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CONGRESSIONAL REVIEW ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

NOVEMBER 6, 2007

Serial No. 110–165

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

38–764 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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CONGRESSIONAL REVIEW ACT

TUESDAY, NOVEMBER 6, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:06 p.m., in room 2237, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Johnson, and Cannon.

Staff present: Eric Tamarkin, Majority Counsel; Daniel Flores, Minority Counsel; and Adam Russell, Professional Staff Member.

Ms. SÁNCHEZ. The Committee on Commercial and Administrative Law will come to order. And I will now recognize myself for a short statement.

In 1996, under a Democratic President, a Republican Congress passed as a part of the Contract with America, the Congressional Review Act. This act created procedures for legislative oversight of administrative rulemaking. Eleven years later I hope that the parties can once again come together in a bipartisan effort to examine some of the processes of the CRA.

The CRA established a provision, the joint resolution of disapproval, by which Members of Congress may disapprove agency rules found to be too burdensome, excessive, inappropriate, duplicative or otherwise objectionable. Since the CRA was signed into law, 43 joint resolutions of disapproval have been introduced relating to 32 rules. None of the House joint resolutions have passed the House, and only three of the Senate joint resolutions passed the Senate.

Only one Senate joint disapproval resolution of the Occupational Safety and Health Administration's controversial ergonomic standards, in March 2001, also passed both the House and Senate. This disapproval was the result of an unusual confluence of factors, including the White House and both houses of Congress in the hands of the same political party, a contentious rule promulgated in the waning days of an outgoing Administration, longstanding opposition to the rule by some in Congress and by a broad coalition of business interests, and encouragement of repeal by the President.

The entities tasked with implementing the CRA have faced significant administrative burdens. The CRA requires that all agencies promulgating a rule must submit a report to each house of

Congress and to the comptroller general at the General Accounting Office.

To date agencies have submitted 47,136 rules. As a result, GAO, the parliamentarians and the clerk's office in the House and Senate have experienced a deluge of paperwork. According to the House Parliamentarian, who is testifying today for the second time before this Subcommittee on this issue, the number of annual executive branch communications to the speaker of the House has nearly tripled since the enactment of the CRA.

In order to relieve some of the administrative burdens of the CRA and to reduce duplicative paperwork, former Judiciary Committee Chairman Henry Hyde introduced H.R. 5380 in the 106th Congress with current Chairman of the Committee, Mr. Conyers, former Representative George Gekas and Representative Gerald Nadler as co-sponsors. I look forward to hearing ideas from our witnesses on how to improve the congressional oversight of executive branch agency rulemaking and whether the previously introduced legislation is an appropriate approach for reforming and streamlining the CRA. I believe many of my colleagues join me in seeking a balanced approach that will allow us to effectively perform our oversight function.

At this time, I am now pleased to recognize my colleague, Mr. Cannon, the distinguished Ranking Member of the Subcommittee for his opening remarks.

Mr. CANNON. Thank you, Madam Chair. We are here today to look at the Congressional Review Act, a law passed by Congress and an important tool in the oversight of administrative rulemaking. As I have highlighted in the past, when Congress passes complex legislation, it often leaves many of the details to the agencies authorized to enforce the laws. This body must remain vigilant over those details and how they are filled in by the agencies. We must do that through congressional oversight.

To support that essential effort, the Congressional Review Act established a mechanism for Congress to review and potentially disapprove of Federal agency rules through an expedited legislative process. It requires agencies to report to Congress and the comptroller general information to help us assess the merits of the rules.

We have yet to actually disapprove of many rules under the act. That is not to say that many rules in the past did not merit review or that many rules were not controversial. That is not to say that we will not in the future disapprove of many rules. We may, but so far we haven't.

This raises a couple of questions. First, are there ways in which the act itself may be impeding our ability to oversee rulemaking? Second, are unnecessary burdens accumulating on those who help us review agency rules as we, for whatever reason, do not move through the Congress enough disapprovals of agency rules.

Those interviews include, for example, the House Parliamentarian's office. Third, to what extent should the Congress review agency actions? I personally believe agency actions, including guidance documents, policy statements, changes to program manuals, and personnel handbooks should be reported to Congress for review. I also believe regulations should be voted on by Congress before they become law.

Let me just pause for a moment here and point out that the problem with this hearing is that we are dealing with one aspect of our role in Congress. And we are doing that in a world that has changed rapidly around us where government has become much more complex, where the extent of rulemaking and guidance documents have become much more complex. And all of that in the context of a law that we passed in the 1960's and really hasn't been updated.

So what we need to get back to, this study that we have had done ongoing for the last 6 years, begun by former Chair George Gekas, and on a bipartisan basis studied by academics across the country, to deal with the complexities that we have found ourselves in and the tools that we are not availing ourselves of as we deal with these complex issues in a world where people need to understand what the rules are so they can operate their businesses from day to day. So I think we need to do that.

That said, our witnesses will help us sort some of these issues that relate solely to the CRA today. But I want to stress that we should sort them out with an eye to making the Congressional Review Act more efficient and more effective, not with an eye just to shift the burdens from one body to another and not with an eye to give up on the act in any way. Why? Because just shifting the burden isn't real reform. And giving up on the act simply is not an option.

And I think that is what our panel will help us understand today. As I stressed at the outset, this body must remain vigilant over agency efforts to fill in the nuts and bolts of the statutes we pass. And we must do that through real congressional oversight.

I thank you, Madam Chair. And I yield back.

Ms. SÁNCHEZ. I thank the gentleman for his statement.

Without objection, other Members' opening statements will be included for the record. Without objection, the Chair will be authorized to declare a recess of the hearing at any point.

I am now pleased at this time to introduce the witnesses for today's hearing. Our first witness is Mr. John Sullivan. Mr. Sullivan has served as the House Parliamentarian from 2004 to the present. Prior to his current appointment, he served as both the assistant parliamentarian and counsel to the House Committee on Armed Services. Mr. Sullivan served in the United States Air Force from 1974 until 1984.

Welcome, Mr. Sullivan.

Our second witness is Mort Rosenberg. Mr. Rosenberg is a specialist in American public law in the American law division at CRS. For more than 25 years Mr. Rosenberg has been associated with CRS. Prior to his service with that office, he was chief counsel to the House Select Committee on Professional Sports.

And he has held a variety of other public service positions. In addition to these endeavors, Mr. Rosenberg has written extensively on the subject of administrative law.

We welcome you, Mr. Rosenberg.

Our final witness is Sally Katzen. Professor Katzen is a visiting professor of law at George Mason University from the University of Michigan Law School where she taught administrative law and information technology policy courses. Prior to joining academia,

Professor Katzen served nearly 8 years in the Clinton administration first as the OIRA administrator, then as deputy assistant to the President for economic policy and deputy director of the National Economic Council in the White House, and finally as the deputy director for management at OMB.

And I thank you as well for being here.

Thank you for agreeing to testify at today's hearing. Without objection, your written statements will be placed into the record in their entirety. And we are going to ask that you please try to limit your oral remarks to 5 minutes.

You all, I am sure, having all testified before Congress, are aware of the lighting system. The light will turn green. When you have 1 minute remaining it will turn yellow as a warning. And when it turns red, your time has expired.

We would appreciate it if you would conclude your testimony when you see the red light so that we can get to everybody. And after each witness has presented their oral testimony Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

With that, I will invite Mr. Sullivan to please proceed with his testimony.

TESTIMONY OF THE HONORABLE JOHN V. SULLIVAN, PARLIAMENTARIAN, UNITED STATES HOUSE OF REPRESENTATIVES, WASHINGTON, DC

Mr. SULLIVAN. Thank you, Madam Chair, Mr. Ranking Member. I am glad to be here with you to discuss this important matter. I have no narrative to add to my written testimony. And I won't take up your time by paraphrasing what I have already submitted. But rather, I will be prepared to answer your questions when we get to that point. And I will let you go on to the statements by my colleagues. Thank you for having me.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN V. SULLIVAN

U.S. House of Representatives	)	**Hon. John V. Sullivan**
Committee on the Judiciary	)	**Parliamentarian**
Subcommittee on Commercial	)	**U.S. House of Representatives**
and Administrative Law	)	
	)	
	)	
	)	
	)	**Testimony**
November 6, 2007	)	**Congressional Review Act**

Madam Chair; members of the committee: I appreciate the opportunity to participate in your review of this matter.

Several laws within the jurisdiction of the Committee on the Judiciary seek to ensure that the exercise of quasi-legislative authority by the executive branch is subject to rigorous scrutiny. Some of these laws have long enabled the public to follow and react to rulemaking actions as they develop. For 11 years now, chapter 8 of title 5, United States Code — colloquially known as the Congressional Review Act (CRA) — has separately focused on Congressional review of executive regulations. I am pleased to help illuminate one part of the factual predicate on which the Committee might judge whether the CRA is optimized to achieve its desired ends.

In the 103d Congress — the last full Congress before the enactment of the CRA — the executive departments transmitted 4,135 communications to the Speaker that warranted referral to committee.[1] In the 109th Congress — the most recent full Congress under the CRA — that number was 10,742.[2] The following pair of graphs depict the effects of the CRA on executive communications traffic.

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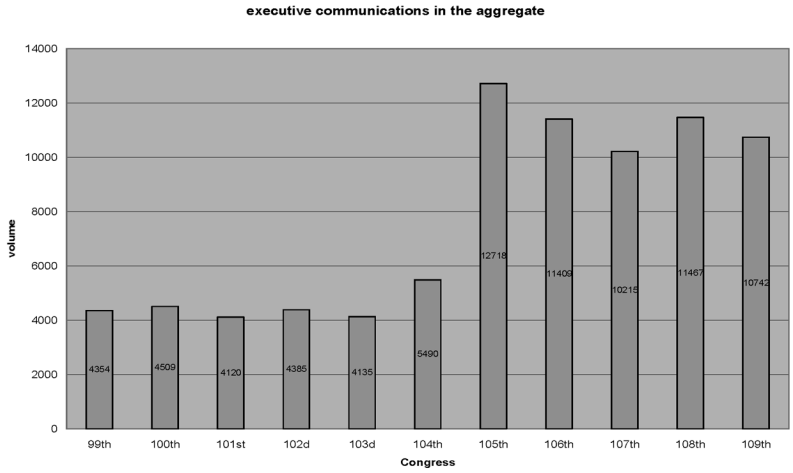
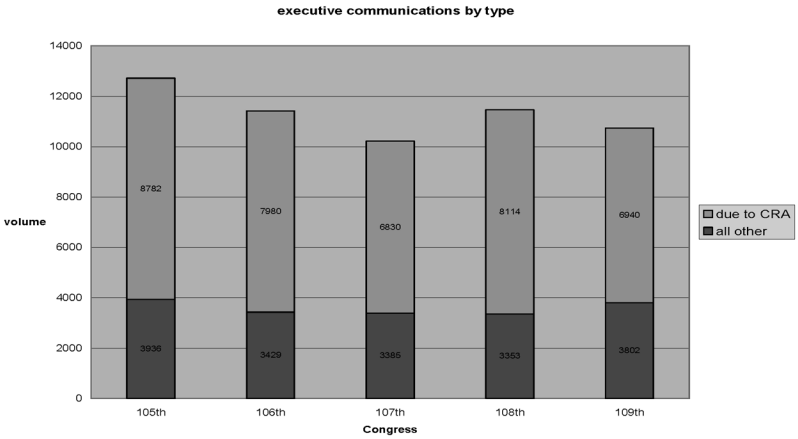
[1] See *Calendars of the United States House of Representatives and History of Legislation*, Final Edition, 103d Congress, 1993-1994, at p. 19-70.

[2] See *Calendars of the United States House of Representatives and History of Legislation*, Final Edition, 109th Congress, 2005-2006, at p. 18-74.

The first graph shows that executive communications have roughly tripled.



The second graph shows that, in each of the past five Congresses, the number of CRA communications has, indeed, been more than twice the number of other executive communications.



These communications transmit regulations promulgated by executive agencies for Congressional review. Under rule XII, they are received by the Speaker. Under rule XIV, the Speaker refers each of them to the committee having jurisdiction over its subject matter. The Speaker delegates to the Parliamentarian the task of identifying a committee of referral — typically the committee having jurisdiction over the enabling statute for a particular rulemaking action.

This flow of paper poses a significant increment of workload for a range of individuals. Although it is relatively easy to identify the appropriate committee of referral for the vast majority of these communications, the sheer volume of them affects not only the parliamentarians who must assess their subject matter but also the individuals who must move the paper and account for dates of transmittal.

Many agencies transmit their communications by courier to ensure timely receipt. These couriers often require a hand-receipt from somebody on the staff of the Speaker or the Parliamentarian. Some agencies have been able to streamline their submissions somewhat; unlike other executive communications, multiple rules submitted by a single agency pursuant to the CRA may be bundled under a single cover letter. But each communication must be logged in by the Office of the Parliamentarian.

In addition to date-stamping each submission, the Office of the Parliamentarian tries to retain outer packaging or other contact information in case the rule — as is not infrequently the case — must be returned to the agency for failure to comply with the CRA or to conform to standards regarding communications transmitted to the Speaker. After documenting the receipt of a communication, a parliamentarian must annotate the committee of referral on each rule.

Every few days, a parliamentarian calls the staff of the Clerk to advise that another batch of submissions is ready to be processed. Two clerks whose sole duty it is to process communications to the House then transport the communications — often voluminous enough to require a hand-truck — to their office, where they are counted and sorted. The clerks then enter all relevant information regarding each rule and its

referral into a database and transmit the same information to the Government Printing Office (for printing in the Congressional Record) and to the Legislative Information Service. Finally, the clerks hand-deliver each rule to the committee of referral.

Of course, this mass of paperwork has a purpose. The fundamental fulcrum of the CRA is that rulemaking agencies must submit proposed regulations to each House of Congress and to the Comptroller General and wait a statutory interval[3] before major rules may be given effect. During this interval, Congress may deliberate on whether a proposed regulation might merit legislative disapproval.

However, of approximately 40,000 submissions to the Congress under the CRA to date, only one has been disapproved. Since the 105th Congress, only 43 joint resolutions of disapproval have been introduced in the House and Senate. None of the 25 House joint resolutions passed the House. Three of the 18 Senate joint resolutions passed the Senate. One of those Senate joint resolutions also passed the House. Thus, the disapproval mechanism established by the Act has invalidated one rule.[4]

The Committee may want to assess whether a lesser volume of executive communications traffic might better optimize Congressional oversight of a more selective universe of rulemaking actions. The Act already differentiates among various rules on the basis of their salience. Some additional discrimination might be sensible. The Office of the Parliamentarian will be pleased to continue to consult with the Committee and its staff on initiatives to eliminate duplication of effort and reduce paperwork like those proposed in H.R. 5380 of the 106th Congress.[5]

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[3] Because of the need to track this interval, the date of receipt of a rule submitted pursuant to the CRA is published in the Congressional Record. With most other executive communications, only the date of referral to committee is published.

[4] Public Law 107-5.

[5] H.R. 5380 of the 106th Congress was introduced by Mr. Hyde (for himself, Mr. Conyers, Mr. Gekas, and Mr. Nadler) and referred to the Committee on the Judiciary. It proposed that the CRA be amended to abolish certain agency submissions to Congress and instead to require the Comptroller General to submit weekly reports to each House of rules published in the Federal Register to the end that they be noted in the Congressional Record with a statement of referral to committee.

Madam Chair, I am grateful for your attention and will be pleased to try to answer any questions you might have.

Ms. SÁNCHEZ. I think that is probably the shortest oral testimony this Subcommittee has ever received. We will, of course, elicit some, I am sure, testimony during our questioning period.

Mr. ROSENBERG. Can I have his 4 and-a-half minutes?

Ms. SÁNCHEZ. We will give you a little more leeway, Mr. Rosenberg. And at this time, I am going to invite you to go ahead and present your testimony.

TESTIMONY OF MORT ROSENBERG, SPECIALIST IN AMERICAN PUBLIC LAW, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Mr. ROSENBERG. Thank you very much, Madam Chair, Mr. Cannon. It is a pleasure to be here again. Just quick, one thing I was—I have been with CRS for 35 years.

Ms. SÁNCHEZ. My apologies, sir.

Mr. ROSENBERG. I am very pleased to be before you again, this time to discuss the Congressional Review Act, a statute that I have closely monitored since its enactment in 1966. Your Committee's continued focus on this important piece of legislation is both opportune and hopefully 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 its original objectives. That is to set in place an effective mechanism to keep Congress informed about the rulemaking activities of Federal agencies and to allow for expeditious congressional review and possible nullification of particular rules.

The numbers that you have told us about, the 46,000 rules that have been reported and the over 700 major rules, only one of which has been nullified, are quite telling about the effect of the rule, I believe. Commentators have expressed the belief that the negation of the ergonomics rule was a singular event and not likely soon to be repeated.

Furthermore, not nearly all the rules defined by the statute as covered are reported for review. The number of rules, of covered rules is likely to be significantly more than the number that are actually submitted for review.

Federal appellate courts in that period of 11 years had negated all or parts of about 60 rules, a number, which while significant in some respects, is comparatively small in relation to the number of rules issues in that period. Indeed, at a hearing that you held in September, Professor Jody Freeman of Harvard presented the tentative conclusions of a study of judicial review of rulemaking that, contrary to popular myth, apparently the courts are not part of the problem, that indeed, the number of rules that have been, you know, successfully challenged is quite small. And the major part of them are limited to two agencies.

The framers of this legislation anticipated that the effective utilization of a 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. That has not happened because the ineffectiveness of the CRA review mechanism soon became readily apparent both to agencies and observers.

The lack of a screening mechanism to identify rules that warranted review and the absence of an expedited consideration process in the House that complemented the Senate's procedures and numerous interpretative uncertainties of the key statutory provisions arguably have deterred 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."

Further reinforcing the perception that Congress would not likely intervene in rulemaking, particularly after 2001, has been in the emergence of what has been called by one scholar as the new presidentialism, which encompasses the notion of the unitary executive and expansive presidential control of the executive bureaucracy. We have reached the stage today where if the executive presumes without serious challenge from Congress that when Congress delegates rulemaking or other discretionary decision-making authority to agencies, it is also a delegation to the President, which allows him to freely control when and how that authority is to be executed.

But there is some light in the tunnel to report. Due to the present and past leadership of this Subcommittee, attention has been given to the perceived flaws in the CRA.

In 2006 and 2007, suggestions for at least a modest remediation of the perceived flaws in the CRA, if for no other reason than to maintain a credible congressional presence in the process of a delegated administrative lawmaking, were presented in a number of forums. These included hearings by this Subcommittee, a symposium held by the Congressional Research Service, CRS and GAO reports, and academic writings. Participating witnesses and panelists concurred that the role of Congress as the Nation's dominate policy maker was being threatened by widespread agency evasion of notice and comment rulemaking requirements and the frequent calls for increased presidential control of agency rulemaking.

Most important, I believe, during this period was the catalogue of legislative options for remedying the flaws of the CRA presented in your Subcommittee's interim report on the administrative law project. Some of those options would not even require the passage of a law.

Among the seven options suggested by the report, which could be explored today, include establishing a joint Committee by rule of each house to act as a clearinghouse and a screening mechanism for all covered rules; second, amending the CRA to limit it to review only of major rules; third, amending the act to make it clear that the failure to report a covered rule is subject to judicial enforcement; fourth, to amend the act to make it clear that an up or down vote is on the entire reported rule; and fifth, amend the act to clarify that a disapproved rule does not disable an agency from promulgating a rule in that area without further authorization from Congress.

With that, I will conclude and await some questions. Thank you.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF MORTON ROSENBERG

STATEMENT

OF

MORTON ROSENBERG
SPECIALIST IN AMERICAN PUBLIC LAW
CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

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

CONCERNING

"OVERSIGHT OF THE CONGRESSIONAL REVIEW ACT"

PRESENTED ON

November 6, 2007

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.
>
> 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
(continued...)

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.

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

Ms. SÁNCHEZ. Thank you for your testimony, Mr. Rosenberg.

At this time, I would invite Professor Katzen to present her testimony.

TESTIMONY OF SALLY KATZEN, VISITING PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW, WASHINGTON, DC

Ms. KATZEN. Thank you, Chairman Sánchez, Ranking Member Cannon, Members of the Subcommittee. I will try to summarize in my oral statement the written testimony.

I would urge you, as you consider changes to the CRA, whether they be necessary or desirable, to keep in mind that the CRA was intended to serve an extraordinarily important function, namely, to reassert congressional accountability for what has become known as the administrative state.

The broad delegations of authority from Congress to the agencies, which have been sanctioned by the courts and are now an integral part of our modern government, invariably diminished the power of Congress vis-à-vis that of the President. To address this balance and to reclaim accountability for the administrative state, Congress enacted the CRA.

The Chairman noted that this was a bipartisan effort. It was passed by a Republican Congress and signed by a Democratic President. He signed the bill not because he had to, but because he wanted to. He saw it as a contribution to good government.

Now, there are two major concerns that have been raised, one having to do with the administrative burden of the act—the costs—and questions about its efficacy—the benefits. Let me start with the latter.

It has been noted that there have been very few joint resolutions of disapproval that have been introduced, and only has been enacted, and the low numbers are being used to show that the act doesn't work. But the numbers are also equally consistent with the notion that the act is working, and that the agencies have been doing a usually good job, faithfully performing their functions, especially knowing that Congress is looking over their shoulders.

In fact, the congressional disapproval mechanism was not intended for the run-of-the-mill case. That was not its objective at the beginning, and I don't think it should be the test by which it is evaluated today.

It was to be used only in those infrequent instances where there was such opposition to an agency rule that the Congress was willing to put aside its other work and to express its concern in an official way, knowing full well that the President, in most such cases, would choose to support the agencies and then veto the joint resolution.

In any event, notwithstanding the paucity of instances where the joint motions or the joint resolution has been enacted, I firmly believe that the fact that the CRA requires agencies to send their rules to Congress before they take effect, and that there is an opportunity for Congress—in admittedly rare cases—to disapprove of the rule, serves as a real check on agency excesses, and, at a minimum, reasserts congressional authority. In other words, the CRA remains an effective watch dog even though it doesn't bark. GAO

and CRS have subscribed to this position, to at least some extent, in the materials that I point out in the written testimony.

I suggest in my written testimony that the burden on the parliamentarian and others could be reduced by authorizing or requiring agencies to submit their rules to Congress electronically, which is how they send them to the Federal Register. I stress, however, that all materials covered by the CRA should continue to be sent to Congress, not to the GAO, but to Congress, without any exceptions so that the agencies are aware of the fact that it is Congress to whom they are beholden, it is Congress which has given them the authority, and it is Congress which is the ultimate lawmaker in our government.

For related reasons, I think it is important to retain the requirement that, once they are received by the Congress, they go to the Committees of jurisdiction, not be filtered through some intervening Committee, or ask the Committees to access some control database.

These Committees are the ones that have the expertise and programmatic experience and, therefore, are in the best position to evaluate whether an impending rule is consistent with congressional intent. With electronic processing the burden on the parliamentarian would be reduced, but systematic and timely notice to the Committees would remain.

A far more dramatic change, affecting substance rather than process, would be to redraw the coverage of the act. As you know, the CRA covers all rules because Congress has authority and has delegated that authority for all rulemaking. So the act covers the major rules, those generally having an annual affect of $100 million or more, and the thousands of non-major rules issued each year. I hope during the question and answer period I can address why Congress would not want to have to take an affirmative step with respect to those non-major rules.

Limiting the scope of CRA to the more important rules would reduce congressional authority. But it would enable Congress to focus on the rules that have the greatest impact and are likely to be the most important rules. This is the tradeoff that was reflected in President Clinton's executive order whereby, OIRA no longer reviews all rules issued by executive branch agencies, but only the more important ones. We thought that if you try to do everything, you may not do anything very well.

If Congress were to restrict the coverage of the CRA to major rules, there are, I think, two critical components that must accompany this. First, you should not use the major, non-major dividing line which is currently set forth in the CRA. The definition of "major" in the CRA was taken from Executive Order 12291, which has not been in effect for 14 years. When President Clinton signed Executive Order 12866, the definition of major was encompassed in the term "economically significant" but there were three other categories that were added to significant. Those categories are important: materially affect the budget, novel issues, inconsistent actions that may be taken. If those are not included in the cutoff, Congress will be cutting off very important rules that it should be looking at. Now, these definitions of "economically significant" and significant were not changed by President Bush. They have been in effect

for over 14 years and I think have the acquiescence of both parties as the best criterion by which to determine what is really important. Or stated another way, if this is what OIRA uses to review executive branch agency rules, isn't this what Congress should use.

In that same connection, I would note that as Ranking Member Cannon said, there is all this guidance out there. Well, recently the President amended the executive order so that OIRA would review that guidance. Again, if it is important enough for OIRA review, it should be subject to congressional review.

The problem with the guidance documents is one that Mr. Rosenberg has addressed. Agencies are not sending them to the Congress. Therefore, I think it would be very salutory if there were changes in the language of the CRA to clarify the initial intention reflected in the legislative history, but these guidance documents and manuals, et cetera were intended to be covered.

I see my time is up. I would love to talk about the section 801(b)(2), which is the prohibition. I hope that we will be able to get to that during the question and answer period because I think it is a very important aspect for this act. Thank you very much.

[The prepared statement of Ms. Katzen follows:]

PREPARED STATEMENT OF SALLY KATZEN

Chairman Sanchez, Ranking Member Cannon, and Members of the Subcommittee. Thank you for inviting me to testify today on the Congressional Review Act, 5 U.S.C. §§ 801–08 (CRA). This Act was an important step toward reasserting Congressional accountability for what has become known as the "administrative state." The Subcommittee is to be commended for convening a hearing, as it has in the past, to examine how the Act has been working in practice and consider whether modifications or clarifications of the law would enable it to better achieve its purposes.

I served as the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for the first five years of the Clinton Administration, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB until January 2001. Among my responsibilities while I was Administrator of OIRA, I coordinated the Executive Branch views on the bills that became the CRA and, after its enactment, worked with the major executive branch regulatory agencies as they sorted through various implementation issues. I remain active in the area of administrative law, generally, and rulemaking, in particular. Since leaving government service, I taught Administrative Law and related subjects at George Mason University School of Law, the University of Michigan Law School, and the University of Pennsylvania Law School, and I have also taught American Government seminars to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program. I frequently speak and have written articles for scholarly publications on these issues.

The CRA was a bipartisan effort, passed by a Republican Congress and signed by a Democratic President. President Clinton signed the bill, not because he had to but because he wanted to. He saw it as a contribution to good government. *See* Statement on Signing the Contract with America Advancement Act of 1996 (Mar. 29, 1996) (available at http://www.presidency.ucsb.edu/ws/?pid=52611).

It may be helpful to provide some background as context for this characterization of the CRA. Congress has, over the years, enacted legislation setting forth general principles or goals and then delegated to the agencies—typically executive branch agencies but independent regulatory commissions as well—the authority to develop and issue implementing regulations that have the force and effect of law. These often broad delegations of authority have been sanctioned by the courts and are now, by any measure, an integral part of our modern government. *See, e.g., Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457 (2001).

One unintended consequence of the vast delegations to agencies was to significantly diminish the power of the Congress vis-á-vis that of the President. To reduce this shift in power, Congress has used various means to exercise authority over the

administrative state. The Senate's role in advising and consenting to presidential appointments at regulatory agencies, oversight hearings by both the House and the Senate, and the power of the purse were all useful in this regard, but necessarily ad hoc, and the latter two strategies were almost always triggered after rules had gone into effect and their unintended or undesired consequences were more difficult to redress. One device used by Congress to retain close control of certain rules, which was used in nearly 200 hundred provisions, was the one- (or sometimes two-) House legislative veto, whereby the enabling legislation provided that any implementing regulations would be laid before the Congress and go into effect *only* if neither House objected. This form of oversight was eventually held unconstitutional in *INS v. Chada,* 462 U.S. 919 (1983).

Thereafter, the absence of a systematic mechanism for Congressional oversight of the regulatory apparatus eventually led to the passage of the CRA. Unlike the one- (or two-) House legislative veto, the CRA is decidedly constitutional—meeting the presentment and bicameral requirements of Article I, §§ 1 and 7, Cls. 2 and 3 identified in the *Chada* case. Also, the CRA was designed to be relatively efficient by, in effect, nullifying the Senate rules permitting a filibuster. Thus, with the CRA, if a majority in each House believes that a rule adopted by an agency is not faithful to Congressional intent or is otherwise deficient in a serious way, there is a ready vehicle for Congress to make its views known to the President.

Some commentators and critics of the CRA have asserted that the Act is "not working"—pointing to the relatively few Joint Resolutions of Disapproval that have been introduced and the fact that only one was enacted into law in the over ten-year history of the CRA. *See* CRS, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years,* RL30116, pg. CRS-1 (Mar. 29, 2006) (hereinafter "CRS Ten-Year Review"); Cindy Skrzycki, *Reform's Knockout Act, Kept Out of the Ring,* Washington Post, Apr. 18, 2006, D01. Limited use of the disapproval resolution mechanism may be a manifestation that the Act is not working; it is, however, equally consistent with the notion that the Act *is* working and that agencies are usually faithfully performing their functions (especially knowing that Congress will be looking at their final work product—more on that below). In fact, the Congressional disapproval procedure was *not* intended to be used in the run of the mill case. Rather it was to be used only in those instances where there was such strong disagreement in Congress with what the agency did that Congress was willing to put aside other work and express its concern in an official way—knowing that in most such cases, the President would chose to support his agencies and thus veto the joint resolution. Stated simply, the disapproval process itself was intended to be used, and should be used, only when an agency's work product warrants the attention of Congress as a whole and is worth a confrontation with the President.

Nonetheless, the fact that the CRA requires that agency rules must be sent to Congress before they can take effect, and that there is an opportunity for Congressional review which could—in admittedly rare cases—result in disapproval of a rule, operates as a real check on agency excesses, and at a minimum reasserts Congressional authority. The General Accountability Office (GAO) has previously testified that "the benefits of compiling and making information available on potential federal actions should not be underestimated." GAO, *Federal Rulemaking: Perspective on 10 Years of Congressional Review Act Implementation,* GAO-06-601T, pg. 4 (Mar. 30, 2006) (hereafter "GAO Testimony"). It further suggested that "the availability of procedures for congressional disapproval may have some deterrent effect." *Id.* The Congressional Research Service (CRS) describes the effect in somewhat more positive terms, such as "exert[ing] pressure on the subject agencies to modify or withdraw the rule." CRS Ten-Year Review at CRS-8. In other words, the CRA remains an effective watchdog over agency rulemaking even when it doesn't bark.

Having said that, there are ways to modify or clarify the Act to ensure that it captures the agency rules that it should capture and that it does so in a relatively efficient way. First, there are concerns about the administrative burden on the Parliamentarian (and others) resulting from the flood of paperwork that is generated by the Act's requirements. One way to alleviate this burden is to explicitly authorize agencies to submit their rules to Congress electronically, as they typically do when sending materials to the Federal Register for publication. This would obviously facilitate the processing of the information provided to Congress and would be in furtherance of the objectives of the "E-Government Act of 2002," 107 P.L. 347, 116 Stat. 2899, codified at 44 U.S.C. § 101 (2007). The requirement for electronic submission should encompass *all* material covered by the CRA, without any exemption, including rules sent to the *Federal Register.* Keeping in place the requirement of 5 U.S.C. § 801(a)(1)(A), that the agencies send their work product to Congress, keeps the agencies focused on the fact that it is Congress that delegates rulemaking au-

thority to the agencies and it is Congress that is ultimately the law maker in our government.

For related reasons, it is important to retain the requirement of 5 U.S.C. § 801(a)(1)(C) that, once the material is received by the Congress in electronic form, it should be forwarded to the committees of jurisdiction rather than leaving it up to the committees to access some central database. These are the committees that have the expertise and programmatic experience and are therefore in the best position to evaluate whether impending rules are consistent with Congressional intent. With electronic processing, the burden on the Parliamentarian would be reduced, but systematic and timely notice to the committees of agency actions within their jurisdiction would remain. Without such notice, the committees might not promptly focus on soon to be effective regulations, unless, of course, special interest groups alert them to potential problems. Given that the strength of the CRA is its comprehensive coverage, it is best not to leave committee awareness to happenstance.

A far more dramatic change, affecting substance rather than process (but which is compatible with the suggestions above) would be to redraw the coverage of the Act. As noted above, the CRA was deliberately designed to cover all rules because Congress is the source of authority for all agency actions that affect the rights and obligations of the public. As a result, the CRA explicitly covers not only the "major" rules—generally those having an annual effect on the economy of $100 million or more, 5 U.S.C. § 804(2)—but also the many thousands of rules by which the agencies carry out the day to day responsibilities of government. A rough estimate is that there may be 50–100 major and 2,000–3,000 non-major rules each year. Limiting the scope of the CRA to the more important rules would somewhat reduce Congressional authority, but it would enable Congress to focus on the rules that are likely to have the greatest impact on the public, and it would obviously greatly reduce the burden of sorting through the flood of less important rules that the Parliamentarian is currently receiving. This is the type of trade-off that was reflected in President Clinton's Executive Order 12,866, 58 *Fed. Reg.* 51735 (1993), whereby OIRA limited its review of executive branch rules to those defined in the Executive Order as "significant." *See* EO § 6(a)(3)(a). We believed that it was better to focus our limited resources on the more important rules, recognizing that if you try to do everything, you may not do anything well.

If Congress were to decide to restrict the coverage of the CRA to the more important agency actions, there are two key, indeed critical, companion pieces that must be a part of any such change. First, Congress should most definitely *not* use the "major"/"non-major" dividing line as currently set forth in the CRA. The definition of "major" in § 804(2) of the CRA was taken from Executive Order 12,291, 46 *Fed. Reg.* 13193 (1981), which has not been in effect for over 14 years. Executive Order 12,866, which replaced Executive Order 12,291, used the term "economically significant" to capture much of what "major" encompassed, although there were several important changes: "Major" was defined in Executive Order 12,291 § 1(b) as:

> any regulation likely to result in:
>
> 1. An annual effect on the economy of $100 million or more;
> 2. A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
> 3. Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

"Economically significant regulatory action" (the short-hand term for those rules captured by § 6(a)(3)(C)) is defined in Executive Order 12,866 § 3(f) as:

> any regulatory action that is likely to result in a rule that may:
>
> 1. Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities

Executive Order 12,866 § 3(f) also added three other categories of "significant" regulations, namely, those that:

> 2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
> 3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
> 4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

The definitions of "economically significant" and "significant" regulatory actions have been in effect since 1993 and have not been changed in any way by President Bush. As a result, these are the operative definitions for review of executive branch rules by OIRA. If Congress were to limit its review of agency actions under the CRA to the more important rules, these definitions are the best criteria for determining the scope of the Act. Using these definitions would bring the number of rules covered under the CRA to several hundred a year—still well below the number that are now sent to Congress, but presumably a manageable amount. More importantly, as noted, these are the criteria that OIRA uses for presidential review, and if a rule is important enough for presidential review, it should be subject to Congressional review.

A related point is that if Congress were to decide to narrow the scope of the CRA, it should simultaneously clarify, in legislative language, that the CRA covers not only rules subject to the Administrative Procedure Act's notice and comment requirements, but also any interpretive rules, guidance documents, and other similar statements of policy that will have a future effect on the rights and obligations of the public. Making explicit that the CRA covers such agency actions—albeit only those that also fall within the definition of "significant" if that is made the test of coverage—would resolve any lingering doubts on the scope of the Act. Both the GAO and the CRS have opined that this is the correct interpretation of the CRA. GAO Testimony at 4 ("CRA contains a broad definition of the term 'rule,' including more than the usual notice and comment rulemakings published in the Federal Register under APA"); CRS Ten-Year Review at CRS-24 ("it was meant to encompass all substantive rulemaking documents—such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like—which as a legal or practical matter an agency wishes to make binding on the affected public"). Yet it is not altogether clear that this is how the agencies are reading the statute. Both GAO and CRS note that there are instances where agencies are not forwarding their work products to Congress, *Id* at CRS-40, with the GAO stating that when OIRA is notified of unfiled rules, agencies then file the rules "or offer an explanation of why they do not believe a rule is covered." GAO Testimony at 4. In five of the eight cases where GAO was asked to follow-up on a non-filing, GAO said that the supposedly non-covered agency actions were, in GAO's opinion, within the scope of the CRA. GAO Testimony at 4–5. Clarifying in legislative language the intended breadth of the Act would be instructive to, and hopefully productive for, the agencies.

There are two further observations on this point. First, for the reasons set forth above, Congress should ask GAO to send the list of unfiled rules that it currently sends to OIRA to the Congressional committees of jurisdiction as well. Second, as the Subcommittee will recall, earlier this year, President Bush amended Executive Order 12,866 to bring within its scope significant agency guidance documents. See EO 13,422 § 3, 72 *Fed. Reg.* 2763 (2007). Clearly the Administration believes that these documents warrant review by OIRA; again, at a minimum, anything that OIRA reviews should be subject to review by Congress.

Finally, I would like to comment on § 801(b)(2), which prohibits agency issuance of a rule "in substantially the same form" after passage of a joint resolution of disapproval unless Congress, by law subsequent to the disapproval resolution, authorizes the issuance of such a rule. Only one Joint Resolution of Disapproval has been enacted since the CRA became law, but the consequences of that disapproval are draconian—far more draconian than was originally intended. As CRS has noted, a disapproval resolution applies to the rule as a whole, which, as in the case of the ergonomics rule that was disapproved, can cover a vast area. CRS, *Congressional Review of Agency Rulemaking: An Update and Assessment After Nullification of OSHA's Ergonomics Standard,* RL30116, pg. 14–15 (Washington, D.C., Jan. 6, 2003). When the Bush Administration, which supported the disapproval resolution, went back to the drawing board and tried to craft a new rule that would pass muster with Congress, it concluded that it could not, under the CRA, draft any rule relating to ergonomics. If that view prevails—namely, that no new rule affecting the same subject matter can issue without new Congressional authorization—then there could well be an extended period of time where nothing could be done to deal with an admittedly serious problem so long as the agency's first attempt was unsuccessful. Yet, as CRS has noted, other provisions of the CRA, particularly the provision extending for one year any statutory or judicial deadlines for a rule that is disapproved, strongly suggest that the CRA was not intended to be a permanent bar. CRS Ten-Year Review at CRS-34-35. Nor was it so understood within the Administration when the bill was signed. The Subcommittee should therefore consider changing the prohibition so that it extends only for the duration of the Session (or of the Congress) during which the disapproval resolution was enacted. Agencies should be able to take a disapproved rule, fix it, and resubmit it at the next Session

(or next Congress). The CRA would then have the salutary effect it was intended to have.

This brings me back to where I started: CRA is good government. It reasserts Congress' legitimate role and responsibility for the administrative state. It is not an empty shell or mere formality—even if there are few disapproval resolutions filed or enacted. The point is that, with the CRA, the agencies are aware that Congress has an opportunity to review their work before it takes effect and that, on occasion, other sets of eyes and different minds will examine what the agencies have done and evaluate its consistency with the Congressional mandate by which it was authorized. In an age where divided government is more frequently the norm than the exception, there will sometimes be a different perspective coming from the Hill than from the other end of Pennsylvania Avenue. The CRA is an important way to ensure that those different perspectives are taken seriously.

Thank you again for the opportunity to testify today. I look forward to answering any questions you may have.

Ms. SÁNCHEZ. Thank you, Professor Katzen.

We will now proceed to the rounds of questioning. And I will begin with Mr. Sullivan.

Dr. Katzen has suggested that perhaps the CRA could be reformed to permit agencies to submit rules to Congress electronically. Is that a viable reform that could reduce paperwork and reduce the burden on the parliamentarian's office?

Mr. SULLIVAN. Madam Chair, I think that would be a step. And as my colleagues have noted, my input to the Committee has been largely logistical on these things. But I am not here to whine about our workload.

I wonder whether it would have any material effect on your effort to optimize the coverage and the effect of the act. I am not sure it would. Electronic wouldn't be hand trucks of boxes of documents.

Ms. SÁNCHEZ. Right. I read your testimony about that. And I thought all that paperwork is probably——

Mr. SULLIVAN. For a small operation like ours it is more significant than might meet the eye. And, you know, digital is better than analogue in that case. But I am not sure from the broader perspective from which my colleagues speak about the intention here.

And we are talking about delegation of quasi-legislative power and what kind of strings should you attach to it, to the delegation itself or what kind of oversight mechanism should you array to make sure that it is prudently exercised. And I am not sure whether the streamlining by electronic submission affects that equation.

Ms. SÁNCHEZ. Okay. What about considering eliminating the submission requirement in the CRA for non-major rules? Do you support that idea? And if you do, how would that impact the work——

Mr. SULLIVAN. I would support anything—I am sorry.

Ms. SÁNCHEZ. And if you do support that, how would that impact the workload in your office?

Mr. SULLIVAN. I am not sure of what the numbers are between major and non-major. But I certainly would recommend anything that dealt with a more selective universe of rules. I think that would more focus the oversight.

I start from the tenant that Congress doesn't need the CRA in order to disapprove a rulemaking. If Congress sees a bad rule, it can by act of Congress disapprove it. It doesn't need the CRA to do it.

Now, sometimes there are needs to set up either an approval mechanism, an approval requirement saying we will give you a

rulemaking power, but we have to approve it by act of Congress. So you can do the leg work for us, and then we will exercise the legislative power ourselves.

The other option, the one taken by the CRA, is to provide some boost to the Congress' disapproval reaction, some expedition. But as it happens, the CRA doesn't expedite anything in the House. And in the end, all it does from the House's point of view is to facilitate vigilance, facilitate the vigilance that should go on. In the ordinary case, Committee council being experts in their jurisdiction keep an eye on the agencies for whom Congress has enabled rulemaking in their jurisdiction and a watchful eye on them.

Now, perhaps merely facilitating vigilance has the kind of deterrent effect that my colleagues mentioned, that the agencies know that they are being watched more than they otherwise might. But that seems like a very marginal benefit to me.

Ms. SÁNCHEZ. Thank you.

Mr. Rosenberg, given the fact that there are these large volumes of information that are provided to Congress pursuant to the CRA and that that has only resulted in a limited number of joint resolutions of disapproval having been introduced and only one having succeeded, do you think that CRA is not working and should be repealed? Because Professor Katzen obviously feels that the argument can be made the other way. And I am interested in getting your opinion on that.

Mr. ROSENBERG. Not working because it is not—it is flawed in the way that it looks at the rules and the way it receives them. It doesn't receive enough information to start with. You get a report from GAO which simply says we have got a rule that has been in the Federal register. And it complies with all the executive orders and other rules in conformity.

It doesn't deal with analysis of whether the rule is cost beneficial or would, you know, has been looked at for cost effectiveness or anything like that. That is the information that comes over and drops on a Committee.

I don't know who it is in the Committees that do it, but my experience has been that a rule that is controversial, whether it is a major rule with an economic—tremendous economic impact or a lesser rule that, you know, impacts on constituents or small businesses or whatever it may be, it is only when somebody pokes the bear over here that you get some reaction to it.

There is a need for a CRA if there is expedited review. There would be an even better reason for a CRA if there is expedited review in the House.

A second thing is an information clearinghouse mechanism that provides the appropriate Committees with sufficient information on which to determine whether they should take some action, whether a joint resolution of disapproval should be filed in either house. If you had a concurrent, you know, expedited procedure, you would see an awful lot more out there.

I tried to find anecdotal evidence of what Professor Katzen was saying, that, sure, it is having an impact. It must be because it is a wall. I looked at what has been happening the last 6, 10, 12, 14 years. There is less and less acquiescence, less and less cooperation

between the executive branch and Congress with regard to oversight.

You know, you have more than enough instances of refusals to provide access to information with regard to any kind of decision making and a refusal to obey subpoenas upon occasion without response by the Congress. There is a need for an effective CRA to keep Congress even.

I mean, we are talking about separation of powers here. They used to call the old 122941, you know, in OIRA at that time the 800-pound gorilla in the house. I think it is 1,600 pounds now with the kind of changes and the aggressive use of the executive order and the amendments to the executive order. I won't go on.

Ms. SÁNCHEZ. Thank you, Mr. Rosenberg. My time has expired.

I will now recognize my colleague, Mr. Cannon, for 5 minutes.

Mr. CANNON. Thank you, Madam Chair. You know, I couldn't help thinking of the imperial presidency, Mr. Rosenberg, as you were speaking about what I think you called the new presidentialism and what Professor Katzen later then called the administrative state. And so, we are sort of in this like remarkable hearing where our personal views—and I don't know that I—I am not sure I speak for the Chairman here, but I think I do and the panel members—have all transcended party and even branch and have said we have something, we have a problem we have to deal with.

And I was telling some of the panel members before—and I think this story is actually important and maybe ought to go on the record. I have a constituent that has a service that is complicated and allowed by the IRS, but without particular guidance. And in a conference call in which my constituent was excluded but which many other people, 20 or 30 other people were on the conference call, a bureaucrat demeaned the constituent and said that they would never get guidance if he had his way.

So I called the senior person in the general counsel's office and asked about it. And I had an interesting experience.

He talked about their schedule for guidance papers. So what we have here is an environment of complex regulation where a personality can assert himself, maybe improperly. It appeared that way on the surface. Maybe it was not improper. We have a role for curbing individual antagonism. But the context of that role is law.

In other words, we don't let people make decisions. We have a rule of law. And yet that rule of law can't take place because it has to be scheduled, and the person who may have had a problem with my particular constituent may actually have something to do with what gets scheduled or not. And in the meantime, business goes on.

And so, we find ourselves with an administrative process that does not take into consideration the vast amount of activity that individual bureaucrats and cumulatively agencies have to participate in. And in that mix, I know that our parliamentarian has a huge burden. And we want to eliminate the paper part of that burden at least. But we are not in Congress in any way organized to even act consistently or coherently with OIRA.

We put all the burden on a very small parliamentarian staff and virtually none on our Committee staff, as I think Professor Katzen had suggested where the burden ought to be. And therefore, the

only oversight we have is the very inadequate oversight, which today is slightly better from what it was under the Republicans.

I think one of the big mistakes Republicans made when they took over Congress is they decided to show the world that they could cut expenses. And so, we got rid of all of our oversight staff or virtually all of our oversight staff.

And we have had significant arguments among ourselves as Republicans over that. But clearly, we have not done anywhere near the oversight. As the budget of government has doubled over the last 10 or so years, our oversight activity has diminished and only increased slightly under the new Democratic majority.

So what we find ourselves is in a position of not doing oversight, of having laws developed, regulations developed or regulatory activities evolving through the activities of individuals without the kind of oversight that we need. So this hearing is dramatically important.

And in that context, let me just ask. If you talk about the CRA, then we are talking about what we do with paperwork and what we do internally. But we are talking about the Administrative Procedure Act, don't we need to deal with that before we can actually deal with how Congress oversees effectively what we are doing in the Administration?

And let me just put another question on the table, going back to the imperial presidency and whatever name we use for it. We have more judges, more adjudication that happens in the agencies than we have with Article 3 judges.

And we have vastly more law than we produce here in Congress. Shouldn't we in Congress be thinking in terms of shrinking that, strengthen the presidency by taking more control, not just over regulations, but perhaps over administrative judges?

And, Professor Katzen, would you mind responding first, and then we will move across the dais?

Ms. KATZEN. Trying to keep my answer brief, you raise some very important points. The APA is clearly relevant.

The APA, the Administrative Procedure Act, which was written in 1946, deals with, for the most part—this is great simplification—the interaction between the agency and the public, what kind of input the public has and how the agency has to treat those comments. That is clearly relevant. But this is the other end of the process, which is having delegated the authority, what reins does the Congress want to keep on the agencies, and how does it manifest that?

So, I think you can look at the CRA without looking at the APA, though I would encourage you to work on the APA because there are lots of issues there that warrant attention and, I think, updating.

Having said that, the concept of review in this discussion that I find troubling in one major respect is that rules are not all the same.

We talked "major," and "non-major." And I would beg of you to think "significant," "non-significant" instead of "major," "non-major" for the reasons I explained. But even among the biggies and the little guys there are huge differences.

The parliamentarian said he was not completely up to date on the numbers. It is roughly 50 to 100 "economically significant" rules a year, another 200 to 300 "significant" rules a year and 2,000 to 3,000 "non-significant" rules a year. But what are these non-significant rules? One of the ones that I know help populate the "non-significant" world are FAA, Federal Aviation Administration, air worthiness directives.

Do you really want to stand between the FAA issuing an air worthiness directive to take a plane out of operation or to fix a screw or to change a motor or to reinforce a door and have it go through the—no, you want those rules to be able to function. Those are the routine elements of Congress.

Setting the course——

Mr. CANNON. I don't mean to mix your words, but——

Ms. KATZEN. Go ahead.

Mr. CANNON. But this is really a vital issue that I would like to just—if the Chair would indulge me. The fact is you have to have guidance that can't go through Congress. But on the other hand, you want to have clarity about the process that develops the base rule.

Don't we need to be more subtle in our thinking between what is guidance that is clearly guidance and which over time becomes formalized, so that you have the ability to set—as you suggested before the hearing, Congress doesn't set or review the times that we change for daylight savings time. The railroads, the other commissions do those sorts of detailed things.

But ultimately when you make a decision about how the time should change, that may evolve actually into a rule that becomes part of a rule that is overseen. In other words, don't we need to deal with—we have a world that is so radically different. We have wickies today. That means we can accumulate and collaborate and develop a wisdom that is greater than any individuals and certainly than any bureaucrats.

Don't we need to have some kind of process where we have clarity of decision on issues like screws and reinforcing doors and then on the other side, a cumulation of that process into a rule that we know has clarity? So you have certainty that you have to replace the screw. Then you have certainty about what the context of that replacing of the screw is because the larger rule goes through a process that is informed by each of the decisions that are more subtle.

Ms. KATZEN. Yes, in a word.

Mr. CANNON. Thank you. And that seems to me to be the task of this Committee. I appreciate that.

Ms. SÁNCHEZ. Were you finished with your response, Professor?

And did anybody else on the panel want to comment to the question or comments that Mr. Cannon posed?

Ms. KATZEN. I guess I just would like to add that the reason I went through the FAA's air worthiness directives, which are rules, and all the other rules, is you can't talk about them as though they are the same thing. You have to go through the slicing and dicing and making those kinds of distinctions. And this discussion, which lumps it all together, is difficult to navigate.

Mr. ROSENBERG. Let us start with the APA and about amending it or doing something with it. APA is a very special law. It has been around since 1946 and, as Professor Katzen has noted, hasn't been amended. I think there have been, you know, little things here and there.

APA is a special law that is like our Constitution except it is the Constitution for our administrative processes. It has stop signs, and it has protections, and it has due process concerns. And those remarkably, if you study the history prior to 1946 and the 8-year battle to get the APA passed, what you will see is the 1946 enactment has become a charter of the Constitution which has been amended, interpreted as time has changed.

And it has morphed and tempered, you know, with help of the courts, sometimes with, you know, statutory, with imaginative devices that ACUS helped during its 28-year period. Those kinds of things helped it.

I don't think we have to dive into it unless there is something egregiously wrong with the general public participation and reviewability and accountability provisions that are there now that have worked. What we have to look at is broader and look back on—it is dealing with Professor Katzen's—let us cut it down to significant rules.

What determines what is a significant rule? You thought it was pretty significant with regard to your constituent.

Mr. CANNON. And that is only guidance.

Mr. ROSENBERG. And that is guidance. But when a guidance—I have never understood the OMB new bulletin on guidance which says that they will review it if it has $100 million impact. Now, there may be a couple of guidances out there that some way or another have $100 million.

But that seems to be treading very closely on what a rule is. If it has $100 million impact, to my mind, there is a presumption that perhaps there is something substantive about this that has an effect on persons outside the executive branch and outside the government and on private citizens if it has that much of an impact.

What we are dealing with is—and remember what the CRA says. The CRA says that it is for—concerning what is a major rule, the only one who determines it is the OIRA administrator.

Now, I don't know that we want OIRA and what it does to be the one that determines what is a significant rule that Congress might be interested in. I don't know how you can write a statute that says, you know, whatever OIRA is interested in we should be interested in it, too, and that has to be sent over somehow or another.

I don't think you can give the power to a jurisdictional Committee, you know, in the statute to say they can point to a rule and say send it up. I think there may be a charter problem there.

You know, and I don't think you have a choice of all the rules as there are now or specified rules and some other. Whoever determines whether it is a major rule or a significant rule that is important.

Stepping back even further, we have got to be cognizant of the fact that there is a competition that is built into the Constitution between the President and Congress with respect to decision mak-

ing in the executive branch. The fight since the New Deal, especially as more agencies have become more proliferous and also their powers have become more extensive, that the focus is on the agency, on agency decision making and who controls agency decision making.

And over the last since the Reagan administration more and more agency decision making, particularly with regard to rulemaking has fallen into hands of the executive. I am not against executive, you know, review. I think it is beneficial and an important aspect of open government and also, you know, effective government and efficient government.

But to the exclusion of Congress, the more Congress gets excluded from that decisional processes and unable to monitor and control and police the enormous amounts of delegated power, delegated lawmaking power it has given, I think we have to think about the future as, you know, it is not likely that any President in the future is going to accept less of power than has been claimed and asserted, you know, during the last 6, 8 years or 12 years and even during the Clinton administration.

Mr. CANNON. Madam Chair, would you indulge me to just follow up on clarifying one point?

Ms. SÁNCHEZ. I will, although we have gone way over time with your questioning. I will grant you an additional minute. We are also expecting votes.

Mr. CANNON. I thank the Chair.

Ms. SÁNCHEZ. And I do want to allow Mr. Johnson an opportunity to ask questions.

Mr. CANNON. Certainly. I apologize to Mr. Johnson in advance here.

If I could restate what I think you are saying, Mr. Rosenberg, the APA is important because like the Constitution, it is based on principles. And those principles haven't changed. And they won't change.

My concern is that the context in which we are applying those principles has changed dramatically. So the number of decisions being made, the number of people at lower and lower levels making decisions which may or may not be significant to OIRA but may be significant to a business ought to be captured somehow with the new tools that are available to capture those. So I have never advocated a throwing out and redoing of APA, only of updating it on the margins. And is that consistent with what you are suggesting?

Mr. ROSENBERG. Context does not override basic principles, whether it is the principles that underlie the APA or the principles that underlie the separation of powers.

Mr. CANNON. Exactly.

Mr. ROSENBERG. Undermining them, undermining the ability of Congress to be the prime policy maker in the separation of powers is dangerous.

Mr. CANNON. I think we agree entirely. The question is don't we have tools today, and don't we have a need because of the growth of government and decision makers within government to use new tools to help make the principles of the APA applicable at increasingly low levels of government.

Mr. ROSENBERG. If you are thinking the CRA is a tool, it is an ineffective tool. If it was amended and made effective so that Congress can be more accountable about its delegations and also assure that there is transparency and there is accountability in the executive, yes, that is fine. That is creating new tools, you know, to accomplish those basic, you know, constitutional and administrative law, you know, precepts and protecting them——

Ms. SÁNCHEZ. The time of the——

Mr. ROSENBERG [continuing]. Will be very beneficial.

Ms. SÁNCHEZ [continuing]. Gentleman has expired.

Mr. CANNON. Thank you, Madam Chair. I yield back.

Ms. SÁNCHEZ. And I will recognize Mr. Johnson for 5 minutes of questions.

Mr. JOHNSON. Thank you, Madam Chair. I will try my best to come up with 5 minutes worth of material. I will say that I stayed awake last night pondering the realities of this information that we are receiving today and tried my best to engender some type of enthusiasm. And I was woefully unable to do so.

Mr. CANNON. If the gentleman will yield, he has chosen the right Committee.

Mr. JOHNSON. I am very impressed that my friend, Mr. Cannon, has been completely successful at being enthusiastic about it. So my hat is off to you, sir. And you are welcome to utilize another 10 minutes of my time that I will probably——

Mr. CANNON. As long as the gentleman will not go to sleep during that period.

Mr. JOHNSON. It was recently reported that because the Administration has been frustrated by the legislative process, Mr. Rosenberg, that the President has endeavored to achieve policy objectives through executive orders or agency rulemaking. What reforms to the CRA are the most important in strengthening congressional oversight of agency rulemaking?

Mr. ROSENBERG. First, having an adequate screening mechanism with respect to rules, whatever which ones are going to be reported, whether they are all the rules, the major rules, significant rules, whatever they are. It needs to be a mechanism that—and one particular model is a joint Committee that is not a substantive, not a legislative Committee, but a Committee from both houses that receives the rules, has an ability to look at them in-depth, to get help, let us say, of GAO to do cost benefit, cost effectiveness analysis, any other analysis necessary so that a judgment can be made by a joint Committee with respect to rules they find significant, that then recommends them to the jurisdictional Committees; second, a process, a coordinate process of expedited consideration in the House, both houses; third, dealing with certain interpretative flaws that are in the CRA.

I think it wouldn't be destructive or threatening to the executive. It would put back on a par that is probably necessary for the maintenance of the separation of powers.

Mr. CANNON. Would the gentleman yield?

Mr. JOHNSON. Yes.

Mr. CANNON. In that scenario, Mr. Rosenberg, would you suggest that perhaps if the Committee of jurisdiction decides that there is a problem with the rule that it can hold that rule from going into

effect during some sort of a legislative deferral to rules and therefore, having a bigger bite with the agency?

Mr. ROSENBERG. Are you saying to have a——

Mr. CANNON. Some way to have a holdup on a rule.

Mr. ROSENBERG. A mini-veto?

Mr. CANNON. Yes, based upon a majority of a Committee. In other words, what would you do to give teeth to Congress over the rules that come to us?

Mr. ROSENBERG. Well, you can't give them legislative veto powers. In other words, you can't have these rules unless you make all rules recommendatory and have a fast track process for taking care of 99.9 percent of them and filtering them through. That is not likely to receive, you know, blessing either here in the House or certainly not by the President.

Mr. CANNON. You think the President would veto that idea?

Mr. ROSENBERG. I think he would laugh his way to the veto table.

Mr. CANNON. He might laugh his way into an override.

Mr. ROSENBERG. I don't think there could be—no, but I think that a mechanism that—and the joint Committee is one that I think has a political efficacy, too. You are not impinging on the jurisdictions of the Committee's in both houses.

What you are doing is having recommendations which then can be acted upon in an expeditious way. That could be frightening. That would truly be frightening to, you know, the agencies. They would take notice.

I mean, preferably we know that the agencies are between a rock and a hard place between OMB and OIRA and jurisdictional Committees. But if the choice be made nowadays in the last decade or more, they are going to do what OIRA and OMB says.

Mr. CANNON. Madam Chair, I note that the time has expired. But I think that Professor Katzen would like to respond. And so, I ask unanimous consent that the gentleman's time be extended so that she can respond.

Mr. JOHNSON. Thank you. I was just getting ready to reclaim what little time I had.

Ms. SÁNCHEZ. Mr. Johnson, Mr. Cannon ate up all your time. I just want that noted for the record. In the future you might be a little more judicious about how many minutes you do yield to him.

Mr. CANNON. And Mr. Johnson didn't go to sleep. This is an amazing hearing.

Ms. SÁNCHEZ. Professor Katzen, you will be allowed to answer.

I just want to advise Members we have been called across the street to vote. We do need to wrap up the hearing.

So if you could be brief, we would appreciate that.

Ms. KATZEN. I will try, although there has been a lot said that I think is far more complicated. A joint Committee is something, notwithstanding my enormous respect for Mr. Rosenberg, that I am very dubious about. Think about who signs up for such a Committee. Think about who does the work on such a Committee.

Ms. SÁNCHEZ. Probably Mr. Cannon and not Mr. Johnson.

Ms. KATZEN. I am not sure Mr. Cannon would be happy looking at 4,000 rules each year, which is why I say the Committees of jurisdiction are the ones that have the expertise and the experience

to recreate that, or I should say to attempt to recreate that in a new joint Committee would be, I think, to create another bureaucracy. And I ordinarily don't use the "b" word as a bad word. But in this instance, there would be a layering effect that will not provide the institutional benefits that you might otherwise want to have.

With respect to expedition, having participated into the wee hours of the morning in negotiating the CRA back in 1995, I can tell you there was not one whit of concern about the House. If the leadership of the House wants to bring something up, it has the ability to do it. The problem has always been the Senate.

And what the CRA did—and I know I am speaking on the House side, not the Senate side—but please believe me that what the CRA does is bypass the possibility of filibuster, and that was enormous. It was monumental. It was not swallowed easily by the Senate. It was incredibly significant. I don't think you have to change the rules in the House to achieve any kind of result like that.

In terms of the clarifications, I would join Mr. Rosenberg there. I think it is not clear that it is extant to the kinds of guidance documents that have been stipulated. And the agencies are not sure of it.

I would, as a matter of personal privilege having served as administrator of OIRA for 5 years, take exception to the characterization of who decides what is "significant" and whether that is a good place to be. And I would like to engage with the Committee on the process that OIRA uses. And it is not purely subjective, and we are not hiding the ball. We are not.

How could I say we? It has been over 10 years since I served in that capacity. But as an institution, OIRA doesn't try to hide the ball on that. So it strikes me that one has to take some of the things you have heard today with just a tiny grain of salt.

Ms. SÁNCHEZ. Thank you. And I want to thank all of the witnesses for their testimony today.

Without objection, Members will have 5 legislative days to submit any additional written questions which we will forward to the witnesses and ask that you answer as promptly as you can so that they can be made a part of the record. Without objection, the record will remain open for 5 legislative days for the submission of any additional material.

And I want to thank again our panelists for their time and their patience. And this hearing on the Subcommittee of Commercial and Administrative Law is adjourned.

[Whereupon, at 3:04 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

ANSWERS TO POST-HEARING QUESTIONS FROM THE HONORABLE JOHN V. SULLIVAN, PARLIAMENTARIAN, UNITED STATES HOUSE OF REPRESENTATIVES, WASHINGTON, DC

Questions for John V. Sullivan, Parliamentarian
From Linda T. Sanchez, Chair

[answers in *italics*]

1. In the 109th Congress, Representative Ginny Brown-Waite introduced HR 3148, the Joint Administrative Procedures Committee Act of 2005, which would have provided for the creation of a joint committee to screen agency rules submitted to Congress. The joint committee would receive all agency submissions and provide copies to jurisdictional committees.

   Do you support this legislative approach?
   From a procedural perspective, the most pertinent function of a committee-system — the development and application of expertise within discrete legislative jurisdictions — might be diluted by the insertion of a new, supervening layer.

   How would this reform impact the workload in the Parliamentarian's office?
   The Office of the Parliamentarian might end up advising the joint committee, rather than the Speaker, on the same questions of committee-jurisdiction that arise under the status quo. The workload would remain the same.

2. In your written testimony, you indicate that the flow of paperwork creates a significant workload for staff in the Parliamentarian's office. H.R. 5380 from the 106th Congress would eliminate much of that paperwork, but would still require the Parliamentarians to identify the appropriate committee of referral for all of the rules submitted to Congress.

   Do you support this legislative approach?
   From a procedural perspective, it would tend to eliminate some duplication of effort and reduce paperwork.

   Despite the fact that your office would still have to refer thousands of rules per year, would the passage of a bill similar to H.R. 5380 significantly reduce the workload in the Parliamentarian's office?
   Not greatly but still significantly. A material fraction of the workload involves the processing of documents, sending reports to the Legislative Resource Center, and returning deficient reports to agencies.

Questions for the Record by Ranking Member Chris Cannon, Commercial and Administrative Law Oversight Hearing on the "Congressional Review Act" November 6, 2007

[answers in *italics*]

Proposed Questions for John V. Sullivan, Parliamentarian, U.S. House of Representatives

1. What are the three key things we could do to lighten the administrative burden of the CRA on the Parliamentarian's office, without diminishing our ability to effectively oversee agency rulemaking?
   (a) The Committee could consider whether the committees having jurisdiction over statutes that enable rulemaking actions might more efficiently monitor the prudence and probity of those actions without the additional bureaucracy engendered by the CRA.
   (b) The Committee could consider whether the CRA might sensibly engage a more selective universe of rulemaking actions.
   (c) The Committee could consider whether the publication of rulemaking actions in the Federal Register alleviates the need for additional submissions of paper to the Congress.

2. What would be the actual reduction in burden that those changes would accomplish? In man-hours? In budget dollars?
   The first of the three ideas above, amounting essentially to a proposal that the CRA be repealed, would reduce to zero the hours and budget resources that are devoted to the referral of CRA communications.

3. How much of that reduction could be accomplished if, rather than change any of the other requirements in the Act, we simply provided that everything be accomplished electronically, rather than on paper?
   That probably would reduce the hours devoted to the referral of CRA communications by a small, but material, amount.

4. Some have discussed the reintroduction of H.R. 5380, Mr. Hyde's bill from the 106th Congress, as a way to help out the parliamentarian's office. Do you think H.R. 5380 would do the job as is, or can you identify improvements to it that might be considered?
   Enactment of such a bill as-is would tend to eliminate some duplication of effort and reduce paperwork. Modifying it as contemplated in the second and third answers to question 1, above, would yield greater benefit.

ANSWERS TO POST-HEARING QUESTIONS FROM MORT ROSENBERG, SPECIALIST IN AMERICAN PUBLIC LAW, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

MEMORANDUM January 29, 2009

To: The Honorable Steve Cohen, Chairman of the Subcommittee on Commercial and Administrative Law, House Committee on the Judiciary
Attention: Adam Russell

From: Curtis W. Copeland, Specialist in American National Government, (202) 707-0632

Subject: **Answers to Post-Hearing Questions**

This memorandum responds to your request for answers to questions posed to Morton Rosenberg of CRS after hearings held during the 110th Congress. Because Mr. Rosenberg has now retired from CRS, I am providing responses to your questions on his behalf. If you have any questions regarding these responses, please do not hesitate to call me.

Questions from Linda T. Sánchez, Chair

1. Since the Congressional Review Act (CRA) was enacted in 1996, how many times have agency rules been nullified by ordinary legislation without use of the CRA procedures?

Answer: It would be extremely difficult to determine with any precision how many rules have been nullified without using the CRA because those nullifications could take any of a number of forms. However, an August 2008 CRS report (RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by Curtis W. Copeland) identified dozens of provisions in appropriations bills within the previous10 years that (1) restricted the finalization of particular proposed rules, (2) restricted regulatory activity within certain areas, (3) restricted the implementation or enforcement of certain rules, or (4) placed conditional restrictions on rulemaking or regulatory activity (e.g., preventing implementation of a rule until certain actions are taken). Although none of the appropriations provisions appear designed to reverse agency rulemaking actions (as the CRA was intended to permit), the number and variety of the provisions clearly illustrate that Congress's ability to oversee and affect regulatory agencies is not confined to CRA resolutions of disapproval. On the other hand, such provisions are generally applicable only for the period of time and the agencies covered by the relevant appropriations bill. Also, to the extent that agencies have independent sources of funding (e.g., user fees) or implement their regulations through state or local governments, some of the limitations may not be as restrictive as they seem.

2. H.R. 5380 from the 106th Congress would have eliminated the requirement that agencies submit their rules that are printed in the *Federal Register* to each House of Congress while

continuing a referral of all rules printed in the Federal Register and the periodic indication of those referrals in the Congressional Record. Instead of the submission of each individual rule, the House and Senate would receive a weekly list of all rules from the Comptroller General. The House and Senate would then put that list in the Congressional Record with a statement of referral for each rule. What are your views on this legislation?

Answer: CRS does not take positions on proposed legislation. However, the House Parliamentarian and others have indicated support for this type of proposal.

Questions for the Record by Ranking Member Chris Cannon, Commercial and Administrative Law Oversight Hearing on the "Congressional Review Act"

1. In your 2006 study of the Congressional Review Act, you identified seven significant criticisms the Act has received. One was that the Act lacked an adequate screening mechanism to pinpoint rules that need congressional review. Since your report and our 2006 hearing, have any additional proposals been made for how to respond to that?

Answer: I am not aware of any such proposals.

2. Another criticism you mentioned was the alleged lack of an expedited House procedure for review. Since your report and our last hearing, have there been any new ideas on this issue?

Answer: I am not aware of any new ideas of this nature.

3. In your written statement, you state that participants in a CRS conference 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," and the "continued pressure for legislative enhancement of the trend toward substantive judicial review of agency rules." What, in the opinions of these critics, are the three key things we could do to the Congressional Review Act to counteract these trends?

Answer: I am not aware of any CRA-related actions that the conference participants suggested to address either of those issues.

4. In your written statement, you emphasize the need to have strong congressional review of the administrative process, since Congress is directly accountable to the people. Yet, strangely, you seem to fear the presence of strong Executive control of the administrative process by the President, who also is directly accountable to the people. Isn't the right solution strong oversight of the administrative process by both sets of elected officials – those in Congress and the President in the Executive Branch?

ANSWERS TO POST-HEARING QUESTIONS FROM SALLY KATZEN, VISITING PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW, WASHINGTON, DC

Responses from Sally Katzen to Questions from Linda T. Sanchez, Chair

1. Although there have been only a limited number of joint resolutions of disapproval introduced, this fact does not signify that the Congressional Review Act (CRA) is not working. Rather, it is also consistent with the notion that the Act is working and that the legislative oversight it provides has forced agencies to be faithful to Congressional intent while performing their functions. In practice, agencies are aware that Congress will be looking at their final work product, and thus the CRA operates as a real check on agency excesses and, at a minimum, reasserts Congressional authority. Further, the CRA has, in fact, had real consequences at the end of an Administration, and therefore this is not the time to eliminate this tool of Congressional accountability. While there are ways to modify or clarify the Act to ensure that it captures the agency rules that it should capture and that it does so in a relatively efficient way, the Act should not be repealed.
2. The CRA is a powerful tool for Congressional oversight of agency rulemaking and in order to ensure that it remains so, Congress could clarify, in legislative language, what products of agency rulemaking are covered and thus required to be submitted to Congress. Agencies must know that it is not only rules subject to the Administrative Procedure Act's notice and comment requirements that will be scrutinized by Congress, but also any interpretive rules, guidance documents, and other similar statements of policy that will have a future effect on the rights and obligations of the public as well. Congress could also limit the coverage of the CRA to "significant" (rather than "major") rules, as that term is defined in Executive Order 12866 (as amended); this would not only ensure that any rules subject to centralized presidential review would, by that same token,

be subject to Congressional review, but also that the limited resources of Congress would be focused on the most important rules.

3. I would strongly urge that Congress not eliminate the requirement that agencies submit all covered rules, including those printed in the Federal Register, directly to Congress. Requiring agencies to send their work product to Congress serves as a constant reminder that it is Congress that delegates rulemaking authority to the agencies and it is Congress that is ultimately the law maker in our government. Furthermore, it is important to retain the requirement that agency materials received by the Congress should be forwarded to the committees of jurisdiction rather than leaving it up to the committees to access the Federal Register or another central database; these are the committees that have the expertise and programmatic experience and are therefore in the best position to evaluate whether impending rules are consistent with Congressional intent. The burden of processing all of the agency paperwork that likely gave rise to this suggestion can be substantially reduced, if not eliminated entirely, by requiring the agencies to provide their rules to Congress electronically, as they do when submitting them to the Federal Register.
4. Special procedures were required for the Senate because, absent the expediting procedures in the CRA, it would take a super-majority (currently 60 votes) to take up a motion/bill if there is any objection to a motion to proceed. In the House, if the leadership and the pertinent committees are supportive, a "special rule" can be used to expedite getting the motion/bill (including a joint resolution of disproval) to the floor and voted on; if the leadership opposes a motion/bill, it will not pass even if it were to proceed to a vote. Providing expedited procedures in the House, therefore, would likely not trigger either the introduction or the passage of more joint resolutions of disapproval.

Responses from Sally Katzen to Questions by Ranking Member Chris Cannon

1. My testimony was that the limited use of the disapproval resolution mechanism was equally consistent with the notion that the Act is working as it is with the notion that the Act is not working, and that in my experience the CRA has made the agencies more aware of, and responsive to, the role of Congress for agency rulemaking. I also cited findings from both the Government Accountability Office and the Congressional Research Service that the Act has had an effect similar to what I described. One fact I did not mention in my testimony was that, for much of the current Administration, the Executive and Legislative branches were controlled by the same party; under those circumstances, any Congressional concerns or dissatisfaction with agency actions would most likely be communicated directly and discreetly to the agencies rather than through a public denouncement of the Administration.
2. I suggested requiring agencies to file their rules with Congress electronically in response to expressed concerns about the burden on the Parliamentarian (and the committees of jurisdiction) of processing the agencies' paperwork. I have not undertaken a study of the potential gains in efficiency that would likely result from such a change, but I am aware that well designed automated systems generally provide significant benefits in terms of both time and operating costs.
3. Changing the scope of the CRA to cover "significant" rules, as that term in defined in Executive Order 12866 (as amended), would somewhat reduce Congressional oversight, but the trade-off is that it would enable Congress to focus on the rules that have the

greatest impact on the public. As I stated in my testimony, this is the trade-off that President Clinton made in signing Executive Order 12866 (which changed the scope of presidential review from universal to selective) because if you try to do everything, you run the risk of not doing anything well. With respect to the prospect that such a change would "introduce all kinds of perverse incentives for the Executive Branch to game the rulemaking process to keep rules from [Congressional review]," I am extremely dubious that this could or would occur. With such a change, the criteria for Congressional review would be the same as for presidential review; based on my experience at the Office of Information and Regulatory Affairs, I can confidently state that there is little, if any, dispute about the dividing line between those rules that are (or are not) "significant," and if there are any close calls (I can remember only one in my over five-year tenure), the resolution is in favor of presidential review (and hence Congressional review if the criteria were the same.)

4. Lest there be any confusion, I am urging that the coverage of the CRA track the coverage of Executive Order 12866, and for that reason I emphasized that Congress should not use the "major"/"non-major" dividing line as currently set forth in the Act but rather use the definitions of "economically significant" and "significant" found in EO 12,866.
5. Based on my experience, I believe there would be very little attempt to manipulate the timing of the issuance of rules – it is difficult enough to navigate the various substantive and procedural requirements and the pressures that inevitably develop from both proponents and opponents of a proposed rule.

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