



Responses to the House Committee on Administration

# Questions for the Record: Congress in a Post-Chevron World

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August 28, 2024

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Thank you, Chairman Bryan Steil, Ranking Member Joseph Morelle, and members of the committee for inviting me to testify before you on July 23, 2024. It was an honor.

Below please find my responses to your questions for the record. Please contact me if I may be of further assistance.

### Majority questions for the record

*1. Some of your testimonies referenced capacity building in Congress or the creation of new agencies. I believe force multipliers such as CBO, CRS, and GAO are extremely important. What could be done using existing agencies and authority within the Legislative Branch to address staff capacity and ensure complete oversight of the executive branch?*

Answer: The U.S. Constitution establishes a principal-agent relationship between Congress and the executive branch. Congress writes law, and the President must “take Care that the Laws be faithfully executed.” Ensuring faithful execution of the law has led Congress to create:

- (a) the Government Accountability Office (GAO) to help Congress oversee executive branch spending and the efficacy of policies;
- (b) the Congressional Budget Office (CBO) to help Congress to examine and respond to the President’s budget; and
- (c) inspectors general to help Congress detect corrupt behavior in agencies.

Additionally, the Congressional Research Service (CRS) often aids Congress in oversight, such as by briefing legislators on existing policies and advising committees on hearing subjects.

Curiously, Congress has not tasked any of these agencies with helping it oversee all the regulations proposed and finalized each year, which number a few thousand.

Congress has plenary authority to fund legislative branch support agencies to assist it in oversight. It could supplement its existing support agencies by establishing a new Congressional Regulation Office.<sup>1</sup> Alternatively, it could expand CBO to oversee the whole of the regulatory process. Among existing agencies it has the culture and workforce that lend itself well to regulatory oversight.<sup>2</sup>

In the meantime, Congress could better leverage its existing agencies by more proactively explicating its oversight agenda. Each January, committees could draw up a list of oversight matters to study that include proposed or existing regulations. The committees could then host coordinating meetings with the legislative branch support agencies to determine which of these matters the agencies had the capacity to study. (See the below response to Minority Question 1.)

*1. a. Could Congressional agencies absorb more tasks to help Congress be more efficient and empower greater oversight?*

Answer: I have not seen any evidence to suggest that the legislative branch support agencies currently have excess bandwidth that might be deployed to strengthen oversight. Indeed, the data generally indicate that the staffing of these agencies has decreased since the 1980s even though the scope of government has increased.<sup>3</sup>

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<sup>1</sup> Philip Wallach and Kevin R. Kosar, “The Case for a Congressional Regulation Office,” *National Affairs*, fall 2016, <https://www.nationalaffairs.com/publications/detail/the-case-for-a-congressional-regulation-office>.

<sup>2</sup> The agency would need to add additional legal expertise as part of regulatory oversight necessitates assessing proposed regulations’ fealty to the law.

<sup>3</sup> Kevin R. Kosar, *Staffing Congress to Strengthen Oversight of the Administrative State*, Boyden Gray Center, March 2024, <https://www.understandingcongress.org/2024/03/11/staffing-congress-to-strengthen-oversight-of-the-administrative-state/>.

Congress might be able to produce some additional bandwidth within the agencies to take on additional tasks by examining their operations to increase efficiency. For example, CRS must produce bill summaries for all legislation. Could artificial intelligence expedite this laborious process by producing high quality, first drafts for review by CRS's bill summaries experts?<sup>4</sup> Similarly, is there red tape within GAO or CBO that absorbs valuable staff time with no real benefit?

That point noted, the fundamental choice for Congress is whether to expand the capacity of the existing agencies, or to direct any of them to cease doing certain tasks and to use that bandwidth to take on new assignments that are more directly in support of congressional oversight.

### Minority questions for the record

*1. What specific reforms to the committee process do you recommend to improve regulatory oversight?*

Answer: As noted above, committees could proactively create oversight plans and coordinate with the legislative branch support agencies.

Here it is worth mentioning that the statute that established the Congressional Research Service sought to have the agency help Congress with such planning. 2 U.S.C. 166(d) states CRS shall:

“make available to each committee of the Senate and House of Representatives and each joint committee of the two Houses, at the opening of a new Congress, a list of programs and activities being carried out under existing law scheduled to terminate during the current Congress, which are within the jurisdiction of the committee;” and

“make available to each committee of the Senate and House of Representatives and each joint committee of the two Houses, at the opening of a new Congress, a list of subjects and policy areas which the committee might profitably analyze in depth.”

CRS, like the GAO and CBO, were established to be tools of congressional committees first and foremost.<sup>5</sup> Congress may wish to consider whether the present workloads of its legislative support agencies sufficiently support committee oversight activities.

*2. You mentioned that Members of Congress rarely ask CRS for analysis of proposed rules. Do you believe CRS expertise could be more effectively integrated into Congress' legislative drafting and regulatory review processes? If so, how so?*

Answer: Certainly, legislators could more frequently ask CRS analysts and specialists (what few remain) to review a proposed rule. CRS does have issue area experts and a corps of legislative attorneys, all of who could provide useful input. That said, the agency does not have experts to cover every issue. Nor does it employ staff trained in benefit-cost analyses who could check the math issued by executive agencies in support of proposed rules or retroactively assess the utility of the 186,000 existing rules.

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<sup>4</sup> Speaking of CRS, it could be made more efficient by integrating its American Law Division attorneys into its research divisions.

<sup>5</sup> Kevin R. Kosar, “The Atrophying of the Congressional Research Service’s Role in Supporting Committee Oversight,” *Wayne Law Review*, 64 *Wayne L. Rev.* 150, 2018, <https://kevinrkosar.com/Kosar%20CRS%20Oversight%20Wayne%20Final%2008-2018.pdf>; and Kevin R. Kosar, “The Legislative Branch Support Agencies: What They Are, What They Do, and Their Uneasy Position in Our System of Government,” in Tim LaPira, Lee Drutman, and Kevin R. Kosar, *Congress Overwhelmed: Congressional Capacity and Prospects for Reform* (University of Chicago Press, 2020), chapter 8.

3. *What specific expertise gaps do you believe are most critical when considering enhancements to Congress's regulatory oversight capacity?*

Answer: As noted above, Congress lacks staff who can conduct benefit-cost analysis of regulations.

To more fully answer this question, Congress should survey its legislative branch support agencies to see how many staff have demonstrated expertise in the rules proposed and finalized in the most recent calendar year. Does anyone on Capitol Hill, for example, have expertise on the policies related to nuclear power plant licensing or the Centers for Medicare and Medicaid Services' Inpatient Psychiatric Facility Quality Reporting Program?

These survey data then could be used to direct hiring to the regulatory areas deemed by Congress to be most important.<sup>6</sup>

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<sup>6</sup> There is a historical parallel: When Congress established the Legislative Reference Service in 1946 and later upgraded it to the Congressional Research Service, it authorized and urged (*sotto voce*) the agency to hire senior specialists in areas of particular importance, such as mineral economics. (@ U.S.C. 166(e))