

INTO THE VOID: GAO'S ROLE IN THE REGULATORY STATE

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The study of Congress has largely focused on the legislative and oversight mechanisms of its members, committees, and leaders. And the study of federal agencies tends to focus on the executive branch. But there are agencies and institutions that exist to support Congress, the internal operations of which have mostly been overlooked in administrative law and political science. Far more than ministerial, some of these agencies have the ability to shape policy in very meaningful ways. They also have their own institutional interests distinct from the legislators that they serve. As instruments of Congress, though, they are generally exempt from the Administrative Procedure Act and a host of other “good government” statutes that govern agency conduct. This does not mean that they operate in a lawless fashion, quite the contrary. They are bounded by statutes and have internal norms that guide their conduct. This article suggests what we might learn from closer study of these unusual agencies.

One example of such an agency is the U.S. Government Accountability Office (GAO). Known mostly for its role as an auditor, the GAO's activities have expanded over time. As part of this expansion, the GAO became a referee in an increasingly important part of the administrative state: determining which actions are “rules” under the Congressional Review Act. The significance of these opinions, which are not binding as a matter of law, has grown as legislators use them strategically in regulatory politics.

Part I places the GAO into context along with other Congressional agencies, to shed light on the wide array of functions that they exist to serve. Part II explains the Congressional Review Act, the statute that allows Congress to disapprove rules using fast-track procedures. Part III describes

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the CRA legal opinions that the GAO issues and why they matter. Part IV sketches a surprisingly wide variety of policy implications of this phenomenon and suggests areas for future study.

I. CONGRESSIONAL INSTITUTIONS AND AGENCIES

In political science and law, the study of Congress has largely focused on the legislative and oversight mechanisms, and associated dynamics, of its members, committees, and leaders.¹ And the study of bureaucracy in federal government tends to focus on executive branch agencies.² But there are agencies and institutions that exist to support Congress, the internal operations and interests of which have mostly been overlooked in political science and legal literature. The same is true for administrative law, which has mostly concerned itself with how the courts review the actions of agencies that are subject to the Administrative Procedure Act.

Congressional institutions and agencies—which are separate from any individual legislator’s staff—provide a host of services to members of Congress, and, perhaps surprisingly, directly to the public. Table 1 provides

¹ See, e.g., Kenneth Lowande & Rachel Augustine Potter, *Congressional Oversight Revisited: Politics and Procedure in Agency Rulemaking*, J. POL. (forthcoming); BENJAMIN GINSBERG & KATHRYN WAGNER HILL, CONGRESS: THE FIRST BRANCH 148 (2019); Kenneth Lowande, *Who Polices the Administrative State?*, 112 AM. POL. SCI. REV. 874 (2018); Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189 (2018); DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER (2016); Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences & Congressional Monitoring of the Administrative State*, 8 J. L. ECON. & POL’Y 23 (2011); R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE (2009); R.A.W. RHODES, SARAH A. BINDER & BERT A. ROCKMAN, THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS (2008); Jack M. Beer mann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 127-29 (2006).

² See, e.g., RACHEL AUGUSTINE POTTER, BREAKING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY (2019); WILLIAM G. RESH, RETHINKING THE ADMINISTRATIVE PRESIDENCY: TRUST, INTELLECTUAL CAPITAL, AND APPOINTEE-CAREERIST RELATIONS IN THE GEORGE W. BUSH ADMINISTRATION (2015); Sean Gailmard & John W. Patty, *Formal Models of Bureaucracy*, 15 ANN. REV. POL. SCI. 353 (2012); SEAN GAILMARD & JOHN W. PATTY, LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH (2012); DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2010); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1991); Terry M. Moe, *The Politics of Bureaucratic Structure* in CAN THE GOVERNMENT GOVERN? 267 (1989).

a glimpse of the breadth of institutions and agencies that reside in the legislative branch.

Table 1. Congressional Institutions and Agencies³

<p>Senate</p> <ul style="list-style-type: none"> • Office of the Vice President • Offices of the President Pro Tempore and Pro Tempore Emeritus • Leadership Offices (e.g., Offices of the Majority and Minority Leaders; Whips; Conferences; Secretaries) • Committees (e.g., Appropriations, Policy) • Office of the Chaplain • Office of the Parliamentarian • Office of the Secretary • Office of the Sergeant at Arms and Doorkeepers • Office of the Legislative Counsel of the Senate • Office of Senate Legal Counsel • Caucus on International Narcotics Control
<p>House of Representatives</p> <ul style="list-style-type: none"> • Leadership Offices (e.g., Office of the Speaker, Floor Leaders, Whips) • Standing Committees, Special and Select • Committee on Appropriations • Office of the Clerk (inc. Chaplain and Historian) • Office of the Sergeant at Arms • Office of the Chief Administrative Officer • Office of Diversity and Inclusion • Office of the Whistleblower Ombudsman • Office of the Inspector General • Office of General Counsel • Office of the Parliamentarian • Office of the Law Revision Counsel of the House • Office of the Legislative Counsel of the House • Office of Interparliamentary Affairs
<p>Joint Committees</p>

³ OFFICE MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, LEGISLATIVE BRANCH APPENDIX, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2021 (2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/leg_fy21.pdf.

<ul style="list-style-type: none"> • Joint Congressional Committee on Inaugural Ceremonies of 2021 • Joint Economic Committee • Joint Committee on Taxation • Office of the Attending Physician • Office of Congressional Accessibility Services
Capitol Police
Office of Congressional Workplace Rights
Congressional Budget Office
Architect of the Capitol
Capitol Visitor Center
Botanic Garden
Library of Congress <ul style="list-style-type: none"> • Office of the Librarian • Library Services • Law Library • Office of the Inspector General • Office of the Chief Information Officer • Office of the Chief Operating Officer • Copyright Office • Congressional Research Service • National Library Service for the Blind and Print Disabled • Duplication Services • Fedlink Program and Federal Research Program
Government Publishing Office
Government Accountability Office
Medicare Payment Advisory Commission
Medicaid and CHIP Payment and Access Commission

U.S.-China Economic and Security Review Commission
Commission on International Religious Freedom
Other Boards, Commissions, and Trust Funds

Source: Budget of the U.S. Government, Fiscal Year 2021⁴

It is difficult to characterize the functions of these agencies and institutions as a group, with missions ranging broadly to include research services, legal advice, audits and investigations, marvelous libraries and exquisite gardens that are open to the public, publication services for the entire federal government, and law enforcement, these agencies and institutions tackle many different missions and employ several thousand people.⁵ The variety, itself, is note-worthy, in comparison to the typical conception of Congress as the legislature.

Some of these agencies make decisions that directly affect the public. The Copyright Office manages the registration of copyrights. The U.S. Capitol Police is a law enforcement agency with jurisdiction over the grounds of the U.S. Capitol and those who enter them, as well as other areas. The Government Accountability Office (GAO), for example, adjudicates federal procurement disputes for would-be contractors known as “bid protests.” The advisory commission on Medicare, and the advisory commission on Medicaid and CHIP, convene experts drawn from the public to inform policy choices on these massive social programs. However, Congressional agencies are not subject to the Administrative Procedure Act (APA) and therefore

⁴ The U.S. Tax Court is part of the Legislative Branch Appendix of the President’s Budget. OFFICE MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, LEGISLATIVE BRANCH APPENDIX, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2021 (2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/leg_fy21.pdf. The U.S. Tax Court is excluded from this table because of *Freytag v. Commissioner*, in which the Supreme Court determined that the U.S. Tax Court is “independent of the Executive and Legislative Branches.” *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991). See Harold Dubroff & Brant J. Hellwig, *The United States Tax Court: An Historical Analysis* (2014), https://www.ustaxcourt.gov/resources/book/Dubroff_Hellwig.pdf.

⁵ OFFICE MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, LEGISLATIVE BRANCH APPENDIX, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2021 (2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/leg_fy21.pdf; BENJAMIN GINSBERG & KATHRYN WAGNER HILL, *CONGRESS: THE FIRST BRANCH* 148 (2019).

other cross-government, “good government” statutes like the Freedom of Information Act and the Federal Advisory Committee Act that use the APA’s definition.⁶

While many of the agencies and institutions noted above deserve additional study, the balance of this article focuses on one of them: the GAO. The GAO employs over 3000 people with a budget of \$638 million in fiscal year 2019.⁷ It began as the General Accounting Office in 1921 and was renamed in 2004.⁸ This name change reflected the GAO’s broader mission, which expanded, over time, from the government’s “fiscal watchdog” to the “congressional watchdog.”⁹ While the GAO’s mission has grown, it remains best known for its audit and evaluation work.¹⁰ It has a host of other functions, however, including “policy analyses, as well as legal opinions, bid protest adjudications, and investigations.”¹¹ It is this legal opinion function, particularly legal opinions dispensed for purposes of the Congressional Review Act, which this article examines.¹²

⁶ In the Administrative Procedure Act, “the Congress” is excluded from the Act’s definition of “agency.” 5 U.S.C. § 551(1). *Accord* 4 C.F.R. 81.1(a) (“GAO is not subject to the Freedom of Information Act.”). GAO established its own set of public disclosure rules, which “follows the spirit of [FOIA].” 4 C.F.R. 81.1(a).

While Congressional agencies are arguably distinct from “the Congress,” if that means the entity that is authorized to make laws under the Constitution, they are undeniably part of the legislative branch. *See Bowsher v. Synar*, 478 U.S. 714, 731-32 (1986) (finding that the Comptroller General of the United States, the head of Government Accountability Office, is part of the legislative branch).

⁷ https://www.whitehouse.gov/wp-content/uploads/2020/02/leg_fy21.pdf

⁸ BENJAMIN GINSBERG & KATHRYN WAGNER HILL, *CONGRESS: THE FIRST BRANCH* 147 (2019).

⁹ BENJAMIN GINSBERG & KATHRYN WAGNER HILL, *CONGRESS: THE FIRST BRANCH* 147 (2019).

¹⁰ *See* Nancy Kingsbury, *The Government Accountability Office and Congressional Uses of Federal Statistics*, 631 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 43-44 (2010); Simon D. Norton & L. Murphy Smith, *Contrast and Foundation of the Public Oversight Roles of the U.S. Government Accountability Office and the U.K. National Audit Office*, 68 PUB. ADMIN. REV. 921, 925 (2008); Allen Schick, *Congress and the “Details” of Administration*, 36 PUB. ADMIN. REV. 516, 521-22 (1976) (explaining GAO’s expansion into evaluations).

¹¹ Nancy Kingsbury, *The Government Accountability Office and Congressional Uses of Federal Statistics*, 631 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 44 (2010).

¹² The GAO website explains that it “issues decisions regarding federal bid protests, appropriations law, and other legal matters” including “reviewing how federal agencies comply with the Congressional Review Act and the Federal Vacancies Reform Act.” U.S. Gov’t Accountability Office, *Bid Protests, Appropriations Law, and Other Legal Work*, <https://www.gao.gov/legal/>.

II. THE CONGRESSIONAL REVIEW ACT

The Congressional Review Act is an unusual statute that gives Congress fast-track procedures to disapprove a rule within a prescribed window of time after its issuance.¹³ Congress has other ways to roll back an agency's rule, either by legislating to overturn the agency's rule or by restricting the agency's ability to implement the rule using an appropriations rider, but the CRA offers a different pathway that has greater appeal at certain times.¹⁴

Under the CRA, a member of the House or Senate may introduce a resolution for disapproval during a special window of time and that resolution can be expedited through Congress, avoiding, for example, filibuster in the Senate.¹⁵ Once it is through both chambers, the resolution is presented to the President for veto or signature. This presentment process, which cures the legislative veto defect that was at issue in *INS v. Chadha*,¹⁶ means that, as a practical matter, the CRA is only likely to be used to disapprove a rule in certain moments linked to a new presidential term.

That is, disapproval of a rule under the CRA is most feasible immediately following an election where the White House changes parties and the incoming President is politically aligned with both chambers of Congress. Otherwise, a president would likely veto any congressional resolution to disapprove a rule from his own administration or that of a prior president

¹³ Congressional Review Act, 5 U.S.C. 801 et seq.

¹⁴ Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 83-88 (2006) (“Substantively, the CRA is unnecessary because Congress always had the power to legislatively override agency rules.”).

¹⁵ Congressional Review Act, 5 U.S.C. 802 (disapproval procedures). See also MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., IF10023, IN FOCUS: THE CONGRESSIONAL REVIEW ACT (Dec. 18, 2018), <https://fas.org/sgp/crs/misc/IF10023.pdf>; MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS (Jan. 14, 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>.

¹⁶ 462 U.S. 919 (1983). See Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL’Y 187, 197 (2018) (explaining that “[t]he CRA falls between the quick-acting legislative veto and the deliberative process that Congress ordinarily uses to enact legislation”).

from his party.¹⁷ An exception might be for an independent agency.¹⁸ In addition, both chambers of Congress must pass the resolution before it may go to the president, so if either chamber is out of political alignment with the White House, the disapproval is unlikely to make it to the president.¹⁹

Table 2 shows the party affiliation of the president alongside the majorities in the House and the Senate. The year refers to the presidential term beginning January 20 of that year. Because a president is unlikely to disapprove actions issued by his or her own administration, mid-term changes in Congress are not displayed below.

Table 2. Political Alignment Conducive to CRA Disapproval

Presidential Inauguration Year	President	House Majority	Senate Majority
1997	Democrat	Republican	Republican
2001	Republican	Republican	Republican*
2005	Republican	Republican	Republican
2009	Democrat	Democrat	Democrat
2013	Democrat	Republican	Democrat
2017	Republican	Republican	Republican
2021	--	--	--

*Republicans had the majority from Jan. 20, 2001 until June 6, 2001.

Since the enactment of the CRA, there have been three instances when the political alignment of the White House, Senate, and House were conducive to CRA disapproval resolutions: the beginning of George W.

¹⁷ This assumes general political alignment between an outgoing president of one party and an incoming president of the same party. It is conceivable, though, that on any particular regulatory issue, an incoming president might disagree enough to disapprove a rule of a prior president from his or her same party.

¹⁸ Indeed, President Trump signed two disapproval resolutions for actions issued by the Consumer Financial Protection Bureau. S.J. Res. 57, 115th Cong. (2018) (enacted); H.J. Res. 111, 115th Cong. (2018) (enacted). At the time, the Supreme Court had not yet ruled in *Seila Law v. CFPB*, and while the agency's status now is somewhat ambiguous, at the time of the CRA disapproval the agency understood to be independent. See *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ____ (2020).

¹⁹ The exception here, of course, is if members cross the aisle to vote for disapproval of a rule.

Bush's term in 2001, Barack H. Obama's term in 2009, and Donald J. Trump's term in 2017. At those times, the party affiliation of the newly-elected president changed and was in alignment with the new Congress starting that same year.

As such, while there was some CRA disapproval activity following the CRA's enactment in 1996, including introductions of resolutions and votes in one or both chambers,²⁰ the first CRA disapproval was not signed into law until 2001. That disapproval was for a Clinton administration rule setting workplace ergonomic standards that was disapproved in the early days of the George W. Bush administration.²¹

Democrats did not take advantage of the next window of CRA disapproval, at the beginning of President Obama's term. As Bethany A. Davis Noll and Richard L. Revesz explain it, "rather than resort to using the Congressional Review Act, the Obama administration focused its early attention on filling cabinet and subcabinet positions and used regular rulemaking procedures, rather than the Congressional Review Act, to overturn at least some of the targeted rules."²²

Another factor may be that, once a rule is disapproved, an agency may not issue another rule that is "substantially the same form" unless Congress affirmatively permits an agency to do so in subsequent legislation. This language is undefined in the CRA, it has not been litigated. The legal uncertainty around how this prohibition would be applied by a court places a

²⁰ Sam Batkins, *Issues at the Intersection of the Three Branches: Congress Strikes Back: The Institutionalization of the Congressional Review Act*, 45 WM. MITCHELL L. REV. 351, 362-72 (2019).

²¹ Pub. L. No. 107-5, 115 Stat. 7 (2001) (joint resolution disapproving Department of Labor's Ergonomics Rule). *See also* Sam Batkins, *Issues at the Intersection of the Three Branches: Congress Strikes Back: The Institutionalization of the Congressional Review Act*, 45 WM. MITCHELL L. REV. 351, 366-67 (2019) (discussing the legislative history of the ergonomics disapproval).

²² Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 18-19 (2019). *See also* Adam M.K. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the 'Substantially Similar' Hurdle in the Congressional Review Act: Can OSHA ever utter the e-word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 728-29 (2011) (explaining that after considering CRA disapprovals, "in the end, the Obama Administration used executive procedures" instead of the CRA disapproval process).

chill on downstream regulatory activity,²³ and therefore may deter regulation-minded administrations from using the CRA to disapprove a rule in the first place. Given the extensive role of regulation—as an executive action that can be taken unilaterally, without Congressional action—for modern presidents, it is not surprising that a president might prefer not to limit his or her regulatory discretion unnecessarily.

In all, since its enactment in 1996, the CRA was used to disapprove a rule only once prior to Donald Trump’s inauguration. From that point on, however, there has been a sharp increase in CRA disapprovals, resulting in 16 disapproved rules.²⁴ This is partially explained by the fact that deregulation was a campaign promise for President Trump, and CRA disapprovals were one of several strategies used by the Trump administration to carry out that goal.²⁵

A more subtle explanation lies in a procedural aspect of the CRA in which the GAO plays a very important part. The CRA is only likely to be used at certain times when the political stars align, as discussed above. A critical question, during that time, is how far back Congress can reach using the CRA. The conventional wisdom, to the extent that there is such a thing about as statute as arcane as the CRA, is that the window of jeopardy for a rule runs for a set period of time that is determined using a technical but fairly straightforward calculation, and which begins shortly after the rule is issued. As will be discussed below, the GAO’s legal opinions have been used to allow that window to spring open, even years later.

As the 2020 election approaches, the CRA is poised for action again. If

²³ Adam M.K. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the “Substantially Similar” Hurdle in the Congressional Review Act: Can OSHA ever utter the e-word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 730-31 (2011) (noting that, following the ergonomics rule disapproval, the Secretary of Labor commented that “[s]he did not want to ‘expend valuable—and limited—resources on a new effort’ if another regulation would be invalidated as substantially similar”).

²⁴ Regulatory Studies Center, CRA Tracker, <https://regulatorystudies.columbian.gwu.edu/congressional-review-act> (last updated Feb. 27, 2020).

²⁵ Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 2 (2019); Keith B. Belton & John D. Graham, *Trump’s Deregulation Record: Is It Working?*, 71 ADMIN. L. REV. 803, 814-15 (2019).

President Trump is not elected for a second term, and a Democrat replaces him, a key condition for use of CRA disapproval resolutions will have been satisfied: a change in party affiliation at the White House. If Democrats obtain a majority the Senate and retain their majority in the House, then the CRA might well be used to disapprove rules again. This would depend on Democrats' willingness to take the risk of the "substantially the same" test, but it is plausible that they might, at least for a subset of Trump administration rules. Using legal opinions from the GAO, legislators might be able to disapprove policy actions issued at any point in the Trump administration.

III. THE GAO'S CRA LEGAL OPINIONS

This part will describe the GAO's two types CRA activities, reporting on major rules and providing legal opinions. It will also provide descriptive statistics about the GAO legal opinions, from the CRA's enactment through 2020.

A. *The GAO and the CRA*

The GAO has two roles related to the CRA. The first is written into the law, while the second is something that the GAO does at the request of legislators but arguably also of its own accord. First, the CRA requires the GAO to report on whether major agency rules have complied with CRA's procedural requirements.²⁶ These assessments, which are sent to relevant congressional committees, tend to be straightforward recitations of what the agencies did or did not do in their rules.²⁷ The GAO churns these out with regularity.²⁸ What Congress does with these reports upon receipt is not well-documented, but it is reasonable to assume that they occasionally lead to oversight activity.

²⁶ 5 U.S.C. § 901(a)(2)(A).

²⁷ *See, e.g.*, Small Business Administration, Department of the Treasury: Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Loan Forgiveness, Letter from Shirley A. Jones, Managing Associate General Counsel, to The Honorable Marco Rubio, U.S. Senate, and The Honorable Nydia M. Velázquez, U.S. House of Representatives (June 26, 2020), <https://www.gao.gov/assets/710/708776.pdf>.

²⁸ The reports are available on the GAO's website. U.S. Gov't Accountability Office, Congressional Review Act, Reports on Major Rules, <https://www.gao.gov/legal/other-legal-work/congressional-review-act#reports>.

The GAO's second role related to the CRA has gone unnoticed in the academic literature. Members of Congress have, from time to time, asked the GAO to weigh in on whether an action is a "rule" under the CRA.²⁹ If the GAO issues an affirmative opinion, that opinion can be used to start the clock on the CRA window within which legislators may introduce a resolution of disapproval.³⁰ Only "rules" can be disapproved by Congress under the CRA using the fast-track procedures described above, while actions that are not "rules" cannot.³¹ The definition is technical and encompasses more than those rules promulgated using notice-and-comment rulemaking under the APA.³² The definition, in short, hinges more on what a document does than what it is called, so it is sometimes unclear whether an agency action is a "rule" or not.³³ Perhaps due, in part, to this ambiguity, agencies sometimes fail to meet the legal duty under the CRA to send all of their rules to Congress.³⁴

²⁹ MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 11-12 (Jan. 14, 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>.

³⁰ CRS analysts Maeve Carey and Christopher Davis explain the mechanics:

To avail themselves of the CRA's disapproval mechanism following such an opinion, Senators have published the GAO opinion in the *Congressional Record*. It appears that, in these cases, the Senate has considered the date of publication of the GAO opinion in the *Congressional Record* to be the beginning of the periods for congressional review. Normally, when agencies submit their rules to Congress under the CRA, a record of each rule's receipt is published in the *Congressional Record*. The publication of the GAO opinion in the *Congressional Record* fulfills this same purpose: notifying Congress that a rule is now available for review under the CRA.

MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 12 (Jan. 14, 2020) (internal footnotes omitted), <https://fas.org/sgp/crs/misc/R43992.pdf>.

³¹ See 5 U.S.C. § 804(3).

³² See generally VALERIE C. BRANNON & MAEVE P. CAREY, CONG. RESEARCH SERV., R45248 THE CONGRESSIONAL REVIEW ACT: DETERMINING WHICH "RULES" MUST BE SUBMITTED TO CONGRESS (Mar. 6, 2019), <https://crsreports.congress.gov/product/pdf/R/R45248/7>.

³³ See MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 6-7 (Jan. 14, 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>.

³⁴ Curtis W. Copeland, *Hundreds of Recent Final Rules Are Technically Unlawful*, The Regulatory Review (Sept. 15, 2014) <https://www.theregreview.org/2014/09/15/15-copeland-final-rules-unlawful/>.

The CRA does not direct the GAO to resolve this ambiguity by giving legal opinions, nor does it vest any other particular body with the express authority to determine what a “rule” is under the CRA. Legislators requested GAO’s legal opinion, and the GAO obliged, stepping into the void. The GAO’s choice to fulfill this function, though, does not imbue its legal opinions with legal weight. As analysts at the Congressional Research Service have noted: “standing alone, a GAO opinion deciding whether an agency action is a ‘rule’ covered by the CRA does not have legal effect.”³⁵

Legislators have sought the GAO’s legal opinions under the CRA since shortly after it was enacted, suggesting that they attribute political, if not legal, weight to those opinions.³⁶ And, another Congressional institution gave the legal opinions a boost. The Senate Parliamentarian “has considered the date of publication of the GAO opinion in the *Congressional Record* to be the beginning of the periods for congressional review.”³⁷ This means that a legislator can use a GAO legal opinion as leverage to open a fresh window of CRA jeopardy for an agency’s action.

There was a time when the executive branch was cool to the GAO offering its legal opinion on this issue. Testifying before a joint hearing of Congress in 1997, Sally Katzen, Administrator of the Office of Information of Regulatory Affairs, explained that “it is the agency promulgating the regulation that has the responsibility for determining whether a particular issuance is or is not a ‘rule’ under the [CRA].”³⁸ Arguments over which

³⁵ VALERIE C. BRANNON & MAEVE P. CAREY, CONG. RESEARCH SERV., R45248 THE CONGRESSIONAL REVIEW ACT: DETERMINING WHICH “RULES” MUST BE SUBMITTED TO CONGRESS 24 (Mar. 6, 2019), <https://crsreports.congress.gov/product/pdf/R/R45248/7>. This is somewhat akin to GAO’s other work. “[L]ike Inspector General offices, the GAO has no direct authority to make anything happen. Its reports may or may not result in the changes it recommends. Its effect depends on its persuasive authority, which may vary significantly depending on the political and institutional context.” Eloise Pasachoff, *Federal Grant Rules and Realities in the Intergovernmental Administrative State: Compliance, Performance, and Politics*, 37 YALE J. ON REG. 573, 598 (2020).

³⁶ See *infra* Chart 2. GAO Legal Opinions 1996-2020.

³⁷ MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 6 (Jan. 14, 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>.

³⁸ *Tongass Land Management: Joint Hearings Before the S. Comm. on Energy and Natural Resources and H. Comm. on Resources*, 105th Cong. 16-17 (1997) (statement of

branch may define key terms are not unique to the CRA, and are probably indicators of ambition counteracting ambition.³⁹

At that same hearing, which took place one week after the GAO issued a legal opinion finding that the United States Forest Service Tongass National Forest Land and Resource Management Plan was a “rule” under the CRA,⁴⁰ Robert Murphy, the GAO’s General Counsel said: “I cannot say that GAO has a special role under the statute for making that determination. The decision, the opinion, that we issued last week on the question was done in our role as adviser to the Congress in response to the request of three chairmen of congressional committees.”⁴¹ Since that hearing, legislators have continued to request the GAO’s legal opinion, and the GAO has continued to give it.⁴²

More recently, OMB’s General Counsel was dismissive of the weight of the GAO’s legal opinions, writing that “[w]hen an agency of the Legislative Branch interprets a law differently than the Executive Branch, the Executive Branch is not bound by its views.”⁴³ And yet, when President Trump signed

Sally Katzen, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget), <https://www.govinfo.gov/content/pkg/CHRG-105jhr45244/pdf/CHRG-105jhr45244.pdf>.

³⁹ See THE FEDERALIST NO. 51 (James Madison).

⁴⁰ Status of the Tongass National Forest Land and Resource Management Plan Under the Small Business Regulatory Enforcement Fairness Act, Letter from Robert P. Murphy, General Counsel, U.S. General Accounting Office, to The Honorable Ted Stevens, U.S. Senate, The Honorable Frank H. Murkowski, U.S. Senate, and the Honorable Don Young, U.S. House of Representatives, B-275178 (July 3, 1997), <https://www.gao.gov/assets/170/168383.pdf>.

⁴¹ *Tongass Land Management: Joint Hearings Before the S. Comm. on Energy and Natural Resources and H. Comm. on Resources*, 105th Cong. 16-17 (1997) (statement of Robert P. Murphy, General Counsel, General Accounting Office), <https://www.govinfo.gov/content/pkg/CHRG-105jhr45244/pdf/CHRG-105jhr45244.pdf>.

⁴² See *infra* Chart 2. CRA Legal Opinions, 1996-2020.

⁴³ Memorandum from Mark Paoletta, General Counsel, Office of Management and Budget, to Agency General Counsels, Reminder Regarding Non-Binding Nature of GAO Opinions (Nov. 5, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/11/Memo-to-Agencies-on-A-11.pdf>. The timing of this memorandum suggests it is responsive to issues outside of the CRA. Shortly after this memo was issued, GAO issued two determinations critical of OMB’s actions. The first rebuked the Office of Information and Regulatory Affairs for working on certain rules during the partial shutdown from December 22, 2018 through January 25, 2019 in violation of the Antideficiency Act. Office of Management and Budget—Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriations, Letter from Thomas H. Armstrong, General Counsel, Government

disapproval resolutions into law that were introduced based on the GAO legal opinion that started the clock on Congressional review, he arguably acquiesced to the GAO's role in this process.⁴⁴ While signing a disapproval resolution under the CRA is not the same as accepting that the GAO's legal opinions are binding upon the executive, it may make it harder, rhetorically, for future presidents to push back on a disapproval resolution by arguing that it is improper to use a GAO legal opinion to start the CRA clock. Perhaps more importantly, it may also make it harder for the executive branch to shrug off GAO legal opinions in other domains such as the Antideficiency Act or the Impoundment Control Act.

B. The GAO's Record of CRA Legal Opinions

The first CRA legal opinion was requested just five months after President Clinton signed the CRA into law in March 1996.⁴⁵ Senator Larry Craig wrote to the GAO asking for its opinion about whether a memorandum from the Secretary of Agriculture was a "rule" under the CRA.⁴⁶ The GAO said yes, reasoning that the memo was a "statement of general applicability and future effect"—a term of art used in the definition of a rule—and not subject to any exemptions.⁴⁷

Since that first inquiry in 1996, the GAO has offered 27 more legal

Accountability Office, to The Honorable Robert C. Scott, U.S. House of Representatives, and The Honorable Andy Levin, U.S. House of Representatives B-331132 (Dec. 19, 2019), <https://www.gao.gov/assets/710/703496.pdf>. The second found that OMB violated the Impoundment Control Act when it withheld from obligation certain funds for security assistance to Ukraine. U.S. Gov't Accountability Office, Decision In the Matter of Office of Management and Budget—Withholding of Ukraine Security Assistance, B-331564 (Jan. 16, 2020), <https://www.gao.gov/assets/710/703909.pdf>. Both determinations note that OMB was aware of GAO's inquiries into these matters.

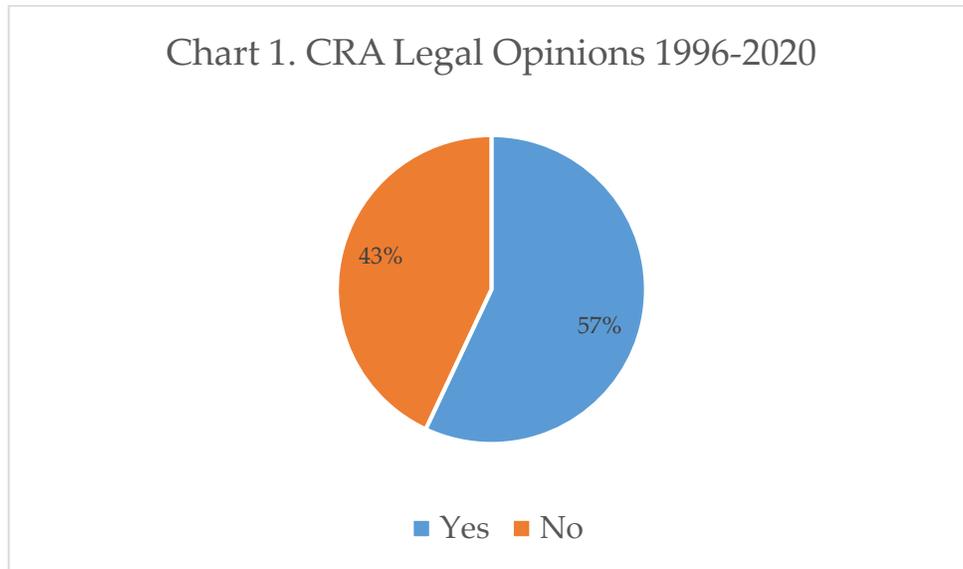
⁴⁴ *E.g.*, S.J. Res. 57, 115th Cong. (2018) (enacted). That resolution disapproved a Consumer Financial Protection Bureau Bulletin from 2013. *Id.*; Consumer Financial Protection Bureau, Bulletin 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (Mar. 21, 2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-_Auto-Finance-Bulletin.pdf.

⁴⁵ Whether Secretary of Agriculture Memorandum Concerning Emergency Salvage Timber Sale Program is a "Rule" under 5 U.S.C. § 801(a)(1)(A), Letter from Robert P. Murphy, General Counsel, U.S. General Accounting Office, to The Honorable Larry E. Craig, U.S. Senate, B-274505 (Sept. 16, 1996) (noting the date of the Senator's request was August 27, 1996), <https://www.gao.gov/assets/370/365493.pdf>.

⁴⁶ *Id.* at 1.

⁴⁷ *Id.* at 7-10.

opinions about whether an agency action was a “rule” in response to inquiries from members of Congress. Across these 28 opinions, the GAO opined that the action was a “rule” 16 times, giving reasons for its opinions in detailed letters that are readily available on the GAO’s website.⁴⁸ As shown in Chart 1, this adds up to a fairly even split.



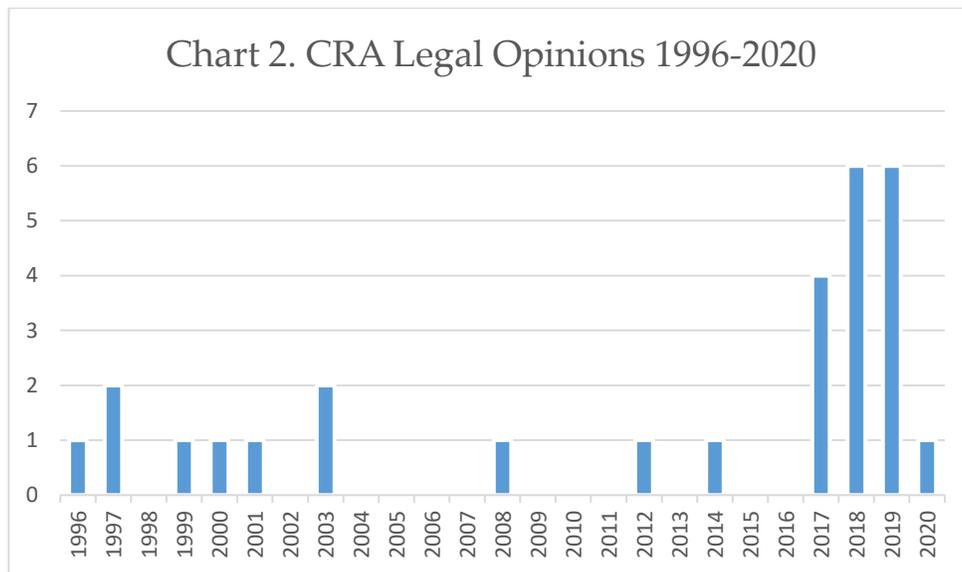
This might be because most of the members’ inquiries have been about agency letters, memos, fact sheets, and other documents that can broadly be described as guidance rather than the “rules” that come out of the notice-and-comment rulemaking process under the Administrative Procedure Act APA.⁴⁹ These are the closer cases, where the ambiguity of a “rule” is especially present.

⁴⁸ U.S. Gov’t Accountability Office, Congressional Review Act, Legal Opinions, https://www.gao.gov/legal/other-legal-work/congressional-review-act#legal_opinions.

⁴⁹ One exception was when the GAO was asked about the status of a notice of proposed rulemaking, the document that goes out for public comment under the notice-and-comment procedures of the APA; the GAO responded that the proposed rule was not a “rule” under the CRA because it was not yet final. GAO’s Role and Responsibilities Under the Congressional Review Act, Letter from Susan A. Poling, General Counsel, U.S. Gov’t Accountability Office, to The Honorable Harry Reid, U.S. Senate, The Honorable Mitch McConnell, U.S. Senate, The Honorable Barbara Boxer, U.S. Senate, and The Honorable Thomas Carper, U.S. Senate, B-325553 (May 29, 2014), <https://www.gao.gov/assets/670/663690.pdf>.

C. Increased Frequency of Opinions

The frequency of the GAO’s legal opinions offers some insight into how Congress uses its ability to request opinions. The GAO issued between zero and two legal opinions in response to inquiries from Members of Congress every year, until there was a significant increase in inquiries in 2017, as shown in Chart 2.



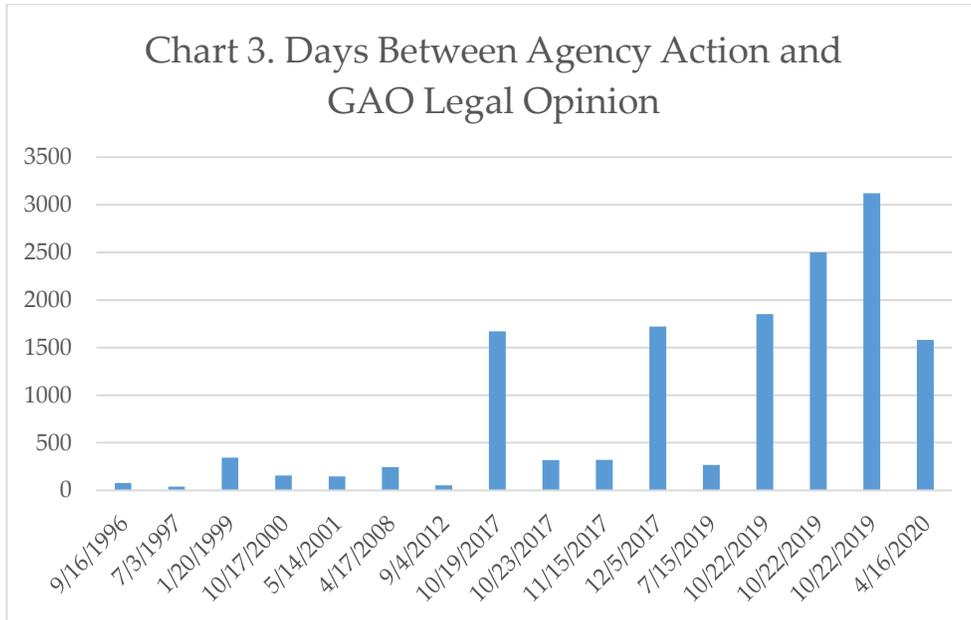
As noted above, prior to 2017, only one rule was disapproved under the CRA. The increase in legal opinions in 2017 and beyond is consistent with increased use of the CRA to disapprove rules in the last few years. It also coincides with a period of advocacy to bring attention to the possibility of using the CRA to reach back farther than was previously understood.⁵⁰

D. Increased Time Between Agency Actions and GAO Legal Opinions

Another way to consider the GAO’s legal opinions is to look at when they

⁵⁰ See, e.g., Pacific Legal Foundation, Red Tape Rollback, www.RedTapeRollbank.com; Jonathan Wood & Todd Gaziano, *Three Cheers for the Congressional Review Act*, NAT’L REV. (June 29, 2017), <https://www.nationalreview.com/2017/06/congressional-review-act-finally-some-accountability-washington/>; Kimberley A. Strassel, Opinion, *A GOP Regulatory Game Changer*, WALL ST. J. (Jan 26, 2017), <https://www.wsj.com/articles/a-gop-regulatory-game-changer-1485478085>.

are requested. Chart 3 shows the number of days between when an agency action was issued, and when the GAO opined that it was a rule under the CRA.⁵¹ This span of time is important because Congress limited the reach of CRA, and the longer the window of jeopardy, the more it is in tension with the idea that the CRA was supposed to place a rule in jeopardy for a limited time.



Overall, Chart 3 shows an upward trend. Legal opinions before 2017 were within the timeframe for the conventional understanding of the CRA window; an average of 152 calendar days. Starting in 2017, the number of days elapsed between the action and the opinion grew significantly; an average of 1484 days.

⁵¹ For simplicity, this chart does not take into account when the legislator requested a legal opinion from GAO. This tacitly presumes that there have not been meaningful differences in the length of time between a legislator's request and the GAO's opinion. In addition, the date of GAO's legal opinion does not start the clock for a rule's window of jeopardy, as explained supra note **Error! Bookmark not defined.**. The clock does not start until the opinion is printed in the *Congressional Record*. Supra note **Error! Bookmark not defined.**. Therefore, the length of time depicted in Chart 3 understates the length of the window. Lastly, this chart only includes those actions for which GAO opined that the action was a rule under the CRA. If GAO found that the action was not a rule, it is not included in Chart 3.

IV. IMPLICATIONS

The legal opinions that GAO issues to help Congress administer the CRA have implications far beyond even the capacious field of federal agency rulemaking. This part offers a number of possibilities for future study along three main dimensions. First, it is plain that the Congressional agencies, as a group, deserve much more attention than they have received in the academic literature to date. Second, with an eye towards understanding legislators, the decision to request a legal opinion from GAO could be driven by a surprisingly large number of factors. Third, with respect to the CRA itself, the use of the GAO's legal opinions to greatly expand the window of jeopardy for certain actions is one that deserves a closer look to assess whether it is in alignment with the compromise reflected in the text of the CRA.

A. Congressional Agencies in the Political Environment

The biggest question provoked by the GAO's CRA legal opinions has nothing to do with the CRA. Congressional agencies are numerous, and they operate within a very political environment, but they have their own incentives, and make their own choices. How do Congressional agencies make the choices that are within their discretion? What guides and governs the actions of Congressional agencies? The APA does not apply, and therefore a host of other "good government" statutes do not apply either, but that does not mean that these agencies operate in a lawless manner. Instead, their behavior suggests that, where statutes do not reach, a complex set of incentives and norms may be guiding their actions. What might this mean for the importance of applying the APA to the Congressional agencies, or for the importance of the APA in general?

With respect to the GAO's incentives, Professor Anne Joseph O'Connell's dissertation cracked open an enticing avenue for further study.⁵² Two of her three essays focus on the GAO.⁵³ Both consider how the GAO's

⁵² Anne Margaret Joseph, *Political Appointees and Auditors of Politics: Essays on Oversight of the American Bureaucracy* (May 2002) (unpublished Ph.D. dissertation, Harvard University) (on file with ProQuest).

⁵³ Anne Margaret Joseph, *Auditing Politics or Political Auditing?*, in *Political Appointees and Auditors of Politics: Essays on Oversight of the American Bureaucracy* (May 2002) (unpublished Ph.D. dissertation, Harvard University) (on file with ProQuest);

institutional incentives differ from those of the legislators requesting investigations from GAO.⁵⁴ The gap between them can lead to strategic behavior both on the part of the legislator, e.g., requesting investigations to advance the legislator’s substantive knowledge or perhaps “to build their chances for reelection,”⁵⁵ and with respect to the GAO’s decision about which investigations to conduct and in what manner.⁵⁶ The GAO, after all, is resource constrained, and must prioritize its investigatory work.

With respect to norms, Congressional agencies emphasize the non-partisan, objective nature of their work.⁵⁷ By statute, the Congressional Budget Office must be led by a Director appointed “without regard to political affiliation and solely on the basis of his fitness to perform his duties” and staffed by personnel selected on that same criterion.⁵⁸ Provisions like this are a source of legitimacy for these agencies, but it does not completely insulate them from political attack.⁵⁹ But apart from staffing decisions, there might be other ways in which Congressional agencies seek to buffer themselves from the strain of the political environment in which they operate. While some of these might be invisible, like internal staff norms transmitted

Anne Margaret Joseph, *Who Walks the Watchdog? Bureaucratic Oversight and the General Accounting Office*, in *Political Appointees and Auditors of Politics: Essays on Oversight of the American Bureaucracy* (May 2002) (unpublished Ph.D. dissertation, Harvard University) (on file with ProQuest)

⁵⁴ See Anne Margaret Joseph, *Political Appointees and Auditors of Politics: Essays on Oversight of the American Bureaucracy* 1. 4-9 (May 2002) (unpublished Ph.D. dissertation, Harvard University) (on file with ProQuest).

⁵⁵ *Id.* at 187.

⁵⁶ See *id.* at 97-99, 178, 182-84.

⁵⁷ The websites of the GAO, the Congressional Budget Office, and the Congressional Research Service offer ready examples. “The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress.” U.S. Gov’t Accountability Office, About GAO, <https://www.gao.gov/about/> (as of August 13, 2020). “CBO’s analysis is objective, impartial, and nonpartisan.” Congressional Budget Office, 10 Things to Know about CBO (as of August 13, 2020), <https://www.cbo.gov/about/10-things-to-know>. “CRS analysis is confidential, authoritative, objective and nonpartisan.” Congressional Research Service, About CRS, Values, <https://www.loc.gov/crsinfo/about/values.html> (as of August 13, 2020). See also BENJAMIN GINSBERG & KATHRYN WAGNER HILL, CONGRESS: THE FIRST BRANCH 144-48 (2019).

⁵⁸ Pub. L. No. 93-244 § 201(a)(2); 201(b).

⁵⁹ E.g., Erik Wasson, *House Budget chairman backs embattled CBO head*, THE HILL (Jan. 6, 2011), <https://thehill.com/policy/finance/136311-ryan-conrad-stand-up-for-cbo-head>; Rebecca Shabad, *Report: Elmendorf out as CBO director*, THE HILL (Dec. 22, 2014), <https://thehill.com/policy/finance/227920-elmendorf-out-at-cbo-report-says>. See BENJAMIN GINSBERG & KATHRYN WAGNER HILL, CONGRESS: THE FIRST BRANCH 145-47 (2019).

through the workplace culture,⁶⁰ legal opinions offer an observable set of actions that one can observe and theorize.

For example, the GAO has elected to make its legal opinions public, and not just those that opine that an action is a rule.⁶¹ This surely serves a purpose to the public as a whole, by making the legal opinions public, an agency will have a better sense of which actions might be “rules,” the public can better understand what to expect in terms of oversight, and non-requestor legislators have access to the opinion to inform themselves. But this choice may also serve the GAO itself, as well, particularly combined with how it writes the legal opinions. The GAO has elected to compose the opinions with a wealth of information about the requestor, the matter under consideration, and the detailed legal reasoning that informed the opinion.⁶² This reason-giving, somewhat akin to the reason-giving an agency does in its proposed and final rules,⁶³ or that a judge does in his or her opinions,⁶⁴ could similarly be a way to bolster the legitimacy the GAO’s action. As the political importance of the GAO legal opinions has increased, has the sophistication of the legal opinions also increased? The GAO also documents, in its legal opinions, that it contacted the agency that issued the action.⁶⁵ This may be the result of an earlier bone of contention tension between the GAO and the executive branch.⁶⁶ How else do agencies in the executive and legislative branches play

⁶⁰ See Kevin R. Kosar, *Why I Quit the Congressional Research Service*, WASH. MONTHLY (Jan./Feb. 2015), <https://washingtonmonthly.com/magazine/janfeb-2015/why-i-quit-the-congressional-research-service/>.

⁶¹ “Once a decision or opinion is issued to the requestor, GAO will publicly release the decision or opinion and post a copy on our Web site.” U.S. Gov’t Accountability Office, Office of the General Counsel, Procedures and Practices for Legal Decisions and Opinions (Sept. 2006), <https://www.gao.gov/assets/210/203101.pdf>.

⁶² See generally U.S. Gov’t Accountability Office, Congressional Review Act, Legal Opinions, https://www.gao.gov/legal/other-legal-work/congressional-review-act#legal_opinions (as of August 13, 2020).

⁶³ See, e.g., Jerry L. Mashaw, *Reasoned Administration*, 76 Geo. Wash. L. Rev. 99 (2007).

⁶⁴ See, e.g., Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683 (2013).

⁶⁵ See generally U.S. Gov’t Accountability Office, Congressional Review Act, Legal Opinions, https://www.gao.gov/legal/other-legal-work/congressional-review-act#legal_opinions (as of August 13, 2020).

⁶⁶ Writing about GAO investigations, Professor O’Connell wrote that “[u]ntil several years ago, members of Congress sprung [GAO] reports on administrative agencies in hearings, creating ill will. The GAO’s current policy is to seek comments from a targeted agency and include them in its reports.” Anne Margaret Joseph, *Political Appointees and*

off of each other?

There is even another layer: the GAO's willingness to offer legal opinions in the CRA context. Presumably, the GAO could have declined to fulfill this role; it is not required by statute. Also, when the GAO stepped into the void, it might not have anticipated how the significance of its CRA legal opinions would increase over time. As the GAO considers its own role, might the use of its opinions to further political, tactical ends encourage them to exit the role?

Turning to the other Congressional agencies, some of the lesser known institutions of Congress shape policy in meaningful ways; for some that is their direct mission (e.g., Medicare Payment Advisory Commission),⁶⁷ some exist to "provide the legislative branch with information and a capacity for action,"⁶⁸ and other individuals in non-policy roles serve alongside policymakers in such a way as to influence policy in more subtle ways.⁶⁹ As such, there is reason to believe that these various Congressional agencies may also have their own institutional interests distinct from the legislators that they serve.⁷⁰ This is deeply intriguing from a scholarly standpoint.

Auditors of Politics: Essays on Oversight of the American Bureaucracy 184 (May 2002) (unpublished Ph.D. dissertation, Harvard University) (on file with ProQuest) (internal footnote omitted).

An interesting contrast is the Congressional Research Service, which tends to work on a confidential basis to respond legislator inquiries, but which has criticized for not making its reports public. Tajha Chappellet-Lanier, *Transparency advocates push Congress on public access to CRS reports*, FEDSCOOP (Feb. 2, 2020), <https://www.fedscoop.com/transparency-advocates-push-congress-public-access-crs-reports/>.

⁶⁷ "The Medicare Payment Advisory Commission (MedPAC) is an independent congressional agency established by the Balanced Budget Act of 1997 (P.L. 105-33) to advise the U.S. Congress on issues affecting the Medicare program. The Commission's statutory mandate is quite broad: In addition to advising the Congress on payments to private health plans participating in Medicare and providers in Medicare's traditional fee-for-service program, MedPAC is also tasked with analyzing access to care, quality of care, and other issues affecting Medicare." About MedPAC, <http://medpac.gov/-about-medpac->.

⁶⁸ BENJAMIN GINSBERG & KATHRYN WAGNER HILL, CONGRESS: THE FIRST BRANCH 144 (2019).

⁶⁹ See, e.g., Library of Congress, *History of the Library of Congress*, <https://www.loc.gov/about/history-of-the-library> (as of August 13, 2020) (discussing various institution-building efforts of Librarians of Congress).

⁷⁰ See, e.g., Daniel Hawkings, *Capitol Police: A Spending Force*, ROLL CALL (Apr. 7, 2016), <https://rollcall.com/2016/04/07/capitol-police-a-spending-force/>.

Beyond the dynamics operating within any given Congressional agency, how do the various Congressional agencies interact with each other? In the CRA legal opinion context, the Senate Parliamentarian greatly increased the relevance of a GAO legal opinion by considering their publication in the *Congressional Record* to start the CRA clock.⁷¹ This was a pragmatic work-around to the problem of an agency failing to give notice to Congress of a rule. This decision has allowed agency actions to be placed into CRA jeopardy years after they were issued, however, which has significant political consequences. Are there other instances of the combined efforts of Congressional agencies coming together to lead to significant political effects?

All of this dovetails with the emerging literature on internal administrative law.⁷² That literature has not yet crossed over into the study of Congressional agencies. Perhaps it should. One indicator of internal administrative law is that it “lack[s] the element of enforcement through independent courts.”⁷³ Might the Parliamentarian’s choice to permit publication of GAO’s legal opinions to start the CRA clock, discussed above, offer an example of how internal administrative law can be enforced, or at least supported, by another institutional actor? And where else might we observe that dynamic in the bureaucracy?

In terms of practical applications, the foregoing is especially relevant given current interest in the relationship between Congressional agencies and Congressional capacity to govern.⁷⁴ The Select Committee on the

⁷¹ See *supra* note 37 and accompanying text.

⁷² See, e.g., Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

⁷³ *Id.* at 1245.

⁷⁴ BENJAMIN GINSBERG & KATHRYN WAGNER HILL, CONGRESS: THE FIRST BRANCH 144-45 (2019); CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM (Timothy M. LaPira, Lee Drutman, & Kevin R. Kosar, eds., forthcoming 2020); Kevin R. Kosar, *Why I Quit the Congressional Research Service*, WASH. MONTHLY (Jan./Feb. 2015), <https://washingtonmonthly.com/magazine/janfeb-2015/why-i-quit-the-congressional-research-service/>; Brian D. Feinstein, *Congressional Government Rebooted: Randomized Committee Assignments & Legislative Capacity*, 7 HARV. L. & POL’Y REV. 601 (2013).

Modernization of Congress was created in January 2019 to make recommendations about the future of Congress.⁷⁵ The Committee process is ongoing, but many of the recommendations have included reforms for Congressional agencies and institutions.⁷⁶ This includes proposing new life for the Office of Technology Assessment, a Congressional agency that existed from 1972 until the late 1990s.⁷⁷ Apart from these recent developments, institutional reform is an occasional topic in Congress. For example, in 2000 legislators came close to piloting a new regulatory review office inside the GAO to advise on regulations promulgated by the executive branch agencies.⁷⁸ With institutional reform always at least somewhat possible in Congress, closer study of Congressional agency function and dysfunction could provide important insights to legislators and advocates. How these agencies are structured likely informs how well they can serve Congress and the public.

B. Legislator Requests of CRA Legal Opinions

As Professor O’Connell observed, legislators may have different reasons to request an investigation from GAO.⁷⁹ So, too, with respect to CRA legal opinions. Reasons might include genuine uncertainty, boundary-testing, clock-starting, and signaling.

First, legislators might be genuinely uncertain about how to apply the CRA’s broad definition of a rule to the multitudes of different policy documents that agencies issue. As the GAO explained in its first legal opinion on the subject: “Many agency rules are not described as such. They may be

⁷⁵ H. Res. 6, tit. II, 116th Cong. (2019) (enacted).

⁷⁶ See Select Committee on the Modernization of Congress, Recommendations, <https://modernizecongress.house.gov/recommendations>.

⁷⁷ *Id.*, Jory Heckman, *House Modernization Committee recommends bringing back Office of Technology Assessment*, FED. NEWS NETWORK (July 16, 2019), <https://federalnewsnetwork.com/congress/2019/07/house-modernization-committee-recommends-bringing-back-office-of-technology-assessment/>. See also BENJAMIN GINSBERG & KATHRYN WAGNER HILL, CONGRESS: THE FIRST BRANCH 144-45 (2019).

⁷⁸ Truth in Regulating Act of 2000, S. 1198, 106th Cong. (2000). The pilot was never funded. William Yeatman, *The Case for Congressional Regulatory Review* 10 (Apr. 14, 2020), https://www.cato.org/sites/cato.org/files/2020-04/PA888_edit.pdf.

⁷⁹ Anne Margaret Joseph, *Political Appointees and Auditors of Politics: Essays on Oversight of the American Bureaucracy* 187 (May 2002) (unpublished Ph.D. dissertation, Harvard University) (on file with ProQuest).

referred to as a guideline, direction, directive, instruction, clarification, manual section, policy, etc. While how an agency describes a document may be considered in determining whether the document is a rule under the APA, the courts primarily consider the substantive effect of the document.”⁸⁰ GAO then explains that whether a document is a rule “requires an examination of what it is intended to accomplish.”⁸¹ If Congress wants to base its decisions on a careful, fact-intensive analysis, it is reasonable that members of Congress would want an expert fact-finder like the GAO to weigh in.

Second, and relatedly, legislators might also be interested in testing boundaries of the definition of a rule. If the legislator is concerned about a policy document but there might be some disagreement about whether it is a rule, being able to rely on an expert opinion from GAO could help blunt criticism that the legislator is stretching the law by trying to introduce a resolution of disapproval.⁸²

Third, legislators could seek GAO’s legal opinion solely as a procedure to start the CRA clock, even when they do not have a substantive need for an opinion. In this way, Congress can use a GAO legal opinion to open the window to take action under the CRA. The descriptive statistics above, particularly the increase in the number of elapsed days between the issuance of an agency action and an associated GAO legal opinion, suggest that Congress may be doing this with increased frequency since 2017.

Fourth, legislators might also request GAO legal opinions to send political signals. A legislator might want to send signals to the agency that issued the document in question, as a shot across the bow to signal displeasure with the policy; constituents and other public stakeholders, as a way to show action; or other legislators or political actors as part of larger debates and

⁸⁰ Whether Secretary of Agriculture Memorandum Concerning Emergency Salvage Timber Sale Program is a “Rule” under 5 U.S.C. § 801(a)(1)(A), Letter from Robert P. Murphy, General Counsel, U.S. General Accounting Office, to The Honorable Larry E. Craig, U.S. Senate, B-274505, p.6 (Sept. 16, 1996) (internal quotations and footnotes omitted), <https://www.gao.gov/assets/370/365493.pdf>.

⁸¹ *Id.* at 6-7.

⁸² One example of this might be when the GAO was asked about the CRA’s applicability to proposed rules. The GAO opined that a proposed rule is not a rule for CRA purposes. See *supra* note 49

negotiations.

When the GAO issues a legal opinion that an agency action is a rule, that opinion is sometimes, but not always, followed by the introduction of a disapproval resolution. In October 2019, for example, the GAO opined that a letter from the Board of Governors of the Federal Reserve was a rule under the CRA.⁸³ No disapproval resolution has been introduced.⁸⁴ Earlier in 2019, however, the GAO issued a legal opinion that a guidance document issued jointly by the Departments of Health and Human Services and Treasury was a rule under the CRA.⁸⁵ Just over two weeks later, a disapproval resolution was introduced in both the House and the Senate.⁸⁶ Neither resolution was signed into law.⁸⁷ This suggests that a request for a legal opinion is not necessarily an indication that a legislator intends to introduce a disapproval resolution. Why else might they request legal opinions then? Might it be to protect the action by letting the agency know that they should submit it to Congress to start the CRA clock?

C. Effects of GAO Legal Opinions on the CRA Window

Lastly, and specific to the CRA, is it a problem that GAO legal opinions are used to broaden the window of jeopardy for agency rules?

On the one hand, yes. Congress chose to limit the window of applicability for the CRA's fast-track procedures. Using a legal opinion to essentially reopen a window may thrust large numbers of rules into doubt. The trade-offs are somewhat analogous to those presented by statutes of limitations, most notably reliance interests.⁸⁸ Members of the public may have invested

⁸³ Board of Governors of the Federal Reserve System—Applicability of the Congressional Review Act to Supervision and Regulation Letter 11-7, Letter from Thomas H. Armstrong, General Counsel, U.S. Gov't Accountability Office, to The Honorable Thom Tillis, U.S. Senate, B-331324 (Oct. 22, 2019), <https://www.gao.gov/assets/710/702190.pdf>.

⁸⁴ According to a search on Congress.gov (last checked Aug. 12, 2020).

⁸⁵ Department of Health and Human Services and Department of the Treasury—Applicability of the Congressional Review Act to State Relief and Empowerment Waivers, Letter from Thomas H. Armstrong, General Counsel, U.S. Gov't Accountability Office, to The Honorable Ron Wyden, U.S. Senate, and The Honorable Frank Pallone, Jr., U.S. House of Representatives, B-330811 (July 15, 2019), <https://www.gao.gov/assets/710/700266.pdf>.

⁸⁶ H.J. Res. 74, 116th Cong. (2019); S.J. Res. 52, 116th Cong. (2019).

⁸⁷ According to a search on Congress.gov (last checked Aug. 12, 2020).

⁸⁸ See Charles C. Callahan, *Statutes of Limitation - Background*, 16 OHIO ST. L.J. 130,

resources or made other decisions in reliance upon the contents of an agency action that the GAO later opines is a rule. But the legal opinion, in conjunction with its use to start the CRA clock, makes CRA disapproval more accessible to lawmakers than was perhaps intended by the CRA.

On the other hand, no. If an agency fails to fulfill its legal obligation to notify Congress of its rule, that essentially deprives Congress of its ability to exercise oversight. This is especially the case for a document that is not published in the *Federal Register*, but might solely reside on an agency's website, for example. While it might be reasonable to hold legislators responsible for knowing what the agencies publish in the *Federal Register*, expecting legislators to know the entire contents of every agency's website is probably not reasonable.

The rub is the ambiguity in the definition of "rule." If an agency failed to classify its action as a rule under the CRA, does it follow that the action should be placed into jeopardy potentially years after it was issued? On balance, the answer might be no, but this is worth additional consideration, perhaps borrowing from statutes of limitations and other doctrines to shed light on the dilemma.

CONCLUSION

A subtle but burgeoning phenomenon, the GAO's issuance of legal opinions for purposes of the CRA has expanded the way that legislators can use the CRA to disapprove rules. The CRA is an increasingly important oversight tool in an era of expanded presidential unilateralism, and the GAO's role in shaping the CRA's scope calls a number of important questions. These questions span the proper role and functioning of Congressional agencies, the political dynamics the drive legislator interaction with these agencies, and the trade-offs between oversight using the CRA and reliance interests. While academic study of Congress and federal agencies has largely overlooked Congressional agencies, this brief analysis of GAO's legal opinions shows that closer study of Congressional agencies could

130-39 (1955); Tyler T. Ochoa & Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453 (1996-1997).

improve our understanding of a host of dynamics at play in the federal government.