



THE C. BOYDEN GRAY

Center *for the Study*
of the Administrative State

ANTONIN SCALIA LAW SCHOOL • GEORGE MASON UNIVERSITY

The Congressional Bureaucracy

Jesse M. Cross
Abbe R. Gluck

CSAS Working Paper 20-23

*First Branch, Second Thoughts – What Is Congress’s Proper Role in the
Administrative State?*

Article
The Congressional Bureaucracy

Jesse M. Cross* & Abbe R. Gluck**

Introduction

Congress has a bureaucracy.

Legal scholarship, judicial discourse, and doctrine about Congress and statutes have focused almost entirely on elected members of Congress and the ascertainability of their purported intentions about policymaking and statutory language. In recent years, we and others have broadened that perspective, with new scholarship about the on-the-ground realities of the congressional drafting process--including the essential role that staff plays in that process--and have argued the relevance of those realities for theory and doctrine.¹

Here we go deeper. This Article goes beyond our previous accounts of partisan committee staff, congressional counsels, and other select staff offices to introduce the broader concept of what we call Congress's bureaucracy. The congressional bureaucracy is the collection of approximately a dozen nonpartisan offices that, while typically unseen by the public and

* Assistant Professor, University of South Carolina School of Law.

** Professor of Law and Faculty Director, Solomon Center for Health Law and Policy, Yale Law School. Soren Schmidt, Yale Law School Class of 2020, was instrumental in working as our partner for the first draft of this article, including doing the first round of interviews and working with us to write the first draft. We are grateful to Douglas Elmendorf, Bill Eskridge, Sherry Glied, Ed Grossman, Rick Hills, Anne Joseph O'Connell, Nick Parrillo, George Yin, Kevin Kosar, Douglas Holtz-Eakin, Nina Kohn, Josh Chafetz, participants at the NYU Public Law Workshop, faculty workshops at the University of North Carolina, Seton Hall and Yale law schools, participants at the 2020 Legislation Works-in-Progress Roundtable, and Yale Law School students Josh Feinzig, Sumer Ghazala, Hilary Higgins, Jade Ford, and Natasha Khan. This paper was also presented at the Gray Center 2020 Roundtable on Congress and the Administrative State, and we are appreciative of support and comments received there. Finally, we are deeply grateful to the editors at the University of Pennsylvania Law Review, and to all the current and former staffers who spoke with us confidentially.

¹ See generally Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside--An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 *Stan. L. Rev.* 725 (2014) (studying drafting practices of congressional counsels and the assumptions they make about judicial interpretation); Jesse M. Cross, *Legislative History in the Modern Congress*, 57 *Harv. J. Legis.* 91 (2020); Jesse M. Cross, *The Staffer's Error Doctrine*, 56 *Harv. J. Legis.* 83 (2019); Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 *Geo. Mason L. Rev.* 453 (2018); Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 *U. Chi. L. Rev.* 177 (2017) (defending an approach based on congressional process and calling attention to the role of the Law Revision Counsel and Congressional Budget Office in drafting statutes) [hereinafter Gluck, *Statutory Interpretation*]; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside--An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *Stan. L. Rev.* 901 (2013); Abbe R. Gluck, Anne Joseph O'Connell, & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 *Colum. L. Rev.* 1789 (2015) (detailing recent deviations from traditional legislative and processes and their implications for doctrine and theory); Abbe R. Gluck, *The "CBO Canon" and the Debate Over Tax Credits on Federally Operated Health Insurance Exchanges, Balkinization* (July 20, 2012), <https://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html> (introducing concept of CBO canon) [hereinafter Gluck, *Debate Over Tax Credits*].

largely ignored by courts and practicing lawyers, provides the specialized and objective expertise that helps make congressional lawmaking possible. In the process, the bureaucracy furthers Congress's own internal separation of powers and safeguards the legislative process from executive and interest-group encroachment.

These institutions internal to Congress use bureaucracy's traditional tools--including nonpartisanship and technical expertise--to separate powers both inside of Congress and external to it. But they do more than that: the congressional bureaucracy also performs functions that add important layers to our understanding of the relevant inputs into statutory text. For one thing, its work destabilizes common views of the boundaries of the "legislative process" and what a "statute" actually is. Some expert inputs, like the economic estimates of legislation, are as critical a part of--and sometimes even more important to--the legislative process and Members' understandings of what bills say as the specific words chosen. Some key aspects of statutes as the public receives them-- such as the ways in which statutes are organized and ordered, and even what words appear-- are changed, or rearranged, by the congressional bureaucracy: that is, changed by nonelected, nonpolitical staff with precisely these delegated functions--even after members vote. Understanding the context in which law is made changes how we understand law itself.

In the pages that follow, we theorize what it means for Congress to have this infrastructure--a workforce of nonpartisan, expert, and long-serving institutional actors and entities without which Congress as we know it could not function.

We focus primarily on Congress's nine nonpartisan legislative institutions:

- The Congressional Research Service (CRS)--the research arm of Congress that provides in-depth legal and policy analysis of existing and proposed legislation or other issues;²
- The Offices of the House and Senate Legislative Counsel (Legislative Counsel)--the nonpartisan staff in each Chamber who actually draft the text of most federal legislation;
- The Office of the Law Revision Counsel (OLRC)--staff who turn Congress's various enacted public laws into a U.S. Code re-organized into fifty-three titles--a process that involves rearranging and reordering statutory sections, cleaning up language, moving enacted text into statutory notes, and sometimes even adding new statutory provisions;

² We focus on CRS within the Library of Congress, because its mission to "serve[] the Congress throughout the legislative process by providing . . . legislative research and analysis," makes CRS a consistent presence in the legislative process. About CRS: History and Mission, Library of Congress, <http://www.loc.gov/crsinfo/about/history.html> (last visited April 19, 2020). However, we note that other parts of the Library of Congress do sometimes provide independent research for Member offices as well. See, e.g., Law Library, Legal Reports, Library of Congress, <http://www.loc.gov/law/help/legal-reports.php> (providing reports produced by the Law Library) (last visited April 19, 2020).

- The Congressional Budget Office (CBO)--economists and analysts who provide influential economic analysis, including estimates of the cost of all significant legislation;
- The Joint Committee on Taxation (JCT)--a nonpartisan committee with staff that assists with all aspects of tax legislation, including policy analysis, drafting assistance, and all revenue estimates;
- The Offices of the House and Senate Parliamentarians (Parliamentarians)--the arbiters of congressional procedure in each chamber who rule on the appropriateness of amendments, resolve jurisdictional questions among committees, and operate as the keepers of legislative precedents;
- The Government Accountability Office (GAO)--Congress's "watchdog" over the executive branch that conducts audits, performs in-depth policy research, and informs Congress about the implementation of its laws.

We selected these nine institutions because they share a generally nonpartisan nature and common roles of information- and expertise-imparting upon Congress in the context of the legislative process. They also share surprisingly common origins in a desire to safeguard Congress's legislative power from the executive. From 2017 to 2019, we conducted confidential interviews of more than twenty staffers with key roles in each of these institutions to complement more than 30 interviews with nonpartisan staff conducted by one of the authors for an earlier study.³ We also interviewed twenty partisan staff--congressional staffers who work outside of the bureaucracy, for members in personal offices or on committees--to mitigate the risk of interviewee bias and to ensure that our account reflects how the work of Congress's bureaucracy actually is perceived on the ground, including by those outside of it.⁴

Why does Congress need this bureaucracy? What roles do the bureaucracy's offices serve, together and apart? What does the bureaucracy teach us about how Congress works and about the distinctive features of modern lawmaking? There are more than 5,000 congressional bureaucrats in our nine nonpartisan institutions alone. Every drafter in the Offices of Legislative Counsel is an attorney.⁵ Ninety percent of staffers at the CRS have graduate degrees, as do most

³ Gluck & Bressman, *supra* note 1, at 740 (reporting interviews of twenty-eight staffers in the Offices of Legislative Counsel as well as several staffers on the Joint Committee on Taxation).

⁴ To preserve anonymity, we do not refer to interviewees by their institutional affiliation. Because institutional affiliation, in context, might compromise individual identity, all interviews are cited as "Staffer Interview." All quotes are based on extensive notes, reviewed by the authors and the editors of the *University of Pennsylvania Law Review*. All affiliations are on file with the authors.

⁵ Career Opportunities, Office of the Legislative Counsel, <https://legcounsel.house.gov/HOLC/Careers/Careers.html> [<https://perma.cc/AFY2-SPC7>] (stating that a law degree is required in order to work for House Legislative Counsel) (last visited August 1, 2019); Careers, Office of the Legislative Counsel, <https://www.slc.senate.gov/Careers/careers.htm> [<https://perma.cc/G5CF-P7QH>] (stating the same requirement for Senate Legislative Counsel) (last visited August 8, 2019).

in JCT.⁶ Some offices, like JCT, interact with members; some, like the OLRC, do not. Some communicate confidentially, like Legislative Counsel; others are almost entirely transparent, like GAO. Some give procedural advice that while neutral effectuates significant decisions, like the Parliamentarians; others offer policy conclusions using objective and defined methodologies, like JCT. Some work in the field of policy, like CBO; others do not, like OLRC. Some have come under political fire for a long time, like CBO; others have come under occasional political scrutiny more recently, like the Parliamentarian and CRS; still others remain out of the fray, and largely unknown, like Legislative Counsel and OLRC.

Our findings allow us to intervene in a variety of heretofore unconnected debates. First, the congressional bureaucracy is a tool of separation of powers. Classic bureaucracy literature focuses on the tradeoff of control for expertise--the standard account is that Congress loses power when it delegates to the executive branch. In contrast, the congressional bureaucracy, as we will illustrate, was explicitly founded for the opposite reason: so that Congress could reclaim and safeguard its own powers against an executive branch that was itself using knowledge and expertise to encroach on the legislative process and congressional autonomy. For Congress, knowledge was power.

Second, the congressional bureaucracy contributes to the already robust conversation about why institutions delegate and what bureaucracy typically looks like. Congress's bureaucracy shares features with some traditional agencies, including a nonpartisan staff committed to the long-term mission of the agency over any particular politics or policy. But unlike many other agencies, Congress's bureaucracy remains under Congress's control, is not run by political appointees, is directly supportive of Congress's work, and Congress can ignore many of its inputs if it wishes. We struggled with nomenclature: "bureaucracy" is not quite perfect. Some internal actors refer to the offices we study as Congress's "scaffolding," or the "institutional staff," as opposed to the professional (political) staff—two alternative terms that may make clearer how Congress's bureaucracy is part of, and a critical support to, Congress.

Third, the bureaucracy offers something of an antidote to the rampant cynicism about Congress as an institution. Legal Process titans Henry Hart and Albert Sacks famously argued that courts should assume "that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."⁷ Modern thinkers about legislation, today known as textualists, pushed that optimism aside decades ago for a view of an irrational and undeliberate Congress

⁶ See Angela M. Evans, Demand for Masters of Public Policy in Public Service, 27 J. Pol'y Analysis and Mgmt. 417, 422 (2008) (reporting CRS percentage); Email from Staffer to Abbe Gluck & Jesse Cross (Apr. 23, 2020)(on file with authors) (noting that, in JCT, all economists have doctorates except one with a masters, all accountants have CPA and some have double JD/CPA, and research assistants are only people without advanced degrees). Similarly, a large share of staffers at the GAO, CBO, MedPAC, and MACPAC also hold advanced degrees. See GAO: Working for Good Government Since 1921, Gov't. Accountability Off. 23 (2001) (noting that "GAO relies on a workforce of highly trained professionals who hold degrees in many academic disciplines"); Organization and Staffing, Cong. Budget Off., <https://www.cbo.gov/about/organization-and-staffing> (reporting that most of the CBO's staff members are "economists or public policy analysts with advanced degrees") (last visited July 26, 2019); infra notes 324-325 (listing MedPAC and MACPAC staffs and their advanced degrees).

⁷ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1415 (1958).

that courts could never hope to really understand and in which the public should not have much faith.⁸

But despite the recent changes to the modern legislative process, the congressional bureaucracy still does its work--it just happens at points earlier in the process and further from the public eye. That work also highlights aspects of congressional lawmaking that are much less partisan than common accounts assume. Specifically, the bureaucracy helps Congress achieve a salutary internal separation of powers, too, even in the modern era of hyper-polarization and party-leader dominance. Congress's intentional decentralization of law-producing responsibilities among a collection of nonpartisan actors prevents any one aspect of the lawmaking process--whether it is fact finding, number crunching, legislative drafting, auditing, or parliamentary procedure--from coming under the control of either party, or any party leader. That today's hyper-partisan Congress is still comfortable with these delegations paints an optimistic lining around Congress's operations and also reveals some democratic benefits that the congressional bureaucracy brings.

Cynicism about Congress is at the heart of the fourth and final arena in which our study intervenes--the enduring disagreement over the proper approach to statutory interpretation. Our previous work, including the Gluck-Bressman studies of congressional drafting⁹ and the Gluck-O'Connell work on modern "unorthodox lawmaking,"¹⁰ have provoked new debates about the relevance of the realities of congressional lawmaking to the doctrines and theories of legislation and statutory interpretation.¹¹ Detractors' arguments have centered on the kinds of claims that ushered in textualism in the first place: claims based on Congress's irrationality and its purported inability to act collectively. Those claims are offered as reasons to eschew a focus on Congress itself in favor of textualist presumptions--"linguistic conventions"--that detractors assume

⁸ See, e.g., Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 32 (Amy Gutmann ed., 1997) (claiming that "with respect to 99.99 percent of the issues of construction reaching the courts, there is no legislative intent"); William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621 (1990) (reviewing this textualist movement); John F. Manning, *The Absurdity Doctrine*, 116 *Harv. L. Rev.* 2387, 2410 n.81 (2003) (reiterating Max Radin's argument against Congress possessing a "coherent 'specific' intent," particularly one that could be reliably perceived).

⁹ See Bressman & Gluck, *supra* note 1; Gluck & Bressman, *supra* note 1.

¹⁰ See generally Bressman & Gluck, *supra* note 1; Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 *Harv. L. Rev.* 62 (2015) (analyzing the court's approach to statutory interpretation in *King v. Burwell*); Gluck & Bressman, *supra* note 1; Gluck, O'Connell & Po *supra* note 1. Victoria Nourse also has importantly written on the value of understanding Congress's own enacted rules. Victoria Nourse, *A Decision Theory of Statutory Interpretation: Operative Legal History by the Rules*, 122 *Yale L.J.* 70, 92-97 (2012).

¹¹ See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *Harv. L. Rev.* 1079, 1121-1128 (2017) (arguing that the Gluck-Bressman findings hold implications for "canons of language" but not "canons of law"); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 *Duke L.J.* 979, 985-86 (2017) (arguing that "the nuances of the legislative process are largely irrelevant for the purpose of interpretation"); John F. Manning, *Inside Congress's Mind*, 115 *Colum. L. Rev.* 1119 (2015) (discussing the Gluck-Bressman findings but concluding "the new empiricism does not undermine the intent skepticism"); John F. Manning, *Without the Pretense of Legislative Intent*, 130 *Harv. L. Rev.* 2397, 2429-31 (2017) (arguing the judiciary's "institutional role[]" undermines utility of the Gluck-Bressman work for doctrine).

Congress shares, or at least accepts, when it drafts.¹² But those assumptions are fundamentally empirical and are largely unsubstantiated.

The structures of congressional lawmaking, including Congress's intentional delegations to the bureaucracy, are indeed a form of collective congressional action--and collective delegation--that produce information about Congress's intentions. Congress is an "it," not just a "they."¹³ When Congress enacts a law requiring all statutes to be scored for their impact on the budget, delegates that scoring to a congressional nonpartisan institution, and enacts statutory text reflecting the score, we can say that Congress thought the words it was enacting would produce a statute that cost that amount of money, regardless of the fact that individual members of Congress may have different reasons for voting for or against the legislation.¹⁴

Congressional naysayers, for their part, have not offered any justification for why this concept of collective congressional intent is any more fictitious than opting--as textualists do--to deploy interpretive conventions that the Gluck-Bressman study has shown Congress does not in fact agree with or, sometimes, even know. Nor do textualists explain why their own refusal to consider legislative history because it is the work of "staff" is any different from their willingness to consider how statutes are organized in the U.S. Code--another task that we will show is likewise performed by "staff" after the statute has passed; or how textualists can argue that a text-focused approach is more member-focused than staff-focused, when in fact members themselves always read other documents produced by "staff" and virtually never read statutory text. And to say that the public, or a member of Congress, is any more on notice of the judiciary's hundred-plus interpretive presumptions than it would be of which committee drafted a particular statute, what that statute cost, or whether it was subject to the special restrictions for budget legislation, is unrealistic and unproven.

This is not to say we think there is no way to justify a textualist approach. Rather, it is to say that the grounds on which textualism has done so--democracy, nondelegation, fear of judicial activism--do not hold. Textualism as currently deployed is too divorced from Congress to be justified on grounds of legislative supremacy. Nor is textualism passive or objective, as it claims, but rather puts the role of active interpretation squarely on courts, which impose their own values and presumptions to interpret text. That those presumptions have "rule of law" benefits--like linguistic consistency--does not mean that they are not creations of judicial power or the imposition of judicial values on legislative language that was not crafted in their shadow. Such an approach must be justified as judicial activism, even if in benign form, and not as passive, legislative-supremacy-furthering interpretation.

¹² See, e.g., Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 51, 61 (2012) ("The canons influence not just how courts approach texts but also the techniques that legal drafters follow in preparing those texts."); Manning, *Inside Congress's Mind*, supra note 11, at 1926 (discussing the position that "shared . . . linguistic conventions" enable "the relevant linguistic community to convey meaning").

¹³ See generally Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 *Int'l Rev. L. & Econ* 239 (1992) (arguing against concept of single legislative intent --Congress as an "it" not a "they"--among 535 legislators).

¹⁴ For a similar point, see Nourse, supra note 10, at 83-85 (arguing the legislative intent debate is a distraction if one focuses on legislative rules under which Congress as a whole operates).

Studying congressional lawmaking, we believe, also provides low-hanging, doctrinal fruit that even textualists might accept. Sources like the budget score, parliamentary rulings on committee jurisdiction, or the special legislative history Congress uses only for appropriations (and the only legislative history partly drafted by professional drafters) are examples of objective outputs that Congress has voted to generate. The congressional bureaucracy helps us to see this. Even non-textualist judges, who look more frequently than textualists do to congressional purpose or extra-textual materials, typically overlook how the objective structures of congressional lawmaking inform statutory meaning or which materials have the marker of collective action, expertise, or nonpartisanship.

We have introduced some of Congress's bureaucratic institutions in other work--including the Offices of the Legislative Counsel, the Congressional Budget Office (CBO), and the Office of the Law Revision Counsel (OLRC).¹⁵ That work has happily invigorated a new branch of the field focused more broadly on the legislative process, with follow-on articles emerging to offer descriptive accounts of the work of individual institutions,¹⁶ and with courts beginning to recognize how the realities of the legislative process and the actors within it may affect how courts interpret and adjudicate statutes.¹⁷ Here we move beyond deep description of any one institution and consider more broadly and as a matter of theory what it means for Congress to have set itself up this way.¹⁸

¹⁵ See, e.g., Bressman & Gluck, *supra* note 1, at 763-65 (discussing CBO); Cross, *Legislative History*, *supra* note 1, at 99-100 (overviewing the nonpartisan offices in Congress); Cross, *Staffer's Error*, *supra* note 1, at 96-97 (discussing rise of Legislative Counsel's drafting role); Cross, *When Courts Should Ignore Statutory Text*, *supra* note 1, at 469-85 (discussing Legislative Counsel and illustrating the use of its drafting manual in statutory interpretation); *id.* at 503-05 (discussing CBO); Gluck, *Statutory Interpretation*, *supra* note 1, at 208 (calling attention to the role of the Law Revision Counsel and Congressional Budget Office in drafting statutes); Gluck & Bressman, *supra* note 1, at 967 (discussing Legislative Counsel); and Gluck, *Debate Over Tax Credits*, *supra* note 1 (same).

¹⁶ At the time of the Gluck-Bressman study, we noted that the political science literature on "Unorthodox Lawmaking" had not been cited in case law and barely in legal scholarship. Gluck & Bressman, *supra* note 1, at 917-18. Since that time, it has been cited in nearly two hundred articles. Some of this newer and important descriptive work began to emerge at the end of our two-year study and thus far includes detailed descriptions of two institutions. See, e.g., Jonathan S. Gould, *Law Within Congress*, 129 *Yale L.J.* 1946 (2020) (interview study examining parliamentary precedent in Congress); Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 *UCLA L. Rev.* 640 (2020) (arguing that the failure to examine the statute codification process has left gaps in understanding and interpreting statutory law). Specific offices also have occasionally drawn sustained attention. See, e.g., *infra* note 193 (showing George K. Yin's series of studies of JCT).

¹⁷ See, e.g., *Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767, 783 (2018) (Sotomayor, J., concurring) ("I do not think it is wise for judges to close their eyes to reliable legislative history--and the realities of how Members of Congress create and enact laws--when it is available."); *Council for Urological Interests v. Burwell*, 790 F.3d 212, 233 (D.C. Cir. 2015) (Henderson, J., dissenting in part) (citing Gluck-Bressman work to argue it "blinks reality" to ignore that Congress often uses legislative history, rather than the text, to restrain agencies.); *King v. Burwell*, 759 F.3d 358, 378 (4th Cir. 2014) (Davis, J., concurring in part) ("Neither the canons of construction nor any empirical analysis suggests that congressional drafting is a perfectly harmonious, symmetrical, and elegant endeavor."); *Loving v. IRS*, 742 F.3d 1013, 1019 (D.C. Cir. 2014) (Kavanaugh, J.) (citing the Gluck-Bressman study for proposition that "[L]awmakers, like Shakespeare characters, sometimes employ overlap or redundancy so as to remove any doubt").

¹⁸ For a rare article that considers multiple nonpartisan congressional offices, though only to explore whether nonpartisan committee staffs could reduce legislative gridlock, see George K. Yin, *Legislative Gridlock and Nonpartisan Staff*, 88 *Notre Dame L. Rev.* 2287, 2292-93 (2013).

We also introduce, but in briefer fashion, two additional nonpartisan institutions--the Medicare Payment Advisory Commission (MedPAC) and the Medicaid and CHIP Payment and Access Commission (MACPAC)--which were mentioned by multiple interviewees as having important similarities to the nine institutions we initially set out to study. Indeed, MedPAC and MACPAC are likewise nonpartisan institutions, legally structured as distinct legislative agencies, and tasked with providing Congress with expert information about these important health statutes. Another important example, mentioned frequently by our interviewees but that we do not discuss in great detail because it no longer exists (some have recently suggested reviving it), is the Office of Technology Assessment (OTA). OTA was a nonpartisan office that served Congress from 1972 to 1995¹⁹ and was charged with using its highly specialized experts to help Congress incorporate technological and scientific expertise into its crafting of legislative policy.²⁰ All three agencies' histories substantiate our broader narrative: they were each founded out of a congressional desire to develop in-house expertise to preserve autonomy in the face of potential executive branch overreach and resist interest group encroachment.²¹ We invoke them as relevant.

¹⁹ See Technology Assessment Act of 1972, Pub. L. No. 92-484, 86 Stat. 797 (creating OTA); see also Legislative Branch Appropriations Act of 1996, Pub. L. No. 104-53, 109 Stat. 514 (1995) (slashing OTA funding for fiscal year 1996 to \$3.6 million "to carry out the orderly closure" of the office).

²⁰ OTA was designed to function "as an aid in the identification and consideration of existing and probable impacts of technological application." 86 Stat. 797, 797. Recent appropriations debates about whether to reopen OTA apparently led to the creation of the STAA team within GAO to serve similar functions. See Ida. A. Brudnick, Cong. Research Serv., R45755 Legislative Branch: FY2020 Appropriations 15-16 (2020), <https://crsreports.congress.gov/product/pdf/R/R45755> [<https://perma.cc/8YEE-KN3X>]. As of December 21, 2019, the most recent development on this issue was the House's passage of its domestic priorities and international assistance appropriations minibus (H.R. 1865), which included a \$40 million increase to the GAO "to handle its large workload and strengthen its Science, Technology Assessment, and Analytics (STAA) team." See Press Release, House Committee on Appropriations, House to Consider Domestic Priorities and International Assistance Appropriations Minibus This Week (Dec. 16, 2019), <https://appropriations.house.gov/news/press-releases/house-to-consider-domestic-priorities-and-international-assistance> [<https://perma.cc/724E-S2EB>]. The new office within GAO--the Science, Technology Assessment, and Analytics (STAA) team--is organized as a "mission team" akin to those focused on other areas of substantive law. See Our Teams, GAO <https://www.gao.gov/about/careers/our-teams/> [<https://perma.cc/WS2F-RRHX>] (last visited May 10, 2020).

²¹ On MedPAC and MACPAC, see Holly Stockdale, Cong. Research Serv., R40915, An Overview of Proposals to Establish an Independent Commission or Board in Medicare 5 (2020), <https://crsreports.congress.gov/product/pdf/R/R40915> [<https://perma.cc/UDT9-3U5Z>] (noting that the two advisory commissions that would be merged to form MedPAC "were established, at least in part, because Congress had become increasingly distrustful of the executive branch and HCFA" and operated to "buffer members of Congress from pressures from interest groups"). On OTA, see Chris Mooney, *The Republican War on Science* (2005) ("In OTA's absence, however, the new Republican majority in Congress freely called upon its own favorable scientific 'experts' and relied upon analyses prepared by lobbyists and ideologically committed think tanks. . . ."); Katherine Tully-McManus, House Members Call for Office of Technology Assessment Revival, Roll Call (Apr. 2, 2019), <https://www.rollcall.com/news/congress/house-members-call-office-technology-assessment-revival> [<https://perma.cc/VCZ5-CSME>] (noting House members complaining about Congress's use of "non-governmental groups that are often advocating a position on technological issues, rather than an unbiased perspective").

On the OTA and executive branch encroachment, see Tully-McManus, *supra* (referring to House members complaining about Congress's use of executive branch experts); Kim Zetter, Of Course Congress Is Clueless About Tech--It Killed Its Tutor, *Wired* (Apr. 21, 2016), <https://www.wired.com/2016/04/office-technology-assessment-congress-clueless-tech-killed-tutor> [<https://perma.cc/77UM-E6TJ>] (stating that "Congress' need for the OTA is more glaring in light of the fact that the White House recently engaged two lauded technical experts to advise the executive branch"). Congress also utilizes temporary advisory commissions that may bear similar characteristics, see Jacob R. Straus & William T. Egar, Cong. Research Serv., R40076, Congressional Commissions: Overview and

We left out of this initial inquiry entirely other institutions that may be nonpartisan and have their own particular expertise but that do not contribute to Congress's legislative work, such as the Office of Senate Legal Counsel and Office of the General Counsel of the House of Representatives--which litigate on behalf of Congress--and the Government Printing Office--which prints official legislative documents.²² Finally, we have mostly left out the political staff in Congress--the staffers in members' individual offices, on committees, and in leadership offices who do the bulk of constituent and policy work. The work of political staff is critical to understanding Congress as an institution and the support that Members receive. These staffs are the key actors tasked with policy development inside Congress, and their role can magnify (arguably to the detriment of nonpartisan offices) on controversial, high-visibility legislation.²³ However, each of us has detailed their role elsewhere,²⁴ and they lack some of the defining features of the "bureaucracy" as we conceptualize it here. In particular, political staff are partisan, many are young, nonexpert, and relatively transient. The average tenure of a political office staffer is three years; the average staff tenure in the nonpartisan institutions is much longer--for example, average at CRS and JCT is about twelve years, and in Legislative Counsel, double that.²⁵ Of course, a different way to look at this is to see Congress as actually having a double layer of bureaucracy in its political and nonpolitical staff; just of very different kinds.²⁶

Considerations for Congress 3 (2019), <https://crsreports.congress.gov/product/pdf/R/R40076> [<https://perma.cc/V8S4-TKMJ>], but we do not discuss those here because we are primarily interested in Congress's permanent operating structure.

²² We similarly omit numerous other support offices in Congress that are even further removed from shaping legislation, such as the Architect of the Capitol, the Capitol Police, each chamber's Sergeant at Arms, and each chamber's chaplain. On these offices, see Ida A. Brudnick, Cong. Research Serv., RL33220, Support Offices in the House of Representatives: Roles and Authorities (2020); Ida A. Brudnick, Cong. Research Serv., R43532, Offices and Officials in the Senate: Roles and Duties (2015). Of these, the strongest case for inclusion perhaps was for the Clerk of the House and the Secretary of the Senate--but despite their roles in ensuring each chamber's smooth operation and preservation of documents, they did not shape legislative product with sufficient regularity to ultimately warrant inclusion in this initial foray. See Brudnick, Support Offices in the House of Representatives, *supra*, at 3 ("[B]ill clerks receive introduced bills and amendments; enrolling clerks prepare the official engrossed copy of House-passed bills, transmit messages to the Senate regarding approved legislation, and prepare the official enrolled copy of any House-originated bill or resolution; journal clerks compile the minutes of proceedings in the House, fulfilling the requirement in Article I, Section V of the Constitution that 'each House shall keep a Journal of its Proceedings'; reading clerks read all of the bills, resolutions, and amendments before the House; and the tally clerks operate the electronic roll call voting system.").

²³ On nonpartisan offices potentially receding on "hot" political issues, see Yin, *supra* note 18, at 2292-93.

²⁴ See Bressman & Gluck, *supra* note 1; Cross, Legislative History, *supra* note 1; and Gluck & Bressman, *supra* note 1.

²⁵ See *infra* notes 437-441 (length of tenure for the institutions); see also Kevin R. Kosar, Legislative Branch Support Agencies: What They Are, What They Do, and Their Uneasy Position in Our System of Government, in Congress Overwhelmed: Congressional Capacity and Prospects for Reform ch. 8, at 2 (Timothy LaPira, Lee Drutman, & Kevin Kosar eds.) (forthcoming 2020) (on file with authors) (observing that "the [GAO] reports an annual retention rate of employees of 96 percent (not counting retirements) each of the past six years"). On tenures of partisan staff, see R. Eric Petersen & Sarah J. Eckman, Cong. Research Serv., R44682, Staff Tenure in Selected Positions in House Member Offices, 2006-2016 7-8 (2016); R. Eric Petersen & Sarah J. Eckman, Cong. Research Serv., R44684, Staff Tenure in Selected Positions in Senators' Offices, 2006-2016 7-8 (2016).

²⁶ There has indeed been much written (mostly in political science) about the "delegation" of subject matter expertise to the various congressional committees. See, e.g., Christopher J. Deering & Steven S. Smith, Committees in Congress 203 (1997) (describing a "specialization norm" in which members of Congress historically deferred to committee members based on expertise developed while serving on a committee); George Goodwin, The Little

Importantly, we do not challenge Congress's ability to set itself up this way. Some academics and judges have argued that reliance on congressional staff--any staff--impermissibly delegates members' lawmaking power,²⁷ and some textualists use such arguments as justification for ignoring the copious material that Congress produces and relies on alongside enacted text. These arguments about the illegitimacy of delegation have been quite imprecise. Among other things, they do not delve into different kinds of staff or the accountability mechanisms that accompany the various delegations. For example, political staff is accountable directly to the members and visible to the public as the key policy personnel, but each member is ultimately responsible for his or her own votes or decision, like a CEO. The nonpartisan bureaucracy, by contrast, are expert staff who offer much less visible inputs, whose duties for Congress are defined *ex ante* by statute--by the members' own vote--and who largely cannot be dismissed by any single member or election outcomes.

We are most interested here in that nonpartisan staff and the relatively autonomous process that Congress winds up for that staff and puts into motion around the lawmaking process. But both layers of the congressional bureaucracy are the result of how Congress has chosen to organize itself. This is not illegitimate: the Constitution gives Congress sole control over its own procedures.²⁸ And it is Congress itself that has put this whole process in motion.

In the end, we emerge with a much more holistic view of the lawmaking process than we had before. As even textualists acknowledge, statutes are not just words--a concept is meaningless without context. The words Congress does pass are the result of the lawmaking context--a highly dialogic process that is triggered by and includes assumptions based on critical inputs from the bureaucracy, including cost and revenue estimates from CBO and JCT, procedural rulings from the Parliamentarians, and explanatory materials written by many of the nonpartisan offices. Members and staff are concerned with the substance of legislation at the macro level, much more so than the specific words chosen in the end at the micro level. Arguably, even those statute-modifying processes that Congress sets up to occur after the vote--such as OLRC's work to edit and significantly rearrange the words passed and the organization in which they originally appeared--are part of the "text" as Congress itself intends it to be understood, precisely because Congress has set itself up this way.

So understood, the words on the page, and the snapshot moment of the vote, are only a small slice of "lawmaking." Thus seeing the congressional bureaucracy and its inputs provocatively deconstructs the very concept of a "statute."

Legislatures 45-49 (1970) (explaining the need for subcommittees to enable members of Congress to specialize further); Kenneth A. Shepsle & Barry R. Weingast, Positive Theories of Congressional Institutions, 19 Leg. Studies. Q. 149, 153 (1994) (recounting the body of scholarship viewing committees "as specialists who, given the right incentives, would collect and reveal information that could improve the parent chamber's decisions").

²⁷ See Scalia, *supra* note 8, at 35 ("Congress can no more authorize one committee to 'fill in the details' of a particular law in a binding fashion than it can authorize a committee to enact minor laws."); see generally John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 677 (1997) (arguing that reliance on legislative history, because it is produced by committee, "makes it far too attractive for legislators to bypass the constitutionally prescribed process of bicameralism and presentment").

²⁸ U.S. Const. art. I, § 5.

For example, even interpreters who insist on focusing only on “enacted text” are getting it wrong when enacted text is viewed in light of the bureaucracy. That includes those interested in where statutes are placed in the U.S. Code and focused on literal aspects of text such as grammar: if textualists understood how OLRC works--making these changes after enactment for many statutes--textualists might not rely on these textual techniques. They instead would be looking only to the public laws--the versions of statutes actually passed by Congress. But those public laws have a lot of stuff in them that textualist courts typically pay little attention to, including purpose clauses and findings, which OLRC, in its post-vote organizing work, typically moves to notes.

Text is also being manipulated when courts ignore assumptions of procedural rulings or the CBO or JCT estimates, treat reconciliation laws like linguistically coherent pieces of legislation, or overlook that Congress’s siloed workforce develops consistent statutory vocabularies only within subject matter areas, not across the U.S. Code, and much more. Make no mistake: when judges--instead of looking to these indications from Congress itself--resolve ambiguities using their own presumptions about policy or linguistic consistency, they are bringing in legal values from the outside. That is justifiable, but not on the “we-are-faithful-agents-to-Congress” terms upon which it has always been justified.

We aim to tackle both this description deficit and this legitimacy deficit. Part I introduces the institutions of the congressional bureaucracy, their functions, and their strikingly common origins in Congress’s desire to reclaim its own lawmaking power from the executive. Part II analyzes features and structures that Congress’s bureaucracy shares and does not share with typical executive branch agencies, including how it separates powers internally. Part III turns to legislation and statutory interpretation, making a positive case for the relevance of understanding the bureaucracy. We illustrate how the bureaucracy informs our account of Congress’s rationality and how changes in the modern lawmaking process--the rise of “unorthodox lawmaking”--have likewise affected the bureaucracy’s work in ways that impact how statutes look. Statutes have more errors, are much longer, have less legislative history, and have a less transparent amendment process. All of this should be of interest to interpreters of all stripes. Finally, Part IV illustrates how understanding the bureaucracy provocatively deconstructs common understandings of what statutory “text” is. That Part also offers some initial, concrete doctrinal takeaways for doctrine, including new canons--and anti-canons--based on the objective outputs of the bureaucracy.

Regardless of whether one cares about the statutory interpretation wars, statutes comprise the majority of federal law today. But lawyers and judges remain mostly uninterested in and unknowledgeable about how Congress works—a curious deficit given how much lawyers, judges, and legal academics study the structures and decision-making processes of the other key lawmaking institutions, especially the judiciary and administrative agencies. Congress’s own lawmaking machinery produces the lion’s share of modern American law and deserves at least as

much attention. And it is time to relinquish the fictitious bases of prevailing interpretive theories and come up with something better. Let's enter the sausage factory.²⁹

I. The Bureaucracy's Institutions: Common Origins in Separation of Powers and Present-Day Operations

This Part introduces the bureaucracy's institutions and summarizes their origins, structures and present-day functions. One overarching theme that is essential to understanding the history and motivations for the bureaucracy, yet not a story we have found in other bureaucracy literature, is the role of bureaucracy in the congressional context as a tool to safeguard Congress's lawmaking and separate that power from the executive branch.

The notion of knowledge as power is common, and much has been written about separation of powers in the context of executive branch delegations.³⁰ But Congress's bureaucracy story is different. Creating a bureaucracy inside Congress did not pose the same kind of tradeoff between knowledge and control which external delegation is normally understood to pose.³¹

Instead, for Congress, bureaucracy was power. Despite their different functions, Congress's nonpartisan institutions were each created and molded for the common, overarching purpose of protecting congressional autonomy. Each of the bureaucracy's institutions we study was created or strengthened during the same three periods--the 1920s, 1940s and 1970s--and the latter two especially were periods in which Congress was openly concerned that it was ceding too much ground to the executive branch. Establishing its own bureaucracy to draft, research, organize, estimate, and audit legislation was viewed as key to safeguarding its legislative autonomy. The alternatives--seeking executive branch or third-party assistance for information-gathering and drafting help--had already been tried and deemed unacceptable. They had created a sense inside Congress that it was losing its status as a coequal branch because it was neither a self-sufficient policymaker nor could it adequately check an executive whose power continued to expand.³²

The 1940s was the first key period. The years leading up to and through the New Deal had seen an explosion of legislative activity--and a concomitant explosion in the size of the executive branch--yet Congress's own staff had remained relatively small and almost entirely

²⁹ Robert Pear, *If Only Laws Were Like Sausages*, N.Y. Times (Dec. 4, 2010), <https://www.nytimes.com/2010/12/05/weekinreview/05pear.html> [<https://perma.cc/4GTY-X7LN>] (repeating the famous quote from Von Bismarck, "If you like laws and sausages, you should never watch either one being made.").

³⁰ See *infra* Part II (outlining the standard account of bureaucracy developed in the executive-branch context, and discussing its relevance for the congressional bureaucracy).

³¹ For sources outlining the typical view of this tradeoff in the executive-branch context, see *infra* notes 337-349.

³² For an argument that Congress's use of rulemaking power to repeatedly restructure in ways that "enhance the chambers' power vis-à-vis the executive," Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 281 (2017), is a continuation of similar early English parliamentary practices, see *id.* at 267-301. It is also true that committees still do try to send some draft legislation to agency staff for technical review.

partisan.³³ Even the partisan staffs at the time were not substantive experts; their work usually was confined to only clerical tasks.³⁴ It was estimated that, in 1941, there were “not more than two hundred persons [on congressional staffs] who could be considered legislative professionals.”³⁵ Without in-house expertise, Congress had to rely during this period on the executive branch for expertise, information, and drafting assistance.³⁶

Congress increasingly came to view this executive-branch dependence as intolerable. In a 1942 floor speech entitled What Is Wrong with Congress, Representative Everett M. Dirksen voiced these frustrations with this dependence:

[W]e are constantly fishing with the bureaus and we put on a great quiz program, and they tell us what they think we ought to know and not a great deal more. How can the Aegean stables be cleansed unless we are equipped and staffed to secure basic information? Do you think the legislative branch of the Government can function independently and properly with the kind of prestige it ought to enjoy on that kind of a basis? The Congress today, in my judgment, needs a great, big dose of B, in the form of a staff or an instrumentality so we can make out a case after gathering information and rebut cases that are so often presented to us. . . .

What is wrong with Congress? It is not implemented; it is not staffed; it does not have the weapons with which to do the best kind of job. So I say to you now: Let us spend a little money on ourselves; let us provide legislative tools to get the facts, the data, the information, and then control, supervise, and survey the operations of the Government.³⁷

³³ Harrison W. Fox, Jr. & Susan Webb Hammond, *The Growth of Congressional Staffs*, 32 *Proc. Acad. Pol. Sci.* 112, 115-117 (1975) (recounting historical evolution of staffing in different staff categories); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 *Colum. L. Rev.* 807, 822 (2014) (on Legislative Counsel being limited to formatting duties); *id.* at 834 (on Congressional Research Service’s narrow original responsibilities). For information on personal and committee staff levels between 1977 and the present, see R. Eric Petersen & Amber Hope Wilhelm, *Cong. Research Serv.*, R43946 *Senate Staff Levels in Member, Committee, Leadership, and Other Offices, 1977-2016* (2016) (reporting Senate staff levels by staff category from 1977 through 2016); R. Eric Petersen & Amber Hope Wilhelm, *Cong. Research Serv.*, R43947, *House of Representatives Staff Levels in Member, Committee, Leadership, and Other Offices, 1977-2016* (2016), <https://crsreports.congress.gov/product/pdf/R/R43947> (reporting the same for the House of Representatives).

³⁴ Harrison W. Fox & Susan Webb Hammond, *Congressional Staffs: The Invisible Force in American Lawmaking* 15 (1977) (explaining that “[s]taffing began in both Senate and House [in 1885-1946] as clerical assistance”).

³⁵ *Congressional Quarterly Press, How Congress Works* 189 (5th ed. 2013).

³⁶ See Gladys Marie Kammerer, *Congressional Committee Staffing Since 1946*, at 1 (1951) (“The new enlarged and qualified staff [created by the 1946 Act] was to perform such research and analytical services for all committee members as had never been available to our national legislators except on loan from executive departments.”); Cross, *Staffer’s Error Doctrine*, *supra* note 1, at 89-93 (describing the “agency-delegation model” of statutory drafting that prevailed during the period); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 *Yale L.J.* 266, 338 (2013) (“[I]t seems probable that the New Deal and World War II saw the greatest executive-branch dominance of congressional drafting and deliberations that America has ever witnessed.”).

³⁷ 88 *Cong. Rec.* 7696, 7699-7700 (1942) (statement of Rep. Dirksen).

Dirksen's calls for legislative action translated into the most notable reform of the period: the Legislative Reorganization Act of 1946. In addition to providing the first authorization for committees to retain professional political staff,³⁸ the 1946 Act expanded the size and role of Congress's internal nonpartisan institutions, as detailed below.³⁹ Explaining the logic of these 1946 reforms, Representative Moroney observed:

Today we are confronted and confounded by the problems of a \$35,000,000,000 government trying to do the job with tools so absolutely obsolete and antiquated that 435 saints could not possibly do with our present equipment and organization. . . .

We cannot be coequal; we cannot do this fundamental task of supervision that the framers of the Constitution had in mind unless the Congress is virile, strong enough and well equipped enough to handle this magnitude of work that is dumped on us.

Five hundred and thirty-one men that compose the membership of the House and Senate are going to have a pretty hard time in handling, in supervising, in surveying the work of over 3,000,000 men scattered throughout the executive department. It is like trying to move a battleship with a jeep or a model T Ford.⁴⁰

The committee report for the Act reiterated these goals. As the report put it:

When [the branches] were created, they were more or less equal. But the executive branch of the Government has mushroomed into the greatest governmental bureaucracy not only this country but any other country in the world has known. The legislative branch of the Government has relatively stood still.⁴¹

Notably, the Administrative Procedure Act was passed in 1946 in parallel to the Legislative Reorganization Act. As Joseph Postell writes, although the two acts "advanced different aspects of the solution--increasing congressional capacity and efficiency versus applying legal constraints on agencies--they were designed to address the same problem, namely the inevitable arrival of the modern administrative state."⁴²

³⁸ Fox & Hammond, *supra* note 34, at 14; Kammerer, *supra* at 36. Professional aides to Representatives would not be recognized until 1970. Fox & Hammond, *supra* note 34, at 12.

³⁹ Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 203-205, 60 Stat. 836.

⁴⁰ 92 Cong. Rec. 10039 (1946) (statement of Rep. Moroney).

⁴¹ S. Rep. No. 79-1400, at 6558 (1946) (report of the Special [Joint] Committee on the Organization of Congress).

⁴² Joseph Postell, *The Other New Deal Settlement: The Relationship Between the Administrative Procedure Act and the Legislative Reorganization Act 17* (on file with authors); see also David H. Rosenbloom, *Building a Legislative-Centered Public Administration* (2000) (arguing for viewing the LRA and APA as part of a coherent effort in 1946 to make agencies operate as extensions of Congress); Postell, *supra*, at 22 ("The debates over the APA and LRA indicate that Congress, like the Court, was in a sense making its peace with the New Deal, but establishing a baseline set of principles that would govern how the New Deal would operate in practice."). Postell argues, however, that the LRA's intention to strengthen substantive committees and increase oversight has been mostly a failure. Postell, *supra*, at 27 ("If the combination of the APA and LRA reflect a major settlement between Congress and the New Deal over the status and control of the administrative state, it has largely been abandoned.").

The 1970s brought another wave of reform. During this period, rising disenchantment with the executive branch (which culminated mid-decade with the Watergate scandal) brought fresh concerns about congressional dependence on the executive and a desire for a more democratic and transparent lawmaking process in Congress. These frustrations generated a number of laws to augment Congress's resources. Most notable among these was the Legislative Reorganization Act of 1970.⁴³ Describing the motivation for the Act, numerous members made comments similar to this one, from Representative Fred Schwengel: "The efficiency and effectiveness of our operation has decreased to the point where many people consider us to be a rubberstamp for the Executive."⁴⁴ In response to this frustration, the 1970 Act provided Representatives with statutory acknowledgment of their ability to retain professional partisan staff and made changes to the committee system to empower the use of expert committee staffers.⁴⁵ At the nonpartisan level, it significantly expanded and empowered Congress's internal bureaucracy.⁴⁶

Of interest, while these reforms may have returned power to Congress vis-à-vis the executive branch, they also dispersed power within Congress. After all, Congress could have built its bureaucracy simply by adding experts into existing centers of congressional power. It could have added partisan staff positions to members and committees, for example. It also could have consolidated research, drafting, accounting, procedural, budget, and revenue expertise beneath the Speaker of the House and the Senate Majority Leader. Instead, Congress dispersed these roles across a collection of nonpartisan institutions that, because of their statutory authority and hardwiring into congressional procedures, often are not easily manipulated or cowed by any particular power center in Congress. It is difficult to determine to what extent this decentralization was intentional, but its effect has continued even as Congress itself dramatically changed and generally became more centralized. Several interviewees explicitly volunteered--without prompting--this internal separation of powers benefit, which we shall return to in Part III.

It is also of interest that the history of the congressional bureaucracy is not a story unique to the American legislature. Historians of parliamentary bureaucracies sound much the same theme. Parliaments and legislatures in presidential systems have increasingly come to develop their own internal bureaucracies and professional staffs, in part because service to legislatures requires unique skills--including drafting expertise--as well as insulation from the executive's political control.⁴⁷

⁴³ See Legislative Reorganization Act of 1970, tit. V, Pub. L. No. 91-510, 84 Stat. 1140 (codified at 2 U.S.C. § 281-282e) (describing the Office of Legislative Counsel).

⁴⁴ 116 Cong. Rec. 23914 (1970) (statement of Rep. Schwengel). See also, e.g., 116 Cong. Rec. 26031 (1970) (statement of Rep. Waldie) ("The power of the executive branch is awesome today compared to the legislative branch."); 116 Cong. Rec. 24061 (1970) (statement of Rep. Hanna) ("Mr. Chairman, in the almost 200 years since the Constitution was ratified, the executive branch of the Government and the court system have undergone radical changes, adapting themselves to the changing society in which they operate. Unfortunately, very little has been done in this regard in the third coequal branch of our Government, the Congress.").

⁴⁵ Pub. L. No. 91-510, §§ 301-05, 84 Stat. 1140, 1175-81 (1970); see also Fox & Hammond, *supra* note 34, at 24.

⁴⁶ On the 1946 and 1970 Acts as expansions of Congress's "institutional capacity," see also Chafetz, *supra* note 32, at 294-95.

⁴⁷ David Beetham, *An Effective Parliament (I): The National Level*, in *Inter-Parliamentary Union, Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice* 115-54 (2006), <http://archive.ipu.org/dem->

Studies of parliaments in countries as diverse as Slovenia, India, and Canada have emphasized the importance of independent parliamentary staff to “implement[] the principle of autonomy,”⁴⁸ and to “effectively carry out its functions within the framework of the separation of powers.”⁴⁹ In Canada, as noted by the Canadian parliament (in a submission to the Inter-Parliamentary Union): “operational independence of the Canadian Parliament is provided for in the Constitution and by legislation that guarantees that the Senate, the House of Commons and the Library of Parliament each have access to a non-partisan professional staff distinct from the public service.”⁵⁰

We now introduce in detail our nine main institutions. We also briefly summarize the origins of MedPAC and MACPAC at the end of this Part.

A. Congressional Research Service

“What good does [the Library] do, unless we have senior experts to digest [information] when legislation is before the committees?”

CRS is often described as Congress’s “think tank.”⁵¹ It is directed by statute “to advise and assist . . . in the analysis, appraisal, and evaluation of legislative proposals,” to collect and analyze “data having a bearing on legislation,” and “to prepare and provide information, research, and reference materials. . . to assist [members and committees] in their legislative and representative functions.”⁵²

Statutory authority for CRS is provided by the Legislative Reorganization Act of 1946⁵³--but CRS’s origins are much earlier. In 1901, Wisconsin had been spurred by Charles McCarthy, a University of Wisconsin librarian, to create a nonpartisan reference bureau for the state legislature, and other states followed suit.⁵⁴ Wisconsin Senator Robert LaFollette added an

e/guide/contents.htm [https://perma.cc/YMC9-MJXF] (examining how parliamentary organization contributes to parliamentary efficacy).

⁴⁸ Id. at 118-19 (discussing submission by Slovenian parliament to Inter-Parliamentary Union).

⁴⁹ Id. (quoting submission by Indian parliament to Inter-Parliamentary Union). We note that in parliamentary systems many laws are likely to be introduced (and drafted) by the executive. See Legislative Drafting, Agora: Portal for Parliamentary Development (Nov. 27, 2019), <https://agora-parl.org/resources/aoe/parliamentaryinstitution/legislative-drafting> [https://perma.cc/4EQZ-6NR2] (on parliamentary systems generally, noting that “it is the executive branch of government that produces most of the draft laws”); Legislative Drafting Process Guide, Finlex, <http://lainvalmistelu.finlex.fi/en> [https://perma.cc/3DQD-AHAX] (on Finland, stating that “[l]egislative bills are drafted by the Government”) (last visited Nov. 27, 2019); La procédure législative [The Legislative Procedure], SENAT.FR, http://www.senat.fr/role/fiche/procedure_leg.html [https://perma.cc/94VS-N4AS] (on France) (last visited Nov. 27, 2019).

⁵⁰ Beetham, supra note 47, at 118-19 (quoting submission by Canadian parliament to Inter-Parliamentary Union). In Canada, the perceptions that the nonpartisan legislative offices had become politicized contributing to their 2006 closures. See Marcus Moore, The Past, Present and Future of Law Reform in Canada, 6 Theory & Prac. Legis. 225, 238-40 (2018).

⁵¹ See Stephen W. Stathis, Cong. Research Serv., CRS at 100: The Congressional Research Service 25 (2014).

⁵² 2 U.S.C. § 166(d)(1), (4), (5).

⁵³ Legislative Reorganization Act of 1946, § 203, Pub. L. No. 79-601, 60 Stat. 812.

⁵⁴ See Yin, supra note 18, at 2292-93.

appropriations bill amendment to fund a similar congressional bureau in 1914.⁵⁵ Pursuant to that funding, the Legislative Reference Service was established in the Library of Congress in 1914 via administrative order, enabling the Library to perform the reference functions Congress required.⁵⁶

In 1946, Congress realized the need to transform and empower LRS. Again, from Representative Dirksen:

What good does [the Library] do, unless we have senior experts to digest [the information in the collection] when legislation is before the committees?⁵⁷

The 1946 Act increased the size and scope of LRS⁵⁸ and established it as a separate department in the Library of Congress. These reforms transformed LRS from a service that handled about 1,100 research requests per year in its early years⁵⁹ and roughly 5,000 annual requests in the late-1930s⁶⁰ to one that handled 36,000 requests per year by 1950.⁶¹

Still, the mid-century LRS primarily provided reference services to Congress rather than the independent policy analysis that--as federal programs became increasingly complex--Congress found it needed.⁶² Consequently, LRS was transformed again by the Legislative Reorganization Act of 1970, which remade it into a formidable center for research and policy analysis--a transformation signaled by its renaming as the "Congressional Research Service."⁶³ Explaining the impetus behind the project, the Chair of the House Rules Committee remarked: "Congress needed, but did not have, the capacity to evaluate the policy results of its work."⁶⁴ In the decade following the passage of the Act, one CRS publication observes, "CRS staff more than doubled."⁶⁵

⁵⁵ See *id.*

⁵⁶ For original congressional funding and direction to establish LRS, see Legislative, Executive, and Judicial Fiscal Year 1915 Appropriations Act, June 13, 1914, available at <https://www.visitthecapitol.gov/exhibitions/artifact/amendment-hr-15279-legislative-executive-and-judicial-fiscal-year-1915> [<https://perma.cc/E2SR-6CLX>]. On administrative action to create LRS pursuant to this congressional action, see Stathis, *supra* note 51, at 12-13: ("Two days after the bill was signed by the president, the Librarian of Congress established the Legislative Reference Service (LRS) by administrative order on July 18, 1914."). See also Gilbert Gude, *Congressional Research Service: The Research and Information Arm of Congress*, 2 *Gov't Info. Q.* 5, 7 (1985) (describing and providing legislative context for CRS's initial appropriations and the resulting administrative order).

⁵⁷ 92 *Cong. Rec.* 10049-50 (1946) (statement of Rep. Dirksen).

⁵⁸ Pub. L. No. 91-510, §§ 301-05, 84 *Stat.* 1140, 1175-81 (1970).

⁵⁹ Gude, *supra* note 56, at 7.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Stathis, *supra* note 51, at 24-26.

⁶³ Legislative Reorganization Act of 1970, Pub. L. No. 91-510, § 321, 84 *Stat.* 1181. For renaming of the Service, see *id.* at § 321. See also Stathis, *supra* note 51, at 25 (describing effect of Act on CRS and providing history of renaming proposal); Walter Kravitz, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1970*, 15 *Legis. Stud. Q.* 375, 376 (1990) (describing the newly renamed Congressional Research Service's charge to provide "objective, nonpartisan, in-depth analysis and appraisals to determine the advisability of enacting legislative proposals").

⁶⁴ 116 *Cong. Rec.* 23902 (1970) (statement of Rep. Colmer).

⁶⁵ Stathis, *supra* note 51, at 26.

Today, CRS has approximately 620 employees.⁶⁶ Ninety percent of its analysts have advanced graduate degrees, and analysts have relatively long tenures, with an average of thirteen years.⁶⁷ The Director is appointed by the Librarian of Congress after consultation with the Joint Committee on the Library--an enduring feature of CRS's continued organizational location within the Library of Congress.⁶⁸ The Director is required by statute to be appointed without regard to partisan affiliation.⁶⁹ The Librarian is required by law to "grant and accord to the Congressional Research Service complete research independence and the maximum practicable administrative independence."⁷⁰

CRS analysts produce several types of written products. The most well-known writings are its official CRS Reports, which provide "[c]omprehensive research and analysis" on major policy issues.⁷¹ Committee reports regularly copy and paste material from these Reports.⁷² CRS also sometimes writes the important explanatory statement in Conference reports--the portion that sets forth the House and Senate provisions and describes the disposition of those items by the Conference Committee. It also writes the bill summaries found on congress.gov, an annotated version of the Constitution that contains legal analysis,⁷³ summaries of legal and policy topics,⁷⁴ congressional distribution memoranda,⁷⁵ and blog posts for members and staff.⁷⁶ In response to requests from members or their staff, CRS also provides tailored confidential memoranda and email responses⁷⁷ as well as in-person and telephone consultations, staff briefings, policy seminars and workshops, and congressional testimony.⁷⁸ The Service fielded more than 71,000 research requests in fiscal year 2019, and virtually every member and standing committee office consults with CRS every year.⁷⁹ CRS's research may be conducted either in response to requests from members or committees of Congress, or on issues proactively selected by CRS as topics of likely interest to Congress (these latter reports are often referred to internally as "anticipatories" because they are issued in anticipation of a hot issues for Congress or after CRS receives a pattern of questions about the same issue). CRS reports that had been generally accessible to Congress (as opposed to less formal research requests the Service does for members

⁶⁶ Email from Staffer to Abbe Gluck & Jesse Cross (Apr. 27, 2020)(on file with authors).

⁶⁷ See id.

⁶⁸ Legislative Reorganization Act of 1946, § 203(b)(1), Pub. L. No. 91-510, 84 Stat. 1140 (codified at 2 U.S.C. § 166(c)).

⁶⁹ Id.

⁷⁰ Id. at § 166(b)(2).

⁷¹ Mary B. Mazanec, Annual Report of the Congressional Research Service of the Library of Congress for Fiscal Year 2018, at 10 (2019); see, e.g., Cassandra Dortch, Cong. Research Serv., IF10554, Postsecondary Education of Native Americans (2019).

⁷² Staffer interview.

⁷³ Constitution Annotated, Cong. Research Service (Aug. 26, 2017), <https://www.congress.gov/content/conan/pdf/GPO-CONAN-2017.pdf> [<https://perma.cc/AP6E-LKHL>].

⁷⁴ Mazanec, supra note 71, at 10 (discussing CRS Insights, Legal Sidebars, and In Focus).

⁷⁵ Id.

⁷⁶ Staffer Interview.

⁷⁷ Id.

⁷⁸ Mazanec, supra note 71, at 8, 17.

⁷⁹ Mary B. Mazanec, Director, Congressional Research Service, Statement Before the Subcommittee on the Legislative Branch Committee on Appropriations U.S. House of Representatives (Feb. 27, 2020), <https://www.congress.gov/116/meeting/house/110532/witnesses/HHRG-116-AP24-Wstate-MazanecM-20200227-SD001.pdf>

confidentially) were not allowed to be made publicly available until 2018 (but they often leaked), when Congress passed a bill expressly requiring them to be made public.⁸⁰

CRS told us that it now views its work as providing information to safeguard congressional autonomy not only from the executive, but also from outside interest groups. As recently as June 2019, the President of the Congressional Research Employees Association testified before the Committee on House Administration that an important role of CRS is to “help sort through the facts and opinions and provide an unbiased overview” of the various interest group positions lobbying Congress.⁸¹

B. Offices of the Legislative Counsel

“To help draft the bill it was necessary to seek technical assistance from the executive branch”

The Offices of the Legislative Counsel are the nonpartisan staff who draft the bulk of statutory text. They had their origin largely outside of Congress. In 1911, the Legislative Drafting Research Fund was established at Columbia University to promote the “scientific study and investigation of legislative drafting.”⁸² This included a commitment to “laboratory work” whereby the Fund would provide drafting work for governments.⁸³ To this end, the Fund sent Middleton Beaman, a law professor at Columbia University as well as Library of Congress law librarian, to Congress in 1916.⁸⁴

By the time of Beaman’s arrival to Congress, various states--spurred on by the Progressive movement--already had created their own professional legislative drafting offices.⁸⁵ Congress had begun to consider adding drafting offices,⁸⁶ but all such proposals had failed.⁸⁷ Beaman, however, found a receptive audience in the Ways and Means Committee, which was grappling with the rise of statutory complexity in federal taxation, and he soon became a trusted drafting resource relied upon throughout the Congress.⁸⁸

⁸⁰ Consolidated Appropriations Act, 2018 Pub. L. No. 115-141, 132 Stat. 348.

⁸¹ Susan Thaul, President, Cong. Research Employees Ass’n, Statement to Committee on House Administration (June 20, 2019), <https://docs.house.gov/meetings/HA/HA00/20190620/109663/HHRG-116-HA00-Wstate-ThaulPhDS-20190620.pdf> [<https://perma.cc/L7TM-G5XG>].

⁸² Letter from Joseph P. Chamberlain to President Nicholas Murray Butler, Columbia University (April 27, 1911). On Chamberlain’s role in starting the fund, see John M. Kernochan, A University Service to Legislation: Columbia’s Legislative Drafting Research Fund, 16 La. L. Rev. 623, 624 (1956).

⁸³ See Kernochan, *supra* note 82, at 624-25; see also Frederic P. Lee, The Office of the Legislative Counsel, 29 Colum. L. Rev. 381, 381 (1929).

⁸⁴ Lee, *supra* note 83, at 381, 385.

⁸⁵ For state-level antecedents, see, for example, Wisconsin Legislative Reference Bureau, <https://legis.wisconsin.gov/lrb> (last visited Mar. 19, 2019) (on the 1901 founding of the Wisconsin drafting office). See also 56 Cong. Rec. 10524 (1917) (statement of Rep. Greene) (referencing success of Vermont drafting office).

⁸⁶ For House and Senate Library Committees considering these proposals between 1911 and 1916, see H.R. 31536, 61st Cong. (1911); H.R. 4703, 62d Cong. (1911); H.R. 12155, 62d Cong. (1911); S. 8202, 62d Cong. (1913); H. Res. 833, 62d Cong. (1913); S. 1240, 63d Cong. (1913).

⁸⁷ See Lee, *supra* note 83, at 381-85; see also Shobe, *supra* note 16, at 819-20 (recounting initial congressional reluctance to create drafting office, and Beaman’s ultimate success).

⁸⁸ See Lee, *supra* note 83, at 386 (describing Beaman’s origins with the Ways and Means Committee).

In the Revenue Act of 1918, Congress decided to create a permanent office modeled on Beaman's service. A product of the congressional desire for self-sufficiency, the new office resulted partly from the fact that "[t]he Committee on Ways and Means felt that Congress should not be a mendicant on Columbia University nor receive favors at its hand, however gladly offered."⁸⁹

The 1918 Act dispersed statutory drafting expertise inside Congress, mandating that the new offices be divided into two separate branches--one serving each chamber of Congress--largely out of concern that the Senate would otherwise dominate drafting resources at the House's expense.⁹⁰ The Act also provided that the head of each drafting office was to be appointed "without reference to political affiliations," a phrase that would reappear, in various iterations, in the organic statutes for subsequent nonpartisan congressional institutions.

In 1946, Congress increased appropriations for the offices, allowing for more hires.⁹¹ But in the succeeding decades, Congress largely failed to expand Legislative Counsel's capacity to meet the growing drafting needs that accompanied the ambitious New Deal and Great Society agendas.⁹² As a result, executive agency officials stepped into the gap, taking leading roles in drafting congressional legislation during this period.⁹³ By the time of the Legislative Reorganization Act of 1970, Congress had grown frustrated with this imbalance of power in bill drafting. As a member of the Joint Committee on the Organization of the Congress put it:

In the past 3½ decades we have seen a persistent--if sometimes sporadic--accretion of power to the executive branch. . . . [Even in a bill that originated in Congress,] the irony of the situation is that to help draft [the bill] it was necessary to seek technical assistance from the executive branch; . . . [This] reflects executive rather [than] legislative branch oversight, power, allocation of funds, and precedence.⁹⁴

State legislatures were even ahead of Congress, as Representative Thomas Rees explained that, as a member of the California Senate, he "had a legislative counsel's office in the California Legislature that had 46 attorneys. I think we have 14 attorneys in the Legislative Counsel Office for the House of Representatives."⁹⁵

⁸⁹ 59 Cong. Rec. 8829 (1920) (statement by Rep. Treadway). The offices officially launched in 1919, which is when the Revenue Act of 1918 (which created the offices) actually was enacted.

⁹⁰ Revenue Act of 1918, § 1303(a), Pub. L. No. 254, 40 Stat. 1057, 1141-2. Originally called the "Legislative Drafting Service," the Revenue Act of 1924 renamed it the Office of Legislative Counsel. Revenue Act of 1924, § 1101, Pub. L. No. 68-176, 43 Stat. 353 (1924). On the decision to create separate branches, see Lee, *supra* note 83, at 387.

⁹¹ Legislative Reorganization Act of 1946, § 204, Pub. L. No. 79-601, 60 Stat. 812.

⁹² Arthur J. Rynearson, Office of Legislative Counsel, 1976-2003, Oral History Interviews 30 (2003), https://www.senate.gov/artandhistory/history/oral_history/Rynearson_arthur.htm [<https://perma.cc/6929-VYV5>].

⁹³ Parrillo, *supra* note 36, at 339.

⁹⁴ Hearings Before the Joint Committee on the Organization of the Congress, 89th Cong. 15 (1965) (statement of Rep. Hall).

⁹⁵ 116 Cong. Rec. 23922 (1970) (statement of Rep. Rees).

The resulting 1970 Reorganization Act created a new charter for the House Legislative Counsel that was understood to embody a commitment to increases in funding and resources for the drafting offices.⁹⁶ Pursuant to that commitment, Congress in 1972 provided the House office with increased funding for hires,⁹⁷ and both offices steadily expanded.⁹⁸ The House office has quadrupled in size since 1975, and the Senate office has nearly tripled.⁹⁹ Today, the House office employs fifty-six attorneys as drafters,¹⁰⁰ and the Senate office thirty-four.¹⁰¹ All drafters are required to be attorneys admitted to practice.¹⁰² Each office is led by a Legislative Counsel who is appointed by the House Speaker or the Senate President pro tempore, respectively, and who is required by law to be appointed without regard to partisan affiliation.¹⁰³ By tradition, the Legislative Counsel is promoted from within the office and is one of its longest-tenured members.¹⁰⁴

Use of the offices' drafting services is optional, but members and committees now use them with respect to nearly every bill, resolution, and amendment introduced in Congress.¹⁰⁵ As the Gluck-Bressman study emphasized, and our twenty additional interviews of policy staff for this paper corroborated, members are generally not involved in the actual drafting of legislation; even senior policy staff do not usually write the words of statutory text. Instead, partisan staff submit policy decisions and outlines to Legislative Counsel--often provided in the form of bullet points--that Legislative Counsel must transform into "clear, concise, and legally-effective

⁹⁶ Legislative Reorganization Act of 1970, tit. V, Pub L. 91-510, 84 Stat. 1140 (codified at 2 U.S.C. 281-282e); see also H.R. Rep. No. 92-236, at 6 (1971) (explaining that 1972 funding increases "are attributable to the Legislative Reorganization Act of 1970 which authorized . . . expanded services by the House Legislative Counsel"). The new charter added language that made explicit the House office's commitments to impartiality, confidentiality, and Congress-wide service. Legislative Reorganization Act § 502.

⁹⁷ H.R. Rep. No. 92-236, at 7 (1971).

⁹⁸ See Shobe, *supra* note 16, at 823 (reporting offices' growth over four-year increments).

⁹⁹ Compare Staff of J. Comm. on Printing, 94th Cong., Official Cong. Directory 422, 430 (1975), with Officers and Officials of the House, Congressional Directory 464 (2018) [hereinafter Congressional Directory], <https://www.govinfo.gov/content/pkg/CDIR-2018-10-29/pdf/CDIR-2018-10-29-HOUSECOMMITTEES-3.pdf> [<https://perma.cc/DT6X-6RAE>] and Staffer Interview.

¹⁰⁰ Staffer Interview.

¹⁰¹ Officers and Officials of the Senate, Congressional Directory 397 (Oct. 29, 2018) [hereinafter Senate Directory], <https://www.govinfo.gov/content/pkg/CDIR-2018-10-29/pdf/CDIR-2018-10-29-SENATECOMMITTEES-2.pdf> [<https://perma.cc/E2QA-AKWP>].

¹⁰² See Career Opportunities, Office of the Legislative Counsel, U.S. House of Representatives, <https://legcounsel.house.gov/HOLC/Careers/Careers.html> [<https://perma.cc/A8Z8-T4FZ>] (last visited May 11, 2020); Careers, Office of the Legislative Counsel, United States Senate, <https://www.slc.senate.gov/Careers/careers.htm> [<https://perma.cc/62FS-STKU>] (last visited May 11, 2020). Paralegals also occasionally assemble drafts considered so formulaic or ministerial that they do not involve significant drafting work.

¹⁰³ See 2 U.S.C. §§ 282, 272 (2018).

¹⁰⁴ Email from Former Staffer to Abbe Gluck & Jesse Cross (Jan. 26, 2020)(on file with authors).

¹⁰⁵ See Bressman & Gluck, *supra* note 1, at 740 (quoting staffer interviews that "99% [of statutory text] is drafted by Legislative Counsel," and that: "No staffer drafts legislative language. Legislative Counsel drafts everything."); see also Amendment Resources, House of Representatives Committee on Rules, <https://rules.house.gov/amend/amendment-resources> [<https://perma.cc/J8GW-MAEJ>] (directing that "[t]he assistance of the Office of the Legislative Counsel . . . should be sought in drafting [all amendments submitted to the House Committee on Rules]").

language.”¹⁰⁶ After Legislative Counsel drafts such language, there is sometimes, but not always, a back-and-forth with staff (especially staff who are attorneys) to finalize the text.¹⁰⁷

In a testament to the shift of inter-branch responsibilities brought about by the rise of these drafting offices, the executive branch now sometimes borrows Legislative Counsel’s drafters for major legislative proposals, rather than vice versa (but policy staff also often consult with agencies while drafting, especially for technical guidance).¹⁰⁸ Legislative Counsel also provides Congress with a measure of independence from interest groups, which often offer partisan, lobbyist-drafted legislative text as a roadmap or starting point for new legislation.¹⁰⁹

Going beyond the legislative text, the offices are also brought in to draft several non-statutory-text documents--a signal of the especially legally and regulatorily significant import of those documents. These include conference committee reports, important portions of appropriations bills’ legislative history,¹¹⁰ special portions of committee reports that show redlines of changes a bill makes to existing law,¹¹¹ and certain motions in the House.¹¹² The work of the offices is wholly confidential.¹¹³

C. Office of the Law Revision Counsel

“The bulk of the revision done is done by lawyers in the executive branch”

Tasked by its organic statute to “develop and keep current an official and positive codification of the laws of the United States,”¹¹⁴ the OLRC functions as the custodian of the U.S. Code. Before the existence of the Code, private companies and agencies prepared some compilations of updated federal laws, but these collections were not authoritative, and they could contain errors.¹¹⁵ As a result, the only way to determine current law was “slogging through all of

¹⁰⁶ Office of the Legislative Counsel: U.S. House of Representatives, <https://legcounsel.house.gov/#> [<https://perma.cc/EJH8-ETN7>] (last visited Aug. 1, 2019); Office of the Legislative Counsel: U.S. Senate, <https://www.slc.senate.gov/> [<https://perma.cc/BV9T-LC42>] (last visited Aug. 1, 2019).

¹⁰⁷ Staffer Interviews.

¹⁰⁸ See, e.g., Robert Pear, It Should Be Called the Grossman Health Care Bill, N.Y. Times, Nov. 26, 1993, at D10 (crediting the authorship of the Clinton healthcare bill of the 1990s to a Legislative Counsel attorney).

¹⁰⁹ See Shobe, *supra* note 16, at 848-49 (describing comments from legislative counsel who observed that lobbyists and law firms have increasingly provided draft text for proposed legislation).

¹¹⁰ Gluck & Bressman, *supra* note 1, at 980; Staffer Interviews.

¹¹¹ Our Services, Office of the Legislative Counsel: U.S. House of Representatives, https://legcounsel.house.gov/HOLC/About_Our_Office/Our_Services.html [<https://perma.cc/YV2V-ANQZ>] (last visited Aug. 1, 2019) (describing duties as including portions of committee reports that show the changes a bill makes to existing law (known within Congress as “Ramseyers”).)

¹¹² *Id.* (describing duties as including certain motion text, including some motions to suspend the rules, motions to recommit, and motions to instruct conferees).

¹¹³ 2 U.S.C. § 281a (2018) (noting that “the Office [of Legislative Counsel for the House] shall maintain the attorney-client relationship with respect to all communications between it and any Member or committee of the House.”); Office of the Legislative Counsel: U.S. Senate, *supra* note 106 (“Members and staff of the Senate can rest assured that communication with the Office is always confidential.”).

¹¹⁴ Committee Reform Amendments of 1974, H.R. Res. 988, 93d Cong. (1974).

¹¹⁵ See Mary Whisner, The United States Code, Prima Facie Evidence, and Positive Law, 101 L. Libr. J. 545, 549-52 (2009) (citing agency and private publications and noting the problem of errors); Charles J. Zinn, Codification of the

the session laws” of Congress.¹¹⁶ It was not enough to know that a law had been passed a century ago; one had to search all laws passed since that time to ensure no amendments had been made in the intervening years. The U.S. Code was deemed necessary because this research process became “increasingly cumbersome” as the number of laws exploded.¹¹⁷

By creating the U.S. Code in 1926,¹¹⁸ Congress joined many state legislatures that had begun to prepare and adopt topically-arranged legal codes.¹¹⁹ Unlike several such states, however, Congress did not create a governmental office to maintain its Code.¹²⁰ Instead, Congress entrusted management and oversight of the Code to the House Committee on the Revision of Laws--and it did not provide the Committee with any significant staff to perform this task.¹²¹

Throughout the 1950s and 1960s, even as the federal statutory landscape was expanding, the work of preparing codification bills was assigned to only two individuals.¹²² As a result, Congress often outsourced this work to non-congressional actors. With respect to the updating and publishing of the Code, Congress often relied on services offered by the West Publishing Company.¹²³ With respect to the preparation of codification bills, most work was done by executive-branch attorneys, because executive agencies had more staff.¹²⁴

Laws, 45 L. Libr. J. 2, 5-6 (1952) (noting the prevalence of private publications prior to 1925). This was a problem specifically with enactments after 1873; prior enactments had been consolidated by the Revised Statutes of the United States, though Congress did authorize some unofficial updates to it. See Margaret Wood, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, In *Custodia Legis* (July 2, 2015) <https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/> [https://perma.cc/U8TC-T3HG].

¹¹⁶ Whisner, *supra* note 115, at 550.

¹¹⁷ *Id.*

¹¹⁸ Act of June 30, 1926, Pub. L. No. 440, ch. 712, 244 Stat. 777.

¹¹⁹ See Dru Stevenson, *Costs of Codification*, 2014 U. Ill. L. Rev. 1129, 1140 (noting that “most states adopted revisions or codes around that time [of the U.S. Code’s creation] that took similar form—topical arrangement, sequential numbering, indexing, incorporation of other sections by reference, and so on”). These state projects also built on a prior wave of state-level codification that had been catalyzed partly by Field’s Code in New York in 1848, and that by 1894 had led roughly a quarter of the states to embody some statutes in a code. See *id.* at 1139.

¹²⁰ When Congress ultimately moved to create the Office of the Law Revision Counsel, its primary advocate, Representative William Steiger of Wisconsin, cited the success of such an office established by Wisconsin in 1909, for example. See Markup of House Resolution, Committee Reform Amendments of 1974, 93rd Cong. 659 (1974) [hereinafter 1974 Markup] (statement of Rep. Steiger) (remarking that “I have an interest in this obviously, because Wisconsin was the first State, in 1909, to establish a Law Revision Counsel” and referring to this as the “Wisconsin system”). See also H.R. Rep. No. 28-728, at 89 (1974) [hereinafter 1974 Committee Report] (“State practices vary but most have a revision capability and employ a small staff located in a revisor of statutes bureau. Wisconsin was the first State to adopt this practice (1909).”).

¹²¹ On the evolution of this committee assignment, see Will Tress, *Lost Laws: What We Can’t Find in the U.S. Code*, 40 Golden Gate U. L. Rev. 129, 143-45 (2010).

¹²² See 1974 Committee Report, *supra* note 120, at 88.

¹²³ *Id.* at 88.

¹²⁴ See 1974 Markup, *supra* note 120, at 660 (statement of Rep. Ketcham) (“The bulk of the revision done [was] done by lawyers in the executive branch.”).

The House addressed these concerns about the lack of institutional capacity for codification as part of its review its committee structure in 1974.¹²⁵ The result was a House resolution that, among other reforms,¹²⁶ created the OLRC.¹²⁷ The committee report echoed the same concerns for the lack of congressional self-sufficiency that drove the creation of the other nonpartisan offices, lamenting that: “To assist in the Judiciary Committee’s codification and revision work the West Publishing Company has, for some 50 years, more or less donated its services to the committee.”¹²⁸ The report also documented Congress’s prior dependence on executive-branch codification resources, noting that: “One title was codified after a large effort by the Defense Department which put together a team of 52 lawyers . . . and budgeted roughly \$3 million to prepare the bill for the codification of Title 10, Armed Forces.”¹²⁹ The OLRC would enable Congress to perform this work for itself.

A few months later, Congress passed a bill that declared the provision creating the OLRC was “permanent law,” rather than just the creature of a House resolution.¹³⁰ In so doing, Congress ensured that OLRC could not be abolished via unilateral action by the House.¹³¹

The office currently employs thirteen individuals--a significant increase over earlier numbers,¹³² but one dwarfed by increases in many other congressional offices. OLRC employees are all attorneys.¹³³ They are divided into two teams, with nine working on classification and four on codification (a distinction explained below). The OLRC is headed by an individual known as the Law Revision Counsel who must be appointed by the House Speaker without

¹²⁵ See 1974 Committee Report, *supra* note 120, at 87 (explaining that the production of the Code had become a “massive task”); *id.* at 7 (describing the exceedingly “large body of Federal laws”). The House considered proposals from a bipartisan Select Committee on Committees tasked with looking at House Rules X and XI. These rules “establish[ed] the standing committees of the House, define[d] their jurisdictions, and regulate[d] their procedures.” *Id.* at 3.

¹²⁶ The 1974 Amendments also undertook a broader restructuring of the responsibilities, jurisdictions, and resources available to House committees. See generally Committee Reform Amendments of 1974, H.R. Res. 988, 93d Cong. (1974). For a detailed description of its reforms, and of their evolution in Congress, see Judy Schneider & Christopher M. Davis, RL31835, *Reorganization of the House of Representatives: Modern Reform Efforts 17-36* (2003) at 17-36.

¹²⁷ Committee Reform Amendments of 1974, H.R. Res. 988, 93d Cong. § 405 (1974).

¹²⁸ 1974 Committee Report, *supra* note 120, at 88. Reference is made to the Judiciary Committee because, in 1946, the House Committee on the Revision of Laws was absorbed into the House Judiciary Committee as a subcommittee. See Tress, *supra* note 121, at 144.

¹²⁹ See 1974 Committee Report, *supra* note 120, at 89.

¹³⁰ Pub. L. No. 93-554, 88 Stat. 1771, 1777 (1974) (codified at 2 U.S.C. § 285c (2018)).

¹³¹ Largely to its origin in a House resolution, OLRC still submits its codification bills specifically to the House Judiciary Committee. See H.R. Res. 988, 93d Cong. § 405(c)(1) (1974) (requiring submissions of titles to House Judiciary Committee); *id.* § 405(c)(2), (7) (requiring submissions of recommendations to House Judiciary Committee).

¹³² Compare Staff of J. Comm. on Printing, 115th Cong., *Official Cong. Directory 464* (2018) with Staff of J. Comm. on Printing, 94th Cong., *Official Cong. Directory 437* (1976) (reporting that the Office employed three attorneys in 1976).

¹³³ See Tress, *supra* note 121, at 121n.142.

regard to partisan affiliation.¹³⁴ The Law Revision Counsel typically is selected through internal promotions of existing employees.

For its work on the U.S. Code, OLRC now performs several tasks. First, it performs “codification” work, where it prepares codification bills for Congress.¹³⁵ This work requires surveying the myriad already-enacted federal statutes and determining which statutes fall within general cohesive subject-matter areas; those subject-matter areas are reflected in the fifty-three titles of the U.S. Code. OLRC occasionally creates new titles or repurposes old ones, but most of the subject matter areas were organized by Congress itself when it adopted the Code in 1926. (The Code was less than 2000 pages long then; now it is more than 50,000.)

OLRC then takes those statutes apart from the form in which they were passed and reassembles them--moving and reorganizing sections around to integrate those statutes into the a single, coherent subject-matter title in the Code.¹³⁶ OLRC inserts that newly prepared title into a bill, which it presents to Congress for formal enactment of the title into what is known as “positive law.” To transform a title of the U.S. Code into positive law, Congress must pass the codification bill repealing the myriad underlying statutes and enacting the codification bill itself (and the title contained therein) as the sole governing law in their place.¹³⁷ Through its codification work, OLRC therefore conceptualizes, creates, and organizes a title of the Code.¹³⁸

In preparing a codification bill, OLRC may make editorial changes to clarify presumed congressional intent in the prepared title, including grammatical changes or even the insertion of substantive textual provisions such as definitions. OLRC’s work to draft codification bills includes a formal review and comment period whereby the office invites feedback and analysis on the bills from those with expertise in the relevant area of law, including administrative agencies, congressional committees, and academics. Congress has enacted twenty-seven titles of the U.S. Code into positive law, with the most recent enacted in 2014.¹³⁹

There are twenty-seven additional subject-matter-cohesive titles of the U.S. Code that most lawyers perceive as indistinguishable from the enacted titles (for instance, Title 42 of the U.S. Code, which contains the Civil Rights Acts, Medicare, and Medicaid). OLRC also conceptualizes and organizes those titles (most of which were originally organized by Congress

¹³⁴ Pub. L. No. 93-554, tit. I, ch. III, § 101, 88 Stat. 1777 (1974) (enacting the terms of a House Resolution, H. Res. 988, 93rd Congress, that established the OLRC) (codified at 2 U.S.C. § 285c).

¹³⁵ See Positive Law Codification, Office of the Law Revision Counsel, <https://uscode.house.gov/codification/legislation.shtml> (last visited May 19, 2020) (“Positive law codification by the Office of the Law Revision Counsel is the process of preparing and enacting a codification bill to restate existing law as a positive law title of the United States Code.”)

¹³⁶ Frequently Asked Questions and Glossary, Office of the Law Revision Counsel, <https://uscode.house.gov/faq.xhtml> (last visited May 19, 2020) (noting that the Code is a “consolidation and codification by subject matter”).

¹³⁷ See Positive Law Codification, *supra* note 135.

¹³⁸ See 2 U.S.C. 285b(1) (2018) (requiring that the office shall “prepare, and submit to the Committee on the Judiciary one title at a time, a complete compilation, restatement, and revision of the general and permanent laws of the United States”).

¹³⁹ See Browse the United States Code, Office of the Law Revision Counsel, <https://uscode.house.gov/browse.xhtml> [<https://perma.cc/BD3Q-RXRL>] (last visited Aug. 1, 2019) (titles marked with an asterisk are positive law).

in 1926) by rearranging provisions from enacted statutes (or retaining the work done by prior codifiers to that end). But those titles have not been formally enacted as codified law by Congress--that is, Congress has not voted on those OLRC edits at all--in many instances simply because Congress has not acted on requests for codification and has little interest in doing so, as we elaborate in Part II. As a result, those twenty-seven titles do not have the status of positive law (in other words, the governing law is still the originally-enacted public laws not the title of the of the Code).

A key practical effect of the difference between positive and non-positive titles goes to how a law is properly amended. To amend a law that is part of the enacted Code, one needs to amend to the Code itself (e.g., “Title 28, United States Code, is amended . . .”). If instead, Congress accidentally amends with a public law that says “the Judiciary Act of 1789 is amended,” that amendment becomes something of a free floating piece of law because it is not “where” it belongs, as the provisions of the Judiciary Act were formally repealed when they were codified into the Code. Surprisingly, as we detail in Part IV, such mistakes in amending are not rare and they create challenges for those trying to find the most up-to-date versions of the law. To amend to one of the twenty-seven titles not enacted as positive law, Congress does have to amend to the underlying non-codified statute (e.g., “The Social Security Act is amended . . .”), not to the Code, because the Code for those sections is not enacted law to amend. These distinctions have caused much confusion and numerous mistakes, as we elaborate in Part IV. The big point for now is how little most lawyers and judges understand about any of this.

For all titles, whether or not voted on by Congress, OLRC also performs “classification” work.¹⁴⁰ Here, it prepares and publishes updated versions of the Code that incorporate recent amendments.¹⁴¹ This includes updating the official online version of the Code throughout the legislative year, which OLRC typically updates approximately thirty to forty times per year.¹⁴² For non-positive titles, this classification work requires OLRC decisions about where to locate newly enacted provisions in the Code. This work also can entail certain edits to statutory text--such as modifying cross-references and inserting headings in non-positive titles. As non-positive titles grow unwieldy over time with repeated classifications, OLRC also periodically revisits them to rearrange them--work that it labels as “editorial reclassification.”¹⁴³

¹⁴⁰ See About Classification, Office of the Law Revision Counsel, https://uscode.house.gov/about_classification.xhtml (last visited May 19, 2020) (“The Office . . . reviews every provision of every public law to determine whether it should go into the Code, and if so, where. This process is known as U.S. Code classification.”). The statutory charter only uses the term “classification” with respect to non-positive titles, but it requires OLRC to perform this updating work for all titles. See 2 U.S.C. 285b(4) (2018) (listing a function of the OLRC as “[t]o classify newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law”).

¹⁴¹ See Frequently Asked Questions and Glossary, *supra* note 136 (noting updates are made throughout a congressional session on an ongoing basis as public laws are enacted. For the print version of the Code, each title is updated once a year to include all of the laws enacted during the latest session of Congress.”).

¹⁴² Email from Staffer to Abbe Gluck & Jesse Cross (Apr. 28, 2020)(on file with authors).

¹⁴³ See Editorial Reclassification, Office of the Law Revision Counsel, <https://uscode.house.gov/editorialreclassification/reclassification.html> (last visited May 19, 2020) (stating that OLRC “must occasionally undertake editorial reclassification projects to reorganize areas of law that have outgrown their original boundaries, or to eliminate organizational units that are no longer efficient”). OLRC typically views it as the job of Congress, not OLRC, to further modify the text of positive law titles, and so OLRC does not make all

As noted, OLRC has significant editorial discretion in the performance of these functions, a fact unknown to most lawyers and courts. In codification bills, it may alter or even add statutory text in order to correct errors, resolve ambiguities, and make the Code easier to understand and navigate. In all aspects of its work, it has significant discretion to omit those provisions from the Code entirely that it deems not “general and permanent,”¹⁴⁴ such as most parts of appropriations bills. It also has discretion to move full provisions outside the text of the Code and into the side notes—a determination that surprisingly often includes some important provisions, like pilot programs, statutory effective dates, and legislative findings.¹⁴⁵ To appreciate the significance of this discretion, as we discuss in Part IV, more than half of the enacted text of the U.S. Code is now in statutory notes--that is, not visible as inline text in print sources and not readily accessible at all on secondary electronic sources, even for those who know to look for them.¹⁴⁶ These changes often create situations in which the statute as encountered by the general public appears different—or at least less complete-- from the text that was enacted.

D. Congressional Budget Office (CBO)

“[T]he Congress has, in the eyes of many, lost the power of the purse to the Executive Branch.”

In the half-century preceding the creation of CBO, the office that now is Congress’s economic and budgetary analyst, budgetary power rested heavily with the executive branch. The Budget and Accounting Act of 1921 required the President to submit an annual budget proposal, and so largely entrusted the President with responsibility for budget planning.¹⁴⁷ The 1921 Act also established the Bureau of the Budget, later renamed the Office of Management and Budget (OMB), which gave the President significant control of data and analysis relating to the budget.¹⁴⁸ In the following decades, economic analyses of legislative issues, such as cost estimates for bills, typically were produced by executive agencies.¹⁴⁹ Those calculations, it often

the same types of edits when classifying in positive law titles. Instead, OLRC will submit to Congress a bill that, if enacted by Congress, would implement its proposed edits (such as reorganization of a title). See Email from Staffer to Abbe Gluck & Jesse Cross (on file with authors).

¹⁴⁴ 2 U.S.C. § 285b(1) (2018).

¹⁴⁵ See *infra* Part IV.B for elaboration; see also About Classification, *supra* note 140 (“While the decision to classify a freestanding provision as a section or a statutory note is an editorial judgment, there are certain types of provisions that are normally classified as notes in both positive and non-positive law titles, such as effective dates, short titles, savings, and statutory construction. Statutory notes also include provisions that are somewhat less than general or less than permanent, but still relate to existing Code sections, such as those requiring studies and reports, implementation of regulations, or the establishment of a task force.”); Email from Staffer to Abbe Gluck & Jesse Cross (Apr. 28, 2020) (on file with authors) (“Sometimes [placement in a note] is by Code custom. Other times [OLRC has] no other choice—as when a freestanding provision belongs in a positive law title based on subject matter.”).

¹⁴⁶ On this point, see also Shobe, *supra* note 16.

¹⁴⁷ Philip G. Joyce, *The Congressional Budget Office: Honest Numbers, Power, and Policymaking* 15 (2011); History, Cong. Budget Office, <https://www.cbo.gov/about/history> [<https://perma.cc/3ZJS-5QP3>] (last visited Aug. 8, 2019).

¹⁴⁸ *Supra* note 147.

¹⁴⁹ Olivia B. Waxman, *This Is Why the Congressional Budget Office Was Created*, *Time* (May 24, 2017), <http://time.com/4786202/cbo-estimates-history> [<https://perma.cc/6BA2-E5EF>].

was suspected, would vary based on the President's level of support for the underlying legislation.¹⁵⁰ This era of "presidential dominance" over the budget process continued unabated throughout the 1960s.¹⁵¹

Congress became increasingly concerned about this allocation of budgetary power in the 1960s. The Vietnam War and the Great Society policies placed new strain on the federal budget, and Congress grew dissatisfied with executive-branch budgetary tactics that it viewed as coercive.¹⁵² These inter-branch tensions reached a boiling point when, in 1972, President Nixon threatened to withhold significant appropriations from certain federal programs that conflicted with his policies.¹⁵³ These impoundments, along with a post-Watergate concern among some about the trustworthiness of OMB,¹⁵⁴ led to new congressional interest in reclaiming its budgetary and economic powers.

In response, Congress formed a joint committee in 1972 that was directed to develop recommendations "for the purpose of improving congressional control of budgetary [procedures]."¹⁵⁵ Drawing on the template of California's Joint Legislative Budget Committee, it recommended the creation of a nonpartisan joint staff and director to work beneath two new budget committees, one for each chamber.¹⁵⁶ This approach, the committee hoped, might finally "give Congress its own center of congressional budgetary operations."¹⁵⁷

A year later, Congress enacted the Congressional Budget and Impoundment Control Act of 1974, which acted upon the joint committee's recommendations.¹⁵⁸ The conference committee's explanatory statement observed: "[T]he Congress has, in the eyes of many, lost the power of the purse to the Executive Branch."¹⁵⁹ It further stated: "[C]ongressional enactments [have] permitted the Executive to achieve a great concentration of financial and policymaking authority Yet the Congress did little to improve its own budget capabilities."¹⁶⁰

To reclaim control, the Act established a series of new procedures and practices--including presidential procedures for impoundments¹⁶¹ and procedures for the new congressionally driven budget process.¹⁶² To manage the latter process, it also created several new congressional institutions. These included the new budget committee in each chamber--a division of labor partly designed to allow for specialized attention to aggregate federal

¹⁵⁰ *Id.*

¹⁵¹ Allen Schick, *The Federal Budget: Politics, Policy, Process* 14 (3rd ed. 2007) (labeling 1921 to 1974 as the era of "Presidential Dominance" in federal budgeting); see also Joyce, *supra* note 147, at 15 ("In fact, Allen Schick refers to the period explicitly as one of 'presidential dominance' in the budget process.").

¹⁵² Joyce, *supra* note 147, at 15.

¹⁵³ *Id.* at 15-16.

¹⁵⁴ Waxman, *supra* note 149.

¹⁵⁵ Pub. L. 92-599, § 301(b)(1), 86 Stat. 1324 (1972).

¹⁵⁶ H.R. Rep. No. 93-147, at 2-3 (1973).

¹⁵⁷ *Id.*

¹⁵⁸ Pub. L. No. 93-344, 88 Stat. 297 (1974).

¹⁵⁹ Joint Explanatory Statement of the Committee of Conference on H.R. 7130, 93rd Cong. 1 (1974).

¹⁶⁰ *Id.* at 2.

¹⁶¹ Pub. L. No. 93-344, tit. X.

¹⁶² *Id.* tit. III.

spending¹⁶³ and partly the byproduct of bicameralism traditions in Congress¹⁶⁴--a structure that separated budget power across the two chambers. It was also partly an effort to navigate and appease existing committee-level conflicts inside Congress.¹⁶⁵ Rather than leave issues of budgetary expertise and calculation to these new committees, however, the Act also created the CBO.¹⁶⁶

The Act made the CBO a nonpartisan legislative office, not committee staff as had been proposed.¹⁶⁷ Representative Frank Annunzio said that the CBO would “aid in redressing the imbalance of information which the executive branch commonly uses to its advantage and our embarrassment.”¹⁶⁸ Senator Edmund Muskie similarly commented that the office would “provide Congress with the kind of information and analyses it needs to work on an equal footing with the executive branch.”¹⁶⁹

In subsequent years, CBO accreted authority, largely by proactively looking to analyze major legislative proposals and taking a firmly nonpartisan stance. President Carter’s energy policy was the important first milestone. As CBO historian Philip Joyce put it, CBO proactively involved itself by “proposing to do an analysis of the plan, and by generating requests for this analysis from the committees of jurisdiction.”¹⁷⁰ Ultimately, CBO determined that the Carter estimates of the policy’s intended effects were overly generous.¹⁷¹ Despite the controversy generated by this conclusion, CBO’s critique of President Carter’s plan helped establish the office’s independence, especially because the entire federal government, including CBO, was headed by Democrats.¹⁷² CBO continued to display this independence from majority leadership

¹⁶³ See Public Law 93-344: Legislative History, Committee on Governmental Operations, United States Senate, 93rd Cong. 29 (1974) (“The Budget Committee is being created to guide the Congress in...tasks that no other standing committee now performs....By performing effectively the new fiscal policy and priority-setting functions that no other legislative committee now performs it should enable other committees...to work with greater focus and effect.”).

¹⁶⁴ See *id.* at 30 (“Congress needs the legislative mechanism to make fiscal policy, and legislation under the Constitution is the product of a bicameral system. Thus each House needs a Budget Committee to formulate and prepare its fiscal policy decisions, legislating such decisions in the same manner as all other such decisions.”).

¹⁶⁵ See Alan J. Abramson, *Broken Purse Strings: Congressional Budgeting 1974 to 1988*, at 11-13 (1988) (providing context on conflict between appropriations and authorizing committees).

¹⁶⁶ Pub. L. No. 93-344, tit. II.

¹⁶⁷ *Id.* at §201.

¹⁶⁸ Public Law 93-344: Legislative History, *supra* note 163 at 1964.

¹⁶⁹ *Id.* at 2000; see also Chafetz, *supra* note 32, at 63; Joyce, *supra* note 148, at 6 (describing how the creation of the CBO was “[p]art of [an] effort...to provide Congress with analytical capacity independent of the executive branch.”). Interestingly enough, the creation of OMB in the first place was in part the reverse story: the President trying to reclaim budget authority from Congress. See John Burke, *The Institutional Presidency* 11 (1992) (describing how the 1939 changes to the Bureau of the Budget (BOB), the predecessor of the OMB, involved “an attempt to channel departmental relations with Congress through the White House and to tailor departmental needs to the president’s programmatic goals”).

¹⁷⁰ Phillip G. Joyce, *The CBO at Middle Age*, Brookings (Feb. 11, 2015), https://www.brookings.edu/wp-content/uploads/2016/06/PJ_WorkingPaper9_Feb11_Final.pdf [<https://perma.cc/BS3Q-5UEM>].

¹⁷¹ *Id.*

¹⁷² *Id.*

with controversial forecasts relating to President Reagan’s budget policy¹⁷³--particularly in projecting a deficit when Reagan promised his budget would balance¹⁷⁴--as well as unfavorable forecasts that contributed to the failure of President Clinton’s proposed health reform legislation in 1994.¹⁷⁵

The creation of the office angered some members by drawing power away from the very influential committees with control over the budget, including House Ways & Means and Senate Finance. CBO similarly has maintained independence from the budget committees of Congress. One of the most important early CBO directors, Dr. Alice Rivlin, openly embraced this internal separation of powers function for the office, famously stating: “[T]he CBO was not set up to work solely for the budget committees. I work for the whole Congress and have responsibilities to all committees and indeed to all members.”¹⁷⁶

Today, CBO has approximately 250 employees, which it reports are “mostly economists or public policy analysts with advanced degrees,” and a few attorneys.¹⁷⁷ The office is headed by a Director who is jointly appointed by the House Speaker and Senate President pro tempore (with recommendations from the Budget Committees) and who legally must be appointed without regard to political affiliation.¹⁷⁸ In practice, the House and Senate Budget Committees have alternated in recommending candidates for the position, and the Committees’ recommendations have been followed.¹⁷⁹

The office provides analyses, reports, and studies designed to inform Congress about the fiscal impacts of policies, legislative proposals, and enacted law.¹⁸⁰ Its analyses include: (1) a cost estimate for nearly every bill that is approved by a committee;¹⁸¹ (2) ten-year and thirty-year

¹⁷³ Id.; see also Cong. Budget Off., *An Analysis of President Reagan's Budget Revisions for Fiscal Year 1982* (1981) (“[T]he CBO estimates of the economic effects of the Administration’s budget proposals are subject to a large margin of error.”).

¹⁷⁴ Joyce, *supra* note 170 at 7.

¹⁷⁵ See Paul Starr, *What Happened to Health Care Reform?*, *Am. Prospect* (1995), <https://prospect.org/article/what-happened-health-care-reform> [<https://perma.cc/N9CA-VBG5>] (describing the “considerable political impact” of the CBO’s decision not to “count much savings from competition in its estimate of the future costs of any [healthcare] proposal.”).

¹⁷⁶ Congressional Budget Office Oversight: Hearing before S. Comm. on the Budget, 94th Cong. 4 (1975). In practice, we were told, CBO when busy has to prioritize the requests of leadership and the main financial committees. Staffer Interviews.

¹⁷⁷ Organization and Staffing, Cong. Budget Office, <https://www.cbo.gov/about/organization-and-staffing> [<https://perma.cc/N5E3-C9VJ>] (last visited May 11, 2020). The Office also employs lawyers, information technology specialists, editors, and others.

¹⁷⁸ 2 U.S.C. § 601(a)(2) (2018). The Director serves for a fixed term of four years, although the Director can be removed earlier by a resolution in either chamber. 2 U.S.C. § 601(a)(3)-(4) (2018).

¹⁷⁹ Megan S. Lynch, Cong. Research Serv., RL31880, *Congressional Budget Office: Appointment and Tenure of the Director and Deputy Director*, Cong. Res. Serv. (2019).

¹⁸⁰ See generally Joyce, *supra* note 147, at 22; Joyce, *supra* note 170 at 10-23 (discussing CBO scores, which provide fiscal estimates for proposed legislation, and baseline projections, which provide such analyses for enacted law).

¹⁸¹ These are provided for any committee except the appropriations committees, see 2 U.S.C. § 653 (2018) (noting that “to the extent practicable,” cost estimates shall be provided to “any committee of the House of Representatives or the Senate (except the Committee on Appropriations of each House)”), but CBO still works very closely with appropriators, including providing substantial analyses of appropriations bills. See Staffer Interview.

forecasts of the budgetary and economic outcomes anticipated to result under continuation of current law; (3) economic analysis of the President’s budget; (4) examination of the options to reduce the federal deficit; and (5) analysis of the economic impacts of federal mandates upon state, local, and tribal governments and the private sector, as required by the Unfunded Mandates Reform Act of 1995.¹⁸² CBO often proactively assists legislative staff in designing legislation that will not exceed desired expenditure levels.¹⁸³ The office performs these functions particularly with respect to spending legislation (i.e., non-tax legislation), due to the complementary role played by JCT for tax bills.¹⁸⁴

Congress also has hardwired use of the office’s cost estimates into the routine legislative process, with rules and laws requiring committee-reported legislation to be cost-estimated (and for committee reports to publish those estimates).¹⁸⁵ In most instances, Congress also has required that legislation meet certain budgetary goals--and while most of these rules provide the Budget Committees with the option to determine their own cost estimates, use of CBO estimates occasionally is mandated, and even when they are not, congressional convention dictates the use of CBO estimates regardless of such specification.¹⁸⁶ As a result, the “CBO score”--the estimated cost of a bill--often plays a pivotal role in a bill’s success or failure.¹⁸⁷

CBO publishes its formal cost estimates and analytic reports,¹⁸⁸ materials outlining its underlying data and analytical methods,¹⁸⁹ comparisons of its projections with a variety of sources,¹⁹⁰ and chart books, slide decks, and infographics about the budget and the economy to

¹⁸² Pub. L. 104-4, § 424, 109 Stat. 55 (codified at 2 U.S.C. 658c (2018)); Products, Cong. Budget Off., <https://www.cbo.gov/about/products> [<https://perma.cc/Z2M6-SG3S>] (last visited Aug. 1, 2019).

¹⁸³ Bressman & Gluck, *supra* note 1, at 764 (reporting interviews with current and former CBO staff).

¹⁸⁴ See *infra* note 206 and accompanying text.

¹⁸⁵ See Congressional Budget Act of 1974, § 308(a), Pub. L. No. 93-344, 88 Stat. 297; Rules of the House of Representatives, 116th Cong., Rule XIII.3(c)(3).

¹⁸⁶ The House’s PAYGO rule requires use of a CBO-calculated baseline to measure a bill’s impact on the deficit. Rules of the House of Representatives, 116th Cong., Rule XXI(10)(a)(2). See also Pub. L. No. 111-139, 124 Stat. 8 (2010) (codified at 2 U.S.C. §933(c)(2)(B) (2018)) (specifying CBO role in statutory PAYGO rule). Otherwise, chamber budget rules typically provide the budget committees with discretion to determine compliance with budgetary rules, and convention alone dictates use of CBO estimates. See Congressional Budget Act of 1974, § 312; Rules of the House of Representatives, 116th Cong., Rule XXI; H.R. Con. Res. 71, § 4106, 115th Cong. (2017); See also *infra* note 245 (on reconciliation process and the Byrd rule); Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd’s Eye View*, 81 *L. & Contemp. Probs.* 99, 105 (2018)(explaining JCT and CBO role in Byrd rulings); CBO’s Role in Budget Resolutions, Cong. Budget Off., <https://www.cbo.gov/publication/51379> (last visited May 15, 2020) (describing CBO role for budget resolutions).

¹⁸⁷ See, e.g., Robert King, *Following GOP Criticism, CBO Revamps Insurance Coverage Estimates*, *Wash. Examiner* (Sept. 21, 2018), <https://www.washingtonexaminer.com/policy/healthcare/following-gop-criticism-cbo-revamps-insurance-coverage-estimates> [<https://perma.cc/SD84-4BVY>] (describing how the repeal of the ACA died in part due to “the CBO’s high estimates of coverage losses.”).

¹⁸⁸ Processes, Cong. Budget Off., <https://www.cbo.gov/about/processes#release> [<https://perma.cc/LZ6H-64FF>] (last visited Aug. 1, 2019).

¹⁸⁹ Transparency, Cong. Budget Off., <https://www.cbo.gov/about/transparency> [<https://perma.cc/R4KM-B97B>] (last visited Aug. 1, 2019).

¹⁹⁰ *Id.*

make its projections more accessible.¹⁹¹ Any preliminary analyses CBO conducts at the behest of members or committees to assist in the development of legislation are confidential.¹⁹²

E. Joint Committee on Taxation (JCT)

“Congress ought not to be dependent absolutely on what may be reported to it by the officials and people engaged in the administration side alone”

Created in 1926, the JCT emerged in part from the enactment of the Sixteenth Amendment which, by providing legislative authority to impose an income tax, created a growing need for expertise in taxation. More concretely, however, it also emerged from a personal feud between congressional and executive actors. As George K. Yin, who has written extensively on JCT, has chronicled,¹⁹³ Treasury Secretary Andrew Mellon proposed in 1924 to reduce surtax rates and Senator James Couzens responded with well-publicized critiques of the proposal. This dispute turned personal and culminated in a Senate investigation into the Bureau of Internal Revenue.¹⁹⁴ As Yin observes, the investigation awoke Congress to broader concerns about the drafting and implementation of tax policy.¹⁹⁵

In the Finance Committee’s hearing on the Couzens investigation, Senator Andrieus Jones lamented, with respect to tax oversight: “[T]he Congress ought not to be dependent absolutely on what may be reported to it by the officials and people engaged in the administration side alone.”¹⁹⁶ Arguing that the committee should have experts of its own, Jones said: “I am not an expert engineer; I am not an expert auditor; nor have I the time to do the work myself.”¹⁹⁷

With respect to drafting “recommendations for legislation,” Jones added: “[Congress] has had to rely solely upon recommendations which came from the Secretary of the Treasury. I

¹⁹¹ Id.

¹⁹² Processes, supra note 188. If these relate to publicly available legislative proposals, they will be made available only to members of Congress; if not, they will remain wholly confidential. Id.

¹⁹³ Yin, a former head of the JCT, has profiled the Committee and its staff in a number of excellent articles. See George K. Yin, *Crafting Structural Tax Legislation in a Highly Polarized Congress*, 81 J. L. & Contemp. Prob. 241, 251-54 (2018); George K. Yin, *How Codification of the Tax Statutes and the Emergence of the Staff of the Joint Committee on Taxation Helped Change the Nature of the Legislative Process*, 71 Tax L. Rev. 723, 725-26 (2018); George K. Yin, *James Couzens, Andrew Mellon, the “Greatest Tax Suit in the History of the World,” and the Creation of the Joint Committee on Taxation and Its Staff*, 66 Tax L. Rev. 787 (2013); George K. Yin, *The Joint Committee on Taxation and Codification of the Tax Laws* (Feb. 2016) (unpublished draft), <https://uschs.org/wp-content/uploads/2016/02/USCHS-History-Role-Joint-Committee-Taxation-Yin.pdf> [<https://perma.cc/XK36-J2DS>].

¹⁹⁴ Yin, *James Couzens*, supra note 193, at 814-838 (describing the escalating feud that included Mellon perhaps accessing Couzens’s confidential tax information for purposes of attacking him, Couzens proposing a Senate investigation that threatened to examine Mellon’s management of the Bureau of Internal Revenue, and Bureau officials attempting to coerce Couzens into paying \$10 million in alleged back taxes).

¹⁹⁵ Id. at 838-42 (explaining that “[d]espite its controversial origins, the Couzens investigation ended up playing an important role in defining the need for and functions of the JCT”).

¹⁹⁶ Id. at 848 (citing Revenue Act of 1926: Hearings Before the S. Comm. on Fin., 69th Cong. 213-14 (1926)).

¹⁹⁷ Id. (same). See also Michael A. Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 Tex. L. Rev. 819, 829-30 (1991) (noting the role of tax law complexity in giving rise to JCT).

submit that that is not a proper basis for the framing of legislation. You see only one side of it.” To avoid “becom[ing] mere rubber stamps” of the Bureau, Jones concluded: “We want an agency under our jurisdiction so we know what is going on.”¹⁹⁸

This desire for congressional autonomy from executive-branch tax analysis translated into the committee’s proposal for a “Joint Committee on Internal Revenue Taxation,” which was enacted into law by the Revenue Act of 1926.¹⁹⁹ The resulting institution, the JCT and its staff, quickly became essential to Congress’s tax process and remains so today. There is no “tax committee” in Congress; instead, JCT provides the tax expertise for the House Ways & Means Committee and the Senate Finance Committee, as well as any other committee working on tax-related issues in Congress. As one commentator remarked, its Chief at times has exerted “more influence [on tax legislation] than the President, the Secretary of State, the assistant secretary in charge of taxation, [and] the chairmen of the tax-writing committees in Congress--separately or combined.”²⁰⁰ The JCT staff now assists Congress at every step of the tax-related legislative process. It contributes legal, policy, behavioral, administrative, and economic analysis with respect to tax legislation.

Unlike most committee staff--but like the other offices of the congressional bureaucracy--JCT’s nonpartisan staff serves both chambers of Congress and aids all members and committees.²⁰¹ For example, JCT staff works with members and committees to develop tax policies and then collaborates with Legislative Counsel to translate these policies into statutory text.²⁰² It also supports the committees at markups, floor debates, and committee meetings, and drafts the legislative history for tax bills.²⁰³ It prepares summaries of the bill and its proposed amendments at each stage of the legislative process, provides hearing testimony and produces “hearing pamphlets” that summarize and analyze potential reforms,²⁰⁴ and describes the proposals before the committee at markup.²⁰⁵

If the legislation reaches either chamber floor, JCT staff provides an official revenue estimate for the legislation--a function analogous to CBO’s role on spending legislation.²⁰⁶ At

¹⁹⁸ Yin, James Couzens, *supra* note 193, at 849.

¹⁹⁹ Revenue Act of 1926, Pub. L. No. 69-20, § 1203, 44 Stat. 9.

²⁰⁰ E.W. Kenworthy, Colin F. Stan: A Study in Anonymous Power, in *Adventures in Public Service* 107-08 (Delia & Ferdinand Kuhn eds., 1964). For an argument that JCT enables Congress to perform powers meant for other branches and therefore may undermine separation of powers, see Livingston, *supra* note 197 (arguing that, along with its beneficial functions, JCT also gives Congress ability to perform executive or judicial functions of elaborating desired implementation details in legislative materials); Michael A. Livingston, *What’s Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of “Subsequent” Legislative History*, 11 *Am. J. Tax Pol’y* 91 (1994) (same).

²⁰¹ About Us--Overview, Joint Comm. on Taxation, <https://www.jct.gov/about-us/overview.html> (last visited Apr. 11, 2020).

²⁰² Staffer Interview.

²⁰³ Joint Committee Role in the Tax Legislative Process, Joint Comm. on Taxation, <https://www.jct.gov/about-us/role-of-jct.html> [<https://perma.cc/VA2D-DVJM>] (last visited August 1, 2019).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Congressional Budget Act of 1974 § 201(f), as amended by the Balanced Budget and Emergency Deficit Control Act of 1985 (commonly known as the Gramm-Rudman-Hollings Act); Congressional Budget Act of 1974, Pub. L. No. 93-344, § 308, 88 Stat. 297. These JCT estimates are calculated by reference to the CBO revenue baseline.

conference committee, the staff drafts the markup document, conference report, and revenue table.²⁰⁷ At various points in the legislative process, JCT also prepares distributional analyses of tax provisions,²⁰⁸ generates macroeconomic analysis of tax bills, and analyzes these bills' impact on GDP, unemployment rates, and the budget.²⁰⁹ It also ghostwrites committee reports for Ways and Means, Finance and other committees insofar as they relate to tax. JCT also supports the Senate Foreign Relations committee on treaties.

Outside the legislative process, JCT staff also conducts oversight functions, including ensuring that the IRS implements federal tax legislation in compliance with congressional intent.²¹⁰ JCT almost never holds hearings of its own but, rather, works with partisan staff on other committees. Certain aspects of policy work, we were told, “are viewed by other staff as JCT stuff You will hear, ‘this is for Joint Tax. Joint tax with go through it They talk with us about their policy. We put together bullet-point specs of the bill, then JCT and legislative counsel writes the bill.’”²¹¹

JCT staff also publishes the influential “Bluebook,” a document “written for the tax bar” and widely used by it, that provides explanations of the tax legislation enacted by each Congress.²¹² It also annually produces a description of the revenue provisions in the President’s most recent budget proposal,²¹³ a tax expenditures budget enumerating spending through tax subsidies,²¹⁴ and an annual overview of expiring tax provisions, among other materials.²¹⁵

Although the cost estimates in committee reports for tax bills may nominally be attributed to CBO, they are produced in practice by JCT staff. Staffer Interview.

²⁰⁷ About Us--Overview, *supra* note 201; see also Staffer Interview.

²⁰⁸ Joint Comm. Taxation, JCX-1-05, Overview of Revenue Estimating Procedures and Methodologies Used by the Staff of the Joint Committee on Taxation 4 (2005).

²⁰⁹ See Rules of the House of Representatives, 116th Cong., Rule XIII.8(b)-(c) (outlining the provision on “estimates of major legislation”); Rule XIII.3(h), *id.* at 26-27 (requiring JCT-prepared tax complexity analysis); Publications on Tax Expenditures, Joint Comm. on Taxation, <https://www.jct.gov/publications.html?func=select&id=5> [<https://perma.cc/D2JB-FYSG>] (last visited Aug. 1, 2019) (containing reports on Tax Expenditures); Staffer Interview (discussing provision of distributional analyses, budgetary analysis, and assessments of impact on GDP and unemployment).

²¹⁰ See I.R.C. §§ 8021-8023 (2018). This oversight work includes monitoring the IRS and Treasury for compliance with congressional intent, consulting with these agencies to explain such intent, reviewing unusually large tax refunds, collaborating with GAO to conduct studies of IRS implementation, and conducting specific reviews at the request of Members. *Id.* To this end, the Joint Committee has authority to hold hearings, issue subpoenas, and take testimony under oath. See *id.*

²¹¹ Staffer Interview.

²¹² Staffer Interview. In the development of the Bluebook, JCT staff consult with Treasury, the House Ways and Means Committee, the Senate Finance Committee, and the IRS. Staffer Interview.

²¹³ Description of the President’s Budget Proposals, Joint Comm. on Taxation, <https://www.jct.gov/publications.html?func=select&id=7> [<https://perma.cc/3JBA-P6L2>] (last visited Aug. 1, 2019).

²¹⁴ Pub. L. No. 99-177, § 273 (codified at 2 U.S.C. § 601(f) (2018)) (requiring CBO use of JCT estimates for revenue effects); Congressional Budget and Impoundment Control Act Of 1974, Pub. L. No. 93-344, § 301(e)(2)(E), 88 Stat. 297 (requiring tax expenditures budget); see also Joint Comm. on Taxation, JCX-55-19, Estimates of Federal Tax Expenditures for Fiscal Years 2019-2023 at 2, n. 4 (2019) (explaining JCT production of tax expenditures for CBO publication).

²¹⁵ See Expiring Provisions, Joint Comm. on Taxation, <https://www.jct.gov/publications.html?func=select&id=10> [<https://perma.cc/WJG8-PQHY>] (last visited Aug. 1, 2019) (containing publications of Expiring Provisions).

These published materials notwithstanding, JCT staff interacts with members and staff confidentially.²¹⁶ Much like CBO, JCT staff will develop revenue estimates for early tax proposals, and it will collaborate with members to assist them in developing bills to reach members' revenue goals. As part of its routine work, the staff receives approximately 6,000 to 7,000 requests from members each year, the majority of which are requests for revenue estimates, and all of which are confidential unless released by the member.²¹⁷ As JCT staff put it "revenue estimates are part of our routine work because revenue estimates are bound up in design of provisions; members care about budgetary effects. It's part of the policy design."²¹⁸

Under its statutory authorization (now located in the Internal Revenue Code),²¹⁹ JCT has statutory authority to appoint the Chief of Staff and additional staff.²²⁰ In practice, the Chief of Staff is selected alternately by the chair of the House or Senate committee with jurisdiction over tax issues (with the other chair assenting), and the Chief of Staff selects all additional committee staff.²²¹ Currently, JCT has sixty-nine staff members, and while its organic statute does not mandate that hiring of staff (or Chief of Staff) be conducted in a nonpartisan manner, in practice the JCT explicitly seeks "nonpartisan legal professionals" and economists when hiring.²²²

F. Offices of the Parliamentarians

"We are the procedural navigators. Our knowledge isn't replicated anywhere else."

The Parliamentarians' Offices are each chamber's "keeper of the precedents;" they have responsibility for collecting, maintaining, and knowing volumes of congressional procedural history.²²³ Even prior to the creation of the Parliamentarians' Offices, Congress relied on nonpartisan experts for procedural guidance. Throughout the nineteenth century, chamber clerks and messengers assisted members with floor procedures and provide point-of-order clarifications.²²⁴ The work of these informal advisors, combined with the procedural knowledge

²¹⁶ See Staffer interview ("[W]e treat all our work for members as confidential . . .").

²¹⁷ Joint Committee Revenue Estimation Process, Joint Comm. on Taxation, <https://www.jct.gov/about-us/revenue-estimating.html> [<https://perma.cc/4LGN-MFLB>] (last visited Aug. 1, 2019).

²¹⁸ Staffer Interview.

²¹⁹ 26 U.S.C. § 8001, et seq. (2018).

²²⁰ Id. at § 8004.

²²¹ John M. Samuels, The Joint Committee Staff -- From the Outside Looking In (unpublished draft at 5) (Feb. 2016) (on file with authors) (explaining that the "Chief of Staff is selected by the Chairman of the Joint Committee on Taxation," which rotates between the Chairmen of House Ways and Means and Senate Finance Committees, and that the "Chief of Staff is an experienced and highly respected tax lawyer or economist and is responsible for hiring and managing the rest of the JCT Staff").

²²² See Current Staff, Joint Comm. on Taxation, <https://www.jct.gov/about-us/current-staff.html> [<https://perma.cc/5LA8-555P>] (last visited Aug. 1, 2019) (providing a list of current staff members); About Us, Joint Comm. on Taxation, <https://www.jct.gov/about-us/overview.html> [<https://perma.cc/YMX7-KF4M>] (last visited Aug. 1, 2019) (describing itself as a nonpartisan committee); Staffer Interview (discussing the importance of candidates not touting partisan background).

²²³ Staffer Interview.

²²⁴ See James I. Wallner, Parliamentary Rule: The U.S. Senate Parliamentarian and Institutional Constraints on Legislator Behavior, 20 J. Leg. Stud. 380, 388 (2014) ("The clerk advised the presiding officer and individual members on parliamentary questions using compilations such as Gilfry's Precedents to assist them in this effort."); Parliamentarians of the House, Office of the House Historian,

of the members themselves, was sufficient for many decades to “keep some semblance of uniformity” in each chamber, as one Parliamentarian has put it.²²⁵

By the 1920s, however, the emergent committee system had channeled members away from the chamber floors, particularly in the House, and thus reduced their familiarity with their own procedures.²²⁶ The new institution of Parliamentarians’ Offices--created by the House in 1927 and by in the Senate in 1935--was to compensate for the diminution in member procedural knowledge and save members from having to master procedural rules.²²⁷ Freeing up members to focus more on substantive policymaking, it was thought, would empower Congress to better resist executive encroachments into such policymaking.²²⁸ Moreover, members wanted a professional parliamentarian to play an internal separating powers role--namely, to curb the increasing consolidation of procedural power in both chambers, as was occurring under Speaker Joseph “Boss” Cannon in the House,²²⁹ and under Vice President John Nance Garner in the Senate.²³⁰

The initial use of the Parliamentarian’s Offices to disperse power within Congress has continued to shape the offices’ work. For instance, the Parliamentarians’ adjudicatory function is separated from the legislative leadership; they will issue rulings that accord with chamber precedent even if at odds with leadership preferences. A distinct Parliamentarian’s Office for each chamber, accomplished in their separate establishment and continuing into the present, further disperses power in Congress. This separation is largely the product of an internal form of separation of powers mandated by the Constitution. Article I, Section 5 provides that “Each House may determine the Rules of its Proceedings.”²³¹ As a result, each chamber has amassed a distinct body of rules and precedents.

<https://history.house.gov/People/Office/Parliamentarians/> [<https://perma.cc/242K-5YUZ>] (last visited May 12, 2020) (describing the history of the Parliamentarians of the House); see also Floyd M. Riddick, Senate Parliamentarian 1947-1974, Oral History Interviews 61-62 (1978), http://senate.gov/artandhistory/history/resources/pdf/Riddick_interview_3.pdf [<https://perma.cc/J4SD-4LUG>] (noting that “in the 1800’s some clerk tried to keep the presiding officer advised as to the practices and precedents of the Senate”).

²²⁵ See Riddick, *supra* note 224, at 62.

²²⁶ See Gould, *supra* note 16, at 1964 (“The proliferation of committees meant that legislators began to spend less time on the floor, and, consequently, they developed less individual knowledge of parliamentary procedure.”); Staffer Interviews.

²²⁷ Gould, *supra* note 16, at 1964. (noting years of creation and that offices were created in response to Members “develop[ing] less individual knowledge of parliamentary procedure” than in prior years).

²²⁸ See Michael S. Lynch & Anthony J. Madonna, Procedural Uncertainty, the Parliamentarian, and Questions of Order in the United States Senate 11-12 (unpublished manuscript), http://spia.uga.edu/faculty_pages/ajmadonn/Parliamentarian.pdf [<https://perma.cc/9SNY-5Y8A>] (arguing that the long-term gains from avoiding inter-party procedural conflict were worth “sacrific[ing] the short-term partisan gains resulting from a favorable ruling”). For the argument that procedural and precedential sophistication itself helps buttress legislative power against executive encroachments, see Chafetz, *supra* note 32, at 271.

²²⁹ Gould, *supra* note 16, at 1963; see also Chafetz, *supra* note 32, at 288; David C. King, Turf Wars: How Congressional Committees Claim Jurisdiction 87 (1997).

²³⁰ See Timothy Noah, Romancing the Parliamentarian, Slate (Sept. 2, 2009, 7:10 PM), <https://slate.com/news-and-politics/2009/09/romancing-alan-frumin-the-senate-parliamentarian.html> [<https://perma.cc/MK4C-2EVK>] (noting that the Senate parliamentarian was “created in 1935 in revolt against John Nance Garner”).

²³¹ U.S. Const. art. I, § 5.

But the two Parliamentarians' Offices exist upon different legal foundations. The House Parliamentarian's Office is statutorily authorized by the Legislative Branch Appropriations Act for 1978.²³² By contrast, the Senate Parliamentarian's Office has never been given separate statutory authorization; instead it operates as a chamber appointment under the authority of the Secretary of the Senate, technically sitting beneath the Secretary.²³³ As a result, while federal statute provides that the House Parliamentarian will be appointed by the House Speaker and chosen "without reference to political affiliations," no comparable statute provides for the method of selecting the Senate Parliamentarian.²³⁴ In practice, however, both chambers have selected Parliamentarians via internal promotions of existing employees--the last three new Senate Parliamentarians, for example, each began the job with an average of over a dozen years' work experience in the office before assuming its leadership.²³⁵ The selection of the Senate Parliamentarian typically is made by the Senate Majority Leader.²³⁶ Although the Senate Parliamentarian has occasionally been removed for politically-motivated reasons,²³⁷ each successor has resisted partisan pressure,²³⁸ and the Senate Parliamentarian has in recent years survived partisan turnover.²³⁹

As the smallest of Congress's nonpartisan institutions, the Senate office currently employs just two attorneys and one clerk, and the House office employs six attorneys and two clerks. The House office maintains one subsidiary office, the Office of Compilation of

²³² Pub. L. No. 95-94 §115, 91 Stat. 653, 668 (1977) (providing that "House Resolution 502, Ninety-fifth Congress, relating to the establishment and administration of the Office of the Parliamentarian, shall be the permanent law with respect thereto").

²³³ 2 U.S.C. § 6531, et seq. (2018); see also Valerie Heitshusen, Cong. Research Serv., RS20544, *The Office of the Parliamentarian in the House and Senate 2* (2018) (explaining that "[o]rganizationaly, the office of the Senate Parliamentarian is within the office of the Secretary of the Senate"); United States Senate, Secretary of the Senate, https://www.senate.gov/artandhistory/history/common/briefing/secretary_senate.htm (last visited May 12, 2020) (explaining that "[a]mong other Senate floor staff who report to the secretary are the parliamentarian").

²³⁴ 2 U.S.C. § 287a (2018).

²³⁵ See Gould, *supra* note 16, at 2006; see also Brian Palmer, *So, You Want to Be a Parliamentarian?*, *Slate* (Mar. 18, 2010), <https://slate.com/news-and-politics/2010/03/how-to-become-the-senate-parliamentarian.html> (detailing the role and the selection of the Parliamentarian and providing work histories of various Parliamentarians).

²³⁶ See Andrea C. Hatcher, *Majority Leadership in the U.S. Senate 32* (2010) (outlining Majority Leader's selection of Parliamentarian and other Senate office heads).

²³⁷ See *id.* (describing the change of Parliamentarians that accompanied changes of party control in 1981, 1987, and 1995, and a change of Parliamentarian in 2001 at the behest of Majority Leader Lott that did not accompany partisan turnover and resulted from political frustrations with Parliamentarian rulings). See also Gould, *supra* note 16, at 2006; further discussing these removals); Kate Tummarello, *Senate Will See First Female Parliamentarian*, *Roll Call* (Jan. 30, 2012, 6:33 PM), <https://www.rollcall.com/2012/01/30/senate-will-see-first-female-parliamentarian/> (discussing the change of Parliamentarians by Lott).

²³⁸ See Stuart Altman & David Shactman, *Power, Politics, and Universal Health Care 317-20* (2011) (describing Parliamentarians installed after removal subsequently issuing rulings frustrating the installing majority).

²³⁹ See Gould, *supra* note 16, at 1997 n.233-34 (discussing Parliamentarians' survival of party turnover); *id.* at 42-43 (same).

Precedents.²⁴⁰ Both offices publish a number of materials related to chamber rules and precedents.²⁴¹

The Parliamentarians make procedural recommendations on consequential matters. First, they make committee referral decisions for each introduced bill--referrals that determine the allocation of power across congressional committees (and often a bill's chance of success). Committee referrals are high stakes and often hotly contested decisions within Congress.²⁴² The offices handle approximately ten thousand referrals over the course of each Congress.²⁴³

Second, the House Parliamentarian makes important determinations on the "germaneness" (and hence allowability) of proposed amendments to bills. Under the germaneness rule, an amendment must address the same subject as the matter being amended. While the rule itself is a single sentence, it has generated "thousands of precedents."²⁴⁴

Third, because budget reconciliation bills cannot be filibustered in the Senate, they are an increasingly popular mode of legislating in times of intense partisan gridlock. The Senate Parliamentarian has the authority through application of the so-called "Byrd rule" to determine which bills comply with six important budgetary rules that must be met to satisfy the conditions for reconciliation.²⁴⁵ Analogous fast-track procedures existing in current law also are providing fertile new battlegrounds for procedural battles.²⁴⁶

To advise Congress on the application of these and other rules, the offices perform both public and private functions. In their public-facing role, members of the office will advise the

²⁴⁰ See Parliamentarian of the House, U.S. House of Representatives, <https://www.house.gov/the-house-explained/officers-and-organizations/parliamentarian-of-the-house> <https://perma.cc/7G58-ZYCR> (last visited Aug. 8, 2019) (noting that the Office of Compilation of Precedents is a subsidiary of the Office of the Parliamentarian).

²⁴¹ The House Office publishes the House Rules and Manual; House Practice; Precedents of the U.S. House of Representatives; and How Our Laws Are Made. *Id.* The Senate Office periodically publishes Standing Rules of the Senate, and it also publishes Riddick's Senate Procedure. See Heitshusen, *supra* note 233, at 1.

²⁴² See generally King, *supra* note 229 (explaining how jurisdictional areas for committees are created and changed in Congress); Bressman & Gluck, *supra* note 1, at 728, 748; Staffer interview

²⁴³ See Gould, *supra* note 16, at 1969 (noting that the parliamentarians' offices "process all of the new bills that are introduced, totaling roughly ten thousand in each Congress").

²⁴⁴ Rules Of The House Of Representatives, 116th Cong., Rule XVI(7); see also Charles W. Johnson, John V. Sullivan & Thomas J. Wickham, Jr., *House Practice* 543–602 (2017) (discussing how the germaneness rule "has been interpreted through thousands of precedents since its adoption"); Staffer Interview.

²⁴⁵ 2 U.S.C. § 644 (2018). A provision is defined as "extraneous" if it:

- a) does not produce a change in outlays or revenues;
- b) produces an increase in outlays or decrease in revenues that does not follow the reconciliation instructions in the budget resolution;
- c) is not in the jurisdiction of the committee that reported the provision;
- d) produces changes in outlays or revenues that are merely incidental to the non-budgetary components of the provision;
- e) increases the deficit in any fiscal year after the period specified in the budget resolution;
- f) recommends changes to Social Security.

²⁴⁶ See Gould, *supra* note 16, at 1961 nn.45-47; see also 50 U.S.C. §§ 1544–1546 (2018) (describing special procedures for the War Powers Resolution); Ian F. Fergusson, Cong. Research Serv., RL33743, Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy (2015) (explaining how Congress has granted the President fast-track authority with trade agreements).

presiding officer of a chamber on the correct responses to procedural issues that arise in real-time on the chamber floor.²⁴⁷ In private, they also deliver advice through consultations with members and their staffs in advance of a bill’s consideration on the floor.

Procedural recommendations by the Parliamentarians’ Offices carry no inherent, binding authority over members. Chamber rules bestow the presiding officer in each chamber with the power to make procedural rulings--and custom alone dictates that, in making these rulings, the presiding officer follow the recommendations of the relevant Parliamentarian’s Office.²⁴⁸ Nonetheless, these recommendations are almost always followed by the presiding officer--and the presiding officer’s ruling, in turn, is almost never appealed or overturned by a chamber majority, especially in the House.²⁴⁹ (A notable, modern exception has occurred in the context of the “nuclear option,” which we further detail in the notes²⁵⁰ and in Part II).

G. Government Accountability Office (GAO)

“The committees of Congress have no way of getting down to the actual facts . . . we have no check at all”

The GAO is the “congressional watchdog.”²⁵¹ It is easily the largest of the nonpartisan institutions, with a whopping 3,000 employees (once as many as 15,000!) spread across its Washington, D.C. headquarters and eleven field offices.²⁵²

²⁴⁷ See Heitshusen, *supra* note 233, at 1 (noting that the parliamentarians may “convey their advice verbally to the presiding Representative or Senator--for example, when that Member needs to respond to a parliamentary inquiry or rule on a point of order”).

²⁴⁸ See Rules of the House of Representatives, 116th Cong., Rule I(5) (providing that “[t]he Speaker shall decide all questions of order, subject to appeal by a Member, Delegate, or Resident Commissioner”); Rules of the House of Representatives, 116th Cong., Rule XII(2) (discussing the procedures for receiving and referring bills, resolutions, and other matters); Floyd M. Riddick & Alan S. Frumin, *Riddick’s Senate Procedure*, S. Doc. No. 101-28, at 989 (Alan S. Frumin, ed., rev. ed. 1992).

²⁴⁹ See Email from Former Staffer to Abbe Gluck & Jesse Cross (Jan. 26, 2020) (on file with authors); see also Gould, *supra* note 16, at 1976 n.125, 2000.

²⁵⁰ The “nuclear option” is a method to require only a simple majority in the Senate for the appointment of federal judges. The procedural obstacle to this is Senate Rule XXII, which requires a two-thirds vote to modify chamber rules. Under the “nuclear option,” a complex series of procedural maneuvers can allow Senators to raise a point of order that reinterprets the rule as requiring only a bare majority for some or all such appointments, and to raise it on a question (*viz.*, a cloture motion) that, because non-debatable, itself requires only a simple majority. Through a ruling of the chair supporting this point of order, or a Senate vote to overturn a ruling of the chair, this reinterpretation is then upheld as binding precedent, even if in plain contradiction of the rule it ostensibly interprets. See Valerie Heitshusen, Cong. Research Serv., R44819, *Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief 1 (2017)* (explaining that the “‘nuclear option’ . . . require[s] actions arguably at variances with established principles underlying Senate procedure”); Li Zhou, *Senate Republicans Have Officially Gone “Nuclear” in Order to Confirm More Trump Judges*, Vox (Apr. 3, 2019), <https://www.vox.com/2019/4/2/18286991/senate-republicans-nuclear-option-rules> [<https://perma.cc/AL5X-Z87L>] (detailing how Senate Republicans have gone “nuclear” and changed Senate rules so they can confirm Trump nominees more expeditiously).

²⁵¹ About GAO: Overview, Gov’t Accountability Office, <https://www.gao.gov/about/> [<https://perma.cc/PA3B-DA6E>] (last visited Aug. 1, 2019).

²⁵² See U.S. Gov’t Accountability Off., GAO-18-1SP, *Serving the Congress and the Nation: Strategic Plan 2018-2023* 12 (2018), (noting that GAO is comprised of approximately 3,000 employees).

In the late nineteenth and early twentieth centuries, responsibility for the auditing and oversight of federal expenditures belonged to the Comptroller of the Treasury. In the debate over the legislation that ultimately would create the GAO, the bill's sponsor, Representative James W. Good, shared a story highlighting his concern for the Comptroller's executive-branch dependence:

[T]he President desired to use a certain appropriation for a given purpose, and was told by his Comptroller of the Treasury, who happened to be a little independent of this system, that he could not do it. But the President insisted and finally said, "I must have that fund, and if I can not change the opinion of my comptroller, I can change my comptroller." With less independence all comptrollers, no matter to which political party they owe allegiance, have been forced to face the same practical situation.²⁵³

In 1920, Congress passed a bill to create a new office to address the Comptroller's independence and relocate the auditing and oversight functions from the executive branch. President Wilson vetoed it, claiming the bill's provisions allowing Congress to remove the new Comptroller General through concurrent resolution or to impeach were unconstitutional. But members continued to voice displeasure with the Comptroller's relationship to the executive. Representative Good again explained:

We believe that the Committee on Appropriations and the committees on expenditures and on revenue that are investigating matters under their jurisdiction should have at all times something more than an ex parte statement with regard to expenditures. . . . Every bureau chief who is worth anything wants his department to grow So year after year they come and ask for new activities and additional money to perform those activities, and most frequently Congress and the committees of Congress have no way of getting down to the actual facts, except as we dig them out from an unwilling witness, a witness naturally unwilling because he wants the money, and in his attempt to get the money will cover up all the defects of his office, all the shortcomings of his organization, simply to get the appropriation for his department. We have no check at all upon this method.²⁵⁴

With the Budget and Accounting Act of 1921, Congress proposed a "General Accounting Office" to address these concerns. The statute charged the office to "investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds" and to "make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations,

²⁵³ 67 Cong. Rec. 982 (May 3, 1921) (statement of Rep. Good).

²⁵⁴ Id.

or expenditures.”²⁵⁵ The Act allowed for removal of the Comptroller by joint resolution or impeachment.²⁵⁶

Describing this proposed office, Representative Jo Byrns remarked: “The [proposed] comptroller general is the representative of Congress. He does not represent the Executive in any sense of the word, and the whole idea of the Budget Committee was to make him absolutely and completely independent of the Executive.”²⁵⁷ Representative Simeon Fess similarly explained: “This bill removes from the spending department the right to audit its own books”²⁵⁸ And the House committee report for the Act expressly discussed the office’s role in the separation of powers, observing that:

The Executive having the power to initiate the budget, certainly an independent audit is necessary to insure at all times a businesslike execution of the budget. . . . The creation of this office will, it is seen, serve as a check, not only on useless expenditures but will keep the bureau more keenly alive to a rigid performance of its duties and obligations.²⁵⁹

Nonetheless, to secure the signature of the new President, Warren G. Harding, the bill made compromises. GAO would also have some independence from Congress; its head, the Comptroller General, would be appointed by the President (with Senate advice and consent).²⁶⁰ The GAO’s creation ultimately came as part of a larger set of tradeoffs with the executive over power, including over the budget. The bill creating the GAO also required the President to submit an annual budget proposal (thereby entrusting budgetary planning to the President) and established the Bureau of the Budget, later renamed the Office of Management and Budget (thereby entrusting budgetary analysis to the President).²⁶¹ As one historian wrote, “Many congressmen, probably most, viewed the independent audit as the ‘quid pro quo’ for instituting an executive budget.”²⁶²

The GAO’s early work focused mostly on clerical review of “vouchers”--forms used by executive branch officials to document expenditure details.²⁶³ By the 1940s, however, GAO

²⁵⁵ The Budget and Accounting Act of 1921, Pub. L. No. 67-13 § 312, 42 Stat. 20.

²⁵⁶ This removal power would become central to the Court’s conclusion in *Bowsher v. Synar* that GAO belonged to the legislative branch. See 478 U.S. 714, 727 (1986) (“The critical factor lies in the provisions of the statute defining the Comptroller General’s office relating to removability.”).

²⁵⁷ 67 Cong. Rec. 1081 (May 5, 1921) (statement of Rep. Byrns).

²⁵⁸ 67 Cong. Rec. 977 (May 3, 1921) (statement of Rep. Fess).

²⁵⁹ National Budget System: Report of the Select Committee on the Budget, U.S. House of Representatives, to Accompany H. R. 30, at 7-8 (1921).

²⁶⁰ See Roger R. Trask, Gov’t Accountability Off., GAO/OP-3-HP, GAO History: 1921-1991, at 3 (1991) (“The congressional debate led to a consensus that the functions of the Comptroller General were semijudicial and that his independence, like that of judicial officials, should be assured.”).

²⁶¹ See *supra* notes 124-25 and accompanying text.

²⁶² Frederick C. Mosher, *The GAO: The Quest for Accountability in American Government* 49 (1979).

²⁶³ See Government Accountability Office, GAO: Working for Good Government Since 1921, at 2 (2001), <https://www.gao.gov/pdfs/about/GAO%20Working%20for%20Good%20Government%20Since%201921.pdf> [<https://perma.cc/JJ45-YBBK>] (“Much of the agency’s work centered on reviewing vouchers, which were forms used by executive branch administrative officials and disbursing officers to record information on spending. . . . This early period of GAO’s history often is called the voucher checking era.”).

supervised the creation and holistic auditing of accounting systems in administrative agencies.²⁶⁴ Congress also reasserted its control over the office, declaring it officially part of the legislative branch in 1945²⁶⁵ and giving it additional powers to oversee executive branch implementation of the budget.²⁶⁶ In 1946, GAO's workforce consisted of nearly 15,000 employees.²⁶⁷

By the 1970s, Congress had more than tripled the GAO's budget and, in the 1970 Legislative Reorganization Act, mandated that it carry out full-fledged "program evaluation."²⁶⁸ The office transitioned from hiring only accountants to hiring scientists, policy specialists, and technical experts to aid in its modern mission of monitoring the substance and effectiveness (rather than just the accounting) of executive programs.²⁶⁹ The 1990s' Republican Revolution significantly pared back GAO's budget and personnel, inaugurating its transition away from work initiated by GAO itself--and instead mostly toward congressionally initiated projects.²⁷⁰ However, GAO remains the largest nonpartisan congressional institution.²⁷¹

Present-day GAO oversees and evaluates federal programs and federal expenditures,²⁷² and undertakes traditional financial audits to ensure that agencies are spending funds in an

²⁶⁴ See Mosher, *supra* note 262, at 121-22 (noting that "GAO established offices within the various agencies to carry on what were then called comprehensive audits").

²⁶⁵ Reorganization Act of 1945, Pub. L. No. 263, § 7, 59 Stat. 613 (asserting that "the Comptroller General of the United States [and] the General Accounting Office . . . are a part of the legislative branch of the Government"); see also Mosher, *supra* note 262, at 104-05 (discussing that in enacting the Reorganization Act of 1945, "Congress not only exempted the Comptroller General and the GAO from presidential authority but also described them as 'a part of the legislative branch of the government'"); Trask, *supra* note 260, at 33 (describing how the Comptroller General strengthened GAO's relationships with Congress through the Reorganization Act of 1945). For the Court's confirmation that GAO belongs to the legislative branch, see *Bowsher v. Synar*, 478 U.S. 714, 727 (1986).

²⁶⁶ Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 206, 60 Stat. 812, 837 (authorizing and directing GAO to conduct "expenditure analysis of each agency in the executive branch . . . to determine whether public funds have been economically and efficiently administered and expended").

²⁶⁷ See *id.* at 124 (highlighting that "GAO had reached a peak of almost 15,000 in 1946").

²⁶⁸ Mosher, *supra* note 262, at 176.

²⁶⁹ See GAO: Working for Good Government Since 1921, *supra* note 263 at 18 ("In the 1970s, GAO started recruiting physical scientists, social scientists, computer professionals, and experts in such fields as health care, public policy, and information management."). The Gramm-Rudman-Hollings Act, passed in 1985, additionally gave the Comptroller authority to bind the President to reduce federal spending for deficit-reduction purposes, but the Supreme Court struck down this arrangement in *Bowsher v. Synar*, 478 U.S. 714 (1986).

²⁷⁰ See Anne Joseph O'Connell, Auditing Politics or Political Auditing (Univ. of Cal. Berkeley Pub. Law Research, Paper No. 964656, 2007) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=964656 (finding that, in the mid-1980s, GAO "shifted from mostly self-initiated work to congressionally driven work"); Paul Glasstris & Haley Sweetland Edwards, The Big Lobotomy, *Wash. Monthly* (Summer 2014), <https://washingtonmonthly.com/magazine/junejulyaug-2014/the-big-lobotomy/> ((discussing GAO budget cuts). See also *Walker v. Cheney*, 230 F.Supp.2d 51 (D.D.C. 2002) (challenging GAO's authority to issue demand letters of executive agencies); *Walker v. Cheney: District Court Decision and Related Statutory and Constitutional Issues*, Cong. Research Serv. (2004) (explaining role of Walker regarding GAO's continued demand letter authority); T. J. Halstead, "The Law: Walker v. Cheney": Legal Insulation of the Vice President from GAO Investigations, 33 *Pres. Stud. Q.* 635 (2003) (same).

²⁷¹ See Brookings, Vital Statistics on Congress tbl.5-8, 18 (2019) (listing the number of GAO employees at almost 3,000 while listing the Congressional Budget Office and Congressional Research Service as having 235 and 609, respectively). For staff numbers of all the nonpartisan congressional offices, see *infra* Table 1.

²⁷² Today, its primary work is conducting of "performance audits," whereby the Office examines whether government programs are meeting their objectives. Gov't Accountability Off., GAO at a Glance (2019),

efficient manner.²⁷³ A broader range of investigations also fall within the office’s ambit, including examining redundancies in federal programs and possible illegalities.²⁷⁴ GAO issues legal decisions addressing issues of appropriations law--i.e., the body of laws governing agencies’ use of and accountability for public funds.²⁷⁵ The majority of the GAO’s studies, investigations, and legal decisions now result from specific congressional requests, although it retains latitude to undertake audits, investigations, and legal decisions at its own behest.²⁷⁶ A recent, prominent example--at the center of efforts to impeach President Trump --was the GAO’s determination that OMB violated the Impoundment Control Act when it withheld Ukrainian military aid that had been appropriated by Congress. The decision stated: “GAO’s role under the ICA--to provide information and legal analysis to Congress as it performs oversight of executive activity--is essential to ensuring respect for and allegiance to Congress’ constitutional power of the purse.”²⁷⁷

GAO also submits policy recommendations for legislative action to Congress.²⁷⁸ These proposals can include recommendations that Congress enter into entirely new areas of legislation.²⁷⁹ The congressional solicitation of these recommendations is not simply pro forma--Congress regularly acts on the GAO’s recommendations. In 2018, for example, Congress adopted the GAO’s recommendations to direct the Veterans Health Administration to research overmedication, update the Department of Defense’s prescription drug buying programs, and develop “performance metrics” on border security for the Department of Homeland Security.²⁸⁰

https://www.gao.gov/pdfs/about/gao_at_a_glance_2019_english.pdf [<https://perma.cc/MQ84-MARX>] (noting that “GAO examines how taxpayer dollars are spent”); see also Gene L. Dodaro, The Work of the U.S. Government Accountability Office on Contemporary Issues, 26 Res. Acct. Reg. 132, 138 (2014) (noting that “[m]ost” GAO work is “performance audits in which we are trying to improve the effectiveness and efficiency of federal programs and activities”).

²⁷³ See Alissa M. Dolan, et al., Congressional Research Service, RL30240, Congressional Oversight Manual 82 (2014) (stating one of GAO’s goals is “auditing agency operations to determine whether federal funds are being spent efficiently and effectively”).

²⁷⁴ See *id.* (reporting GAO’s goals of identifying “opportunities to address duplication, overlap, waste or inefficiencies in the use of public funds” and “investigating allegations of illegal and improper activities”).

²⁷⁵ See Gov’t Accountability Off., GAO-06-1064SP, Procedures and Practices for Legal Decisions and Opinions (2006) (outlining procedures and practices for legal decisions and opinions of the Comptroller General).

²⁷⁶ See 31 U.S.C. § 717(b) (2018) (requiring the Comptroller General to evaluate government programs “on the initiative of the Comptroller General”); Staffer Interview (stating that, today, 95% of work is done at request of committee chairs and ranking members). In fiscal year 2018, GAO received requests from 90% of the standing committees. See Gov’t Accountability Off., GAO-19-403T, Fiscal Year 2020 Budget Request 27 (2019) (reporting standing committee percentage of requests).

²⁷⁷ Gov’t Accountability Off., B-331564, Office of Management and Budget--Withholding of Ukraine Security Assistance 9 (2020).

²⁷⁸ Reports & Testimonies: Recommendations Database, Gov’t Accountability Off., <https://www.gao.gov/reports-testimonies/recommendations-database/> (last visited Apr. 12, 2020) (collecting recommendations GAO makes to Congress).

²⁷⁹ See Staffer Interview (noting that “sometimes [the GAO] recommend[s] Congress to step into a completely new area”).

²⁸⁰ See Gov’t Accountability Off., GAO-19-1SP, GAO Performance and Accountability Report 2018, at 2-3 (2018) (listing the GAO recommendations that Congress adopted).

The head of GAO is still known as the Comptroller General and is still appointed by the President and subject to Senate confirmation,²⁸¹ now after a congressional commission recommends a list of at least three possible candidates to the President.²⁸² Although it is unclear whether the President is required to choose a name from the provided list, all three Comptrollers General selected since the institution of this process have been so selected.²⁸³ The Comptroller General is still considered a legislative office because only Congress can remove it,²⁸⁴ and the person heading this position serves a non-renewable term of fifteen years.

GAO's main work products are detailed reports, which typically range from 10 to 100 pages in length.²⁸⁵ The office also issues a "high-risk list," which notes federal programs that GAO believes are susceptible to significant financial loss.²⁸⁶ Among other things, it also publishes its "Red Book," an influential guide to appropriations law and rulings cited numerous times by the federal courts, including this past term by the Supreme Court.²⁸⁷ With respect to its analyses and methodology, the office's work is structured by transparency. GAO publishes nearly all of its reports and studies for public consumption--even if members of Congress would prefer the reports to be suppressed.²⁸⁸

GAO carries out a variety of additional responsibilities less immediately tied to the legislative process. Each year, it adjudicates thousands of bid protests--challenges to awards or solicitations of government contracts.²⁸⁹ Per the Federal Vacancies Reform Act, the Comptroller General notifies Congress, the President, and the Office of Personnel Management if an acting official has served longer than the 210-day allowance without official appointment and

²⁸¹ 31 U.S.C. § 703(a)(1) (2018).

²⁸² *Id.* at (2)–(3).

²⁸³ See Frederick M. Kaiser, Cong. Research Serv., RL30349, GAO: Government Accountability Office and General Accounting Office 21 (2008) ("On the two occasions since the 1980 enactment when a vacancy in the office of Comptroller General arose, Presidents Reagan in 1981 and Clinton in 1998 each selected a nominee from the initial congressional list."); About GAO: Comptroller General: Biography, Gov't Accountability Off., <https://www.gao.gov/about/comptroller-general/biography/> (last visited Apr. 11, 2020) (current Comptroller selected in 2010 from congressional list).

²⁸⁴ See *Bowsher v. Synar*, 478 U.S. 714, 727-729 (1986) (holding it to be a legislative office due to removal power).

²⁸⁵ For a list of publicly available GAO reports, see Reports & Testimonies: Overview, Government Accountability Office, <https://www.gao.gov/reports-testimonies/> [<https://perma.cc/L9AR-VW7E>] (last visited Apr. 3, 2019).

²⁸⁶ See Staffer Interview (noting GAO's issuance of "high-risk list, where [it] identif[ies] programs where they think Congress is at risk of high loss").

²⁸⁷ Its official name is Principles of Federal Appropriations Law. The Red Book, Gov't Accountability Off., <http://www.gao.gov/legal/red-book/overview> [<https://perma.cc/EDB9-C6K5>] (last visited Aug. 1, 2019). The Supreme Court has cited the Red Book at least five times. See, e.g., *Maine Community Health Options v. United States*, No. 18-1023, Slip. Op. at 4-5, -- U.S. -- (Apr. 27, 2020)(extensively citing Red Book throughout in dispute about appropriations, in addition to CBO interpretation); Bressman & Gluck, *supra* note 1, at 751 n.75.

²⁸⁸ See Staffer Interview (noting that most of the work of GAO is available to public). The only thing a member requesting GAO work can do is put a 30-day hold on the report. The only notable exceptions to this practice of transparency arise in the contexts of investigations and audits of intelligence community. *Id.*

²⁸⁹ Bid Protests at GAO: A Descriptive Guide, Gov't Accountability Office at 1, 4 (May 2018), <https://www.gao.gov/assets/700/691596.pdf> [<https://perma.cc/Z8UM-DK97>] (providing an overview of the bid protests); see also Gov't Accountability Off., GAO-18-510SP, Bid Protests at GAO: A Descriptive Guide, at 1 (2018) (noting that in the 2018 fiscal year, the GAO received 2,474 bid protests).

confirmation.²⁹⁰ Congress also periodically requests GAO views (in the form of legal opinions) assessing whether the Congressional Review Act applies to certain agency actions.²⁹¹

In fiscal year 2018, GAO “received 786 requests for work from the standing committees of the Congress, . . . issued 633 reports[,] and made 1,650 recommendations.”²⁹² Senior GAO officials testified ninety-eight times before forty-eight separate committees or subcommittees. According to GAO, agencies implemented seventy-seven percent of GAO’s recommendations in fiscal year 2018 (an increase from seventy-three percent in fiscal year 2016).²⁹³

GAO staff, in interviews, repeatedly volunteered that the office’s primary role continues to be safeguarding “Congress’s constitutional prerogatives.”²⁹⁴

H. MedPAC and MACPAC

“Each of them are incredibly necessary, so that you take the decision-making and put it in the hands of professionals and take it out of the hands of Congress and the lobbyists.”

MedPAC and MACPAC likewise had their origins in congressional distrust of executive-branch administration. Like JCT, MedPAC and MACPAC stand out as nonpartisan institutions designed to support Congress in areas of particular policy and financial import in which the executive had become dominant. In this sense, they perform a specialized version of the kind of work that GAO also sometimes performs in other subject-matter areas.

But the history of MedPAC and MACPAC also illustrates a more modern story of interest group encroachment as another, and growing, threat to congressional autonomy that the congressional bureaucracy may guard against. In the early 1980s, Congress grew distrustful of the Health Care Financing Administration (the predecessor to the Centers for Medicare and Medicaid Services that administered these federal health care programs in the executive branch).²⁹⁵ This distrust moved Congress to create two Medicare advisory commissions. The first, the Prospective Payment Assessment Commission (ProPAC), was created in 1983 to advise Congress on Medicare payment policies for hospitals.²⁹⁶ The second, the Physician Payment Review Commission (PPRC), was created in 1986 to assist Congress on Medicare payment

²⁹⁰ See GAO Performance and Accountability Report 2018, *supra* note 280, at 47 (stating that the Federal Vacancies Reform Act “requires the Comptroller General to report to the Congress, the President, and the Office of Personnel Management if the Comptroller General determines that an acting official is serving longer than the 210-day period”).

²⁹¹ See *id.* at 46 (“GAO is also sometimes asked to provide opinions on Congressional Review Act (CRA)-related issues”; see, e.g., Gov’t Accountability Off., B-330190, U.S. Department of Justice--Applicability of the Congressional Review Act to the Attorney General’s April 2018 Memorandum (2018) (assessing whether a GAO memorandum is “subject to review under CRA”).

²⁹² GAO Performance and Accountability Report 2018, *supra* note 280, at 5.

²⁹³ See *Id.* at 22 (“We fell short of our target of 80 percent for past recommendations implemented by 3 percentage points, at 77 percent”).

²⁹⁴ Staffer Interview.

²⁹⁵ See *supra* note 20 (discussing MedPAC as a product of rising congressional skepticism of HCFA).

²⁹⁶ See Social Security Act Amendments of 1983, Pub. L. No. 98-21, § 601, 97 Stat. 65 (creating the Prospective Payment Assessment Commission).

policies for physicians.²⁹⁷ In the Balanced Budget Act of 1997, Congress merged these advisory commissions into MedPAC--an entity that retained the label of “commission” but that, unlike most congressional commissions, had no statutory expiration date.²⁹⁸ Building on the model provided by MedPAC, Congress established MACPAC in the Children’s Health Insurance Program Reauthorization Act of 2009,²⁹⁹ and provided it with funding (and expand its mandate) under the Patient Protection and Affordable Care Act.³⁰⁰

Lobbyists were also a cause for concern. Describing the impetus behind the creation of MedPAC, CRS chronicled: “Congress [by creating MedPAC] was able to obtain its own source of objective expertise on Medicare payment policy and buffer Members of Congress from pressures from interest groups.”³⁰¹ The chair of the Finance Committee’s Subcommittee on Health Care, Senator Jay Rockefeller, said: “Each of [MedPAC and MACPAC] are incredibly necessary, so that you take the decision-making and put it in the hands of professionals and take it out of the hands of Congress and the lobbyists.”³⁰² The commissions continue to provide a counterweight to lobbyists; partisan congressional staffers view MACPAC as a resource to help them get “outside the lobbyist bubble,” for example, providing “an objective take” that can inform the staffers of whether interest group information is accurate.³⁰³

Interestingly, several of the interviewees who staff the older nonpartisan institutions likewise mentioned interest groups as a common modern problem for them too. We were told that, if not for their offices, lobbyists would have more power. One former member of the Legislative Counsel’s office recounted that office’s efforts to resist pressure from partisan staff to simply incorporate legislative language drafted by lobbyists rather than draft its own version

²⁹⁷ See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9305, 100 Stat. 82 (creating the Physician Payment Review Commission); see also Thomas R. Oliver, *Analysis, Advice, and Congressional Leadership: The Physician Payment Review Commission and the Politics of Medicare*, 18 *J. Health Pol., Pol’y & L.* 113, 142-152 (1993) (detailing PPRC establishment, role in 1989 Medicare reform, and role in providing congressional autonomy from executive).

²⁹⁸ On MedPAC as merging of ProPAC and PPRC, see Balanced Budget Act, Pub. L. 105-33, § 5022(c), 111 Stat. 251 (1997) (stating that “[t]he MedPAC shall be responsible for the preparation and submission of reports required by law to be submitted . . . by the ProPAC and the PPRC, and, for this purpose, any reference in law to either such Commission is deemed, after the appointment of the MedPAC, to refer to the MedPAC”). On congressional advisory commissions, see Straus & Egar *supra* note 21, at 3 (“Congressional commissions are established to perform specific duties, with statutory termination dates linked to task completion.”).

²⁹⁹ Pub. L. No. 111-3, § 1900(a), 123 Stat. 8.

³⁰⁰ Pub. L. No. 111-148, § 2801, 124 Stat. 119 (2010). The creation of MedPAC is viewed by some to have been more bipartisan in nature than the creation of MACPAC, see Staffer Interview, since MACPAC’s creation was a function of the extension of the Children’s Health Program and the enactment of the ACA, both “basically a partisan exercise.” *Id.* But the Commission has evolved to be viewed as more bipartisan since. *Id.*

³⁰¹ Cong. Research Serv., *supra* note 22. See also Oliver, *supra* note 297, at 149 (noting that “the commission’s own research and analysis made it possible to test the empirical claims of the interest groups with greater rigor” and that the “expertise of the PPRC commissioners and staff diminished the informational power of lobbyists”).

³⁰² John Reichard, *Make Way for MacPAC, the New Kid on Washington’s Health Policy Block*, The Commonwealth Fund (Aug. 2, 2010), <https://www.commonwealthfund.org/publications/newsletter-article/make-way-macpac-new-kid-washingtons-health-policy-block> [<https://perma.cc/8EDR-DF96>]; cf. Andrew B. Whitford & Gary Miller, *Above Politics: Bureaucratic Discretion and Credible Commitment* 65-66 (2016) (describing their “credible commitment” theory which outlines the conditions under which it is logical for political actors to visibly and convincingly delegate power to a bureaucracy insulated from the political actors’ influence).

³⁰³ Staffer Interview.

of the text. As noted earlier, the now-defunct independent technology agency, OTA, was founded at least in part for the same reasons³⁰⁴--interest group influence had become a more pressing problem for congressional autonomy over time.

MedPAC and MACPAC continue to advise Congress on the federal health programs within their purview.³⁰⁵ Like GAO, each commission also makes policy recommendations to Congress relating to the health care programs it monitors.³⁰⁶ These policy recommendations are made by the body of commissioners itself (as opposed to by its permanent professional staff), and also may be shared with executive agencies or states.³⁰⁷ The permanent staff also operates as a continual informational resource for Congress, producing explanations of federal programs (like CRS) and of real-world implementation experience (which may be based on data they proactively collect, like GAO).³⁰⁸ The professional staffs also provide Congress with technical feedback on policy ideas or proposed statutes (like JCT).³⁰⁹ Unlike the commissioners themselves, the permanent staff does not advance its own policy recommendations in the performance of its functions.³¹⁰

Like GAO, MedPAC and MACPAC also emphasize transparency.³¹¹ Both are required by statute to make their reports publicly available.³¹² Both also meet in public, provide opportunity for public comment at their meetings, and publish transcripts of their meetings.³¹³ As with Congress's other internal agencies, however, more informal technical feedback provided to congressional staffers is confidential--to the point that even commissioners have access only to aggregate data regarding the extent and nature of the feedback that professional staff provides to congressional members and staff.³¹⁴ Unlike GAO, the work that the Commissions perform in response to congressional requests does not dominate their workload; much of the Commissions' work continues to be self-initiated and proactive, anticipating issues that will be salient to Congress.³¹⁵

³⁰⁴ See Technology Assessment Act of 1972, Pub. L. No. 92-484, § 2(c), 86 Stat. 797.

³⁰⁵ Rick Mayes & Robert A. Berenson, Medicare Prospective Payment and the Shaping of U.S. Health Care 140 (2008) (noting that MedPAC counsels Congress in determining Medicare's payment levels); MACPAC, <https://www.macpac.gov/about-macpac/> (last visited Apr. 11, 2020) (MACPAC "provides policy and data analysis and makes recommendations to Congress, the Secretary of the U.S. Department of Health and Human Services, and the states on a wide array of issues affecting Medicaid and the State Children's Health Insurance Program")

³⁰⁶ Social Security Act §§ 1805(b)(1)(B), 42 U.S.C. § 1395b-6; *id.* at 1900(b)(1)(B), 42 U.S.C. § 1396-1.

³⁰⁷ Staffer Interview.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ While the members of MedPAC and MACPAC are appointed by the Comptroller General, they retain important autonomy from GAO: they exist under their own statutory authorizations, Social Security Act §§ 1805(c) & 1900(c), and while their funds must be requested in the same manner as those of GAO, §§ 1805(f)(1) & 1900(f)(1), they are appropriated separately, *id.*

³¹² Social Security Act §§ 1900(b)(7), 1805(b)(5).

³¹³ Public Meetings, MedPAC, <http://www.medpac.gov/-public-meetings-/january-2020-public-meeting> [<https://perma.cc/8PQT-EULD>] (last visited May 2, 2020); Public Meetings, MACPAC, <https://www.macpac.gov/meetings/> [<https://perma.cc/Z9QZ-3US9>] (last visited May 2, 2020).

³¹⁴ Staffer Interview.

³¹⁵ *Id.*

MedPAC and MACPAC each submit two annual reports to Congress reviewing the federal health programs.³¹⁶ If the Secretary of Health and Human Services submits a report to Congress, the commissions must submit written comments on the report to the relevant congressional committees,³¹⁷ and MACPAC also is statutorily encouraged to submit reports to committees commenting on agency regulations.³¹⁸ MACPAC also produces MACStats, which compiles data on the Medicaid program, annotated versions of the Medicaid and CHIP statutes, and a variety of issue briefs and fact sheets. Beyond submitting reports, the commissions communicate with Congress in various ways, including through testimony, briefings, and informal staffer conversations.³¹⁹

The two commissions share the same organizational structure. Each consists of seventeen commissioners who are appointed by the Comptroller General. These commissioners must be drawn from a representative mix of individuals and professions involved with the applicable federal health programs.³²⁰ This structure was meant to bring a variety of perspectives to Congress that it might otherwise lack.³²¹ The commissioners serve three-year terms, and their appointments are staggered.³²² The Comptroller General also designates the Chair and Vice Chair of each commission.³²³

In addition to the commissioners, MedPAC has a permanent staff of thirty individuals, including nineteen policy analysts;³²⁴ MACPAC has a permanent staff of twenty-nine employees, including fifteen analysts.³²⁵

As a point of contrast, the entire full-time staff of the Senate Health, Education, Labor, and Pensions Committee specializing in healthcare is seven staffers and three fellows.³²⁶ All analysts in MedPAC and MACPAC have advanced degrees.³²⁷

³¹⁶ See Social Security Act §§ 1805(b)(1)(C), 1805(b)(1)(D), 1900(b)(1)(C), 1900(b)(1)(D); see also *id.* at §1805(b)(2) (describing dimensions to be reviewed by MedPAC); *id.* at §1900(b)(2) (same for MACPAC); About MedPAC, MedPAC <http://www.medpac.gov/-about-medpac-> [<https://perma.cc/5BFT-DVFZ>] (last visited May 3, 2020) (describing these as “the primary outlet for Commission recommendations”). MedPAC’s reports review various statutorily-identified dimensions of the Medicare program, Social Security Act § 1805(b)(1)(C), and “contain[] an examination of the issues affecting” the program, *id.* at § 1805(b)(1)(D).

³¹⁷ Social Security Act §§ 1805(b)(3), 1900(b)(5).

³¹⁸ *Id.* at § 1900(b)(5)(b).

³¹⁹ About MedPAC, *supra* note 316.

³²⁰ Social Security Act §§ 1805(c)(1)-(2)(A), 1900(c)(1)-(2)(A).

³²¹ Staffer Interview.

³²² Social Security Act §§ 1805(c)(3)(A), 1900(c)(3)(A).

³²³ *Id.* at §§ 1805(c)(5), 1900(c)(5); Staffer Interview.

³²⁴ See Commission Staff, MedPAC, <http://www.medpac.gov/-about-medpac-/commission-staff> [<https://perma.cc/NSV9-KWJ3>] (last visited May 3, 2020) (listing the names of MedPAC Commission Staff).

³²⁵ See Commission Staff, MACPAC, <https://www.macpac.gov/about-macpac/commission-staff/> [<https://perma.cc/FN7H-SHCN>] (last visited May 3, 2020) (listing the names of MACPAC Commission Staff).

³²⁶ The seven includes someone on detail from FDA. The full-time fellows are paid for by outside organizations.

³²⁷ See *supra* notes 324-325 (listing degrees of analysts).

Table 1: Basic Overview

	Office Function	Year Created	Organic Statute	Number of Employees	Office Division/Specialization
House Legislative Counsel	Legislative Drafting	1918	Legislative Reorganization Act of 1970	56	By subject matter
Senate Legislative Counsel	Legislative Drafting	1918	Revenue Act of 1918	34	By subject matter
Law Revision Counsel	Managing & Organizing the U.S. Code	1974	Act of December 27, 1974	13	By task (codification bills versus updating titles)
Congressional Research Service	Legal & Policy Research	1915; 1946	Legislative Reorganization Act of 1946; Legislative Reorganization Act of 1970	~620	By subject matter (American Law Divisions analyzes number of legal issues)
Congressional Budget Office	Economic & Budgetary Analysis	1974	Congressional Budget and Impoundment Control Act of 1974	~250	By mode of economic analysis or subject matter
Joint Committee on Taxation	Tax Analysis	1926	Section 8001 <u>et seq.</u> , Internal Revenue Code of 1986	65	By mode of economic analysis or subject matter
House Parliamentarian	House Procedure	1927	Legislative Branch Appropriations Act of 1978	13	One subsidiary office (the Office of Compilation of Precedents)
Senate Parliamentarian	Senate Procedure	1935	No Statutory Authorization	3	
Government Accountability Office	Auditing & Oversight	1921	31 U.S.C. 701, <u>et seq.</u>	~3,000	By field office, task, and subject matter

II. The Bureaucracy's Features and Functions

Bureaucracy as a subject of study has captured the interest of theorists of government and law for decades. But that literature has focused primarily on executive branch agencies, not legislative agencies, and the legal arena has been dominated by leading scholars of administrative law and the presidency.³²⁸ We briefly lay out the standard account of the bureaucracy, what it looks like, and classic tradeoffs it entails. We then detail how the congressional bureaucracy intervenes in that account and, in substantial ways, diverges from it.

A. The Standard Account

The congressional bureaucracy substantiates the mainstream account in part, but also offers some important divergences. Max Weber's classic analysis of the bureaucracy describes the ideal-typical bureaucracy as containing a number of key elements, including specialization and training, hierarchical relations of authority and compensation, ideological impartiality, and continuous fulfillment of duties by fully committed employees.³²⁹ Weber's bureaucracies were staffed by appointed specialists with legal protections against arbitrary dismissal who received a regular salary, and who were expected to subordinate their personal or political goals to institutional ends.³³⁰

"Bureaucratic administration means fundamentally domination through knowledge,"³³¹ he wrote, while emphasizing that "the question is always who controls the existing bureaucratic machinery."³³² Because in the ideal form the work of the bureaucracy is wholly rational, "dehumanized," and thereby "eliminat[es] . . . all purely personal, irrational, and emotional elements,"³³³ it requires additional leadership to steer it toward larger moral goals--what Weber labels "charismatic" leadership.³³⁴ The political and the bureaucratic, as modern government experts have argued, are in a relationship of "conditional cooperation"; both need one another

³²⁸ For leading examples from the administrative law literature, see generally Anne Joseph O'Connell, *Bureaucracy At The Boundary*, 162 U. Pa. L. Rev. 841 (2014); Parrillo, *supra* note 36. For an early classic study of the presidential bureaucracy, see generally Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001). For more recent work, see generally Josh Chafetz, *Constitutional Maturity, or Reading Weber in the Age of Trump*, 34 Const. Comment. 17 (2019).

³²⁹ See Max Weber, *Economy and Society* 955-58 (Guenther Roth & Claus Wittich eds., 1978) (1922) (describing the characteristics of modern bureaucracy).

³³⁰ *Id.* at 960-63.

³³¹ *Id.* at 225.

³³² *Id.* at 224.

³³³ Max Weber, *Essays in Sociology* 216 (H. Gerth and C. Wright Mills eds., 1946).

³³⁴ See *id.* at 245-53 (Weber outlining his "sociology of charismatic authority").

and the top does not have complete control over the bottom.³³⁵ Debates over the need to preserve bureaucratic autonomy have been a key focus of modern scholars.³³⁶

Other work on bureaucracy has roots in rational choice theory, which has considered why Congress creates an executive branch bureaucracy and how it structures it.³³⁷ That work focuses mostly on Congress's own deficiencies as the reason why Congress turns to agencies--including limited time,³³⁸ lack of expertise,³³⁹ and desire to avoid accountability.³⁴⁰ The story is almost always one of Congress relinquishing policy control in the hope of receiving some countervailing benefit,³⁴¹ such as increased efficiency (and other time-related benefits),³⁴² high-

³³⁵ Hugh Heclo, *A Government of Strangers: Executive Politics, 193-94*, 232-35 (1977) (defining conditional cooperation); see also Chafetz, *supra* note 328, at 24 (“[P]olitics without bureaucratic pushback is no better [for Weber]. The politician can articulate ends, but she cannot effectuate them on her own, which is why modern governance ‘demands’ a bureaucratic element.”).

³³⁶ See, e.g., Chafetz, *supra* note 328 at 35 (arguing for the need to preserve bureaucratic autonomy); Kagan, *supra* note 328 at 2331-383 (arguing for greater presidential intervention in the bureaucracy).

³³⁷ In characterizing this work as belonging to the domain of rational choice theory, we follow Terry Moe's excellent overview of this literature. See Terry M. Moe, *Delegation, Control, and the Study of Public Bureaucracy*, 10 *Forum* 1, 3-10 (tracing the origin and evolution of the use of rational choice theory in works on the theory of bureaucracy).

³³⁸ See, e.g., Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Political Control of the Bureaucracy*, in 3 *New Palgrave Dictionary of Economics and the Law* 50-51 (Peter Newman ed., 1998) (noting the “delegation dilemma” whereby “leaders have limited time and information, and so cannot take informed actions to solve every problem” and therefore “employ others to work for them”); Jonathan Bendor, Amihai Glazer, & Thomas Hammond, *Theories of Delegation*, 4 *Ann. Rev. Pol. Sci.* 235, 258 (2001) (noting models which propose that “[d]elegation occurs in these contexts because the boss lacks the time or expertise to carry out [the] search”), Craig Volden, *Delegating Power to Bureaucracies: Evidence from the States*, 18 *J. L. Econ. & Org.* 187, 191 (2002) (citing scholarship on the hypothesis that “[l]egislators will delegate to bureaucrats when they do not have the time or ability to specify every detail of their legislative goals”).

³³⁹ See, e.g., David Epstein & Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* 78 (1999) (discussing delegation decisions as a weighing of costs where “the necessary information to make well-formed policy may be costly to obtain” for legislatures that lack expertise); John D. Huber & Charles R. Shipan, *Deliberate Discretion?* 2 (2002) (discussing the “well-known tension” politicians face in delegating to bureaucrats whose interests may differ but who “have knowledge and expertise that politicians lack”); Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 *Am. Pol. Sci. Rev.* 62, 62 (1995) (arguing that Congress chooses to delegate when the benefits of agency expertise in an area outweigh other potential costs). But see George A. Krause, *A Two Way Street: The Institutional Dynamics of the Modern Administrative State* 61 (1999) (noting that some have questioned whether information asymmetries always favor agents over principals).

³⁴⁰ See Morris Fiorina, *Legislative Choice of Regulatory Form*, 39 *Pub. Choice* 33, 46-47 (1982) (identifying the transfer of accountability as a key motivation for delegation); Alberto Alesina & Guido Tabellini, *Why Do Politicians Delegate?* 19 (NBER Working Paper No. 11531, 2005), <https://www.nber.org/papers/w11531> (same).

³⁴¹ See Moe, *supra* note 337 at 15-16 (observing theme in scholarship of the “trade-off between expertise and political control”). But see Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 *N.Y.U. L. Rev.* 1463, 1463 (2015) (arguing that agency delegation allows some individual legislators to enhance their power and control).

³⁴² See James W. Fesler & Donald F. Kettl, *The Politics of the Administrative Process* 318 (1991) (identifying the competing goals of democratic rule and bureaucratic efficiency); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *Can the Government Govern?* 271 (John E. Chubb & Paul E. Peterson, eds. 1989) (arguing that delegation improves policymaking expertise and economy of resources). This view goes back at least to Weber's *Theory of Social and Economic Organization*. Max Weber, *The Theory of Social and Economic Organization* 337 (trans. A.M. Henderson & Talcott Parsons, 1964) (“[T]he purely bureaucratic type of administrative organization . . . is, from a purely technical point of view, capable of attaining the highest degree of efficiency . . .”).

quality output (resulting, for example, from enhanced institutional memory³⁴³ or managerial experience³⁴⁴), greater political leeway to pursue additional policy achievement,³⁴⁵ or a convenient scapegoat that Congress can hide behind to avoid political blame for difficult decisions.³⁴⁶ A different kind of benefit identified by scholars both past and present is the potential for a strong bureaucracy not only to check excessive presidential power, but also to serve as a bulwark against undue corporate influence.³⁴⁷ But the most touted benefit is expertise.³⁴⁸ Expertise gained from the bureaucracy, the theory goes, outweighs the loss of political control.³⁴⁹

With respect to control, scholars emphasize Congress's ex post tools, such as oversight power,³⁵⁰ as well as ex ante means, such as initial decisions about the structure of the bureaucracy that can orient it toward Congress's political preferences or otherwise "stack the deck" in favor of Congress's preferred outcomes.³⁵¹ Some scholars have argued that the absence

³⁴³ See Herbert A. Simon, *Administrative Behavior* 218 (4th ed. 1997) ("[O]rganizations, to a far greater extent than individuals, need artificial 'memories.'").

³⁴⁴ See David Lewis, *The Personnel Process in the Modern Presidency*, 42 *Pres. Stud. Q.* 577, 589 (2012) (arguing that career officials have more experience in managing particular agencies and public sector organizations generally).

³⁴⁵ See Epstein & O'Halloran, *supra* note 339. Cf. Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633 (2000) (contrasting the policy achievements that bureaucracy enables in presidential versus parliamentary systems).

³⁴⁶ See William T. Gormley, Jr. & Steven J. Balla, *Bureaucracy and Democracy* 57 (2004) (identifying delegation of airline security as one area in which Congress has avoided blame for potential catastrophic outcomes); R. Kent Weaver, *The Politics of Blame Avoidance*, 6 *J. Pub. Pol.* 371, 386-87 (1986) (explaining how legislators can craft delegation to shift blame to agencies for future unpopular decisions); see also Epstein & O'Halloran, *supra* note 339, at 22-23 (discussing the various forms of "blame shifting" and "shifting responsibility" between the legislative and executive branches).

³⁴⁷ See James Landis, *The Administrative Process* 10-46 (1938) (defending agency-level bureaucratic autonomy as a tool to counteract executive and corporate power); see also Adrian Vermeule, *Bureaucracy and Distrust*, 130 *Harv. L. Rev.* 2463, 2469 (2017) ("Conditional on the failure of the original Constitution to provide an adequate counterbalance to corporate power, [Landis believed that] concentrated administrative power that also counterbalances swelling executive power is the attainable second-best").

³⁴⁸ See Moe, *supra* note 337, at 28 ("At the heart of these delegation models is the agency's advantage in expertise.").

³⁴⁹ *Id.* at 15-16 (noting that in trying "to strike the right balance between control and expertise[, i]t is clear . . . that total political control is an extreme solution that is usually not desirable").

³⁵⁰ See generally Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (2001); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 *Am. J. Pol. Sci.* 165 (1984) (focusing on how ex post congressional oversight can deter executive branch overreach). See also Moe, *supra* note 337, at 8 ("The early theory of congressional dominance was a theory of ex post control.").

³⁵¹ See Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 *J. L., Econ. & Org.*, 243, 261 (1987) (discussing how, "by controlling the details of procedures and participation, political actors stack the deck in favor of constituents who are the intended beneficiaries of the bargain struck by the coalition"); Bawn, *supra* note 339 at 62 (describing how Congress chooses procedures in order to effect their substantive policy preferences). These procedures often are thought to be designed specifically in the effort to insulate the bureaucracy from presidential influence, as that influence is assumed to undermine continued congressional control. See Aberbach, *supra* note 350; Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 *J. Institutional & Theoretical Econ.* 171, 192 (1994) (suggesting that certain outcomes are "program[med]" into congressional choices about agency structure).

of active congressional oversight is actually a beneficial sign that more efficient control mechanisms are in use, not that bureaucracy has been left adrift.³⁵²

More recent administrative law scholarship has also looked to separation of powers.³⁵³ Neomi Rao critiques administrative delegation as undermining separation of powers, in part because she concludes that Congress is unable to adequately police its delegations.³⁵⁴ Neal Katyal and Gillian Metzger have argued for a strong internal separation of powers within the executive branch itself--across and within agencies--to provide the kind of check on executive power that they worry Congress can no longer provide.³⁵⁵

Much of this work points to arguments that, instead of formal constitutional structures, or a strong Congress, or even Supreme Court doctrine, sub-constitutional strategies can and should be used to achieve the same checks and balances.³⁵⁶ Almost all of this literature, however, identifies those sub-constitutional strategies, including how powers are internally separated, as located in the structure and operations inside the executive branch.³⁵⁷

³⁵² See Whitford & Miller, *supra* note 302, at 42 (2016) (summarizing this contribution).

³⁵³ See John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1942-61 (2011) (summarizing this scholarship); see also Harold H. Bruff, The Incompatibility Principle, 59 Admin. L. Rev. 225, 225-26 (2007) (same); M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127, 1136 (2000) (remarking on “lively debate” among separation of power scholars and surveying the literature).

³⁵⁴ See, e.g., Rao, *supra* note 341, at 1488-1492 (arguing that Congress lacks the ability to police delegations due to factors such as regulatory speed, and that individual legislator incentives make Congress structurally unable to conduct policing).

³⁵⁵ See Neal K. Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314, 2318 (2006) (arguing that “[w]ithout that checking function, presidential administration can become an engine of concentrated power”); Gillian E. Metzger, The Interdependent Relationship between Internal and External Separation of Powers, 59 Emory L.J. 423, 457 (2009) (same).

³⁵⁶ Cf. Bruce Ackerman, Good-bye, Montesquieu, in *Comparative Administrative Law* 128, 131 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) (noting, while focusing on executive-branch actors, that “[a]lthough the traditional tripartite formula fails to capture distinctive modes of operation, these new and functionally independent units are playing an increasingly important role in modern government”); Ackerman, *supra* note 345 (arguing that executive-branch bureaucracy advances the values of functional specialization and of shielding law implementation from politics); Aziz Z. Huq & Jon D. Michaels, The Cycles of Separation-of-Powers Jurisprudence, 126 Yale L.J. 346, 391 (2016) (noting that there is a “complex ecosystem of intrabranch and entirely external actors not traditionally accounted for in the separation-of-powers literature”); Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2376-80 (2006) (“Instead of empowering the opposition party to oversee or check the majority party under unified government (or in addition to doing so), constitutional engineering might focus on insulating the administrative bureaucracy more fully from the partisan pressures of unified government. One way to ensure that government is never fully unified is to protect this branch from falling into the hands of the majority party--by keeping it independent of both parties.”). See also Whitford & Miller, *supra* note 302, at 27 (“[W]hen legislative goals are themselves destructive, then bureaucratic defiance . . . may actually prove to be a useful version of a Madisonian ‘check.’”); Landis, *supra* note 347 at 46 (“If the doctrine of the separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance. . . .”).

³⁵⁷ See, e.g., Metzger, *supra* note 355 at 428 (observing that “the focus of internal separation of powers scholarship is overwhelmingly on the Executive Branch”). For more examples of this executive branch scholarship, see Katyal, *supra* note 355 at 2318; Jon D. Michaels, Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers, 91 N.Y.U. L. Rev. 227, 229 (2016) (“[Traditional accounts] don’t capture the multidimensional nature of administrative control in which the constitutional branches (the old separation of

B. How the Congressional Bureaucracy Intervenes in This Account

The congressional bureaucracy, in many ways, reflects Weber's description of what an ideal bureaucracy looks like. Congress' internal institutions, too, share a fierce commitment to objectivity and nonpartisanship; are each marked by their particular form of highly specialized knowledge; have long-serving staff who, on the whole, are more educated and older than Congress's political staff; share a commitment to the long-term interests of Congress as an institution rather than the political question of the day; and respect Congress's rules and jurisdictional limits about the scope and extent of their powers. This comment from one of the longest serving counsels in Legislative Counsel captures the mood: "For Congress . . . it has been the curious marriage of the cool rationality that these auxiliary legislative institutions add (both from appearance as well as from reality) to the heat of raw politics that produces a stronger, more durable democratic system."³⁵⁸

Congress's bureaucracy also aligns with the classic account that a paramount role for the bureaucracy should be the provision of technical and subject-specific expertise. Much has been written about how Congress uses delegations to executive agencies to avoid blame.³⁵⁹ We extend those insights now to the legislative-branch bureaucracy. Members use the bureaucracy's expertise as a sword as well as a shield, including to shift blame.³⁶⁰ One interviewee explained: "There is a lot of value to having a memo on CRS letterhead in support of a position" because it "can be used as leverage over other members or the public."³⁶¹

But there are some critical differences from the Weberian model. One is the lack of political leadership at the top of any of our bureaucratic institutions; as detailed in Part I, the heads of these institutions generally are appointed without regard to partisan affiliation. In many

powers) and the administrative rivals (the new separation of powers) all compete with one another to influence administrative governance."); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post 9-11 World*, 94 Calif. L. Rev. 1655, 1689 (2006) ("[T]he most effective [national intelligence] structure probably would have redundant components as well as components that coordinate and centralize certain efforts.")"

³⁵⁸ Email from Former Staffer to Abbe Gluck & Jesse Cross (Jan. 26, 2020) (on file with authors).

³⁵⁹ See; Gormley & Balla, *supra* note 346, at 57 (noting that "[b]y placing responsibility for aviation security in the hands of DOT, Congress has distanced itself from culpability should there be a catastrophic breakdown in the system."); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 13-19 (1993) (arguing that delegation undermines democracy, liberty, and protection of the public by allowing legislators to shift blame to agencies); Gluck et al., *supra* note 1, at 1841; Kenneth R. Mayer, *Closing Military Bases Finally: Solving Collective Action Dilemmas Through Delegation*, 20 Leg. Stud. Q. 393 (1995); Weaver, *supra* note 346, at 386-87 ("Independent regulatory commissions are delegated responsibility for many of the most sensitive economic conflicts that pit one firm or industry's interests directly against others (e.g., mergers, rate-making."); Morris Fiorina, *Group Concentration and the Delegation of Legislative Authority* (Social Science Working Paper 112, California Institute of Technology, 1982) (manuscript at 19), <https://authors.library.caltech.edu/81967/> (explaining that delegation allows for blame avoidance by creating "political daylight between the legislators and those who feel the incidence of legislative actions").

³⁶⁰ See Staffer Interview ("Members find us useful—and that's kind of the key. Sometimes we can be useful and they can hide behind us.")

³⁶¹ Staffer Interview.

of the offices, the head is promoted from within and is a long-term staffer.³⁶² One explanation for this structural difference is likely that these agencies are internal, not external, to Congress. The political leadership that we typically associate with the executive branch agency head is replicated in the congressional bureaucracy instead by members and their political staffs themselves; they decide how to utilize the information the bureaucracy provides. Further, removal power of the office heads often remains with political actors: three serve at the pleasure of the House,³⁶³ one is removable by a resolution in either chamber,³⁶⁴ one by joint resolution for certain specified reasons or impeachment,³⁶⁵ and four lack specification of any removal power or protections.³⁶⁶

Importantly, the offices of Congress's bureaucracy are not all the same. Like the executive branch literature emphasizes, Congress's internal agencies, too, are a "they," not an "it."³⁶⁷ Some are policy experts, some are not. Some expertise they provide is confidential, some is public. Some offer their expertise before legislation is enacted, others' expertise comes in ex-post. Some expertise is only suggestive and can be discarded by members at will; others' is more constraining. Some nonpartisan offices in Congress have become the subject of political attention and, with visibility, criticism; others have escaped attention almost entirely. Members and staff interact directly with some offices; for others, they never see them and may not even know they exist. Each of these differences contributes to how Congress controls its own bureaucracy.

These descriptions illuminate two additional important distinctions from executive agencies at the outset: First, much of the congressional bureaucracy's work is not binding on Congress. In practice, the congressional bureaucracy's work-product is enormously influential--the budget score or a revenue estimate for legislation are good examples-- and Congress is generally required to obtain those numbers. But Congress does not necessarily have to act on the information. For instance, Congress can disregard the score and legislate outside of its financial targets. Congress can ignore research or drafted legislative language or decide not to act on a GAO audit, although the transparency and visibility of the congressional bureaucracy work-product on the ground makes at least some of it hard to ignore. Additionally, a good portion of Congress's bureaucratic work is not substantive (in the classic sense of devising policy for Congress), but rather involves the execution of policy ideas--whether converting them into legislative text, scoring their financial impact, referring them to the proper committees, organizing them in the U.S. Code, or providing research on their implications.

³⁶² Cf. Heclo, *supra* note 335 (noting that in executive branch paradigm agency heads typically are imported from without).

³⁶³ 2 U.S.C. § 282 (2018) (House Legislative Counsel); 2 U.S.C. § 285(c) (2018) (OLRC); 2 U.S.C. 287(a) (House Parliamentarian).

³⁶⁴ 2 U.S.C. § 601(a)(4) (2018) (CBO).

³⁶⁵ 31 U.S.C. § 732a(a)(1) (2018) (GAO).

³⁶⁶ Senate Legislative Counsel, Senate Parliamentarian, CRS, and JCT.

³⁶⁷ See Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 Yale L.J. 1032, 1036 (2011) ("Even casual observers of the administrative state recognize that agencies, like nearly all large organizations, are not unitary actors. They are fractured internally.").

This may be another reason that the congressional bureaucracy has not been the same source of public and academic angst as its executive counterparts. While there are exceptions--CBO numbers had a large impact on several failed efforts to repeal the Affordable Care Act,³⁶⁸ and the Parliamentarian's rulings generally constrained what the Senate could and could not do by reconciliation without filibuster³⁶⁹--the bureaucracy has generally seemed unthreatening to Congress.

In fact, the very comfort that Congress takes in its bureaucratic structure offers another important theoretical contribution. Congress uses its own internal structures, and especially its bureaucracy, to separate powers inside of it and not just external to it. Members voluntarily cede power from themselves, or their own party, by winding up the congressional bureaucracy and setting it in motion. The congressional bureaucracy's continued existence itself--because Congress can always abolish it--strongly suggests that Congress values the dispersal of power that its nonpartisan institutions accomplish.

As we noted in the introduction, because of these differences, the term "bureaucracy" is not quite perfect. Congress's "scaffolding" is another term we heard; or the "institutional staff," as opposed to the professional (political) staff. We also considered Congress's "Underbelly"--to connote an important support that is largely unseen. That term seemed too pejorative, although it captures the feel.

We begin the discussion below with the internal separation of powers point and for the remainder of the Part detail the different functions and constraints of our bureaucratic institutions. There are many different ways to provide nonpartisan legislative support.

1. Internal Separation of Powers

Part I of this article offered a new account of how the congressional bureaucracy contributes to the modern story of sub-constitutional separation of powers. The congressional bureaucracy adds a legislative component to that story that has been mostly overlooked. Congress's decisions to restructure itself via nonpartisan offices in the 1940s and 1970s were primarily motivated by its desire to check executive power and reassert itself in the lawmaking, budget, tax, and oversight processes. Its establishment of more subject-matter oriented independent agencies like MedPAC, MACPAC, and OTA came later, but likewise were responses to threats of usurpation that arose from Congress's perceived inability to effectively oversee the activities of parallel executive branch agencies (and later, lobbyists).³⁷⁰

³⁶⁸ See Dylan Matthews, The Republican War on the CBO, Vox (July 19, 2017, 9:00AM EDT), <https://www.vox.com/policy-and-politics/2017/7/19/15967224/congressional-budget-office-cbo-war-explained> [<https://perma.cc/P9UY-KBAF>] (detailing how CBO estimates "heavily affected congressional debates over the legislation" to repeal the Affordable Care Act, angering Republicans).

³⁶⁹ For a discussion of the "nuclear option" that provides workarounds of the typical methods of enforcing Parliamentarian determinations, see *supra* note 250.

³⁷⁰ See *supra* note 21 (detailing the separation-of-power origins of MedPAC, MACPAC, and OTA).

The congressional bureaucracy also deserves a place in the modern account of internal separation of powers. To the limited extent that scholars have remarked on how Congress decentralizes power internally, they have understandably focused on Congress's outward-facing structures of which members are a part and how Congress disperses power among those members, such as committee organization, minority and majority leadership, bicameralism, and legislative veto gates.³⁷¹

But Congress's internal institutions disperse lawmaking power within Congress even more, by removing swaths of it from members and political staff entirely. Simultaneously, the congressional bureaucracy prevents that power from being centralized in any single political office. Critically, in a context in which the president is not a threat, Congress is willing to set up *ex ante* processes that take power away from one kind of congressional actor or another in the interest of something greater.

Consider the alternatives. Congress could have built its bureaucracy simply by adding experts into existing centers of congressional power. As several of our interviewees have noted, this could have been accomplished by adding nonpartisan expert staff positions to the leadership staff, committee staff, or other partisan staff under members' direct control. Congress could have divided these positions between different staffs for majority and minority, with each side providing its own competing estimates, drafts, statutory re-organizations, and so on. Or it could have consolidated research, drafting, accounting, procedural, budget, and revenue expertise under the Speaker of the House and the Senate Majority Leader.

Instead, Congress dispersed these expert staffers across a collection of *nonpartisan* institutions whose mission is to serve the institution as a whole, including both parties--and that, because of their statutory authority and hardwiring into congressional procedures, cannot be removed by any one faction in Congress and often are not easily manipulated. In so doing, Congress decentralizes power within itself and removes a piece of the legislative process from partisan politics. As one high-level staffer put it: "We do not want the of power such as we see in house of commons under clerk or where everyone functions under a single secretary general."³⁷²

By way of comparison, Whitford and Miller's "credible commitment" theory posits that, in the executive branch, "[d]elegation to a (relatively neutral) professionalized bureaucracy serves as a natural conflict-resolution mechanism" when legislators are not certain in advance their first-choice policy outcome will always prevail. Delegation "is the natural form of

³⁷¹ See, e.g., Senate Committees, United States Senate, <https://www.senate.gov/artandhistory/history/common/briefing/Committees.htm> [https://perma.cc/X2V5-Y7QA] (last visited Aug. 1, 2019) ("Committee membership enables members to develop specialized knowledge of the matters under their jurisdiction."); see also Chafetz, *supra* note 32, at 285 (explaining how rise of standing committees "naturally tended toward a certain diffusion of power" especially when party leaders did not control appointments); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. Pa. L. Rev. 603, 651 (2001) ("State power is diffused among an enormous, and diverse, array of decisionmakers who populate what we call the branches. Within Congress: a house committee chair; a ranking member of a Senate committee; and the deputy whip in the Senate or the majority leader in the House."); Metzger, *supra* note 355 (noting committees and parties achieve dispersion of power).

³⁷² Staffer Interview.

compromise between competing political perspectives.”³⁷³ They further posit that bureaucrats “have no discretion when politicians are united. It is only when politicians are divided into conflicting factions that bureaucrats find a zone of independent authority.”³⁷⁴

The congressional bureaucracy fits the Whitford and Miller account, but only to a point. Congress does commit *ex ante* to processes (such as revenue and cost scoring), procedural rules, rules on committee jurisdiction, and impartial legislative drafters and codifiers that may not always give members their first-best policy outcomes, but at least ensure nonpartisan arbiters. But this happens regardless of whether one party is in control or when the Congress is bitterly divided. That kind of trust in the congressional bureaucracy is what makes this story different from the typical executive branch story. Epstein and O’Halloran’s oft-cited work on delegation likewise argues that a congressional majority is less likely to delegate to an executive branch under a different party’s control.³⁷⁵ But there is little evidence that utilization of the congressional bureaucracy changes depending on the composition of the government.³⁷⁶

For another comparison, Jon Michaels posits an administrative (executive) state safeguarded by the division of power “among three sets of rivals” that are legally authorized to contribute to administrative policymaking: namely, “politically appointed agency leaders . . . politically insulated career civil servants . . . and the broader public.”³⁷⁷ The congressional bureaucracy does not perfectly fit Michaels’ view either. The congressional bureaucracy, as the next section details, so steadfastly insists on nonpartisanship and displays such a total lack of interest in aggregating power that it is hard to describe it, in Michaels’ terms, as a “counterweight.”³⁷⁸ That said, its institutions do in a sense function like Michaels’ “heterogeneous institutional” agencies--operating alongside the political staff (what we may think of as a partisan bureaucracy), members, and interest groups all aiming to inform legislation.³⁷⁹

Indeed, several of our interviewees emphasized that in the absence of these internal congressional institutions, power would inure even further to partisan politics and interest groups. The bureaucracy is a counterweight to hyper-partisanship. It provides some optimism that Congress--even during the modern period of increasing centralization and partisanship--still preserves aspects of its process at the institutional and nonpartisan level. That is, Congress has chosen not to fully center power over the design, writing and analysis of legislation, in the hands of any one party or senior member.

Recall from our historical account in Part I that one motivating force for the creation of the Offices of the Parliamentarians was to curb the internal consolidation of procedural power

³⁷³ Whitford & Miller, *supra* note at 302, at 102.

³⁷⁴ *Id.* at 102.

³⁷⁵ See Epstein & O’Halloran, *supra* note 339, at 157 (“[N]on-executive actors . . . receive a greater percentage of delegations during divided government.”).

³⁷⁶ See Russell D. Renka, Party Control of the Presidency and Congress 1933-2010, <http://cstl-cla.semo.edu/rdrenka/ui320-75/presandcongress.asp> [<https://perma.cc/6XZM-UX9S>] (last visited Feb. 20, 2020) (providing statistics regarding party control of the presidency and Congress between 1933 and 2010).

³⁷⁷ See Michaels, *supra* note 357, at 234 (describing the division of power among the three groups).

³⁷⁸ *Id.* at 262.

³⁷⁹ *Id.* at 235.

under the House Speaker Joseph “Boss” Cannon.³⁸⁰ On the Senate side, the parallel motivation was concern regarding the centralized procedural control of Vice President John Nance Garner.³⁸¹ We have already noted how the creation of CBO initially threatened some Members of Congress by pulling power away from the then-influential finance-related committees and how CBO’s Alice Rivlin openly embraced this internal separation of powers function for the new office.³⁸² The 1970s expansion of Legislative Counsel was similarly aimed at democratizing drafting resources in Congress--an attempt described to us by one longtime staffer as “a movement of the Watergate class to gain more power” that gave rise to “things like the establishment of subcommittees to take power away from committee chairmen and increased support staff to help individual members” and not just committee chairs and leadership.³⁸³ The expanded funds dedicated to Legislative Counsel (as initially made in furtherance of the House office’s new 1970 charter) provided more drafting resources for individual members and committees alike.³⁸⁴

The GAO also has received similar attention, even beyond its role in the landmark separation-of-powers case of Bowsher v. Synar. Studies have chronicled the role that GAO has played in preserving the balance of power between political parties,³⁸⁵ between Congress and the executive branch,³⁸⁶ and between itself and partisan congressional actors.³⁸⁷

The political (partisan) staffers we interviewed for this study corroborated these points regarding the decentralization of internal power and elaborated on them. They emphasized that GAO was valued inside Congress for giving equal attention to the work of the majority and minority parties. Many opportunities and resources in Congress are allocated according to party control and/or seniority. But when it comes to GAO, one party does not receive more GAO

³⁸⁰ Gould, *supra* note 16, at 1963; see also King, *supra* note 229, at 87 (1997) (“This revolt [against Speaker Cannon] is pivotal in the institutionalization of the parliamentarian as an institutional guardian.”).

³⁸¹ See Noah, *supra* note 230 (discussing John Nance Garner’s influence on the creation of the Senate Parliamentarian office).

³⁸² Congressional Budget Office Oversight, Hearing before S. Comm. on the Budget, 94th Cong., 10 (1976); *supra* note 176 and accompanying text.

³⁸³ Staffer Interview.

³⁸⁴ Legislative Branch Appropriations for Fiscal Year 1974: Hearings Before a Subcommittee of the Committee on Appropriations for the House of Representatives, 93rd Cong. 1003-07 (1974) (testimony of Ward M. Hussey).

³⁸⁵ See Levinson & Pildes, *supra* note 356, at 2370-71 (observing that minority parties use GAO to protect their prerogatives in times of unified government).

³⁸⁶ See Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* 207 (1982) (telling story of dual creation of OMB and GAO that focuses on these institutions arising from separation-of-powers tradeoffs between the branches); Levinson & Pildes, *supra* note 356, at 2370-71 (citing Anne Margaret Joseph, *Political Appointees and Auditors of Politics: Essays on Oversight of the American Bureaucracy*, at 209-10 (May 2002) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard University John F. Kennedy School of Government Library)) (reporting that Congress uses GAO to protect its institutional prerogatives against the executive branch in times of unified government); see also Frederick C. Mosher, *A Tale of Two Agencies: A Comparative Analysis of the General Accounting Office and the Office of Management and Budget* 2-3 (1984) (comparing the GAO and the Office of Management and Budget to highlight that these agencies “are the most striking yet institutional expressions of the separation between the executive and legislative powers in the national government”).

³⁸⁷ See O’Connell, *supra* note 270 (manuscript at 5-6) (noting that the GAO is affected by the legislature’s party affiliation and faces “political constraints”).

attention simply because it is in power. It has been found that minority parties have leveraged this power to protect their prerogatives even in times of unified government.³⁸⁸

We were also told by partisan staff that the Parliamentarians and Legislative Counsel help to preserve minority party power by assisting with drafting motions (a resource provided equally to both parties, on all sides of an issue), and by making sure the minority understands its power and uses it properly.

In a different vein, another set of staffers emphasized that CRS was a particularly “democratic” bureaucracy: whereas CBO, or even Legislative Counsel, must prioritize the work of committee chairs and leadership (equally across the two parties) when Congress is particularly busy, CRS has the obligation to answer every call with equal attention. For a junior member of Congress, particularly in the House, CRS can serve as a critical research arm for that member’s office that enhances her power and lawmaking ability. MedPAC and MACPAC can serve a similar function for junior members.³⁸⁹

C. Different Types and Structures of Congressional Bureaucratic Expertise

There are many ways to be nonpartisan bureaucrats. In structuring its bureaucracy, Congress demanded specialization and nonpartisanship of all of its bureaucratic institutions. But Congress differentiated across the institutions in other aspects, making tradeoffs across structural elements. Should a nonpartisan agency’s work be authoritative or permissive? Confidential or transparent? Policy neutral or offering a conclusion? At what point in the legislative process should the bureaucracy be engaged? At least some of these tradeoffs are relevant to considerations about the structures of executive branch agencies as well. And the tradeoffs contribute to theories of oversight. One way Congress can control its bureaucracy is if it does not have to use its inputs and assessments. Other offices in the congressional bureaucracy have mandatory inputs but are governed by transparency rules that allow Congress to police that work. Congress also votes on statutes after most (but not all) of the congressional bureaucratic input. That is of course another significant control. The rest of this Part highlights the key tradeoffs and features of Congress’s bureaucracy.

1. Nonpartisanship

“You’d never go down this road if you had a partisan bone in your body”

All nine of the bureaucracy offices emphasized nonpartisanship as the defining characteristic of their work. One interviewee described nonpartisanship as the “core of their legitimacy.”³⁹⁰ Two heads of offices told us that nonpartisanship is what makes their offices “valuable” to Congress.³⁹¹ And a deputy head of one of the offices remarked:

³⁸⁸ See *id.* (citing Anne Margaret Joseph, *supra* note 386, at 209-10).

³⁸⁹ Staffer Interview.

³⁹⁰ Staffer Interview.

³⁹¹ Staffer Interview.

The nonpartisan nature of the work infuses every conversation we have here every day, so both sides of the aisle know no matter who calls us first to ask the question we give the same answer. It is so ingrained in everything we do here every day. Nonpartisan is the core of what we are.³⁹²

This nonpartisanship is anchored in a patchwork of legal requirements. Six of the institutions (out of nine, with single-chamber offices counted individually) have statutory requirements that their office head be appointed without regard to political affiliation.³⁹³ Six have statutory requirements that their staffs be so appointed.³⁹⁴ Statutory rules for eight provide a role for political actors in the appointment of office heads, but CRS's statute requires the head be appointed by a non-elected actor, the Librarian of Congress.³⁹⁵ Similarly, while statutory rules detail a potential role for political actors in staff hiring for five of the institutions, they explicitly omit such a role for three such institutions (and are silent for one).³⁹⁶ GAO also pointed toward the absence of political appointees below the Comptroller General, for example, as a feature that contributed to the GAO's nonpartisan culture.³⁹⁷

Culture and mission commitment also contribute. All of the bureaucratic institutions reported that, despite statutory requirements or lack thereof, they hire and promote on a nonpartisan basis. The Senate Office of the Legislative Counsel is typical. It lacks statutory protections for nonpartisanship in staff hiring, yet it reports on its website that “[n]o change in personnel of the Office has resulted from any change in political control of the Senate.”³⁹⁸ Prior

³⁹² Staffer Interview.

³⁹³ The six that do are: Senate Legislative Counsel; House Legislative Counsel; OLRC; CRS; CBO; House Parliamentarians. Those that do not are: JCT; Senate Parliamentarians; and GAO. For the relevant statutory provisions, see *supra* Part I. In practice, these statutory rules have not uniformly protected against appointments being perceived, on rare occasion, as politically motivated. See Joyce, *supra* note 147, at 38-42 (describing the widespread perception that CBO Directors appointed in 1995 and 1999 were selected partly for partisan reasons, and the partisan disappointment when those Directors maintained the office's nonpartisan independence from partisan goals).

³⁹⁴ They are: House Legislative Counsel; OLRC; CBO; House Parliamentarians; CRS; GAO (must hire based on merit and fitness).

³⁹⁵ Those appointed by House Speaker: House Legislative Counsel; Senate Legislative Counsel; House Parliamentarians. Appointed by Speaker Pro Tempore: Senate Legislative Counsel. Appointed by House Speaker and Senate President pro tempore, with recommendations from Budget Committee: CBO. Appointed by President, with Senate confirmation, after congressional submission of recommendations: GAO. Appointed by Joint Committee: JCT.

³⁹⁶ Those with statutorily defined roles for political actor: Senate Legislative Counsel (subject to President pro tempore approval); House Legislative Counsel (subject to Speaker approval); Law Revision Counsel (with approval of Speaker); JCT (power to hire lodged in Joint Committee); House Parliamentarian (with Speaker approval). Those without a role: CBO (power vested in CBO Director); CRS (power vested in Librarian of Congress, upon Director's recommendation); GAO (power in Comptroller, or in Inspector General for Inspector General staff). Statute is silent for Senate Parliamentarian's Office.

³⁹⁷ Cf. Staffer Interview (describing the nonpartisan nature of GAO). Anne Joseph O'Connell has modeled the empirical incentives for and reality of nonpartisanship among GAO employees. See O'Connell, *supra* note 270.

³⁹⁸ Careers, Office of the Legislative Counsel, <https://www.slc.senate.gov/Careers/careers.htm> [<https://perma.cc/G5CF-P7QH>] (last visited Aug. 8, 2019).

research has found that JCT,³⁹⁹ GAO,⁴⁰⁰ and the Senate Parliamentarian's Office⁴⁰¹--each of which lacks statutory protections for nonpartisanship in the selection of office heads--nonetheless all appoint leadership and hire without regard to partisanship, and some nonpartisan congressional offices also explicitly avoid hiring individuals who have previously done partisan work.⁴⁰² Self-selection also happens on the employee side at the hiring stage, as the positions typically lack appeal for individuals with strong partisan inclinations. As one staffer in a Parliamentarian's Office remarked: "You would never go down this road if you had a partisan bone in your body."⁴⁰³

Office culture further cultivates the view that the primary allegiance is to the institution of Congress as a whole. We see similar descriptions in the general bureaucracy literature.⁴⁰⁴ The head of one office said:

There could be three senators in my office arguing about something, but there is always a fourth entity [in that meeting] and [that is the Congress as] an institution. You are trying to be the guardian or steward of its unseen needs and traditions . . . [t]rying to take a long view, when most [people] coming in are just trying to get something done for today.⁴⁰⁵

In fact, we were told that this steadfast commitment to nonpartisanship is what saved the offices of the House Legislative Counsel and Parliamentarian in 1995, when Speaker Newt Gingrich and the new Republican majority revamped many other congressional operations. One longtime former nonpartisan staffer said:

³⁹⁹ Notably, even though JCT staff are nested within a committee, all sources agree that they are "assiduously nonpartisan." Victor Fleischer, *The State of America's Tax Institutions*, 81 *J. L. & Contemp. Probs.* 7, 21-22 (2018); see also Yin, *Tax Legislation*, supra note 193, at 265 (reporting that "JCT staff is increasingly viewed like staff of a legislative support organization (such as CBO, CRS, and GAO) rather than committee staff"); Yin, supra note 18, at 2298 ("Unlike most committee staffs . . . the JCT staff is not affiliated with any party and is not separated into majority and minority party staff members.").

⁴⁰⁰ While the President (a political actor) appoints the Comptroller General, early heads of the GAO made it clear that their watchdog role was apolitical, and that norm persists today. See Roger R. Trask, *Defender of the Public Interest 49-65* (1st ed. 1996) (emphasizing the independence of the first Comptroller General, John R. McCarl, despite the political nature of his appointment to the position).

⁴⁰¹ Gould, supra note 16, at 2006 ("[A]lthough removals of the parliamentarian have at times been partisan in nature, appointments have always been promotions from within the office or restorations to office of past parliamentarians, rather than installations of an outside party loyalist.").

⁴⁰² See, e.g., *Careers*, supra note 398 ("Since the Office provides technical legal services on a nonpolitical and confidential basis, and must be impartial in appearance as well as in fact, active public participation in political matters is regarded as a disqualification for appointment or retention."); Staffer Interview ("We are nonpartisan. In hiring, if someone says 'I'd like to work for you because I worked on so-and-so's campaign and really want to advance these ideas,' we reject that application.").

⁴⁰³ Staffer Interview.

⁴⁰⁴ See, e.g., Alberto Alesina & Guido Tabellini, *Bureaucrats or Politicians? Part II: Multiple Policy Tasks*, 92 *J. Pub. Econ.* 426, 434 (2008) (noting that bureaucrats focus more on long term consequences of policies because they are often "appointed for longer than electoral cycles, precisely to avoid short-termist policies" and because "they care about their professional reputation in the eyes of their peers").

⁴⁰⁵ Staffer Interview.

I attribute this to (1) the institutions being neutral and having worked with, and in support of, the minority in the House as well as the majority--[we] had personally worked extensively with Gingrich and other political generals--less so with their newly enlisted and drunk with power troops; and (2) the leadership observation that the revolution reflected in the 1994 election would be incapable of carrying out their mandate without the professional resources of the legislative quartermaster corps who had the logistics to actually produce legislation.⁴⁰⁶

This commitment to neutrality was not sufficient to protect all nonpartisan offices-- some offices had their budgets or functions reduced at this time,⁴⁰⁷ and OTA was eliminated.⁴⁰⁸ For OTA, a combination of factors overwhelmed the institution-preserving function of neutrality--including Gingrich's desire to centralize power,⁴⁰⁹ growing anti-science sentiments among some Republican factions,⁴¹⁰ a desire for a highly-visible display of slashing the federal government,⁴¹¹ and lingering resentment over OTA assessments of the "Star Wars" program.⁴¹² For Legislative Counsel and the Parliamentarian, however, prior displays of neutrality proved vital to the cultivation of this support--and, consequently, to their survival both in that political transition, and into the current hyper-polarized and increasingly centralized environment. This supports George Yin's suggestion that, in at least some instances, the neutral stance of the bureaucracy is key to preserving its power and influence.⁴¹³

⁴⁰⁶ Email from Former Staffer to Abbe Gluck & Jesse Cross (Jan. 26, 2020) (on file with authors).

⁴⁰⁷ See R. Eric Petersen and Ida A. Brudnick, Cong. Research Serv., RL33724, *Administrative Issues Related to a Change in Majority in the House of Representatives* (2006) ("[T]he incoming majority in the last weeks of 1994 reportedly informed managers of several House administrative and support offices that they were dismissed."); Yin, *Tax Legislation*, supra note 193, at 261-65 (discussing increased role of partisan staff in tax policy development, at expense of JCT, beginning in early 1990s); Glastris & Edwards, supra note 270 (describing Gingrich successfully eliminating OTA and cutting staff in other congressional service agencies, including GAO and CRS); supra note 270 & accompanying text (discussing shift in GAO work).

⁴⁰⁸ On OTA's strategy of neutrality, see Bruce A. Bimber, *The Politics of Expertise in Congress: The Rise and Fall of the Office of Technology Assessment* 40-71 (1996). Building on Bimber's study, George Yin has noted that OTA's neutrality was complicated: the office's founding structure arguably did not promote nonpartisanship, thereby requiring a later pivot to a "strategy of neutrality" that, while more successful in establishing the office's nonpartisanship, limited its influence. See Yin, supra note 18, at 2299-2300 & 2311-2315.

⁴⁰⁹ See Chris Mooney, *Requiem for an Office*, 61 *Bull. Atomic Scientists* 40, 44 (2005) (documenting that some attributed OTA's closure to Gingrich not wanting a voice within Congress that might contradict his own); see also Bruce Bartlett, *Gingrich and the Destruction of Congressional Expertise*, *N.Y. Times* (Nov. 29, 2011, 6:00 AM), <https://economix.blogs.nytimes.com/2011/11/29/gingrich-and-the-destruction-of-congressional-expertise/> ("Mr. Gingrich's real purpose was to centralize power in the speaker's office, which was staffed with young right-wing zealots who followed his orders without question.").

⁴¹⁰ See Mooney, supra note 409, at 45 (discussing the linkage between OTA closure and "the science politicizing bonanza of the Gingrich Congress").

⁴¹¹ See id. at 44 (explaining how "the new Congress wanted to prove its willingness to make budget cuts in its own house," and citing Representative Amo Houghton saying that "they were just looking for sort of symbolic targets").

⁴¹² See id. at 43 (explaining the dispute over Star Wars assessments that led some to describe OTA's closing as "Reagan's revenge").

⁴¹³ Yin, supra note 18, at 2311-2312.

2. Specialization and Long Tenure

“A real cadre of people with institutional loyalty and knowledge”

Specialization is another commonly touted bureaucratic feature in general.⁴¹⁴ And the congressional bureaucracy’s institutions are likewise marked by a very high degree of it. The bureaucracy was created precisely because Congress was desperately in need of that expertise. Today, the institutions’ size gives the offices of the congressional bureaucracy capacity for heightened specialization: GAO has more than 3,000 employees,⁴¹⁵ CRS around 620,⁴¹⁶ CBO 250,⁴¹⁷ Legislative Counsel more than 90,⁴¹⁸ and JCT 65.⁴¹⁹ By contrast, the partisan committee with the largest staff in the House is the Appropriations Committee with 119 employees;⁴²⁰ in the Senate it also is the Appropriations Committee, with 133 employees.⁴²¹ The average size of committee staff in both chambers is about 58.⁴²²

This capacity enables impressive output. GAO has produced thousands of sophisticated analyses on topics from energy (2,593 reports) to health care (5,105) to space policy (920).⁴²³ GAO was directed to conduct over forty studies just by the Dodd-Frank Act, for example.⁴²⁴ CRS estimates that every year it fields over 60,000 informational queries from members on “whatever is hot” at the moment.⁴²⁵ In 2018, CBO produced 947 formal cost estimates, responded to thousands of informational requests, and provided almost 150 scorekeeping estimates for appropriations bills.⁴²⁶ JCT emphasized that the committee staff it supports has much smaller staff than JCT itself. The Ways & Means Committee staff, for example, has only

⁴¹⁴ See Leonard D. White, *Introduction to the Study of Public Administration* 6 (1st ed., 1926) (noting that “[t]he problems which crowd upon legislative bodies today are often . . . technical questions which the layman can handle only by utilizing the services of the expert,” which drives government to incorporate subject-matter experts); see also James W. Fesler & Donald F. Kettl, *The Politics of the Administrative Process* 16 (1991) (arguing that congressional staff follow “internalized guides to conduct,” including an awareness of the sensitivity associated with their role in government, agency loyalty, and professional responsibility) (citing Max Weber, *Bureaucracy*, in *From Max Weber: Essays in Sociology* 196-244 (eds. H.H. Gerth and C. Wright Mills, 1946)).

⁴¹⁵ Gov’t Accountability Off., GAO-18-1SP, *Serving the Congress and the Nation* 12 (2018) (noting that “GAO is composed of roughly 3,000 employees possessing academic degrees in various fields”).

⁴¹⁶ Email from Staffer to Abbe Gluck & Jesse Cross (Apr. 27, 2020) (on file with authors).

⁴¹⁷ See *Organization and Staffing*, Cong. Budget Off., <https://www.cbo.gov/about/organization-and-staffing> [<https://perma.cc/4F5Z-VSWD>] (last visited May 10, 2020) (“CBO has about 250 staff members . . .”).

⁴¹⁸ See *Officers and Officials of the House*, Congressional Directory (2018) [hereinafter *House Directory*], <https://www.govinfo.gov/content/pkg/CDIR-2018-10-29/pdf/CDIR-2018-10-29-HOUSECOMMITTEES-3.pdf> [<https://perma.cc/8MN8-DEK5>] (listing the names of officers and officials of the House; Senate Directory, *supra* note 101 (listing the names of officers and officials of the Senate)).

⁴¹⁹ Email from Staffer to Authors (on file with authors).

⁴²⁰ See Petersen & Wilhelm, *House of Representatives Staff Levels*, *supra* note 33, at 13.

⁴²¹ See Petersen & Wilhelm, *Senate Staff Levels*, *supra* note 33, at 9.

⁴²² *Id.*

⁴²³ See *Reports and Testimonies*, Gov’t Accountability Off., <https://www.gao.gov/docsearch/topic.php> [<https://perma.cc/RK55-5Z3R>] (last visited July 30, 2019) (listing various GAO reports and testimonies by topic).

⁴²⁴ See Dodaro, *supra* note 272, at 133 (noting that “the Dodd-Frank Wall Street Reform and Consumer Protection Act alone required GAO to conduct more than 40 studies”).

⁴²⁵ Staffer Interview.

⁴²⁶ Cong. Budget Off., *The Congressional Budget Office’s Work in 2018: A Report to the Congress* (2019), <https://www.cbo.gov/system/files/2019-03/55044-CBOsWork2018.pdf> [<https://perma.cc/794L-YF4N>] (providing an overview of the CBO’s work in 2018).

five people providing services for all of the members on all of their issues. JCT in contrast has forty-three legislative congressional staff, including seventeen attorneys. They said: “For example, we have one person who does nothing but cross-border issues. The Ways & Means [staffer on that issue] has many other issues [to handle] as well.”⁴²⁷

Legislative Counsel divides drafters into teams that focus on specific subject areas.⁴²⁸ CBO is organized into nine divisions that are oriented around particular modes of analysis or subject matter.⁴²⁹ CRS partitions its analysts into six research divisions, as well as four research support offices.⁴³⁰ JCT divides its staff into interdisciplinary teams. GAO, in addition to having several internal management divisions, boasts fourteen “mission teams” that each have a special area of policy expertise.⁴³¹ Even OLRC, one of the smallest nonpartisan offices, divides its workforce into a codification team and a U.S. Code-updating team.⁴³²

Most of the congressional bureaucracy requires employees to hold advanced degrees in specific fields. The Parliamentarians, Legislative Counsel, and OLRC all are staffed by attorneys.⁴³³ GAO’s employees have (often advanced) academic degrees in fields including accounting, law, engineering, economics, and social and physical sciences.⁴³⁴ JCT staff includes attorneys, economists, and experts in accounting and tax analysis.⁴³⁵ At CRS, ninety percent of staffers have graduate degrees in law, policy, or other fields of expertise.⁴³⁶

Long tenure is another feature that the congressional bureaucracy shares with other common bureaucratic career staff.⁴³⁷ In CRS, for example, current employees have spent an average of thirteen years there, with several working for CRS for over fifty years.⁴³⁸ Legislative

⁴²⁷ Staffer Interview.

⁴²⁸ Bressman & Gluck, *supra* note 1, at 746-47;

⁴²⁹ See Organization and Staffing *supra* note 417 (listing the various divisions: budget; financial; health, retirement, and long-term analysis; macroeconomic; management, business, and information services; microeconomic; national security; and tax).

⁴³⁰ Mazanec, *supra* note 71, at app. 91-93.

⁴³¹ See Gov’t Accountability Office, *supra* note 415, at 13 (describing teams’ competencies as including defense capabilities and management, healthcare, and natural resources and environment).

⁴³² Staffer Interview.

⁴³³ See House Directory, *supra* note 418 (listing counsels in Legislative Counsel offices and OLRC); Statement Before the House Subcommittee on Legislative Branch Appropriations Regarding Fiscal Year 2020 Appropriations, 116th Cong. 7 (2019) (statement of E. Wade Ballou, Jr., Legislative Counsel) (reporting that House office was staffed in 2019 by 49 attorneys, and a support staff of 11 individuals); Matthew E. Glassman, Cong. Research Serv., RS20856, Office of Legislative Counsel: Senate 1 (2008) (reporting that Senate office was staffed in 2008 by 30 attorneys along with a support staff, Legislative Counsel, and Deputy Legislative Counsel); Gould, *supra* note 16, at 1989 (noting that “[t]he parliamentarians are trained as attorneys”); Staffer Interview.

⁴³⁴ See Gov’t Accountability Office, *supra* note 415, at 12 (noting that many of GAO employees hold degrees in listed fields).

⁴³⁵ See About Us--Overview, *supra* note 201 (“The Joint Committee operates with an experienced professional staff of Ph.D economists, attorneys, and accountants . . .”).

⁴³⁶ Evans, *supra* note 6, at 422 (“Ninety percent of CRS staff hold master’s, law, or doctoral degrees.”).

⁴³⁷ The median tenure of federal employees is over eight years. Employee Tenure Summary, Bureau Labor Statistics (Sept. 20, 2018), <https://www.bls.gov/news.release/tenure.nr0.htm> [<https://perma.cc/3V4M-GK8T>]. This has positive consequences for policymaking. See *supra* Section 1 (discussing bureaucratic staff’s nonpartisan character).

⁴³⁸ See Email from Staffer to Abbe Gluck & Jesse Cross (Apr. 27, 2020) (on file with authors) (discussing the average length of tenure for CRS staff members).

Counsel and GAO employees are of similar longevity.⁴³⁹ OLRC employees noted that: “[G]enerally, we’ve been here a long time [So] there is a real cadre of people with institutional loyalty and knowledge who interact with each other informally to get stuff done”⁴⁴⁰ JCT staff commented their “expertise is longer, we’ve seen stuff before. Our tenure is longer.”⁴⁴¹

As in Weber’s paradigm, each institution respects its own jurisdictional boundaries and the expertise and terrain of others. JCT staff, for example, emphasized that they pride themselves on “good tax policy,” and that they relatedly have a commitment to working with their field-specific counterparts in the executive branch--the nonpartisan Treasury staff.⁴⁴² These JCT staff comments were typical of those we heard from others: “Our comparative expertise is we have greater specialization We have 15 lawyers plus accountants and we can specialize. Legislative Counsel brings drafting expertise. . . . Political staff brings a closer understanding of policy and members’ preferences.”⁴⁴³ The staff in a Parliamentarian’s Office told us: “We are the procedural navigators. Our knowledge isn’t replicated anywhere else.”⁴⁴⁴ A GAO interviewee added: “We have a multidisciplin[ary] workforce. Most of [our] workforce have advanced degrees [and] have specialties that aren’t represented with staff. [B]ecause we don’t have to respond to the political process, we can make plans and look at programs in a very orderly fashion.”⁴⁴⁵

This high degree of specialization stands in contrast to the political policy staff and members themselves. Interviewees emphasized that Congress is now experiencing a greater “churning” of partisan congressional staff and that “new folks” are coming in who “need to get up to speed.”⁴⁴⁶ The relative youth of that staff was also emphasized, as was their transient nature.⁴⁴⁷ Interviewees also told us that political staff “doesn’t have time” to cultivate expertise or specialized knowledge, and that “members are coming from more nontraditional [i.e., non-legal or policy] backgrounds . . . with different types of expertise” and that may change “how we need to get them up to speed.”⁴⁴⁸ Staff who work directly for members are generally less expert

⁴³⁹ See Shobe, *supra* note 33, at 823-25 (reporting “almost all attorneys staying with the [Legislative Counsel] offices for more than twenty-five years”); GAO at a Glance, *supra* note 272 (noting that the Comptroller serves a “15-year term—one of the longest in government” and that GAO’s “workforce consists of career employees”).

⁴⁴⁰ Staffer Interview.

⁴⁴¹ *Id.*

⁴⁴² *Id.* We cannot resist here introducing the idea of what we might call “picket fence administrative law”—the cooperative relationships between nonpartisan bureaucrats across branches that seems to parallel the concept of “picket fence federalism” in the political science literature. Cf. Terry Sanford, *Storm Over the States* 80 (1967) (describing government as like “like a picket fence” in that it keeps “lines of authority, the concerns and interests, the flow of the money, and the direction of programs” in line, but does not bring them together).

⁴⁴³ Staffer Interview. There are now 17 lawyers.

⁴⁴⁴ Staffer interview.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ Many members’ political staff are “young, right out of college” Bressman & Gluck, *supra* note 1, at 756. The average age of congressional staff is around 30. See Jennifer M. Jensen, *Explaining Congressional Staff Members’ Decisions to Leave the Hill*, 38 *Congress & Presidency* 39, 44 *tbl. 1* (2011); see also Cross, *Legislative History*, *supra* note 1 (parsing these staffer differences).

⁴⁴⁸ Staffer Interview.

than committee staff, and House member staffs tend to be less experienced than Senate member staffs.⁴⁴⁹

Through the combination of nonpartisanship and specialization, these offices foster a perception in Congress that they are valuable and trustworthy. In a recent survey of partisan congressional staff, Kevin Kosar gathered staffer impressions regarding the frequency of use and reliability of different congressional support actors in budget and healthcare policy.⁴⁵⁰ Kosar found that staffers ranked each nonpartisan office included in the survey (GAO, CRS, and CBO) as more trustworthy across all topics (significantly so with a minor exception⁴⁵¹) than each of: professional committee staff, bureaucratic agencies, party leadership, members similar to one's own boss, caucuses, the administration, and state delegation members;⁴⁵² CBO and CRS were also reported to be the most frequently used support actors along with professional committee staff.⁴⁵³

3. Nonpartisan Is Not Necessarily Position-Neutral or Non-Substantive

There are different ways to be nonpartisan and to use specialized expertise. For starters, there is a difference between being nonpartisan and being position-neutral, although almost nothing the congressional bureaucracy does is devoid of substance.

With respect to those institutions that do not reach policy conclusions, , OLRC, and to some extent Legislative Counsel and the Parliamentarians, do not take substantive positions on one side of a question or another, but the Parliamentarians will give members advice about procedural matters and how to structure bills to bring them within (or keep them out of) a particular committee's jurisdiction. Their decisions have an important impact on the ultimate shape of legislation. Legislative Counsel will not judge the merits of any statute but will express views about the best way to phrase language or provisions that should be added.

Unlike the executive branch bureaucracy, the congressional bureaucracy performs its tasks for both the majority party and the party not in control. Legislative Counsel, for instance, may have views about how to write clear language, use cross references, and so on, but those views will be consistently applied between the majority and minority draft legislation. They will work on whatever policy, "no matter how despicable," that Members ask them to draft. It is common for a single Legislative Counsel drafter to help members of both parties draft opposing legislation on the same policy question, often simultaneously. JCT staff told us "all the time, we advise Members of opposite parties about the same issue."⁴⁵⁴

⁴⁴⁹ Staffer Interviews; see also Cross, Legislative History, *supra* note 1 (parsing these staffer differences).

⁴⁵⁰ Kosar, *supra* note 25, at 12.

⁴⁵¹ Professional committee staff ranked very close to CBO--professional staff received a mean score for trustworthiness (on a scale from zero to three) that was .01 higher than the score for CBO for budget whereas CBO's mean score was .02 higher for healthcare--but CBO still scored much more highly than all of the other actors, and CRS and GBO both beat professional committee staff on both budget and healthcare by large margin Id.

⁴⁵² Id.

⁴⁵³ Id. at 13.

⁴⁵⁴ Staffer Interview.

Similarly, OLRC's mission is the same regardless of whose law OLRC is working on. As one interviewee described the office's role: "[It] doesn't matter to us whether a policy is liberal or conservative, wise or stupid. We are looking for clarity of expression and that's it."⁴⁵⁵

In contrast, those congressional bureaucrats that are nonpartisan, but more policy focused, do issue conclusions about legislative proposals that may be preferred by one side or another. In many cases, these are conclusions about whether the proposals comport with rules or goals that, again, Congress has articulated for itself *ex ante*. CBO and JCT issue conclusions about the fiscal impact of proposed legislation--conclusions that are used, among other things, to determine if legislation comports with Congress's stated fiscal goals. CBO, as noted, established its independence early by issuing estimates at odds with the policy goals of Congress and an Administration from the CBO director's own party. CRS likewise told us:

We are not the decision maker. We can draw pros and cons and arrive at conclusions, but we don't advocate. . . . We are an objective organization. We don't tell Members what the best option is and what they should vote for. That's not our job. But it is not uncommon for us to come to a rather firm conclusion. . . . We have to present the minority position in order to fully inform Members about any given issue.⁴⁵⁶

George Yin also has recounted a now-famous battle inside CRS over the drawing of policy conclusions.⁴⁵⁷ There, a CRS analyst had published an academic article critical of government decisionmaking that led to the Iraq war, leading the CRS Director to caution against taking "public positions" related to an analyst's research in outside publications.⁴⁵⁸ In a response, the analyst suggested the Director's stance could have a chilling effect, preventing analysts from drawing conclusions even in CRS publications (which typically draw conclusions when appropriate).⁴⁵⁹ The Congressional Research Employees Association also weighed in, releasing a statement in support of the analyst.⁴⁶⁰ (CRS staff we interviewed, however, disputed that CRS management had ever discouraged drawing conclusions and pointed to recent instances of CRS taking controversial stances.)⁴⁶¹

This dispute reveals the competing conceptions of nonpartisanship that the congressional bureaucracy navigates. On the one hand, the analyst had expressed the opinion that, if not permitted to draw policy conclusions, the utility of his expertise would be greatly diminished. As Yin notes, the dispute thereby highlighted the risk that neutrality, when understood as a

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ See Yin, *supra* note 18, at 2316-19.

⁴⁵⁸ See Louis Fisher, *Deciding on War Against Iraq: Institutional Failures*, 118 *Pol. Sci. Q.* 389 (2003) (analyst article); Daniel P. Mulhollan, Cong. Research Serv., *Director's Statement, Outside Activities: Preserving Objectivity and Non-Partisanship 2* (2004) (Director statement).

⁴⁵⁹ Memorandum from Louis Fisher, Senior Specialist, Cong. Research Serv., to Daniel P. Mulhollan, Dir., Cong. Research Serv. 2 (Jan. 31, 2004), <http://www.fas.org/sgp/crs/fisher013104.pdf>.

⁴⁶⁰ Position Statement, Congr. Research Emps. Ass'n, *Outside Writing, Lecturing Activities by CRS Staff: Objectivity 3-4* (2004), <http://www.fas.org/sgp/crs/crea051204.pdf>.

⁴⁶¹ Staffer Interview. For an example of CRS taking and defending a controversial stance, see *supra* note 484 and accompanying text (discussing CRS report receiving public criticism from Sen. Grassley and others).

reluctance to draw conclusions, can pose to the benefits offered by expertise. On the other hand, CREA forcefully defended analysts issuing policy conclusions when derived from “generally accepted methodologies of analysis and scholarship.”⁴⁶² In so doing, it offered a competing vision where policy conclusions are nonpartisan when anchored in neutral, expert methodologies.

These institutions--and Congress in utilizing them--do consistently rely on their established methodologies to claim an objective legitimacy even in the face of side-taking. Parliamentarians operate based on the inherently neutral principle of precedent, and publish their precedents, but render decisions applying precedents that will favor one side or the other. JCT, GAO, CBO, and CRS issue analytical product that may cut in favor of one position, but all of them forcefully emphasize the same principle of relying upon a consistent, published, and justified methodology as critical to their objectivity and nonpartisan credibility--a Weberian focus on rationalization that they argue lends neutrality or objectivity even to conclusions that some members might not wish to receive. As one interviewee remarked:

I’ve always seen a tendency to ascribe advice that is not what they wanted to some political motive. I think the only way we can combat that is [to] be available to go over that with them and use precedents and so on to show them that we have history of doing things this way.⁴⁶³

Congress has had hearings on JCT and CBO’s methodologies by way of oversight.⁴⁶⁴ As JCT staff told us:

What does nonpartisan mean? This is why there’s lots of pressure on modeling and transparency. Some Members are disturbed that the way they think the world’s going to work doesn’t square with our estimates, so [we say to them,] here are our methods and our evidence for why we are lining up a certain way.⁴⁶⁵

⁴⁶² Id.

⁴⁶³ See Staffer Interview. See generally Gould, *supra* note 16.

⁴⁶⁴ Republicans have criticized these offices’ reluctance to calculate important cost estimates through “dynamic scoring,” a process whereby cost estimates incorporate the macroeconomic effects of a bill. See Wendy Edelberg, *Dynamic Scoring at CBO*, Cong. Budget Off. (Oct. 21, 2015), <https://www.cbo.gov/publication/50919>. Republicans long argued that this policy led to unduly harsh assessments of tax cuts. See Joyce, *supra* note 147, at 69; Jonathan Weisman, *House Republicans Change Rules on Calculating Economic Impact of Bills*, N.Y. Times (Jan. 6, 2015), <https://www.nytimes.com/2015/01/07/business/house-republicans-change-rules-on-calculating-economic-impact-of-bills.html>. In 2015, these criticisms culminated in the 114th Congress mandating that dynamic scoring be used in certain instances. S. Con. Res. 11, 114th Cong., § 3112 (2015). Until that time, CBO and JCT had resisted political pressure on this matter, even after a change of leadership at CBO in 1995 and 1999 that many Republicans assumed would bring more receptive administrations. Joyce, *supra* note 147, at 69; *id.* at 78.

⁴⁶⁵ Staffer Interview.

4. Policy Versus Procedure

Within Congress, the political staffs (those who work for members, committees, and Leadership) undoubtedly are the primary specialists in policy development. As noted, however, some offices in the congressional bureaucracy explicitly provide critical policy development work for Congress. Congress tends to control those institutions' policy work by making the members' use of it optional. Others primarily play a procedural role--assisting a policy idea on its journey toward legislative enactment--but even procedural work can have policy implications.

CRS and GAO (and MedPAC and MACPAC) provide the most direct substantive policy support. Those offices independently (i.e., without specific congressional solicitation) may produce policy reports that Congress can use as it wishes.⁴⁶⁶ GAO has documented that many of its reports have played a mobilizing role in the ideation of legislation.⁴⁶⁷ JCT staff, while more reactive than proactive, also supply the bulk of tax policy expertise to staffers across various committees--especially Senate Finance and House Ways and Means--working on tax issues.⁴⁶⁸

Some straddle the policy-procedure divide. Legislative Counsel, for instance, is tasked only with taking members' policy ideas and "translat[ing] those ideas into statutory language and legalese."⁴⁶⁹ In practice, however, the offices' deep knowledge of statutory regimes--and their institutional memory of past congressional successes and failures--often leads political actors to seek out input on how best to address policy concerns.

OLRC occupies a similar position. Its assigned task is to capture the already-enacted intent of Congress, not to develop new policy ideas. Nonetheless, it still engages in something that bleeds into policy when it reconceptualizes (indeed its authorizing legislation uses the word "restatement") separately enacted public laws as belonging together under a new single title of the U.S. Code.⁴⁷⁰ So, too, OLRC makes significant policy-implicating determinations when it decides which parts of a statute will be inserted into the main text of the U.S. Code versus those parts that will be relegated to largely-invisible side notes (a function of OLRC, surprising and unknown to many, that we detail below⁴⁷¹). These editorial and conceptual functions are critical to shaping how legislation reads and is understood by the public after enactment, but they do not reflect the underlying policy decisions leading up to enactment.

The Parliamentarians' Offices engage mostly in procedure. While the work of these offices has high-stakes policy implications, they are almost never enlisted to assist in policy development.

⁴⁶⁶ See Reports & Testimonies: Recommendations Database, *supra* note 278 (listing GAO's pending recommendations); see also Staffer Interview (noting Comptroller authority to initiate investigations); *Id.* (noting CRS authority to initiate research into "general congressional interests," whether current or anticipated).

⁴⁶⁷ See GAO at a Glance *supra* note 272 (stating that GAO work has helped "shape[] legislation").

⁴⁶⁸ See *supra* notes 201-211 (reviewing JCT's key role in federal tax policy).

⁴⁶⁹ See Gluck & Bressman, *supra* note 1; see also Staffer Interview.

⁴⁷⁰ 2 U.S.C. § 285(b)(1) (2018).

⁴⁷¹ See *infra* Section IV.B.

5. Confidential Versus Transparent: “The Atmosphere Has Changed”

Not all expertise-giving is apparent to the public. As we discuss in Part III, massive changes in how Congress operates--most importantly, departures from the regular-order, textbook process of lawmaking--have pushed much of the expertise-giving by the congressional bureaucracy earlier in the process and made it generally less visible. But here we wish to highlight another distinction that is a familiar tradeoff in administrative law: some expertise that these institutions develop is intended to be confidential, while some is not.

Each approach comes with its own risks. Confidential expertise can be manipulated (another way Congress can control its bureaucracy) and used to shift blame. Transparent expertise can get politicized.

Congress has written specific confidentiality obligations into the organic statutes of CRS, House Legislative Counsel, and the CBO,⁴⁷² but private consultations with all of the nonpartisan offices that we studied are totally confidential--a confidentiality practice that, for many offices, extends even to when members commission reports.⁴⁷³ Members can use information they commission if helpful, but never release it if harmful to their position.⁴⁷⁴ Staffers from all these agencies told us that members “find us useful. They can hide behind us sometimes or use us to delay. They can tell constituents they submitted a question and haven’t heard back.”⁴⁷⁵ And: “Yes, they can request [information] and choose to release or not if it comports with their political purposes. If they hear something from us they don’t like, we won’t tell anyone we spoke to them.”⁴⁷⁶

Even when official public input is ultimately the goal, members and staff frequently first consult informally--and confidentially--with all parts of the congressional bureaucracy. They routinely ask CBO about projections, or the Parliamentarians about jurisdictional and procedural questions, before seeking formal, public opinions from those entities.⁴⁷⁷ We were repeatedly told that this dialogic process of informal and typically confidential expertise-giving and subsequent legislation-changing--whether to get the bill to a particular budget number or to tweak the subject matter for a particular committee referral--greatly impacts what is ultimately written into the statute’s text. So does the substantive feedback that the offices may provide in confidential

⁴⁷² 2 U.S.C. § 166(i) (2018); 2 U.S.C. § 281a (2018); 2 U.S.C. § 603(d) (2018).

⁴⁷³ See Staffer Interview (noting that if members and staff “request that something is confidential, it’s automatically confidential”); *id.* (emphasizing that private consultations remain private).

⁴⁷⁴ See Staffer Interviews; see also Lisa Rein, *Trying to Crack Open Congress’s Confidential Think Tank After a Century of Secrecy*, *Wash. Post* (Oct. 29, 2015, 6:56 PM), <https://www.washingtonpost.com/news/federal-eye/wp/2015/10/29/a-confidential-arm-of-congress-gets-more-secretive/> (“For 101 years, the Congressional Research Service has conducted studies for members of the Senate and House, and the findings have remained confidential unless the lawmakers release the research themselves.”).

⁴⁷⁵ Staffer Interview.

⁴⁷⁶ *Id.*

⁴⁷⁷ Staffer Interviews; see also Bressman & Gluck, *supra* note 1, at 764 (discussing CBO’s consultative role); Gould, *supra* note 16, at 2007-08 (discussing Parliamentarians’ advisory role).

consultations, such as when MedPAC or MACPAC provide commentary on early legislative proposals or drafts.⁴⁷⁸

GAO operates under a stronger default norm of transparency agreed to ex ante with Congress. Most of GAO's work happens in public, although the GAO does informally consult with members in private. GAO emphasized the transparency of its actions as a core feature of its credibility.⁴⁷⁹ Notably, legislative reforms in recent years have called for more transparency in the various nonpartisan congressional institutions, with respect to both their processes and their work products.⁴⁸⁰ But our interviews suggest some caution may be warranted. In recent years, the CBO has found that publication of its cost estimates has dragged the office into the partisan fray.⁴⁸¹ For example, CBO drew major heat after its influential Affordable Care Act forecasts.⁴⁸² CRS also has come under political pressure for conclusions it draws in published materials, such as a 2019 CRS report about the economic effects from the 2017 tax reform legislation⁴⁸³--a conclusion met with partisan criticism from political commentators, the Treasury Department, and the Chair of the Senate Finance Committee, Senator Chuck Grassley.⁴⁸⁴

⁴⁷⁸ Staffer Interviews.

⁴⁷⁹ See id.; see also supra notes 311-313 (noting the similar transparency emphasis for MedPAC and MACPAC).

⁴⁸⁰ See, e.g., Aprill & Hemel, supra note 186 at 133-35 (calling for greater transparency in Senate Parliamentary rulings on the Byrd rule); Rebecca M. Kysar, Tax Law and the Eroding Budget Process, 81 Law & Contemp. Probs. 61, 92-93 (2018) (discussing a proposed "CBO Show Your Work Act" and endorsing a similar approach to JCT); Shobe, supra note 16 (arguing for greater transparency in Law Revision Counsel methods); Stephanie Akin, Critics Pan Plan to Publish Congressional Research, Roll Call (July 16, 2018), <https://www.rollcall.com/news/politics/critics-pan-plan-publish-reports-congress-house-think-tank> [<https://perma.cc/GZ44-WRAN>] (describing Congress's recent imposition of a requirement for CRS to publish its reports, as well as criticisms that CRS is not making a sufficient number of reports available).

⁴⁸¹ See Alan Rappeport, C.B.O. Head, Who Prizes Nonpartisanship, Finds Work Under Attack, N.Y. Times (June 19, 2017), <https://www.nytimes.com/2017/06/19/us/politics/cbo-congressional-budget-office.html> [<https://perma.cc/GZ44-WRAN>] (noting that the CBO and its "facts and data have increasingly come under assault by politics").

⁴⁸² See, e.g., Douglas Holtz-Eakin, The Real Arithmetic of Health Care Reform, N.Y. Times (March 20, 2010), <https://www.nytimes.com/2010/03/21/opinion/21holtz-eakin.html> [<https://perma.cc/J7KJ-3HU3>] (providing conservative criticism of the CBO calculations); Robert Pear, House Committee Approves Health Care Bill, N.Y. Times (July 16, 2009), <https://www.nytimes.com/2009/07/17/us/politics/17cbo.html> [<https://perma.cc/2B9D-HRKT>] (noting progressive criticism of the CBO calculations). For a more recent round of criticism directed at CBO during the Republican attempt to repeal and replace the ACA, see Dylan Matthews, The Republican War on the CBO, Vox (July 19, 2017, 9:00AM EDT), <https://www.vox.com/policy-and-politics/2017/7/19/15967224/congressional-budget-office-cbo-war-explained> [<https://perma.cc/P9UY-KBAF>] (explaining criticism and attacks of the Congressional Budget Office by Republicans).

⁴⁸³ Jane G. Gravelle & Donald J. Marples, Cong. Research Serv., R45736, The Economic Effects of the 2017 Tax Revision: Preliminary Observations (2019) (analyzing the effects of P.L. 115-97 in 2018).

⁴⁸⁴ See Naomi Jagoda, Grassley Raises Concerns About Objectivity of Report Critical of GOP Tax Law's Effects, The Hill (June 22, 2019), <https://thehill.com/policy/finance/449824-grassley-raises-concerns-about-objectivity-of-report-critical-of-gop-tax-laws> (reporting Grassley criticisms); Naomi Jagoda, Treasury Pushes Back at Report Critical of Trump Tax Law's Effects, The Hill (June 7, 2019), <https://thehill.com/policy/finance/447513-treasury-pushes-back-at-report-critical-of-trump-tax-laws-effects> (reporting criticisms by Treasury Department and Grover Norquist).

Parliamentarians also have come under media and political scrutiny precisely at moments when high-stakes, procedural rulings became public.⁴⁸⁵ On rare occasions, the Senate has even fired the Parliamentarian, including in the wake of controversial rulings.⁴⁸⁶ More recently, some members have argued that the Vice President should play the role of Parliamentarian⁴⁸⁷--a threat made possible by virtue of the fact the Senate Parliamentarian exists only for the grace of Congress.⁴⁸⁸ As the only nonpartisan congressional institution without an organic statute, its very existence is especially precarious. As we were told, the Senate Parliamentarian “is out there without a net.”⁴⁸⁹

Staffers from all nine offices told us that congressional bureaucrats “would never take those jobs so they can carry out some [political] purpose,” even as some noted “the atmosphere has changed” and “nonpartisan staff are being impugned.”⁴⁹⁰ They worried about the “huge effort to minimize CBO and GAO and other organizations we use to function every day,” which often comes in the form of public criticism of those offices’ outward-facing work.⁴⁹¹ The more transparent the bureaucracy work has been, the greater the public oversight and the more it has come under this kind of pressure.⁴⁹²

⁴⁸⁵ See, e.g. Margot Sanger-Katz, *Byrd Bath: Seven Provisions that Could Disappear from the Senate Health Bill*, N.Y. Times (Jul. 21, 2017), <https://www.nytimes.com/2017/07/21/upshot/byrd-bath-seven-provisions-that-could-disappear-from-the-senate-health-bill.html> (covering Byrd bath over Affordable Care Act repeal); Dylan Scott, *Senate’s Budget Rules Invalidate Key Provisions in Republican Health Care Bill*, Vox (Jul. 21, 2017), <https://www.vox.com/policy-and-politics/2017/7/21/16012950/senate-health-care-bill-byrd-rule-rulings> (same); Staffer Interview (noting political scrutiny of Parliamentarians for Affordable Care Act rulings).

⁴⁸⁶ When a new party took over the Senate in the 1980s and 1990s, it regularly installed a new Parliamentarian. See Hatcher, *supra* note 236, at 32; Gould, *supra* note 16, at 2005 (“Senate parliamentarians have been removed several times”); see also Wallner, *supra* note 224, at 392 (noting that “in 1981, the new Republican Majority Leader Howard Baker removed Murray Zweben as Senate parliamentarian and replaced him with Robert Dove”); David E. Rosenbaum, *Rules Keeper is Dismissed by Senate, Official Says*, N.Y. Times, May 8, 2001, at A20. In 2001, Senate Majority Leader Trent Lott also dismissed the Parliamentarian after disagreeing with rulings on tax and budget bills and reinstated a prior Parliamentarian. See Altman & Shactman, *supra* note 238 (on role of reconciliation ruling in firing); Gould, *supra* note 16, at 2006 (on return of prior Parliamentarian). Since then, the position has stabilized, with each of the next two Senate Parliamentarians surviving party transitions. See *id.*

⁴⁸⁷ See, e.g., Alexander Bolton, *Cruz: Let’s Override Senate Office to Expand ObamaCare Bill*, The Hill (March 9, 2017, 4:58 PM), <https://thehill.com/homenews/senate/323272-cruz-lets-overrule-senate-officer-to-expand-obamacare-bill> [<https://perma.cc/PC9K-2LBA>] (describing Ted Cruz’s statements that Mike Pence should wield more power over the Senate in order to permit inclusion of additional provisions in health care reconciliation bill).

⁴⁸⁸ The Senate Parliamentarian has no independent originating statute but exists per the statutory authority of the Secretary of the Senate to establish positions under her purview. 2 U.S.C. § 6539 (2018). There is also a statutory provision setting forth the maximum compensation for the Senate Parliamentarian. *Id.* at § 6535.

⁴⁸⁹ Staffer Interview.

⁴⁹⁰ Staffer Interview.

⁴⁹¹ *Id.*

⁴⁹² See, e.g., Jeff Stein, Ellen Nakashime, & Erica Werner, *White House hold on Ukraine aid violated federal law, congressional watchdog says*, Wash. Post (Jan. 16, 2020) https://www.washingtonpost.com/business/economy/white-house-hold-on-ukraine-aid-violated-federal-law-congressional-watchdog-says/2020/01/16/060ea7aa-37a3-11ea-9c01-d674772db96b_story.html [<https://perma.cc/M5VC-VYJW>](reporting that Russell Vought, the acting director of the Office of Management and Budget, derided the GAO assessment that the Trump administration broke the law by withholding Ukraine aid, tweeting that GAO’s “opinion comes from the same people who said we couldn’t keep National Parks open during the shutdown”). For a connection to the executive bureaucracy literature, see Roger Taylor & Tim Kelsey, *Critiques of Transparency*, in *Transparency And the Open Society* 34-45 (2016) (discussing the negative effects of

6. Authoritative Versus Permissive

Some of Congress's nonpartisan institutions have limited mandatory responsibilities. Others are a statutorily required step in the legislative process. But one difference across the board from the executive bureaucracy is that most of the work of the congressional bureaucracy does not have formal legal effect without some additional action from Congress.

Use of CRS and the Legislative Counsel is voluntary.⁴⁹³ CBO's cost estimates, on the other hand, are a necessary hurdle most bills must clear. Federal law mandates that each bill or resolution approved by any congressional committee (other than an appropriations committee) receive a CBO estimate.⁴⁹⁴ House rules additionally require these estimates to be published in committee reports⁴⁹⁵ and that legislation may be considered in the House only if, over various timeframes, that legislation does not increase the deficit or reduce the surplus--a determination that, partly by statutory mandate and partly by custom, is made by reference to CBO's cost estimates⁴⁹⁶ (but a House majority vote can waive the rule, and legislation has been passed

transparency); Alesina & Tabellini, *supra* note 404, at 434; Albert Meijer, *Understanding the Complex Dynamics of Transparency*, 73 *Pub. Admin. Rev.* 429, 429 (2013) ("Government organizations take decisions on and implement government transparency, but they are influenced in this process by various stakeholders in their environments concerning whether and how to enhance or decrease transparency.").

⁴⁹³ This is in contrast to many other countries where legislators are required to use professional drafters. In Canada, England, Ireland, Australia, New Zealand, and France, use of professional drafting services is required, not optional. See John Bell, *What Is the Function of the Conseil D'etat in the Preparation of Legislation?*, 49 *Int'l & Comp. L. Q.* 661, 662 (2000) ("[I]n France, there are constitutional requirements that the Conseil d'Etat and the Conseil Economique et Social are consulted on a wide range of legislation."); Serge Lortie & Robert C. Bergeron, *Legislative Drafting and Language in Canada*, 28 *Statute L. Rev.* 83, 92 (2007) ("All government Bills are drafted by the Legislation Section of the Department of Justice."); Reed Dickerson, *Legislative Drafting: American and British Practices Compared*, 44 *Am. B. Ass'n J.* 865, 865 (1958) ("almost all the public laws enacted by Parliament are drafted by one small group of men, the expert draftsmen of the Office of the Parliamentary Counsel."); Office of the Parliamentary Counsel, U.K. GOVERNMENT, <https://www.gov.uk/government/organisations/office-of-the-parliamentary-counsel/about> (last visited May 12, 2020) (The Office of the Parliamentary Counsel is "responsible for drafting all government bills"); *What Parliamentary Counsel Do*, Off. Att'y Gen., http://www.attorneygeneral.ie/pc/pc_do.html (last visited May 11, 2020); *About the Office of Parliamentary Counsel*, Austl. Gen., <https://www.opc.gov.au> (last visited May 12, 2020) (the Office of Parliamentary Counsel is responsible for drafting and publishing the laws of the Commonwealth of Australia); *Role of the Parliamentary Counsel Office*, Parliamentary Couns. Off., <http://www.pco.govt.nz/role-of-the-pco> (last visited May 11, 2020) (the Parliamentary Counsel Office is New Zealand's law drafting office responsible for drafting all of New Zealand's legislation).

⁴⁹⁴ See *Congressional Budget and Impoundment Control Act of 1974*, Pub. L. No. 93-344, § 402, 88 Stat. 297..

⁴⁹⁵ See *Rule of the House of Representatives*, 116th Cong., Rule XIII.3(c)(3) ("The report of a committee on a measure that has been approved by the committee shall include . . . [a]n estimate and comparison prepared by the Director of the Congressional Budget Office . . ."). For tax legislation, CBO simply publishes the estimate made by the JCT. See Pub. L. No. 99-177 § 273 (codified at 2 U.S.C. § 601(f) (2018)) (requiring CBO use of JCT estimates for revenue effects).

⁴⁹⁶ Technically, the Committee on the Budget determines, relative to a baseline calculated by the Congressional Budget Office, whether the legislation complies. In practice, CBO determines both the baseline and the impact of the legislation.

without a score, or with a score after passage).⁴⁹⁷ JCT plays an analogous, mandatory role with respect to revenue-raising legislation.

GAO publishes a “Red Book” of appropriations opinions that are viewed as precedential inside Congress. These opinions are not binding on the judiciary, and GAO has no enforcement powers, but courts do give them “special weight.”⁴⁹⁸ When the Comptroller General exercises its statutory power to “settle all accounts of the United States Government and supervise the recovery of all debts,” the balance the Comptroller certifies is “conclusive on the executive branch.”⁴⁹⁹

Parliamentarian decisions are often treated as conclusive within Congress, even though statutes and chamber rules do not mandate their use in the legislative process. On a few procedural matters over the last few decades, Senators have ignored (or overturned by a majority vote) Parliamentarians’ decisions⁵⁰⁰--including in the much-discussed instances in which the Senate has invoked the “nuclear option” in order to override supermajority rules for federal judicial appointments.⁵⁰¹

Notably, many offices in the congressional bureaucracy with authoritative powers are required to exercise those powers transparently, through public reports or opinions. We think it is no coincidence that those offices are the ones most at risk of politicization.⁵⁰² The combination of their visibility and the importance of their rulings puts them in the oversight spotlight.

7. Trust with Low Saliency Tasks: Why OLRC? *“No Members Know We’re Here”*

It is worth noting that OLRC inhabits an odd place on this spectrum. OLRC is required to prepare the U.S. Code for publication; that aspect of its work is mandatory. But it is up to OLRC to decide when a new title should be created and what it should contain, and Congress is not required to take any action on codification bills prepared by the office. OLRC can organize and reclassify enacted statutes into coherent legal titles, but it is up to Congress whether to formally enact those titles as so-called “positive law.” As noted, half of the titles of the U.S. Code

⁴⁹⁷ See, e.g., Kelsey Snell, *Here's How Much Congress Has Approved for Coronavirus Relief So Far and What It's For*, NPR (May 15, 2020), <https://www.npr.org/2020/05/15/854774681/congress-has-approved-3-trillion-for-coronavirus-relief-so-far-heres-a-breakdown> (noting that “In several cases [on the emergency Coronavirus relief bills], Congress voted on the relief spending . . . without an official cost estimate from the Congressional Budget Office.”).

⁴⁹⁸ *Nevada v. Dep’t of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) (quoting *United Auto., Aerospace & Agric. Implement Workers v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984)); supra note 287 (citations to Red Book by the Supreme Court).

⁴⁹⁹ 31 U.S.C. §§ 3526(a), (d) (2018).

⁵⁰⁰ See Gould, supra note 16, at 1976-77. By one count, such an appeal has been successfully carried out seventeen times between 1980 and 2013. See Wallner, supra note 224, at 391 (“In the 30 years since the Republicans took over the majority in 1980 . . . [t]he full Senate overturned the decision of the Chair only 17 times . . .”).

⁵⁰¹ On the “nuclear option” and its recent uses, see supra note 250.

⁵⁰² In the case of the Affordable Care Act and its repeal, for example, see supra note 485 (discussing politicization of Parliamentarians); supra note 368 & infra note **Error! Bookmark not defined.** (discussing politicization of CBO).

(including important titles like Title 42, which contains the civil rights laws) have been organized by OLRC (or prior codifiers) but were never formally enacted by Congress as positive law titles.

OLRC staff told us several times there is a “total lack of political will” to enact codification bills:

Members don’t care about positive law codification bills. Members care about, at best, policy and constituents, but making law easier to read and understand and navigate or correcting technical errors? They don’t care about that. . . . What member ever went back to town hall meeting and said, you know, “I got a U.S. Code title codified!”⁵⁰³

We were surprised to learn from our interviews of partisan staff that most staffers do not even know what OLRC does, or where it is! Due to this lack of political salience, the OLRC is not sought out by members. As they put it: “No members know we are here.”⁵⁰⁴

Why have an office no one cares about enough to use? The need to organize the U.S. Code in ways that make statutes and their amendments accessible to the public is uncontroverted. But why give that responsibility to a nonpartisan agency? Why not the Speaker’s Office?

One reason, we believe, is precisely because no one is watching. As one interviewee put it: “Someone needs to do this. You need someone to run this stuff down. You have to have someone who isn’t going to slip something by. Congress isn’t going to be tracking it down.”⁵⁰⁵ In other words, the nonpartisan and politically dull stance of OLRC, *ex ante*, gives it the credibility to do work that is needed, but that Congress does not care about enough to supervise.

As with other studies of bureaucracies, OLRC’s institutional design enables it to take on projects with long-term, diffuse benefits (but correspondingly low political salience). Its staff are incentivized not by the electoral connection, but by their own commitment to professionalism far beyond the next election cycle.⁵⁰⁶

⁵⁰³ Staffer Interview.

⁵⁰⁴ *Id.*; but see the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, § 6, 130 Stat. 549 (2016) (statutory provision directing Law Revision Counsel where to place a provision in a non-positive title). Stephen Lubben, who first brought attention to this provision, found no other examples of Congress directing placement for non-positive provisions. See Stephen J. Lubben, PROMESA and the Bankruptcy Clause: A Reminder About Uniformity, 12 *Brook. J. Corp. Fin. & Com. L.* 53, 60 n.54 (2017).

⁵⁰⁵ *Id.*

⁵⁰⁶ See Alesina & Tabellini, *supra* note 404, at 434 (noting that “bureaucrats care about their professional reputation in the eyes of their peers”).

8. Timing

Finally, expertise comes in all stages of the legislative process--including both pre- and post-enactment. The timing of congressional bureaucratic intervention is particularly interesting because, in addition to shedding light on the modern Congress's operations, it also creates a far more nuanced view of where "lawmaking" stops and starts. We return to this point in Part IV.

Some offices play a mobilizing role in the generation of legislation. The GAO produces policy reports containing specific recommendations that can inspire legislators and staff to take action.⁵⁰⁷ CRS submits to Congress a list of expiring provisions in current law, thereby identifying possible topics for legislation.⁵⁰⁸ And OLRC even notifies members and Legislative Counsel of errors and inconsistencies in the law as enacted so that corrective measures can be passed.⁵⁰⁹

The Parliamentarian interjects expertise very early when called upon to make the critical decision about referrals to committee. (Consistent with the findings in the Gluck/Bressman study, it was repeatedly emphasized that "referral to committee remains hugely important."⁵¹⁰) Legislative Counsel translates policy staff goals into statutory language, and CBO and JCT calculate the cost of the legislation. JCT staff, as noted, is directly involved in nearly all stages of the legislative process.⁵¹¹ CRS drafts the bill summaries that appear on Congress.gov after their introduction.⁵¹² Germaneness rules and the Byrd rule create an important role for the Parliamentarians' Offices.

During this iterative process, the congressional bureaucracy's various offices have different roles, but they do not operate as silos. CBO relies on JCT estimates in the tax and revenue context. Partisan staff bring the Parliamentarians into dialogue with Legislative Counsel to develop statutory text that receives a desired committee referral. CRS may draft a report on proposed legislation that partisan staff will pass to Legislative Counsel to draft. JCT describes their role as one of transforming a concept into a concrete plan, but told us they then work hand-in-hand with Legislative Counsel to translate that plan to text. Language and substance are tweaked and tweaked again to get legislation within the budget and revenue goals Members have set. A GAO staffer remarked:

We talk to each other all the time. We are very supportive of each other; we want to be sure we stay in our lanes. At the end of the day, we are all here to serve

⁵⁰⁷ See supra notes 278-280 (discussing GAO policy reports).

⁵⁰⁸ 2 U.S.C. 166(d)(2) (2018).

⁵⁰⁹ Staffer interview. One of the authors also has first-hand experience with this because, as a drafter in Legislative Counsel, he received such edits.

⁵¹⁰ See Staffer interview (discussing committee referral). With regard to committee referral, LRC staff were particularly attuned to how legislation is often carefully drafted to obtain (or avoid) a certain referral: "From the inside, where the real acid wars take place is committee jurisdiction. How things are written in the law has to do with, 'My God, we have to keep it away from so and so in the subcommittee.'" Staffer Interview.

⁵¹¹ See supra Part I.E.

⁵¹² See Staffer Interview (noting that CRS writes bill summaries that are published on Congress.gov).

Congress and support congressional prerogatives. We do it in our own way. Some of CBO's work overlaps with GAO; everyone is respectful of that. Same with CRS. Congressional staff knows how to use us.⁵¹³

A CRS staffer similarly noted: "There is complementary relationship across GAO, CRS, and CBO in terms of our various mission spaces . . . [as] defined by Congress."⁵¹⁴

Later in the process, JCT also drafts the legislative history for tax aspects of most bills before they are passed (usually for the Senate Finance and House Ways and Means Committees). CRS may be called in at any stage, whether to assess new ideas, analyze proposed legislation, or evaluate already passed legislation. CRS also provides data and analysis for committee reports.⁵¹⁵ Legislative Counsel drafts some special legislative history, conference reports, and even amendments on the floor until the moment of the vote.

Most interestingly--in part because it is least well known--OLRC begins its influential work reorganizing and editing the positive and non-positive law titles of the U.S Code only after enactment. This includes textual changes (those changes, for positive law titles, are voted on in codification bills but not for the nonpositive titles). Other offices have post-enactment roles as well. JCT comes back into the picture to draft the "Bluebook," its influential post-enactment synthesis. And the GAO, in its role as the watchdog that oversees agency implementation, often begins the cycle anew by producing policy reports that contain specific recommendations for new legislative action--whether to address gaps in oversight or to reign in agencies who are implementing laws improperly.⁵¹⁶

III. Legislation and Statutory Interpretation

At one of his last oral arguments before his death, Justice Antonin Scalia debated with Justice Stephen Breyer over how to resolve ambiguity in a statute where the text alone, including rules of grammar, was of no help.⁵¹⁷ Justice Breyer suggested looking to legislative history. Justice Scalia instead suggested relying on a source outside the legislative process--a policy-based presumption of statutory interpretation. Justice Scalia's rationale: "You don't think Congress can leave it to its staff to decide what a statute means, do you?"

We now turn to the implications of our study for the field of legislation and statutory interpretation. There are several deficits we seek to remedy and several debates in which we intervene.

⁵¹³ Staffer Interview.

⁵¹⁴ Staffer Interview.

⁵¹⁵ See *id.* (discussing that CRS conducts "complex economic or political analysis" at the request of committee staff). Interviewees noted that committee requests tend to be more complex and robust than most other queries. *Id.*

⁵¹⁶ See *supra* notes 278-280.

⁵¹⁷ Transcript of Oral Argument at 39-42, *Lockhart v. United States*, 136 S. Ct. 958 (2015) (No. 14-8358). Grammar rules were not helpful because there were applicable grammar rules supporting both sides.

First, no matter where one comes down in the statutory interpretation wars, those debates are almost entirely based on empirical assumptions about Congress. Even those who think that lawyers should ignore the realities of the legislative process ground that argument in empirical claims that Congress has no collective intent, that Congress operates irrationally, or that Congress shares special drafting conventions with courts that are better substitutes for an approach focused on how Congress actually works.⁵¹⁸ One cannot legitimate (or refute) such claims without doing the work of learning about Congress to determine if they are true.

We should be clear, too, that no one's approach is merely: "read the text and stop." Every approach in the mainstream debates depends on sources external to enacted text when statutes are unclear, whether those sources are dictionaries, congressional operations, legislative history, or judge-crafted interpretive presumptions. Just because some sources, such as the courts' common presumptions of linguistic consistency or dictionaries, have legally attractive features (because some interpreters think those sources are "objective"), that does not make those sources less external to the text Congress enacts than sources linked to Congress's work.

John Manning's argument for shared interpretive conventions--that is, using judicially-developed canons of statutory interpretation instead of material more tied to Congress--is expressly legitimated on the assumption that Congress in fact shares those conventions. Justice Scalia's argument for the use of canons was similarly dependent on the assumption that Congress uses those conventions or knowingly drafts in their shadow. However, the Gluck/Bressman empirical study of congressional drafting practices seriously undermines those assumptions.

A more recent critic, Ryan Doerfler, argues that information about Congress is irrelevant because "context consists of information salient to both author and audience" and that the ordinary public, and perhaps also agencies or other legislators, do not know about Congress's operations.⁵¹⁹ There is zero evidence, however, that the courts' interpretive presumptions are salient to anyone other than judges. The congressional bureaucracy's materials--including the CBO score, the Parliamentarians' rulings, legislative history, JCT explanatory outputs, and the organization of statutes in the U.S. Code--are more salient to all of the actors Doerfler identifies.

Doerfler also aligns himself with others⁵²⁰ in claiming that any arguments about collective intent--for instance that Congress, like corporations, can act collectively--are false

⁵¹⁸ See, e.g., Antonin Scalia, *supra* note 8, at 23-25 (discussing textualist justifications for statutory interpretation); Doerfler, *supra* note 11, at 981-83 (noting that "as an empirical matter, members of Congress do not share intentions" (emphasis in original)); John F. Manning, *Textualism and Legislative Intent*, 91 *Va. L. Rev.* 419, 424 (2005) (describing the textualist argument that Congress does not share a "collective will apart from the outcomes of the complex legislative process that conditions its ability to translate raw policy impulses or intentions into finished legislation"); see also Gluck & Bressman, *supra* note 1, at 915 (2013) (cataloging the many fictions judges apply, including the lack of collective intent, "the notion of a single 'congressional intent'", and the idea that canons are background assumptions that Congress knows and against whose background Congress legislates).

⁵¹⁹ Doerfler, *supra* note 11, at 983.

⁵²⁰ See Nourse, *supra* note 9 (collecting the criticisms); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 *B.C. L. Rev.* 1613 (2014) (same); see also Eskridge, *supra* note 8, at 651-52 (arguing that Justice Scalia adopted Max Radin's critique against collective intention); Manning, *supra* note 518, at 430 (noting that "textualists deny that a legislature has any shared intention that lies behind but differs from the reasonable import of the words adopted."); Max Radin, *Statutory Interpretation*, 43 *Harv. L. Rev.* 863, 870

because one cannot impute the intention of any one member of Congress to the whole. But that is not the point. Arguments about individual or subjective intentions are distractions here. Even Doerfler recognizes that Congress speaks collectively when it passes procedural rules or when it votes on final text of legislation, and that “it is plausible to attribute to an institutional group an intention to [do X] despite some members of that group failing to intend that ‘we’ [do x].”⁵²¹

The congressional bureaucracy’s formal work is precisely this kind of collective activity. As we stated earlier, Congress is sometimes an “it” as well as a they. The offices of the congressional bureaucracy are the creatures of Congress’s own enacted laws, and those laws direct the bureaucracy to produce statutory inputs. If the JCT says a law will raise \$100 million, it does not matter if a particular member of Congress opposed the law for other reasons and it does not matter if the law actually would raise \$100 million; regardless, we can assume that Congress had before it the conclusion the law it was enacting would raise \$100 million. If the Parliamentarian says a piece of legislation should be referred to committee Y instead of committee Z because committee Z has no jurisdiction over oceans, then it is fair to assume that the bill covers oceans. So, too, legislators voting for a bill produced through Congress’s professionalized drafting process, can be assumed to enact what the professional drafters themselves aimed the legal text to convey, not what any single member might have sneakily thought to herself. Just because legislators sometimes act individually, does not mean Congress does not act collectively.⁵²²

Second, we are part of a new movement in the field that has a civic-education bent. Legislation is now a subject taught in the first-year curriculum at many law schools. It would be preposterous to teach administrative law without teaching students about the components, structures, rules, and operations of the administrative state. And yet when it comes to statutes--the lion’s share of modern American law--that is exactly how the topic has traditionally been approached, both as a matter of pedagogy and as a matter of legal doctrine. Statutory interpretation theory has engaged more deeply with dead philosophers than it has with Congress. Congress also has changed over time, and yet barely a dent has been made from those changes in even those interpretive theories and doctrine that are purportedly based on Congress’s own operations. Work by us and our coauthors--as well as other scholars including Judge Robert

(1930) (“The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.”); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 *Geo. Wash L. Rev.* 1610, 1611–12 (2012) (describing textualism); Shepsle, *supra* note 13 at 254 (arguing that “[i]ndividuals have intentions and purpose and motives; collections of individuals do not”).

⁵²¹ Doerfler, *supra* note 11, at 1007.

⁵²² It might be said that locating legislative meaning with Congress’s internal bureaucracy only reproduces aggregability problems at the sub-congressional level, given that drafting bodies are themselves comprised of many people. While a response goes beyond the contours of this article, the bureaucratic form of such bodies is particularly amenable to ascriptions of collective intent. For one, drafters are much less likely to diverge in their understandings of a legislative text in favor of individual preferences than are legislators themselves, given drafters’ politically neutral character and close cooperation. Second, internal drafting bodies themselves reflect hierarchical arrangements that consolidate agency in a head or lead drafter.

Katzmann, Elizabeth Garrett, Victoria Nourse, Rebecca Kysar, and Jonathan Gould--has pushed to change this.⁵²³

Third, regardless of the first two points, the fact of the matter is that judges do consistently interpret statutes in ways that judges claim are usually tethered to Congress. That means lawyers have to engage those arguments, too. Judges tell us they interpret statutes as not using redundant language because they assume that is how Congress uses language (at least one prominent textualist judge (now Justice) has questioned that rule in the face of empirical evidence to the contrary.⁵²⁴) Judges tell us they rely on statutory organization instead of legislative history precisely because they assume the organization of statutory text is voted upon by members as part of the text, whereas legislative history is written by staff. This is not true. Students of the congressional bureaucracy now know that statutes are organized into the U.S. Code after passage by OLRC. Judges also presume that Congress uses the same words in the same way throughout the U.S. Code, when in fact, the structure of Congress and its bureaucracy points toward consistency and coherence only within subject matter areas and not within the Code as a whole.

With the exception of former Judge Richard Posner, we have not encountered a judge in the modern legislative state who has claimed that his or her interpretive approach is the result of judicial invention, federal common-law lawmaking, or the imposition of external norms--norms like notice, coherence, and consistency that could indeed justify some linguistic presumptions--atop the congressional process even in the face of evidence that Congress does not operate in the shadow of those norms. We emphatically believe that one could justify modern approaches in that way, but modern judges have never been willing to assert the mantle of being anything other than “faithful agents” of Congress with their work tethered to the principle of legislative supremacy. If that is to remain the justification, then for the doctrines to be legitimate our understanding of Congress has to be more accurate.

In the exchange set out at the top of this Part, Justice Scalia debated Justice Breyer over how to resolve a statutory ambiguity. Breyer would have used legislative history, but Scalia refused to because legislative history was the product of “staff.” But turning to a policy presumption instead, as he suggested, simply means the Court decides the question itself. How is that more faithful to Congress or more democratically legitimate if a theorist is focused--as textualists say they are--on legislative supremacy?

⁵²³ See generally Robert A. Katzmann, Judging Statutes (discussing utility of legislative history to everyday work of Congress and judges); Elizabeth Garrett, The Purposes of Framework Legislation, 14 J. Contemp. L. Issues 717 (2005) (arguing that different interpretive methods might apply to omnibus legislation because of the unique circumstances of their enactment); Gould, *supra* note 16 (descriptive account of the Parliamentarians’ offices); Rebecca M. Kysar, Dynamic Legislation, 167 U. Pa. L. Rev. 811 (2018); (discussing special kinds of laws, ideal for bypassing gridlock, that automatically evolve with changed circumstances); Kysar, *supra* note 480 (detailing modern realities and instabilities of the budget process); Victoria F. Nourse, A Decision Theory of Statutory Interpretation: Legislative History by the Rules, 122 Yale L.J. 70, 80-86 (2012) (advancing theory of interpretation based on Congress’s own procedural rules); Elizabeth Garrett, Conditions for Framework Legislation, (USC Law & Econ., Working Paper No. 04-23, 2004).

⁵²⁴ *Loving v. I.R.S.*, 742 F.3d 1013, 1017 (D.C. Cir. 2014).

Further engagement in these debates requires separate treatment. Our aim in this Article is (mostly) not to argue that the realities of the congressional bureaucracy necessarily must be utilized by statutory interpreters. Rather, our aim is to illustrate how our analysis of heretofore-overlooked congressional functions sheds light on those debates and offers a challenge to interpreters with theories and doctrines tied in one way or another to Congress.

A. What the Congressional Bureaucracy Tells Us About Congress's Rationality and Changes in Modern Lawmaking

Recall the famous assumption about Congress advanced by Legal Process titans Hart and Sacks: “the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”⁵²⁵ Modern textualism pushed that assumption aside, grounding interpretation instead in realist- and economic-based theories of Congress as an impenetrable, deal-making, compromise-driven, incoherent institution that courts can never hope to understand.⁵²⁶

The Court today has no loyalty to the Legal Process approach (although one of us has argued that Chief Justice John Roberts is actually of that school⁵²⁷), and the Court as a whole is quite textualist.⁵²⁸ But ironically, textualism's main interpretive doctrines--which are the ones the Court applies in virtually every statutory interpretation case--do implicitly attribute rationality, sometimes even perfection, to Congress. In other words, the assumption of a reasonable Congress underpins the central textualist canons of interpretations, even as textualism itself is grounded in the opposite assumption. Among the presumptions that federal courts (including judges of all stripes) routinely apply are assumptions that Congress legislates constitutionally;⁵²⁹ does not bury elephant-sized changes in statutory mouseholes;⁵³⁰ does not unnecessarily repeat

⁵²⁵ Hart & Sacks, *supra* note 7, at 1378.

⁵²⁶ See John F. Manning & Matthew C. Stephenson, *Legislation and Regulation* 67 (3d ed. 2017) (“Rather than seeing the legislative process as coherent and reasonable, the new textualists emphasize the rough-and-tumble of political compromise.”).

⁵²⁷ Gluck, *Imperfect Statutes*, *supra* note 10.

⁵²⁸ Justice Kagan has made this point several times, see, e.g., Ryan Lovelace, *Elena Kagan: The Supreme Court Is a ‘Textualist Court’ That Reasons More Like Scalia Than Breyer*, *Wash. Examiner* (Oct. 16, 2017), <https://www.washingtonexaminer.com/elena-kagan-the-supreme-court-is-a-textualist-court-that-reasons-more-like-scalia-than-breyer> [<https://perma.cc/U9TX-M5B8>] (“[W]e are a generally, fairly textualist court . . .”).

⁵²⁹ See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2089-90 (2014) (construing statute implementing an international convention on chemical weapons does not apply to local crimes involving chemicals to avoid constitutional question); *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (narrowing potentially unconstitutionally vague statute, regarding the intangible right of honest services for vagueness, to avoid the constitutional issue”). For a full explanation and additional examples, see William N. Eskridge, Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 317 (2016) (describing the development of the “Modern Avoidance Canon”).

⁵³⁰ See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (striking an interpretive regulation that would have dramatically altered the landscape of drug regulations and physician-assisted suicide); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-27 (2000) (finding that Congress would not have delegated major question of tobacco regulation to FDA without expressly saying so); see also Eskridge, *supra* note 529, at 337 (explaining the “No Elephants in Mouseholes Canon”).

itself;⁵³¹ uses similar words in the same way throughout statutes;⁵³² and so on. The Gluck-Bressman study has shown that some of these assumptions are mistaken, but that does not change the larger point that even textualists, despite their purported values, maintain an idealized vision of a rational Congress for purposes of doctrine.

Modern lawmaking further complicates this view. The Gluck/O’Connell study of “unorthodox lawmaking” documents for legal readers the pervasive deviations from the textbook, “schoolhouse rock” legislative process that has been the paradigm for the past half century.⁵³³ If textualists thought the Congress of the 1970s was incoherent, they should find the gridlocked, unorthodox Congress of the 2000s much worse.

Enter the congressional bureaucracy. The congressional bureaucracy’s interaction with the modern unorthodox Congress makes three interventions in this debate. First, it challenges these pessimistic views of Congress as an institution. Second, it helps us see how even common interpretive methods, including textualist interpretive presumptions, might be better tailored to the facts of modern lawmaking. And third, it illustrates gaps in prevailing doctrine that must be addressed.

B. Unorthodox Lawmaking Is the New Orthodox Lawmaking: Implications for Understanding Statutes

The concept of “unorthodox lawmaking” (a term coined by political scientist Barbara Sinclair) was almost entirely absent from legislation and statutory interpretation theory and doctrine even a few years ago.⁵³⁴ The nonpartisan offices studied in this Article both fill out and

⁵³¹ See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697-98 (1995) (discussing the “reluctance to treat statutory terms as surplusage”); *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion) (describing how the concurrence “violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant”); see also Eskridge, *supra* note 529, at 112 (discussing the “Anti-Surplusage (-Redundancy) Canon”).

⁵³² See, e.g., *Babbitt*, 515 U.S. at 702 (describing the way the word “harm” came to have a particular meaning throughout the entirety of the Endangered Species Act); see also *West Va. Hosp. v. Casey*, 546 U.S. 243, 265-68 (2006) (assuming Congress drafted fee-shifting statutes the same way in 41 instances across the U.S. Code); see also Eskridge, *supra* note 529, at 108 (discussing the “Consistent Use Canon”).

⁵³³ The late political scientist Barbara Sinclair first introduced the concept. See Gluck, O’Connell & Po *supra* note 1, at 1794 (“[I]t seems that the Schoolhouse Rock! Cartoon version of the conventional legislative process is dead. It may never have accurately described the lawmaking process in the first place.”).

⁵³⁴ References to Sinclair’s canonical work in political science on unorthodox lawmaking were almost entirely absent from legal scholarship before the Gluck-Bressman study. A search of law reviews on Westlaw found just fifty-one results for “Barbara Sinclair,” and just 13 for “unorthodox lawmaking,” prior to 2003. By contrast, a similar search of law reviews published after 2003 found 209 results for “Barbara Sinclair” and 228 for “unorthodox lawmaking.” One critical exception is Elizabeth Garrett, whose excellent work documented deviations from the textbook process much earlier. See, e.g., Elizabeth Garrett, *Conditions for Framework Legislation*, in *The Least Examined Branch* 294, 297-318 (Richard W. Bauman & Tsvi Kahana eds., 2006) (cataloguing various types of modern statutes with special rules that deviate from textbook account, including omnibus laws, the budget process, and statutes that use commissions as automatic decisionmaking regimes); Garrett, *The Purposes of Framework Legislation*, *supra* note 523, at 718 (same).

complicate the unorthodox lawmaking account that has recently gained more traction in legal scholarship.

1. Congress is Still Informed in Key Ways

On the one hand, the experience of the congressional bureaucracy substantiates the notion that the textbook process is increasingly rare and that new procedures--which to many internally already are understood to be the new orthodox lawmaking--have replaced it. Each of the offices we studied volunteered these congressional-process changes as extremely significant and pervasive. On the other hand, however, our account adds nuance that may be cause for at least some optimism. "Unorthodox," we learn from the nonpartisan institutions, does not necessarily mean "uninformed." Regular order--the now-traditional process that emerged in the 1970s to publicly vet a bill through committee, hearings, floor debates, bicameral conference, and more--was designed to ensure that legislation was studied, deliberated, transparent, precise, and error-free. Today, those processes have changed, but the congressional bureaucracy, and its expertise, continue to be utilized, even if they are less visible.

When it comes to a broad swath of legislative activities (including drafting, estimating, auditing, analyzing, and following the procedures for amending legislation), Congress continues to seek out rational deliberation and expertise--even within unorthodox lawmaking. Of course, the bureaucracy's institutions are not Congress's main source of substantive subject-matter expertise--except for JCT (and legislative commissions like MedPAC and MACPAC). Future scholars therefore still bear the burden of showing that the partisan expert policy staff--the committee staff who provide the bulk of Congress's substantive policy expertise--continue to act in ways that contribute to a rational account of Congress (Our anecdotal impression is that they do). But to say that modern federal statutes are not vetted or deliberated is simply wrong. Reasonable legislators still try to pursue reasonable purposes reasonably--just not in the ways the old orthodox model recognizes.

It is undoubtedly true that things are much more rushed. As Gluck, O'Connell, and Po detailed,⁵³⁵ unorthodox lawmaking changes the timing and transparency of legislative interventions and, with it, the structure, complexity, and legislative materials that accompany legislation. This proves to be as true for the congressional bureaucracy's role. As one staffer put it:

The expectation today is totally different. Before, it used to be the joke was the complexity of the tax code, but now that is spreading to other areas of the law. This creates more challenges for practitioners. The amount of time spent on legislating, having to do everything in one large bill, ram it all in, in fewer steps, leads to more mistakes, more inconsistencies.⁵³⁶

⁵³⁵ See Gluck, O'Connell & Po *supra* note 1, at 1819-20 (discussing the impact of unorthodox lawmaking on timing and transparency of the legislative process).

⁵³⁶ Staffer Interview.

Parliamentarians are increasingly doing their work off the floor. The Legislative Counsel still drafts bills but now rarely has the chance to draft amendments from the floor or clean up in conference (because there is rarely a conference anymore). JCT still provides the policy backbone of tax legislation and the accompanying legislative materials, but legislative history is evaporating thanks to unorthodox processes. The JCT now puts those materials in other formats--including the post-enactment Bluebook--in the absence of legislative history. CBO has an iterative back-and-forth with drafters before an official score is released as drafters “slice and dice” to get a statute within target score. The public cannot see any of that. The public just sees legislation rushed from formal introduction to passage.

Sometimes, bills simultaneously undergo the more public journey through the steps of the old orthodox lawmaking process. Some legislative reformers, nostalgic for the olden days, have called for changes to bolster those old steps.⁵³⁷ But, at least some of the time today, the tools of old orthodox lawmaking--hearings and floor debates--are for C-SPAN cameras, not for internal fact-gathering and deliberation.⁵³⁸ Other times, it is true, public airing of issues--much like an oral argument in court--is a way to bat around the issues, or hear where other colleagues stand. Substantive markups are still typically core legislative work. At the same time, however, Congress has remade these old orthodox steps into opportunities for external communication with constituents--and a great deal of deliberation and refinement now occur largely off the radar behind closed doors. But they do occur, and to a great extent they still rely on the bureaucracy.

The Gluck-O’Connell study details many distinctive features of the new unorthodox lawmaking and their implications for statutory interpretation and administrative law doctrine, and it raises questions about the risks and benefits of these modern departures from so-called “regular order.”⁵³⁹ Below, we highlight those areas that are of particular relevance to the congressional bureaucracy and that emerged as especially salient from our interviews. The main takeaways are:

- Preconference replaces conference: textual changes to bills are less visible, come earlier, and party leaders aggregate more power; no more conference reports

⁵³⁷ See, e.g., Thomas E. Mann & Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (2008) (arguing Congress has become dysfunctional); Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 *Geo. L.J.* 109, 166 (2018) (arguing for imposing “role morality” on Members of Congress to preserve “important rules and practices,” including regular order); ; Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 *Mo. L. Rev.* 135, 139 (2011) (noting the problem of rushed legislation and arguing for “a Read the Bill norm, coupled with a norm of writing bills in readable and understandable language”); *Improving Congress, C-SPAN* (July 22, 2015), <https://www.c-span.org/video/?c4722150/returning-regular-order-congress> [https://perma.cc/B3GF-N5M3] (discussing comments of John Fortier, Director of the Bipartisan Policy Center’s Democracy Project); Derek Willis & Paul Kane, *How Congress Stopped Working*, *ProPublica* (Nov. 5, 2018), <https://www.propublica.org/article/how-congress-stopped-working> [https://perma.cc/6B5A-NUZ4] (recounting the problems Members of Congress attribute to Congress’s deviation from regular order and several ideas to remedy the issue, including remaining in session for longer).

⁵³⁸ Cross, *Legislative History*, *supra* note 1, at 140-50 (providing survey results on the uses of, and intended audience for, different congressional statements and fora than hearings, to learn the contents of proposed legislation).

⁵³⁹ See generally Gluck & Bressman, *supra* note 1; Gluck, O’Connell & Po, *supra* note 1.

- Statutes are longer, and have more errors and gaps
- Text relating to procedural hurdles and budget scoring is painstakingly negotiated
- There is less legislative history
- The bureaucracy becomes more politicized as procedural tactics gain importance

2. New Timing and “Preconference”—and their challenges for textualists

The new timing is different, not only with respect to compressed timeframes for legislating, but with respect to the point in the process at which expertise is sought and utilized. A new procedure--“preconference”--has largely replaced the last stage of the legislative process (conference) where changes between House and Senate bills were traditionally worked out. Many of our interviewees, without prompting, referenced to this term--“preconference”—as the new norm.

Conference has largely disappeared because any changes made at that stage require a new vote from both chambers; in today’s era of extreme gridlock,⁵⁴⁰ party leaders are reluctant to take that step and seek to get bills done with just one vote.

Preconference was described this way: “Senate staff, they might negotiate more informally to get a bill the House can pass after Senate [passage].” There are “amendments back and forth.”⁵⁴¹ Because of the traditional importance of conference, courts typically give great weight to the textual changes made at that stage,⁵⁴² and many judges give special weight to the conference committee report.⁵⁴³ The new unorthodox timing changes this because there are almost no conference reports. The new timing also makes less visible the various changes made to bills between introduction and the vote. This is also an important change for interpreters, given that judges and advocates, including and especially textualists, often look to that statutory evolution for textual evidence of statutory meaning.

The Parliamentarians told us that now they “try to negotiate . . . out [ahead of time] rather than fight them out on the floor.”⁵⁴⁴ GAO told us that, even while most of its work is transparent, it now gives more nonpublic, early informal technical assistance than in the past.⁵⁴⁵ We were

⁵⁴⁰ For a discussion of whether nonpartisan staff themselves reduce gridlock, see Mickey Edwards, *The Parties Versus the People* 91–128 (2012) (arguing that nonpartisan committee staff could reduce gridlock); Yin, *supra* note 18 (questioning this idea).

⁵⁴¹ *Id.*

⁵⁴² See, e.g., William Eskridge Jr. et al., *Statutes, Regulation, and Interpretation: Legislation & Administration in the Republic of Statutes* 72-73 (2014) (noting that conference reports typically sit atop the hierarchy of legislative history as reviewed by judges); Nourse, *supra* note 9, at 93-97 (noting the Supreme Court’s reliance on Conference history).

⁵⁴³ Even scholars who urge attention to the legislative process place great weight on this now largely absent stage. See Nourse, *supra* note 9.

⁵⁴⁴ Staffer Interview.

⁵⁴⁵ *Id.*

also told that procedural decisions are “becoming a lot more front-loaded” and decisions about germaneness are “happening earlier and earlier in the process.”⁵⁴⁶

We were told there are rarely presidential vetoes anymore, “because the administration sends out statements of policy . . . and the Senate and House are coordinating. Things are scheduled and done ahead of time. [They] are dealing with this stuff earlier.” Staffers characterized this new normal as “more pointing out landmines in advance . . . rather than on the floor.”⁵⁴⁷

Staffers stated: “Fast track processes can feel like cheating. You are never going to spend three weeks on an energy bill, again.”⁵⁴⁸ One staffer told us that the national defense authorization process used to be a “robust amendment process” in committee and on the floor. But now, the staffer added, “today we do it one day on the floor as opposed to two weeks”⁵⁴⁹

JCT staff noted that under regular order, JCT had a role with conference [i.e., to reconcile House and Senate versions]. They told us: “behind the scenes, bills still look different now on the House and Senate side, but now they do preconference more to reconcile bills before they come out.”⁵⁵⁰ Even apart from losing the conference report, these timing changes make the basic amending process less transparent. Under old orthodox lawmaking, much of Congress’s expertise-seeking occurred in display of the public. Congress undertook these activities, for the most part, on chamber floors or in committees. Today, with most vetting, changing, and analyzing of legislation now happening before a bill hits the floor, there is less opportunity for outsiders to see Congress actually grappling with difficult issues and tradeoffs. There is less formal procedural precedent being created and less explanatory material to inform other members and later readers of statutes. This leads to the often-false perception that Congress is not doing its job in a thoughtful way.

It also means one of textualists’ favorite materials--what they call “statutory history” (as opposed to legislative history), the textual evolution of a bill, including rejected and accepted amendments--are disappearing. We were told, for instance, that “appropriations has traditionally had a more open process. Legislative Counsel used to come to the floor to be ready to write amendments, but that is [a] relic of the past.”⁵⁵¹ This does not mean that appropriations bills are not being amended or that Legislative Counsel is not writing the amendments. It would be a mistake for judges to assume these things do not happen just because they are now less visible, with fewer published materials.⁵⁵² It just means that the negotiations and drafting happen before

⁵⁴⁶ See *id.*; see also Gould, *supra* note 16, at 1974 (reporting similar references in his own interviews to “frontloading”).

⁵⁴⁷ Staffer Interviews.

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*

⁵⁵² [To be added]

the bills come to the floor. Instead, policy staff exchange notes and negotiate changes behind the scenes, often together with their bureaucracy supports, and typically before the bill goes to the floor, to avoid a conference.⁵⁵³ Policy staff may continually adapt the proposed legislation outside of the public view to account for the feedback, debates, and discussions that these entities now facilitate more informally--whether through early projections of a budget score, procedural advice on germaneness, or the drafting of language.

This movement away from the action on the floor to these earlier behind-the-scenes procedures may also have implications for our internal separation of powers point, detailed in Part II. The Gluck-Bressman study established that unorthodox lawmaking has shifted power away from committees and toward the party leaders.⁵⁵⁴ Our bureaucracy interviewees corroborated those conclusions and added to them. They told us that the timing changes make regular members less visible, and that there is instead more interaction with the bureaucracy directed by party leaders. CRS staff's comment was typical: "The nature of work is largely unchanged . . . [but] the avenues by which they come to us are . . . different Decades ago we worked primarily [with Members] through committee constructs . . . [but now it's coming] primarily through Leadership."⁵⁵⁵ This account suggests that increasingly centralization might be happening with respect to bureaucratic information and expertise--centralization that would undermine some of the internal separation of powers benefits the congressional bureaucracy brings.

3. More Mistakes and Gaps

There is now a higher expectation of errors and gaps. We were told by several offices that, for Legislative Counsel, usually charged with cleaning up statutes, unorthodox processes and timing now make it "harder to fix problems in bills on the floor," and that as a result, statutes may be more "Delphic."⁵⁵⁶ We were also told by OLRC that "as Congress has become contentious . . . it's hard to get [the law] passed" that would make technical corrections after enactment. They added that departures from regular order can get a bill passed but that they "come out messier and later in the session."⁵⁵⁷ In the 114th Congress, we were told, 75% of the passed legislation was passed at the end of the session. In addition, OLRC observed: "They can throw things in omnibus bills; those bills tend to be more complicated, have more errors. This has complicated things for us."⁵⁵⁸

⁵⁵² Cf Margaret B. Kwoka, *Setting Congress Up to Fail*, 17 *Berkeley J. Afr.-Am. L. & Pol'y* 97, 97-98 (2015) (noting in the constitutional law context, the way courts are doing legislative record review not based on accurate assumptions about legislative process).

⁵⁵³ Staffer Interviews. Hearings and markups occurred before congressional committees, for example, while debate over solutions occurred both in committee rooms and on the floor of Congress.

⁵⁵⁴ See Bressman & Gluck, *supra* note 1, at 976-77.

⁵⁵⁵ Staffer Interview.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

As one of us has previously detailed, the federal courts do not have a clearly articulated doctrine of legislative mistakes.⁵⁵⁹ Instead, the courts have an exceedingly harsh rule: effectively, that if the statutory language reads in plain English, apply it as such. The courts mitigate this rule with case-by-case exceptions meted out with little rhyme or reason apart from the fact that it is most often high-stakes cases (e.g., the recent Affordable Care Act challenge in King v. Burwell) that get the leniency.⁵⁶⁰ The lack of usable doctrine in this area is a major gap, and the quality-enhancing effects of the bureaucracy institutions notwithstanding, courts must develop a more rigorous and well-considered approach to legislative mistakes.

4. Highly Specific, Negotiated, Language Used to Clear Procedural Hurdles

On the other hand, and in some tension with our point about mistakes, there may be a reason to give heightened weight to the particular words used to clear procedural or budgetary hurdles and to consider text especially carefully in the context of those procedural and budget rules. Our interviewees strongly emphasized the very careful language-slicing that occurs to bring bills with the desired procedural or budgetary goals.

One staffer compared this parsing of language to “slicing garlic with a razor blade.”⁵⁶¹ When it comes to procedures for reconciliation--the procedural mechanism that avoids a filibuster--our interviewees emphasized that, to get a bill within the rules: “[we] are ripping things out of [it] . . . [l]ike weeds in a garden.”⁵⁶²

Anyone looking at such a law, they emphasized, has to “presume it’s not just because you are pleasing a particular constituency; it’s about reconciliation.”⁵⁶³ Any interpretation of the text that does not account for the constraints of the reconciliation process, we were told, is considered a misinterpretation of the law Congress tried to pass--plain and simple.⁵⁶⁴

OLRC’s work has changed in a different way. Unorthodox lawmaking has made that Office’s job much more complex. Omnibus bills are the current favorite vehicle for passing mega-legislative deals together, and, as such, they bring together many different subjects. OLRC’s job is basically the opposite--that is, to cohere the U.S. Code by subject matter. What OLRC must now do, then, is effectively reverse-engineer Congress’s omnibus process. They told us: “We are breaking up what they are bringing together.”⁵⁶⁵

⁵⁵⁹ Gluck, *supra* note 10, at 99-102; cf. Cross, Staffer’s Error, *supra* note 1, at 121-122 (describing how in *King* “[t]he Court essentially reviewed statutory text for a specific, particularly egregious type of staffer error” of the type that would “undermine core statutory purpose—which is to say . . . the basic goals that members of Congress would have entrusted to [the staffers]”).

⁵⁶⁰ Compare, e.g., *King v. Burwell*, 135 S.Ct. 2480, 2495 (2015) (reading likely erroneous statutory language expansively in order to uphold statutory plan), with *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (holding Congress to its word despite a clear error in the bankruptcy code because the statute could still be read intelligibly).

⁵⁶¹ Staffer Interview.

⁵⁶² *Id.*

⁵⁶³ *Id.*

⁵⁶⁴ On highly specific language being used to clear procedural hurdles, see also Gould, *supra* note 16, at 1971-73 (discussing the Byrd bath process).

⁵⁶⁵ Staffer Interview.

5. Less Legislative History

JCT and Legislative Counsel emphasized the important legislative materials that are often lost in the modern processes. Many omnibus bills do not have legislative history at all, or they bring together previously-written, separate bills with legislative history that may be old and outdated. JCT noted that, in particular, without the conference report “you lose an important part of the legislative history, which can be a significant loss.”⁵⁶⁶ JCT also told us that unorthodox lawmaking consequently increases the importance of the Bluebook--the influential summary of tax legislation produced by JCT after statutes are enacted. The Bluebook takes on greater significance in conveying congressional intent to agencies and the tax bar, we were told, “when there is no regular order, because often there is no conference report [or] committee report.”⁵⁶⁷ This is the case even though the Bluebook has often “been more aggressively expansive [than] legislative history”--it makes bigger statements.⁵⁶⁸

The House Parliamentarian’s Office similarly emphasized that legislative history looks different now:

When looking to legislative history, there needs to be a modern look that takes into account [the fact] that the process [on the House floor] is much more structured [now]. The amendments and remarks need to be construed using a modern lens [T]he amount of remarks on the floor that are generated for purpose of legislative history has shrunk tremendously and [these remarks are now] reserved to bills where there are likely to be practitioners: judiciary committee, election law. . . . I don’t think the process is as static as some academics or judicial branch folks may have learned in civics.⁵⁶⁹

6. More Visibility and Politicization

Unorthodox lawmaking is not solely about doing things behind closed doors. It has actually elevated the visibility of some of the nonpartisan institutions--as we have noted, not always in ways that are beneficial.

For the Senate Parliamentarian, resort to special procedures that get around the filibuster and other hurdles has made a difference in the public perception of the role. We were told: “The job is same as before, but it’s gotten a higher profile and more personal largely because of the Byrd rule . . . [and] fast track [procedures]. More light will be shone . . . where expedited

⁵⁶⁶ Id.

⁵⁶⁷ Id.

⁵⁶⁸ Id.

⁵⁶⁹ Id.

procedures have been written. And [they] have to make Solomonian decisions here and there.”⁵⁷⁰ Budget reconciliation proceedings, it was emphasized, “are very high profile, and criticized in the news . . . the Byrd rule is the thing that makes Parliamentarians almost ‘Washington famous’ every few years based on decisions that [they’re] making about what is or isn’t appropriate in reconciliation bills.”⁵⁷¹

Just as CBO became more politicized once the importance of its reports became more salient, the Parliamentarian becomes a divisive figure when unorthodox processes put pressure on complex procedural workarounds.

C. What Does the Supreme Court Think About Unorthodox Lawmaking?

Congress is routinely disparaged and unorthodox lawmaking makes Congress appear even less deliberative than it did before. Years ago, some scholars had urged a theory of interpretation that considered whether Congress had adequately deliberated--in former Oregon Supreme Court Justice Hans Linde’s words, whether Congress had engaged in “due process in lawmaking.”⁵⁷² Until recently, courts had resisted any kind of direct engagement with the question of how the seriousness of a statute’s legislative process should affect how that statute is interpreted.⁵⁷³ As noted, the Court has no coherent doctrine of statutory mistakes, and does not seem to understand how aspects of the process--including the disappearance of conference and conference reports--have changed.

The Court has just started to grapple with these issues, but has a long way to go. The notable example is King v. Burwell, the 2015 challenge to the Affordable Care Act’s insurance subsidies. Dealing with a likely amalgamation error in the ACA--an ambiguity caused by the sloppy merger of two different versions of the law without an opportunity for conference to clean up errors--Chief Justice Roberts opined:

Congress wrote key parts of the Act behind closed doors, rather than through “the traditional legislative process.” . . . And Congress passed much of the Act using a complicated budgetary procedure known as “reconciliation” As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation.⁵⁷⁴

For all the Court’s salutary interest in Congress--this was the first time the Supreme Court strove to bend interpretation to the realities of a statute’s unusual legislative process--it largely got the story wrong. The ACA’s unorthodox history was no parliamentary aberration;

⁵⁷⁰ *Id.*; accord Gould, *supra* note 16.

⁵⁷¹ *Id.*

⁵⁷² Hans A. Linde, *Due Process of Lawmaking*, 55 *Neb. L. Rev.* 197, 241 (1976).

⁵⁷³ By contrast, in the constitutional law context, Courts often scour the legislative record for proof that Congress deliberated. See William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 *Stan. L. Rev.* 87, 109 (2001) (outlining the theory of legislative record review in the constitutional law context); cf. Kwoka, *supra* note 563, at 97-98 (noting legislative record review not based on accurate assumptions about legislative process).

⁵⁷⁴ 135 S.Ct. 2480, 2492 (2015).

plenty of legislation had gone through reconciliation before (and only a portion of the ACA went through it). The statute also was exceedingly deliberated by a record-breaking five congressional committees for two years (including hundreds of hours of hearings). Legislative Counsel was intimately involved in the drafting. CBO and JCT were constantly engaged on scoring and estimating. CRS and MedPAC wrote numerous reports.⁵⁷⁵ It is true there was no conference, and as such the opportunity for Legislative Counsel to correct errors was indeed forgone. Arguably that means the final product was sloppy, but not necessarily that the law was not carefully deliberated and reviewed along the way. Studying the congressional bureaucracy substantiates the account that there is a “new normal” when it comes to the legislative process; how courts account for that has to be part of the project in statutory interpretation if the field is to have a democratic link to Congress.

Finally, we note that, we did not hear from anyone that Congress is eschewing congressional bureaucracy consultations due to unorthodox lawmaking. But Congress could always pass rules requiring such consultation, just as it has in requiring a CBO score.⁵⁷⁶ Congress could also develop a practice of noting in the materials accompanying legislation which bureaucracy institutions were in fact consulted--a practice that might assuage some public concerns about the lack of deliberation in our lawmaking process. At the same time, as we have noted throughout the Article, there are risks to elevating the profile of the congressional bureaucracy--risks to the institutions’ perceived neutrality and the lack of politicization around them. Mandating use of the bureaucracy might introduce new pathologies into the process, just as some have already argued that PAYGO has skewed the drafting process by excessively elevating the importance of the CBO score.⁵⁷⁷

In the next and final Part of the Article, we offer more takeaways for courts, both for purposes of statutory cases and for overarching conceptualizations and assumptions about Congress’s rationality. Our aim in this Part has not been to advocate for specific legislative reforms, or to criticize unorthodox lawmaking, or to argue that courts should develop doctrines to curtail it--as Hans Linde and others likely might have. Rather, we have primarily aimed in this Part to show how courts’ assumptions about lawmaking and the materials produced therein have changed; the congressional bureaucracy’s modern experience corroborates earlier accounts of those changes.

⁵⁷⁵ See, e.g., Jennifer Staman et al., Cong. Research Serv., R40725, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* (2012); Hinda Chaikind et al., Cong. Research Serv., R40942, *Private Health Insurance Provisions in the Patient Protection and Affordable Care Act (PPACA)* (2010). Compare March 2009 Report to Congress: Medicare Payment Policy, <http://www.medpac.gov/documents/reports/march-2009-report-to-congress-medicare-payment-policy.pdf?sfvrsn=0> (last visited May 11, 2020) (proposing hospice reforms) with the Pub. L. No. 111-148, § 3132, 124 Stat. 119 (2010) (hospice reforms).

⁵⁷⁶ Section 402 of the Congressional Budget and Impoundment Control Act of 1974, while not framed as a rule binding on Congress, has a similar effect. It directs CBO to estimate the costs of bills and resolutions approved by Congressional committees other than the House and Senate Appropriations Committees, thereby cementing a default practice of soliciting CBO input.

⁵⁷⁷ See, e.g., John B. Wells, *As It Applies to Veterans, It is Time for Pay-Go to Go*, *The Hill* (Jan. 24, 2019, 11:30 AM), <https://thehill.com/opinion/finance/426773-as-it-applies-to-veterans-it-is-time-for-pay-go-to-go> [<https://perma.cc/EBF5-D65W>].

And of course, we want courts to *notice* the congressional bureaucracy. American federal courts rarely cite to the institutions' work. In the past decade, the Supreme Court has cited only a handful of times to CBO (five), the Legislative Counsel drafting manuals (two) GAO (two), and to CRS (eleven).⁵⁷⁸ It has never cited to MedPAC, MACPAC, parliamentary rulings or precedents, and cited only once, in 1975, to OLRC.⁵⁷⁹ The Courts of Appeals have cited them more frequently: GAO (fifteen); CBO (twenty-four) CRS (eighty-four); OLRC (five); Parliamentarian (two); MedPAC (five); JCT (twenty-four); and Legislative Counsel drafting manuals (eight). The next and final Part offers more concrete doctrinal payoffs for courts.

IV. Statutory Interpretation Doctrine

Is there a way to translate these findings to on-the-ground statutory interpretation doctrine? Remember, the question is not whether to ignore enacted text. Assume the text is always consulted first, but the question is where to turn when the text runs out. Would looking more frequently to the JCT's report or revenue score, or considering Legislative Counsel's established drafting conventions, or the parliamentarian's jurisdictional or procedural rulings, or the CBO score, or the GAO Red Book or its report that prompted new legislation shed as much--if not more--light on textual meaning than a dictionary or judicially crafted policy presumption?

Recall the presumptions currently in use. They range from presumptions about language (e.g., it is not used redundantly) to presumptions about policy that judges, not Congress, devise (e.g., the presumption that construes statutory ambiguities in favor of Native American tribes, or in favor of bankruptcy debtors, or in favor of arbitration, or extraterritorial application of securities law, and scores more). Those judicially developed presumptions reflect the normative choices of the courts that created and later perpetuated and entrenched them. Which sources are more relevant and why?

This is a doctrinal legitimacy question. As Gluck's work emphasizes, we do not have to have statutory interpretation tethered to Congress. But if a connection to Congress is going to be the justification--including through policy presumptions the courts claim Congress knows or uses--then the doctrines should be tethered. Many canons simply are not.

At least three possible paths forward present themselves. First, ignore the congressional bureaucracy on the grounds that Congress does not act collectively, or cannot be understood. We

⁵⁷⁸ See *Fin. Oversight and Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, ___ S. Ct. ___, at *19 (June 1, 2020) (Sotomayor, J., concurring) (citing CRS report on Puerto Rico's Current Fiscal Challenges); *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1319 (2020); (citing GAO, Principles of Federal Appropriations and referencing CBO score); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 203 (2012) (Roberts, J., dissenting) (citing GAO Principles of Federal Appropriations Law); *Carr v. United States*, 560 U.S. 438 (2010) (citing Legislative Counsel drafting manual); *United States v. O'Brien*, 560 U.S. 218 (2010) (citing Legislative Counsel drafting manual); cf. *U.S. v. Woods*, 571 U.S. 31 (2013) (dismissing JCT's "Blue Book" as relevant).

⁵⁷⁹ *Muniz v. Hoffman*, 422 U.S. 454, 472 n.11 (1975) (referencing a point made "by the Law Revision Counsel to the House subcommittee which held joint hearings on the revision to the Judicial and Criminal Codes").

have already discussed how Congress does indeed act collectively when it comes to the formally delegated work of the congressional bureaucracy. Moreover, if Congress can never be understood, then the answer is to move away entirely from a faithful-agent approach to a judicially centered one, not to continue what we have now.⁵⁸⁰ We will not devote further space to those arguments here.

Second, assuming some link to Congress is desired in at least some cases, we can consider how to utilize the outputs of the congressional bureaucracy, just as we utilize other outputs from Congress, like legislative history. In at least some cases, the bureaucracy's outputs may have more credibility than legislative history because they are nonpartisan and ex ante approved by Congress as a whole.

Third, we might draw some lines as to which aspects of the bureaucracy's work should be considered or consider some inputs as stronger than others, just as we prioritize different kinds of legislative history and canons. For instance, those inputs that are directly part of the legislative process--scoring, parliamentary rules, Legislative Counsel drafting--might be considered more relevant than reference materials like CRS reports.

Another place to draw a line might be at the vote. That is, perhaps post-enactment work to organize and clean up the U.S. Code (OLRC) or explain changes to the tax codes (JCT) should be discounted because Congress votes before they happen. For those who take such an approach, the Statutes at Large presumably should replace the U.S. Code as the source for federal statutory law, especially for non-positive titles. But we also want to suggest a more provocative reconceptualization of "lawmaking" and the resulting statutory "text" would include all the inputs and processes Congress sets up for itself when it creates and puts in motion its massive bureaucracy. Some of those inputs and processes are indeed explicitly set up by Congress to occur after the vote. The Constitution would seem to permit this: the text of Article I does not specify the rules, procedures, positions, or offices to create a functional legislature. Instead, it gives Congress the power to construct the institution it finds most useful, including the power to create and choose its own officers, create its own rules, and use any necessary and proper powers to execute its functions.⁵⁸¹ The fruits of those efforts are evident in Title 2 of the U.S. Code, where one finds the organic statutes for the congressional bureaucracy.⁵⁸²

⁵⁸⁰ See, e.g., Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 *Stan. L. Rev.* 1833, 1864-66 (1998).

⁵⁸¹ See U.S. Const. art. I, §§ 2, 3, 5, 8; see also Chafetz, *supra* note 32, at 267 ("The ability of each chamber to determine its own cameral rules can be thought of as its authority to create its own constitution: the rules constitute it as a certain type of body with certain powers and procedures for exercising those powers, as well as certain constraints on its powers.").

⁵⁸² 2 U.S.C. § 166 et seq. (2018) (Congressional Research Service); 2 U.S.C. 281a et seq. (2018) (House Office of the Legislative Counsel); 2 U.S.C. § 275 (2018) (Senate Office of the Legislative Counsel); 2 U.S.C. § 601 et seq. (2018) (Congressional Budget Office); 26 U.S.C. 8021 (2018) (Joint Tax Committee); 2 U.S.C. § 287 et seq. (2018) (House Parliamentarian); 2 U.S.C. § 6531 et seq. (2018) (Secretary of the Senate, which includes Senate Parliamentarian); 2 U.S.C. § 285a (2018) (Office of the Law Revision Counsel); 31 U.S.C. §§ 701 et seq. & 3511 et seq. (2018) (Government Accountability Office).

We start with a discussion of these and other ways that the congressional bureaucracy complicates the concept of “a statute.” We then introduce several more specific potential doctrinal moves.

A. Deconstructing the Concept of “a Statute”

Perhaps the most provocative output of our study is how the various duties of the congressional bureaucracy contribute to--and destabilize--our common understanding of what a “statute” is.

Everyone knows that words must be understood in context, but the context of legislative language is much more than the surrounding words on the page. In fact, in many instances what we see when we pull up laws on Westlaw is not the entirety of what Congress wrote or how Congress arranged it at all. Lawmaking does not begin with the vote, and neither does it end with it. Final text reflects, incorporates, and assumes the various inputs from the bureaucracy, some of which are provided after enactment.

Statutory text is changed, reorganized, and reconceptualized by OLRC after enactment--and also explained and interpreted by JCT at that time. One of OLRC’s primary missions is to pull apart the individual texts that Congress enacts and recombine and reorganize them with other texts enacted at different times into coherent subject matter areas. The OLRC organic statute actually (and aptly) uses the term “restatement”--not faithful reproduction but rational reorganization--to describe its work on positive-law titles. The statute expressly calls the output a “revision” of the law--another reference to an editorial function (in full: “complete compilation, restatement, and revision”). Congress also expressly directs OLRC, in its authorizing statute, to interpret its enacted language purposively, not literally, in carrying out its codification tasks, even those tasks that occur after the vote.⁵⁸³

Indeed, the JCT staff emphasizes the importance of “congressional intent,” as reflected not only in the text but also in the revenue estimates, the legislative history, and other explanatory materials that accompany tax legislation. It thinks carefully about “what words should be in the statutes, and what words should be in the legislative history,” but it does not view them as of dramatically different importance.⁵⁸⁴

Congress structures itself across the board to think about law more as “topics” or fields, than as individually coherent or consistent texts. The committee system, OLRC’s work to “restate” the Code into subject-matter areas, and the division of the bureaucracy--including Legislative Counsel, CRS, JCT, CBO, GAO--into staff that specializes within topics and not across the entire Code all reflect this consistent congressional organizational norm. The bureaucracy brings coherence to a subject-matter field but affirmatively does not attempt to bring coherence across subjects. But that is not how our dictionary-wielding, statutory-interpreting, whole-code-cohering courts think about text.

⁵⁸³ 2 U.S.C. 285b(2) (2018).

⁵⁸⁴ Staffer Interview.

Members focus only on broad policy brushstrokes. Staff, particularly Legislative Counsel, is responsible for the textual language. To say, as textualists do, that legislative history is especially unreliable because it is written by staff and not members is to say that the entire U.S. Code is unreliable: it is *all* produced by staff.

The entire process is iterative, with inputs from all of the bureaucracy. The real work of the modern legislative process, and especially members' role in it, has more to do with figuring out large-scale policy for complicated problems, not debating individual words and phrases. Two cheers to Chief Justice Roberts in Burwell for seeing that, but no third cheer to the Court for reverting to strict hyper-textualism in cases immediately afterward.⁵⁸⁵

What, then, is the "text?" Consider the Medicare statute. There is no "text" of that statute. The "text" of the Medicare "law" is a concept--one made up of many different statutory texts enacted over time. It is only the post-enactment, multi-year custodial work of OLRC that creates the illusion of a single, coherent text. They are the ones who take the original, thirty-six page Medicare statute enacted in 1965,⁵⁸⁶ along with the thousands of laws amending this original statute, and transform them into a single 1,183 page tome.⁵⁸⁷ However, this is simply their best guess at how to assemble a "text" of "Medicare law." So is anyone else's attempt to assemble that "text." This is true of any law that has been amended--positive or non-positive law.

Statutory law's complexity--all of these layers--may be its modern defining feature. And yet courts place great weight on the structure of those "laws" as they appear in the U.S. Code, as if each law was birthed with its final structure. Not so. Understanding the bureaucracy helps to reveal this.

Getting more granular, a statute that is parsed "like slicing garlic with a razor blade" to get the Parliamentarian to refer it to the jurisdiction of a certain committee incorporates an understanding of what subjects that statute is supposed to cover, because each committee only has jurisdiction over certain subjects.⁵⁸⁸ A statute that is repeatedly amended to get within a revenue or budget score incorporates the assumptions of those estimates. Statutes drafted with purpose clauses that no longer appear in the Code because OLRC moves purpose clauses to

⁵⁸⁵ See *Lockhart v. United States*, 136 S.Ct. 958, 964-66 (2016) (majority and dissenting opinions based on grammar canons). For contrasts of *Burwell* and *Lockhart*, see Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 83 U. Chi. L. Rev. 81, 86 (2017); Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 Notre Dame L. Rev. 2053, 2072-76 (2017) (comparing interpretive methodology in both cases).

⁵⁸⁶ Even the original statute was actually just an amendment of an older text, the Social Security Act.

⁵⁸⁷ Title XVIII of the Social Security Act, as amended through Pub. L. No. 115-271 (Oct. 24, 2018), [https://legcounsel.house.gov/Comps/Social%20Security%20Act-TITLE%20XVIII\(Health%20Insurance%20for%20The%20Aged%20and%20Disabled\).pdf](https://legcounsel.house.gov/Comps/Social%20Security%20Act-TITLE%20XVIII(Health%20Insurance%20for%20The%20Aged%20and%20Disabled).pdf) [<https://perma.cc/D4E9-NAWM>].

⁵⁸⁸ See *supra* note 561. The Gluck-Bressman study likewise showed that committee jurisdiction is a strong proxy for which agency--the one under the committee with jurisdiction--is a statute's primary delegate. This is not to say that staff might not sometimes try to enlarge jurisdiction with statutory language, but if we are focusing on collective rather than subjective, individual decision-making, then the focus belongs at the objective, transparent, institutional level.

small side notes does not make those statutes less purposive and it does not erase the fact that Congress actually enacted purpose into statutory text in the first place. Should textualist courts ignore this?

To understand that Legislative Counsel drafts only operative statutory text, and never legislative history except in the case of some explanatory statements for conference reports (detailing differences between House and Senate versions of bills and how they are resolved) and some appropriations legislative history, is to understand such history carries special operative weight--and is more akin to enacted text than legislative history--inside Congress. Many judges do give extra weight to conference reports, but the special weight for some appropriations legislative history that is produced by Congress's own practices thus far has been ignored by courts.⁵⁸⁹

On the other hand, it is interesting that Legislative Counsel typically does not draft those enacted purpose clauses--and disproves of enacting non-operative text (that is, text without specific mandates). OLRC marginalizes those materials too. But the partisan policy staff puts those materials in. What does that tell us about the weight they should be given?

This is complicated, and one has to be honest in evaluating this evidence. It is not that all of it is unequivocally clear or that all unequivocally points in the direction of "use it!" But this evidence, no matter how one slices it, is much more tethered to the legislative process than what courts use now.

B. What You Think Is the "Statute" Is Not; OLRC As a Deeper Example

The best way to fully understand our point about deconstructing "text" is through a detailed example. Due to the post-enactment nature of OLRC's work, the formidable role it plays in shaping the language as it appears in the U.S. Code, and how courts--and, to our surprise, many partisan staff inside Congress--simply do not understand what OLRC does or how it affects text, we use it as our illustration.⁵⁹⁰ As we have emphasized, OLRC has broad, widely unknown, statutory mandates to rearrange federal law for various ends. For codification bills it

⁵⁸⁹ See, e.g., *TVA v. Hill*, 437 U.S. 153, 191 (1978) ("Appropriation Committees have expressly stated their 'understanding' that the earlier legislation would not prohibit the proposed expenditure. We cannot accept such a proposition."); see also Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 *J. L. & Contemp. Legal Issues* 669, 688-89 (2005) (describing that the Court's "appropriations canon rest[s] on a series of controversial assumptions"). Legislative Counsel also will draft motions when those motions operate as an amendment to bill text (e.g., a motion to recommit that instructs a committee to report back a bill with a specific amendment made to its text).

⁵⁹⁰ Gluck, *supra* note 1, at 208-09, argued several years ago that courts have ignored OLRC's work. Tobias Dorsey previously offered a pair of important meditations on the Code, with the the principal thrust of reminding readers that the Statutes at Large provide a truer source of law than the non-positive titles. See Tobias A. Dorsey, *Some Reflections on Yates and the Statutes We Threw Away*, 18 *Green Bag* 377 (2015); Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 *Green Bag* 283 (2007); A new project, Shobe, *supra* note 16, offers extremely valuable and detailed descriptions of OLRC's functions. See *infra* note 644 and accompanying text for our disagreement with some of his conclusions. Shawn Nevers and Julie Graves Krishnaswami, *The Shadow Code*, 112 *L. Libr. J.* (forthcoming 2020), is a terrific descriptive account.

also is charged to “remove ambiguities, contradictions, and other imperfections both of substance and of form.”⁵⁹¹

1. When You Open the U.S Code You Only See About Half of Enacted Statutory Law

For starters, there is the often-overlooked distinction in federal law between the “positive law” and “non-positive law” titles of the U.S. Code.⁵⁹² Positive law titles are arranged and edited by OLRC and then formally enacted as titles of the U.S. Code by Congress, which is also supposed to repeal the various underlying statutes collected therein at the same time.⁵⁹³ By contrast, a non-positive law title of the Code has still been arranged and edited by OLRC (or OLRC working with a title previously organized), but the newly arranged title does not go through this bicameralism-and-presentment process (the underlying statutes, of course, did previously).⁵⁹⁴

In codifying titles, and in publishing both positive and non-positive law titles, OLRC makes consequential determinations that affect what we understand as the statute’s “text.” First, OLRC’s statutory mandate is to codify only “general and permanent” laws.⁵⁹⁵ OLRC deems some important provisions to be nonpermanent, such as most appropriations riders and many pilot/demonstration projects. Those are not codified. Second, OLRC often moves ancillary or nonoperative provisions (provisions that do not directly command) into statutory notes--a practice that has resulted in OLRC moving more than half of the words in the U.S. Code into statutory notes.⁵⁹⁶ That is, notes not visible when one pulls up a page of the Code on Westlaw or Lexis.

OLRC regularly moves not only preambles and purposes into notes but also effective dates, and sometimes even severability clauses and other provisions.⁵⁹⁷ OLRC emphasizes that those provisions in the notes or omitted from the Code as temporary, what some staffers call “outside the quotes” provisions, are still law. Our point is that lawyers often miss, or misunderstand them. These decisions involve considerable discretion. Take the example of the Office of National Drug Control Policy, the authorizing statute of which required a statutory repeal of the law to occur in 2003.⁵⁹⁸ That repeal eventually was undone by Congress in 2018⁵⁹⁹-

⁵⁹¹ 2 U.S.C. § 285b(1) (2018).

⁵⁹² See Shobe, *supra* note 16, at 4-5; see also Nevers & Graves Krishnaswami, *supra* note 590.

⁵⁹³ Positive Law Codification, *supra* note 135 (noting that “the original enactments are repealed”).

⁵⁹⁴ *Id.* (“A non-positive law title of the Code is an editorial compilation of Federal statutes.”).

⁵⁹⁵ See 2 U.S.C. 285b(1) (2018) (directing OLRC to prepare “a complete compilation, restatement, and revision of the general and permanent laws of the United States”).

⁵⁹⁶ Harlan Ming-Tun Yu, *Designing Software to Shape Open Government Policy*, at 90 (Sept. 2012) (unpublished Ph.D. dissertation, Princeton University) (on file with authors).

⁵⁹⁷ The terms nonoperative and ancillary are ours, not those of OLRC. For effective dates and severability clauses, this placement also often results from these provisions applying to amendments made to scattered provisions in the main text of the Code, but (unlike the amendments themselves) without any explicit instruction to modify the Code text. For a detailed explanation of how OLRC makes these determinations, see Nevers & Graves Krishnaswami, *supra* note 590.

⁵⁹⁸ Office of National Drug Control Policy Reauthorization Act of 1998 § 715.

⁵⁹⁹ SUPPORT for Patients and Communities Act, Pub. L. No. 115-271, § 8202(b)(2), 132 Stat. 3894 (2018).

-but between 2003 and 2018, the Office continued to exist (and be funded), even though it had no statutory authorization.⁶⁰⁰ OLRC deemed the office permanent during that interim period--and consequently its statutory authorization was above-the-line in the U.S. Code despite being repealed.

A different example, and one that also illustrates the kind of judgment calls OLRC has to make, is the Hyde Amendment, an influential appropriations rider, which bars the use of federal funds to pay for abortions, and which is re-enacted every year. Per OLRC's judgment, the Hyde amendment does appear in the U.S. Code, because it is consistently re-enacted.⁶⁰¹ On the other hand, an appropriations rider--again, part of an enacted statute--that defunded part of the Affordable Care Act in 2014, and even became the subject of a Supreme Court case, does not.⁶⁰² When we look at the Code, we only see part of enacted statutory law.

Jarrold Shobe insightfully has posited that OLRC's editing work in pushing prefatory and purposes language to the sidelines makes the Code look less purposive than it really is and gives courts more leeway to ignore congressional intent than they might otherwise.⁶⁰³

Even lawyers well versed in statutory research are likely to be surprised by how much of enacted law is now in notes. It has been calculated that 50 percent of the statutory text of the enacted laws of the United States are in the notes--that is, not in the main text of the U.S. Code.⁶⁰⁴ Shawn Nevers and Julie Krishnaswami found that the Code contains a staggering 32,424 notes in total.⁶⁰⁵

As an exercise, assume a hospital general counsel is searching for her hospital's Medicare payment amounts. Searching for "hospital Medicare payment" on Lexis or Westlaw would bring up 42 U.S.C. § 1395ww, "Payments to hospitals for inpatient hospital services," and the familiar-looking text of that section of the U.S. Code, as Figure 1 shows.

⁶⁰⁰ Staffer interview.

⁶⁰¹ See 10 U.S.C. 1093 (2018).

⁶⁰² See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §227, 128 Stat. 2130, 2491; *Me. Community Health Options v. United States*, No. 18-1023 (S. Ct. Apr. 27, 2020) (holding Congress could not repeal in appropriations rider payment promised to insurers in text of ACA).

⁶⁰³ Jarrold Shobe, *Enacted Legislative Findings and Purposes*, 86 U. Chi. L. Rev. 669 (2019).

⁶⁰⁴ Yu, *supra* note 596.

⁶⁰⁵ Nevers & Graves Krishnaswami, *supra* note 590.

Figure 1

< Previous Next >

42 USCS § 1395ww

[Copy Citation](#)

Current through Public Law 116-39, approved August 6, 2019.

[United States Code Service](#) > [TITLE 42. THE PUBLIC HEALTH AND WELFARE \(Chs. 1 – 161\)](#) > [CHAPTER 7. SOCIAL SECURITY ACT \(§§ 301 – 1397mm\)](#) > [TITLE XVIII. HEALTH INSURANCE FOR THE AGED AND DISABLED \(§§ 1395 – 1395III\)](#) > [Part E. MISCELLANEOUS PROVISIONS \(§§ 1395x – 1395III\)](#)

§ 1395ww. Payments to hospitals for inpatient hospital services

(a) Determination of costs for inpatient hospital services; limitations; exemptions; “operating costs of inpatient hospital services” defined.

(1)

(A)

(i) The Secretary, in determining the amount of the payments that may be made under this title [[42 USCS §§ 1395](#) et seq.] with respect to operating costs of inpatient hospital services (as defined

The text goes on for dozens of pages, but the counsel will not find anything about payment amounts for her particular hospital’s classification unless she takes the additional step to “read below the line,” and scroll through to Lexis’s “Annotations” Section (which comes after the source notes), as Figure 2 shows.

Figure 2

2018, P. L. 115-141, Div G, Title IV, § 429, [132 Stat. 693](#); Oct. 24, 2018, [P.L. 115-271](#), Title VI, Subtitle K, § 6104, [132 Stat. 4006](#).

▼ Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

- References in text:
- Redesignation:
- Explanatory notes:
- Amendment Notes
- 1982.

Once in the Annotations, the general counsel would still need to scroll through dozens of pages of other notes--amendment histories, OLRC editorial explanations, effective dates, and rules of construction--before she would find this provision, “Application § 15008(a) of Act Dec. 13, 2016”, as Figure 3 shows.

Figure 3

the enactment of section 112 of the Protecting Access to Medicare Act of 2014.”.

Effective date of § 15007 of Act Dec. 13, 2016 amendment. Act Dec. 13, 2016, P. L. 114-255, Div C, Title XV, § 15007(b), [130 Stat. 1320](#), provides: “The amendments made by subsection (a) [amending a note to this section] shall be effective as if included in the enactment of section 1206(a)(3) of the Pathway for SGR Reform Act of 2013 (division B of [Public Law 113-67](#); [42 U.S.C. 1395ww](#) note).”.

Application § 15008(a) of Act Dec. 13, 2016. Act Dec. 13, 2016, P. L. 114-255, Div C, Title XV, § 15008(c), [130 Stat. 1321](#), provides:

“(1) In general. For cost reporting periods beginning on or after January 1, 2015, in the case of an applicable hospital (as defined in paragraph (3)), the following shall apply:

“(A) Payment for inpatient operating costs shall be made on a reasonable cost basis in the manner provided in [section 412.526\(c\)\(3\) of title 42, Code of Federal Regulations](#) (as in effect on January 1, 2015) and in any subsequent modifications.

“(B) Payment for capital costs shall be made in the manner provided by [section 412.526\(c\)\(4\) of title 42, Code of Federal Regulations](#) (as in effect on such date).

“(C) Claims for payment for Medicare beneficiaries who are discharged on or after January 1, 2017, shall be processed as claims which are paid on a reasonable cost basis as described in [section 412.526\(c\) of title 42, Code of Federal Regulations](#) (as in effect on such date).

“(2) **Applicable hospital defined.** In this subsection, the term ‘applicable hospital’ means a hospital that is classified under clause (iv)(II) of section 1886(d)(1)(B) of the Social Security Act ([42 U.S.C. 1395ww\(d\)\(1\)\(B\)](#)) on the day before the date of the enactment of this Act and which is classified under clause (vi) of such section, as redesignated and moved by subsection (a), on or after such date of enactment.”.

This is where the correct payment calculation for her hospital’s Medicare classification is found—duly enacted statutory text, but far outside the bounds of the “law” as displayed in the U.S. Code, and buried beneath more than one hundred pages of other material.

Westlaw does not even display statutory notes on the landing page for each U.S. Code section.⁶⁰⁶ To even know whether there were notes of relevance, the attorney would have had to affirmatively navigate a drop-down menu (first the “History” tab and then the “Editor’s and Revisor’s Notes” tab), then scroll through the dozens of pages before the “Effective and Applicability Provisions,” which contain the relevant provisions of law, would appear.

These payment policies were passed by bicameralism and presentment along with the rest of the statute, and carry the full force of the law, yet they are nowhere to be found in the “text” of the law as encountered by most practitioners and judges.

OLRC sometimes even inserts entire laws into statutory notes--so they do not appear as “law” at all to the uninformed when a title is pulled up on Westlaw.⁶⁰⁷ This often occurs when Congress enacts a freestanding law that relates, in terms of subject matter, to a topic within a codified (positive law) title. If Congress does not amend a codified title directly--an error that happens with relative frequency--the new freestanding law cannot simply be added to it.⁶⁰⁸ But OLRC wants to group like subjects together, so it appends the new law as a note to the codified title for subject-matter coherence. Westlaw and Lexis then make those notes not visible to the average researcher.

The Wounded Warrior Project is an example of this problem.⁶⁰⁹ It was enacted as a freestanding law, but it was related to the topic of medical care for the armed services--a topic within Title 10, a positive law title. Because the bill that passed as law did not explicitly amend Title 10, but rather was drafted as freestanding new law, OLRC was forced to locate the program wholly in a statutory note under that title.⁶¹⁰ Nevers and Krishnaswami identify many other examples.⁶¹¹

Through the use of these notes, OLRC manages to keep seemingly similar subject-matters grouped together in the Code, while also keeping Congress’s enacted, positive law intact.

⁶⁰⁶ Nevers and Krishnaswami similarly note that Westlaw’s display of notes is even more problematic than that of its competitors. See Nevers & Graves Krishnaswami, *supra* note 590, at 34 (describing how “Westlaw is the only major legal research provider that breaks the mold [in its presentation of notes], but not in a good way”).

⁶⁰⁷ Accord Nevers & Graves Krishnaswami, *supra* note 590, at 34 (“When presented with a U.S. Code section . . . in Westlaw, there is no indication on the face of the page that statutory notes even exist”).

⁶⁰⁸ This is because codified titles are positive law; Congress enacts them like statutes, in codification bills that simultaneously repeal the underlying public laws.

⁶⁰⁹ Shobe, *supra* note 16, at 34, uses it as well.

⁶¹⁰ 10 U.S.C. § 1071 note (2018).

⁶¹¹ See Nevers & Graves Krishnaswami, *supra* note 590, at 24 (citing 28 U.S.C. § 1350 note (2012), the Torture Victim Protection Act, which is placed in its entirety in a statutory note); *Id.* at 16 (citing Pub. L. No. 115-391, 132 Stat. 5194 (2018), the First Step Act, recent criminal justice legislation which includes provisions regarding reports, appropriations, statutory construction, faith-based considerations, data collection, and a provision requiring the Director of the Bureau of Prisons to make feminine hygiene products available to prisoners for free, that did not explicitly amend Title 18 and so are placed in the notes even as the rest of the law is in Title 18).

It accomplishes this at the cost of accessibility, however, as lawyers and judges easily overlook these out-of-the-way provisions.⁶¹² Some even dispute whether these outside-the-code provisions are “equal laws” to those OLRC puts above the line.

This accessibility problem is significant enough that actors within Congress--in particular, in Legislative Counsel--have sometimes tried to devise their own creative workarounds, both to overcome this problem for themselves and to assist outside interpreters (although we would note here that failure to draft a particular law properly into the Code in the first place might have been the responsibility of Legislative Counsel itself). We were told of attorneys in Legislative Counsel who, at times, maintained personal collections of slip laws to assist in the ongoing challenge of locating provisions that OLRC excludes or relocates. We also were told of attorneys in that office adopting creative drafting techniques, such as inserting effective dates directly into the language of operative statutory rules, in an effort to tie OLRC's hands and require them to include such dates in the Code.⁶¹³

Ironically, a big part of the resulting transparency problem comes from relying on commercial providers like Westlaw and Lexis and the systems they design. Recall that OLRC itself was founded in part because Congress feared such reliance on outside compilers, namely West Publishing.

As Nevers and Krishnaswami additionally note, the fact that Westlaw places the editorial notes--which are explanations provided by OLRC about the statute's history, references, amendments and other matters but are not actual law--together with the statutory notes, which are indeed law, “with no clear distinction, makes it difficult for researchers to find statutory notes or to understand their importance.”⁶¹⁴ We have begun an effort to have Westlaw and Lexis address this problem. Congress's own work-product makes statutory notes more accessible than do commercial databases--the printed U.S. Code lists the notes in the side margins. The official Code website lists them as searchable text beneath the relevant codified provisions. Even so, where there are rules of construction or other notes that apply to more than one section, a reader just clicking one tab is unlikely to see them,⁶¹⁵ and to the uninitiated they still appear to be of subordinate status to the Code's “text” and thereby similarly invite confusion and misinterpretation.⁶¹⁶

⁶¹² See Nevers & Graves Krishnaswami, *supra* note 590.

⁶¹³ Today, House Legislative Counsel also maintains its own internal, continually-updated collection of the major statutes that are in non-positive law, so that it can view these statutes with subsequent amendments added but without the other editorial alterations made by OLRC. See Statute Compilations--Office of the Legislative Counsel, U.S. House of Representatives, https://legcounsel.house.gov/HOLC/Resources/comps_alpha.html (last visited May 11, 2020) (providing “frequently requested compilations of . . . public laws”).

⁶¹⁴ Nevers & Graves Krishnaswami, *supra* note 590, at 30.

⁶¹⁵ For example, the relevant rule of construction for Yates appears in the Front Matter to title 18 (before section 1 of the title), and the relevant provisions appeared hundreds of pages later in sections 1512(c) and 1519 (which are found in Part I and Chapter 73 of the title, which each have their own “Front Matter” sections). See Title 18 of United States Code, Office of the Law Revision Counsel, <https://uscode.house.gov/view.xhtml?path=/prelim@title18&edition=prelim> (accessed June 8, 2020).

⁶¹⁶ Underscoring this risk, Nevers and Graves Krishnaswami note a 2003 case in which the 11th Circuit was required to correct the district court's mistaken conception that statutory notes were of lesser authority. See Nevers & Graves Krishnaswami, *supra* note 590, at 15 (discussing *Schwier v. Cox*, 340 F.3d 1284, 1288 (11th Cir. 2003)). It

2. Text Is Added, Edited, and Rearranged After Enactment

In deciding the breadth of each topic that it will reorganize into a title for codification, OLRC is statutorily directed to capture the presumed intent (specifically, “the understood policy, intent, and purpose”) of Congress--including by modifying statutory language.⁶¹⁷ An interviewee said: “The idea is to carry forward the precise meaning and effect without any change [in that meaning] . . . but [also] to make any adjustments to make it easier to understand and to navigate, to correct technical errors, and to resolve ambiguities.”⁶¹⁸

The changes that are made as a result to enacted text may surprise not only outsiders. Even most of the partisan staffers we interviewed, many of whom have worked in Congress for a long time, had no knowledge of OLRC’s editorial work.⁶¹⁹ In combining, reorganizing, and restructuring statutes into new subject-matter documents--whether for a new codification bill or to arrange a non-positive title--OLRC determines statutory structure, and it inserts cross references, subtitle divisions, and headings.⁶²⁰ In codification bills, it sometimes even adds new textual provisions, like definitions(!). We see all those items when we look at the Code, and courts derive much meaning from them--where a provision is placed, what provisions it is near, what the title of the section is, and so on.

For example, OLRC may insert what it calls a “no source” provision into a new positive title that it is preparing for Congress. A “no source” provision is one that did not exist in any congressionally enacted law, but that OLRC creates out of whole cloth.⁶²¹ For example, if OLRC concludes that a new defined term will help it more easily articulate the policies that it is assembling in the title, it may insert a new definition into the title, and then use this newly defined term throughout the title.⁶²² In the chapter of title 46 labeled “Liability of Water Carriers,” for example, the very concept of a “carrier” is a defined term added by OLRC in a “no source” provision.⁶²³ While these “no source” provisions are flagged in the Revision Notes, those notes are hard to find and do not appear in the main text--whereas the “no source” provisions do appear in the main text of the Code, just like provisions that Congress actually had enacted in

additionally was suggested to us that Legislative Counsel might consider releasing the compiled statutes that it now publishes as PDFs, see *supra* note 613, in a format that outside companies could readily use and adapt (known as “USLM” format, which OLRC already uses). Email from Former Staffer to Abbe Gluck & Jesse Cross (Jan. 26, 2020) (on file with authors).

⁶¹⁷ 2 U.S.C. 285b(1) (2018).

⁶¹⁸ Staffer Interview.

⁶¹⁹ None of the partisan staff we interviewed for the article was familiar with these details of OLRC’s work.

⁶²⁰ Staffer Interviews.

⁶²¹ Staffer Interview.

⁶²² See, e.g., 31 U.S.C. 9101 (2018) (noting no-source provision defining “Government corporation”); 51 USC §10101(2) (2018) (providing no-source provision defining the “Administrator” of NASA).

⁶²³ 46 U.S.C. 30701 (2018) (definition of “carrier”). Explaining the insertion, OLRC wrote in the notes: “A definition of ‘carrier’ is added based on language appearing in various provisions of the Harter Act. The definition avoids the need to repeat in various sections of this chapter the list of persons to whom the requirements and restrictions of this chapter apply, and it ensures that the list of persons is consistent in the chapter.” *Id.*

prior law. “In a positive law codification bill,” an interviewee reported, “we create these definition sections pretty frequently.”⁶²⁴

The Westlaw version of this title 46 “carrier” definition is shown below. Figure 4 shows the definition as it appears in the main text of the Code, where it looks like any other provision—no indication is given that the definition was added via an OLRC-drafted “no source” provision. As Figure 5 shows, it is only when the reader selects the “History” tab (flagged with a yellow arrow) and selects “Editor’s and Revisor’s Notes” from that drop-down tab menu that one encounters the table and explanation where OLRC identifies these as “no source” provisions (also flagged with yellow arrows); Westlaw’s mere “no source” heading does not explain for the initiated what that means.

Figure 4

The screenshot shows a Westlaw document page for § 30701. Definition. The page header includes the title and effective date: "46 USCA § 30701 · United States Code Annotated · Title 46. Shipping · Effective: October 6, 2006 (Approx. 2 pages)". Below the header is a navigation bar with tabs for "Document", "Notes of Decisions (2,518)", "History (45)", "Citing References (2,180)", and "Context & Analysis (134)". The "History" tab is selected. The main content area displays the definition: "Effective: October 6, 2006", "46 U.S.C.A. § 30701", "§ 30701. Definition", "Currentness", "In this chapter, the term “carrier” means the owner, manager, charterer, agent, or master of a vessel.", "CREDIT(S)", and "(Pub.L. 109-304, § 6(c), Oct. 6, 2006, 120 Stat. 1516.)". A "Notes of Decisions (2518)" section is visible at the bottom, with the text "46 U.S.C.A. § 30701, 46 USCA § 30701" and "Current through P.L. 116-141." The page also features a "Back" button in the bottom right corner.

⁶²⁴ Staffer interview.

Figure 5

§ 30701. Definition 
46 USCA § 30701 · United States Code Annotated · Title 46. Shipping · Effective: October 6, 2006 (Approx. 2 pages)

Document Notes of Decisions (2,518) **History (45)**  References (2,180) Context & Analysis (134)  Powered by KeyCite

Editor's and Revisor's Notes (3) 

HISTORICAL NOTES

Revision Notes and Legislative Reports

2006 Acts.

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
30701.	(no source). 	

 This chapter codifies the Act of February 13, 1893 (ch. 105, 27 Stat. 445) (commonly known as the Harter Act). Changes are made to simplify, clarify, and modernize the language and style, but the intent is that these changes should not result in changes in substance.

A definition of “carrier” is added based on language appearing in various provisions of the Harter Act. The definition avoids the need to repeat in various sections of this chapter the list of persons to whom the requirements and restrictions of this chapter apply, and it ensures that the list of persons is consistent in the chapter.

OLRC also exercises its editorial discretion by formulating novel provisions to clarify what otherwise might only be implicit. Consider, again, Title 10, which contains a chapter entitled “Retirement of Warrant Officers for Length of Service.”⁶²⁵ This chapter contains three provisions. Under section 1293, it authorizes the Secretary to retire a warrant officer (upon their request) after twenty years of creditable active service, and under Section 1305, it provides that warrant officers shall be retired after thirty years of service (with some exceptions).⁶²⁶ These Sections, codifiers believed, implied that warrant officers would receive retired pay (e.g., by discussing eligibility for such pay).⁶²⁷ However, Sections 1293 and 1305 never made that entitlement explicit. Consequently, in preparing Title 10 for codification in 1956,⁶²⁸ codifiers at that time (predecessors to OLRC) created a “no source” provision to be added to the chapter: Section 1315, which would “make explicit the entitlement to retired pay upon retirement” for warrant officers under the chapter.⁶²⁹ It remains that way today.

When Congress passed the codification bill it effectively blessed these edits and changes. As formal matter, they are enacted by Congress. But they are certainly much further removed from the core legislative process--in Justice Scalia’s terms, much more the product of staff--than many

⁶²⁵ 10 U.S.C. ch. 65 (2018).

⁶²⁶ 10 U.S.C. §§ 1293, 1305 (2018).

⁶²⁷ See 10 U.S.C. § 1315 (2018) (describing provision as added to “make explicit” the entitlement).

⁶²⁸ Title 10 and Title 32, United States Code, Pub. L. No. 84-1028 (Aug. 10, 1956), available at https://uscode.house.gov/codification/2Stat_at_Large_Title10andTitle32.pdf.

⁶²⁹ 10 U.S.C. § 1315 (2018).

other materials courts eschew. The point is not that OLRC is acting ultra vires or secretively. OLRC actively solicits input from key staff, administrative agencies, and academics for its codification bills, but it is difficult to find evidence that many members and even most staff pay much attention to them.⁶³⁰

Looking to the legislative histories of the past five codification bills that have been passed, no committee hearings were held; all passed the Senate by unanimous consent and the House by voice vote, except for two recorded votes of 409-0 and 385-0. The sponsors of these bills consistently emphasize that they make no substantive change in existing law and that there has been a comment process that includes the agencies. These bills were rarely amended, and when they were, it was to make technical corrections or to incorporate revisions arising out of the OLRC review and comment process.⁶³¹

3. Yates v. United States--A Legislation Chestnut Misunderstood

With respect to how OLRC reorganizes statutory text and the weight courts give such actions, a prominent recent example is Yates v. United States⁶³²--already a legislation-course chestnut for its memorable fact pattern (is a fish a “tangible object” for purposes of the evidence destruction provisions of the Sarbanes Oxley Act?) and its dueling textualist opinions by liberal

⁶³⁰ [To be added]

⁶³¹ For example, for the most recent codification bill, 113 H.R. 1068 (12/19/2014 Became Public Law No. 113-287), To enact title 54, United States Code, “National Park Service and Related Programs”, as positive law, the bill passed the House on a motion to suspend the rules to pass the bill and passed the Senate without amendment by unanimous consent. Representative Bob Goodlatte introduced the bill stating, “The bill was prepared in accordance with the statutory standard for codification legislation, which is that the restatement shall conform to the understood policy, intent, and purpose of Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections.” 159 Cong. Rec. H2228 (daily ed. Apr. 23, 2013) (statement of Rep. Goodlatte). Representative Bass spoke in support of the bill as well, referring to it as a “commonsense, noncontroversial bill that enjoys strong bipartisan support.” Id. For similar elements in the title 41 codification, see Markup of H.R. 1107, To Enact Certain Laws Relating to Public Contracts as Title 41, United States Code, “Public Contracts”; H.R. 1139, the “COPS Improvements Act of 2009”; and H.R. 1575, “The End GREED Act”, 111th Cong. 44-45 (2009) (statement of Rep. Lofgren, H. Comm on Judiciary) (Rep. Lofgren thanking the sponsors for doing this “unglamorous work; but it is necessary”). The bill was reported without amendments. Similarly, at the markup session of a previous version of the bill, Representative Bobby Scott gave an opening statement and stated, “We have a waiting period after introduction so that the bill could be reviewed by the relevant federal agencies, congressional committees and practitioners.” There were no further comments on the bill. Hearing To Consider a Resolution and Report Finding Karl Rove in Contempt for Failure To Appear Pursuant to Subpoena and Recommending to the House of Representatives That Mr. Rove Be Cited for Contempt of Congress; and Markup of... H.R. 4779, To Enact Certain Laws Relating to Public Contracts as Title 41, United States Code, “Public Contracts,” 110th Cong. 198 (2008) (statement of Rep. Bobby Scott, H. Comm on Judiciary); 156 Cong. Rec. H104 (daily ed. Jan. 13, 2010) (statement of Rep. Smith). (“H.R. 3237 and similar law revision bills are important because they ensure that the U.S. Code is up to date and accurate, without making substantive changes to the law.”). On title 46 codification, see 150 Cong. Rec. H7,654 (daily ed. Sep. 28, 2004) (statement of Rep. Sensenbrenner) (noting that it had been circulated by OLRC to interested parties and congressional committees, that the Federal Maritime Commission and Department of Transportation had provided extensive comments, and that “Members should understand that because of the nature of this bill, supporting it does not imply support of the underlying provisions that are being reorganized and cleaned up”).

⁶³² 574 U.S. 528 (2015).

Justices Ginsburg and Kagan. Writing for the plurality, Justice Ginsburg emphasized the provision's Code placement, noting that it sat alongside rules for specific kinds of evidence, not generally-applicable prohibitions.⁶³³ By focusing on this issue, as commentators have noted, the plurality overlooked a rule of construction for title 18 prohibiting considering placement as evidence of meaning--a rule added by the codifiers themselves to flag that they made those changes.⁶³⁴ Of course, the rule was voted on by Congress when it approved the codification bill. The plurality likely missed the rule because OLRC had relegated it to the Code's notes.⁶³⁵

Both sides' textual analyses also fall short in other ways in light of our knowledge of the enactment process. Take the Court's use of the "same Act" / "whole act" canons. Interpreting Sections 1512(c) and 1519 of the federal criminal code, the plurality applied a heightened rule against redundancy,⁶³⁶ and the dissent applied a heightened rule of consistent usage,⁶³⁷ both of which apply specifically to provisions passed in the same Act. Sections 1512(c) and 1519 both were enacted as part of the Sarbanes-Oxley Act of 2002, so these rules were assumed to apply.

However, both Justices missed a relevant piece of Sarbanes-Oxley: the titles that added sections 1512(c) and 1519 had short titles labeling each a separate "Act."⁶³⁸ (Short titles, too, are moved into notes in the Code, making them easy to miss.)⁶³⁹ As the House Legislative Counsel's drafting manual specifies, provisions are labeled as separate short "Acts" specifically to signal that, rather than being drafted together, they were assembled by cobbling together separate, previously-drafted bills.⁶⁴⁰ This means that Sections 1512(c) and 1519 were drafted with a dual blindness to each other--each was drafted when the other was neither in the same bill nor in already-enacted law, making it impossible for drafters to account for the other.⁶⁴¹ Absent

⁶³³ Id. at 1077 (arguing that "[s]ection 1519's position within Chapter 73 of Title 18 further signals that § 1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence of every kind").

⁶³⁴ See Act June 25, 1948, ch. 645, Pub. L. No. 772, § 19, 62 Stat. 862.

⁶³⁵ See Dorsey, *Some Reflections on Yates*, supra note 590, at 386 ("I simply observe that while a congressional instruction on how to interpret title 18 exists, no one mentioned it (and everyone violated it)."); Daniel B. Listwa, *Uncovering the Codifier's Canon: How Codification Informs Interpretation*, 127 *Yale L.J.* 464, 474 (2017) (same); Shobe, supra note 16, at 45 (same).

⁶³⁶ See 135 S.Ct. 1074, 1085 (noting that canon applies to sections "passed in proximity as part of the same Act"); see also id. (emphasizing the "contemporaneous passage" of the two provisions).

⁶³⁷ See id. at 1096 (J. Kagan, dissenting) (observing that canon applies "identical words used in different parts of the same act") (quoting *Sorenson v. Secretary of Treasury*, 475 U.S. 851 (1986)). The dissent does at least also contemplate a belt-and-suspenders interpretation. Id.

⁶³⁸ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 801, 116 Stat. 745 ("This title may be cited as the 'Corporate and Criminal Fraud Accountability Act of 2002.'"); id. at § 1101 ("This title may be cited as the 'Corporate Fraud Accountability Act of 2002.'").

⁶³⁹ See 18 U.S.C. 1501 note (2018) (short title for title VIII); 15 USC 78a note (2018) (short title for title XI).

⁶⁴⁰ The Office of the Legislative Counsel, U.S. House of Representatives, *House Legislative Counsel's Manual on Drafting Style* 26-27 (1995), https://www.llsdc.org/assets/sourcebook/manual_on_drafting_style.pdf [<https://perma.cc/8LAA-5W6H>] (explaining that, while "[t]he practice of providing a short title for each title . . . generally should be avoided," congressional drafters make exceptions "[i]n cases of omnibus bills . . . that consist of proposals that had been . . . separate legislation."). The drafting manual cites only one other instance where such short titles may be appropriate--one not applicable to Sarbanes-Oxley. See id. (appropriate when full Act's short title misrepresents provision's contents).

⁶⁴¹ Sure enough, this explanation proves correct for sections 1512(c) and 1519. On July 10, 2002, Senator Leahy proposed an amendment to Sarbanes-Oxley that contained the new Section 1519, and that was a repackaged version of companion bills previously introduced by Senator Leahy and Representative Conyers. See S.Amdt. 4185 to

evidence that these provisions were then modified to fit together, it makes no sense to interpret them via the “same Act” / “whole act” canons, which assume that neighboring provisions are drafted with each other in mind.⁶⁴² If anything, a lessened rule of redundancy and consistency--not a heightened one--makes sense in this instance. The plain statutory language of Sarbanes-Oxley, understood in the light of Congress’s operations, therefore reveals that the Court’s application of its “same Act” canons to Sections 1512(c) and 1519 was misguided--at least, to a reader who knows: (1) to look at statutory notes; and (2) to interpret in light of published Legislative Counsel drafting practices. Others have produced the same conclusion about these provisions using legislative history; our point is that these more objective inputs from the congressional bureaucracy’s own ex-ante-defined rules are as instructive.⁶⁴³

We recognize this feels like inside baseball. And courts could easily articulate other reasons for applying consistency rules to statutes--like public notice--reasons that would openly acknowledge “this might not be what Congress intended.” But instead, we have courts doing the kind of close-reading and statutory-parsing, including deep dives into statutory history, grammar, and word meaning, that the Yates Court performed.

Opinions like Yates are not easy public meaning opinions, as textualists would have us believe; rather they are textual detective missions to figure out what Congress meant. Congress’s own conventions are uniquely importantly to any such mission, no less textualist, and once known easier to apply than some of the court’s own tools.

4. Positive v. Nonpositive Law

To be sure, in the case of codified titles, Congress formally votes on the title and structure when it votes to approve the codification bill. But that distinction gives too much credit to the kind of vetting it is assumed Congress does in the process of codification. We disagree with Shobe that enactment or nonenactment makes a dramatic difference in how little weight should be given to Code placement in statutory interpretation; this distinction only makes sense for pure formalists, not for anyone focused on linking statutory construction to what Congress actually meant. Far more reliance on “staff” happens in this context than in other contexts, like committee

S.2673, 107th Cong. (2002) (Leahy amendment); 107 Cong. Rec. S6578 (2002) (same); S. 2010, § 2, 107th Cong. (2002)(earlier Senate companion); H.R. 4098, § 2, 107th Cong. (2002) (earlier House companion). Also on July 10, an administration-crafted package of amendments containing the new section 1512(c) was proposed by Senator Lott and adopted (with a companion bill introduced shortly thereafter in the House). See S.Amdt. 4188, 107th Cong. (2002) (Lott amendment); 107 Cong. Rec. S6542 (2002)(same); H.R. 5118, § 3, 107th Cong. (2002)(House companion). The legislative history thereby confirms the lesson from statutory text: these provisions came in as separate, pre-drafted packages being dropped into a larger package together, likely drafted without cognizance that the other might be beside it.

⁶⁴² Moreover, the short titles for sections adding 1512(c) and 1519 are nearly identical, suggesting some overlap in content and thereby further heightening the concern for redundancy. Compare § 801 (giving title VIII the short title, “Corporate and Criminal Fraud Accountability Act of 2002”); with § 1101 (giving title XI the short title, “Corporate Fraud Accountability Act of 2002”).

⁶⁴³ See William N. Eskridge Jr., Abbe R. Gluck, & Victoria F. Nourse, *Statutes, Interpretation, and Regulation* 127-29 (Supp. 2020) (explaining how these conclusions can be drawn both from bureaucracy’s inputs and from legislative history).

reports, that judges who mistrust staff are not willing to consider. As OLRC told us, there is “no political will” for its work, and in fact Congress has not taken up a codification bill in more than 5 years.⁶⁴⁴ In reality, it is OLRC that edits, reorganizes, and adds to both positive and nonpositive law.

As another indication, OLRC sometimes also drafts rules of construction, (OLRC’s predecessor codifiers drafted the one at issue in *Yates*), to instruct courts not to rely on its work--for instance not to rely on organization of the title--as evidence of congressional intent, but the courts tend to overlook those provisions or not even realize they were added after the initial public law was enacted, in the codification process.⁶⁴⁵

OLRC does flag the significant changes that it has made, via historical and revision notes, disposition tables, and data tables.⁶⁴⁶ But, again, they are difficult to locate on third-party sites and appear in the sidebar of the paper book.

For non-positive law titles--the ones OLRC arranges for the Code (like Title 42, which includes the Civil Rights Act) but that Congress has not blessed by enacting into positive law--the current leadership of OLRC told us that it is their practice not to change text or add new provisions like definitions.⁶⁴⁷ Even in those titles, however, OLRC will rearrange provisions, add headings, and modify cross-references.

For an example, consider sections 3 and 4 of the Robinson-Patman Antidiscrimination Act. They are found in Title 15, a non-positive title, but codifiers have renumbered, rearranged, and modified cross-references and section headings.⁶⁴⁸ Figure 6 presents these sections as they appear in the Statutes at Large. Figure 7 then shows those sections in the Code on the OLRC website. In each Figure, the relevant provisions are identified by a yellow box. Notice that the Code provisions have been renumbered, given section titles, and relocated between provisions from 1914 and 1938 (as flagged with red arrows). Additionally, note that these Code provisions appear in a Code chapter entitled “Monopolies and Combinations in Restraint of Trade” and a title labeled “Commerce and Trade”—labels not in the original statute.

⁶⁴⁴ Staffer interview. The most recent enactment was Title 54, National Park Service and Related Programs, in 2014. See Pub. L. 113-287. For the current status of codification bills that OLRC has prepared for Congress, see Positive Law Codification, *supra* note 135.

⁶⁴⁵ See Dorsey, *Some Reflections on Yates*, *supra* note 590, at 379 (stating that section 5600 of the Revised Statutes of the United States of American included a provision that “no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed”).

⁶⁴⁶ Positive Law Codification, *supra* note 135 (discussing the preparation of these items and their inclusion in the Code).

⁶⁴⁷ Nevers and Krishnaswami refer to this as OLRC’s preference for “act-code coherence”—an approach that, as they observe, increases use of statutory notes in non-positive titles. See Nevers & Graves Krishnaswami, *supra* note 590, at 19 (explaining this “principle of act-code coherence”).

⁶⁴⁸ Compare Act of Aug. 27, 1894, § 76, 28 Stat. 570, Clayton Antitrust Act of 1914, Pub. L. No. 63-212, §§ 2-3, 38 Stat. 730, and Robinson-Patman Act, Pub. L. No. 74-692, §§ 1-4, 49 Stat. 1526 with 15 U.S.C. § 11-14 (2018) (reorganizing provisions, modifying cross-references, and adding headings). For an example with an antitrust statute enacted after OLRC’s creation, compare Curt Flood Act of 1998, § 3, 12 Stat. 2824 with 15 U.S.C. 26b (reorganizing provisions and adding headings).

Figure 6

1528

74TH CONGRESS. SESS. II. CHS. 592, 593. JUNE 19, 1936.

Review and enforcement of Commission's orders.
Vol. 38, p. 734; Vol. 48, p. 1102.

its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

Discounts, rebates, allowances, advertising service charges.

SEC. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Sales, etc., at discriminatory prices to destroy competition.

Penalty for violation.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.

Cooperative associations.

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Approved, June 19, 1936.

Figure 7

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. (Oct. 15, 1914, ch. 323, §2, 38 Stat. 730; June 19, 1936, ch. 592, §1, 49 Stat. 1526.)

AMENDMENTS

1936—Act June 19, 1936, amended section generally.

SHORT TITLE

Act June 19, 1936, which amended this section and added sections 13a, 13b, and 21a of this title, is popularly known as the Robinson-Patman Act, as the Robinson-Patman Antidiscrimination Act, and also as the Robinson-Patman Price Discrimination Act.

§13a. Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.

June 19, 1936, ch. 592, §3, 49 Stat. 1528.)

§13b. Cooperative association; return of net earnings or surplus

Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

June 19, 1936, ch. 592, §4, 49 Stat. 1528.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 19, 1936, ch. 592, 49 Stat. 1526, popularly known as the Robinson-Patman Antidiscrimination Act and also as the Robinson-Patman Price Discrimination Act, which enacted sections 13a, 13b, and 21a of this title and amended section 13 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 13 of this title and Tables.

§13c. Exemption of non-profit institutions from price discrimination provisions

Nothing in the Act approved June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

(May 26, 1938, ch. 283, 52 Stat. 446.)

And while the present-day OLRC emphasizes editorial modesty in its editing of non-positive law, previous codification offices were sometimes more ambitious, on occasion significantly rewriting enacted statutory text, and those changes remain. For example, 2 U.S.C. § 271 (the Senate Legislative Counsel charter) was prepared by a predecessor to the current OLRC. Among other editorial changes, it breaks up a long paragraph of Section 1303(a) of the Revenue Act of 1918 into individual provisions with headings; modifies the language to reflect new labels that the Revenue Act of 1924 created for the Drafting Service and the draftsmen; and strikes references in the text to the House Legislative Counsel and the Speaker of the House, to reflect the changes made by the 1970 Act.⁶⁴⁹

Present-day OLRC still also makes use of statutory notes in non-positive law titles. For example, the Belarus Democracy Act of 2004 contained mostly Sense of Congress provisions, reporting requirements, and quasi-temporary provisions--and the entire act was put in a statutory note.⁶⁵⁰ Severability provisions also sometimes will be located in statutory notes for non-positive titles, despite their high importance for judicial and other interpreters.⁶⁵¹

Figure 8 shows how the Belarus Democracy Act of 2004 appears on Westlaw. To locate it, a reader must navigate on Westlaw to the U.S. Code provision for 22 U.S.C. 5811 (which

⁶⁴⁹ See supra note 90. See also Dorsey, Not Reading the Statutes, supra note 590, at 285-86 (discussing this provision).

⁶⁵⁰ See Pub. L. No. 108-347 (codified at 22 U.S.C. § 5811 (2018)) (referencing Belarus Democracy Act of 2004 in the statutory note).

⁶⁵¹ See, e.g., 2 U.S.C. 900 note (2018) (stating the severability provision in the note section); 15 U.S.C. 1601 note (2018) (same); supra note 597. Severability clauses instruct courts whether to strike entire laws down if provisions are found invalid.

contains only a findings section for a different statute), click on the “History” tab, and select “Editor’s and Revisor’s Notes” from the drop-down tab menu (as noted with yellow arrows). The reader then must scroll through roughly seven pages of material to reach the heading of “Belarus Democracy Act of 2004” as it appears in Fig. 8. There, the reader finds the full text of the statute. OLRC also adds the bracketed phrase “[enacting this note]” into the text of the statute (as flagged with yellow arrow) in order to clarify what the statute’s reference to “This Act” means in this context: a full act located in a statutory note.

Figure 8



As one interviewee put it:

Should someone trying to understand the law skip over the notes? No! You’re not going to understand what [the law] is. . . . If there is a [provision] saying that “the above amendments only apply to people with blue eyes” or “[only apply] after such a year,” where do we put that information? In the notes.⁶⁵²

OLRC is just one office in the congressional bureaucracy, but it offers an extreme and very important example of bureaucratic work that has gone unnoticed. Other inputs of the bureaucracy, including JCT’s post-vote bluebook, CBO’s pre-vote score, and Legislative Counsel’s drafting work, including certain legislative history, are much more salient to members and as important.⁶⁵³ The “text” has more inputs than most courts and lawyers assume.

C. New Canons, Canons, Canons

This is not the place to spin out every possible implication of our study for statutory interpretation doctrine. We reserve those efforts mostly for future work, and instead offer some

⁶⁵² Staffer interview.

⁶⁵³ [To be added]

big-picture points, as well as some low-hanging fruit, for lawyers and judges, including textualists, by way of conclusion.

Which aspects of the congressional bureaucracy are most relevant for those courts interested in the statutory meaning intended by Congress? If courts want to understand what elected members thought they were voting on, pre-enactment inputs like the CBO score and JCT estimate, legislative history, committee jurisdiction assignments, budget reconciliation rulings, and requested analyses of bills from CRS or MedPAC/MACPAC may be most relevant to the operating assumptions of elected members.

We have already discussed the complexity of post-enactment bureaucratic work. If courts were concerned about bureaucracy work after the vote, they could construct “anti-deference” rules for that, as they have in other contexts.⁶⁵⁴ Alternatively, courts might respect Congress’s right--safeguarded in Article I of the Constitution--to establish its own procedures. That is, precisely because Congress has created OLRC and charged it with making those post-enactment edits, we should view those delegated responsibilities to be legitimate contributions to the statutory text that results. That is much a more expansive view of the lawmaking process than one cabined by the discrete moment of a vote.

To make things simpler, as a start, we suggest some specific moves as low-hanging fruit that eschews the harder questions of post-enactment work. Courts have actually proven quite willing to consider drafting realities when presented in small-scale form, case by case.⁶⁵⁵ As one example, after the Gluck-Bressman study’s finding that Congress often legislates with intentional repetition, some judges have resisted applying the presumption against redundancy.⁶⁵⁶

Judges of most interpretive stripes also should be attracted to the new canons we suggest--all of them are based on objective, not subjective, outputs that are the direct results of collective congressional direction. To those who would already consider legislative history, these outputs may be even more representative of collective intent. To those who would look instead to an objective source like a dictionary to glean how words were understood at the time of enactment, these outputs are similar but more closely tethered to Congress’s own democratic process.

⁶⁵⁴ This is essentially what Listwa suggests with respect to OLRC code placement decisions. Listwa, *supra* note 635, at 468 (“[T]he interpreter ought to follow a simple rule: ignore editorial decisions made by the nonlegislative codifiers--i.e., the OLRC--but consider those made by Congress.”).

⁶⁵⁵ For examples of courts relying on CBO calculation, see, e.g., *Halbig v. Burwell*, 758 F.3d 390, 407–08 (D.C. Cir. 2014) (citing the CBO analysis as inconclusive evidence of congressional intent); *King v. Burwell*, 759 F.3d 358, 374 (4th Cir. 2014) (relying on a CBO report to establish congressional intent to combine subsidies with the individual mandate); *King v. Sebelius*, 997 F. Supp. 2d 415, 430–31 (E.D. Va. 2014) (citing the CBO analysis and CBO director letter as indicative of congressional intent to create insurance subsidies for every state); *Halbig v. Sebelius*, 27 F. Supp. 3d 1, 24–25 (D.D.C. 2014) (same); see also *Monk v. Shulkin*, 855 F.3d 1312, 1320 n.4 (Fed. Cir. 2017) (relying on CBO report for assumption Congress intended Veterans courts to allow class actions); *U.S. House of Reps. v. Burwell*, 185 F. Supp. 3d 165, 172 (D.D.C. 2016) (relying on CBO characterization of cost-sharing reductions as direct spending). But see *Ohio v. United States*, 154 F. Supp. 3d 621, 642 (S.D. Ohio 2016) (claiming that “the CBO does not and cannot authoritatively interpret federal statutes”).

⁶⁵⁶ See *supra* note 17.

1. The CBO Canon--And Now, the JCT Canon, OLRC Canon, Parliamentarian's Canon

In 2012, one of us suggested a new “CBO canon,” to push courts to take into account assumptions about the statute--including the understandings of its words--that CBO used in computing its budget score.⁶⁵⁷ The CBO canon is especially appropriate when the score is a matter of serious attention (the Affordable Care Act is a prominent example). This canon quickly found its way into law and policy blogs,⁶⁵⁸ official congressional correspondence,⁶⁵⁹ litigation briefs,⁶⁶⁰ and court opinions.⁶⁶¹

Other scholars have followed upon this approach, and we now have a recent proposal, from Clint Wallace, for a JCT canon, building off the CBO canon as the revenue analogue: look to JCT's understanding of the tax law to resolve ambiguities.⁶⁶² Wallace notes that, like the CBO canon, his approach has “democratic bona fides” of having been generated and required by Congress itself.⁶⁶³ Indeed, the JCT staff we interviewed emphasized that members “care about budgetary effect” and view them as “part of the day to day policy design.”

⁶⁵⁷ See Bressman & Gluck, *supra* note 1, at 782 (justifying the CBO canon based on interviews with legislative drafters). See also Gluck, *Statutory Interpretation*, *supra* note 1 (illustrating how CBO canon would work and why, in some cases, it would be more reliable indicium of statutory meaning than other common tools); Gluck, *The “CBO Canon,”* *supra* note 1 (“[The CBO canon is a]n interpretive presumption that ambiguities in legislation should be construed in the way most consistent with the assumptions underlying the congressional budget score on which the initial legislation was based.”);

⁶⁵⁸ Timothy Jost, *Tax Credits in Federally Facilitated Exchanges Are Consistent with the Affordable Care Act's Language and History*, *Health Aff. Blog* (July 18, 2012), <https://www.healthaffairs.org/doi/10.1377/hblog20120719.021337/full/> [<http://perma.cc/3QZJ-7ZBK>] (noting CBO's assumption that “premium tax credits would be available to all Americans in all states”); Jonathan Cohn, *The Legal Crusade to Undermine Obamacare--and Rewrite History*, *New Republic* (Dec 4, 2012), online at <http://newrepublic.com/article/110770/legal-challenge-obamacare-insurance-exchanges-full-holes> [<https://perma.cc/X9LT-NA53>] (discussing Jost's article and the CBO canon).

⁶⁵⁹ See, e.g., Letter from, Douglas W. Elmendorf, Dir. of the Cong. Budget Off., to Rep. Darrell E. Issa, Chairman of the Committee on Oversight and Government Reform at *1 (Dec 6, 2012) (responding to a query regarding “CBO's assumption that the premium assistance tax credits established by [the Affordable Care Act] would be available in every state”).

⁶⁶⁰ See, e.g., Defendants' Memorandum in Opposition to Motion for Preliminary Injunction at *21, *Halbig v. Sebelius*, No. 13-cv-00623, (D.D.C. Sept. 27, 2013) (arguing that Congress's intent was manifest through its heavy reliance on CBO's assumption that tax credits would be available in every state); Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at *3, 4, 12, 18, *United States House of Representatives v. Burwell*, No. 14-cv-01967, (D.D.C. Jan. 15, 2016) (describing how Congress relied on CBO's scoring of the Affordable Care Act's insurance subsidy as mandatory spending); Brief of Appellants at *12, 51, *Ohio v. United States*, No. 16-cv-3093 (6th Cir. Apr. 4, 2016) (relying on CBO descriptions to bolster point about reinsurance tax definition).

⁶⁶¹ For examples of relying on CBO calculation, see *supra* note 655.

⁶⁶² See Clint Wallace, *Congressional Control of Tax Rulemaking*, 71 *Tax L. Rev.* 179, 225 (2017) (“Under the JCT Canon, courts (and Treasury and IRS personnel) should construe ambiguous tax statutes in the same manner as the JCT did in producing revenue estimates and other analysis and explanations for the statute.”).

⁶⁶³ Wallace, *supra* note 662. Ultimately, he predicates the canon on the unique ability of JCT to add agency-like virtues to tax. *Id.*

Daniel Listwa also suggested a “codifier’s canon,”⁶⁶⁴ which would direct courts to use captions and placement only when Congress itself enacts them directly into positive law--a conclusion in some tension with our suggestion that OLRC’s work is part of Congress’s delegatory authority.⁶⁶⁵

Most recently, Jonathan Gould suggests a “Parliamentarian’s canon,” which would resolve ambiguities by interpreting them consistently with parliamentary precedent and “especially rulings of the chair.”⁶⁶⁶ We would go further and extend this deference to parliamentary decisions regardless if they are made from the chair, in public. Thanks to unorthodox lawmaking, we have seen that the most consequential rulings of late are not from the public chair at all, but rather resolved before a bill ever reaches the floor. We think committee jurisdiction referrals would be as important, especially because such referrals are directly tied to statutory meaning and other important matters, including often which agency is the lead administrator.⁶⁶⁷ Staffers in the Parliamentarians’ offices told us they help partisan staff who “might be putting their finger on the scale to rewrite [bills] for jurisdictional concerns.”⁶⁶⁸ We would also emphasize rulings on reconciliation. Reconciliation bills, once unorthodox, are now a central means of legislating. Recent major statutes--e.g., the 2017 tax bill and parts of the ACA--were passed using this special process. The Byrd rule plays a pivotal role in shaping those bills, and so any “Parliamentarian’s canon” should also counsel not to interpret a reconciliation bill in a way that would have clearly violated the Byrd rule.

Some scholars have voiced skepticism about the extent to which parliamentary or congressional-rules-based interpretations can be attributed to the larger Congress.⁶⁶⁹ But it matters not whether individual members of Congress subjectively agreed with the Parliamentarian’s ruling. What matters is that language inserted or deleted was necessary to clear procedural hurdles and should not be given short shrift by courts. For example, under the Byrd rule, a reconciliation bill cannot include any “extraneous” provisions (a complex standard more fully set out in the notes).⁶⁷⁰ When points of order are raised about language that does not fit this requirement, Legislative Counsel works with staff to modify the bill text (sometimes creatively)

⁶⁶⁴ Listwa, *supra* note 635.

⁶⁶⁵ For Listwa, even codification bills are not good enough because OLRC decides placement there and Congress gives such bills very little attention. *Id.*

⁶⁶⁶ Gould, *supra* note 16, at 2022.

⁶⁶⁷ See Gluck & Bressman, *supra* note 1, at 1006-1007 (detailing internal view that the agency under the jurisdiction of committee who drafting the bill is typically the lead agency, because the committee wants to oversee implementation).

⁶⁶⁸ Staffer Interview.

⁶⁶⁹ For an excellent recent example, see Rebecca M. Kysar, *Interpreting by the Rules*, 99 *Tex. L. Rev.* (forthcoming 2021).

⁶⁷⁰ 2 U.S.C. § 644 (2018). A provision is defined as “extraneous” if it:

- a) does not produce a change in outlays or revenues;
- b) produces an increase in outlays or decrease in revenues that does not follow the reconciliation instructions in the budget resolution;
- c) is not in the jurisdiction of the committee that reported the provision;
- d) produces changes in outlays or revenues that are merely incidental to the non-budgetary components of the provision;
- e) increases the deficit in any fiscal year after the period specified in the budget resolution;
- f) recommends changes to Social Security.

bring it into compliance with the rule.⁶⁷¹ As one interviewee colorfully told us: “If it’s reconciliation, they are ripping things out of there left and right. It’s only when you see the final product and say, ‘What is this crap?’”⁶⁷² The result is a bill that may not be as internally consistent or coherent as the Court would assume. For the court to impose its usual canons here would undermine the specific moves Congress made to clear its procedural hurdle. There are other doctrines, like severability, under which Courts are loathe to impose something on a statute that Congress never would. This should be no different.

Gluck and O’Connell made the same suggestion about eliminating the presumption of consistency for omnibus legislation. Even more extreme than omnibus bills, interpreters cannot assume consistency even within provisions in a reconciliation bill. Because the Byrd rule is applied on a provision-by-provision basis, drafters often will unnaturally cram together unrelated (or only semi-related) rules into a single provision for Byrd rule purposes.⁶⁷³ Additionally, courts should have a heightened sense of budgetary windows when interpreting reconciliation bills, since reconciliation bills often are contorted in order to comply with year-specific fiscal rules.

What about Legislative Counsel canons? The Gluck-Bressman study offered some prospects. For example, Legislative Counsel drafts only one type of legislative history: appropriations legislative history. By Congress’s own rules, appropriations bills list only outlays; the legislative history provides the programmatic direction. That is why Legislative Counsel drafts the report language for part of the appropriations history--in this unique context, the history is effectively an operative provision. But courts do not give this kind of history any special deference.

Legislative Counsel has its own drafting manuals, too.⁶⁷⁴ They include directions that contradict some judicial presumptions. For example, the House manual says that statutes need not have severability clauses to be presumed severable. Courts, however, sometimes attribute false meaning to the lack of a severability clause, especially if the House version of a bill has one and the Senate does not.⁶⁷⁵ We already have pointed out how the House Legislative Counsel manual directions on short titles would have informed the Yates case.

It is true that a multitude of new canons might emerge from this kind of inquiry, and some judges might balk at the further complication of statutory interpretation doctrine. But this does not strike us as more onerous than legislative history courts currently consider, or the more than one hundred policy presumptions courts already devise and apply to statutes. Concerns about volume are something of a straw man. And there are limiting principles. We focus on those

⁶⁷¹ See Gould, *supra* note 16, at 19-20 (discussing the behind-the-scenes “Byrd bath” process).

⁶⁷² Staffer Interview.

⁶⁷³ In particular, this is done to satisfy subsection (a) of the Byrd rule (which requires each provision to have a budgetary impact). Here, a policy with no budgetary impact is combined with one that has such an impact, and so the provision is treated as compliant with the Byrd rule--thereby smuggling a “non-scoring” provision into the bill.

⁶⁷⁴ See B.J. Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 *Yale L.J.* 185, 195 (2010) (discussing the Legislative Counsel’s drafting manuals).

⁶⁷⁵ See, e.g., *Fla. ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1301 (N.D. Fla. 2011) (reasoning ACA’s lack of severability clause “can be viewed as strong evidence that Congress recognized the Act could not operate as intended without the individual mandate”).

stages in the lawmaking process that are critical turning points or hurdles for legislation or member focus. All of this comes with the important caveat that Gluck and others have noted--namely, that elevating Congress's bureaucracy in this way could inject more pathologies into the legislative process--unhealthily skewing statutes, for instance by leading Congress to draft bills even more to the CBO score than they already are.

D. Anti-Canons:

"A court that would look at placement in the Code to somehow imbue meaning into what a provision says is barking up the wrong tree."

i. Drop canons on Code organization

The above quote comes from OLRC staff. If the goal is a formalist one of blessing the matter actually voted on, courts should emphatically reject any continuing use of the Code placement as evidence of intent for the entire half of the U.S. Code--27 titles--that is not positive law.⁶⁷⁶ For those titles, courts should not presume that statutory section arrangement, headings, or title structure has anything to do with statutory meaning unless those details come from the public law enacted by Congress before it was reorganized in the U.S. Code.⁶⁷⁷ Frankly, we have doubts about relying on the organization of the Code for positive-law titles too. When OLRC creates those titles, it "restates"--reconstructs and reorganizes Congress's work, sometimes years old. Although Congress as a formality blesses those acts by voting for codification, the kind of legislative (especially high-level partisan staff) attention to substance that attends the legislative process is wholly absent from this technical process of codification (Listwa agrees with us as to this point⁶⁷⁸). Indeed, some statutes even have provisos telling courts not to infer any intent from structure.⁶⁷⁹ No one seems to realize those provisions are written and inserted by OLRC precisely for this reason.⁶⁸⁰ And yet, courts still grasp onto structure and placement because doing so "feels" more textualist than looking to legislative history, CBO scores, and so on--that is, Congress's actual inputs and assumptions. We have serious doubts about such a formalist approach.

⁶⁷⁶ See, e.g., *United States v. Sigillito*, 759 F.3d 913, 926 (8th Cir. 2014) (citing Code placement in title 21); *Reyes v. Sessions*, 342 F. Supp. 3d 141, 153 (D.D.C. 2018) (citing Code placement in title 15 while noting that OLRC determined placement).

⁶⁷⁷ For a rare example of Congress directing Code placement for an amendment to a non-positive title, see the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, § 6, 130 Stat. 549 (2016); see also Lubben, *supra* note 504 (noting this provision, and finding no other examples of Congress directing placement for non-positive provisions).

⁶⁷⁸ Hence his recommendation that only when Congress itself actively amends already positive titles should code placement matter--because Congress would be effectively placing the amendment when it decides what and where it is amending.

⁶⁷⁹ See Dorsey, *Some Reflections on Yates*, *supra* note 590, at 379 (stating that section 5600 of the Revised Statutes of the United States of American included a provision that "no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed").

⁶⁸⁰ *Contra* others who have written on OLRC, we also think it matters little whether a title has been enacted into positive law or not, since Congress has explicitly blessed OLRC's post-enactment organization.

ii. Drop Grammar Canons

Likewise, we suggest applying greater skepticism to grammar canons. Grammar is often changed after enactment by OLRC, for positive and--especially in earlier eras--non-positive law alike.⁶⁸¹ Even before the vote, to assume that any staff or member other than Legislative Counsel focused on comma placement is pie in the sky.

iii. Drop Anti-Purpose Canons and Recognize Congress's Own Instructions to Construe Purposively

For the same reasons--and here we agree with Shobe--we are disturbed by the practice of courts undervaluing or even overlooking entirely purpose provisions and findings enacted by Congress.⁶⁸² We also agree that understanding OLRC's work reveals Congress to be a more purposive institution than courts typically acknowledge. OLRC's practice of placing purposive (but enacted) materials into notes--compounded by the way those notes appear on commercial research sites like Westlaw and Lexis--likely contributes to the court's propensity to underemphasize them.

We do not mean this as any critique of OLRC. Throughout our study, the bureaucracy staff spoke of "statutes" far more holistically than legislation scholars commonly do. The nonpartisan staff share customs and views about what belongs in the "text" and what is better put in legislative history, notes, or other materials.⁶⁸³ We heard that from JCT, Legislative Counsel, and OLRC, even as each of those entities emphasized the importance of consulting those other materials in actually understanding the law. This desire not to overcomplicate the words in the "text" seems to have been overread by courts and scholars to view statutes unduly narrowly. If something about the way that courts are dealing with those materials elevates some over others, to some extent that is the courts' and lawyers' problem, not the fault of the bureaucracy. At a minimum, Westlaw and Lexis could change the way it displays these materials to highlight them more. And textualists might start by reading the public laws themselves, if they really want to see what Congress considered and in what form it appeared. At best, we would like to see more dialogue between courts and Congress; previous efforts to launch such a dialogue have been very difficult.⁶⁸⁴

⁶⁸¹ On the greater editorial discretion exercised by prior codifiers, see *supra* notes 649, 625-629, & 647-648 and accompanying text.

⁶⁸² Shobe, *supra* note 16.

⁶⁸³ Staffer Interviews. See Nevers & Graves Krishnaswami, *supra* note 590, at 17 (citing "legislative drafting manuals [that] show a distaste by drafters for including provisions in legislation that are 'not legally useful,' such as 'findings that are nothing more than rhetoric, definitions that merely state the obvious, and precatory language...that has no binding effect'").

⁶⁸⁴ See, e.g., Katzmman, *supra* note 523 (suggesting checklists for drafters highlighting common statutory interpretation issues); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 *Harv. L. Rev.* 1417, 1430 (1984) (arguing for congressional committees that "would take a second look at a law once a court opinion or two highlighted the measure's infirmities"); cf. Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 *Minn. L. Rev.* 1045 (1991) (detailing difference between close communication in state court/legislative systems as compared to Congress and the federal courts).

As far as a purposive legislature goes, recall that Congress itself directs OLRC to draft a U.S. Code that “conforms to the understood policy, intent, and purpose of the Congress in the original enactments,” rather than a Code that preserves enacted statutory text exactly.⁶⁸⁵ This seems to be statutory *evidence that Congress shares three beliefs that are central to purposivist theory*: (1) that Congress has an intent or purpose when enacting laws; (2) that statutes are, above all, an expression of intent and purpose; and (3) that Congress’s overriding desire is to see that intent or purpose carried forward. If courts wish to position themselves as “faithful agents” to Congress, they ought to consider this evidence of their principal’s principles.

iv. Drop the Whole-Code Canons

Finally, we want to drive home the Gluck-Bressman study’s cry to abandon the courts’ beloved “whole code rules” and other canons that presume consistency and coherence across the U.S. Code.⁶⁸⁶ First of all, the “U.S. Code” is a construct made after legislation is enacted. Second, even OLRC told us they try to carry consistent language within titles, but not further than that. Third, as we have emphasized, not only every substantive committee but virtually every one of the congressional bureaucracy institutions works--and remains siloed--within topics, not across the Code. We think there is much to be said about resituating methods of interpretation around subject matter areas, a point one of us has made elsewhere. Other scholars have shown that agencies likewise operate differently in different subject areas and even deploy different interpretive presumptions. The titles of the U.S. Code itself are the very result of ripping statutes apart to reconceptualize them this way.

Conclusion

We recognize the can of worms a study like this opens. But we do not think that an ostrich burying her head in the sand is any better a metaphor for how lawyers and judges should interpret statutes than the sausage factory is for the legislative process. Most practicing judges, including textualist judges, claim their legitimacy as statutory interpreters derives from their connection to and respect for Congress. Shouldn’t courts the respect the inputs that Congress sets up for itself to face of the challenges of the modern era? Aren’t the inputs of Congress’s own bureaucracy--a set of internal institutions Congress founded to be self-sufficient, to resist an encroaching executive, and to meet the needs of the increasingly complex statutory state--as relevant as a dictionary or a judicially crafted policy presumption?

We could go much further than we have. The exemplary canons and anti-canons we offer here are the lowest hanging, most formalist-friendly, fruit. It would be wildly richer and more provocative to reconceptualize “lawmaking” and the resulting statutory “text” to actually include

⁶⁸⁵ 2 U.S.C. § 285b(1) (2018).

⁶⁸⁶ Gluck & Bressman, *supra* note 1, at 936 (demonstrating whole code rule does not reflect how Congress drafts); Gluck, *Statutory Interpretation*, *supra* note 1, at 203 (advocating a new rule: “Absent clear evidence to the contrary, consistency presumptions should not be applied for exceedingly lengthy statutes, for different statutory sections within a single statute drafted by multiple committees, or across different statutes.”).

all the inputs Congress sets up for itself, ex ante, when it creates and puts in motion its massive, important, and--until now--overlooked bureaucracy.