STATEMENT

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BEFORE THE

HOUSE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY

CONCERNING

"OVERSIGHT OF THE CONGRESSIONAL REVIEW ACT"

PRESENTED ON

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Madam Chair and Members of the Subcommittee,

I am very pleased to be before you again, this time to discuss a statute, the Congressional Review Act (CRA), that I have closely monitored since its enactment in 1996, over a decade ago. Your commencement of oversight of this important piece of legislation is opportune and perhaps propitious.

As the CRS Report on the decade of experience under the CRA details, we know enough now to conclude that it has not worked well to achieve the objectives of its sponsors: to set in place an effective mechanism to keep Congress informed about the rulemaking activities of federal agencies and to allow for expeditious congressional review, and possible nullification, of particular rules. The House and Senate sponsors of the legislation made clear the fundamental institutional concerns that they were addressing by the Act:

> As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulations are often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.
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> In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its

policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

The numbers accumulated over the past eleven years are telling. Over 46,000 rules were reported to Congress over that period, including 703 major rules, and only one, the Labor Department's ergonomics standard, was disapproved in March 2001. Forty three disapproval resolutions, directed at 32 rules, have been introduced during that period, and only three, including the ergonomics rule, passed the Senate. Commentators have expressed the belief that the negation of the ergonomics rule was a singular event not likely to soon be repeated. Furthermore, not nearly all the rules defined by the statute as covered are reported for review. The number of covered rules is likely to be significantly more than the number actually submitted for review. Federal appellate courts in that period have negated all or parts of 60 rules, a number, while significant in some respects, is comparatively small in relation to the number of rules issued in that period.

It was anticipated that the effective utilization of the new reporting and review mechanism would draw the attention of the rulemaking agencies and that its presence would become an important factor in the rule development process. At the time of enactment, Congress was well aware of the effectiveness of President Reagan's executive orders centralizing review of agency rulemaking, from initial development to final promulgation, in the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) in the face of aggressive challenges of congressional committees. The Clinton Administration, with a somewhat modified executive order, but with an aggressive posture of intervention into and direction of rulemaking proceedings, continued a program of central control of administration.[1] The expectation of many was that Congress, through the CRA, would again become a major player influencing agency decisionmaking.

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[1] *See*, Christopher Yoo, Steven G. Calabresi, and Anthony J. Colangelo, "The Unitary Executive in the Modern Era, 1945-2004," 90 Iowa L. Rev. 601, 690-729 (2005) (detailing the history of presidential control of administrative actions of departments and agencies in the Reagan, Bush I, Clinton and Bush II administrations) (Yoo).

The ineffectiveness of the CRA review mechanism, however, soon became readily apparent to observers. The lack of a screening mechanism to identify rules that warranted review and an expedited consideration process in the House that complemented the Senate's procedures, and numerous interpretative uncertainties of key statutory provisions, may have detered its use. By 2001, one commentator opined that if the perception of a rulemaking agency is that the possibility of congressional review is remote, "it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road," an attitude that is reinforced "so long as [the agency] believes that the president will support its rules."[2]

Compounding such a perception that Congress would not likely intervene in rulemaking, particularly after 2001, has been the emergence of what has been called by one scholar as the "New Presidentialism,"[3] that has become a profound influence in administrative and structural constitutional law. It is a combination of constitutional and pragmatic argumentation that holds that most of the government's regulatory enterprise represents the exercise of "executive power" which, under Article II, can legitimately take place only under the control and direction of the President; and the claim that the President is uniquely situated to bring to the expansive sprawl of regulatory programs the necessary qualities of "coordination, technocratic efficiency, managerial rationality, and democratic legitimacy" (because he alone is elected by the entire nation). One of the consequences of this presidentially centered theory of governance, it has been argued, is that it diminishes the other important actors in our collaborative constitutional enterprise.

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[2]Mark Seidenfeld, "The Psychology of Accountability and Political Review of Agency Rules," 51 Duke L.J. 1059, 1090 (2001).

[3]Cynthia R. Farina, "Undoing The New Deal Through The New Presidentialism," 22 Harv. J. of Law and Policy 227 (1998).

In a widely cited 2001 article,[4] the current dean of the Harvard Law School posits the foregoing notions and suggests that when Congress delegates administrative and lawmaking power specifically to department and agency heads, it is at the same time making a delegation of those authorities to the President, *unless the legislative delegation specifically states otherwise.* From this flows, she asserts, the President's constitutional prerogative to supervise, direct and control the discretionary actions of all agency officials. The author states that "a Republican Congress proved feckless in rebuffing Clinton's novel use of directive power - just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process."[5] She explains that "[t]he reasons for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power - or, what is the same thing, to deny authority to other branches of government."[6] She goes on to effectively deride the ability of Congress to restrain a President intent on controlling the administration of the laws:

> Presidential control of administration in no way precludes Congress from conducting independent oversight activity. With or without a significant presidential role, Congress can hold the same hearings, engage in the same harassment, and threaten the same sanctions in order to influence administrative action. Congress, of course, always faces disincentives and constraints in its oversight capacity as this Article earlier has noted. Because Congress rarely is held accountable for agency decisions, its interest is in overseeing much administrative action is uncertain; and because Congress's most potent tools of oversight require collective action (and presidential

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[4]Elena Kagan, "Presidential Administration," 114 Harv. L. Rev. 2246 (2001) (Kagan).

[5]Kagan at 2314.

[6]*Id.*

> agreement), its capacity to control agency discretion is restricted. But viewed from the simplest perspective, presidential control and legislative control of administration do not present an either/or choice. Presidential involvement instead superimposes an added level of political control onto a congressional oversight system that, taken on its own and for the reasons just given, has notable holes.[7]

Dean Kagan's observations and theories appear to have been almost a blueprint for the presidential actions and posture toward Congress of the current Administration.[8] Dean Kagan's thesis has not gone without challenge.[9]

The CRA reflects a recognition of the need to enhance the political accountability of Congress and the perception of legitimacy and competence of the administrative rulemaking process. It also rests on the understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. The Supreme Court's most recent rejection of an attempted revival of the nondelegation doctrine[10] adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent review, current trends of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, judicial review, and increasing presidential control over the rulemaking process will likely continue.

A number of proposals for CRA reform were introduced in the 109th Congress that addressed the question of how to make more effective utilization of the review mechanism. Two proposals suggested a congressional screening mechanism and an expedited consideration procedure in the House of Representatives. H.R. 3148, introduced by Rep. Ginny Brown-Waite, and H.R. 576, filed

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[7]Kagan at 2347.

[8]*See* Yoo at 722-30.

[9]*See, e.g,* Kevin M. Stack, "The President's Statutory Power to Administer the Laws," 106 Colum. L. Rev. 263 (2006).

[10]*Whitman* v. *American Trucking Assn's*, 531 U.S. 457 (2001).

by Rep. Robert Ney, both provided for the creation of joint committees to screen rules and for expedited House consideration procedures. H.R. 3148 also suggested a modification of the CRA provision that withdraws authority from an agency to promulgate future rules in the area in which a disapproval resolution has been passed until the enactment by Congress of a new authorization. That provision had been seen as a key impediment to the review process. Neither proposal received further consideration.

In 2006 and 2007, suggestions for at least modest legislative remediation of the perceived flaws in the CRA, if for no other reason than to maintain a credible presence in the process of delegated administrative lawmaking, were presented in a number of forums. These included hearings held by the House Judiciary Subcommittee on Commercial and Administrative Law, a symposium held by the Congressional Research Service (CRS Symposium), CRS and GAO reports, published recommendations of the House Judiciary Subcommittee, and academic writings.[11] Participating witnesses and panelists concurred that the role of Congress as the nation's dominant policy maker was being threatened by widespread agency evasion of notice and comment rulemaking requirements; the continued pressure for legislative enhancement of the trend toward substantive judicial review of agency rules; and the frequent calls for increased presidential control of agency rulemaking.

In particular, studies characterizing current rulemaking procedures as ossified concluded that rule promulgation has become too time consuming, burdensome, and unpredictable. The thrust of the academic critics, which assigns blame to each of the branches for the increasingly ineffective implementation of statutory mandates, often identifies the courts as the chief culprits because of

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[11] *See,* Interim Report on "The Administrative Law, Process, and Procedure Project for the 21st Century." House Subcommittee on Commercial and Administrative Law, Judiciary Committee, 109th Cong. 2d Sess. (December 2006)(Committee Print No. 10); Hearing, (Reauthorization of the Administrative Conference of the United States,) before the House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, 109th Cong., 2d Sess. (September 2007)(Reauthorization Hearing).

intrusion in agency decisionmaking through interpretations and applications of APA's arbitrary and capricious test. Reviewing courts, it was maintained, will now find an agency to have violated its duty to engage in reasoned decisionmaking if its statement of basis and purpose is found to contain any gap in data or flaw in stated reasoning with respect to any issue. The commentators cite statistical indications that reviewing courts have been holding major rules invalid up to fifty percent of the time.[12] Preliminary indications of a study commissioned by the House Judiciary Subcommittee, however, appear to suggest a far less successful challenge rate, but the consequence of the perceived actions of the reviewing courts has been the encouragement of agencies to utilize alternative vehicles to make and announce far-reaching regulatory decisions.[13] It was also argued that agencies can use actions such as in adjudication of individual disputes or by so-called "non-rule" rules, where purportedly non-binding statements of policy are made in guidances, operating manuals, staff instructions, or like agency public communications.[14] However, the proposed solutions of these scholars are essentially adjurations to the judiciary to modify or abandon current doctrinal courses. For example, some scholars suggest that courts abolish the duty to engage in reasoned decision making and instead conduct a review of rules to determine whether they violate clear statutory or constitutional constraints, or apply the *Chevron* defense more consistently and strictly.[15]

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[12] *See* Peter H Schuck & Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L. J. 984, 1022 (1990)(finding that during 1965,1974, 1984 and 1985, reviewing courts upheld only 43% of agency rules); Patricia M. Wald, *Judicial Review; Talking Points*, 48Admin L. Rev. 350 (1996) (noting that of 36 major rules reviewed by the District of Columbia Circuit during one year, 17 or 47% were remanded in part for reconsideration.) .

[13] Hearing, "Reauthorization of the Administrative Conference of the United States,"before the house Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, 109th Congress, 2d Sess. (2006) (Testimony of Professor Jody Freeman).

[14] *See, e.g.* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like - Should Federal Agencies Use Them to Bind the Public?* 41 Duke L.J. 131 (1992); Robert A. Anthony, *"Well You Want the Permit, Don't You?"*: *Agency Efforts to Make Non-legislative Documents Bind the Public,* 44 Adm. L. Rev. 31 (1992); Michael Aismow, *California Undrground Regulations, 44 Adm. L. Rev 43 (1992).*

[15] *See, e.g.* Paul R. Verkuil, Comment, Rulemaking Ossification-A Modest Proposal, 47 Adm.

(continued...)

It was also argued that only part of the problem facing Congress is fixing identifiable structural and interpretive flaws. Part may also be attributable to a lack of interest in confronting and dealing with complex and sensitive policy issues that major rulemakings often present. During the CRS-sponsored symposium on "Presidential, Congressional, and Judicial Control of Rulemaking", one panelist, Professor Jack Beermann, expressed his view that making it easier for Congress to overturn an agency rule may come at a high political cost. He asked "Does Congress want to be in the position where [it is perceived] that everything an agency does is their responsibility since they've taken it on and Reviewed it under this mechanism?. . .Do they want to have that perception?" He concluded that "I think that this may just increase the blaming opportunities for Congress."

Some of the commentators saw a failure of the Congress to understand and appreciate the nature of the stakes involved and the dangers inherent in failing to act decisively to resolve them. Professor Cynthia Farina argued that it was the legitimacy of the administrative lawmaking process that is at the heart of the deossification, nondelegation and new presidentialism debates. Her insight as to the necessity of viewing the legitimacy and operational effectiveness of the regulatory process as a "collaborative enterprise" involving the appropriate official actors and institutional practices may be seen by some as an informing guidepost for action.[16]

The following list of legislative options propounded by the House Judiciary Subcommittee in its "Interim Report"[17] appears based on propositions and assumptions extracted from the hearings held

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[15](...continued)
L. Rev. 453(1995); Richard J. Pierce, Seven Ways to Deossify Agency Rulemaking, 47 Adm. L. Rev. 59, 71-93(1995). A more detailed discussion of the issues by court rulings on agency decisionmaking appears in this report's section of Judicial Review of Agency Rulemaking.

[16]Cynthia R. Farina, Undoing the New Deal Through the New Presidentialism, 22 Harv. J. of L. & Pub. Policy, 227, 232, 235, 238 (1998).

[17]*See,* Interim Report on "The Administrative Law Process, and Procedure project for the 21st
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on the CRA by the Committee, the CRS symposium, CRS and GAO reports, and academic commentary. Please remember, however, that the Congressional Research Service takes no position on any legislative option.

Options

1. *Amend the CRA to provide that all covered rules must be submitted to Congress and cannot become effective until Congress passes a joint resolution of approval.* This would vest significant control (as well as accountability) over agency rulemaking in Congress. It would require expedited consideration procedures to be established in both Houses as well as a special process to assure speedy approval of non-controversial proposed rules. Testimony before the Committee indicated that a "deeming" process could be established under the rulemaking authority of each House which would allow summary approval of all rules for which there has been no indication of a need for full consideration by the House, *i.e.*, the filing of a notice of intent by a specific number of Members within a prescribed time period after congressional receipt of the proposed rule.[18] Although the internal decisional processes (expedited consideration and the deeming process) could be established by House rule, the requirement of congressional approval of all rules would require the passage of a new law. Presidential approval of such legislation is likely to be highly problematic.

2. *By rule of each House, establish a joint committee to act as a clearinghouse and screening mechanism for all covered rules.* Such a committee would be advisory only, reporting to jurisdictional committees for both Houses its findings with respect to reported rules and

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[17](...continued)
Century,"House Subcommittee on Commercial and Administrative Law, 109th Cong., 2d Sess. (December 2006)(Committee Print No.10).

[18]A more detailed description of such a process and a discussion of its constitutional basis appears in "*Whatever Happened to Congress Reviews of Agency Rulemaking? A Brief Overview, Assessment , and Proposal for Reform*," 51 Admin.L. Rev. 1051, 1083-1090 (1999).

recommendations, when appropriate, for action on joint resolutions of disapproval. The House of Representatives would establish by rule an expedited consideration procedure complementary to the current Senate procedure. The joint committee would be authorized to request reports on submitted rules from GAO assessing such matters as the cost and benefits, cost effectiveness, and legal authority for the subject rule. None of the foregoing would require the passage of legislation requiring presidential approval. [19] The witnesses at the Committee's hearings and panelists at the CRS symposium concluded that the establishment of a joint congressional committee to screen rules and recommend action to jurisdictional committees in both Houses could provide the coordination and information necessary to inform both bodies sufficiently and in a timely manner to allow them to take actions under current law. The balanced nature of such a joint committee and its lack of substantive authority might provide a way to allay political concerns regarding "turf" intrusions.

3. *Amend the CRA to direct that reports to Congress and GAO of covered rules are to be submitted electronically.* The House Parliamentarian and other witnesses and symposium panelists indicated that the paperwork burden on the Parliamentarian's office as well as the uncertainties of proper receipt by Congress and timely redirection to the appropriate committees, and other problems with paper submissions, could be relieved by electronic submissions.

4 *Amend the CRA to require the reporting of only "major rules."* This option was suggested by witnesses and panelists as a means of limiting the screening burden on committees and on the assumption that only "major rules" are likely to raise significant congressional review issues. At present, the CRA allows only the Administrator of OIRA to designate which rules are to be deemed "major." However, even a rule that may be conceded to be "minor", in the sense of it having minimal

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[19] However, an appropriation to cover the costs of GAO's new assessment tasks is likely necessary.

economic impact, may well have a significance to congressional constituencies The difficulty would be designating a determiner that is politically acceptable and constitutionally appropriate. The Supreme Court's ruling in *INS v. Chadha*, [20] the legislative veto case, precludes authorizing legislative committees or officers from selecting particular rules and ordering agencies to report them for review. In view of the practical and legal problems, it may well be that the current requirement of blanket rule reporting, perhaps supplemented by a screening body, such as the suggested joint committee, would be more acceptable.

5. *Amend the CRA to make it clear that failing to report a covered rule renders the rule unenforceable and is subject to judicial review.* Proponents of the CRA consider this lack of an enforceable reporting requirement to undermine the purpose of the CRA.

6. *Amend the CRA to make it clear that an up-or-down vote is on the entire reported rule.* The credible threat of congressional review would presumably force agencies to carefully tailor their rules with more attention to congressional expectations. Expedition in the review process, however, is vital so as not to undermine agency enforcement and the certainty needed by the regulated community. The possibility of conflicting disapproval resolutions from each House, and long, perhaps unsuccessful conference committees deliberations, may undermine the intended purpose of the CRA. The following option, however, may ameliorate the concern over the up-or-down vote on the entire rule.

7. *Amend the CRA to provide that if a rule is disapproved, an agency is prohibited from repromulgating only those provisions of the rule that the review process and floor debates on disapproval clearly identify as objectionable.* Such a qualification to the CRA review process appears to comport with the legislative intent of the sponsors of the CRA. If the option of creation of a joint

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[20] 462 US. 919 (1983).

committee were adopted, it could be mandated to identify the discrete problems of the rule that were objectionable. That would obviate the necessity of legislative amendment to re-establish agency authority in an area after passage of a disapproval resolution.

Conclusion

The Interim Report of this Subcommittee and the CRS Report identify structural and interpretive issues affecting use of the CRA. While there have been some instances of the law apparently influencing the implementation of certain rules, the limited utilization of the formal disapproval process in the eleven years since enactment has arguably reduced the threat of possible congressional scrutiny and disapproval as a factor in agency rule development. The one instance in which an agency rule was successfully negated is likely a singular event not soon to be repeated. Presently, the Congress and the White House are in the hands of opposing political parties, the rules of the previous Administration are no longer subject to the CRA, and the current Administration appears to be establishing firm control of the agency rulemaking process through its administration of Executive Order 12,866.[21] One commentator opined that if the perception of a rulemaking agency is that the possibility of congressional review is remote "it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road," an attitude that is reinforced "so long as [the agency] believes that the president will support

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[21] *See*,e.g., Changes in the OMB Regulatory Review Process by E.O. 13422, CRS Report RL33862 by Curtis W. Copeland, August 17, 2007; Rebecca Adams, Graham Leaves OIRA With a Full Job Jar, CQ Week, Jan. 23, 2006; U.S. GAO. Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews, GAO-03-929 (September 2003; Stephen Power and Jacob M. Schlesinger, Redrawing the Lines: Bush's Rule Czar Brings Long Knife to New Regulations, Wall St. Journal, 6/12/02 at Al; Rebecca Adams, Regulating the Rulemakers: John Graham at OIRA, CQ Weekly, 2/23/02 at 520-526.

its rule."[22] Some observers say that a significant number of covered rules are not being submitted for review at all. Also, a potentially effective support mechanism, the in-depth, individualized scrutiny of selected agency cost-benefit and risk assessment analyses by GAO authorized under the Truth in Regulating Act of 2000, was never implemented for lack of appropriated funds.

[22]Seidenfeld, *supra* note 2, at 1090.