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on the
"Congressional Review Act"

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. S*ee, 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-à-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 authority 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.