

Can Legislative Expert Agencies Un-Bend Science?

NATHAN TAYLOR*

TABLE OF CONTENTS

Introduction	593
I. Bent Science and Agency Oversight	595
II. Evaluating the Legislative Agencies	596
A. The Expert Legislative Agencies	597
1. The Government Accountability Office	597
2. The Congressional Research Service	600
3. The Congressional Budget Office	601
4. The Office of Technology Assessment	602
III. Survival Strategies in a Hyper-Partisan Setting	604
IV. Politicized Science is Off Limits: No Truth to Legislative Power	607
Conclusion	607

INTRODUCTION

“[We went to work to break down the consensus] because we believed that the consensus was phony. We believed that the so-called global warming consensus was not based on science, but was a political consensus, which included a number of scientists.”

—Myron Ebell, Head of President Donald Trump’s EPA Transition Team.¹

The modern administrative state blossomed in the New Deal Era on the promise of rational rule by experts.² It is now seventy years since the passage of the Administrative Procedure Act,³ and, standing in the rubble of the 2016 election, the possibility of rational rule seems remote.⁴ Yet, over the past seven decades as our administrative institutions have evolved, so has our understanding of the challenges they face. In particular, the notion of a technocratic ideal has

* J.D. 2017, Georgetown Law; Ph.D., 2014, Texas A&M. © 2017, Nathan Taylor.

1. *Frontline: Climate of Doubt* (PBS television broadcast Oct. 23, 2012).

2. See Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 *YALE L.J.* 1487, 1488 (1982).

3. Administrative Procedure Act, 5 U.S.C. § 551 (2012).

4. Some comfort might be taken from Professor Shapiro’s observation that the tension between technocracy and democracy is old. He points to the beginnings of two party politics in the United States, which took the shape of popular, democratic revolt by Jefferson and the Democratic-Republicans against the perceived elitism of John Adams and the Federalists. See Shapiro, *supra* note 2, at 1488; GORDON WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815* (Oxford Press 1982). Unfortunately, the issues may be timeless. Cf. Andrew Sullivan, *Democracies End When they Are Too Democratic*, *N.Y. MAG.* (May 1, 2016), <http://nymag.com/daily/intelligencer/2016/04/america-tyranny-donald-trump.html> (beginning a long line of articles arguing the parallels between President Donald Trump and Plato’s ideal tyrant).

given way to a more nuanced appreciation of the potential and pitfalls of reliance on expertise.⁵ Professor McGarity and others have exposed the susceptibility of scientific research to manipulation and the use of technical findings as façades for arbitrary policy.⁶ Despite these challenges, the attraction of rational, expert governance remains, as evidenced by the relentless pursuit of cures for these pathologies.⁷ Indeed, for those who put faith in the dream of rational rule, the issue has new urgency.

This Note seeks to examine the existing and potential role of the legislative branch, particularly legislative agencies, in checking and correcting exercises of expertise by executive agencies. Much of the scholarship on the oversight of executive expertise focuses on judicial review and the long tradition of deference to agencies.⁸ A central theme of administrative law is the institutional limits of courts—that judges are generalists, that there is great difficulty, cost, and time lost in sifting complex competing theories, and that judges are typically reticent to confront scientific issues.⁹ In contrast, Congress natively possesses accumulated expertise within its three expert agencies: the Government Accountability Office, the Congressional Research Service, and the Congressional Budget Office. This Note explores the influence of these institutions on executive expertise.

I argue that, though these agencies do exert a salutary, “un-bending” effect on regulatory agencies’ technological and scientific functions, there are significant structural and political limits on the scope of their influence. Examining the structure and function of these three expert legislative agencies, as well as the now-defunct Office of Technology Assessment, reveals organizations capable of tremendous expertise, possessing powerful investigative tools, and backed by the normal modes of congressional oversight. That examination also reveals organizations that are staunchly non-partisan, limited by their need to avoid controversy with any Members of Congress, and limited to indirect influences on executive agencies. The analysis concludes by considering how these institutions and characteristics might contribute to resolving the vulnerabilities of regulatory science described by Professor McGarity.

5. THOMAS O. MCGARITY & WENDY E. WAGNER, BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH (1994). See generally Thomas O. McGarity, *Politics by Other Means: Law, Science, and Policy in EPA's Implementation of the Food Quality Protection Act*, 53 ADMIN. L. REV. 103 (2001).

6. See *id.* See generally Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

7. See, e.g., Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011).

8. *Id.*

9. *Id.*

I. BENT SCIENCE AND AGENCY OVERSIGHT

Executive agencies are, in part, legitimized by their institutional capacity for scientific and technical expertise: it is a principal justification for both delegation by Congress¹⁰ and judicial deference to executive actions.¹¹ Unsurprisingly, it is a key battleground in the balance of power. It is also a key battleground in the “blood sport” of regulatory war. Primarily in the second context, administrative law scholarship has developed a keen appreciation for the limits and pathologies of agency science. Within that context, the correction of agency science and findings is often tasked to the regulatory process, and ultimately to judicial review; Congress is more often conceived as a source of political oversight.¹² Yet, a central narrative of the history of the balance of power between the legislative and executive branches during the twentieth century is the development of in-house congressional expertise, particularly in budgetary matters, to contradict an imperial presidency.¹³ This Note draws from that history to explore the role of expert legislative agencies in confronting the pathologies of executive agency science.

Two trends increase the importance of understanding congressional oversight. First, it has been argued that conflicts in high-stakes regulatory initiatives have spilled out of the traditional regulatory process, with highly motivated, well-heeled interests drawing on every possible tool to influence the regulatory outcome.¹⁴ Rather than simply opposing a proposed regulation, a trade association might simultaneously comment on the rule, lobby Congress to pressure and legislate against the rule, form a political coalition large enough to draw presidential notice, and conduct a public awareness campaign.¹⁵ Such high-stakes regulatory battles not only affect the political pressures put on agencies by Congress, they may also interfere with the institutional expertise present in Congress and tilt the associated balance of power. For example, a partisan decision to eliminate or weaken the Congressional Budget Office might ultimately restore budgetary control to the executive.¹⁶

10. *E.g.*, Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 82 (1985) (describing the existing body of delegation apologists).

11. *See, e.g.*, *Skidmore v. Swift*, 323 U.S. 134, 139–40 (1944).

12. *E.g.*, Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 187 (2013) (arguing that strict constitutional “take care” jurisprudence—which limits congressional oversight—should give way to a pragmatic need for *politically responsive* agencies). *See generally* Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994).

13. *See, e.g.*, JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 199 (The Brookings Institution 1981).

14. *See generally* Thomas O. McGarity, *Administrative Law As Blood Sport: Policy Erosion in A Highly Partisan Age*, 61 DUKE L.J. 1671, 1672 (2012) (describing the overrun of administrative processes in high-stakes regulatory initiatives).

15. *Id.*

16. *See, e.g.*, Editorial, *A Partisan CBO Would Be DOA*, BLOOMBERGVIEW (Dec. 9, 2014), <https://www.bloomberg.com/view/articles/2014-12-09/republicans-threaten-cbos-independence> (alleging the imprudence of

Second, and similarly, there is a perception that regulatory technical work and science is increasingly politicized.¹⁷ As Professors McGarity and Wagner document, there are many ways to manipulate findings to justify a desired policy outcome—techniques that are difficult to detect.¹⁸ In *Bending Science*, they highlight a need for greater disclosure of independent research, for independent peer scrutiny, and more tools for effective judicial review.¹⁹ Others have pointed to the potential of legislative agencies to provide oversight.²⁰ But while there has been significant analysis of the ability of the courts to discern junk science,²¹ there is much less written about the impact of increased politicization on congressional oversight.

This Note approaches these issues by focusing on a major organ of congressional expertise and oversight: the legislative support agencies. These agencies were formed to provide a legislative counter balance to executive expertise, to allow Congress to effectively oversee a growing administrative state. Though diverse in structure and function, this Note seeks to demonstrate that they are each characterized by an overwhelming aversion to partisan disputes. Thus, even though these agencies provide a meaningful check on executive expertise, their effectiveness decreases sharply when confronted with politicized questions of science and technology such as climate change. This dynamic predicts that increased politicization of science will undermine the scope of these agencies influence, as will regulatory battles in the halls of Congress.

II. EVALUATING THE LEGISLATIVE AGENCIES

Despite a shared agenda of providing expertise and information to the Congress, the legislative agencies have distinct structures and institutional characteristics that reflect their purpose and history. This analysis begins by exploring the agencies' functions: Who ultimately controls them? How do they acquire expertise? It also looks at the agencies' history to understand why they exist and what roles they were intended to play. This history is, in many aspects, the most unifying theme. The history and work of the legislative support agencies reveal that their expertise was a crucial element in the balance of power between the legislative and executive branches.²²

politicizing the CBO).

17. Cf. Sidney A. Shapiro, "Political" Science: Regulatory Science After the Bush Administration, 4 DUKE J. CONST. L. & PUB. POL'Y 31, 33 (2009); MCGARITY & WAGNER, *supra* note 5; Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1640 (1995).

18. MCGARITY & WAGNER, *supra* note 5.

19. *Id.*

20. See Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 231 (2006) (proposing additional audit responsibilities vested with an independent agency).

21. See Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1710 (2016) (arguing that highly specialized agency decisions receive a problematic plenary deference).

22. See, e.g., SUNDQUIST, *supra* note 13, at 199–200.

The analysis then explores a second unifying theme: Each agency has adopted varied approaches for avoiding partisan scrutiny, which can be fatal in a hyper-partisan Congress.²³ These “survival strategies” can include strict rules against partisan research, refusal to move beyond policy analysis to policy recommendations, seeking a political sponsor for any work that might draw fire, and curating a broad clientele within Congress. Given their pervasiveness, these features indicate a fundamental dynamic that controls the potential of legislative agencies.

A. THE EXPERT LEGISLATIVE AGENCIES

This Note focuses on the three legislative agencies that possess overlapping expertise with regulatory agencies: the Government Accountability Office (“GAO”), the Congressional Research Service (“CRS”), and the Congressional Budget Office (“CBO”).²⁴ These offices are each under the control of Congress rather than the President, distinguishing them as legislative, rather than executive agencies.²⁵

As described below, the distinct agendas, jurisdictions, congressional clientele, and functions of these institutions strongly shape their influence on executive agencies. These three organizations also share traits that arise from their position within a highly partisan body, and which suggest functional limits on the development and use of technical expertise by congressional organs.²⁶ In addition to the three existing expert legislative agencies, I also describe the now-defunct Office of Technology Assessment (“OTA”). The OTA’s focus on technical expertise, its successful mission to offset superior executive expertise, and its struggles and ultimate demise make it an excellent case-study of the limits and potential of legislative oversight.²⁷

1. The Government Accountability Office

The GAO is the largest of the expert legislative agencies—the only legislative agency as large as the Library of Congress in its entirety.²⁸ In 2016, it employed

23. See BRUCE BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT* (1996).

24. IDA A. BRUDNICK, CONG. RESEARCH SERV., RL33471, *THE CONGRESSIONAL RESEARCH SERVICE AND THE AMERICAN LEGISLATIVE PROCESS 2* (2011).

25. The degree of congressional control does vary, with the GAO more independent than the CBO, whose head is chosen by the Budget Committees. Apart from control itself, the most important consequence of congressional control is the inability to create binding policies, following separation of powers jurisprudence. See *Bowsher v. Synar*, 478 U.S. 714 (1986); cf. Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 266 (2007) (explaining that, on this small point of separations of powers jurisprudence, the law seems clear).

26. See BIMBER, *supra* note 23, at 96.

27. *Id.* at 98.

28. GENE L. DODARO, COMPTROLLER GENERAL, U.S. GOV’T ACCOUNTABILITY OFFICE, FISCAL YEAR 2017 BUDGET REQUEST 13 (2016); see also *GAO at a Glance*, U.S. GOV’T ACCOUNTABILITY OFFICE, <https://www.gao.gov>.

nearly 3000 full time staff and had an operating budget of \$555.3 million.²⁹ Established by the Budget and Accounting Act of 1921 as the General Accounting Office, the GAO was shaped from its inception by its oversight role and independence from the executive.³⁰ The original Act was vetoed by President Wilson because it allowed removal of the Comptroller General, the agency's head, by a joint resolution of Congress, without presidential acquiescence—a veto that signaled the GAO's instrumentality in the balance of power between the two branches.³¹

Though initially conceived as an independent auditing and accounting agency, the GAO's functions have shifted and expanded.³² The GAO's missions are to support Congress and improve government function, primarily by providing information.³³ The GAO's work includes auditing executive agency operations for efficiency and effectiveness; investigating allegations of illegal government activities; reporting on how well government programs are meeting their stated objectives; and performing forward-looking policy analyses to support legislative action.³⁴ This work is undertaken either as-directed by law or at the request of Members of Congress or congressional committees (subject to GAO protocols for prioritizing requests).³⁵ These evaluations and audits draw on internal GAO expertise, input from the target agency, subpoenas reaching any federally funded activity, independent reports, original surveys and studies, and collaborations with Inspectors General within executive agencies.³⁶ Except where findings are

gov/about/gg glance.html (last visited June 11, 2017); *General Information*, LIBRARY OF CONG., <https://www.loc.gov/about/general-information/> (last visited June 11, 2017).

29. *GAO at a Glance*, *supra* note 28.

30. ROBERT R. TRASK, U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO HISTORY: 1921-1991*, at 2 (1991).

31. *Id.* at 3.

32. *Id.* at 4. Section 312 of The Budget and Accounting Act of 1921 lists many of the original duties of the GAO—many which remain central to its activities.

The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts

Pub. L. No. 67-13, § 312, 42 Stat. 20, 25–26. Section 312 also made the GAO responsive to report requests from both chambers and committees having jurisdiction over revenues, appropriations, or expenditures; required reports to Congress on auditing activities; and reports on the effectiveness of executive agencies' own audit procedures. *See id.*

33. DODARO, *supra* note 28, at 13. Apart from its reporting duties, the GAO also has quasi-judicial functions, including an extensive role in arbitrating bid-protests by government contractors. *See* The Competition in Contracting Act, 31 U.S.C. §§ 3551–56 (2000).

34. *About GAO*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/about/index.html> (last visited Dec. 12, 2016).

35. *Id.*; ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 110 (2014) (providing a list of limits on CRS work).

36. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-208G, *DESIGNING EVALUATIONS* 20 (2012). With auditing in its DNA, the GAO frequently evaluates its own programs, including this report on program

confidential, the GAO makes its reports available to the public.³⁷

The approximately 900 major reports produced by the GAO each year are the tip of an iceberg of oversight.³⁸ Backed by both congressional and judicial modes of regulatory control, GAO reports and audits influence regulatory agencies through a diverse array of direct and indirect channels. Many GAO program evaluations simply provide recommendations to the target agency, which are then adopted.³⁹ For example, a 2016 report on the Federal Highway Administration guardrail safety testing protocols—produced in typical collaboration with the target agency—included a response letter from the Department of Transportation stating its intent to proceed with the recommendations *dated before the GAO report even issued*.⁴⁰ Alternatively, GAO reports can include recommendations for Congress to either correct agency behavior⁴¹ or facilitate programs with new legislative grants of authority.⁴² In a 2013 report on the Transportation Security Administration (“TSA”) Screening of Passengers by Observation Techniques (“SPOT”) program, the GAO specifically criticized the methods used by TSA to justify the program as “unscientific” and recommended that Congress consider defunding that program because the TSA did not concur with the GAO’s findings.⁴³ Finally, GAO studies provide powerful evidence for non-governmental groups challenging agency actions.⁴⁴ In a suit by women’s rights advocates alleging that the FDA was improperly delaying its responses to requests to approve over-the-counter access to Plan B emergency contraceptives,

evaluations—sometimes to a ludicrous degree. In 2012, the GAO was “awarded” an Ig Nobel Prize in literature for an interim report on the need for a report to evaluate the impacts of reports on the costs of reports. *See An Interim Report about the Report about Reports about Reports*, ANNALS OF IMPROBABLE RESEARCH, <http://www.improbable.com/2014/04/10/an-interim-report-about-the-report-about-reports-about-reports/> (last visited Dec. 2016) (referring to U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-480R, DEFENSE MANAGEMENT: ACTIONS NEEDED TO EVALUATE THE IMPACT OF EFFORTS TO ESTIMATE COSTS OF REPORTS AND STUDIES (2012)).

37. DODARO, *supra* note 28, at 13.

38. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-1SP, GAO STRATEGIC PLAN 2014-2019, at 8 (2014).

39. *E.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-575, HIGHWAY SAFETY: MORE ROBUST DOT OVERSIGHT OF GUARDRAILS AND OTHER ROADSIDE HARDWARE COULD FURTHER ENHANCE SAFETY (2016).

40. *Id.* at 45.

41. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-159, AVIATION SECURITY: TSA SHOULD LIMIT FUTURE FUNDING FOR BEHAVIOR DETECTION ACTIVITIES 1 (2013) [hereinafter GAO-14-159]. Because the Department of Homeland Security “did not concur with GAO’s recommendations” in its comments on the report, GAO recommended that “Congress should consider the absence of scientifically validated evidence for using behavioral indicators to identify threats to aviation security when assessing the potential benefits and cost in making future funding decisions for aviation security.” *Id.*

42. *E.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-1SP, GAO PERFORMANCE AND ACCOUNTABILITY REPORT 2016, at 3 (2016) [hereinafter GAO-17-1SP]. The GAO maintains a list of high-priority matters needing congressional action, which has included needed updates to EPA’s powers under the Toxic Substances Control Act. *Id.*

43. *See* GAO-14-159, *supra* note 41, at 1.

44. *See, e.g.*, *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 216 n.4 (E.D.N.Y. 2006); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-109, FOOD AND DRUG ADMINISTRATION: DECISION PROCESS TO DENY INITIAL APPLICATION FOR OVER-THE-COUNTER MARKETING OF THE EMERGENCY CONTRACEPTIVE DRUG PLAN B WAS UNUSUAL 1 (2005) [hereinafter GAO-06-109].

a magistrate of the federal District Court for the Eastern District of New York relied heavily on GAO findings of “unusual process” in allowing discovery to supplement the administrative record.⁴⁵ The FDA is notoriously opaque in its deliberations—here, the GAO report played a critical role in rectifying that information asymmetry.

2. The Congressional Research Service

The Library of Congress has housed the Congressional Research Service—or its predecessor, the Legislative Reference Service—since its formation in 1914.⁴⁶ It is the oldest legislative support agency and employs approximately 600 staff, 400 of which are directly involved in research activities.⁴⁷ It has an annual budget of \$107 million.⁴⁸ CRS took its modern form from the 1970 Legislative Reorganization Act, as part of an effort to reduce the power of the committee system, undermine the seniority power of conservative Southern committee chairs, provide enhanced services to minority and junior members of Congress, and enhance the standing of Congress in confrontations with the executive branch.⁴⁹

Even more so than the GAO, the main product of CRS is information.⁵⁰ In 2015, CRS provided over 60,000 custom reports, its major function, responding to at least one request from over ninety-nine percent of the Members of Congress and every standing committee.⁵¹ These products ranged from research memoranda (approximately 3000) to email responses (approximately 25,000); discretion to disseminate reports lies with the requesting congressional office.⁵² CRS also provides a smaller set of generally distributed reports and services, such as summaries of each bill before Congress, a continuously updated database of ongoing appropriations, and seminars and briefings for new Members of Congress.⁵³ These research activities are typically carried out by internal subject-

45. *Tummino*, 427 F. Supp. 2d. at 216 fn.4.

46. See BRUDNICK, *supra* note 24, at 5.

47. *Organizational Structure*, THE LIBRARY OF CONG., <https://www.loc.gov/crsinfo/about/structure.html> (last visited June 11, 2017).

48. Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015).

49. DONALD R. WOLFENBERGER, THE WOODROW WILSON CENTER, A BRIEF HISTORY OF CONSTITUTIONAL REFORM (2013), https://www.wilsoncenter.org/sites/default/files/brief_history_congressional_reform_efforts.pdf. Wolfenberger suggests that the Legislative Reorganization Act of 1970 greatly weakened the power of the committee, eventually leading to majority-rule model that has been evident in each major shift in control. *Id.*

50. CONG. RESEARCH SERV. CRS ANNUAL REPORT, FISCAL YEAR 2015, at 9 (2016) [hereinafter CRS FY 2015], https://www.loc.gov/crsinfo/about/crs15_annrpt.pdf. The CRS mission statement provides that, “CRS serves Congress throughout the legislative process by providing comprehensive and reliable legislative research and analysis that are timely, objective, authoritative, and confidential, thereby contributing to an informed national legislature.” *Id.*

51. *Id.* at 3.

52. *Id.*

53. *Id.*

matter experts (on topics from law, to science, to policy) and range from simple information gathering to independent, original analysis.⁵⁴

Unlike the GAO, CRS abstains from making any policy or legislative recommendations—its role in oversight is through analysis and information.⁵⁵ Lacking a direct mechanism, its influence on executive expertise is circumscribed. Yet CRS was partly formed in response to a perceived “imperial presidency” as a check on rising executive power.⁵⁶ In the early 1970s, Congress was perceived, both internally and externally, as lacking the capacity to effectively legislate without external initiative—and heavily reliant on the executive agencies.⁵⁷ Thus, while lacking any formal oversight role, CRS reports serve to counterbalance executive expertise and provide an independent source of information for Congress. Examples of CRS contributions to executive oversight range from investigation of the shift in the executive Office of Information and Regulatory Affairs (“OIRA”), toward *ultra vires* policy control and possible legislative recourse,⁵⁸ to simply explaining the legal and regulatory frameworks for Genetically Modified Organisms (“GMOs”).⁵⁹ The basic nature of many of these reports testifies to the size of the information asymmetry between expert agencies (the FDA certainly understands its own GMO regulations) and the usefulness of independent expertise to congressional oversight.

3. The Congressional Budget Office

The Congressional Budget Office was formed in 1974, and is the youngest legislative support agency.⁶⁰ It is a smaller and more focused agency; its \$47 million dollar budget and 235 employees are primarily devoted to economic and public policy analysis.⁶¹ The CBO formed in response to the impoundment conflicts between Congress and President Nixon, at the “nadir of

54. *About the Congressional Research Service*, LIBRARY OF CONG., <https://www.loc.gov/crsinfo/about/> (last visited Dec. 12, 2016).

55. BRUDNICK, *supra* note 24, at 5.

56. SUNDQUIST, *supra* note 13, at 6 (describing the perception that Congress had acquiesced to executive usurpation that culminated in the “Watergate Congress,” the budgetary impoundment fight, and the efforts by Congress to reassert itself).

57. *Id.* at 4. See generally CHRISTOPHER J. WALKER, ADMIN. CONFERENCE OF THE UNITED STATES, FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS 3 (2015), <https://www.acus.gov/sites/default/files/documents/technical-assistance-final-report.pdf> (citing Reed Dickerson, *The Catholic University Study of Federal Legislative Drafting in the Executive Branch: A Foreword*, 21 CATH. U. L. REV. 703 (1972)).

58. See CURTIS W. COPLAND, CONG. RESEARCH SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2009).

59. EMILY M. LANZA, CONG. RESEARCH SERV., RL43705, LEGAL ISSUES WITH FEDERAL LABELING OF GENETICALLY ENGINEERED FOOD: IN BRIEF 2 (2015).

60. *History of the CBO*, CONG. BUDGET OFFICE, <https://www.cbo.gov/about/history> (last visited Dec. 23, 2016).

61. *Organization and Staffing*, CONG. BUDGET OFFICE, <https://www.cbo.gov/about/organization-and-staffing> (last visited Dec. 23, 2016).

Congress[ional]” power.⁶² Since the early 1920s, the executive branch had assumed significant control of spending, and left Congress to clean up the results.⁶³ According to a *New York Times* economics reporter, “[t]he United States, it can be said, does not have a fiscal policy but a fiscal result.”⁶⁴ The CBO was established, along with the Senate and House Budget Committees, to wrest fiscal control from the executive.⁶⁵

The CBO seeks to allow Congress to make informed decisions about the budget and economic policy.⁶⁶ It produces a wide range of statutorily mandated products: a yearly analysis of the President’s budget, monthly analysis of economic trends, economic forecasts of revenues and expenditures, and estimates of the economic impacts and costs of each bill approved by a congressional committee.⁶⁷ The CBO also performs analysis and summarizes reports for senior committee members, makes presentations, and conducts seminars; all of which are made public, down to the slides presented.⁶⁸ The CBO is notably interactive with the committee proposing a bill or requesting analysis, and the reports are frequently iterative.⁶⁹ Though the official tally of reports issued each year is approximately 900, uncounted informal and iterative reports make up a large part of the CBO work product.⁷⁰ By providing sophisticated, independent analysis of program costs, the CBO provides a significant check on executive cost justifications. An impressive example provided by Phillip Joyce is the CBO analysis of a reform bill championed by Vice President Al Gore, which valued its cost savings at \$300 million, rather than the \$6 billion urged by Mr. Gore.⁷¹ Likewise, in the regulatory arena, the CBO can provide cost and policy analysis for proposed regulations upon request, allowing for more effective oversight.⁷²

4. The Office of Technology Assessment

The now-defunct Office of Technology Assessment (“OTA”) was created by the Technology Assessment Act of 1972 in much the same spirit as CRS and CBO

62. SUNDQUIST, *supra* note 13, at 6.

63. *See id.* at 199; PHILIP G. JOYCE, THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWER, AND POLICYMAKING (2011). Impoundment refers to the practice of repurposing appropriations in the face of congressional directives.

64. Edwin L. Dale Jr., *Washington Report*, N.Y. TIMES (June 15, 1975), http://www.nytimes.com/1975/06/15/archives/washington-report-why-us-budget-figures-miss-the-mark.html?_r=0.

65. SUNDQUIST, *supra* note 13, at 6.

66. *Introduction to CBO*, CONG. BUDGET OFFICE, <https://www.cbo.gov/about/> (last visited Dec. 12, 2016).

67. *Products*, CONG. BUDGET OFFICE, <https://www.cbo.gov/about/products> (last visited Dec. 12, 2016).

68. *Id.*

69. *See* JOYCE, *supra* note 63, at 15.

70. CONG. BUDGET OFFICE, THE CONGRESSIONAL BUDGET OFFICE’S WORK IN 2015: A REPORT TO THE CONGRESS 2 (2016), <https://www.cbo.gov/publication/51290>.

71. *Id.* at 106.

72. *See, e.g.*, CONG. BUDGET OFFICE, HOW WOULD PROPOSED FUEL ECONOMY STANDARDS AFFECT THE HIGHWAY TRUST FUND? (2012), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/05-02-CAFE_brief.pdf.

were established—to reassert an independent congressional role in facing an increasingly complex domain of federal governance and regulation.⁷³ The OTA was to assist Congress by providing reports on questions of science and emerging technology, reflecting the same growing societal concern with the dangers of new technology and development as in the environmental movement.⁷⁴ Founded during a major shift in congressional organization—one that eventually replaced committee dominance with majority party rule⁷⁵—the OTA was defunded as part of the Republican take-over and Contract with America in 1995.⁷⁶ At its peak, the OTA’s budget was \$22 million (in 1995 dollars) and it employed 190 full time staff, seventy-five percent of which were researchers, and it produced around thirty major reports per year.⁷⁷

The OTA was primarily charged with preparing reports at the request of ranking committee members.⁷⁸ While Congress occasionally considered statutorily mandating OTA to produce certain recurring reports, the OTA resisted these attempts.⁷⁹ Unlike the GAO, CBO, and CRS, the OTA was overseen by an alternating board of directors composed of sitting Members of Congress—a feature which gave them some voice in Congress.⁸⁰ Along with its lower numerical productivity, these features left the OTA with a much narrower clientele than the three other support agencies.⁸¹ Despite being directed to receive requests from individual committee members, the OTA typically informed all committees in both houses with any jurisdiction over any requested research, accepted input from all interested committees, provided each with an opportunity to comment on the result, and offered each the opportunity to independently release the final product.⁸²

The OTA’s role in overseeing and offsetting executive expertise was similar to that of CRS and was predicated on information. In Bruce Bimber’s study of the OTA, he describes several notable examples of OTA reports allowing Congress to challenge executive agendas. In 1983, an OTA contractor named Ashton B. Carter provided a report challenging the technological basis of the Reagan Administration’s Strategic Defense Initiative, which greatly contributed to its eventual rejection by Congress.⁸³ The OTA also provided needed technical advice to support environmental legislation in late 1980s and early 1990s that

73. See BIMBER, *supra* note 23, at 40–41.

74. *Id.* at 26.

75. See WOLFENBERGER, *supra* note 49.

76. See BIMBER, *supra* note 23, at 41.

77. *Id.* at 33.

78. *Id.*

79. *Id.* at 30.

80. *Id.* at 30.

81. *Id.* at 33.

82. *Id.* at 9, 35.

83. *Id.* at 44–46.

forced agency action on air quality and offshore drilling.⁸⁴ In both cases, the executive agencies could not be relied upon to produce unbiased expertise, and the OTA's independent expertise was invaluable.⁸⁵

III. SURVIVAL STRATEGIES IN A HYPER-PARTISAN SETTING

The expertise provided by these support agencies can be powerful ammunition to contest executive expertise, and can provide invaluable analysis to craft legislative policies. But, it is also susceptible to becoming a rhetorical weapon for partisan battles *within* Congress.⁸⁶ For a legislative agency, being perceived as a partisan tool, ally, or foe is dangerous—no party retains power indefinitely. Though the OTA had bipartisan support and was shuttered as part of a larger program of budget cuts,⁸⁷ its demise has been attributed to its alienation of conservative Republicans through its criticism of proposals of the Reagan Administration.⁸⁸

The partisan pressures on legislative agencies produce distinct institutional characteristics, typified by an arduous commitment to political neutrality. Often developed in response to confrontations and crises, each agency has adopted what Bruce Bimber described as “strategies for survival” to avoid the pitfalls of partisan disputes.⁸⁹ Though the agencies share some strategies, such as strict policies against partisan conclusions, their distinct missions have produced diverse adaptations. In particular, the OTA, CRS, and CBO are more similar to each other than to the GAO, and these three agencies have adopted similar strategies.

Soon after the OTA formed, it faced termination for a perceived partisan bias.⁹⁰ Some of this perception grew from its intended role in contesting executive expertise—and apparent orientation against the Nixon Administration.⁹¹ This perception continued through its earliest years, during which the agency was tightly tied to Senator Ted Kennedy.⁹² As criticism mounted, in 1979 the OTA board (composed of Members of Congress) endeavored to de-politicize the agency, and to make it more independent from the board itself.⁹³ None too soon, the OTA relied on its newly bipartisan support (including board chairman Senator Ted Stevens) to survive a campaign to defund it by the newly Republican Senate

84. *Id.* at 42.

85. *Id.* at 47.

86. *Id.* at 26 (categorizing the use of expertise and knowledge as either analytical and rhetorical).

87. *Id.* at 69.

88. CHRIS MOONEY, BULL. OF THE ATOMIC SCI., REQUIEM FOR AN OFFICE (2005), <http://www.princeton.edu/step/seminars/previous/fall-2005/Mooneyreading2005No2Requiemforanoffice.pdf>.

89. *See* BIMBER, *supra* note 23, at 11, 61.

90. *Id.* at 51.

91. *Id.*

92. *Id.* at 52.

93. *Id.*

in 1980.⁹⁴ The OTA developed several strategies as a result of this and similar conflicts involving committee jurisdictions. First, the OTA sought to expand its clientele, producing studies that were responsive to as many perspectives as possible.⁹⁵ The OTA adopted a practice of informing all committees with any interest in a proposed study, to allow broader ownership of the results and avoid becoming a tool of committee “turf battles.”⁹⁶ Second, and similarly, the OTA frequently constituted bipartisan advisory panels from academia and industry, to ensure technical integrity and political neutrality.⁹⁷ Finally, the OTA created a fixed protocol of providing and analyzing an array of policy options, rather than any single recommendation.⁹⁸ These strategies proved effective in cultivating bipartisan respect. Bruce Bimber reports a statement by Republican Senator Orrin Hatch that “the OTA is objective and bipartisan because it cannot afford not to be.”⁹⁹

While the CBO did not adopt survival strategies in the face of a particular crisis, its eventual non-partisan posture is remarkable because it was not explicitly mandated.¹⁰⁰ The CBO’s initial mandate was quite loose, and control of its structure and activities was largely entrusted to its first director, Alice Rivlin.¹⁰¹ The agency was responsive to the newly formed Budget Committees, and it was an open question whether it would serve the partisan interest of the Committees’ leadership (who appointed the director), or be independent.¹⁰² Director Rivlin had fairly lofty goals for the CBO and believed that its success would depend on interacting with a broad constituency within Congress, particularly with the Appropriations Committees in each house, which had ceded turf with the formation of the Budget Committees.¹⁰³ In Philip Joyce’s history of the CBO, he highlights two other behaviors the CBO adopted to preserve itself. First, though the CBO was interested in self-directed analysis, it typically sought sponsors for any planned report to avoid appearing too independent.¹⁰⁴ Second, the CBO strictly distinguished between policy recommendations (which were off limits) and analysis.¹⁰⁵ This distinction ran on two axes: within Congress, the CBO would not make any recommendation, but only present options; however, when performing its evaluation of the presidential budget, the CBO would offer

94. *Id.*

95. *Id.* at 60.

96. *Id.* at 63.

97. *Id.* at 65.

98. *Id.* at 66.

99. *Id.* at 67.

100. JOYCE, *supra* note 63, at 40.

101. *Id.*

102. *Id.* at 21, 44.

103. *Id.* at 25.

104. *Id.*

105. *Id.*

criticism.¹⁰⁶ A final aspect of the CBO that somewhat reduces its susceptibility to partisan disputes is a sense that a professional commitment to “honest numbers” is inherently non-partisan.¹⁰⁷

The survival of CRS has never been seriously threatened, and it enjoys broad bipartisan support.¹⁰⁸ Its success has been attributed to its reputation for objectivity and strict non-partisan stance.¹⁰⁹ CRS policies prioritize these characteristics,¹¹⁰ which are reinforced by vociferous reactions when it is perceived to violate them.¹¹¹ It also possesses several features that have been credited with the success of the CBO and OTA, including an incredibly wide clientele (over ninety-nine percent of Members and committees make requests each year) and assiduously refusing to offer policy recommendations.¹¹²

Different, again, is the GAO. Holding onto its heritage of auditing and independence, the GAO also does make policy recommendations to Congress.¹¹³ And, like the other support agencies, the GAO has a strong commitment to being “professional, objective, fact-based, nonpartisan, and non-ideological in all its work.”¹¹⁴ There are also limits on the GAO’s policy recommendations that bear some similarities to the CBO’s distinction between critical evaluations of the presidential budget and general avoidance of policy recommendations. First, it is an outward-looking criticism, focused on the executive. Similarly, the GAO program evaluations are typically cast in politically neutral terms, focusing on procedural regularity and success at meeting stated goals.¹¹⁵ Like the CBO, the GAO has also taken some hits in funding during shifts in congressional power—both had their budgets trimmed as part of the Contract with America in 1995.¹¹⁶

Common to each agency is a narrative of harsh partisan scrutiny leading to expedient political neutrality. There are variations in the defense mechanisms each relies on to avoid controversy, and even stories of particularly bold leaders

106. *Id.*

107. *Id.* This is certainly not a panacea for partisan woes. For a broad overview of the CBO’s role in the budget process, and the politics of scoring, see Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1573 (2007).

108. M. GRANGER MORGAN & JON M. PEHA, SCIENCE AND TECHNOLOGY ADVICE FOR CONGRESS 45 (2003).

109. See BIMBER, *supra* note 23, at 82 (quoting U.S. Senator Orrin Hatch).

110. See DOLAN ET AL., *supra* note 35, at 98.

111. See, e.g., Lee Lescaze, *Reports on Arms Control are Faulted in Hill Report*, WASH. POST, May 9, 1977, at A14; Rowland Evans & Robert Novak, *Suppressing a Gloomy Report on Defense*, WASH. POST, July 21, 1977, at A19; Yochi Dreazen, *Politics & Economics: Expert On Congress’s Power Claims He Was Muzzled For Faulting Bush*, WALL ST. J. (Feb. 9, 2006), <https://www.wsj.com/articles/SB113945303766669147>. Each of these provides examples of CRS analysts being targeted for being too outspoken on politically sensitive issues.

112. See CRS FY 2015, *supra* note 50.

113. See GAO-17-1SP, *supra* note 42, at 9–10.

114. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-310G, GAO’S CONGRESSIONAL PROTOCOLS 7 (2004).

115. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-208G, DESIGNING EVALUATIONS 13 (2012); see also GAO-06-109, *supra* note 44 (describing the battle over over-the-counter access to Plan B contraception—a fight that depended critically on an innocuously titled GAO report).

116. See BIMBER, *supra* note 23, at 88, 92.

like the first director of the CBO successfully pushing the boundaries, but the common pressure and common tendency seems clear: legislative agencies do not thrive in conflict with any congressional position.¹¹⁷

IV. POLITICIZED SCIENCE IS OFF LIMITS: NO TRUTH TO LEGISLATIVE POWER

If, as I have argued, the legislative agencies are characterized by an expedient non-partisanship and a strong aversion to political controversy, then the encroachment of politics into domains of technical expertise described by Professor McGarity should presage a retreat by legislative agencies. Their sensitivity to these pressures might even make them a canary in the coal mine, signaling the extent of politicization. There is anecdotal evidence suggesting that this retreat has occurred, supporting the larger thesis of this paper, though no scholarly work has addressed this dynamic.

For example, in 2015, the *Washington Monthly* published an editorial by a former CRS employee who quit partly in response to his perception that the agency had retreated from performing meaningful policy analysis.¹¹⁸ The analyst suggested that Congress relied on CRS less and less as a tool for developing sound policy, but as a source of political ammunition.¹¹⁹ In response, the agency came under greater political scrutiny, leading to more conservative reporting, and “[t]he CRS’s researchers felt the chill.”¹²⁰ A recent analysis of GAO and CRS reports on climate change found that both organizations employed tactics such as emphasizing uncertainty, weak language, and false equivalence to avoid making politically charged claims.¹²¹ On the other hand, there is less evidence that the CBO has significantly changed its stance or avoided contentious analysis. It has remained impressively steadfast in its stance on “dynamic scoring,” despite substantial pressure.¹²²

CONCLUSION

In *Bending Science*, Professors McGarity and Wagner suggest six basic ways in which technical findings and scientific studies can be manipulated: by spinning

117. For further discussion of this theory, see Jason Delborne, *Navigating Controversies in Search of Neutrality*, in *CULTURE, POLITICS AND CLIMATE CHANGE: HOW INFORMATION SHAPES OUR COMMON FUTURE* (2014). This essay drew similar conclusions about the common features of these agencies. Its analysis was based on a textual analysis of GAO and CRS reports using common natural language analytics to evaluate how the agencies navigate controversial subjects using “fudge words” and other strategies. Aside from the valuable analysis, the list of heavily relied-on phrases would make a writing instructor faint.

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

119. *See id.*

120. *Id.*

121. *See* Delborne, *supra* note 117.

122. *See, e.g.*, Editorial, *supra* note 16. “Dynamic scoring” is a method of accounting for the macroeconomic effects of a proposed change in policy. *Id.*

the research to fit a chosen narrative, by packaging specious research in legitimate-seeming organizations or reports, by harassing the originators of the report to soften or abandon controversial points, by attacking the research itself, by concealing or cherry picking, and by shaping the study to rely on favorable methods or researchers.¹²³ In many ways and in many circumstances, staunchly non-partisan legislative agencies do avoid these pitfalls. When not under political pressure—on neutral issues—they produce independent, well-respected, and typically unbiased results. But we have seen substantial evidence that legislative agencies can be very sensitive to harassment by congressional partisans—leading to either concealment or softening, or otherwise “bent” results.

Thus, armed with an expectation of legislative agency sensitivity to partisanship, it would be unreasonable to predict much of a role for these agencies in preventing or checking regulatory blood sport. As regulatory issues spill into Congress, they exert exactly the type of pressures that legislative agencies typically try to avoid. Likewise, when scientific issues become politicized, legislative agencies frequently retreat.

This dynamic also provides a good starting point for evaluating proposals to reform these institutions. For example, several organizations have called for full publication of all CRS reports.¹²⁴ But confidentiality and vesting the discretion to disseminate with the requesting Member of Congress is an important survival strategy. Removing the protection of political cover would likely disincentivize frank appraisals of policy positions. Better proposals have urged an expanded opportunity for “directed writing” by the CRS, in which a partisan assumes full responsibility for a political stance, but relies on CRS to provide support.¹²⁵

In conclusion, the legislative agencies perform an important oversight function and have played a critical role in restoring Congress’s position in the balance of power. In response to partisan pressures, these agencies have become strictly non-partisan, giving rise to salutary neutrality in their analysis of non-politicized matters, but a significant reduction in their ability to confront high-stakes issues.

123. MCGARTY & WAGNER, *supra* note 5, at 10.

124. Blessing Jee, *Former CRS Employees Put Heat On Congress To Make Reports Public*, SUNLIGHT FOUND. (Oct. 22, 2015), <https://sunlightfoundation.com/2015/10/22/crs-reports-public/>.

125. See Delborne, *supra* note 117.