



December 2023

# LEGISLATIVE BRANCH

## Options for Enhancing Congressional Oversight of Rulemaking and Establishing an Office of Legal Counsel

Accessible Version

Revised January 9, 2024, to correct page 20. The corrected section on page 20 should read: “The Office of the Whistleblower Ombuds was first established in 2019, and permanently added to the standing rules in 2021, in the Rules of the House of Representatives to promulgate best practices for whistleblower treatment for offices of the House.” The corrected footnote on page 21 should read: “H.R. Cong. Res. 6, 116th Cong., § 104(e) (2019); H.R. Cong. Res. 8, 117th Cong., § 2 (2021).”

## Why GAO Did This Study

Congress has broad oversight and investigative authorities, which are essential to its legislative functions under Article I of the U.S. Constitution. In recent years, members of Congress have explored options for enhancing its oversight functions. This includes oversight of federal rulemaking—the process used by federal agencies to formulate, amend, or repeal a rule or regulation. Members of Congress also have shown interest in reforming Congress’s legal services.

GAO was asked to review congressional oversight of executive branch rulemaking, as well as considerations for establishing a congressional office for legal counsel. This report identifies and describes options for enhancing Congress’s role in the oversight of the federal rulemaking process and for establishing a potential Congressional Office of Legal Counsel, as well as potential tradeoffs.

GAO analyzed literature from academic, legal, and other sources, as well as GAO’s past work. GAO also interviewed selected officials at congressional offices, the Office of Management and Budget, professionals from nongovernmental organizations and the private sector to identify tradeoffs and other considerations. Finally, GAO held group discussions with researchers and other knowledgeable individuals to validate its research.

This report contains supplemental material on the options. See <http://www.gao.gov/products/GAO-24-105870>.

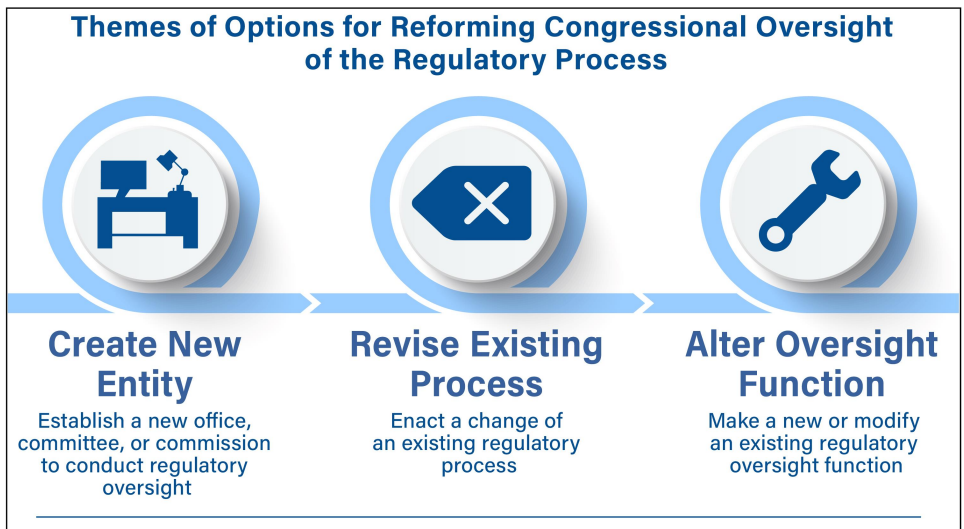
View [GAO-24-105870](#). For more information, contact Yvonne Jones at (202) 512-6806 or [jonesy@gao.gov](mailto:jonesy@gao.gov).

## LEGISLATIVE BRANCH

### Options for Enhancing Congressional Oversight of Rulemaking and Establishing an Office of Legal Counsel

#### What GAO Found

GAO identified numerous options for how Congress could enhance oversight of the executive branch rulemaking process. GAO groups the options into three overall themes (see figure). One set of options involves creating a new entity, such as a Congressional Office of Regulatory Review. Other options for additional congressional oversight involve either revising the existing regulatory process or altering existing functions (e.g., altering the responsibilities or duties of entities involved with rulemaking).



Source: GAO literature review. For image credits, see Additional Source Information for Images. | GAO-24-105870

Congress would have to weigh various tradeoffs if it were to adopt any of these options. While all options could enhance congressional oversight, establishing a new office to conduct research on proposed rules, for example, could entail increased costs for additional staff and potentially duplicate existing congressional services. The extent and scope of the tradeoffs may depend on what Congress determines to be the mission and functions of the new office. Other options, such as requiring agencies to conduct additional analyses, could add complexity or time to the existing rulemaking process.

Options also exist for establishing a Congressional Office of Legal Counsel (OLC), which Congress has debated for decades. Establishing the OLC would require specifying its function, organizational structure, and legal authority. Potential functions for the office could include advisory, litigation, and coordination with other entities. Organizational structure options include making the OLC a joint or separate entity within or outside of Congress. Authorities by which Congress could establish the OLC include legislation or adopting new chamber rules. Each of these options has tradeoffs. For example, if Congress were to establish a joint OLC, the OLC may speak for Congress as a whole on legal issues, but it could encounter difficulties in obtaining consensus across chambers.

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### Abbreviations

ACUS	Administrative Conference of the United States
APA	Administrative Procedure Act
BLAG	Bipartisan Legal Advisory Group
CBO	Congressional Budget Office
CRA	Congressional Review Act
CRS	Congressional Research Service
DOJ	Department of Justice
FTE	Full-time equivalent employees
NPRM	Notice of Proposed Rulemaking
OIRA	Office of Information and Regulatory Affairs
OLC	Office of Legal Counsel
OMB	Office of Management and Budget
PAS	Nominated by the President and confirmed by the Senate
The Center	George Washington University Regulatory Studies Center

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December 19, 2023

### Congressional Requesters

Congress has broad oversight and investigative authorities, which are essential to its legislative functions under Article I of the U.S. Constitution. In recent years, some members of Congress have explored ways for Congress to enhance its oversight function. These efforts include, for example, the formation of a special congressional committee that made recommendations on how Congress could modernize various aspects of overseeing the executive branch.<sup>1</sup>

One area of executive branch oversight that members of Congress have considered strengthening is the rulemaking process.<sup>2</sup> Rulemaking is the process used by agencies to formulate, amend, or repeal a rule or regulation. Agencies use rules to implement laws enacted by Congress.<sup>3</sup> While rules can result in substantial benefits to the American public, they also can impose significant costs. Members of Congress periodically have proposed legislation to create new entities to assist with rulemaking oversight.

Our prior work has found that agencies do not always fully meet their responsibilities when promulgating rules. For example, in our 2021 report on the public comment portion of the rulemaking process, we found that selected agencies did not always describe the data limits on public

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<sup>1</sup>The Select Committee on the Modernization of Congress, *Final Report* (October 2020).

<sup>2</sup>5 U.S.C. § 551(5). With appropriate underlying authority, rules may arise in response to actions such as court decisions, Executive branch and other recommendations, and other events. Moreover, the Administrative Procedure Act describes two types of rulemaking, formal and informal. Formal rulemaking (“on-the-record rulemaking”) applies when rules are required by statute to be made on the record after an opportunity for an agency hearing. Most federal agencies, however, use the informal rulemaking procedures outlined in 5 U.S.C. § 553 (“notice-and-comment rulemaking”). The rulemaking process described in this report is informal rulemaking.

<sup>3</sup>A rule is defined as the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. 5 U.S.C. § 551(4). Rules create legally binding requirements and are established by agencies pursuant to statutory authority. The *Code of Federal Regulations* annual edition is the codification of the general and permanent rules published in the *Federal Register* by agencies of the federal government. An executive agency means an executive department, a government corporation, and an independent establishment. 5 U.S.C. § 105.

comment data, which could lead to inaccurate conclusions about that data.<sup>4</sup> In our 2018 and 2023 reports on rulemaking, we found that agencies did not always comply with certain Congressional Review Act requirements, such as providing Congress the required time to review and possibly disapprove rules, with noncompliance more frequent at the end of presidents' terms.<sup>5</sup>

Members of Congress also have shown interest in reforming Congress's legal services. As with proposals for the rulemaking process, Congress periodically has suggested reforms to create a new body that would represent and advise Congress. Efforts to create a Congressional Office of Legal Counsel (OLC) began in the 1960s and gained traction in the 1970s. These efforts stemmed from a perceived need to have an institutional congressional attorney who would serve at the pleasure of Congress, speak for the Congress, and represent the Congress in court proceedings.

None of the prior proposals to create new entities for regulatory review or legal counsel were enacted into law. Our previous work on federal agencies' reforms and reorganizations suggests that considering leading practices and key oversight questions for reforms and reorganizations, such as standing up new offices, may help ensure their effectiveness, as well as protect the federal government from unnecessary duplication, overlap, and costs.<sup>6</sup>

You asked us to examine options to strengthen congressional oversight of the federal rulemaking process, including the feasibility of establishing new, congressional offices for regulatory review and legal counsel. This report identifies and describes options for (1) enhancing congressional

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<sup>4</sup>GAO, *Federal Rulemaking: Selected Agencies Should Fully Describe Public Comment Data and Their Limitations*, [GAO-21-103181](#) (Washington, D.C.: Sept. 21, 2021).

<sup>5</sup>The Congressional Review Act (CRA) provides Congress with an opportunity to review and possibly disapprove rules, in certain cases, before they become effective. It established expedited procedures by which Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's action. See also, GAO, *Federal Rulemaking: OMB Should Work with Agencies to Improve Congressional Review Act Compliance during and at the End of Presidents' Terms*, [GAO-18-183](#) (Washington, D.C.: Mar. 13, 2018). GAO, *Federal Rulemaking: Trends at the End of Presidents' Terms Remained Generally Consistent across Administrations*, [GAO-23-105510](#) (Washington, D.C.: Jan. 31, 2023).

<sup>6</sup>GAO, *Government Reorganization: Key Questions to Assess Agency Reform Efforts*, [GAO-18-427](#) (Washington, D.C.: June 13, 2018).

oversight of executive branch rulemaking and (2) considerations for establishing a Congressional OLC. We also present information on considerations that Congress could apply to starting new offices in general in appendix I. We present considerations for Congress in establishing a Congressional OLC in appendix II.

To identify and describe proposed options for establishing additional oversight of informal rulemaking and for establishing a Congressional OLC, we reviewed relevant academic literature on the rulemaking process since 1999 and legal literature since 1968 and interviewed officials from relevant government agencies and selected private organizations that have addressed these topics.<sup>7</sup>

Based on this research, we compiled a list of options for both enhancing rulemaking oversight and establishing a Congressional OLC. To corroborate our findings, we held group discussions with knowledgeable individuals randomly selected from our research and with a selected group of former government officials. Our research focused on the informal rulemaking process because it is the more common form of rulemaking. The list of options we have compiled reflect the views of the original authors of those options. We are not endorsing any of the options in this report. These options represent policy choices for Congress.

To identify foundational considerations for standing up new, nonpartisan congressional offices, we conducted a literature review, reviewed applicable laws, and interviewed officials in selected congressional and executive agencies, and reviewed relevant appropriations data.

We also reviewed our prior related work and consulted internal GAO stakeholders.<sup>8</sup> Because you requested considerations for nonpartisan offices, we generally did not consider partisan or bipartisan structures, and we did not assess whether these would have considerations different from those of a nonpartisan office. We identified congressional entities to interview through a literature search, consultations with internal GAO stakeholders, and referrals obtained during the interviews with researchers and congressional offices. We reviewed whether the identified entities received appropriations under the Consolidated

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<sup>7</sup>We excluded from the scope of this report options in which the executive or judicial branch would need to take action to implement the option.

<sup>8</sup>[GAO-18-427](#).

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Appropriations Act, 2023.<sup>9</sup> For more detail on our scope and methodology, see appendix III.

We conducted our work from March 2022 to December 2023 in accordance with all sections of GAO's Quality Assurance Framework that are relevant to our objectives. The framework requires that we plan and perform the engagement to obtain sufficient and appropriate evidence to meet our stated objectives and to discuss any limitations in our work. We believe that the information and data obtained, and the analysis conducted, provide a reasonable basis for any findings and conclusions in this product.

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## Background

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### Overview of the Rulemaking Process

The rulemaking process is governed by a number of laws, executive orders, and agency guidance. Rulemaking generally begins with a congressional delegation of authority through legislation that requires or allows agencies to generate rules to implement a statutory program.<sup>10</sup> Congress maintains legislative oversight over rules, and may mandate, limit, or nullify them through legislation or congressional procedures.<sup>11</sup> Congress and other legislative and executive branch entities have key roles and responsibilities in the federal rulemaking process:

- **Congress.** Passes legislation governing rulemaking and may mandate, limit, or nullify rules.
- **Federal agencies.** Follow the rulemaking process and, when applicable, incorporate public comments to develop and finalize rules.

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<sup>9</sup>Pub. L. No. 117-328, div. I, 136 Stat. 4459, 4913 (2022).

<sup>10</sup>Under the Administrative Procedure Act, "agency" means each authority of the government of the United States, whether or not it is within or subject to review by another agency, but does not include Congress, U.S. courts, governments of the territories or possessions of the United States, or the District of Columbia, among other things.

<sup>11</sup>For example, Congress may use the CRA procedures to pass a joint resolution of disapproval that, if enacted into law, would nullify a rule and prevent the issuing agency from issuing a rule that is substantially the same, unless specifically authorized by law after the enactment of the joint resolution disapproving of the original rule. 5 U.S.C. § 801(b).

- **Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA).** Serves as the repository of expertise concerning regulatory issues; provides guidance to agencies on analytic and policy regulatory matters; and manages the review of a subset of proposed rules and draft final rules for compliance with laws and other requirements, adherence to analytic principles and rulemaking procedures, and consistency with administration priorities.<sup>12</sup>
- **GAO.** Receives final rules from agencies and reports to Congress on major rules, including summaries of the procedural steps taken by agencies.<sup>13</sup>

The regulatory process also depends on the type of rule being implemented. Table 1 shows the various types of rules as defined by executive orders and law.

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<sup>12</sup>For purposes of this report, “proposed rules” refers to rules in the public comment period and “draft final rules” refers to rules crafted after the public comment period and prior to the published final rules.

<sup>13</sup>Under the CRA, a “major rule” is one OIRA finds has resulted in or is likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. § 804(2).

**Table 1: Definitions of Key Selected Regulatory Terms**

	<b>Significant regulatory action<sup>a</sup></b>	<b>Economically significant regulatory action<sup>b</sup></b>	<b>Major rules</b>
Defined by	Exec. Order No. 12866, <i>Regulatory Planning and Review</i> , 58 Fed. Reg. 51735 (Oct. 4, 1993), as amended by Exec. Order No. 14094, <i>Modernizing Regulatory Review</i> , 88 Fed. Reg. 21879 (Apr. 6, 2023)	Exec. Order No. 12866, <i>Regulatory Planning and Review</i> , 58 Fed. Reg. 51735 (Oct. 4, 1993), as amended by Exec. Order No. 14094, <i>Modernizing Regulatory Review</i> , 88 Fed. Reg. 21879 (Apr. 6, 2023)	Congressional Review Act, 5 U.S.C. §§ 801-808 <sup>c</sup>
Definition	<p>Likely to result in a rule that may</p> <ul style="list-style-type: none"> <li>create a serious inconsistency or otherwise interfere with an action taken or planned by another agency</li> <li>materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or rights and obligations of recipients thereof, or</li> <li>raise legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in Executive Order 12866, as specifically authorized in a timely manner by the Administrator of the Office of Information and Regulatory Affairs (OIRA) in each case.</li> </ul>	<p>Likely to result in a rule that may</p> <ul style="list-style-type: none"> <li>meet the definition of a significant regulatory action and</li> <li>have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product), or</li> <li>adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, territorial, or tribal governments or communities.</li> </ul>	<p>Likely to result in a rule that may</p> <ul style="list-style-type: none"> <li>have an annual effect on the economy of \$100 million or more,</li> <li>cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions, or</li> <li>have significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.</li> </ul>

Source: GAO analysis of Executive Orders 12866 and 14094 and the Congressional Review Act. | GAO-24-105870

<sup>a</sup>Economically significant rules are a subset of significant rules. For the purposes of this table, significant rules exclude the subset of economically significant rules, which is defined and discussed separately.

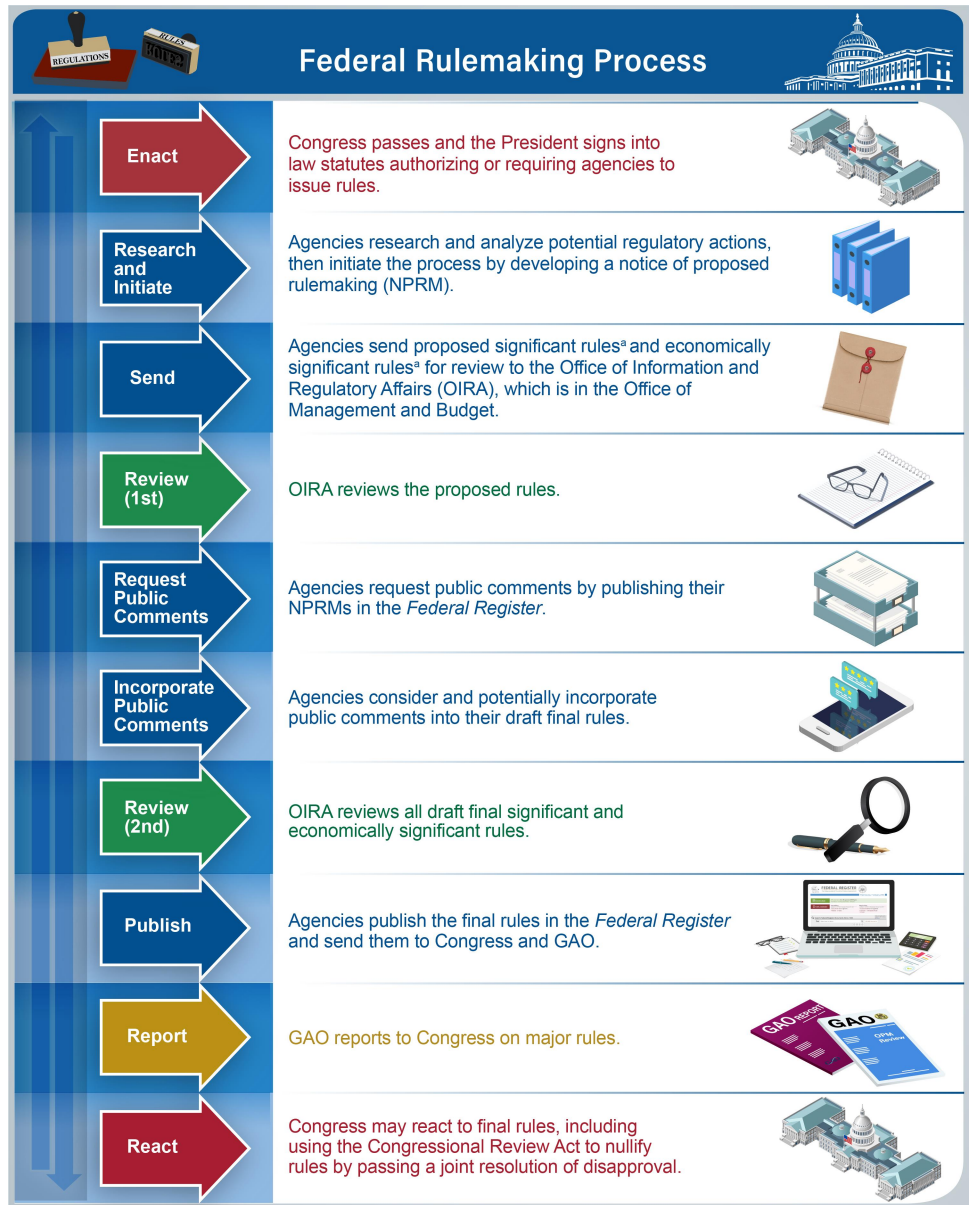
<sup>b</sup>Rules in this category have been commonly referred to as economically significant rules; OMB now refers to these rules as “significant under section 3(f)(1).”

<sup>c</sup>The definition of “major rule” is codified at 5 U.S.C. § 804(2).

Figure 1 shows the relevant entities’ roles and responsibilities in the rulemaking process.



**Figure 1: Steps in the Federal Rulemaking Process**



■ Congress  
 ■ Agency  
 ■ OIRA  
 ■ GAO

Source: Previous GAO reports and GAO analysis of relevant federal statutes and executive branch documents. For image credits, see Additional Source Information for Images. | GAO-24-105870

Note: This is an illustrative overview of the steps characteristic of the most common rulemaking process (known as informal rulemaking), by which federal agencies develop, amend, or, in some

instances, repeal rules. These steps are not required for all rulemakings. In addition, some rulemakings have additional requirements not included in this overview.

<sup>a</sup>The definitions for significant and economically significant rules are derived from Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735, 51737 (Oct. 4, 1993), as amended by Exec. Order No. 14094, *Modernizing Regulatory Review*, 88 Fed. Reg. 21879, 21879 (Apr. 6, 2023). OMB now refers to economically significant rules as “significant under section 3(f)(1).” Major rules are defined in the Congressional Review Act, 5 U.S.C. § 804(2).

### Enact: Congress

Generally, Congress and the President establish the basis for rulemaking by enacting legislation that authorizes or requires agencies to issue regulations.

### Research and Initiate: Agency

In their research and analyses of potential regulatory actions, agencies follow OMB guidance and best practices from OMB *Circular A-4: Regulatory Analysis*,<sup>14</sup> including, where appropriate,

- systematic evaluations of qualitative and quantified costs and benefits,
- monetized estimates of cost-benefit analyses or sensitivity analyses, and
- probability analysis for rules with more than \$1 billion effect on the economy.<sup>15</sup>

### Send: Agency

Under the Administrative Procedure Act (APA), informal rulemaking (also known as notice-and-comment rulemaking) requires agencies to develop a Notice of Proposed Rulemaking (NPRM) that incorporates certain information, including

- a statement of the time, place, and nature of public rulemaking proceedings;

<sup>14</sup>Office of Management and Budget, *Circular A-4: Regulatory Analysis* (Washington, D.C.: 2003).

<sup>15</sup>For the purposes of this report, the term “cost-benefit” analysis includes both the assessment of costs and benefits for significant rules and the more rigorous requirements under Executive Order 12866 for economically significant rules. Note that OMB now refers to economically significant rules as “significant under section 3(f)(1)”. *Circular A-4* includes more specific guidance for agencies to follow when conducting these analyses.



- 
- reference to the legal authority under which the rule is proposed; and
  - either the terms or substance of the proposed rule or a description of the subjects and issues involved.<sup>16</sup>

For each rule that meets the definition of a significant rule, as described in Executive Orders 12866 and 14094, agencies provide OIRA a draft rule with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need.<sup>17</sup>

For significant rules, agencies provide OIRA and the public with an assessment of the potential costs and benefits of the regulatory action. This assessment includes an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, as permitted by law, promotes the President's priorities, and avoids undue interference with state, local, and tribal governments in the exercise of their governmental functions.

For each rule identified as economically significant, executive agencies include an analysis of the rule's anticipated costs and benefits. Agencies also provide an assessment of any potentially effective and reasonably feasible alternatives, including improving the current regulations and reasonably viable nonregulatory actions, and an explanation of why the planned regulatory action is preferable to these alternatives.

To inform the public of planned or active regulatory actions, each agency is to prepare a regulatory agenda of all rules and regulations under development or review, as requested by the Administrator of OIRA, typically twice annually for publication as a spring and fall *Unified Agenda*. Agencies also submit to OIRA a regulatory plan to be included in the fall *Unified Agenda*. The plan is to include information about the most important significant rules that each agency reasonably expects to issue in proposed or final form in the current fiscal year or thereafter. This

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<sup>16</sup>5 U.S.C. § 553(b).

<sup>17</sup>Under Executive Order 12866, "agency" is defined as any executive department, military department, government corporation, government-controlled corporation, or other establishment in the executive branch of the government. See also 44 U.S.C. § 3502(1). The order's definition excludes, however, independent regulatory agencies as defined in 44 U.S.C. § 3502(5). *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (Oct. 4, 1993), as amended by Exec. Order No. 14094, *Modernizing Regulatory Review*, 88 Fed. Reg. 21879 (Apr. 6, 2023).

includes a statement of the need for each action, a summary of the legal basis for each action, and the schedule for each action.<sup>18</sup>

Agencies also may conduct retrospective review analysis. Agencies use retrospective analysis to examine how existing regulations have contributed to specific policy goals, assess the effectiveness of their implementation, or reexamine estimated benefits and costs based on actual performance and experience.<sup>19</sup>

### Review (1st): OIRA

OIRA staff have up to 90 days to review proposed rules they consider significant or economically significant.<sup>20</sup> Where appropriate, OIRA's findings may result in certain rules being major rules, per the CRA.<sup>21</sup>

OIRA is tasked with providing meaningful oversight so that each agency's actions are consistent with applicable laws, the President's priorities, and the principles established in Executive Order 12866. By coordinating interagency review, OIRA must also ensure agency regulatory actions do not conflict with the policies or actions of another agency. OIRA may return a regulatory action to an agency for further consideration. In doing



<sup>18</sup>To coordinate regulations and maximize consultation and resolution of conflicts at an early stage of the regulatory process, OIRA circulates the plans to other affected agencies, the Vice President, and the regulatory advisors to the President and Vice President, within 10 calendar days after receiving an agency's Regulatory Plan. Exec. Order No. 12866, § 4(c)(3).

<sup>19</sup>Executive Orders 13563, 13579, and 13610, along with OMB guidance, establish what should be included in agencies' retrospective review plans. There is no one standard term or definition for the variety of activities that might be considered retrospective regulatory analysis. For example, in various contexts, these activities have been referred to as retrospective reviews or look-backs. In this report, we use terminology consistent with Executive Orders 13563, 13579, and 13610. We refer to the general plans and updates that agencies prepared in response to the executive orders as "retrospective review plans" and to the agencies' individual analyses of specific existing regulations as "retrospective analyses." Exec. Order No. 13563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 18, 2011); Exec. Order No. 13579, *Regulation and Independent Regulatory Agencies*, 76 Fed. Reg. 41587 (July 11, 2011); and Exec. Order No. 13610, *Identifying and Reducing Regulatory Burdens*, 77 Fed. Reg. 28469 (May 10, 2012).

<sup>20</sup>OIRA may extend its review once by no more than 30 days upon written approval of the Director of OMB. Heads of agencies may also request reviews be extended. Exec. Order No. 12866, § 6(b)(2)(C). In addition, OIRA shall complete its reviews and notify the agencies within 45 calendar days after receiving the proposed rules if: (1) it had previously reviewed the rules; and (2) there are no material changes in the facts and circumstances upon which the regulatory action is based. Exec. Order No. 12866, § 6(b)(2)(B).

<sup>21</sup>5 U.S.C. § 804(2).

so, OIRA must provide the agency a written explanation of the needed change, identifying the relevant section of Executive Order 12866 that necessitates the change.<sup>22</sup>

### Request Public Comments: Agency

Agencies publish NPRMs in the *Federal Register* and allow interested parties an opportunity to comment. The comment period is typically not less than 60 days.<sup>23</sup> Interested parties may provide written data, views, or arguments for the agency's consideration.<sup>24</sup> Parties can submit comments electronically on [www.regulations.gov](http://www.regulations.gov) or on agencies' websites.



Request  
Public  
Comments

### Incorporate Public Comments: Agency


Agencies consider and, at their discretion, incorporate relevant comments into the draft final rules. Specifically, agencies need to respond to comments that, if true, would require a change to the agency's proposed rule. However, agencies do not need to respond to every comment or analyze every issue raised by comments. Agencies generally explain their response to comments in a statement in the preamble of a draft final rule.



Incorporate  
Public  
Comments

### Review (2nd): OIRA

OIRA reviews all draft final significant and economically significant rules from executive agencies. According to OIRA officials, the review includes the agency's responsiveness to the public comments it received. Under Executive Order 12866, OIRA may convey in writing any of its concerns to the agencies, citing the pertinent provisions of Executive Order 12866, on which it is relying.



Review  
(2nd)

<sup>22</sup>Exec. Order No. 12866, § 6(b)(3).

<sup>23</sup>Agencies can claim good cause to waive the notice of proposed rulemaking requirements under the APA. 5 U.S.C. § 553(b)(3)(B); (d)(3).

<sup>24</sup>5 U.S.C. § 553(c).



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### Publish: Agency

Generally, agencies publish final rules in the *Federal Register*. A final rule does not go into effect until the agency sends a report to both houses of Congress and to GAO containing<sup>25</sup>

- a copy of the rule;
- a concise general statement relating to the rule (including whether it is a major rule);
- the proposed effective date;
- a complete copy of the cost-benefit analyses, if any;
- a statement of the agency's actions relevant to certain sections of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995;<sup>26</sup> and
- any other information or requirement under any other act and any relevant executive orders.

Nonmajor final rules generally take effect not less than 30 days after publication.<sup>27</sup> Major rules generally may take effect 60 days after either publication in the *Federal Register* or when Congress receives the reports, whichever is later.<sup>28</sup>

### Report: GAO

The CRA requires GAO to report to Congress on major rules 15 calendar days after the submission or publication of a rule. The reports include summaries and assessments of how the rule addresses certain procedural steps. For example, the reports assess whether major rules comply with the 60-day delay in the effective date requirement under the CRA.<sup>29</sup>



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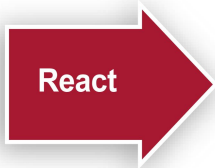
<sup>25</sup> 5 U.S.C. § 801(a)(1)(A)-(B).

<sup>26</sup> 5 U.S.C. § 801(a)(1)(B)(ii)-(iii).

<sup>27</sup> 5 U.S.C. § 553(d).

<sup>28</sup> 5 U.S.C. § 801(a)(3). Agencies can find good cause to waive the delay in effective date requirements under the CRA. 5 U.S.C. § 808.

<sup>29</sup> 5 U.S.C. § 801. For more information on the CRA, see [Congressional Review Act | U.S. GAO](#).



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## React: Congress

Congress may react to final rules by using a variety of processes, including holding hearings or informal meetings, issuing reports, or adopting new legislation. Congress may disapprove a final rule by introducing a resolution of disapproval that, if adopted by both chambers of Congress and enacted into law, can nullify the agency's action. Such a disapproval precludes the agency from reissuing the rule in "substantially the same form," unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.<sup>30</sup>

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## Congressional Office of Legal Counsel History

Over the years, members of Congress have attempted to establish a Congressional Office of Legal Counsel (OLC) that would serve at the pleasure of the Congress, speak for the Congress, and represent the Congress in court proceedings.<sup>31</sup> These efforts began in the 1960s and gained traction in the 1970s in the post-Watergate period. During this period, members of Congress introduced a series of bills seeking to establish a Congressional OLC with a variety of functions, which evolved over time.<sup>32</sup> Congress also held hearings on the matter; solicited input from a variety of stakeholders, legal scholars, and former government officials; and debated the matter over several years.

Between 1973 and 1977, efforts to establish a Congressional OLC were generally in response to the Watergate investigations and related

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<sup>30</sup>5 U.S.C. § 801(b).

<sup>31</sup>113 Cong. Rec. 7871, 7985 (1967). Our review found that proposals would have called the office of a variety of names, including: "Office of the Legislative Attorney General," "Office of Congressional General Counsel," "Congressional Legal Service," and "Office of Congressional Legal Counsel." In this report, we refer to an office fulfilling the role identified by these proposals as the Congressional Office of Legal Counsel or Congressional OLC. For the purposes of this report a "proposal" means a proposed bill or a proposal made by legal scholars.

<sup>32</sup>The earliest bill we identified was first introduced in the Senate in 1967, seeking to establish a Congressional OLC. S. 1384, 89th Cong. (1967). In total, during the period of 1967 to 1978 we identified one bill in 1967, three bills in 1973, two bills in 1974, three bills in 1975, two bills in 1976, one bill in 1977, and one bill in 1978. S. 2615, 93d Cong. (1973); S. 2569, 93d Cong. (1973); H.R. 11101, 93d Cong. (1973); S. 4227, 93d Cong. (1974); S. 3877, 93d Cong. (1974); S. 2036, 94th Cong. (1975); S. 2731, 94th Cong. (1975); S. 563 94th Cong. (1975); S. 495, 94th Cong. (1976); H.R. 14795, 94th Cong. (1976); S. 555 95th Cong. (1977); H.R. 8686, 95th Cong. (1978).



concerns, including conflicts between the legislative and executive branches.<sup>33</sup> While those efforts did not result in a Congressional OLC, they led to the establishment of the Senate Legal Counsel in 1978 and the House Office of General Counsel in 1993. The idea for a Congressional OLC surfaced again in 2021 during hearings before the House Select Committee on the Modernization of Congress when legal scholars stated that Congress needs a Congressional OLC to advance congressional oversight norms. They also said the office would help inform the executive branch of Congress's oversight expectations, and articulate Congress's institutional prerogatives.<sup>34</sup>

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## Proposals to Increase Congressional Oversight of Rulemaking

Congress has a variety of existing mechanisms to conduct oversight of the rulemaking process, including holding hearings and using the authorities in the CRA to disapprove rules. However, researchers from academia, public policy professionals, and some government stakeholders have suggested ways to increase congressional participation in and oversight of executive branch rulemaking amid questions about Congress's oversight of the process. Members of Congress also have introduced dozens of bills related to regulatory oversight. We identified more than 60 relevant bills introduced since 1999 aimed at addressing Congress's oversight of the regulatory process. We also identified dozens of options proposed by researchers that would affect congressional oversight of the rulemaking process in a variety of

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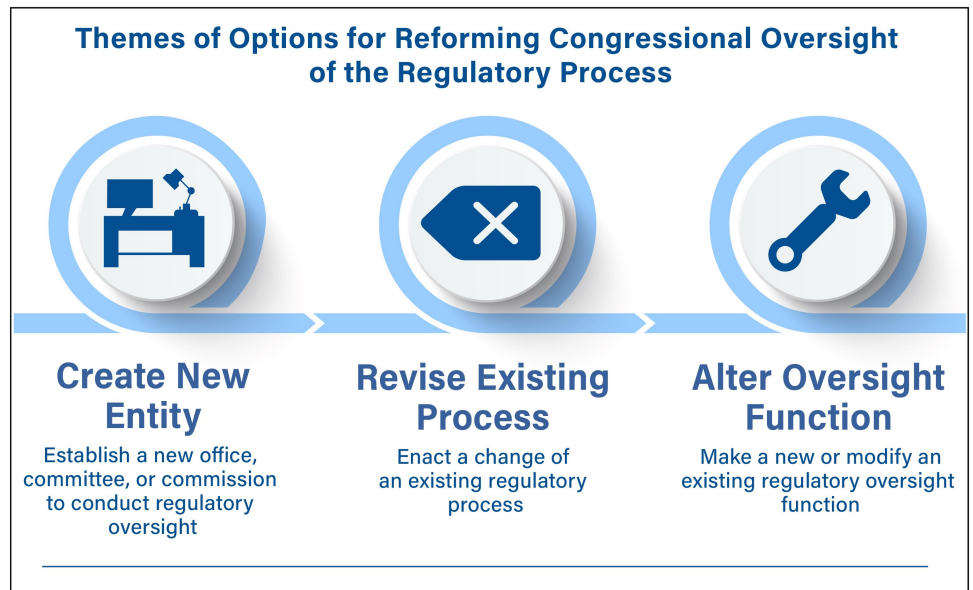
<sup>33</sup>See, e.g., 119 Cong. Rec. 33788, 33797 (1973) (introducing S. 2569 (1973) and explaining that an Office of Congressional Legal Counsel within the Congress would be able to use the judicial branch to reestablish an equality of power between the Congress and the Executive); *Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Part 1, 94th Cong. 1 (1975) (statement of Sen. Abraham Ribicoff stating "The Watergate Reorganization and Reform Act of 1975 is an effort to provide a series of mechanisms to safeguard against such abuses in the future"); *Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate*, 95th Cong. 1 (1977) (statement of Sen. Charles H. Percy explaining that the act is similar to the Watergate Reorganization and Reform Act of 1976).

<sup>34</sup>*Article One: Strengthening Congressional Oversight Capacity: Hearing Before the Select Committee on the Modernization of Congress, House of Representatives*, 117th Cong. Rec. 18 (2021) (testimony of Elise J. Bean, Director, Levin Center at Wayne State University Law School and Anne Tindall, Counsel, Protect Democracy).

ways, including creating a new congressional entity to be involved with the rulemaking process.

For purposes of this report, we categorized the various options we identified into three themes—creating a new entity, revising existing processes, and altering an existing oversight function (see fig. 2).

**Figure 2: Themes for Reforming Congressional Oversight of the Regulatory Process**



Source: GAO literature review. For image credits, see Additional Source Information for Images. | GAO-24-105870

We defined the three themes in the following ways:

- Options to create a new congressional entity for regulatory oversight generally focus on creating an office, joint committee, commission, or advisory committee to review, analyze, and report on various types of promulgated rules or conduct another regulatory oversight function.
- Options to revise existing regulatory processes include options that would add new steps to the regulatory process, such as requiring expiration dates for certain rules.<sup>35</sup> This theme also includes options

<sup>35</sup>This is commonly known as a sunset provision which is analogous to a sunset law, which is defined as a statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed (*Black's Law Dictionary*, 11<sup>th</sup> ed. 2019).

that would substantially alter or add new requirements to the rulemaking process.

- Options to alter regulatory oversight functions include options that would make changes to an existing entity's roles and responsibilities in the rulemaking process, such as new requirements for how agencies conduct cost-benefit analyses.

We compiled the options by theme as well as other characteristics, into a supplement available on our web site. See the box for how to access the table and links to instructions for using it.

### Supplemental Data on Options and Tradeoffs

This report includes a sortable data table with additional information about the options we reviewed, including, where applicable

- a description of the option and its source,
- the affected step of the rulemaking process,
- the responsible entity for making a change, if applicable,
- the associated authority for the option, and
- potential tradeoffs and considerations for each option.

The supplement permits users to sort the data by these and other categories.

Access the data and the Readme file describing how to sort the data at <https://www.gao.gov/products/GAO-24-105870>.

Source: GAO literature and legal review. | GAO-24-105870



Source: ramill/stock.adobe.com icons. | GAO-24-105870

## Options for New Entities Vary in Functions, Structure, and Authority

Within this group of options, we identified a number of features that relate specifically to creating new entities, including the entity's potential function (what work the entity would conduct), structure (how the entity would be organized), and specific legal authority (the legal mechanism for establishing the entity).<sup>36</sup>

<sup>36</sup>Appendix I provides more detail on foundational considerations for Congress to consider when creating new congressional entities, including general authority considerations, administrative considerations, and budgetary considerations. These foundational considerations generally would apply to any option listed in our supplement.

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## Functions

In general, the options we identified would establish an entity that would perform a broad range of oversight activities. These options often would have the entity maintain certain analytical responsibilities and capacities. For instance, five options we reviewed from research organizations called for different versions of a congressionally based Office of Regulatory Review, which would conduct activities such as analyzing the costs and benefits of proposed and existing rules and assess regulatory burdens.<sup>37</sup>

Other proposals recommended that a new entity could perform functions such as conducting additional periodic reviews of rules, tracking regulatory compliance with appropriate statutory standards, or providing expertise to assist committee oversight when appropriate. Specifically, one bill we reviewed would have required a new congressional office to analyze an agency's assessment of the potential benefits, costs, alternatives, net benefits of major rules, and assessments of nonmajor rules.<sup>38</sup>

## Organizational Structure

The proposals we reviewed included three general structures that a new oversight entity could take: a new independent office, a new congressional committee, or a new commission or advisory group. For example, several proposals suggested establishing an office to conduct regulatory oversight work, similar to the work OIRA conducts as an executive branch entity within OMB. The text box shows some features of OIRA that Congress could consider if it were to structure an analogous entity within the legislative branch.

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<sup>37</sup>We use the term "Office of Regulatory Review" throughout this report to describe such a potential congressional office. However, this is a generic title. Research organizations and past bills have used other potential titles for this proposed office including, "Congressional Office of Regulatory Affairs" and "Congressional Office of Regulatory Analysis."

<sup>38</sup>Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2010, H.R. 6223, 111th Cong. (2010).

**Features of the Office of Information and Regulatory Affairs (OIRA):** Three proposals we reviewed called for establishing an office under the legislative branch to act as a counterpart to the Office of Management and Budget's Office of Information and Regulatory Affairs. The details of OIRA's structure and features could serve as a point of reference if Congress were to create an analogous entity.

Generally, OIRA manages the review of certain draft proposed rules and final rules for compliance with laws and other requirements.

- Officials said OIRA's fiscal year 2023 budget appropriation was \$15 million. They also said OIRA's primary expense was compensation (including benefits) to its 58 full-time equivalent employees (FTE).
- OIRA officials also said that, of these 58 FTEs, 40 are assigned to four regulatory branches—Food Health & Labor (10 FTEs), Information Policy (10 FTEs), Natural Resources and Environment (11 FTEs), and Transportation Security (nine FTEs)—whose primary function involves regulatory review.
- OIRA's other two branches – Science & Statistical Policy and Privacy Policy – support reviews of rules as part of their policy-related responsibilities, according to OIRA officials.

Source: GAO analysis of OIRA information. | GAO-24-105870

To create an independent office, Congress would have to consider such matters as how the head of the office or entity would be appointed, what the mission of the new office would be, and how many staff it would require. Some legislative proposals we reviewed discussed the structure of a potential new independent office and addressed these types of details. For example, some legislative proposals we reviewed addressed the following:

- duties, such as evaluating and providing recommendations on whether rules should be revoked, and powers, such as holding hearings;
- staffing issues, such as assigning duties and hiring employees or contracting consultants;
- coordination with other offices and standing committees; and
- the transfer of certain functions from GAO and the Congressional Budget Office to the new office.<sup>39</sup>

Other proposals we reviewed suggested creating new congressional committees. For example, one proposal we reviewed stated that Congress could establish a Regulatory Committee similar to the Senate

<sup>39</sup>See Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2011, H.R. 214, 112th Cong. (2011), and Regulatory Improvement and Transparency Act of 2017, S. 1734, 115th Cong. (2017). For our list of such entities, see the supplement available at <https://www.gao.gov/products/105870>.

and House Budget committees. Under the proposal, the new Regulatory Committee—which would have jurisdiction over regulatory policy proposals and have bipartisan staff and membership—would issue reports and hold hearings on regulatory review topics. Other options proposed that Congress structure a new committee similar to the Joint Committee on Taxation, which has a nonpartisan mission and a bicameral system for member leadership in which the chair rotates between the House and Senate from the first to second sessions of each Congress.

A third type of entity we identified in our research was an advisory committee that could assist Congress in addressing certain rules. According to the Congressional Research Service (CRS), advisory committees also may be labeled as commissions, councils, task forces, or working groups.<sup>40</sup> They have been formed in the past to assist congressional and executive branch policymaking and are generally governed by the Federal Advisory Committee Act.<sup>41</sup> A proposal made during the 115th Congress would have created a retrospective regulatory review commission, which would review rules and sets of rules according to specified criteria to determine if a rule should be repealed to reduce the costs of regulation on the economy.<sup>42</sup> Congress could decide whether to establish an advisory committee, the duration, and the types of advice it might provide and reviews it might conduct.

Appendix I lists various considerations and features of proposed entities that Congress could consider in weighing whether to adopt a new type of entity to enhance its rulemaking oversight.

### Authority

It is likely that Congress would need to adopt new legislation to authorize many of the options we identified in our research. For example, to create new entities assisting with regulatory review, Congress may need to

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<sup>40</sup>Congressional Research Service, *Federal Advisory Committees: An Introduction and Overview (R44253)* (Washington, D.C.: Oct. 27, 2016.)

<sup>41</sup>Pub. L. No. 92-463, 86 Stat. 770 (1972) *codified as amended at* 5 U.S.C. §§ 1001-1014. GAO recently made nine recommendations on improving the transparency and independence of advisory committees in September 2020, seven of which have been implemented as of September 2023. See GAO, *Federal Advisory Committees: Actions Needed to Enhance Decision-Making Transparency and Cost Data Accuracy*, [GAO-20-575](#) (Washington, D.C.: Sept. 10, 2020).

<sup>42</sup>H.R. 998, 115th Cong. (2017).

change laws such as the Unfunded Mandates Reform Act or the CRA. In some cases, Congress could adopt new chamber rules to create an entity, such as a new committee.

If Congress were to create a new regulatory oversight entity, it could model the authorization used to establish other congressional offices. Examples of authorization for other entities that Congress previously created and their associated duties include the following:

- The Senate Office of the Legislative Counsel was established in the Revenue Act of 1918 to aid in drafting public bills and resolutions or amendments upon the request of any Senate committee.<sup>43</sup> This office reviews drafts of legislation prepared by executive agencies and others; prepares measures for committees; and prepares floor amendments for all members and staff for measures that are before the Senate.
- The Joint Committee on Taxation was created by legislation in 1926. Its tasks include investigating the operation and effects of the federal system of internal revenue taxes and the administration of such taxes. This office also was charged with reporting to House and Senate committees on the results of investigations and studies.<sup>44</sup>
- CRS was established in the Legislative Reorganization Act of 1946 to, among other things, when requested, advise and assist any committee of the Senate or the House of Representatives and any joint committee of Congress in the analysis, appraisal, and evaluation of legislative proposals. CRS also prepares summaries and digests of bills and resolutions of a public general nature introduced in the Senate or the House of Representatives and develops and maintains research capability.<sup>45</sup>
- The Office of the Whistleblower Ombuds was first established in 2019, and permanently added to the standing rules in 2021, in the Rules of the House of Representatives to promulgate best practices for whistleblower treatment for offices of the House.<sup>46</sup> The office also provides training for House offices on whistleblower intake,

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<sup>43</sup>Pub. L. No. 65-254, 40 Stat. 1057 (1919), *codified at* 2 U.S.C. § 275.

<sup>44</sup>26 U.S.C. §§ 8001-8005, 8021-8023.

<sup>45</sup>Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (1946), *codified at* 2 U.S.C. § 166. CRS was first named the “Legislative Reference Service” and was subsequently named the “Congressional Research Service” in the Legislative Reorganization Act of 1970. Pub. L. No. 91-510, 84 Stat. 1140 (1970).

<sup>46</sup>H.R. Cong. Res. 6, 116th Cong., § 104(e) (2019); H.R. Cong. Res. 8, 117th Cong., § 2 (2021).



including establishing an effective reporting system for whistleblowers and maintaining whistleblower confidentiality.

- The duties of the Secretary of the Senate originate from Congress's constitutional requirement to keep a journal of proceedings.<sup>47</sup> These duties have expanded beyond the original duties and include keeping the legislative records of the Senate, as well as receiving and transmitting official messages to and from the President and the House of Representatives.

Appendix I contains more detail on the types of authorization Congress could consider in adopting new oversight entities, as well as additional detail on the rules and legislation that established existing congressional offices.<sup>48</sup> Furthermore, our supplement shows some potential laws or rules that might need to be revised for the options we identified.

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## Options for Revising Congressional Oversight of the Rulemaking Process

Our research identified various proposals for Congress to revise its oversight of the rulemaking process without creating a new entity. This theme includes proposals that would add or change steps to the rulemaking process.

Examples of proposals that would revise the existing process include creating new rulemaking steps, such as (1) statutorily requiring that agencies publish a list of information on which the rule is based, including data, and scientific and economic studies, among others, in the *Federal Register* before the rules can take effect and (2) statutorily requiring that agencies periodically conduct retrospective reviews of significant rules.<sup>49</sup> Other proposals would allow Congress to disapprove parts of a rule instead of requiring the disapproval of a rule in its entirety as currently required by the CRA.

In one proposal we reviewed, Congress could amend the CRA to include a process for initiating congressional review of agency actions for which the agency did not submit a report under 5 U.S.C. § 801(a). Another

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<sup>47</sup>U.S. Const. art. I, § 5, cl. 3.

<sup>48</sup>The authority section of appendix I contains examples of legislation and rules that Congress adopted to create other congressional offices.

<sup>49</sup>H.R. 277, 118th Cong. (2023); H.R. 33, 115th Cong. (2017).



**Revise Existing  
Process**

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icons. | GAO-24-105870

option includes requiring agencies to add new, regulatory budget procedures. This option suggests establishing regulatory budgets that set a ceiling for regulatory costs imposed on the economy each year, based on agency requests. Such requests would then be compiled into a unified regulatory budget that provides measurements of regulatory burden.

One option we identified recommended establishing sunset or expiration dates for certain rules, meaning a rule would expire without additional action by Congress or agencies.<sup>50</sup> Some proposals suggest technical changes to existing laws governing the rulemaking process. For example, one proposal recommended the CRA be updated to require agencies to submit reports on CRA covered rules to Congress and to GAO electronically to ensure timely delivery.

Another example includes amending the CRA to limit the period during which Congress can issue joint resolutions of disapproval for rules to presidential transition periods and limit the use of the CRA to rules finalized between the end of one presidential administration and the beginning of the next administration.

For more details about each of these options, as well as additional options we identified, see our supplement.

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<sup>50</sup>See, e.g., H.R. 214, 112th Cong. (2011).

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## Options for Altering Oversight Functions of Entities Already Involved with Rulemaking

Our third theme focuses on how the roles and responsibilities of existing entities involved in the rulemaking process could be adjusted to enhance congressional oversight.

These options would change how entities already involved in the rulemaking process perform their duties. For example, various proposals of options we reviewed would require:

- agencies to conduct an economic analysis of their rulemakings using a uniform cost-benefit analysis;<sup>51</sup>
- agencies to explicitly build into their proposed rules methods for evaluating whether the rules are succeeding;
- each congressional committee, when they are drafting statutes requiring agency regulatory action, to present estimates of the expected benefits and costs of the regulatory program in the report accompanying the legislation;
- GAO to conduct and submit to Congress a study on how many rules are in effect, how many major rules exist, and total estimated economic cost imposed by all such rules;<sup>52</sup>
- agencies to include in every rulemaking preamble a separate section that discusses how an agency used the results of the regulatory impact analysis to decide on the proposed or final rule;<sup>53</sup> and



Source: Adobe Illustrator program free icons. | GAO-24-105870

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<sup>51</sup>Jumpstarting Opportunities with Bold Solutions Act, H.R. 4304, 113th Cong. § 501 (2014) and Sound Regulation Act of 2014, S. 2099, 113th Cong. § 3 (2014). GAO developed a compilation of cost estimating best practices drawn from across industry and government. GAO, *Cost Estimating and Assessment Guide: Best Practices for Developing and Managing Program Costs*, [GAO-20-195G](#) (Washington, D.C.: March 2020). See also GAO, *Government Reorganization: Key Questions to Assess Agency Reform Efforts*, [GAO-18-427](#) (Washington, D.C.: June 2018).

<sup>52</sup>H.R. 277, 118th Cong. (2023).

<sup>53</sup>Generally, a regulatory impact analysis is an agency's assessment of the costs and benefits anticipated from the regulatory action. According to OMB's *Circular A-4*, a regulatory impact analysis should include an evaluation of the benefits and costs of the proposed regulatory action and any reasonable alternatives, as well as a description of assumptions and the treatment of uncertainty.

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- agencies to publish draft regulatory impact analyses prior to making a proposal that contains their preferred alternative.

Our supplement lists options we identified for altering oversight functions.

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## Options Pose a Variety of Potential Tradeoffs and Involve Other Considerations

Our interview sources and research cited identified a number of possible tradeoffs and considerations associated with the options we identified. For example, several of the proposals could have outcomes such as Congress gaining additional information or analysis about proposed rules, increasing transparency of the rulemaking, or helping Congress understand the costs that rules may impose on the public. In exchange for these types of outcomes, however, Congress would have to weigh various tradeoffs and other considerations. For example, options for creating new, independent offices to issue reports on new regulations could provide Congress with more information to consider when reviewing rules but setting up a new office entails costs and resources devoted to staffing, infrastructure, and administration.

Cited tradeoffs across the options in our review—though not the only tradeoffs cited—included potential overlap and duplication of existing offices’ functions or duties, added costs or required additional resources for hiring new staff for conducting additional studies and research, and extended time frames and added complexity for the rulemaking process. Our supplement lists possible tradeoffs for options we identified.

### Potential Overlap and Duplication

CRS and GAO already may report on rules when requested by Congress, while the Congressional Budget Office produces cost estimates of new legislation. OIRA already reviews agencies’ actions as part of the rulemaking process. According to two of our sources, establishing a new congressional office potentially could overlap with or duplicate these efforts.<sup>54</sup> The extent of the potential duplication would depend on what the

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<sup>54</sup>Overlap occurs when multiple agencies or programs have similar goals, engage in similar activities or strategies to achieve them, or target similar beneficiaries. Duplication occurs when two or more agencies or programs are engaged in the same activities or provide the same services to the same beneficiaries. See GAO, *Additional Opportunities to Reduce Fragmentation, Overlap, and Duplication and Achieve Billions of Dollars in Financial Benefits*, [GAO-23-106089](#) (Washington, D.C.: June 14, 2023).

purpose of that office would be, how it was implemented, and how effectively the offices coordinated. Potential overlap and duplication can lead to inefficient expenditure of resources.

For example, one proposal we identified worked around this issue by recommending the transfer of certain functions from GAO and the Congressional Budget Office to the newly proposed office.<sup>55</sup> Congress also could choose to intentionally duplicate some offices' activities because of the complex nature or magnitude of the federal effort or to add a check on federal agencies' regulatory activity.

### Costs and Resources

Another consideration that arose in our review was the potential added cost for a new office or additional functions. For example, if Congress were to create a congressional office similar to OIRA, it may consider that OIRA's fiscal year 2023 estimated total budget was \$15 million. The scope of a potential new office's responsibilities would affect the amount of resources it would need.

For example, proposals for a new congressional office to review only economically significant rules (historically less than 75 rules per year) could require fewer staff and resources than proposals to review all significant rules (historically more than 200 rules per year), according to data collected by the George Washington University Regulatory Studies Center (the Center).<sup>56</sup> Overall, the data also show that the executive branch issues thousands of rules per year. The greater the number of rules Congress tries to address with its own analyses or reviews and the more sophisticated it wants the reviews to be, the more it will need in staff, necessary skills, expertise, technology, and time to complete the work.

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<sup>55</sup>H.R. 214, 112th Cong. (2011).

<sup>56</sup>According to the Center's data, the federal government published more than 75 economically significant rules in 2 years between presidential years 1994 and 2022 (a presidential year is February 1 through January 31). In contrast, the federal government published more than 200 significant final rules every presidential year from 1994 through 2012 and published more than 200 significant final rules again in presidential years 2016 and 2020. All eight of the presidential years that the government published fewer than 200 significant final rules occurred between presidential years 2013 and 2022, according to the Center's research.

Costs also could increase because of additional requirements for studies, such as additional retrospective review requirements. For example, one organization proposed amending the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act of 1995 to require agencies to include in proposed rules additional federalism analysis, risk analysis, and calculation of the impact of proposed regulations on market competition.<sup>57</sup> This organization acknowledged that, were Congress to amend these authorities, the cost to agencies of conducting such analyses would increase.<sup>58</sup>

Furthermore, if Congress were to create a new office, it would have to determine where an office would be located and what kinds of infrastructure resources it would need. We list broad spending and administrative considerations such as these in appendix I.

### Timeliness

A third tradeoff concerned adding time to the rulemaking process. For example, some options, including ones requiring formal rulemaking for certain rules and increasing the use of evidence in decision-making, could add time to the rulemaking process. Resources would be needed to hold the hearings and review opinions and evidence presented at the hearings. The hearings could take longer than typical informal rulemaking. A longer rulemaking process could delay the implementation of existing laws. One stakeholder we interviewed said that proposals requiring formal rulemaking for all major rules could slow down the rulemaking process so much it would make regulating nearly impossible.

### Complexity

Some options could add complexity to the rulemaking process. For example, options that require OIRA and agencies to assemble a

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<sup>57</sup>Respectively, Pub. L. No. 104-4, 109 Stat. 48 (1995); Pub. L. No. 96-354, 94 Stat. 1164 (1980); and Pub. L. No. 104-13, 109 Stat. 163 (1995). Under Executive Order 13132, agencies cannot, to the extent practicable and permitted by law, promulgate regulations that have federalism implications and that preempt state law, unless the agency (1) consulted with state and local officials early in the process of developing the proposed regulations; (2) provides a federal summary impact statement in the preamble of the regulation; and (3) makes available to OMB written communications submitted to the agency by state and local officials. Exec. Order No. 13132, *Federalism*, 67 Fed. Reg. 43255 (Aug. 4, 1999).

<sup>58</sup>Appendix I discusses a broad range of budget and spending considerations for establishing new offices.

regulatory budget could entail setting new criteria for agencies to follow, require new and different types of expertise, and make the rulemaking process more costly and complex. Another proposal called for allowing Congress to disapprove provisions of certain rules. The author of this proposal acknowledged that the change could leave agencies guessing about how to change the specified provisions to satisfy Congress. However, the proposal may allow Congress to identify provisions in the rule that it objects to, allowing the remaining provisions in the rule to go into effect. Such a change also could put a greater burden on Congress to find time to hold hearings and debates on proposed rules.

### Other Considerations

For certain options we identified, tradeoffs and considerations for Congress to weigh would be specific to the proposal. For example, a proposal to create OIRA-like Congressional Offices of Regulatory Affairs recommends the new entity concentrate on “the most important policies – regulatory or deregulatory.” Determining the feasibility of allocating resources to the offices would thus depend greatly on defining the scope of and a definition for “the most important” issues.

In another example, a former OIRA Administrator observed that agencies have the data they use to conduct their cost-benefit analyses or other studies in house. If Congress were, for example, to establish a new congressional office to conduct its own cost-benefit analyses, it would have to obtain the necessary data from the agency or generate data on its own, which could create extra burden on the agencies.

Options that involve creating new types of entities have their own sets of tradeoffs, as well. For example, committees could offer Congress more flexibility in matters such as setting priorities than an independent office might offer, but an independent office would not necessarily be subject to political changes in Congress. The activities of an advisory committee may be more limited than those of a congressional committee or congressional office.

See our supplement for tradeoffs and other considerations associated with each option that we identified.

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## Proposals for a New Congressional Office of Legal Counsel

Congress periodically has shown interest in reforming its legal services with the addition of a new Congressional Office of Legal Counsel (OLC). Appendix II provides a detailed, legal discussion of these proposals. In general, our review of proposed legislation, law review articles, statements for the record on relevant bills or hearings, and interviews with knowledgeable individuals identified three functions for a Congressional OLC: advisory, litigation-related, and coordination.

We also identified five primary organizational structure options for a Congressional OLC, including proposals that Congress establish a new joint entity within Congress serving both chambers or expand the functions of existing legislative branch agencies, such as the CRS.

Finally, we identified two authorities—statutory and chamber rules—to establish a Congressional OLC, and two authorities—Article II of the Constitution and internal congressional procedure—to appoint a Legal Counsel who could head the office.

Researchers and professionals have opined on the feasibility of establishing a Congressional OLC with the features we have identified. For example, they have generally supported providing a Congressional OLC with an advisory function but have expressed concerns with certain litigation-related functions.

The sources we reviewed have also opined on the feasibility of certain structures proposed for a Congressional OLC. For example, they have generally expressed concern about establishing a joint entity within Congress that serves both chambers because meaningful differences between the two chambers may not result in an entity that effectively serves both.

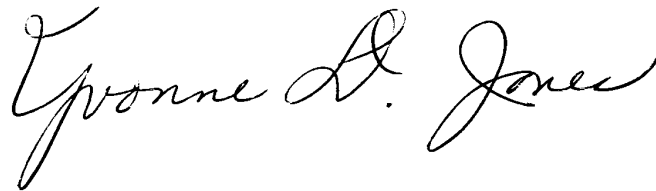
Key potential tradeoffs we identified for each feature of a Congressional OLC include the need for additional resources and the potential for having an entity that could provide Congress with greater insight or clarity on certain legal issues. Appendix II provides more details on various tradeoffs and options for establishing a new Congressional OLC, as well as illustrative examples of how a Congressional OLC could function, based on our research.



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We are sending copies of this report to the appropriate congressional committees, the Office of Management and Budget, and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff members have any questions about this report, please contact me at (202) 512-6806 or [JonesY@gao.gov](mailto:JonesY@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix IV.

A handwritten signature in black ink that reads "Yvonne D. Jones". The signature is written in a cursive style with a large, stylized 'Y' and 'J'.

Yvonne D. Jones  
Director, Strategic Issues

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*List of Requesters*

The Honorable Bryan Steil  
Chairman  
The Honorable Joseph D. Morelle  
Ranking Member  
Committee on House Administration  
House of Representatives

The Honorable Laurel M. Lee  
Chair  
The Honorable Terri A. Sewell  
Ranking Member  
Subcommittee on Elections  
Committee on House Administration  
House of Representatives

The Honorable Stephanie I. Bice  
Chair  
The Honorable Derek Kilmer  
Ranking Member  
Subcommittee on Modernization  
Committee on House Administration  
House of Representatives

The Honorable Barry Loudermilk  
Chair  
The Honorable Norma J. Torres  
Ranking Member  
Subcommittee on Oversight  
Committee on House Administration  
House of Representatives

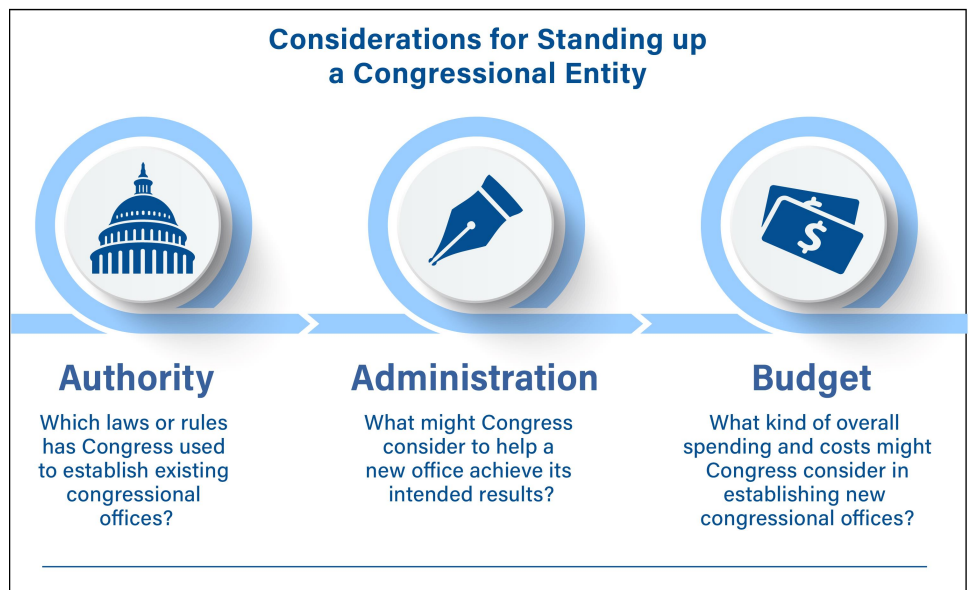
The Honorable Zoe Lofgren  
House of Representatives

The Honorable William Timmons  
House of Representatives

# Appendix I: Congressional Considerations for Establishing New Offices

Congress faces a variety of choices and, in some cases, tradeoffs when establishing new offices, ranging from what kind of authority Congress might use to start a new office to how much spending to allocate to new offices. This appendix discusses foundational considerations that Congress could apply to starting new offices in general. We use information about existing congressional offices to illustrate these foundational considerations. We have grouped these foundational considerations into three broad categories—authority, administration, and budget, as shown in figure 3.

Figure 3: Considerations for Standing up Congressional Entities



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## Authority

According to our research and congressional entities we interviewed, the selected congressional offices we reviewed had been established under three types of authority: constitutional, statutory, or rules. Two of the selected offices have constitutional authority. Of the entities authorized in statute, two are Senate offices, three are House offices, and three are joint House and Senate offices. The three entities authorized by rules were all in the House of Representatives. Table 2 provides an overview of the authorities used to establish selected congressional offices.

**Table 2: Selected Congressional Offices and Their Authorities**

Congressional office	Authority	Type of authority	Congressional chamber
House Office of the Law Revision Counsel	2 U.S.C. § 285	Statutory	House
Clerk of the House	U.S. Const. art. I, § 5	Constitutional	House
The Office of the Chief Administrative Officer	H.R. Cong. Res. 6, 104th Cong. (1995)	Rules	House
Office of General Counsel of the United States House of Representatives	H.R. Con. Res. 5, 103d Cong. (1993) <sup>a</sup>	Rules	House
House Office of the Legislative Counsel	2 U.S.C. §§ 281-282e	Statutory	House
Parliamentarian of the House	2 U.S.C. § 287	Statutory	House
Office of the Senate Legislative Counsel	2 U.S.C. §§ 271-276b	Statutory	Senate
Secretary of the Senate (including the Chief Counsel for Employment and the Parliamentarian)	U.S. Const. art. I, § 5	Constitutional	Senate
Office of Senate Legal Counsel	2 U.S.C §§ 288-288n	Statutory	Senate
Office of the Whistleblower Ombuds	H.R. Con. Res. 8, 117th Cong. § 2 (2021).	Rules	House
Joint Committee on Taxation	26 U.S.C. §§ 8001-8005, 8021-8023	Statutory	Joint
Congressional Research Service	2 U.S.C § 166	Statutory	Joint
Congressional Budget Office	2 U.S.C. §§ 601-613	Statutory	Joint

Source: GAO analysis of the U.S. Constitution, federal statutes, and congressional rules. | GAO-24-105870

<sup>a</sup>Fully incorporating rule II, clause 8 of the Rules of the House of Representatives for the 117th Congress (Feb. 2, 2021).

The type of authority required to establish a new congressional office—statute or chamber rules—will likely depend on the kind of office established. However, each type of authority has tradeoffs.

For example, an office may need to be authorized by statute if it is to serve both chambers of Congress because of the need to obtain approval

from both chambers. A tradeoff under this authorization is that, compared to offices authorized by rules, the structure of statutorily authorized offices is relatively inflexible and less likely to be changed given the additional requirements for enacting or amending legislation.

Authorization under chamber rules may be best suited for offices situated within and serving a single chamber of Congress. However, rules are not the only method of creating such single-chamber offices—several Senate offices were created by statute.

Our review found that nonpartisanship often was established in the authorizing language of offices. For example, the Congressional Research Service is statutorily tasked with performing several duties without partisan bias.<sup>1</sup> Additionally, the House Office of General Counsel, established in House Rules, is tasked with providing legal assistance and representation without political affiliation.<sup>2</sup> The Congressional Budget Office's authorizing statute also states that employees should be appointed without regard to their political affiliation and solely because of their fitness to perform their duties.<sup>3</sup> In addition, the authorizing statute of the Senate Office of the Legislative Counsel states that the Legislative Counsel should be appointed by the President of the Senate without reference to political affiliations and solely on the ground of fitness to perform the duties of the office.<sup>4</sup>

We also found cases in which an office without a statutory mandate to maintain nonpartisanship still adopted this practice. For example, the Office of the Whistleblower Ombuds adopted a mission statement and vision to serve the House of Representatives in an independent and nonpartisan manner, even though such action was not required by its authorizing rule.

Nonpartisanship and independence could be affected by the type of authority used to establish the office. Entities established by both chambers of Congress through statute may have a greater degree of independence than entities established in a single chamber through rules.

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<sup>1</sup>2 U.S.C. § 166(d).

<sup>2</sup>H.R. Con. Res. 8, 117<sup>th</sup> Cong. (2021).

<sup>3</sup>2 U.S.C. § 601(b).

<sup>4</sup>2 U.S.C. § 272.

For example, a staff member of the Joint Committee on Taxation told us that the committee manages partisan issues by looking to peer-reviewed economic literature for the development of microeconomic and macroeconomic models. The office also explains its methods, data, and assumptions to members and their staff. Staff members at the House Office of the General Counsel, which was created in rules to serve the House of Representatives, said they strive to generally provide legal assistance and representation to all members of the House. However, serving under the direction of the Speaker of the House, the office represents the Speaker if the Speaker is sued by other members of the House.

Finally, our interviews and research raised nonpartisanship and independence as potential considerations for starting new nonpartisan congressional offices. For example, according to a report written by the Organisation for Economic Co-operation and Development, independence should be considered when starting new offices that perform financial analyses for legislative or executive bodies—work that is analogous to the regulatory reviews or legal reviews that the proposed offices would conduct.<sup>5</sup>

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## Administration

The second area of consideration for setting up a new congressional office involves questions of how the office will be administered, presented below as five broad administrative considerations. Accounting for these considerations could help a new office achieve its intended results, address emerging issues with available resources, and support its ability to serve Congress.

**Purpose: What will be the new office’s mission or purpose?** A clear mission serves as the foundation for subsequent decisions on standing up a new office. The mission or purpose can be communicated through statutory authority, a rule of the office, or statements by office leadership. A clear mission also can help avoid unwarranted duplication or overlap with existing offices or services. According to a report from the National Academy of Public Administration and our prior work on agency reforms and reorganizations, there should be consideration of fragmentation,

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<sup>5</sup>Organisation for Economic Co-operation and Development, *Recommendation of the Council on Principles for Independent Fiscal Institutions* (February 2014).



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overlap, and duplication of responsibilities before any reform occurs.<sup>6</sup> Avoiding unwarranted overlap and duplication of roles and responsibilities can mitigate potential challenges to efficient and effective operations. Gap analysis can be used to determine available or missing resources and can help determine whether presumed functions of the new office already exist or could exist within existing congressional entities.

We identified the following insights about establishing an office's mission.

- Staff members with the Office of the Whistleblower Ombuds said having a specific mission has helped them communicate the role and services offered to their congressional clients and direct their resources appropriately. A staff member also said when standing up the office, staff coordinated with other House offices to avoid unnecessary duplication and overlap of efforts and work. This member also said that the office ensures its guidance is complementary in areas where there is overlapping jurisdiction.
- Staff members from private organizations we interviewed and certain congressional entities mentioned that, given the changing nature of political coalitions, having clear language that defines the scope of work of the office and articulates the goals of the office can help establish the range of work the office will do and the structure of the decision-making process.

**Human Capital: What types of personnel management and expertise are needed to staff the new office?** Human capital refers to the staffing needs of the office, the skills that these staff can bring, and the benefits that can be offered to compete for employees where relevant. According to our interviews and literature review, it is easier to plan for an organizational structure and hiring needs if an office has a well-articulated staffing plan that takes into account the types of expertise and staffing categories the office should have and the hiring authority given to leaders. The staffing plan can also address pay scales, retirement and health benefits, and hiring strategies to recruit talent in a competitive job market.

Comments made during our interviews are consistent with key principles from our prior work on strategic workforce planning. This work recommends that offices identify the critical skills and competencies

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<sup>6</sup>National Academy of Public Administration, *Science and Technology Policy Assessment: A Congressionally Directed Review*, (Oct. 31, 2019), and GAO, *Government Reorganization: Key Questions to Assess Agency Reform Efforts*, [GAO-18-427](#) (Washington, D.C.: June 13, 2018).

needed to achieve programmatic results as one of five key principles to effective workforce planning.<sup>7</sup> Our prior work on human capital also emphasizes the need for organizations to use data to identify current and future human capital needs, such as the appropriate deployment of staff, to maximize the value of human capital and managing risk.<sup>8</sup>

The staff from congressional offices we interviewed also provided examples of the importance of human capital planning to their offices:

- A representative from the Joint Committee on Taxation said the quality of their staff is the most important factor in carrying out the office's mission. The representative stated that workforce planning entails matching the skills of the staff to the needs of the committee, including being ready to fill the gaps from anticipated retirements.
- A human capital representative from GAO stressed the importance of new offices having experienced human resources-oriented staff who can keep ideas and initiatives relevant and practical, as these staff will have knowledge or expertise about what talent and skill sets will be needed and how to recruit them.

**Senior Staff and Leadership: How will the office's leader be selected and what will be the leader's responsibilities?** Senior staff and leadership in a new office will help implement the hiring strategy, stand up the new office's operations, and make sure that the work performed is consistent with the office mandate. Our prior work on agency reforms and reorganizations discusses the need to designate a leader who can be responsible for the implementation of proposed reforms, as well as an implementation team that manages the reform process.<sup>9</sup> Our prior work also emphasizes the importance of developing a process to hold leaders

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<sup>7</sup>GAO, *Human Capital: Key Principles for Effective Strategic Workforce Planning*, [GAO-04-39](#) (Washington, D.C.: Dec. 11, 2003). The other four key principles include: involving top management, employees, and other stakeholders in developing strategic workforce plans; developing strategies tailored to address gaps and human capital conditions in critical skills and competencies; building the capability needed to address administrative, educational, and other requirements important to supporting workforce strategies; and monitoring and evaluating an agency's progress toward its human capital goals.

<sup>8</sup>GAO, *A Model of Strategic Human Capital Management*, [GAO-02-373SP](#) (Washington, D.C.: Mar. 15, 2002).

<sup>9</sup>[GAO-18-427](#).



accountable for successfully setting up offices and implementing the office mandate.<sup>10</sup>

Additionally, our interviews and the documentation we reviewed emphasized that choosing office leadership is key for establishing productive working relationships with other congressional offices. Senior leadership can be appointed by congressional leadership or nominated and confirmed by a bipartisan committee. Each option has tradeoffs or other considerations to weigh. For example:

- One staff member with a Senate legislative office said an office leader chosen solely by a committee chair and responsible only to the committee chair has a lower chance of being nonpartisan than a leader chosen by a bipartisan nomination and confirmation process.
- Staff members with the House Office of General Counsel said that the General Counsel reports to the Speaker of the House. Generally, the office strives to maintain political neutrality, but there are times when conflicts may arise and the office may be required to represent the Speaker. They said potential conflicts in a newly established office may be avoided by structuring the appointment of leadership in a politically neutral manner.

**Infrastructure: Where will the office be physically located?**

Infrastructure refers to office space and proximity to the clients it will serve, as well as the services and IT infrastructure that are shared with other congressional entities. The physical location of offices that serve Congress can affect how these offices conduct their work and overall costs. For example, one official mentioned that physical access to members of Congress can facilitate in-person meetings or allow for impromptu conversations that can expedite the office's work. However, if proximity is not critical to the office's function or if congressional office space is limited, Congress can consider alternative office space locations.

Infrastructure also refers to available shared services, such as physical security and information technology. Our 2019 report on streamlining government showed that efforts to promote greater use of shared services can lead to cost savings and efficiency gains.<sup>11</sup> Shared services

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<sup>10</sup>GAO-18-427.

<sup>11</sup>GAO, *Streamlining Government: OMB and GSA Could Strengthen Their Approach to Implementing a New Shared Services Plan*, GAO-19-94 (Washington, D.C.: Mar. 7, 2019).

also can reduce the burden on a new office to operate and manage its infrastructure needs on its own.

Our interviews with congressional offices provided the following examples of infrastructure considerations:

- Staff members from five congressional offices we spoke with said that their office's proximity to the Capitol and House and Senate offices is important to the functionality of their offices, as it adds a level of convenience for reaching out to members and ensuring confidentiality in discussing legal matters.
- One congressional office staff member said their office has had space in different Capitol office buildings. The staff member noted that the frequency of in-person meetings was higher when the office was located closer to the members it serves.
- Staff members with multiple congressional offices noted that they use certain shared services with other offices. These include services such as human resources, payroll, and administrative services. Staff members from multiple congressional offices said the Sergeant at Arms provides training and physical security services to several offices.

**Transparency: How will the office prioritize and conduct its work?**

Transparency refers to the public's or stakeholders' ability to see and understand the process of how and why certain decisions are made, which can be specific to each office. Transparency can include a process that clearly lays out how the office will prioritize and conduct its work. The process also could address public outreach, access to information, and public availability of reports. According to the National Academy of Public Administration report, a well-developed, transparent assessment process is key to making decisions about how best to address Congress's needs.<sup>12</sup> Our interviews and literature review provided examples of the importance of transparency:

- A staff member with the Congressional Budget Office (CBO) said transparency is a hallmark of CBO's work and helps CBO stay politically neutral and maintain its credibility.
- The Administrative Conference of the United States (ACUS) has recommended that executive agencies have transparent frameworks

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<sup>12</sup>National Academy of Public Administration, *Science and Technology Policy Assessment: A Congressionally Directed Review* (Washington D.C.: Oct. 31, 2019).

to enable the public to understand why agencies prioritize retrospective reviews of certain rules over others.<sup>13</sup> According to ACUS’s report, these procedures are important when there are conflicting policies and limited resources and time to review rules. A new congressional office for reviewing rulemaking may face similar resource constraints and a framework or policy could help maintain transparency.

- The Organisation for Economic Co-operation and Development reports that institutions that serve legislatures have a special duty to act as transparently as possible, and that transparency provides the greatest protection to institutional independence.<sup>14</sup>

## Budget

A third area of consideration for setting up a new congressional office involves decisions about overall spending and costs.

**What are the budgets and staff levels for existing congressional offices?** Staff members in the congressional offices we spoke with generally said that most of their expenses were staff salaries. Table 3 lists selected congressional offices and shows the funding and staffing levels across them. Another potential model from the executive branch could be the Office of Management and Budget’s Office of Information and Regulatory Affairs, which had an estimated total budget of \$15 million for fiscal year 2023.



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**Table 3: Appropriations for Selected Congressional Entities, Fiscal Year 2023**

Congressional entity	Fiscal Year 2023 Salaries and Expenses (dollars in millions)	Full-time equivalents
The Office of the Chief Administrative Officer (House)	211.6	750
Office of General Counsel of the United States House of Representatives	1.9	9
House Office of the Law Revision Counsel	3.7	15
House Office of the Legislative Counsel	13.5	80
Parliamentarian of the House	2.2	12

<sup>13</sup>Administrative Conference of the United States, *Retrospective Review of Agency Rules 2014-5* (Dec. 4, 2014).

<sup>14</sup>Organisation for Economic Co-operation and Development, *Recommendation of the Council on Principles for Independent Fiscal Institutions* (February 2014).

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<b>Congressional entity</b>	<b>Fiscal Year 2023 Salaries and Expenses (dollars in millions)</b>	<b>Full-time equivalents</b>
Office of the Whistleblower Ombuds (House)	1.25	4 <sup>b</sup>
Joint Committee on Taxation	12.9	65
Congressional Research Service	133.6	586
Congressional Budget Office	63.2	278
Office of the Senate Legislative Counsel	8.2	50
Secretary of the Senate <sup>a</sup>	46.8	240
Senate Office of Legal Counsel	1.4	6

Source: Data for salaries and expenses are from relevant portions of the Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. 1, 136 Stat. 4459,4913 (2022), rounded to nearest tenth of a dollar. Data on full-time equivalents are from interviews with relevant officials. | GAO-24-105870

<sup>a</sup>This line includes the Senate Parliamentarian and Chief Counsel for Employment. Expenses and salaries are shown separately in the Appropriations Act. We added them here for presentation purposes.

<sup>b</sup>In addition to the four full-time equivalents, the House Office of the Whistleblower Ombuds is authorized to retain “fellows” on a temporary basis over the course of the year that are not counted here.

**What are examples of specific cost and budget considerations?**

- **Staffing:** Costs could vary depending on how competitive hiring is for experienced staff and any statutory caps on salaries. Such decisions will stem from the specific purpose of the office.
- **Location:** If the office does not reside in an existing House and Senate office space, leasing will become an expense.
- **Travel:** A staff member from the Office of the Chief Administrative Officer mentioned that establishing a travel budget for the new office could be an important consideration, in addition to budgeting for pay, retirement, and health benefits.
- **Budgeting processes:** Representatives of several of the smaller offices we interviewed said they did not have a formal process for budgeting beyond having a staff member review previous years’ allocations and making a budget based on that trend, plus expected upcoming hiring needs. Larger offices had dedicated staff analyzing budget allocations and preparing budget requests.
- **Long-term appropriations:** Certain sources we interviewed suggested that it would be helpful to consider ways for the office to have reliable funding. For example, officials from the Senate Office of the Legislative Counsel mentioned that long-term appropriations would help a new office be responsive to the needs of the Senate. They added that good plans tend to be in 2- to 5-year funding cycles.

# Appendix II: Considerations for Establishing a Congressional Office of Legal Counsel

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## Background

In our review of a variety of sources, we identified potential tradeoffs Congress may wish to consider when deciding whether to establish a Congressional Office of Legal Counsel (OLC).<sup>1</sup> We also identified how Congress might establish such an office, including its functions, organizational structure, and establishing legal authority. Additionally, we identified commentary from stakeholders, legal scholars, and former government officials on establishing a Congressional OLC. This appendix is based on our review of bills introduced in prior sessions of Congress, law review articles, statements for the record on relevant bills or hearings, statements from a discussion group of legal scholars and former government officials, and interviews we conducted from June 2022 to May 2023 with existing congressional entities.<sup>2</sup> While this discussion includes potential features Congress may wish to consider if establishing a Congressional OLC, it is not meant to represent a comprehensive view of all possible alternatives.

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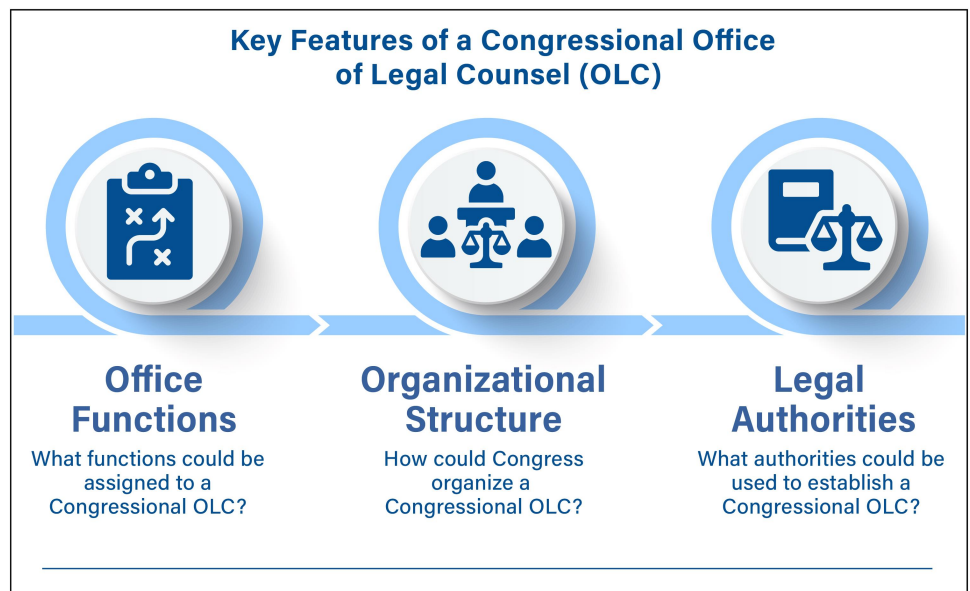
<sup>1</sup>Our review found that proposals would have called the office of a variety of names, including: "Office of the Legislative Attorney General," "Office of Congressional General Counsel," "Congressional Legal Service," and "Office of Congressional Legal Counsel." In this report, we refer to an office fulfilling the role identified by these proposals as the Congressional Office of Legal Counsel or Congressional OLC. For the purposes of this report a "proposal" means a proposed bill or a proposal made by legal scholars.

<sup>2</sup>The earliest bill seeking to establish a Congressional OLC we identified was first introduced in the Senate in 1967. S. 1384, 89th Cong. (1967). In total, during the period of 1967 to 1978 we identified 13 bills: one bill in 1967, three bills 1973, two bills in 1974, three bills in 1975, two bills in 1976, one bill in 1977, and one bill in 1978. S. 1384, 89th Cong. (1967); S. 2615, 93d Cong. (1973); S. 2569, 93d Cong. (1973); H.R. 11101, 93d Cong. (1973); S. 4227, 93d Cong. (1974); S. 3877, 93d Cong. (1974); S. 2036, 94th Cong. (1975); S. 2731, 94th Cong. (1975); S. 563, 94th Cong. (1975); S. 495, 94th Cong. (1976); H.R. 14795, 94th Cong. (1976); S. 555, 95th Cong. (1977); H.R. 8686, 95th Cong. (1978).

## Three Key Features of a Congressional OLC

We identified three key features for Congress to consider if establishing a Congressional OLC—functions, organizational structure, and the legal authority used to establish such an office, as shown in figure 4. Should Congress decide to establish a Congressional OLC, it may wish to consider selecting from the identified features, and whether a policy decision for one feature may inform which other features are most appropriate.<sup>3</sup>

Figure 4: Key Features for Establishing a Congressional Office of Legal Counsel



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<sup>3</sup>The last section of this appendix provides illustrative examples showing how Congress might combine identified features to address various needs.

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## Potential Functions of a Congressional OLC



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The functions of a Congressional OLC refer to the duties and responsibilities of such an office. The potential functions Congress may want to consider assigning a Congressional OLC can be grouped into three categories—advisory, litigation, and coordination. Below we describe each function, past efforts to establish a Congressional OLC and the proposed functions the office would have performed, and the related functions of current congressional entities.<sup>4</sup>

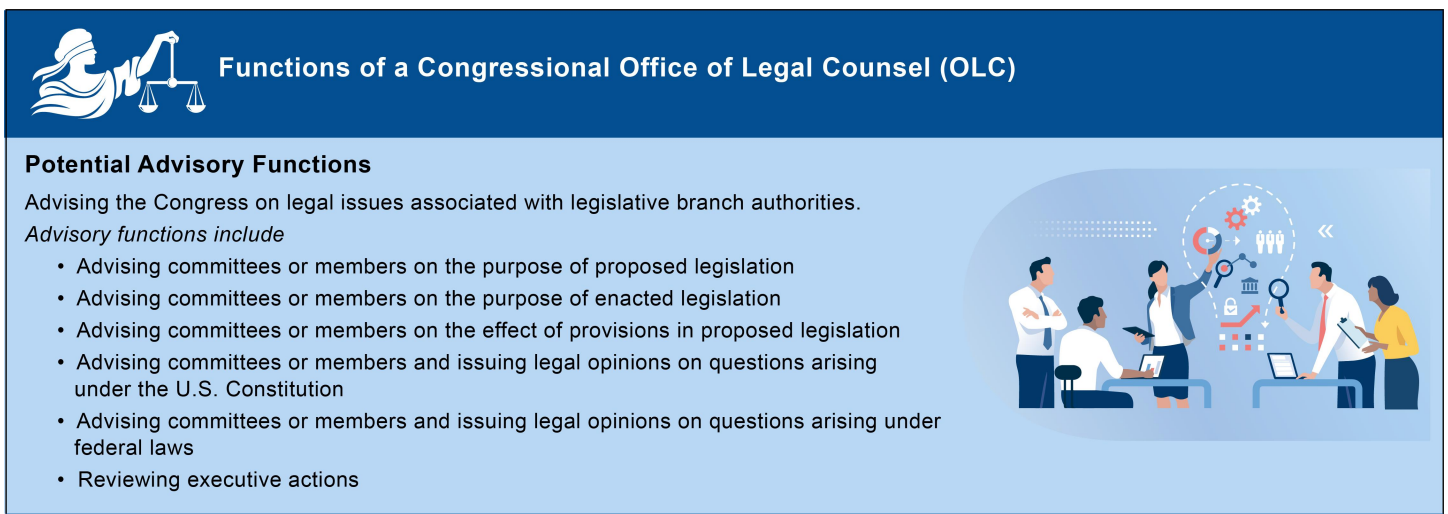
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<sup>4</sup>For the purposes of this appendix, we use the term “congressional entity,” “congressional agency,” and “legislative branch agency” to broadly refer to offices and agencies of Congress. For example, the terms include, among others, the Senate Office of Legal Counsel, House Office of General Counsel (OGC), Congressional Research Service (CRS), Congressional Budget Office (CBO), Government Accountability Office (GAO), and Architect of the Capitol.

## Advisory Functions

When assigning advisory functions to a Congressional OLC, Congress could include parameters around (1) the topics the Congressional OLC could consider, (2) the process for members and committees to request work from the Congressional OLC, or (3) publishing legal opinions or memoranda issued by the Congressional OLC. The potential advisory functions for a Congressional OLC are shown in figure 5.

Figure 5: Identified Potential Advisory Functions for a Congressional Office of Legal Counsel



Source: GAO analysis of proposed bills. For image credits, see Additional Source Information for Images. | GAO-24-105870

## Past Efforts

Most of the bills we identified included advisory functions for a potential Congressional OLC. The bills specify some of the questions the Congressional OLC could consider and establish processes for members and committees to request work from the Congressional OLC. For example, seven of the bills tasked a Congressional OLC with issuing legal opinions on questions arising under the Constitution and federal law, and with advising committees and members of Congress on the purpose and effect of proposed laws. Some bills specified the types of issues such legal opinions could address. For example, some specified the Congressional OLC could determine whether

- a Freedom of Information Act request was properly denied by a federal agency;



- a nomination or foreign agreement should have been submitted to the Senate;
- an executive action violates federal law or the U.S. Constitution;
- executive privilege exists and was properly asserted; and
- budget authority was lawful under the Impoundment Control Act of 1974.<sup>5</sup>

Regarding the process for requesting opinions, one bill required at least three Senators or 12 members of the House to initiate a request for the Congressional OLC to issue a legal opinion.<sup>6</sup> Another bill established a procedure for committees to make legal opinion requests.<sup>7</sup> This bill also included a provision requiring all legal opinions issued by a Congressional OLC to be published and made available for public inspection.<sup>8</sup>

### Current Congressional Entities with Related Functions

We identified several congressional entities with advisory-related functions that may overlap or complement potential Congressional OLC functions. Were Congress to establish a Congressional OLC, it would be important to manage unnecessary overlap or duplication with these existing entities.

**The Office of the House Legislative Counsel.** Established by the House of Representatives in 1970, this office is tasked with advising and assisting the House, its committees, and its members in the achievement of a clear, faithful, and coherent expression of legislative policies.<sup>9</sup> The work of the office includes such activities as the preparation of conference

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<sup>5</sup>S. 2569, 93d Cong. (1973); H.R. 11101, 93d Cong. (1973); S. 4227, 93d Cong. (1974).

<sup>6</sup>S. 4227, 93d Cong. (1974).

<sup>7</sup>H.R. 11101, 93d Cong. (1973).

<sup>8</sup>H.R. 11101, 93d Cong. (1973).

<sup>9</sup>2 U.S.C. § 281. The Office of the Legislative Counsel for the House of Representatives evolved from a Legislative Drafting Service established for the Congress. Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057 (1919). However, the House established its own Legislative Counsel Office in 1970. Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (1970), as amended by the Legislative Branch Appropriations Act, 1972, Pub. L. No. 92-51, 85 Stat. 125 (1971).

reports and drafting bills, amendments, and resolutions for purposes of floor and committee consideration and introduction in the House.<sup>10</sup>

**The Congressional Research Service (CRS).** Established in 1946, CRS is tasked with, upon request, advising and assisting any committee of the Senate or House of Representatives and any joint committee of Congress in the “analysis, appraisal, and evaluation of legislative proposals,” or recommendations submitted to Congress by the President or any executive agency to “assist the committee in determining the advisability of the proposals, estimating the probable results of the proposal and any alternatives, and evaluating alternative methods for accomplishing those results.”<sup>11</sup> In addition, CRS prepares summaries and digests of bills and resolutions, and develops and maintains an information and research capability.<sup>12</sup> Further, upon request by any committee or member of Congress, CRS prepares concise memoranda on legislative measures upon which hearings by any committee have been announced.<sup>13</sup>

**The Congressional Budget Office (CBO).** Pursuant to the Congressional Budget and Impoundment Control Act of 1974, CBO assists budget committees in the discharge of all matters within their jurisdiction, including information with respect to the budget, appropriations bills, and other bills authorizing or providing new budget authority or tax expenditures.<sup>14</sup>

**GAO.** GAO was created in the Budget and Accounting Act of 1921 to investigate, among other things, the use of public money, evaluate

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<sup>10</sup>2 U.S.C. §§ 281-281b.

<sup>11</sup>Legislative Reorganization Act of 1946, Pub. L. No. 60-812, 60 Stat. 812 (1946), *codified at* 2 U.S.C. § 166(d). CRS was first named the “Legislative Reference Service” and was subsequently named the “Congressional Research Service” in the Legislative Reorganization Act of 1970. Pub. L. No. 91-510, 84 Stat. 1140 (1970).

<sup>12</sup>2 U.S.C. § 166(d)(6), (8).

<sup>13</sup>The memoranda must include a statement on the purpose and effect of each measure, a description of other relevant measures of similar purpose or effect previously introduced in Congress, and recitation of all actions taken in Congress with respect to each measure. 2 U.S.C. § 166(d)(7).

<sup>14</sup>2 U.S.C. § 602(a).

programs and activities of the government, and audit executive branch agencies.<sup>15</sup>

**House and Senate Office of the Parliamentarian.** Both the House and Senate have an Office of the Parliamentarian to provide expert advice and assistance on questions relating to the meaning and application of that chamber's legislative rules, precedents, and practices.<sup>16</sup> The House and Senate Parliamentarians are charged with providing confidential and nonpartisan assistance to all members of Congress.<sup>17</sup> In the discussion groups we held with legal scholars and former officials, one participant explained that the parliamentarians may be examples to emulate in a Congressional OLC because of their influence. That influence developed as a result of their expertise and status as advisors rather than final decision makers, since chamber leadership can overrule them. Although the Parliamentarians for the House and Senate do not perform functions directly related to those of a Congressional OLC, those offices' reputations and influence within Congress might prove instructive.

#### Feasibility of Advisory Functions for a Congressional OLC

Our review found that commentators generally agree that certain advisory functions could be appropriate for a Congressional OLC. Support for a Congressional OLC with advisory functions appeared in some of the earliest attempts to establish such an office. For example, in the 93rd Congress Senator Vance Hartke explained that the Congressional OLC's responsibility to issue legal opinions on questions arising under the Constitution and federal law "will provide a way for Members and committees of Congress to present an authoritative viewpoint to executive departments and agencies upon the validity, but not the merit, of

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<sup>15</sup>31 U.S.C. §§ 712, 713, 714, 717.

<sup>16</sup>The Speaker of the House has appointed a Parliamentarian since 1927 and the office was formally and permanently established in the 95th Congress. Pub. L. No. 95-94, 91 Stat. 668 (1977), *codified at* 2 U.S.C. §§ 287-287d; Rules of the House of Representatives, H.R. Doc. No. 116-177, at 1064 (2021). The Senate formally recognized its parliamentarian in 1935. CRS, *The Office of the Parliamentarian in the House and Senate*, RS20544 (Nov. 28, 2018).

<sup>17</sup>CRS, *The Office of the Parliamentarian in the House and Senate*, RS20544 (Nov. 28, 2018).

regulations . . . . In this capacity the counsel will speak authoritatively in the sense of being the counsel representing Congress.”<sup>18</sup>

Several stakeholders also supported the creation of a Congressional OLC with advisory functions during a series of hearings held in 1975 and 1977.<sup>19</sup> During 1975 hearings, a former government official stated that the “advisory functions that would be conferred . . . represent areas in which it would be quite appropriate and informative for Congress to have professional legal advice.”<sup>20</sup> Similarly, a Department of Justice (DOJ) official said that a Congressional OLC could be useful to Congress by “providing a central clearing house of analysis and for recommending legislative responses to rulings of the courts and administrative bodies.”<sup>21</sup> During 1977 hearings, a DOJ official supported the establishment of a Congressional OLC with advisory functions, including the function of providing legal advice to the various congressional components, because such functions relate “exclusively to Congress’ performance of its

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<sup>18</sup>119 Cong. Rec. 35070, 35088 (Oct. 26, 1973) (remarks made when introducing S. 2615, which would have established a Congressional OLC).

<sup>19</sup>*Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, 94th Cong. 1 (1975) (Congress considered S. 495 and S. 2036, both of which would have established a Congressional OLC); *Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate*, 95th Cong. 1 (1977) (Congress considered S. 555, which would have established a Congressional OLC).

<sup>20</sup>*Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Pt. 1, 94th Cong. at 277 (1975) (statement of Philip A. Lacovara, former Counsel to the Special Prosecutor and Deputy Solicitor General of the United States). Thomas Ehrlich, professor and dean at Stanford University School of Law, also expressed support during these hearings for the advisory functions assigned to a Congressional OLC, stating, “Establishment of Congressional Legal Service appears to me a sound step to provide the Congress with much needed legal advice, just as the General Accounting Office gives counsel in its areas of expertise.” *Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Pt. 1, 94th Cong. at 223 (1975) (statement of Thomas Ehrlich).

<sup>21</sup>*Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Part 2, 94th Cong. at 2 (1975) (statement of Michael M. Uhlmann, Assistant Attorney General, DOJ Office of Legislative Affairs).

legislative functions and are thereby quite properly lodged in the Congress itself.”<sup>22</sup>

More recently, several legal scholars have noted that a congressional entity that could provide legal advice to Congress and issue legal opinions expressing Congress’s interpretation of federal law could help Congress respond to legal questions.<sup>23</sup> In addition, in a recent hearing before the House Select Committee on the Modernization of Congress, stakeholders expressed support for a process within Congress to issue bipartisan legal opinions on oversight matters.<sup>24</sup>

Similarly, all discussion group participants agreed that advisory functions could be appropriate for a Congressional OLC. Some participants stated that Congress should consider whether Congressional OLC legal opinions or memoranda would be issued privately or released to the public. Some expressed a preference for legal opinions that are publicly issued because it would give the opinions greater influence as the official congressional position. Participants noted that publicly issued legal opinions or memoranda might duplicate efforts in other legislative branch agencies, such as CRS, but concluded that some duplication is not unwarranted if there is coordination between potentially duplicative entities.

However, some have raised concerns about a Congressional OLC with advisory functions. Specifically, when the Senate was considering a bill that would have established a Congressional OLC with advisory functions, including issuing legal opinions that express legislative intent, some Senators expressed concern that such an office would become the

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<sup>22</sup>*Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate, 95<sup>th</sup> Cong.* at 12 (1977) (statement of John M. Harmon, Assistant Attorney General, DOJ Office of Legal Counsel).

<sup>23</sup>Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Powers?*, 68 *UCLA L. Rev.* 2, 83 (proposing to strengthen Congress as a counterweight to the executive branch by creating a Congressional OLC that can address legal questions that arise in the branch it serves, and issue its own legal opinions on issues of contested legal authority); Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 *B.C.L Rev.* 515, 563 (proposing a Congressional OLC that can develop an official congressional position when legal questions arise).

<sup>24</sup>*Article One: Strengthening Congressional Oversight Capacity: Hearing Before the Select Committee on the Modernization of Congress, House of Representatives, 117<sup>th</sup> Cong.* 18 (2021) (testimony of Elise J. Bean, Director, Levin Center at Wayne State University Law School and Anne Tindall, Counsel, Protect Democracy).

“authoritative source for interpretation of legislative intent.”<sup>25</sup> Senator Hartke further stated that “the Senate considered it to be unwise to establish a quasi-legal office of Congress having the power to issue binding legal opinions whether or not requested by a committee to do so.”<sup>26</sup> Additionally, during hearings on the Watergate Reorganization and Reform Act of 1975, one stakeholder opined that there may be appeal in having an entity that gives legal advice to members of Congress but noted that, “any member will, of course, be free to accept or to reject any legal opinion” issued by a potential Congressional OLC.<sup>27</sup>

### Litigation-related Functions

When assigning litigation-related functions to a Congressional OLC, policy decisions could include specifying (1) the procedures for authorizing the office’s representational services, (2) the scope of who the office may represent, (3) the issues in which the office may become involved, and (4) whether the office would speak for or represent Congress as a body (see fig. 6).

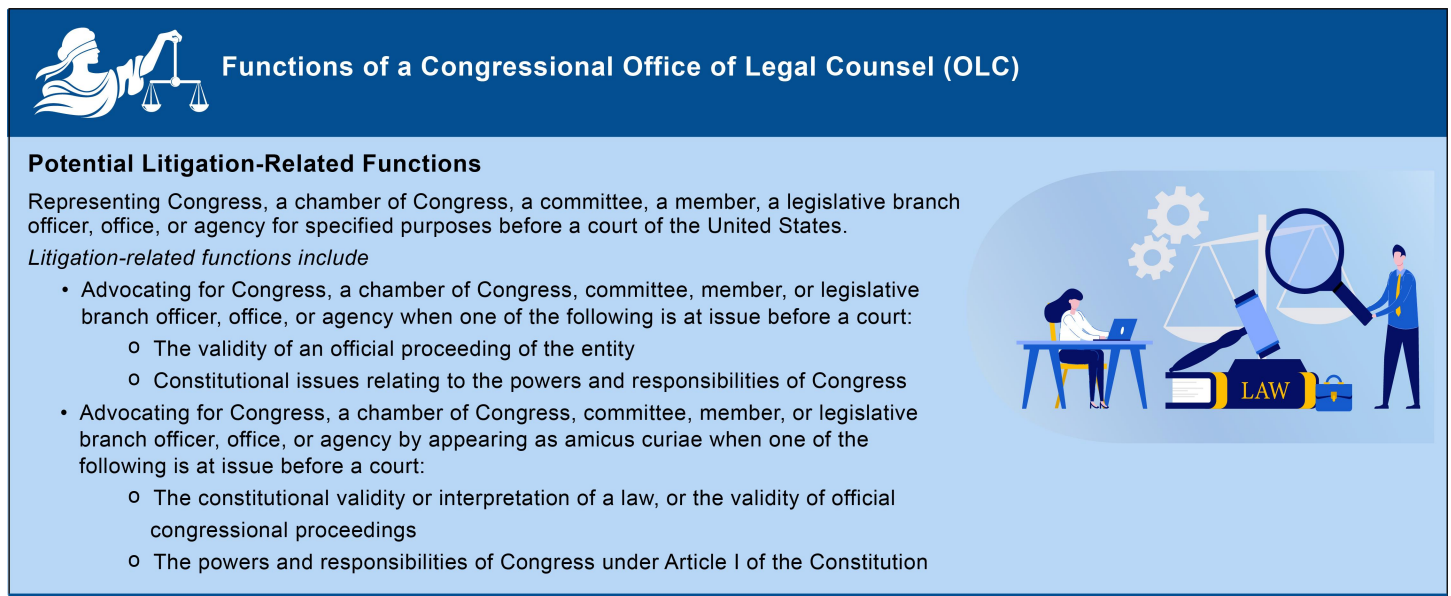
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<sup>25</sup>122 Cong. Rec. 5, 22677 (June 19, 1976).

<sup>26</sup>122 Cong. Rec. 5, 22677 (June 19, 1976).

<sup>27</sup>*Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Pt. 1, 94th Cong. at 244 (1975) (testimony of Erwin N. Griswold, Jones, Day, Reavis & Pogue).

Figure 6: Identified Potential Litigation-related Functions for a Congressional Office of Legal Counsel



Source: GAO analysis of proposed bills. For image credits, see Additional Source Information for Images. | GAO-24-105870

### Past Efforts

Every proposal we identified would have assigned the Congressional OLC litigation-related functions, such as the ability to

- intervene or appear as amicus curiae in pending U.S. court proceedings;
- represent either chamber of Congress, or any committee, member, officer, office, or agency of Congress in pending U.S. court proceedings; or
- enforce congressional subpoenas.

In early proposals the Congressional OLC would have appeared as amicus curiae in pending U.S. court proceedings where there was placed at issue “the constitutional validity or interpretation of any Act of the Congress, or the validity of any official proceeding of or action taken by either House of Congress, or by any committee, Member, officer, office,

or agency of Congress.”<sup>28</sup> In some bills, appearance as amicus curiae would have required the request, or approval, of the Judiciary Committee of the Senate or of the House.<sup>29</sup>

Subsequent bills added provisions authorizing the Congressional OLC to not only appear as amicus curiae, but also to intervene in certain pending U.S. court proceedings, such as when the constitutionality or interpretation of any federal law, or the validity of any official congressional proceeding or action taken was challenged.<sup>30</sup> The bills set different processes for the Congressional OLC to intervene or appear as amicus curiae.<sup>31</sup> Other proposals would have allowed the Congressional OLC to intervene or appear as amicus curiae upon determining that it was necessary to carry out the functions of the Congressional OLC.<sup>32</sup>

Certain proposals would have specified the parties the Congressional OLC was authorized to represent.<sup>33</sup> Others would have established a

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<sup>28</sup>S. 1384, 89th Cong. (1967); S. 2615, 93d Cong. (1973). “Amicus Curiae” which is Latin for “friend of the court,” refers to a nonparty with an interest in the outcome of a pending lawsuit who petitions the courts or is requested by the court to file a brief in the action. Amicus Curiae, Black’s Law Dictionary (11th ed. 2019).

<sup>29</sup>S. 1384, 89th Cong. § 2(a)(4) (1967); S. 2615, 93d Cong. § 3(a)(4) (1973).

<sup>30</sup>S. 4227, 93d Cong. § 102(c)(1)(B) (1974); H.R. 11101, 93d Cong. § 3(a)(2)(B) (1973); S. 2569, 93d Cong. § 3(a)(2)(B) (1973). “Intervention” is the “entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome.” Intervention, Black’s Law Dictionary (11th ed. 2019).

<sup>31</sup>Some bills specified that the Congressional OLC could only intervene or appear as amicus curiae when either chamber, a joint committee of Congress, any committee of either chamber, at least three senators, or at least 12 members of the House requested the service. S. 4227, 93d Cong. § 102(c)(1)(B) (1974); H.R. 11101, 93d Cong. § 3(a)(2) (1973); S. 2569, 93d Cong. § 3(a)(2) (1973).

<sup>32</sup>Under this proposal, the Congressional OLC would have been permitted to intervene or appear as amicus curiae 10 days after continuous session of Congress unless by concurrent resolution, or, if only one chamber had an interest in the matter, by resolution of such chamber, the intervention or appearance was disapproved or limited. S. 2731, 94th Cong. § 8(b)(1) (1975).

<sup>33</sup>For example, a 1967 bill would have required the Congressional OLC to represent either chamber of Congress, or any committee, member, officer, office, or agency of Congress in any pending U.S. court proceeding in which such entity is a party and the validity of any official proceeding or action taken by such entity was challenged. S. 1384, 89th Cong. § 2(a)(5) (1967).



procedure to limit representation to specified matters.<sup>34</sup> Later bills would have limited the Congressional OLC's authority to defending certain constitutional powers and prerogatives when specified matters were placed in issue before a U.S. court.<sup>35</sup>

All bills included provisions, with varying levels of detail, explaining the request and approval process for authorizing the Congressional OLC to represent the Congress and others. For example, early bills required either the request, or the approval, of the Senate or House Judiciary Committee for the Congressional OLC to represent either chamber of Congress, or any committee, member, officer, office, or agency of the Congress.<sup>36</sup> Alternatively, some bills only required that the party request that the Congressional OLC represent them.<sup>37</sup> Another bill required approval from a Joint Leadership Group or by the adoption of a resolution by the relevant chamber.<sup>38</sup>

Several bills also included provisions requiring the Congressional OLC to enforce congressional subpoenas. For example, one proposal would have required the Congressional OLC to, at the direction of Congress or the appropriate chamber, bring civil action to enforce any congressional subpoena or order.<sup>39</sup> Another proposal would have further specified that the Congressional OLC could only bring civil action to enforce a

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<sup>34</sup>For example, some bills limited representation authority to constitutional issues relating to the powers and responsibilities of Congress. S. 2731, 94th Cong. § 5(b) (1975); S. 495, 94th Cong. § 203(b)(1) (1976).

<sup>35</sup>For example: (1) the constitutional privilege from arrest or from being questioned in any other place for any speech or debate in either House under Article I, Section 6, of the U.S. Constitution; (2) the constitutionality of statutes enacted into law; (3) the constitutional power of Congress to make all laws as shall be necessary and proper for executing the constitutional power of Congress; and (4) all other constitutional powers and responsibilities of Congress. S. 2731, 94th Cong. § 10 (1975); S. 495, 94th Cong. § 208(3)-(5) (1976). S. 495 differed slightly from the language in S. 2731 because it notably added that the Congressional OLC *vigorously* defend the enumerated constitutional powers. The statutory text was used to draft the enabling legislation which created the Senate Legal Counsel. See 2 U.S.C. § 288h.

<sup>36</sup>S. 2615, 93d Cong. § 3(a)(5) (1973); S. 1384, 89th Cong. § 2(a)(5) (1967).

<sup>37</sup>S. 3877, 93d Cong. § 402(b)(4)(B) (1974); S. 2036, 94th Cong. § 402(a)(4)(B) (1975).

<sup>38</sup>The proposal would have created a Joint Leadership Group which would have included, among others, the Speaker of the House and President pro tempore of the Senate, and the majority and minority leaders of both chambers. S. 555, 95th Cong. § 202(a) (1977).

<sup>39</sup>S. 495, 94th Cong. § 204(a) (1976).

subpoena when authorized through a resolution of the appropriate chamber of Congress.<sup>40</sup>

### Current Congressional Entities with Related Functions

We identified congressional entities with certain litigation-related functions that serve their respective chambers. If Congress were to develop a Congressional OLC with litigation-related functions, it would be important to consider potential overlap with existing entities as well as any gaps that Congress may wish to fill. Congress may also consider whether a Congressional OLC should be authorized to speak for and represent Congress as a body or only in a more limited capacity.

The Senate Legal Counsel and House Office of General Counsel (OGC) developed as a result of prior efforts to establish a Congressional OLC.<sup>41</sup> The Senate Legal Counsel's current litigation functions overlap significantly with those Congress previously considered for a unified office. For example, the Senate Legal Counsel is tasked with

- intervening or appearing as amicus curiae on behalf of the Senate, or officer, committee, subcommittee or chairman of a committee or subcommittee of the Senate, when the powers and responsibilities of the Senate are at issue in any legal proceeding in any U.S. court;<sup>42</sup>
- instituting civil action to enforce, secure a declaratory judgment on the validity of, or prevent the threatened failure to comply with a Senate subpoena or order;<sup>43</sup>
- defending the Senate, a committee, subcommittee, member, officer, or employee of the Senate when the party is made a defendant and the validity of any proceeding is at issue;<sup>44</sup> and

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<sup>40</sup>S. 555, 95th Cong. § 203(b) (1977).

<sup>41</sup>The Senate Legal Counsel's enabling legislation was based on prior efforts to create a unified Congressional OLC. In fact, the language in S. 555, which would have established a joint Congressional OLC, matches almost exactly the enabling legislation that created the Senate Legal Counsel. S. 555, 94th Cong. (1977); Ethics in Government Act, Pub. L. No. 95-521, tit. VII, 92 Stat. 1824, 1875 (1978). The House later formally created the House OGC in 1993. H. Res. 5, 103d Cong. (1993).

<sup>42</sup>U.S.C. § 288e(a).

<sup>43</sup>U.S.C. § 288d(a).

<sup>44</sup>U.S.C. § 288c(a)(1).

- defending vigorously certain constitutional powers, among other duties.<sup>45</sup>

The House OGC is similarly tasked with litigation-related functions, including providing legal assistance and representation. For example, according to House OGC officials, the office provides representation when an official act—typically related to congressional subpoena enforcement and claims of executive privilege—is at issue in court. To initiate representation, the officials told us that individual committees or members may request their services, or House OGC may make recommendations for legal action. In both cases, according to House OGC officials, the Bipartisan Legal Advisory Group votes whether to initiate legal action.<sup>46</sup>

### Feasibility of Litigation-Related Functions for a Congressional OLC

Our review found that much of the commentary on granting a potential Congressional OLC with litigation-related functions has centered around three broad themes: encroachment upon executive branch functions, routine involvement of the judiciary in inter-branch disputes, and representation of Congress’s interests in court.

#### **Encroachment of Executive Branch Functions**

We identified a number of stakeholders, government officials, and legal scholars who expressed concern that litigation-related functions for a potential Congressional OLC would unconstitutionally encroach upon executive branch functions.<sup>47</sup> Specifically, they expressed concern about provisions in proposals that would require a potential Congressional OLC

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<sup>45</sup>2 U.S.C. § 288h.

<sup>46</sup>House OGC consults the Bipartisan Legal Advisory Group, which speaks for, and articulates the institutional position of, the House in all litigation matters. *Rules of the House of Representatives*, 118th Cong. rule II, cl. 8 (Jan. 10, 2023).

<sup>47</sup>Several past proposals would have granted a potential Congressional OLC with “all powers conferred by law upon the Attorney General, or any United States attorney,” or tasked such an office with bringing civil action to require executive branch agencies to act in accordance with the U.S. Constitution and federal law. S. 1384, 89th Cong. § 3(b) (1967); S. 2569, 93d Cong. § 3(a)(4) (1973); H.R. 11101, 93d Cong. § 3(a)(4), (c) (1973); S. 4227, 93d Cong. § 102(c)(1)(D), (d)(1)(3) (1974). DOJ’s Office of Legal Counsel opined at the time that a Congressional OLC tasked with bringing civil action requiring an officer or employee of the executive branch to act in accordance with the Constitution and federal law is performing an executive function. *Constitutionality of Bill Creating an Office of Congressional Legal Counsel*, DOJ Memorandum Opinion (Feb. 13, 1976).

to represent Congress in pending court proceedings by intervening in certain legal actions, and to enforce congressional subpoenas. They noted that a Congressional OLC may face standing issues when representing Congress.

For instance, during 1977 hearings before the Committee on Governmental Affairs, a DOJ official objected to provisions that would have required a Congressional OLC to intervene in certain legal actions.<sup>48</sup> The official noted that the provisions in the Public Officials Integrity Act of 1977 did not clarify whom the Congressional OLC would be representing and that it could not represent the United States in such actions because of the President's constitutional responsibility to take care that the laws be faithfully executed.<sup>49</sup> The DOJ official asserted that such an intervention function would unconstitutionally encroach upon executive branch functions. In addition, in the hearings on the Watergate Reorganization and Reform Act of 1975, a stakeholder noted that the inherent conflicts in regularly pitting Congress against the executive branch in court would outweigh the utility of having some congressional input in litigation involving the executive branch.<sup>50</sup>

Several stakeholders noted that there may also be issues with standing related to the concern that intervening in certain cases would encroach on

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<sup>48</sup>*Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate*, 95th Cong. at 32 (1977) (statement of John M. Harmon, Assistant Attorney General, DOJ Office of Legal Counsel). S. 555 would have required a Congressional OLC to intervene in any legal action pending in a federal or state court where the powers and responsibilities of Congress under the Constitution are placed in issue. S. 555, 94th Cong. § 206 (1977). A DOJ official raised a similar concern in hearings before the Committee on Government Operations. Specifically, the official noted that provisions in S. 495 are unclear in whether a Congressional OLC would intervene on behalf of members and officers of Congress in criminal proceedings arising out of their official duties. A DOJ official explained that it may be improper to defend, for example, a member who is the subject of a prosecution of bribery, election fraud, or filing false information. *Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Pt. 2, 94th Cong. at 12 (1975) (statement of Michael M. Uhlmann, Assistant Attorney, General DOJ Office of Legislative Affairs).

<sup>49</sup>U.S. Const. art II, § 3; *Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate*, 95th Cong. at 32 (1977) (statement of John M. Harmon, Assistant Attorney General, DOJ Office of Legal Counsel).

<sup>50</sup>*Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Pt. 1, 94th Cong. at 278 (1975) (statement of Philip A. Lacovara, former Counsel to the Special Prosecutor and Deputy Solicitor General of the United States).

executive branch functions. Standing is a legal doctrine to identify disputes which are appropriately resolved through the judicial process, the core component of which is ensuring there is a case-or-controversy as required by Article III of the U.S. Constitution.<sup>51</sup> Failure to satisfy standing requirements will result in dismissal without a decision by the court on the merits of the case. Several court decisions have weighed in on congressional standing related to Congress as a plaintiff (for example, when bringing suit to enforce a congressional subpoena) or intervener. In those cases, courts have generally ruled that congressional committees have standing to enforce a subpoena when they are authorized by their respective chamber of Congress.<sup>52</sup>

DOJ officials have also taken issue with provisions in bills that would have required a Congressional OLC to intervene to defend the constitutionality of federal law. For example, several proposals would have included a provision stating that the Congressional OLC is entitled “as of right” to intervene as a party, appear as amicus curiae, or bring civil action under

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<sup>51</sup>In *Lujan v. Defenders of Wildlife*, the U.S. Supreme Court held that there are three elements to meet minimum constitutional standing: (1) the plaintiff must have suffered an injury in fact that is (a) concrete and particularized, and (b) actual or imminent; (2) there must be a causal connection between the injury and the conduct complained of such that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely that the injury will be redressed by a favorable decision. 504 U.S. 555 (1992).

<sup>52</sup>See CRS, *Congressional Participation in Article III Courts: Standing to Sue*, R42454 (Sept. 4, 2014), for additional information. In 1997, the U.S. Supreme Court held that individual members of Congress lacked standing to sue because they did not have a sufficient personal stake in the dispute and attached “some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in [the] action, and indeed both Houses actively oppose their suit.” *Raines v. Byrd*, 521 U.S. 811 (1997) (involving members of Congress alleging that the Line Item Veto Act unconstitutionally diminished their legislative power and that of Congress by allowing the President to cancel individual items of spending in an appropriations bill). In contrast, in 2008 and 2013, House committees successfully asserted standing to sue to enforce congressional subpoenas, in part because the suits were authorized by the House. *Comm. On the Judiciary v. Miers*, 558 F.Supp.2d 53 (D.D.C. 2008) (holding that the House Judiciary Committee “had been expressly authorized by the House of Representatives as an institution” to initiate the lawsuit by House resolution); *Comm. On Oversight and Governmental Reform v. Holder*, 979 F.Supp.2d 1 (D.D.C. 2013) (stating that the House as a whole has standing to assert its investigative power). In a 1976 court decision where the House authorized a chairman to intervene on behalf of a committee, a U.S. district court held that “the House as a whole has standing to assert its investigatory powers, and can designate a member to act on its behalf.” *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976).

specified circumstances.<sup>53</sup> In testimony on the 1977 Public Officials Act, a DOJ official questioned whether Congress, a chamber of Congress, or an officer, committee, or committee chairman would have standing under the Constitution to intervene to defend the constitutionality of federal law.<sup>54</sup> Similarly, during the Watergate Reorganization and Reform Act of 1975 hearings, a DOJ official explained the department had “serious problems” with provisions that attempted to do away with the requirements of standing where the Congressional OLC intervenes or appears as *amicus curiae*.<sup>55</sup> Some discussion group participants also stated that it might be challenging for a Congressional OLC to litigate certain matters because of jurisprudence on standing. Taking this history and context into account will be important if Congress were to consider what, if any, litigation-related functions to assign to a Congressional OLC.<sup>56</sup>

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<sup>53</sup>S. 2036, 94th Cong. § 403 (1975); S. 3877, 93d Cong. § 403 (1974); S. 563, 94th Cong. § 603 (1975).

<sup>54</sup>*Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate*, 95th Cong. at 33 (1977) (statement of John M. Harmon, Assistant Attorney General, DOJ Office of Legal Counsel).

<sup>55</sup>*Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Pt. 2, 94th Cong. at 11 (1975) (statement of Michael M. Uhlmann, Assistant Attorney, General DOJ Office of Legislative Affairs). Another stakeholder stated that “requirements of standing are not mere expression of legislative restraint or preference, rather they are the consequences of the constitutional limitations that flow from Article III of the U.S. Constitution.” *Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Pt. 1, 94th Cong. at 278 (1975) (statement of Philip A. Lacovara, former Counsel to the Special Prosecutor and Deputy Solicitor General of the United States).

<sup>56</sup>We also identified constitutional concerns from DOJ that enforcement of a subpoena could be regarded as enforcement of law which may only be performed by the executive, but that congressional enforcement of a *congressional* subpoena is an appropriate and integral part of the legislative process. *Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate*, 95th Cong. at 30 (1977) (statement of John M. Harmon, Assistant Attorney General, DOJ Office of Legal Counsel) (explaining that “at first glance enforcement of a subpoena might be regarded as ‘enforcement of the law’ which may only be performed by the Executive”). A sizable body of law has since developed regarding Congress’s subpoena enforcement. Enforcement of congressional subpoenas is part of Congress’s larger contempt and investigative powers. Congress’s contempt power is the means by which it responds to certain acts that in its view obstruct the legislative process. Congress’s authority to investigate is extremely broad and the Supreme Court has established that such a power is essential to the legislative function. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 435, 453 (1977). See also CRS, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas*, RL34097 (May 12, 2017) (providing information on contempt resolutions in the House and Senate and civil enforcement resolutions in the Senate since 1980).

### Involvement of the Judiciary in Inter-Branch Disputes

In addition to concerns about litigation-related functions potentially encroaching upon executive branch responsibilities, several stakeholders expressed concern on the effect of routine involvement of the judiciary in inter-branch disputes between the legislative and executive. For example, in testimony on the Watergate Reorganization and Reform Act one stakeholder argued that some of the provisions would produce a continuing series of confrontations between the legislative and executive branches, and involve the courts in the “detailed operation of the government, including many essentially political questions.”<sup>57</sup> The U.S. Supreme Court’s political question doctrine instructs federal courts to refrain from “resolving questions when doing so would require the judiciary to make policy decisions, exercise discretion beyond its competency, or encroach on the powers of the legislative and executive branch.”<sup>58</sup>

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<sup>57</sup> *Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Pt. 1, 94th Cong. at 247 (1975) (testimony of Erwin N. Griswold, Jones, Day, Reavis & Pogue). Another stakeholder in the hearing stated that the “notion that the judiciary should routinely become the umpire in disputes of this sort is a disquieting one.” *Watergate Reorganization and Reform Act of 1975: Hearings Before the Committee on Government Operations, United States Senate*, Pt. 1, 94th Cong. at 279 (1975) (statement of Philip A. Lacovara, former Counsel to the Special Prosecutor and Deputy Solicitor General of the United States).

<sup>58</sup> CRS, *The Political Question Doctrine: An Introduction (Part 1)*, LSB10756 (June 14, 2022). See *Baker v. Carr*, 369 U.S. 186 (1962) (stating: “whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.”).

## Representation of Congressional Interests in Court

We identified multiple instances of members and committees expressing a desire to voice institutional interests.<sup>59</sup>

The Senate Judiciary Committee's Subcommittee on Separation of Powers held hearings in 1975 to examine whether the DOJ is capable of vigorously representing congressional interests.<sup>60</sup> In testimony, a stakeholder argued that when the DOJ will not defend a statute, Congress should be able to provide some means for the statute to be defended.<sup>61</sup> Generally, DOJ has a long-standing practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense.<sup>62</sup> However, in certain cases DOJ declines to

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<sup>59</sup>See 113 Cong. Rec. 7871, 7984 (1967) (Sen. Hartke stating that Congress needs a voice "speaking clearly to the executive, to administrative agencies, and the courts"); *Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate*, 95th Cong. at 61 (1977) (Sen. James Abourezk stating that a Congressional OLC representing Congress as an institution before the courts can have a "tremendous impact. Indeed, in those cases 'the Congress' should be represented by a Congressional OLC"). See also, *Article One: Strengthening Congressional Oversight Capacity: Hearing Before the Select Committee on the Modernization of Congress, House of Representatives*, 117th Cong. at 1 (2021) (Rep. Derek Kilmer stating: "We have sought to understand how and why Congress's ability to uphold its Article I powers have been weakened so that we can find meaningful and lasting ways to rebuild capacity and strengthen the legislative branch."). A 1965 joint committee considered the litigation needs of Congress and recommended the establishment of a joint committee tasked with determining whether Congress should be appropriately represented in cases of vital interest to Congress. *Organization of Congress, Final Report of the Joint Committee on the Organization of the Congress*, S. Rept. No. 1414, at 47 (1966). However, when such a committee was later established through the Legislative Reorganization Act of 1970, it was only tasked with identifying court proceedings of interest to Congress, not determining whether Congress should be represented in those proceedings. Pub. L. No. 91-510, § 402, 84 Stat. 1187 (1972).

<sup>60</sup>*Representation of Congress and Congressional Interests in Court: Hearings Before the Subcommittee on Separation of Powers*, 94th Cong. at 1 (1975).

<sup>61</sup>*Representation of Congress and Congressional Interests in Court: Hearings Before the Subcommittee on Separation of Powers*, 94th Cong. at 161 (1975) (testimony of Simon Lazarus, Arnold and Porter).

<sup>62</sup>*Representation of Congress and Congressional Interests in Court: Hearings Before the Subcommittee on Separation of Powers*, 94th Cong. 2 (1975); Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, DOJ Office of Public Affairs (Feb. 23, 2011). The United States attorney for the district in which a suit is brought is also statutorily required "in any action brought against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any such order of such House . . . on being thereto requested by the officer sued, [to] enter an appearance on behalf of such officer." 2 U.S.C. § 5503.



defend statutes “despite the availability of professionally responsible arguments, in part because it does not consider every plausible argument to be a ‘reasonable’ one.”<sup>63</sup>

For example, in *Turner Broadcasting System, Inc. v. FCC*, DOJ under the Bush administration did not defend, consistent with President Bush’s veto message and determination that the provisions were unconstitutional, the constitutionality of certain provisions in the Cable Television Consumer Protection and Competition Act of 1992.<sup>64</sup> Similarly, in 2011 under the Obama administration, DOJ declined to defend the constitutionality of certain provisions in the Defense of Marriage Act after a presidential determination that certain provisions were unconstitutional.<sup>65</sup> As a result, the Bipartisan Legal Advisory Group of the House (BLAG) intervened to defend the constitutionality of the statute,<sup>66</sup> while other members filed an amicus brief arguing that the statute was unconstitutional and stating that BLAG did not speak for the Congress.<sup>67</sup>

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<sup>63</sup>Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, DOJ, Office of Public Affairs (Feb. 23, 2011). In the 1975 hearings, DOJ provided the Subcommittee on Separation of Powers with a list of cases in which it declined representation between 1970 and 1975. *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcommittee on Separation of Powers*, 94th Cong. at 36 (1975).

<sup>64</sup>12 U.S. 622 (1994); Pub. L. No. 102-385, 106 Stat. 1460 (1992). The act, among other things, required cable operators to carry the signals of a specified number of local broadcast television stations. Congress overrode a Presidential veto to enact the act.

<sup>65</sup>Pub. L. No. 104-199, 110 Stat. 2419 (1996); Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, DOJ Office of Public Affairs (Feb. 23, 2011). Seth P. Waxman, *Defending Congress*, 79 N.C.L. Rev. 1073, 1083-85 (2001) (explaining that there are two exceptions to the practice of defending any act for which reasonable arguments can be made: (1) when an act of Congress raises separation of powers concerns, and (2) when defending an act of Congress would require the Solicitor General to ask the Supreme Court to overrule one of its constitutional precedents. In addition, Waxman explained that when DOJ declines representation outside these two exceptions, it is typically because the President has concluded that the statute is unconstitutional).

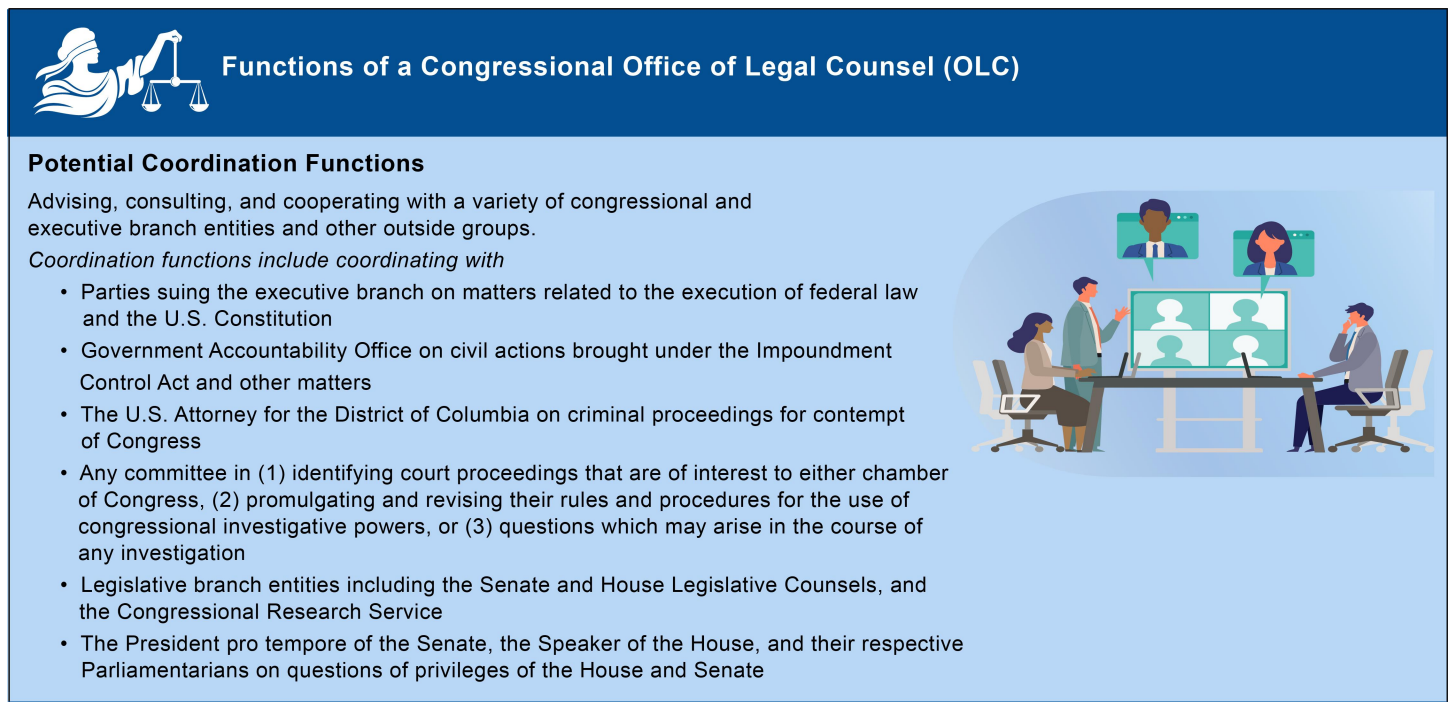
<sup>66</sup>Reply Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the United States House of Representatives, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307).

<sup>67</sup>Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in Support of Edith Schlain Windsor, Urging Affirmance on the Merits, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307).

## Coordination Functions

When assigning coordination functions to a Congressional OLC, policy decisions could include requiring a level of coordination with other congressional entities to reduce or to manage any duplication, fragmentation, or overlap of efforts (see fig. 7).<sup>68</sup>

Figure 7: Identified Potential Coordination Functions for a Congressional Office of Legal Counsel



Source: GAO analysis of proposed bills. For image credits, see Additional Source Information for Images. | GAO-24-105870

## Past Efforts

Bills we identified would have required a Congressional OLC to advise, consult, and cooperate with various congressional entities, including:

<sup>68</sup>We have also reported on leading practices to enhance collaboration between and within federal agencies. GAO, *Government Performance Management: Leading Practices to Enhance Interagency Collaboration and Address Crosscutting Challenges*, [GAO-23-105520](#) (Washington, D.C.: May 24, 2023).

- GAO on civil actions brought under the Impoundment Control Act, and other matters;
- the U.S. Attorney for the District of Columbia on criminal proceedings for contempt of Congress;
- the Joint Committee on Congressional Operations to identify court proceedings that are of interest to either chamber of Congress;
- the Senate and House Legislative Counsels, and CRS;
- members, officers, or employees attempting to obtain private counsel;
- the President pro tempore of the Senate, the Speaker of the House, and their respective Parliamentarians on withdrawal of papers and questions on privileges of the House and Senate; and
- a committee or subcommittee in promulgating and revising their rules and procedures for the use of congressional investigative powers and questions which may arise in the course of any investigation.<sup>69</sup>

### Current Congressional Entities with Related Functions

As explained earlier, the Senate established its own office of legal counsel based on earlier attempts to create a joint Congressional OLC. As a result, the Senate Legal Counsel is tasked with performing coordination functions that closely correspond to those Congress previously considered for a Congressional OLC. For example, the Senate Legal Counsel must advise, consult, and cooperate with GAO, the Office of Legislative Counsel of the Senate, and CRS.<sup>70</sup> The office is also to coordinate with the U.S. Attorney for the District of Columbia with respect to any criminal proceeding for contempt of Congress, among other things.<sup>71</sup>

### Feasibility of Coordination Functions for a Congressional OLC

Commentary on potential coordination functions for a Congressional OLC has been relatively limited compared to the commentary we identified regarding advisory and litigation-related functions. The remarks we identified on coordination functions relate to the institutional structure of

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<sup>69</sup> S. 495, 94th Cong. § 207 (1976); S. 2731, 94th Cong. § 9(a) (1975).

<sup>70</sup> 2 U.S.C. § 288g(a)(3). The statute also specifies that advising, consulting, and cooperating with these entities is not to be construed as affecting or infringing on any of their functions, powers, or duties.

<sup>71</sup> 2 U.S.C. § 288g(a)(1).

Congress, and whether bicameralism prevents certain forms of coordination. For example, some legal scholars have argued that bicameralism purposefully prevents Congress from coordinating a unified congressional position.<sup>72</sup>

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## Key Potential Tradeoffs for Functions of a Congressional OLC

We identified a number of key tradeoffs to consider in assigning functions to a Congressional OLC (see fig. 8). These tradeoffs would depend on the language used to establish an office. For example, if Congress assigned the Congressional OLC an advisory function, the Congressional OLC may be able to represent congressional interests in any legal opinions or memoranda it issues. However, there is a possibility that the Congressional OLC's legal opinions or memoranda might exert an outsized influence. For example, some senators were concerned the Congressional OLC would become the authoritative source for interpretation of legislative intent.<sup>73</sup>




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<sup>72</sup>Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself*, 99 Cornell L. Rev. 571, 631 (2014).

<sup>73</sup>122 Cong. Rec. 5, 22677 (June 19, 1976). As discussed in later sections of this appendix, some have also argued that Congress was deliberately designed as a bicameral institution such that there are few connections between to the two chambers. A potential Congressional OLC that could become the authoritative source for interpretation of legislative intent may present concerns related to such a bicameral structure. See *Constitutionality of Bill Creating an Office of Congressional Legal Counsel*, DOJ Memorandum Opinion (Feb. 13, 1976); Grove & Devins, *Congress's (Limited) Power to Represent Itself*, 99 Cornell L. Rev. at 604.

**Appendix II: Considerations for Establishing a  
Congressional Office of Legal Counsel**

**Figure 8: Key Potential Tradeoffs Associated with Functions for a Congressional Office of Legal Counsel**

Key Tradeoffs		
Potential Functions		
Advisory Functions 	Litigation Functions 	Coordination Functions 
Considerations		
Increased clarity and insight	Increased clarity and insight	Increased clarity and insight
Increased institutional influence	Increased institutional influence	Increased institutional influence
Representation of congressional interests	Representation of congressional interests	Representation of congressional interests
Greater need for resources	Greater need for resources	Ensure efficient use of congressional resources
Difficult to obtain consensus	Difficult to obtain consensus	Difficult to obtain consensus
Potential outsized influence	Higher volume of work	
Higher volume of work	Separation of power issues	

Source: GAO analysis of law review articles and statements for the record on relevant bills or hearings. For image credits, see Additional Source Information for Images. | GAO-24-105870

**Accessible Text and Table for Figure 8: Key Potential Tradeoffs Associated with Functions for a Congressional Office of Legal Counsel**

**Key Tradeoffs**  
**Potential Functions**

<b>Advisory Functions</b>	<b>Litigation Functions</b>	<b>Coordination Functions</b>
Considerations		
Increased clarity and insight	Increased clarity and insight	Increased clarity and insight
Increased institutional influence	Increased institutional influence	Increased institutional influence
Representation of congressional interests	Representation of congressional interests	Representation of congressional interests
Greater need for resources	Greater need for resources	Ensure efficient use of congressional resources
Difficult to obtain consensus	Difficult to obtain consensus	Difficult to obtain consensus
Potential outsized influence	Higher volume of work	
Higher volume of work	Separation of power issues	

Source: GAO analysis of law review articles and statements for the record on relevant bills or hearings. For image credits, see Additional Source Information for Images. | GAO-24-105870

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## Potential Organizational Structures for a Congressional OLC

We identified several organizational structure options for a Congressional OLC. The organizational structure refers to both the organizing authority and the organizing principle. The organizing authority refers to whether the office would be established through chamber rule or statute. The organizing principle refers to whether the office would be organized as a joint or separate congressional entity for each chamber, and whether the office would be situated within or outside Congress. Organizational structure options include:



### Organizational Structure

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- establishing a joint office within Congress serving both of its chambers;
- establishing a joint office outside Congress serving both of its chambers;
- establishing separate offices within each chamber of Congress serving their respective chambers;
- expanding functions of existing congressional entities such as committees or offices of legal counsel; and
- expanding functions of existing legislative branch agencies, such as the Congressional Research Service (CRS).

As Congress considers the appropriate organizational structure for a Congressional OLC, it may consider how the functions it assigns inform the type of organizational structure best suited for the entity. Additionally, policy decisions could include whether to assign oversight responsibility to a joint committee that prescribes rules governing the duties of the Congressional OLC, or that serves as a check on the office by requiring authorization for certain Congressional OLC actions.

### Organizational Structure Proposals and Feasibility

Previous efforts to establish a Congressional OLC focused on a joint office within Congress that would serve both chambers.<sup>74</sup> In recent years, legal scholars have also recommended additional structures, including

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<sup>74</sup>See, e.g., S. 495, 94th Cong. (1976); S. 2036, 94th Cong. (1975); S. 4227, 93d Cong. (1974).

expanding the functions of existing congressional entities and establishing a joint Congressional OLC outside of Congress.

### Joint Office within Congress

All bills we identified would have established a joint Congressional OLC within Congress. In some proposals, the Congressional OLC would have been subject to direct oversight by a joint committee. For example, the Watergate Reorganization and Reform Act would have required a Joint Committee on Congressional Operations to directly oversee the activities of the Congressional OLC by requiring the Congressional OLC to consult with the joint committee on the conduct of litigation and seek the joint committee's authorization to perform representational services in certain circumstances.<sup>75</sup> Other bills specified that the duties of the Congressional OLC would have been subject to joint rules established by the Senate and House Judiciary Committees.<sup>76</sup>

### Joint Congressional Entity outside Congress

Some scholars have recommended Congress establish the Congressional OLC as an entity outside of Congress—similar to the Congressional Budget Office (CBO), CRS, or GAO—that would serve both chambers of Congress.<sup>77</sup> For example, CBO is “an office of the Congress,” CRS is a department within the Library of Congress, and we are a legislative branch agency.<sup>78</sup>

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<sup>75</sup>S. 495, 94th Cong. § 202(b) (1976).

<sup>76</sup>See e.g., S. 563, 94th Cong. § 602(a) (1975); S. 2615, 93d Cong. § 3(a) (1973); S. 1384, 89th Cong. § 2(a) (1967). Similarly, CRS is required to send the Joint Committee on the Library a special report covering CRS activities for the prior fiscal year, and describing CRS's efforts to make additional nonconfidential products available to the Library of Congress for publication. 2 U.S.C. § 166(i).

<sup>77</sup>Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C.L Rev. at 516; Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Powers?*, 68 UCLA L. Rev. at 85-88 (pointing to GAO and CRS as examples of agencies serving Congress).

<sup>78</sup>2 U.S.C. § 601 (establishing CBO); 2 U.S.C. § 166 (re-designating the Legislative Reference Service as CRS); *Bowsher v. Synar*, 478 U.S. 714, 731 (1986) (explaining that GAO is a legislative branch agency and citing the Accounting and Auditing Act of 1950 which required GAO to conduct audits “as an agent of the Congress”).

### Feasibility of a Joint Congressional OLC

We identified commentary that a joint Congressional OLC serving both chambers of Congress would challenge Congress's bicameral nature. In a 1976 memorandum opinion, DOJ's Office of Legal Counsel opined on the constitutionality of S. 2731, which would have created a joint Congressional OLC.<sup>79</sup> Among other things, the memorandum concluded that Congress was deliberately denied the ability to appoint joint congressional officers to minimize the connections between the two houses because of the principle of bicameralism.<sup>80</sup> More recently, some legal scholars have argued that the Constitution does not establish a unified "Congress," but it provides that all legislative powers are vested in a Congress of the United States consisting of a Senate and House of Representatives.<sup>81</sup> They further argue that tension and competition between the two legislative chambers is crucial to the constitutional scheme such that neither chamber can take action without conferring with the other chamber or the President.<sup>82</sup>

In addition to concerns that a joint Congressional OLC may undermine Congress's bicameral structure, we identified concerns that perceived differences in culture between the two chambers of Congress may not result in a joint Congressional OLC that effectively serves both chambers.

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<sup>79</sup>*Constitutionality of Bill Creating an Office of Congressional Legal Counsel*, DOJ Memorandum Opinion (Feb. 13, 1976).

<sup>80</sup>The memorandum notes, however, that some congressional officials, such as joint committee staff, perform functions that are purely internal and advisory. *Constitutionality of Bill Creating an Office of Congressional Legal Counsel*, DOJ Memorandum Opinion, 388-89 (Feb. 13, 1976) (stating that "Article I, sections 2 and 3, of the Constitution provide that the House and Senate may choose their respective officers. There is, however, no provision in the Constitution 'otherwise providing' for the appointment of officers serving Congress as such rather than its components."). We discuss the appointment of officials in a potential Congressional OLC in later sections of this appendix.

<sup>81</sup>These legal scholars cite to James Madison's Federalist No. 51 argument that to prevent legislative encroachments on constitutional principles, the legislature should be split into two chambers that would be "as little connected with each other as possible" to conclude that division between the two legislative chambers is a crucial component of our constitutional scheme of separate powers. Grove & Devins, *Congress's (Limited) Power to Represent Itself*, 99 Cornell L. Rev. at 604.

<sup>82</sup>Grove & Devins, *Congress's (Limited) Power to Represent Itself*, 99 Cornell L. Rev. at 607. For example, the House and Senate play separate and independent roles in the impeachment process, with the House empowered to indict an alleged offender, and the Senate overseeing the trial of the accused. Const. Art. I, §§ 2-3 (stating that the House of Representatives shall have the sole power of impeachment, and the Senate the sole power to try all impeachments).



Legal scholars have argued that inherent differences between the two chambers make it “impossible for either chamber to speak the voice of the entire Congress.”<sup>83</sup> Officials we spoke to in congressional offices explained that the deep philosophical and practical differences between both chambers would make it very difficult for a joint Congressional OLC to provide legal services. The inherent differences are reflected in the different traditions and procedures of each chamber. For example, while House rules facilitate majoritarian control, Senate procedures and norms promote individualism and facilitate minority participation.<sup>84</sup> As a result, according to legal scholars, when Congress considered establishing a joint Congressional OLC in the 1970s the House declined to vote on the proposal to create the joint entity, in part because of institutional rivalry and concern that the Senate might come to dominate the Congressional OLC.<sup>85</sup>

We also identified concerns that a new joint constitutional entity may result in separation of powers issues. A 1996 DOJ OLC memorandum opinion on separation of powers explained that many of the functions

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<sup>83</sup>Grove & Devins, *Congress’s (Limited) Power to Represent Itself*, 99 Cornell L. Rev. at 615. See also, Sean M. Theriault & David W. Rohde, *The Gingrich Senators and Party Polarization in the U.S. Senate*, 73 J. of Pol. 1011 (2011) (stating, “Unlike the House of Representatives where the majority party leaders can more easily manipulate floor proceedings, the more egalitarian Senate requires that much of its work be accomplished through unanimous consent agreements.”).

<sup>84</sup>For example, several Senate procedures, such as the filibuster and the power to offer nongermane amendments, allow individual senators to block debate on measures, at least temporarily. See *Standing Rules of the Senate*, S. Doc. 113-18 (2013) (rule XIX on debate procedures, rule XV on amendments and motions). In the House, the majority leaders may impose rules limiting floor debate and prohibit members of the minority party from offering amendments. *Rules of the House of Representatives*, 118th Cong. rule XVI, cl. 6 (Jan 10, 2023). See also, Steven S. Smith, *Parties and Leadership in the Senate*, in *THE LEGISLATIVE BRANCH* 255, 276 (Paul J. Quirk, Sarah A. Binder, 2005) (stating “[t]he contrast between the modern Senate and the modern House of Representatives is stark, even considering that both houses are deeply affected by new-styled election campaigns, polarized parties, and intense partisanship.”).

<sup>85</sup>124 Cong. Rec. 35672 (1978); Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 Cong. & the Pres. at 136 (explaining that the decision by the House not to participate in a joint Congressional OLC was based on a number of factors including inter-house rivalry and a House desire not to have a joint office). In hearings before the Committee on Governmental Affairs considering the Public Officials Integrity Act of 1977, a Senator acknowledged House reservations about a joint office “on the fear that the Senate might dominate the office” and stated that the fear was without foundation because the structure of the office guarantees that neither chamber could come to dominate it. *Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate*, 95th Cong. at 60 (1977) (statement of Sen. Abourzek).

within congressional entities can comfortably be described as “in aid of the legislative process.”<sup>86</sup> However, the DOJ memorandum opinion further explained that Congress could not constitutionally create new legislative agencies with powers reaching beyond the legislative branch.<sup>87</sup>

While we found concerns that a joint Congressional OLC may undermine the constitutional bicameral structure for Congress, we also identified expressions of support for a joint entity serving both chambers. These arguments center on the advantages of such an entity. For example, in 1977 Senator James Abourzek stated that “only by establishing a joint House-Senate office will the Congress be able to effectively and consistently to defend its constitutional powers in court.”<sup>88</sup> In addition, a discussion group participant argued that a joint office with targeted functions would better represent congressional prerogatives.

### Separate Offices within Each Chamber of Congress

A Congressional OLC could also be established as separate offices within each chamber. Under this structure, it would be important to consider how those two offices would coordinate to ensure, if desired, a cohesive message and strategy.

The chambers’ respective experiences establishing the House Office of General Counsel (OGC) and Senate Legal Counsel could be instructive for any attempt to create a new Congressional OLC. These separate offices already perform a number of legal services that could serve as a model if Congress seeks to establish new separate offices within each chamber to perform the functions of a Congressional OLC. As previously mentioned, the Senate created the Senate Legal Counsel in 1978 and

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<sup>86</sup>*Constitutionality of Separation of Powers Between the President and Congress*, DOJ Memorandum Opinion, 124, 172 (May 7, 1992).

<sup>87</sup>*Constitutionality of Separation of Powers Between the President and Congress*, DOJ Memorandum Opinion, 124, 172 (May 7, 1992). In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, the Supreme Court held that a congressionally constituted board, that was to review certain actions of the Metropolitan Washington Airports Authority, was an agent of Congress and therefore exercised federal power in violation of the doctrine of separation of powers. 501 U.S. 252 (1991).

<sup>88</sup>*Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate*, 95th Cong. at 60 (1977) (statement of Sen. Abourzek).

modeled it on a proposal for a joint Congressional OLC.<sup>89</sup> The House began developing the House OGC incrementally beginning in 1976, with the General Counsel to the Clerk of the House performing the same functions as the Senate Legal Counsel, such as representing the House in a number of cases.<sup>90</sup>

### Expanding the Functions of Existing Congressional Entities

Some legal scholars have suggested expanding the functions of existing congressional entities to provide additional legal services to Congress.<sup>91</sup> For example, some scholars have recommended housing a Congressional OLC within CRS because its current functions may meaningfully inform those that a Congressional OLC could take on, such as issuing legal opinions that represent the views of Congress.<sup>92</sup> Additionally, Congress could consider expanding the functions of other existing congressional entities to perform the functions of a broader Congressional OLC, such as the Senate Legal Counsel or House OGC.

### Feasibility of Expanding Functions of Existing Congressional Entities

Legal scholars have weighed in on the feasibility of expanding the functions of existing congressional entities to house a Congressional

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<sup>89</sup>*Compare* Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (creating the Senate Legal Counsel), *and* Public Officials Integrity Act of 1977, S. 555, 95th Cong. (1977).

<sup>90</sup>*See, e.g.*, Motion for Leave to File and Brief of the Honorable Thomas P. O'Neill, Jr., Speaker; the Honorable Frank Thompson, Jr., Chairman, and the Honorable William Dickinson, Committee on House Administration, of the United States House of Representatives, as Amicus Curiae, U.S. v. Helstoski, 442 U.S. 477 (1979) (No. 78-349) (filed by General Counsel to the Clerk, Stanley M. Brand); Brief of the Speaker and Leadership Group of the House of Representatives, Amici Curiae, Morrison v. Olson, 487 U.S. 654 (1988) (No. 87-1279) (filed by General Counsel to the Clerk, Steven R. Ross). The House formally authorized the House OGC in 1993. 138 Cong. Rec. 8993, 9051 (1992) (amending Rule II of the House Rules to create the House OGC).

<sup>91</sup>Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C.L Rev. at 564; Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Powers?*, 68 UCLA L. Rev. at 88 (stating that the new office could be situated "vis-?-vis the existing legal offices in the same way that the executive OLC is situated vis-?-vis the litigating offices in the Department of Justice, such as the Office of the Solicitor General or Civil Appellate.").

<sup>92</sup>Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C.L Rev. at 564. Indeed, as Congress considered establishing a Congressional OLC in the 1960s and 1970s, a member argued that the services of a Congressional OLC are already provided by CRS. 113 Cong. Rec. 5306, 5365 (1967) (statement of Sen. Byrd).

OLC. One legal scholar argued that CRS could house the functions of a Congressional OLC because of its existing structure and expertise.<sup>93</sup> Specifically, the scholar noted that CRS's expert staff already supplies Congress with, among other things, confidential memoranda prepared for particular members, research reports, and expert congressional testimony. The scholar argued that Congress could institutionalize CRS's legal conclusions or make certain legal opinions presumptively binding.<sup>94</sup>

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### Key Potential Tradeoffs for Organizational Structure Options

We identified a number of tradeoffs to consider in determining the structural organization for a Congressional OLC (see fig. 9). The tradeoffs will depend on the language used to establish an office. For example, if Congress decided to create a joint Congressional OLC within itself, while the office may be able to speak for Congress as a whole on legal issues, it might encounter challenges in obtaining consensus across both chambers.




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<sup>93</sup>Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C.L Rev. at 564-5.

<sup>94</sup>Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C.L Rev. at 565. See also Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Powers?*, 68 UCLA L. Rev. at 87 (stating "[t]here is no reason that Congress could not grant its own [Congressional OLC] the authority to determine the legislative branch's view on the law. . .").

**Appendix II: Considerations for Establishing a Congressional Office of Legal Counsel**

**Figure 9: Key Potential Tradeoffs for Organizational Structure Options**

Key Tradeoffs		
Organizational Structure		
Joint Congressional Office of Legal Counsel (OLC) 	Separate Congressional OLC Serving Respective Chambers 	Expanding Existing Congressional Entities 
Considerations		
Speak for Congress as a whole	Reflects individual chamber preferences	Depending on which office is expanded, it may speak for Congress as a whole or may reflect individual chamber preferences
Greater external institutional influence	Institutional influence within each chamber	Potential conflict with existing processes and procedures
Difficult to obtain consensus	Consensus easier to obtain within each chamber	
Potential outsized influence	Conflicting legal conclusions or strategies between entities	
Greater need for resources	Will not speak for Congress as a whole	
	Legal conclusions or strategies may reflect political positions	
	Greater need for resources	

Source: GAO analysis of law review articles and statements for the record on relevant bills or hearings. For image credits, see Additional Source Information for Images. | GAO-24-105870

**Accessible Text and Table for Figure 9: Key Potential Tradeoffs for Organizational Structure Options**

**Key Tradeoffs**  
**Organizational Structure**

<b>Joint Congressional Office of Legal Counsel (OLC)</b>	<b>Separate Congressional OLC Serving Respective Chambers</b>	<b>Expanding Existing Congressional Entities</b>
Considerations		
Speak for Congress as a whole	Reflects individual chamber preferences	Depending on which office is expanded, it may speak for Congress as a whole or may reflect individual chamber preferences
Greater external institutional influence	Institutional influence within each chamber	Potential conflict with existing processes and procedures
Difficult to obtain consensus	Consensus easier to obtain within each chamber	
Potential outsized influence	Conflicting legal conclusions or strategies between entities	
Greater need for resources	Will not speak for Congress as a whole	
	Legal conclusions or strategies may reflect political positions	
	Greater need for resources	

Source: GAO analysis of law review articles and statements for the record on relevant bills or hearings. For image credits, see Additional Source Information for Images. | GAO-24-105870

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## Potential Authorities to Establish a Congressional OLC and Appoint the Head of a Congressional OLC

We identified several legal options, including statutory or rules-based authorities, that could be used to establish a Congressional OLC and appoint its head or Legal Counsel.<sup>95</sup> The function and structure chosen for a Congressional OLC may affect the type of authority needed to establish a Congressional OLC and appoint its Legal Counsel.

Establishing authority options could include:

- a joint office within Congress serving both of its chambers might need to be established pursuant to statutory authority;
- offices established separately for each chamber of Congress might need to be established pursuant to statutory authority, depending on the functions performed;
- offices established separately for each chamber of Congress might be established pursuant to chamber rules, depending on the functions performed;
- a Congressional OLC housed within an existing congressional entity, such as current offices of legal counsel or committees, might need to be established pursuant to statutory authority if the existing entity was created in statute;
- a Congressional OLC housed within an existing congressional entity, such as current offices of legal counsel or committees, might be established pursuant to chamber rules, depending on the functions it performs;
- a Congressional OLC housed within an existing congressional entity, such as current offices of legal counsel or committees, might need to be established pursuant to statutory authority, depending on the functions it performs; or
- a Congressional OLC housed within an existing legislative branch agency might need to be established pursuant to statutory authority if the agency was created in statute.

Appointment authority options include:

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<sup>95</sup>For the purposes of this report, we refer to the head of a potential Congressional OLC as the “Legal Counsel.”



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- the Legal Counsel might be appointed pursuant to internal congressional procedures; or
- the Legal Counsel might be appointed by the President with the advice and consent of the Senate pursuant to Article 2, Section 2, Clause 2, of the Constitution.

### Authority to Establish a Congressional OLC

All proposals we identified would have statutorily established a joint Congressional OLC serving both chambers. For example, S. 2615 would have established a joint Congressional OLC for both chambers of Congress whose features were laid out in statute.<sup>96</sup> Similar Senate offices, such as the Senate Legislative Counsel and Senate Legal Counsel, were first established through statute.<sup>97</sup> However, House offices, such as House OGC, House Chief Administrative Officer, and House Office of Whistleblower Ombuds, were established through chamber rules.<sup>98</sup>

The type of authorizing authority necessary for a Congressional OLC housed within existing legislative entities may depend on their underlying authority. For example, if CRS's functions were expanded to include

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<sup>96</sup>S. 2615, 93d Cong. (1973). Other proposals also specified conforming amendments to the U.S. Code to accommodate an additional congressional entity in the larger congressional entity scheme. For example, one proposal would have made conforming amendments to sections 3210, 3216, and 3219 of Title 39 to include the Congressional OLC in certain privileges related to the day-to-day functions of Congress. S. 3877, 93d Cong. § 404(a) (1974).

<sup>97</sup>2 U.S.C. §§ 271-276b; 2 U.S.C. §§ 288c-288h. Some panelists in a discussion group explained that although the Senate Legal Counsel's authority is set in statute, its design as a bipartisan office hinders its ability to take action. Senate Legal Counsel officials stated that in the past several years, the Senate has not appeared in litigation where House OGC has participated, because the claims were directed at actions in the House or likely presented divided questions in the Senate.

<sup>98</sup>See respectively, H.R. Cong. Res. 5, 103d Cong. (1993) (establishing the House OGC); H.R. Cong. Res. 6, 104th Cong. (1995) (establishing House Chief Administrative Officer); H.R. Cong. Res. 8, 117th Cong. § 2 (2021) (establishing the House Office of Whistleblower Ombuds). Although House OGC was established through House rules, it was later authorized by statute to appear in any proceeding before a state or federal court without compliance with admission requirements of such court. 2 U.S.C. § 5571(a). Some panelists in a discussion group explained that, in addition to considering a Congressional OLC, Congress might consider formally establishing the House OGC in statute with authority to take certain actions, such as enforcing subpoenas and holding individuals in contempt. However, House OGC officials said the lack of formal statutory authority has not affected their ability to take action because their authority emanates from the backing of House leadership.

Congressional OLC-like functions, the statute that created CRS and set forth its authority may need to be amended.<sup>99</sup> By contrast, if House OGC's functions were expanded, the House may only need to amend its chamber rules.<sup>100</sup>

### Authority to Carry out Congressional OLC Functions

All proposals we identified contained authorities that enabled the Congressional OLC to perform its functions, such as those related to litigation. For instance, several bills addressed:

- standing to obtain judicial review on specific questions;<sup>101</sup>
- relieving the Attorney General of responsibility to represent Congress when the Congressional OLC has undertaken representational services in legal proceedings;<sup>102</sup> and
- allowing attorneys performing authorized duties of the Congressional OLC to appear before any court of the United States without regard to bar admission requirements, except for the U.S. Supreme Court.<sup>103</sup>

Additionally, some proposals would have granted the Congressional OLC authority to issue regulations and internal procedures to carry out the functions established in its authorizing statute. For example, S. 555 would have authorized the Congressional OLC to establish procedures necessary to carry out its functions, including internal procedures for allowing the public access to any legal memoranda or other legal research materials.<sup>104</sup> Other proposals would have authorized the Congressional OLC to promulgate rules and regulations necessary to carry out its functions.<sup>105</sup> One proposal would have required that any

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<sup>99</sup>2 U.S.C. § 166.

<sup>100</sup>H.R. Con. Res. 8, 117th Cong. (2021).

<sup>101</sup>H.R. 11101, 93d Cong. § 4(b) (1973).

<sup>102</sup>S. 1384, 89th Cong. § 2(b) (1967).

<sup>103</sup>S. 1384, 89th Cong. § 3(c) (1967).

<sup>104</sup>S. 555, 95th Cong. at § 201(e); *Public Officials Integrity Act of 1977: Report of the Committee on Governmental Affairs, United States Senate*, S. Rept. No. 95-170, at 83 (1977).

<sup>105</sup>S. 1384, 89th Cong. § 1(c) (1967); S. 2615, 93d Cong. § 4(a) (1973); S. 2569, 93d Cong. § 2(c) (1973); H.R. 11101, 93d Cong. § 2(c) (1973); S. 4227, 93d Cong. § 102(b)(3) (1974); S. 3877, 93d Cong. § 401(c) (1974); S. 2036, 94th Cong. § 401(c) (1975); S. 563, 94th Cong. § 601(c)(1975); S. 495, 94th Cong. § 201(d)(1976).



regulations issued by the Congressional OLC be published in the *Congressional Record* and take effect 10 days after publication, unless Congress passed a concurrent resolution disapproving, amending, or supplementing the rules and regulations.<sup>106</sup>

### Appointment for the Head of a Congressional OLC

All proposals would have appointed the Legal Counsel pursuant to internal congressional procedures. For example, H.R. 11101 provided that the Speaker of the House and President pro tempore of the Senate would appoint the Legal Counsel from recommendations submitted by the majority and minority leaders of each chamber of Congress.<sup>107</sup> Another proposal provided that the Speaker of the House, President pro tempore of the Senate, and the minority House and Senate leaders would appoint the Legal Counsel with approval from both chambers.<sup>108</sup> An alternative proposal was for the Speaker of the House and President of the Senate to appoint the Legal Counsel from recommendations submitted by the majority and minority leaders of the House and Senate, with approval by both chambers of Congress.<sup>109</sup>

We found opinions were mixed about whether the Legal Counsel may need to be nominated by the President and confirmed by the Senate (PAS).<sup>110</sup> In 1976, DOJ's Office of Legal Counsel stated that the position may require Presidential nomination and Senate confirmation, depending on the structure of and functions assigned to the Congressional OLC, in a memorandum opinion on the constitutionality of a proposal creating a joint Congressional OLC with a Legal Counsel appointed pursuant to internal congressional procedures. The opinion cited the Supreme Court's holding in *Buckley v. Valeo*, which found that appointees exercising significant authority pursuant to the laws of the United States are "officers of the

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<sup>106</sup>S. 2731, 94th Cong. § 4(e)(1) (1975).

<sup>107</sup>H.R. 11101, 93d Cong. § 2(a) (1973).

<sup>108</sup>S. 2036, 94th Cong. § 401(a) (1975).

<sup>109</sup>S. 2731, 94th Cong. § 4(a) (1975).

<sup>110</sup>U.S. Const., art. II, § 2. For example, federal judges, among others, are appointed in this manner. We refer to this appointment as a "PAS" position.

United States” and must therefore be appointed in the manner prescribed by Article II, Section 2, of the Constitution.<sup>111</sup>

Subsequently, in testimony before the Senate Committee on Governmental Affairs on the Public Officials Integrity Act of 1977, a DOJ official further stated that a Legal Counsel carrying out “appropriate legislative functions” need not be appointed as a PAS position.<sup>112</sup> More recently, in a 1996 DOJ memorandum opinion on the Separation of Powers, DOJ took the position that political branches cannot vest the power to perform a significant governmental duty of an executive, administrative, or adjudicative nature in a federal official who is not appointed to a PAS position.<sup>113</sup>

Some congressional officers are appointed through presidential nomination and Senate confirmation. Those positions include the Comptroller General, Librarian of Congress, Public Printer, and the Architect of the Capitol.<sup>114</sup> The Comptroller General, who serves as our head, is appointed by the President, by and with the advice and consent

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<sup>111</sup>*Buckley v. Valeo*, 424 U.S. 1 (1976); *Constitutionality of Bill Creating an Office of Congressional Legal Counsel*, DOJ Memorandum Opinion at 388. In *Buckley v. Valeo*, the Supreme Court examined which powers the Federal Election Commissioners, who were not appointed pursuant to Article II, Section 2, of the Constitution, could exercise. The Court found that the Commissioners could exercise powers that were essentially of an investigative and informative nature, falling in the same general category of powers Congress could delegate to its committees. However, the Court also held that the Commissioners could not constitutionally exercise more substantial powers, such as enforcement powers, because that authority is not merely in aid of the legislative function of Congress. The Court noted that Congress may create offices under the Necessary and Proper Clause of the Constitution and provide the appointment procedure of its choosing, but that the holders of those offices will not be “officers of the United States.” Therefore, those offices may only perform duties “in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not ‘Officers of the United States.’” 424 U.S. at 139.

<sup>112</sup>*Public Officials Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings Before the Committee on Governmental Affairs, United States Senate*, 95th Cong. at 31 (1977) (statement of John M. Harmon, Assistant Attorney General, DOJ Office of Legal Counsel). In both the 1976 memorandum opinion and the 1977 testimony, DOJ cited the holding in *Buckley v. Valeo* that, among other things, any appointee exercising significant authority pursuant to the law of the United States is an officer of the United States and must be appointed in the manner prescribed in Article II, § 2 of the Constitution. See 424 U.S. at 126.

<sup>113</sup>*Constitutionality of Separation of Powers Between the President and Congress*, DOJ Memorandum Opinion at 164-5.

<sup>114</sup>31 U.S.C. § 703(a); 2 U.S.C. § 136; 44 U.S.C. § 301; 40 U.S.C. § 162.

of the Senate after a commission recommends at least three individuals to the President.<sup>115</sup> However, the heads of other legislative branch entities—such as CRS, the Congressional Budget Office (CBO), and individual chamber offices—are appointed pursuant to internal congressional procedures.<sup>116</sup> For example, the Director of the CBO is appointed by the Speaker of the House and the President pro tempore of the Senate after considering recommendations from the House and Senate Committees on the Budget.<sup>117</sup>

Other proposals specified the term and procedures for removal of a Legal Counsel. For example, one proposal specified that the term of a Legal Counsel would expire at the end of the Congress in which the Legal Counsel was appointed.<sup>118</sup> In another proposal, the Legal Counsel's term would have concluded at the end of the congressional sessions following the one in which the Legal Counsel was appointed.<sup>119</sup> Currently, the Senate Legal Counsel is appointed for a term that expires at the end of the congressional session following the one during which the appointment was made, and the Legal Counsel may be reappointed.<sup>120</sup> The House OGC currently functions pursuant to the direction of the Speaker.

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<sup>115</sup>The commission is composed of the Speaker of the House, President pro tempore of the Senate, majority and minority leaders of the House and Senate, and the chairman and ranking minority members of the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House. 31 U.S.C. § 703(a). The Supreme Court has also weighed in on the appointment of legislative branch officials. In *Bowsher v. Synar*, the Supreme Court held that the Comptroller General, although appointed as a PAS position, may not be entrusted with executive powers because of Congress's authority to remove the Comptroller General by joint resolution at any time for specified reasons, including for example, neglect of duty or malfeasance. 478 U.S. 714, 728 (1986); 31 U.S.C. § 703(e)(1)(B). The Comptroller General may also be removed by impeachment. 31 U.S.C. § 703(e)(1)(A).

<sup>116</sup>2 U.S.C. § 166; 2 U.S.C. § 601. Examples of individual chamber offices in which the head of the office is appointed pursuant to internal congressional procedures, include the Senate Legislative Counsel, House Legislative Counsel, Senate Legal Counsel, House Office of General Counsel, House Parliamentarian, Senate Parliamentarian, and Joint Committee on Taxation.

<sup>117</sup>For a detailed review of the appointment procedures for the heads of legislative branch entities, see CRS, *Legislative Branch Agency Appointments: History, Processes, and Recent Actions*, R42072 (Jan. 9, 2023).

<sup>118</sup>S. 1384, 89th Cong. § 1 (1967).

<sup>119</sup>S. 2731, 94th Cong. § 4(a)(2) (1975).

<sup>120</sup>2 U.S.C. § 288(a)(3)(A).

According to a scholar, House General Counsels traditionally tender their resignations to the incoming Speaker of the House.<sup>121</sup>

Regarding removal, one proposal would have permitted removing the Congressional Legal Counsel by the House and Senate for inefficiency, misconduct, or physical or mental incapacity.<sup>122</sup> Another proposal would have permitted removal at any time by a joint committee overseeing the Congressional OLC or either chamber of Congress for misconduct or incapacity.<sup>123</sup>

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### Key Potential Tradeoffs for Legal Authorities to Establish a Congressional OLC

We identified tradeoffs to consider in determining the authorities that could be used to establish a Congressional OLC and appoint the Legal Counsel (see fig. 10). These tradeoffs would depend on the language used to establish the office. For example, if Congress established a Congressional OLC through an internal chamber rule, the office's authorizing language may be subject to change in a subsequent Congress. However, if Congress establishes it through statute, it is less likely to be subject to change. In addition, if Congress appointed the Legal Counsel through internal congressional procedure, the nominee may only reflect leadership preference, but minority participation may be limited in the selection of the nominee.

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<sup>121</sup>*Rules of the House of Representatives*, 118th Cong. rule II, cl. 8 (Jan 10, 2023); Salokar, Legal Counsel for Congress: Protecting Institutional Interests, 20 Cong. & the Pres. at 139.

<sup>122</sup>S. 1384, 89th Cong. § 1 (1967).

<sup>123</sup>S. 3877, 93d Cong. § 401(a) (1974).

**Appendix II: Considerations for Establishing a Congressional Office of Legal Counsel**

**Figure 10: Key Potential Tradeoffs for Legal Authorities to Establish a Congressional Office of Legal Counsel**

Authority to Establish Congressional Office of Legal Counsel	
Chamber Rules 	Statutory Authority 
Less stable/more likely to change	More stable/less likely to change
More flexible	Less flexible
Appointment Method of Legal Counsel	
Internal Congressional Procedure 	Article II, Section 2, of the Constitution 
Considerations	
Congress can freely select preferred nominees	Potential for greater external institutional influence
Easier to confirm a nominee	Greater flexibility in functions that may be performed
Minority participation may be limited in selection of nominee	Congressional participation in selection of nominee limited by Presidential selection
Member participation may be limited in selection of nominee	Congressional participation in confirmation of nominee limited by Senate procedures
Selected nominee may only reflect congressional leadership preference	

Source: GAO analysis. For image credits, see Additional Source Information for Images. | GAO-24-105870

**Accessible Tables for Figure 10: Key Potential Tradeoffs for Legal Authorities to Establish a Congressional Office of Legal Counsel**

**Appendix II: Considerations for Establishing a Congressional Office of Legal Counsel**

**Authority to Establish Congressional Office of Legal Counsel**

<b>Chamber Rules</b>	<b>Statutory Authority</b>
Less stable/more likely to change	More stable/less likely to change
More flexible	Less flexible

**Appointment Method of Legal Counsel**

<b>Internal Congressional Procedure</b>	<b>Article II, Section 2, of the Constitution</b>
<b>Considerations</b>	
Congress can freely select preferred nominees	Potential for greater external institutional influence
Easier to confirm a nominee	Greater flexibility in functions that may be performed
Minority participation may be limited in selection of nominee	Congressional participation in selection of nominee limited by Presidential selection
Member participation may be limited in selection of nominee	Congressional participation in confirmation of nominee limited by Senate procedures
Selected nominee may only reflect congressional leadership preference	

Source: GAO analysis. For image credits, see Additional Source Information for Images. | GAO-24-105870

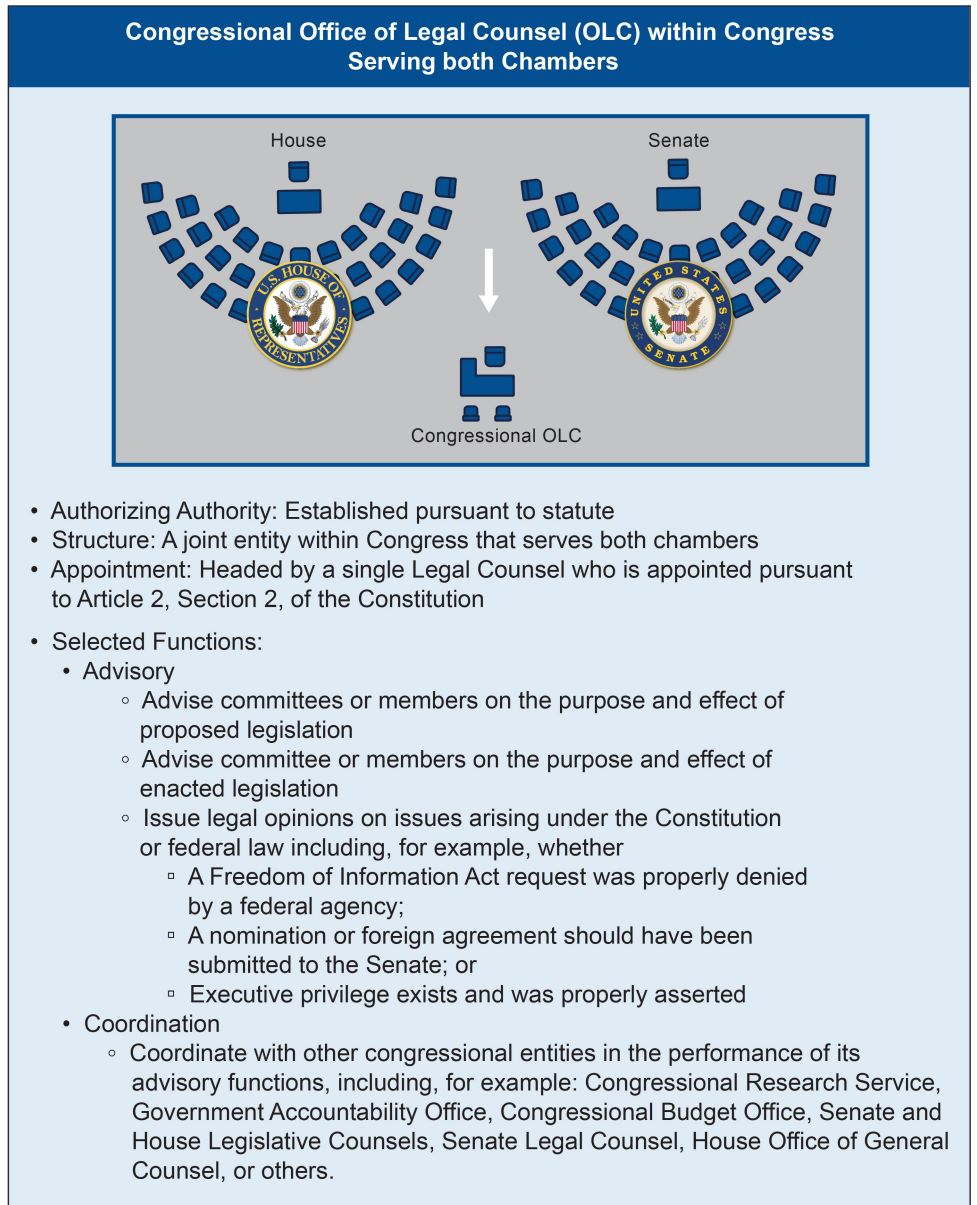
**Illustrative Examples of a Congressional OLC**

While the makeup of a Congressional OLC would be the result of Congress’s policy decisions, we provide three illustrative examples to illustrate how the features we have discussed—functions, structural organization, and authority—could be combined to create a Congressional OLC. See figures 11 through 16 for information on the tradeoffs related to each example.<sup>124</sup>

<sup>124</sup>These illustrative examples are not a definitive sampling of all the ways the features discussed in this report could be combined in a potential Congressional OLC.

Appendix II: Considerations for Establishing a  
Congressional Office of Legal Counsel

Figure 11: Illustrative Example A – Congressional Office of Legal Counsel within Congress Serving Both Chambers



Source: GAO analysis. For image credits, see Additional Source Information for Images. | GAO-24-105870

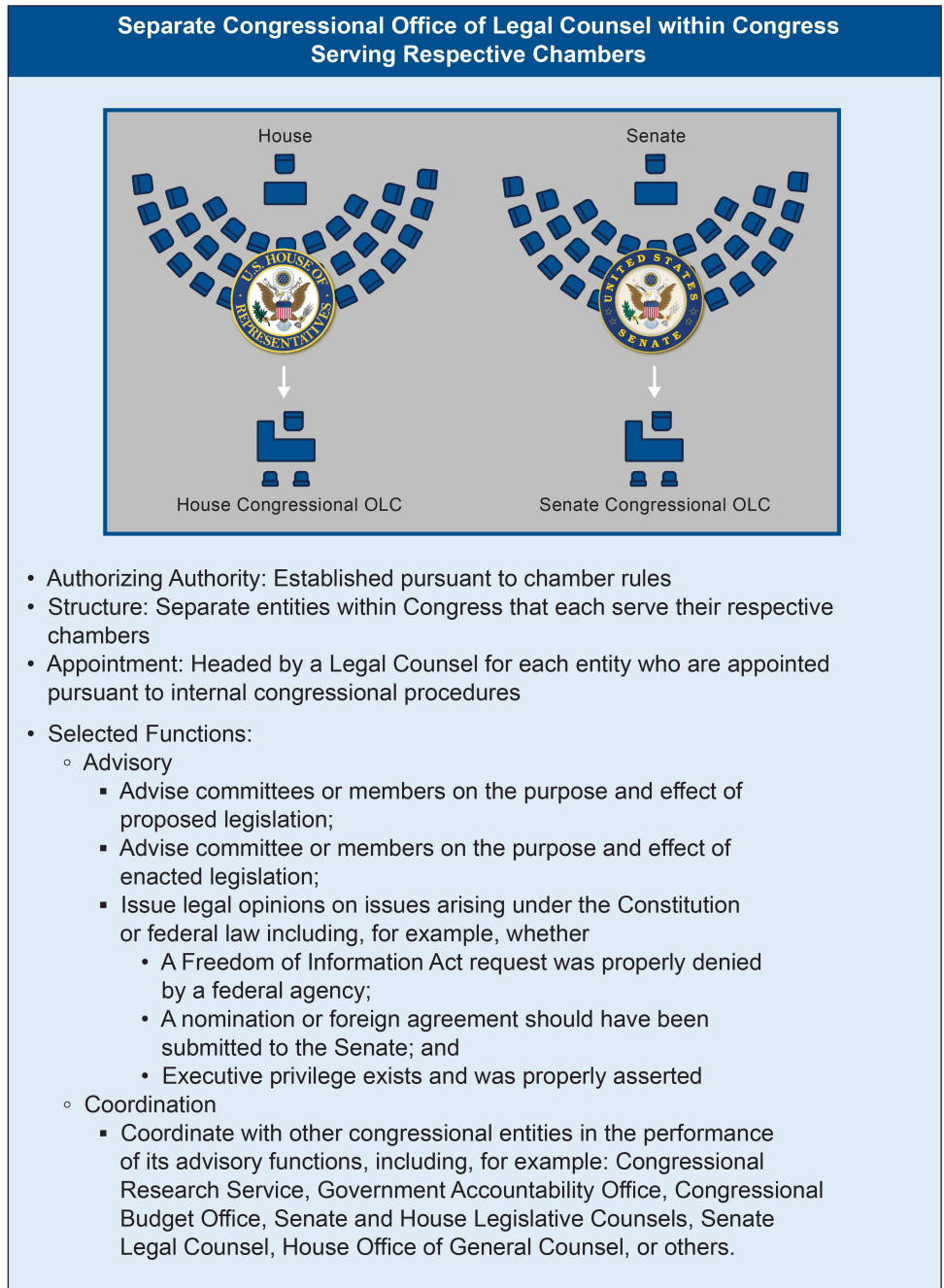
**Figure 12: Key Tradeoffs Associated with Illustrative Example A on a Congressional Office of Legal Counsel within Congress Serving Both Chambers**

Advisory Functions	
<ul style="list-style-type: none"> <li>Increased clarity and insight on proposed and enacted legislation</li> <li>Increased institutional influence</li> <li>Difficult to obtain consensus</li> </ul>	<ul style="list-style-type: none"> <li>Potential outsized influence</li> <li>Greater need for resources</li> </ul>
Coordination Functions	
<ul style="list-style-type: none"> <li>Ensure efficient use of congressional resources</li> <li>Coordinated legal approaches</li> </ul>	<ul style="list-style-type: none"> <li>Difficult to obtain consensus</li> </ul>
Joint Congressional Office of Legal Counsel	
<ul style="list-style-type: none"> <li>Speak for Congress as a whole</li> <li>Greater external institutional influence</li> <li>Difficult to obtain consensus</li> </ul>	<ul style="list-style-type: none"> <li>Potential outsized influence</li> <li>Greater need for resources</li> </ul>
Statutory Authority	
<ul style="list-style-type: none"> <li>More stable/less likely to change</li> </ul>	<ul style="list-style-type: none"> <li>Less flexible</li> </ul>
Article II, Section 2, of the Constitution	
<ul style="list-style-type: none"> <li>Potential for greater external institutional influence</li> <li>Greater flexibility in functions that may be performed</li> </ul>	<ul style="list-style-type: none"> <li>Congressional participation in selection of nominee limited by Presidential selection</li> <li>Congressional participation in confirmation of nominee limited by Senate procedures</li> </ul>

Source: GAO analysis of law review articles and statements for the record on relevant bills or hearings. | GAO-24-105870



Figure 13: Illustrative Example B – Separate Congressional Office of Legal Counsel within Congress Serving Respective Chambers



Source: GAO analysis. For image credits, see Additional Source Information for Images. | GAO-24-105870

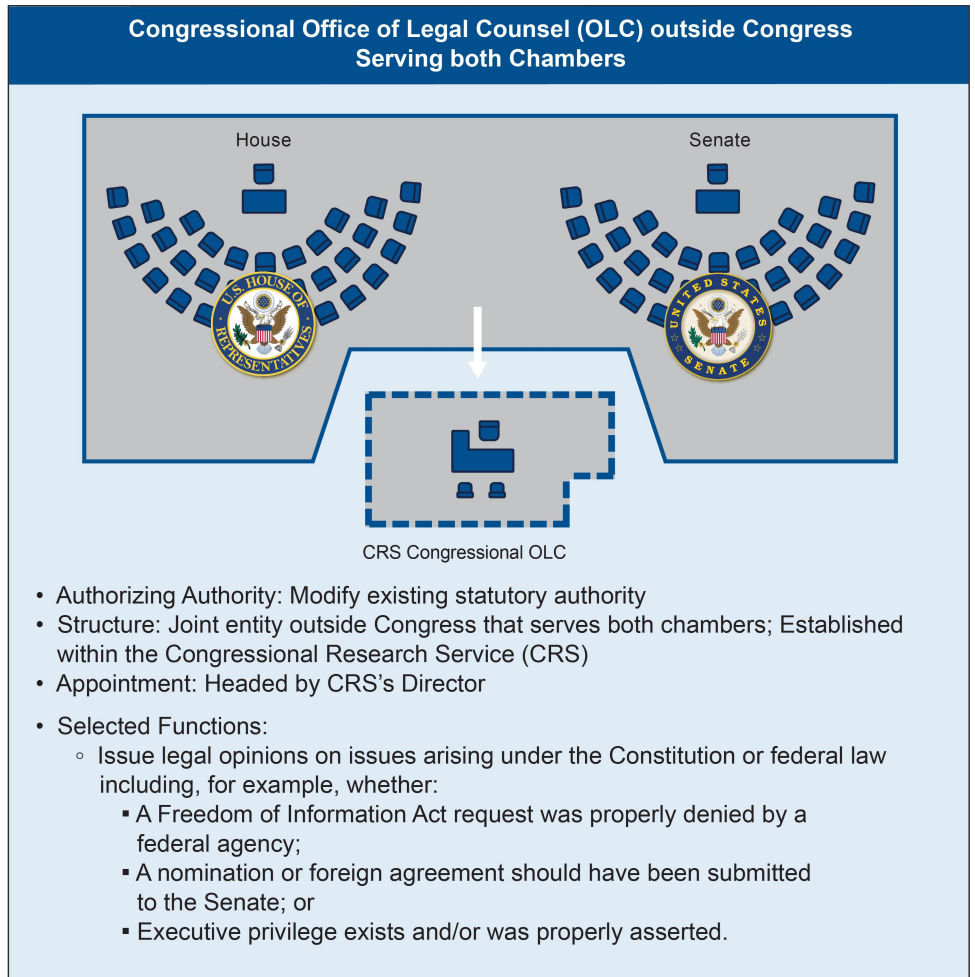
**Figure 14: Key Tradeoffs Associated with Illustrative Example B on Separate Congressional Office of Legal Counsel within Congress Serving Respective Chambers**

Advisory Functions	
<ul style="list-style-type: none"> <li>• Increased clarity and insight on proposed and enacted legislation</li> <li>• Increased institutional influence</li> <li>• Difficult to obtain consensus</li> </ul>	<ul style="list-style-type: none"> <li>• Potential outsized influence</li> <li>• Greater need for resources</li> </ul>
Coordination Functions	
<ul style="list-style-type: none"> <li>• Ensure efficient use of congressional resources</li> <li>• Coordinated legal approaches</li> </ul>	<ul style="list-style-type: none"> <li>• Difficult to obtain consensus</li> </ul>
Internal Congressional Procedure	
<ul style="list-style-type: none"> <li>• Congress can freely select preferred nominees</li> <li>• Easier to confirm a nominee</li> <li>• Minority participation may be limited in selection of nominee</li> </ul>	<ul style="list-style-type: none"> <li>• Member participation may be limited in selection of nominee</li> <li>• Selected nominee may only reflect congressional leadership preference</li> </ul>
Separate	
<ul style="list-style-type: none"> <li>• Reflects individual chamber preferences</li> <li>• Institutional influence within each chamber</li> <li>• Consensus easier to obtain within each chambers</li> <li>• Conflicting legal conclusions or strategies between entities</li> </ul>	<ul style="list-style-type: none"> <li>• Will not speak for Congress as a whole</li> <li>• Legal conclusions or strategies may reflect political positions</li> <li>• Greater need for resources</li> </ul>

Source: GAO analysis of law review articles and statements for the record on relevant bills or hearings. | GAO-24-105870

Appendix II: Considerations for Establishing a  
Congressional Office of Legal Counsel

Figure 15: Illustrative Example C – Congressional Office of Legal Counsel outside Congress Serving Both Chambers



Source: GAO analysis. For image credits, see Additional Source Information for Images. | GAO-24-105870

Figure 16: Key Tradeoffs Associated with Illustrative Example C on Congressional Office of Legal Counsel outside Congress Serving Both Chambers

Advisory Functions	
<ul style="list-style-type: none"> <li>• Increased clarity and insight on proposed and enacted legislation</li> <li>• Increased institutional influence</li> </ul>	<ul style="list-style-type: none"> <li>• Difficult to obtain consensus</li> <li>• Potential outsized influence</li> </ul>
Expanding Existing Congressional Entities	
<ul style="list-style-type: none"> <li>• Depending on which office is expanded, it may speak for Congress as a whole or may reflect individual chamber preferences</li> <li>• Less resource intensive</li> </ul>	<ul style="list-style-type: none"> <li>• Conflict with existing processes and procedures</li> <li>• Greater need for resources</li> </ul>
<ul style="list-style-type: none"> <li>• Depending on which office is expanded, it may not speak for Congress as a whole or may not reflect individual chamber preferences</li> </ul>	
Statutory Authority	
<ul style="list-style-type: none"> <li>• More stable/less likely to change</li> </ul>	<ul style="list-style-type: none"> <li>• Less flexible</li> </ul>

Source: GAO analysis of law review articles and statements for the record on relevant bills or hearings. | GAO-24-105870

## Appendix III: Objectives, Scope and Methodology

To inform our analysis, we obtained information on the roles and responsibilities of Congress and executive agencies in the rulemaking process. We reviewed relevant information from statutes and guidance. The statutes include: the Administrative Procedure Act of 1946, the Regulatory Flexibility Act of 1980, the Paperwork Reduction Act of 1980, the Unfunded Mandates Reform Act of 1995, the Small Business Regulatory Enforcement Fairness Act of 1996, and the Congressional Review Act of 1996.<sup>1</sup>

We also reviewed Executive Orders 12866 (1993) and 14094 (2023), and Office of Management and Budget (OMB) Circular A-4 (2003). We reviewed relevant literature describing the rulemaking process, including The Reg Map®, which the Office of Information and Regulatory Affairs (OIRA) has identified as a resource helpful for understanding the informal rulemaking process. We also reviewed prior GAO reports.<sup>2</sup> Based on these information sources, we identified and summarized key roles and responsibilities of entities in the rulemaking process.

To identify and describe proposed options for enhancing congressional oversight of executive branch rulemaking, we undertook a review of academic and legal literature from 1999 to 2023. Our research focused on the informal rulemaking process because it is the more common form of rulemaking.

For options on additional regulatory oversight, including establishing a Congressional Office of Regulatory Review in some form, this review included searches of relevant research studies, such as those issued by a range of organizations that have addressed these topics, including the American Enterprise Institute, the Brookings Institution, and the Mercatus

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<sup>1</sup>Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237, ch. 324, §§ 1-12 (1946); Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980); Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980); Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995); Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, 110 Stat. 847, 857-874 (1996); Congressional Review Act, Pub. L. No. 104-121, tit. II, subtit. E, § 251, 110 Stat. 868-875 (1996).

<sup>2</sup>For a list of our previous work in this area, see the Related GAO Products section at the end of this report for more.

Center; government reports, such as those issued by the Congressional Research Service; and our reports. We also interviewed knowledgeable individuals employed by or who formerly served with these government offices and private organizations.

We also identified potential tradeoffs and other considerations specified in the literature. In certain cases where tradeoffs were not identified in our literature review, we identified possible tradeoffs and considerations by comparing a description of the option to our previous work or to other research. In this review, we did not specifically take into account potential appropriations or constitutional law considerations, because such considerations would be highly dependent on the specific structure and wording used in any legislation or other action to implement a given option.

To identify and describe proposed options for establishing a Congressional Office of Legal Counsel (OLC), we reviewed proposed bills introduced in prior sessions of Congress, law review articles, statements to the record on relevant bills or hearings, statements from a discussion group of legal scholars and former government officials, and interviews we conducted with congressional entities. Using these sources, we identified specific proposals for Congress to consider including potential functions to assign a Congressional OLC, the potential structure of a Congressional OLC, and the potential authority needed to establish a Congressional OLC. We also identified potential tradeoffs for the functions, structures, and authorities identified. Additionally, we identified commentary from stakeholders, legal scholars, and former government officials on the feasibility of establishing a Congressional OLC.

To further validate the options we identified and their tradeoffs, we held three group discussions with knowledgeable individuals from the academic community and former government officials. One group consisted of randomly selected authors whose papers were included in our literature review about options on the rulemaking process. The second group consisted of randomly selected legal scholars who authored papers included in our literature review about options for establishing a Congressional OLC.

Finally, because of their expertise with the regulatory process, we held a third group discussion with former OIRA administrators. We invited seven former OIRA administrators. Three former OIRA administrators participated in our group discussion. We used the results of these discussions and interviews to develop our findings on options and

potential tradeoffs for additional congressional oversight of the regulatory process or for a potential OLC.

The options we discuss reflect the views of the original authors of those options. Further, the lists of options and tradeoffs are not meant to represent an exhaustive list of all potential options and alternatives. We are not endorsing any of the options in this report, which are policy matters to be decided by Congress.

To identify foundational considerations for establishing new nonpartisan congressional offices, we conducted a literature review, reviewed applicable laws, and interviewed officials from selected congressional and executive agencies, and professionals from nongovernmental organizations and the private sector. Our literature review included our own work, such as our 2018 report on organizational reform.<sup>3</sup> For reporting purposes, we grouped the findings from these reviews into three broad categories of considerations: (1) authority, (2) administration, and (3) budget.

We identified relevant congressional offices to interview through our literature search; consultation with internal stakeholders, such as our Office of Congressional Relations; and referrals obtained during our interviews.

We reviewed whether the entities received congressional appropriations under the Consolidated Appropriations Act, 2023.<sup>4</sup> We also consulted with internal stakeholders experienced with starting up GAO's Science, Technology Assessment, and Analytics team.<sup>5</sup>

We interviewed officials from the following congressional entities:

- The Office of the Chief Administrative Officer (House)
- Congressional Budget Office

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<sup>3</sup>[GAO-18-427](#). For more examples of the work we reviewed, see the Related GAO Products section at the end of this report.

<sup>4</sup>Pub. L. No. 117-328, div. I, 136 Stat. 4459, 4913 (2022).

<sup>5</sup>Although GAO is a legislative branch agency, the information gathered from internal stakeholders was used to understand, validate, and contextualize the illustrative examples presented for the relevant congressional offices we selected. Given differences between evidence obtained internally versus externally, which could limit comparability, we do not highlight specific GAO examples throughout the report.

- Congressional Research Service
- Office of General Counsel of the United States House of Representatives
- House Office of the Law Revision Counsel
- House Office of the Legislative Counsel
- Joint Committee on Taxation
- Parliamentarian of the House
- Parliamentarian of the Senate
- Office of the Senate Chief Counsel for Employment
- Senate Office of Legal Counsel
- Office of the Senate Legislative Counsel
- Secretary of the Senate
- Office of the Whistleblower Ombuds (House)

We spoke with officials from three executive branch offices—OMB, the Administrative Conference of the United States, and the General Services Administration—because they had relevant experience related to the proposed offices or on standing up new offices. We also interviewed officials from the National Academy of Public Administration because its report on science and technology assessment for Congress contains relevant information on starting new congressional offices.<sup>6</sup> We interviewed representatives from professional organizations based on recommendations from our other research and that we determined had relevant information, including the National Academy of Public Administration, and three advocacy groups: Demand Progress, Protect Democracy, and The Levine Center at Wayne State University Law School.

We interviewed officials with the Joint Committee on Taxation because of its nonpartisan mission and because it has a bicameral system for member leadership (i.e., the chair rotates between the House and Senate from the first to second sessions of each Congress).

To identify the authorities of selected congressional entities, we reviewed provisions of the U.S. Constitution, relevant statutes, and House and

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<sup>6</sup>National Academy of Public Administration, *Science and Technology Policy Assessment: A Congressionally Directed Review*, (Washington, D.C.: Oct. 31, 2019).



Senate rules. To describe the type of authority a new congressional entity might need, we reviewed the authorities of existing congressional offices and documentation of our interviews. We listed relevant considerations and tradeoffs. To identify considerations for establishing nonpartisanship in the structure of a new congressional entity, we reviewed the authorities of existing congressional entities and documentation of our interviews and listed relevant considerations.

To identify key themes, we analyzed documentation of our interviews and literature review results. We identified key themes of relevant considerations for setting up congressional offices. The analyst coded the considerations by topic. A second analyst confirmed the coding and the list of considerations. An analyst-in-charge reviewed that work and resolved any discrepancies between the first and second analysts' interpretations. We then counted each instance of coded considerations for each source.

To identify budget information, we reviewed relevant appropriations laws for congressional offices and the President's budget for related executive branch offices. We also contacted the congressional and OMB offices directly to verify estimated numbers of full-time equivalents for their offices.

We conducted our work from February 2022 to December 2023 in accordance with all sections of GAO's Quality Assurance Framework that are relevant to our objectives. The framework requires that we plan and perform the engagement to obtain sufficient and appropriate evidence to meet our stated objectives and to discuss any limitations in our work. We believe that the information and data obtained, and the analysis conducted, provide a reasonable basis for any findings and conclusions in this product.

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## Appendix IV: GAO Contact and Staff Acknowledgments

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### GAO Contact

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[jonesy@gao.gov](mailto:jonesy@gao.gov)

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### Staff Acknowledgments

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