Blocking Weapon?*, WASH. POST, Feb. 13, 1998, at G1 (“The Congressional Review Act was supposed to be a single-shot assault weapon for members of Congress who want to block, or at least delay, federal regulations.”).

<sup>36</sup> This intuitive point is supported by the thesis, developed by Professors Daryl Levinson and Richard Pildes, that political control matters more to the separation of powers than institutional structure. Levinson and Pildes argue that only in times of divided government do the branches impose real checks on each other. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). Conversely, the CRA’s main effect occurs when a President of one party is succeeded by a President and Congress of the other party. In times of divided government, the CRA may be ineffective even in transition periods. The Carter-Reagan transition, in 1981, was the last time the White House changed political parties and the new President’s party did not also control Congress. It is conceivable that the CRA mechanism could be used outside of presidential transitions to overturn the action of an independent agency, whose officers the President cannot unilaterally remove. This possibility is discussed in Part III.

<sup>37</sup> Two other provisions of the CRA are largely irrelevant to this Note. Section 801(a)(1)(B) requires an agency to provide the Comptroller General and the Congress with copies of a final

these provisions of the CRA are discussed in Part III. First, CRA disapproval resolutions short-circuit the congressional committee process. In the Senate, if a committee has not reported out a disapproval resolution within twenty days of a major rule being submitted to Congress, the resolution can be brought to the Senate floor upon a petition signed by thirty senators.<sup>38</sup> Similar expedited procedures were not enacted in the House of Representatives,<sup>39</sup> although House committees may still be circumvented. The CRA provides that when a disapproval resolution is sent from the Senate to the House, or vice versa, the receiving chamber cannot refer the resolution to a committee.<sup>40</sup> Second, the CRA prohibits filibusters of disapproval resolutions in the Senate, setting time limits for debate and eliminating many procedural hurdles.<sup>41</sup> Third, the CRA creates a special extended review period for major rules that are submitted to Congress in the final sixty days of a congressional session.<sup>42</sup> These rules can be disapproved within seventy-five legislative days of when the next session of Congress convenes.<sup>43</sup> Fourth, disapproval resolutions can only be enacted as stand-alone measures, using a template provided in the statute.<sup>44</sup>

The last provision was apparently included to ensure that unrelated bills were not attached to disapproval resolutions to take advantage of the expedited procedures. Providing a template for disapproval resolutions also expedites the legislative process because it ensures that resolutions approved by the House and Senate will be identical. Thus, the resolution can proceed to the President without the need for a conference report.<sup>45</sup> However, given the finite time for debate on the floor of Congress during any sixty-day period, the stand-

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rule's cost-benefit analysis and other required regulatory analyses. Section 801(b)(2) prohibits an agency from reissuing a rule "substantially the same" as one that Congress has disapproved.

<sup>38</sup> 5 U.S.C. § 802(c).

<sup>39</sup> The legislative history does not explain this asymmetry. See 142 CONG. REC. 6815 (statement of Sen. Nickles); MORTON ROSENBERG, CONG. RESEARCH SERV., CONGRESSIONAL REVIEW OF AGENCY RULEMAKING 21 (2008), available at [http://assets.opencrs.com/rpts/RL30116\\_20080508.pdf](http://assets.opencrs.com/rpts/RL30116_20080508.pdf). However, given that the Senate is seen as having more procedural hurdles to majority rule than the House does, the drafters of the CRA may have believed that fast track procedures were only needed for the Senate. See WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 517 (4th ed. 2007). The House parliamentarian speculated in 1997 that the CRA may have neglected fast-track procedures for the House because the House Rules Committee can limit debate and expedite bills to the floor at its choosing. See *Congressional Review Act: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 105th Cong. 50 (1997) (testimony of Charles W. Johnson III, Parliamentarian, U.S. House of Representatives).

<sup>40</sup> 5 U.S.C. § 802(f)(1).

<sup>41</sup> *Id.* § 802(d).

<sup>42</sup> *Id.* § 801(d)(1).

<sup>43</sup> *Id.* § 801(d)(2)(A).

<sup>44</sup> *Id.* § 802(a).

<sup>45</sup> 142 CONG. REC. 8199 (1996) (statement of Sens. Nickles, Reid, and Stevens).

alone requirement may serve to limit the number of disapproval resolutions that can be practically approved.<sup>46</sup>

Although described as a mechanism to allow Congress sufficient time to review all administrative action,<sup>47</sup> the reachback provision has the practical effect of giving the succeeding President and Congress an opportunity to review and overturn the preceding administration's rules.<sup>48</sup> The Congressional Review Act, widely viewed as shifting power to Congress, does no such thing, but it at least theoretically allows a new Congress and administration to review the action of its predecessor. Part II examines whether this mechanism is effective even for this limited goal.

## II. THE CONGRESSIONAL REVIEW ACT IN PRESIDENTIAL TRANSITIONS

The Congressional Review Act has rarely been used. From its enactment in 1996 through March 2008, agencies have submitted 731 major rules to Congress, and only one, the Clinton ergonomics rule, has been repealed under the CRA.<sup>49</sup> In that period, forty-seven disapproval resolutions were introduced, and only three, including the ergonomics rule, passed the Senate.<sup>50</sup> That sole successful use of a disapproval resolution occurred in the context of a presidential transition. As discussed above, the presentment requirement of the CRA means that disapproval resolutions will likely only be enacted in times of presidential transition. Though CRA disapproval resolutions may have some effect even if they are not enacted,<sup>51</sup> the much greater like-

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<sup>46</sup> This was one reason offered to explain why the Democrat-controlled Congress did not repeal more Bush Administration midnight regulations in early 2009. See *Midnight Rulemaking: Shedding Some Light: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Rep. Jerrold Nadler, Member, H. Comm. on the Judiciary) [hereinafter *Hearing* (Nadler)], available at <http://judiciary.house.gov/hearings/pdf/Nadler090204.pdf>.

<sup>47</sup> See 142 CONG. REC. 8199 (statement of Sens. Nickles, Reid, and Stevens).

<sup>48</sup> See CURTIS W. COPELAND & RICHARD S. BETH, CONG. RESEARCH SERV., CONGRESSIONAL REVIEW ACT: DISAPPROVAL OF RULES IN A SUBSEQUENT SESSION OF CONGRESS 6-7 (2008), available at [http://assets.opencrs.com/rpts/RL34633\\_20080903.pdf](http://assets.opencrs.com/rpts/RL34633_20080903.pdf). Given that the reachback allows a new Congress seventy-five days to review rules finalized in the last two months of the previous Congress and that Presidents are now inaugurated on January 20, U.S. CONST. amend. XX, § 1, the new administration and Congress will typically have two months to disapprove midnight regulations.

<sup>49</sup> ROSENBERG, *supra* note 39, at 6.

<sup>50</sup> *Id.* at 6-7.

<sup>51</sup> See Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking? A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1058-60 (1999). Rosenberg concludes that in all cases besides the ergonomics rule, the predominant reasons for a disapproval resolution's introduction have been "to exert pressure on the subject agencies to modify or withdraw the rule, or to elicit support of members. In some instances, this strategy was successful." *Id.* at 1058. Unsuccessful disapproval resolutions are thus indistinguishable



likelihood of passage of a disapproval resolution during a presidential transition period suggests those periods are worthy of further study. This Part summarizes the ergonomics repeal in the wake of the first presidential transition after the CRA's enactment and begins the study of the CRA in the Bush-Obama transition.

### A. *The Ergonomics Rule*

On November 14, 2000, while the contested 2000 election was still being decided, President Clinton's Occupational Safety and Health Administration (OSHA) finalized a workplace ergonomics rule that had been a decade in the making.<sup>52</sup> On March 20, 2001, President Bush signed the first ever CRA disapproval resolution, canceling the regulation.<sup>53</sup> A battle that had pitted business and labor interests was apparently over, and combatants on both sides were bewildered. "It is mind-numbing how quickly the CRA was used and how fast the ergonomics regulations have been undone," a labor official said at the time.<sup>54</sup> An executive at a contractors' trade group said, "After 10 years, this had taken on a kind of semi-permanence . . . . It's still hard to believe that this thing has been rescinded and for all intents and purposes, it is gone."<sup>55</sup>

Though the extraordinary speed with which the ergonomics rule was repealed can largely be attributed to the CRA, it is not clear that the ergonomics repeal is evidence of the CRA's wider power: "The one instance in which an agency rule was successfully negated is likely a singular event not soon to be repeated."<sup>56</sup> It's not hard to see why. During the 1996 floor debate on the CRA, Senator Nickles even mentioned the ergonomics rule as a prime candidate for repeal if it were finalized.<sup>57</sup> Though the ergonomics rule was originally proposed in the first Bush Administration in 1990, it quickly became a prime target of business interests and their Republican allies in Congress. The stakes on both sides were potentially huge. The final rule would have required employers that met certain requirements to design an ergonomom-

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from ordinary unsuccessful legislation, whose introduction alone may be sufficient for an agency to conform to congressional will. This reaffirms the contention that the CRA has little effective power outside of the context of presidential transitions.

<sup>52</sup> Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000); see also Mogensen, *supra* note 35, at 130.

<sup>53</sup> See Ergonomics Program, 66 Fed. Reg. 20,403 (Apr. 23, 2001).

<sup>54</sup> Deirdre Davidson & Tatiana Boncompagni, *The Swift Demise of OSHA Rules*, LEGAL TIMES, Mar. 12, 2001, at 1 (internal quotation marks omitted).

<sup>55</sup> *Id.* (internal quotation marks omitted).

<sup>56</sup> ROSENBERG, *supra* note 39, at 44-45.

<sup>57</sup> 142 CONG. REC. 5049 (1996) (statement of Sen. Nickles) ("[I]f the Department of Labor comes up with a final rule that is similar to the ergonomics language they have been floating, I think a lot of us would say, 'Stop that. Wait a minute.'"). Note that Senator Nickles made this statement more than four years before the final rule was published.

ics program to reduce the risk of musculoskeletal injuries to their workers.<sup>58</sup> OSHA estimated that the ergonomics standard would prevent 4.6 million injuries over ten years and save an estimated \$9.1 billion annually in direct costs from those injuries. It estimated the standard would affect 6.1 million employers, with 102 million employees, at a cost to industry of \$4.5 billion annually.<sup>59</sup> Industry countered that the standard could cost up to \$123 billion a year.<sup>60</sup>

The Bush Administration published an advance notice of proposed rulemaking on ergonomics in August 1992,<sup>61</sup> which had not yet progressed to the proposed rule stage by 1994,<sup>62</sup> when Democrats lost control of both houses of Congress for the first time in forty years.<sup>63</sup> In addition to less direct methods of blocking the rule, the Republican Congress put riders in several appropriations bills that prevented OSHA from promulgating the ergonomics rule.<sup>64</sup> In late 1998, the chairman of the House Appropriations Committee said the Republicans did not intend to block the ergonomics rule, although Democrats then agreed to postpone it for two years, pending a study by the National Academy of Sciences on the issue.<sup>65</sup> Negotiations between the Clinton Administration and Congress over the rule continued through the 2000 election.<sup>66</sup> Before that election, congressional and Administration negotiators struck a short-lived deal to allow the Clinton Administration to promulgate a rule that would not be effective until June 1, 2001, allowing the new Administration to rescind the rule if it so chose.<sup>67</sup> Republicans soon backed out of that compromise, perhaps realizing that the *State Farm*<sup>68</sup> doctrine would not allow a Republican administration to rescind the ergonomics rule without a lengthy rulemaking that provided a rational explanation for why a rule promulgated just months earlier was no longer appropriate.<sup>69</sup> With his Ad-

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<sup>58</sup> Ergonomics Program, 65 Fed. Reg. 68,262, 68,262 (Nov. 14, 2000).

<sup>59</sup> *Id.*

<sup>60</sup> Mogensen, *supra* note 35, at 117.

<sup>61</sup> Ergonomic Safety and Health Management, 57 Fed. Reg. 34,192 (Aug. 3, 1992).

<sup>62</sup> See Ergonomics Program, 65 Fed. Reg. 68,262, 68,264.

<sup>63</sup> See R.W. Apple, Jr., *How Lasting a Majority?*, N.Y. TIMES, Nov. 10, 1994, at A1.

<sup>64</sup> See ROSENBERG, *supra* note 39, at 14; Mogensen, *supra* note 35, at 120-21.

<sup>65</sup> Steven A. Holmes, *Distracted Congress Pushes To Delay Spending Talks*, N.Y. TIMES, Nov. 14, 2000, at A27; Eric Schmitt, *Budget Deal Stalls on Timing of a Worker-Safety Provision*, N.Y. TIMES, Nov. 1, 2000, at A24.

<sup>66</sup> Holmes, *supra* note 65; Schmitt, *supra* note 65.

<sup>67</sup> See Schmitt, *supra* note 65.

<sup>68</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (holding that an agency may only rescind a rule promulgated via notice-and-comment rulemaking through a new notice-and-comment rulemaking and that a presidential election is an inadequate explanation for why such a rescission is not arbitrary or capricious).

<sup>69</sup> Schmitt, *supra* note 65.

ministration winding down, and little need to maintain goodwill with Congress, Clinton issued the ergonomics rule.

Though the contentious pre-enactment history of the ergonomics rule and the Republican win in the 2000 election made repeal likely even in the absence of the CRA, the CRA dramatically altered the process. The head of the industry-backed National Coalition on Ergonomics said the group had hoped to use the CRA to repeal the ergonomics rule and that “when [George W.] Bush was declared the winner of the presidential election, the Congressional Review Act became a viable option.”<sup>70</sup> With the Senate split 50-50 — and a Republican Vice President breaking tie votes — the filibuster-breaking CRA was quite a boon. Ordinary legislation repealing the rule would have been harder to move through the Senate, although the disapproval resolution did pick up some votes from Democrats, passing 56-44.<sup>71</sup> Unsurprisingly, Senator Nickles, who championed the CRA and suggested five years earlier that it could be used to overturn the then-ephemeral ergonomics rule, pushed the disapproval resolution through Congress.<sup>72</sup> Senator Nickles introduced a resolution in the Senate because it was there that the Republicans had a closer margin, and he felt that if he could move the bill out of the Senate, the House would be sure to pass it.<sup>73</sup> But given the CRA structure, starting in the Senate made strategic sense for other reasons as well. The CRA explicitly forbade Senate filibusters and allowed Senate committees to be circumvented upon the signature of thirty Senators, which Senator Nickles quickly obtained.<sup>74</sup> A disapproval resolution that originated in the House would be referred to a committee, but a resolution sent to the House from the Senate could, under the CRA, proceed directly to a floor vote in the House.

Given these advantages, could Congress have repealed the ergonomics rule even without the CRA mechanism? Of course, one can only speculate, but the ergonomics rule was probably unpopular enough with Republicans to ensure its rescission with or without the CRA. Without the CRA, Senate Republicans would have needed to contend with the possibility of a Democratic filibuster. On the March ergonomics vote, Senate Republicans were four votes short of overcoming a potential filibuster. Still, even if Republicans could not have overcome a filibuster on a bill that only overturned the ergonomics rule, they had several other options. One of these non-CRA alternatives would likely have succeeded given the intensity of the Republi-

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<sup>70</sup> Davidson & Boncompagni, *supra* note 54 (alteration in original).

<sup>71</sup> *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

<sup>74</sup> *Id.*

can majority's dislike for the rule. Republicans could have engaged in horse-trading with enough Democrats to overcome a filibuster or tied the ergonomics repeal to legislation appealing to the marginal Democrats.<sup>75</sup> History also indicates that Congress can powerfully control the administrative state, even without the CRA. Indeed, the eight years that Congress delayed the rule — with a Democratic President — suggest that Congress would have found a way to repeal the rule now that the President was a Republican. Even if Republicans could not have mustered the votes for an outright repeal of the rule, they likely would have been able to weaken it dramatically by defunding OSHA, as House Majority Whip Tom Delay (R-Tex.) threatened to do.<sup>76</sup> Finally, when Congress and the President are united in their opposition to a rule — the only conditions under which a CRA disapproval resolution is likely to pass — there are many routes to overturn the rule, including new rulemakings, though they may take longer than the CRA. The experience of the transition in 1993 demonstrates this phenomenon: President Clinton, with the benefit of a Democratic Congress but without the benefit of the CRA, was able to rescind or modify more midnight rules than President George W. Bush and the Republican Congress in 2001.<sup>77</sup>

The creation of the CRA and the ergonomics episode undermine traditional theories of the administrative state and provide strong evidence of ossification in the federal bureaucracy. Traditionally, the executive branch has been viewed as the swifter branch, relative to Congress: the President can, in most cases, act unilaterally to achieve his goals, whereas congressional action requires the coordination of hundreds of legislators.<sup>78</sup> A principal explanation for the growth of the administrative bureaucracy has been that Congress believes it would react too slowly and ineffectively if it had to approve all regulations; instead, Congress delegates to the President and his officers the power to make regulations to govern specific circumstances.<sup>79</sup> Yet, in recent decades, academics and others have become concerned that the administrative state has become ossified — that restraints on rulemaking im-

<sup>75</sup> See generally Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1338–48 (2000).

<sup>76</sup> See Holmes, *supra* note 65.

<sup>77</sup> Loring & Roth, *supra* note 1, at 1456–57. The comparison between 1993 and 2001 has obviously limited value for explaining the relative effectiveness of the CRA. In 1993, Democrats held fifty-seven seats in the Senate, compared with the Republican fifty-seat “majority” in 2001. See United States Senate, Party Division in the Senate, 1789–Present, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_tasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_tasers/partydiv.htm) (last visited May 15, 2009). Absent the CRA, the Republicans might have had a more difficult time repealing the ergonomics rule, but as the text points out, it seems quite likely the Republicans would have found some other mechanism to overturn the ergonomics rule given their intense opposition to it. See ROSENBERG, *supra* note 39, at 15.

<sup>78</sup> Cf., e.g., THE FEDERALIST No. 70 (Alexander Hamilton).

<sup>79</sup> See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS* 7–9 (1999).

posed by the courts, Congress, and the President have so slowed the regulatory process that it has lost the efficiency relative to congressional action that was once seen as its principal advantage.<sup>80</sup> The CRA can be seen as the capstone of this development: Because a disapproval resolution must be presented to the President, it will generally only be used in times when the administration could choose to accomplish the same goals via rulemaking. That Congress believed the President would choose to use a disapproval resolution, instead of rulemaking, speaks to the ossification of rulemaking.

Just before Congress disapproved the ergonomics rule, Peg Seminario, the AFL-CIO's director for health and safety, spoke to the *New York Times* and demonstrated the extent to which traditional notions of administrative effectiveness and democratic accountability have become inverted:

What's happening is stunning . . . . This rule is 10 years in the making, with 10 weeks of public hearings on it, and now they want to wipe it out with not even one hearing and less than 10 hours of debate. That's about as undemocratic a process as you can get.<sup>81</sup>

Seminario describes as "undemocratic" the majority vote in two houses of Congress and presentment to the President of the disapproval resolution. She contrasts the slow and deliberate regulatory proceeding with the fast and — in her view — ill-considered legislative process. Implicitly, she views the regulatory process as more democratically legitimate than the constitutionally prescribed legislative process.

On one side is a slow, but democratically legitimate institution; on the other is a fast institution with questionable democratic credentials. But a century's experience with American bureaucracy has generated uncertainty about which side is the administrative state and which side is Congress.

### *B. Bush Midnight Regulations*

In seeking to finalize rulemaking by November 1, 2008, the Bush Administration said that it was avoiding late-term regulation and the unseemliness associated with midnight action in past presidential transitions.<sup>82</sup> Critics of the Bush Administration said it was avoiding late-term regulation to make it harder for the Obama Administration to

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<sup>80</sup> See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 199, 224–54 (1990); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 *TEX. L. REV.* 525 (1997).

<sup>81</sup> Lizette Alvarez with Steven Greenhouse, *Senate G.O.P. Moving to Nullify Clinton Rules on Worker Injuries*, *N.Y. TIMES*, Mar. 3, 2001, at A1 (internal quotation marks omitted).

<sup>82</sup> See Memorandum from Joshua B. Bolten, *supra* note 2.

undo the rules.<sup>83</sup> What was certain was that Bush could do little to prevent the next administration from rescinding rules under the CRA. Because of the way the CRA counts legislative days at the end of a session of Congress, any rule finalized after May 15, 2008 could be disapproved by the 111th Congress.<sup>84</sup> Several significant and controversial rules were finalized in the final months of the Bush Administration, well after the Administration's self-imposed November 1 deadline and within the reachback period. But the Administration was careful to finalize rules in enough time so that they would become effective before the inauguration, ensuring that even if the CRA allowed rescission of them, the Obama Administration would not be able to withdraw or delay many rules that had not yet become effective.<sup>85</sup>

Several groups have tracked midnight regulation in the Bush Administration.<sup>86</sup> OMB Watch has identified twenty-two "troublesome" rules finalized by the Bush Administration after its self-imposed deadline of November 1.<sup>87</sup> Nineteen of those became effective by President Obama's inauguration on January 20, 2009.<sup>88</sup> Beyond the rules identified by OMB Watch, at least ten other major rules were finalized by the Bush Administration from November 1, 2008, to January 20, 2009.<sup>89</sup> Each of these rules is subject to repeal under the CRA.<sup>90</sup> This timing indicates that the Bush Administration was interested in rules

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<sup>83</sup> See *Midnight Rulemaking: Shedding Some Light: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Gary D. Bass, Executive Director, OMB Watch) [hereinafter *Hearing (Bass)*], available at <http://judiciary.house.gov/hearings/pdf/Bass090204.pdf>.

<sup>84</sup> BETH, *supra* note 5, at 3.

<sup>85</sup> Presidents Reagan, Clinton, and George W. Bush, the last three Presidents to succeed a President of a different party, each imposed a moratorium on regulations that were promulgated by their predecessor but not yet effective. See Jack, *supra* note 1, at 1482 & n.11. President Obama did, in fact, do the same thing. See Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, The White House, for the Heads of Executive Departments and Agencies (Jan. 20, 2009), in 74 Fed. Reg. 4435 (Jan. 26, 2009). It remains undecided whether it is legal for an incoming administration to postpone or withdraw rules that have been finalized but are not yet effective. For one view, see Jack, *supra* note 1, at 1498–1511.

<sup>86</sup> These groups have various political agendas. Yet the political valence of the particular rules they identify as problematic is largely irrelevant for present purposes. These lists are mentioned merely to demonstrate that politically salient regulation did occur in the final months of the Bush Administration.

<sup>87</sup> *Hearing (Bass)*, *supra* note 83, at 3–4 tbl.1.

<sup>88</sup> *Id.* app.

<sup>89</sup> This number is generated by searching the *Federal Register* over the given date range for rulemaking notices that include the phrases "major rule" and "Congressional Review Act" in the same paragraph and then reading each of those notices to determine whether it is the finalization of a major rule for purposes of the CRA. This method certainly undercounts the number of major rules finalized because some agencies do not identify proposals as major rules for purposes of the CRA, or they use different terminology to do so. The precise number of rulemakings finalized is largely irrelevant to the conclusion that the Bush Administration did, in fact, promulgate several major rules in its final months that could be overturned using the CRA mechanism.

<sup>90</sup> See generally COPELAND & BETH, *supra* note 48.

becoming effective before the inauguration so they could not be withdrawn easily but was not particularly worried about the possibility of repeal under the CRA.

Though many of the Bush midnight rules were deeply unpopular with Democrats in Congress, it is unlikely that more than a handful, if any, will be rescinded via the CRA.<sup>91</sup> The requirement that each disapproval resolution come to the floor in a separate vehicle — and for up to ten hours of debate in the Senate — ensures that Congress can only use the disapproval procedure for the most problematic rules.<sup>92</sup> Thus, even in the limited context of presidential transitions, where the CRA would seem to have the greatest impact, its true power is quite limited. The executive appears undeterred from promulgating midnight rules, quite possibly because it has determined that the Congress is not likely to find any additional power in the CRA that it does not otherwise possess. However, traditional means of repealing midnight action remain. The Bush midnight rule that President Obama has most publicly pledged to overturn is being overturned via ordinary informal rulemaking,<sup>93</sup> and President Obama has asked agencies to consider rescinding other Bush midnight rules via rulemaking.<sup>94</sup> One midnight rule was overturned by a proviso in the omnibus appropriations bill President Obama signed March 11, 2009.<sup>95</sup> Even in transition periods, when the CRA is most likely to be effective, an outgoing Administration did not take steps to avoid its effect, and the incoming Administration did not see any benefit in using it. If the Congressional Review Act is effective or significant, it must be for other than the conventional explanations.

### III. UNLEASHING POLITICAL MAJORITIES

Though the executive may not be much more concerned about disapproval resolutions than about ordinary legislation, disapproval resolutions do benefit from a streamlined legislative process unavailable to ordinary legislation. Like all fast-track legislative procedures, the

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<sup>91</sup> As of April 3, no disapproval resolutions had passed either chamber in 2009. Only a single disapproval resolution had been introduced, H.R.J. Res. 18, 111th Cong. (2009). Because the seventy-five-day period defined by 5 U.S.C. § 801(d) (2006) counts only days when Congress is in session, the date on which that period ends cannot be determined prospectively. It will occur, however, after this Note has gone to press.

<sup>92</sup> See *Hearing* (Nadler), *supra* note 46, at 3.

<sup>93</sup> See Rescission of the Regulation Entitled “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,” 74 Fed. Reg. 10,207 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. pt. 88).

<sup>94</sup> See, e.g., Memorandum for the Heads of Executive Departments and Agencies (Mar. 3, 2009), in 74 Fed. Reg. 9753, 9753 (Mar. 6, 2009).

<sup>95</sup> Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 425, 123 Stat. 524, 748–49 (rescinding Toxics Release Inventory Burden Reduction Final rule, 71 Fed. Reg. 76,932 (Dec. 22, 2006)).

CRA is designed to ensure that political minorities are not able to use congressional procedure to hijack policy.<sup>96</sup> That this feature of the CRA was seen as necessary provides useful evidence in contemporary debates about the legislative and regulatory processes.

Both the committee circumvention and the anti-filibuster provisions are designed to prevent the legislative process from being captured by political minorities. Minority capture is a persistent feature of the congressional structure. Senate procedure requires a three-fifths vote for most significant bills to pass, and committees in both houses of Congress exercise veto authority over bills within their jurisdictions.

The Senate filibuster presents a significant challenge to majority rule.<sup>97</sup> A leading treatise on congressional procedure concludes, “House rules are designed to permit a determined majority to work its will. Senate rules are intended to slow down, or even defer, action on legislation by granting inordinate parliamentary power (through the filibuster, for example) to individual members and determined minorities.”<sup>98</sup> The dominant view of the filibuster has been that it is a key element of the specialness of the Senate, which in the constitutional plan was to be a safeguard for minority rights.<sup>99</sup> However, political scientists Sarah A. Binder and Steven S. Smith have persuasively argued that the filibuster is a historical accident — that it was adopted and preserved for the personal political reasons of individual senators, not as an ideological commitment to minority rights.<sup>100</sup> Thus it is not surprising that the Senate has selectively outlawed filibusters for certain measures, like trade and budget acts, where senators determine they would be ill served by permitting filibusters.<sup>101</sup> Review of administrative action is apparently in this category as well.

Committee capture presents another potential impediment to majority rule. Political scientists have debated what effect committees have on the legislative process. The traditional view is that committees represent “preference outliers.”<sup>102</sup> On this view, members of Con-

<sup>96</sup> See ESKRIDGE, *supra* note 39, at 517.

<sup>97</sup> See John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 511–12 (2004); see also SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE (1997); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).

<sup>98</sup> WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 24 (7th ed. 2007).

<sup>99</sup> BINDER & SMITH, *supra* note 97, at 20.

<sup>100</sup> See *id.* at 4.

<sup>101</sup> See generally *id.* at 188–95.

<sup>102</sup> Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149, 149 (1990); see RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973); WOODROW WILSON, CONGRESSIONAL GOVERNMENT 102–03 (Transaction Publishers 2002) (15th ed. 1900); J.R. DeShazo & Jody Freeman, *The Congressional Competition To Control Delegated Power*, 81 TEX. L. REV. 1443 (2003); John Londregan & James M. Snyder,



gress assigned to committees not only are particularly interested in the issues within that committee's jurisdiction, but also hold views on those issues that are systematically inconsistent with the majority of their caucus.<sup>103</sup> In order for a bill to become law, it must be acceptable to a majority in both houses. Assuming that the majority will find a range of policy outcomes viable, a "captured" committee will generate bills within this range, but at the extreme that approaches the committee's true preferences (which under the preference outlier model, are outside the preference range of the chamber majority).<sup>104</sup> In recent decades, empirical studies have questioned this view. In a study of Congresses in the 1980s, Professor Keith Krehbiel concludes that few congressional committees are composed of preference outliers.<sup>105</sup> Krehbiel's view is that committees shape the interests of the chambers by providing information and that they reflect the views of the chamber's median voter.<sup>106</sup> Others argue that an intermediate view is correct: committee capture is conditional on the committees and issues involved. The breadth of a committee's jurisdiction, the political visibility of the constituents for its issues, and the concentration of benefits and costs of the issues with which the committee deals will determine how much of an outlier a committee will be from the view of its chamber.<sup>107</sup> This conditional view of committee bias is quite sensible. At the very least, Congress believes committee capture is real, because it adopted the CRA in part to circumvent committees.

It is also well recognized that agencies themselves may come to be captured by the industries they are intended to regulate.<sup>108</sup> The mechanisms for agency capture are various. Regardless of whether an agency engages in notice-and-comment rulemaking or less formal processes to set policy, it likely will rely on the public to provide relevant information about the industry it is regulating. And the industry itself will tend to be the most vocal source in providing data to the regulators, shaping the form of the ultimate regulation.<sup>109</sup> Furthermore, because a regulated industry is the entity most likely to sue over

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Jr., *Comparing Committee and Floor Preferences*, 19 LEGIS. STUD. Q. 233 (1994); David E. Price, *Policy Making in Congressional Committees: The Impact of "Environmental" Factors*, 72 AM. POL. SCI. REV. 548 (1978); Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987).

<sup>103</sup> Krehbiel, *supra* note 102, at 150-51.

<sup>104</sup> See Shepsle & Weingast, *supra* note 102; Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

<sup>105</sup> Krehbiel, *supra* note 102, at 159.

<sup>106</sup> See KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 150 (1991).

<sup>107</sup> Richard L. Hall & Bernard Grofman, *The Committee Assignment Process and the Conditional Nature of Committee Bias*, 84 AM. POL. SCI. REV. 1149, 1163 (1990).

<sup>108</sup> See MASHAW & HARFST, *supra* note 80, at 16-17.

<sup>109</sup> ROGER G. NOLL, REFORMING REGULATION 41 (1971).

adverse rulemaking, in most domains agencies may have an incentive to publish rules that are unlikely to anger industry and thus generate lawsuits.<sup>110</sup> The revolving door between agencies and private industry may exacerbate bias in decisionmaking. Agency capture may also be driven by congressional committees — themselves captured by industry — which push the agencies they oversee to favor industry. Though some argue that agencies are immune from congressional control, at least one study has concluded that agencies are responsive to Congress, specifically to the agencies' respective oversight and appropriations committees.<sup>111</sup> It is difficult to disentangle the Congress-agency-industry web: Is industry capturing the committees, which in turn control the agency? Or is industry going directly to the agency? Whichever scenario is true, the consequence is that both agencies and committees may produce policies, in rules or laws, that may be inconsistent with broader majority preferences.

For those who view this outcome negatively, there is hope. Even outside the context of elections, the political process is not static. Political scientist Bryan Jones and his colleagues point out that jurisdictions of congressional committees are not fixed and that in times of conflict many committees will hold hearings on a single issue, destroying the potentially biased monopoly that committees exercise.<sup>112</sup> The Congressional Review Act serves a similar function, purporting to liberate the majority from the tyranny of vocal outliers who wield power in the form of filibusters or committee monopolies.<sup>113</sup> Though minority rule is a persistent problem, the CRA addresses a particularly difficult variant of it: the interaction between committees that may be captured and agencies that may also be captured. A hypothetical will illustrate the problem and the CRA solution.

Imagine a rule promulgated by the U.S. Department of Agriculture in December 2008, the waning weeks of the Bush Administration. The rule is popular with all Republicans and unpopular with most Democrats, although farm-state Democrats support it. The Democrats control both houses of Congress and know their majorities will grow

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<sup>110</sup> See *id.* at 40–41.

<sup>111</sup> Weingast & Moran, *supra* note 104.

<sup>112</sup> Bryan D. Jones et al., *The Destruction of Issue Monopolies in Congress*, 87 AM. POL. SCI. REV. 657, 669 (1993); see also Kathleen Bawn, *Choosing Strategies To Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG. 101, 120 (1997) (describing the preference of members to impose statutory constraints on agencies over which their own committees do not have jurisdiction as a route to circumventing the industry-agency-committee “iron triangles”).

<sup>113</sup> *But cf.* Steven J. Balla, *Legislative Organization and Congressional Review of Agency Regulations*, 16 J.L. ECON. & ORG. 424, 437 (2000) (reporting that, for the first four disapproval resolutions introduced in the House, members of relevant committees were just as likely to have co-sponsored the resolutions as nonmembers).

in the next session, although they will still not have enough votes to overcome a Republican party-line filibuster. In both 2008 and 2009, a majority of the relevant oversight committees approve of the rule, even though the Democratic majorities as a whole do not. Given the agency capture hypothesis, even a change in administration might not result in new agency policies. Under the CRA, a non-farm-state Democrat could introduce a disapproval resolution and expect it to overturn the agency action, even though the ordinary legislative process would not have. By raising the political salience of the issue, the disapproval resolution might be signed by President Obama, though his Secretary of Agriculture might not have initiated a rulemaking to overturn the Bush rule. The CRA thus provides useful information on the debate about the committee capture and agency capture hypotheses: the people with perhaps the best perspective, members of Congress, must believe both exist, or else there would be little reason to have enacted the fast-track provisions of the CRA.

Because the rules for each chamber can be set by majority vote, perhaps the CRA is unnecessary: when the majority believes the filibuster or committee capture is preventing its agenda from being enacted, the majority could change the rules, either temporarily or permanently.<sup>114</sup> However, the recent experience of a disgruntled majority trying to eliminate the filibuster to permit the confirmation of judicial nominees demonstrates the difficulty of this approach.<sup>115</sup> Coupling an effort to change Senate or House procedure with a specific legislative agenda that would benefit from the change would surely make the procedural modification more difficult. Congress may fear that in the heat of a policy debate the political will may not exist to rewrite the House or Senate rules. By precommitting itself, Congress is ensuring it will be able to use the CRA mechanism in such a situation.<sup>116</sup>

Even though the CRA may be useful for avoiding capture problems, it will generally only be effective in times of presidential transition, and it has rarely been used in those times, for the reasons discussed in Part II. There is one other area where the CRA might be useful, particularly in avoiding minority capture: the political control of independent agencies. The so-called “independent” agencies are administrative agencies whose officers cannot be removed by the

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<sup>114</sup> Cf. Martin B. Gold & Dimple Gupta, *The Constitutional Option To Change Senate Rules and Procedures: A Majoritarian Means To Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205 (2004).

<sup>115</sup> See David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 52 (2006).

<sup>116</sup> Cf. JON ELSTER, *ULYSSES AND THE SIRENS* 37 (rev. ed. 1984) (“[B]inding oneself is a privileged way of resolving the problem of weakness of will . . .”).

President at will.<sup>117</sup> Scholars and courts widely believe, though not without considerable dissent,<sup>118</sup> that the President's ability to supervise an agency is directly related to how easily he can remove its officers.<sup>119</sup> Therefore, it is generally assumed that the President has limited supervision authority over independent agencies,<sup>120</sup> although as a matter of law it is undecided whether failure to follow a presidential directive would be adequate grounds for the President to fire an independent officer who can only be fired "for cause."<sup>121</sup> In the absence of presidential supervision, who controls the independent agencies? One hypothesis might be that independent agencies are independent of any political control, but this makes little sense. Independent officers are still appointed by the President and have their budgets approved by Congress. Congressional committees still conduct agency oversight. Thus, if the lack of unilateral removal power does in fact reduce presidential supervision, the reduced presidential oversight of independent agencies means that the residual political control of the independent agencies lies with Congress, and more specifically with the relevant appropriations and oversight committees.

The Congressional Review Act applies to nearly all rules, as defined in the Administrative Procedure Act,<sup>122</sup> and therefore covers independent agencies.<sup>123</sup> Of course, as with executive agencies, the President and Congress can use the ordinary legislative process to overturn action by independent agencies. However, the CRA may have particular relevance for independent agencies. Because independent officers do not report to the President — or at the very least may not need to worry that the President can fire them based on their policy choices — it is more likely that the President would seek to disapprove an independent agency action. Furthermore, because the President cannot instruct independent agencies to initiate a new rule-making, the President must go to Congress to overturn a rule from an

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<sup>117</sup> Geoffrey P. Miller, *Introduction: The Debate over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L.J. 215, 216.

<sup>118</sup> See, e.g., Susan Bartlett Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223.

<sup>119</sup> See Miller, *supra* note 117, at 217.

<sup>120</sup> For example, under Executive Order 12,866 §§ 3(b), 4(c), 6, 3 C.F.R. 638, 641, 642, 644–48 (1993), reprinted in 5 U.S.C. § 601 (2006), independent agencies do submit their annual regulatory agendas to OMB, but they do not need to submit major rules for preclearance by OMB, as executive agencies do. Similarly, the Card Memorandum's instructions, although mandatory for executive agencies, were merely precatory for independent agencies. See Memorandum from Andrew H. Card, Jr., *supra* note 1.

<sup>121</sup> Miller, *supra* note 117, at 217 n.12; see also Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 45.

<sup>122</sup> See 5 U.S.C. § 804(3).

<sup>123</sup> 142 CONG. REC. 6907 (1996) (statement of Rep. McIntosh); Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 96 (1997).

independent agency. Finally, because it seems quite likely that agency and committee capture are real, both independent agencies and their oversight and appropriations committees are likely to be captured by the same forces. If the President sought to overturn an independent agency action by ordinary legislation, he would be stymied because the agency's patrons in Congress would block it. The CRA allows the President and congressional chamber majorities to re-exert control over independent agencies that may be captured by preference outliers. Thus, while still not representing much of a change from the Article I legislative process, the CRA may provide some real power in the case of political review of rulemaking by independent agencies.

Regardless of whether the President has legal authority to supervise independent agencies, scholars have debated the separate question of whether the President exercises effective control over them.<sup>124</sup> If independent agencies truly acted in contravention of the President's will, one would expect the President to use the CRA mechanism to overturn independent agency action, at least in times when the Congress also disapproved of the agency action. This has never happened. Congress has occasionally sought to disapprove rules of independent agencies, although the single successful disapproval resolution, the ergonomics rule, was directed at an executive agency — OSHA, part of the Department of Labor. One of the two other disapproval resolutions that passed the Senate (but did not pass the House) concerned a rule from an independent agency, the Federal Communications Commission.<sup>125</sup> Of the forty-seven disapproval resolutions introduced in either house through March 2008, seven were disapprovals of rules from independent agencies: five for Federal Communications Commission rules and two for Federal Elections Commission rules.<sup>126</sup> That the President and Congress have never, in thirteen years, used the CRA to overturn independent agency action — despite the relative ease with which the CRA could be used for this purpose — suggests that the independent agencies are effectively controlled by the President and Congress.<sup>127</sup>

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<sup>124</sup> Compare Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587–91 (1984), with Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2308–09 (2001). For a similar discussion, see Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

<sup>125</sup> ROSENBERG, *supra* note 39, at 6.

<sup>126</sup> See *id.* at 7–14 tbl.1.

<sup>127</sup> There are alternative explanations for the scarcity of disapproval resolutions. Members of Congress might actually like to disapprove more agency actions but benefit more from maintaining the current equilibrium than they would from disapproving individual rules. Under the current equilibrium, the members of Congress who care most about individual issues sit on the committees that set the policy over that domain. Members may tacitly agree not to disapprove rules promulgated about subjects within the jurisdiction of other members' committees in order to maintain a policy monopoly within the domains of most concern to a member. See Thomas W. Gilligan & Keith Krehbiel, *The Gains from Exchange Hypothesis of Legislative Organization*, 19

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The CRA mechanism also raises the normative question of whether it is appropriate for the President to have greater oversight of independent agencies. Though some argue that independent agencies should lose their independence and be made directly responsible to the President, for either constitutional or practical reasons,<sup>128</sup> it is quickly apparent that the CRA does not do this. The debate over independent agencies is a battle between presidential and congressional control over these agencies. But the CRA does not shift control to either branch — it requires cooperation to control the independent agencies.

#### CONCLUSION

The fogs that shroud the Congressional Review Act make a search for meaning in it difficult. The null hypothesis — that the legislation is a purely symbolic bit of chest thumping by congressional Republicans eager to exert control over the President after decades in the wilderness — is appealing. But this Note has shown that there is a bit more to the CRA. Two facts are most salient. First, Congress chose to create the CRA. Second, Congress has never used it, except in the case of the ergonomics rule, which may be *sui generis*. That Congress created the CRA indicates that it believed that ossification of administrative rulemaking and minority capture of the legislative and administrative processes were real concerns, providing further evidence that the conventional wisdom of the efficiency of the executive is an antique notion. The fact that the CRA has been rarely used indicates that the CRA does not represent a background restraint on the administrative process, any more than ordinary legislative overrides do. The CRA also provides useful evidence in the academic debate over the independence of independent agencies. If they were truly independent of presidential control, one would expect to see the CRA used to overturn independent agency action. The fact that the President has never used the CRA for this purpose suggests that he has other means to control independent agencies.

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LEGIS. STUD. Q. 181 (1994). Though this theory is possible, Professor Bryan Jones and colleagues persuasively demonstrate that when issues achieve high political visibility — likely the only time a disapproval resolution would be viable — jurisdictional monopolies deteriorate — that is, members of Congress do not appear to exhibit cartel-like behavior in this regard. Jones et al., *supra* note 112.

<sup>128</sup> See, e.g., James C. Miller, III, *A Reflection on the Independence of Independent Agencies*, 1988 DUKE L.J. 297, 299.