
Oversight of the US executive

The Congressional
experience and its
lessons for the EU



IN-DEPTH ANALYSIS

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This analysis presents the results of original research done on the US's system of oversight. It is based in particular on a series of 44 interviews with policy practitioners, including members of Congress, assistants to members of both houses of Congress, as well as persons working in the Congressional support agencies, the US Administration, think-tanks and academia.

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EXECUTIVE SUMMARY

To ensure that the 'intent' of the legislation it passes is followed adequately, the legislative branch of the United States – Congress – is vested with the power of oversight (better known as 'scrutiny' in Europe) over the country's executive branch, the US Administration. US oversight functions differently from the way the EU's legislative branch, the European Parliament, exercises scrutiny over the EU's executive branch, the European Commission. This is due in part to the underlying differences between the EU and US systems of government, the US being a sovereign state whose Congress both passes legislation and holds the right of legislative initiative. Over the years, the European Parliament has been increasingly keen to exercise policy and legislative initiative – a prerogative which the Treaties assign to the Commission in most areas. It employs methods of oversight with the aim, amongst others, of making proposals on how to improve policies or programmes. Tension in the EU system is less present between the Parliament and the Commission, than between the Parliament and the Council of the EU, the other arm of the legislative branch.

The US Congress has two chambers – Senate and House of Representatives – and has numerous formal and informal instruments at its disposal to hold the executive to account. While its activities largely depend on Senators' and representatives' individual interests, it has been suggested that representatives engage in more regular and systematic oversight, while senators seek the limelight more often and step in with the help of the media whenever the executive is suspected of poor policy implementation. The European Parliament, in comparison, seeks to influence policy and hold the European Commission to account at all points of the legislative and policy cycle, from agenda-setting through consultation and legislation to scrutiny, which should in turn feed back into agenda-setting.

Three agencies staffed with civil servants support the US Congress in its oversight activities: the Congressional Research Service (CRS), the Government Accountability Office (GAO) and the Congressional Budget Office (CBO). CRS provides committees and individual members with written and oral expertise. In the European Parliament, these activities are carried out by the European Parliamentary Research Service (EPRS) and the various policy departments. GAO conducts external audits of federal government expenditure, including performance audits. In broad terms, its functions correspond to those of the European Court of Auditors. CBO supports Congress by performing budgetary and economic analyses and has no direct counterpart in the European Parliament or in any other EU institution.

Much of US oversight is also carried out by the executive. All government departments and agencies have an Office of Inspector General, which has as an internal control function. When the US executive engages in regulation, it provides a regulatory impact analysis for proposals likely to have a significant economic impact. In contrast, the European Commission carries out impact assessments in connection with major proposals, which the European Parliament analyses concurrently with the aid of specialised parliamentary services. The US executive also evaluates existing policy, albeit not yet very systematically. The European Parliament, supported by EPRS, makes concrete efforts to link ex-post evaluation to future proposals.

When comparing US Congressional oversight specifically over two fields – environmental policy and foreign affairs – examples of both evidence-based oversight and politically motivated oversight of the executive can be found in both cases; the latter especially when Congress and the Administration are controlled by opposing parties. When overseeing the activities of the Environmental Protection Agency, Congress has complained that the executive is stepping into its legislative domain, instead of regulating – that is, making legislation more concrete and thus applicable. Oversight of the US State Department ranges from analysing its internal organisation and the administration of programmes to repeated hearings on a particular incident in order to discredit a former Secretary of State.

TABLE OF CONTENTS

1. Introduction	4
1.1. Context of the present study	4
1.2. The rationale behind oversight	6
2. Differences between the EU and the US in terms of governance and structure	6
2.1. Right of initiative	6
2.2. Relationship between the European Parliament and the executive	8
3. Graphics on oversight in the US and the EU	9
4. Congressional oversight: How it works	11
4.1. Instruments used by the US Congress	11
4.1.1. Formal oversight instruments	11
4.1.2. Informal oversight instruments	12
4.1.3. The character of Congressional oversight	13
4.1.4. Comparison to EP oversight	14
4.2. Congressional support agencies	16
4.2.1. Congressional Research Service (CRS)	16
4.2.2. Government Accountability Office (GAO)	17
4.2.3. Congressional Budget Office (CBO)	18
4.2.4. Comparison to EP support bodies	19
5. Internal oversight by the Administration	20
5.1. Inspectors General (IGs)	20
5.2. Linking internal and external oversight	20
5.3. Ex-ante: Regulatory impact analysis (RIA)	21
5.4. Role of the US Congress in regulation	23
5.5. Comparison to EU/EP ex-ante analysis	24
5.6. Ex-post analysis	25
5.7. Comparison to EU/EP ex-post analysis	27
6. Policy area case studies	29
6.1. US Environmental Protection Agency (EPA)	29
6.2. Foreign affairs	30
6.3. Is strength of oversight policy-area specific?	34
7. Conclusions on the comparison between the US and EU systems of oversight	34
8. Main references	35

Glossary

Authorising Committee: A committee of either chamber dealing with a policy area, such as foreign affairs, energy and the judiciary.

Administration: The executive branch, often referring to a specific President, as in ‘the Obama Administration’.

Congress: The US legislature, comprising two chambers: House of Representatives and Senate.

Executive branch: The President's Administration and subordinate services, including government departments equivalent to ministries in Europe, agencies reporting to a government department, and independent regulatory agencies.

Inspector General: Internal review function particular to government departments within the executive branch.

Oversight Committee: Senate Committee on Homeland Security and Governmental Affairs, and House Committee on Oversight and Government Reform.

Regulatory impact analysis (RIA): Assessment by the US executive of the anticipated consequences of a regulation and estimation of its expected benefits and costs. Equivalent to the European Commission's impact assessments.

Rule: A regulation decided on by the executive branch, not voted by Congress, but meant to satisfy Congressional intent.

Statute: A piece of legislation enacted by Congress with (and in some circumstances without) the approval of the President.

Subpoena: A legal order used by House and Senate standing committees and subcommittees to require the attendance and testimony of witnesses and the production of documents.

List of main acronyms used

AWP:	European Commission's annual work programme
CONT:	European Parliament Committee on Budgetary Control
CBA:	Cost-benefit analysis
CBO:	Congressional Budget Office
CRS:	Congressional Research Service
DG EXPO:	European Parliament Directorate-General for External Policies
DG IPOL:	European Parliament Directorate-General for Internal Policies
ECA:	European Court of Auditors
EP:	European Parliament
EPA:	US Environmental Protection Agency
EPRS:	European Parliamentary Research Service
GAO:	Government Accountability Office
IAS:	Internal Audit Service of the European Commission
IG:	Inspector General
OIG:	Office of the Inspector General
OIRA:	Office of Information and Regulatory Affairs
OMB:	Office of Management and Budget
PD:	Policy department in the European Parliament
RIA:	Regulatory impact analysis (US), (regulatory) impact assessment (EU)
RR:	Retrospective review
TEU:	Treaty on European Union
TFEU:	Treaty on the Functioning of the European Union

1. Introduction

1.1. Context of the present study

The aim of this study is to outline how oversight of the executive is undertaken in the United States. The focus is on the relationship between the US Congress and the executive branch. Comparisons are drawn to the EU system, with a focus on the European Parliament and its support services, in particular Directorate C of Directorate-General European Parliamentary Research Service (DG EPRS). This directorate was created to strengthen the European Parliament's (EP) capacity for oversight over the executive (the European Commission) and to contribute to the quality of law-making. Oversight activities can help the EP, as pointed out by EP Secretary-General, Klaus Welle, to complete the legislative cycle.¹ This means that the EP aims to become active and wield influence at every stage of the policy and legislative process:

Table 1 – Completing the legislative cycle

Stage of the cycle	EP efforts and activity
Agenda-setting	Influence the Commission's work programme and multi-annual programme
Consultation	Seek input on the topics the Commission addresses in its work programme
Legislation	Play its full traditional role in the adoption of legislation and the budget
Scrutiny	Check implementation of the legislation and decisions taken at EU level

The study presents the results of original research done on the US system of oversight. It is based in particular on a series of 44 interviews with policy practitioners, including members of Congress, assistants to members of both houses of Congress, as well as individuals working in the Congressional support agencies, the US Administration, think-tanks and academia. The research was undertaken during the author's European Parliament fellowship at the Center for Transatlantic Relations at the School of Advanced International Studies, Johns Hopkins University, in Washington DC, during the 2014/2015 academic year.²

The study also expands on a number of points contained in a shorter, [parallel briefing](#). It delves deeper into the literature and addresses, among other aspects, the character and effectiveness of oversight in different policy areas and provides a more detailed comparison between the US and EU systems.

According to common US usage, the term 'oversight' also extends to the term 'scrutiny' in this analysis. The terms are used interchangeably in this study.³

¹ The cycle's mechanism is described in [Completing the legislative cycle](#), Klaus Welle, European Parliament, 9 October 2014; further information is available in [Total quality management along the whole legislative cycle](#) – A fresh look at better law-making, Klaus Welle, speech, 30 January 2014.

² The author would like to thank the policy experts who agreed to be interviewed and provided valuable insights for this study, as well as the hosting organisation Center for Transatlantic Relations at SAIS/ Johns Hopkins University, and her colleagues from the European Parliament Liaison Office (EPLO) in Washington DC, especially Micaela del Monte, who helped organise many of the interviews on which the study is based.

³ CRS group interview.

Practical information on how US oversight institutions work was gleaned through reading the relevant literature, but more importantly, through interviewing the above-mentioned practitioners.

The interviewees were asked the following standardised questions:

- **How (well) does parliamentary oversight work and how could it be improved?**
 - What are the functions of committees, oversight (sub)committees, other subcommittees?
 - What is the role of partisanship?
 - What formal and informal oversight instruments have you used or been exposed to?
- **Congressional agencies CRS, GAO, CBO**
 - How do your studies and other products reach the members of Congress?
 - Do you analyse the impact of your work on current or future political decision-making?
 - How do you interact with the other Congressional support agencies?
 - Have there been instances where your findings have been radically different from theirs?
 - Is there an overlap between your roles?
 - CRS: you also monitor and assess programme implementation and oversight – how are the boundaries drawn between your remit and that of GAO and CBO?
 - What is these agencies' influence on Congress?
 - What is these agencies' interaction with members and committee staff?
 - At what point of the legislative and policy procedure/ cycle do members typically ask agencies to compile a report?
 - Are there any gaps in the coverage of the legislative cycle, where more agency research would be useful?
 - Do agencies have access to confidential Congressional or governmental information?
 - How do agencies measure the impact of their work? (difficult to measure numerically; issues concerning metrics, output and productivity)
 - Is peer review done through an internal or an external body?
 - How does Congress use expertise – how much evidence-based policy-making is there?
- **Evaluation**
 - How does evaluation/ ex-post impact assessment of legislative acts, spending programmes, international agreements, work in the US?
 - Who requests evaluations?
 - Is there a specific function within Congress or within the Administration, responsible for taking care of evaluation beyond that of hearings and workshops?
- **Is oversight of foreign affairs more difficult than that of environmental policy?**

When making a transatlantic comparison of oversight, it is also necessary to discuss the way the Administration (executive branch) oversees its own activities. In the US, the Administration implements statutes (legislation, see glossary) after they have been passed by Congress and approved by the President. Such implementation measures are considered as regulations and are sometimes accompanied by a **regulatory impact analysis**, depending on the case.

Ex-post, after the adoption of legislation and regulations, the US Administration engages in a process called retrospective review. This is an evaluation of current policies which can help the Administration improve regulations and which leads, although rarely, to Congress recasting the underlying statutes.

In the US, the executive branch also regularly oversees its own activities by using **inspectors general**, who belong to an agency or department and conduct internal audits of legislation, policies and spending programmes.

1.2. The rationale behind oversight

US oversight is seen as part of the work of the Congressional committees and members in pursuing their legislative responsibilities. Congress creates statutes but also wants to ascertain that Congressional intent is followed in the course of their implementation.

Other goals of Congressional oversight include:

- holding executive officials accountable for the implementation of delegated authority;
- promoting administrative efficiency and economy in government;
- protecting and supporting policies and programmes considered important by committees, including as an alternative, or prior to legislation;
- exposing an Administration's failures or achievements;
- publicising the goals of a particular committee or member;
- reasserting Congressional authority over the Administration; and
- pursuing the interests of lobbies.

The oversight function of Congress was codified in 1946 under the Legislative Reorganization Act.

Table 2 – Legislative Reorganization Act

Entity	Activity
Legislative or authorising committees	Review government programmes and agencies
Appropriations committees	Review government spending
Oversight committees	Probe for inefficiency, waste and corruption in the federal government

After 1946, Congress reinforced its oversight functions with several laws. These enhanced staff assistance to Senate and the House, changed the funding patterns of some programmes from longer-term to annual, and strengthened the role of GAO. The Legislative Reference Service was expanded and later became the Congressional Research Service.⁴

2. Differences between the EU and the US in terms of governance and structure

The United States is a sovereign state, whereas the EU is commonly described as a *sui generis* political phenomenon, with a system of governance that is neither federal nor confederal, and combines the features of a state and an international organisation in one.⁵

2.1. Right of initiative

The US Congress is the principal legislative body which has, inter alia, the **right of initiative**. The EP shares legislative competence with the Council of the EU, while in most policy areas, the Commission is the sole initiator of legislation.

Exceptions to this rule are the following areas where the EP has the right of initiative:

⁴ How Congress Works, Congressional Quarterly Inc., 2013, p. 181.

⁵ [Struktur der Europäischen Union](#), European Parliament, accessed on 29 July 2016.

- the uniform procedure for European elections;
- the Statute for Members of the European Parliament;
- the Statute of the EU Ombudsman;
- the exercise of its own right of inquiry;
- the determination of a clear risk of a serious breach of EU values by a Member State.⁶

The most recent treaty changes delegated exclusive or shared rights of initiative to the Commission with regard to Justice and Home Affairs and the Common Foreign and Security Policy, areas that were previously based on intergovernmental cooperation.⁷ The EP's 2025 Team observed, however, that the Commission's formal rights have, since the time when it was presided by Romano Prodi (1999–2004), devolved to some extent to the Council, European Council and the EP.⁸ The EP is endeavouring to enhance its possibilities of setting the policy and legislative agenda by drawing up legislative own-initiative reports⁹. Article 225 TFEU gives the EP an indirect right to initiate legislation, by which it can ask the Commission to propose legislation. While the Commission can turn down such requests, amendments introduced by the Lisbon Treaty require it to justify its refusal.

Applied to oversight, this difference in rights of initiative is significant: Congress engages in oversight activities, inter alia, with the practical **aim** of changing legislation or the budget for policies that do not work well. It can initiate such changes itself. The '**power of the purse**',¹⁰ however, is also a well known and well-used point of leverage for the EP. It makes use of this power when adopting the EU budget (together with the Council) and also in the discharge procedure (see Section 5.7). The Lisbon Treaty abolished the distinction between compulsory and non-compulsory expenditure and thus, formally at least, increased the EP's leverage over the whole budget.¹¹

Congress does not possess full power in the **budget** domain either. Every year, it authorises only the discretionary spending, which is about a third of the total US budget. Mandatory (direct) spending, which makes up the remaining two thirds, is based on permanent laws and includes entitlements such as pensions. To provide its priorities and ceiling for discretionary spending, Congress first votes on a budget resolution prepared by the budget committees, and then on discretionary spending authorisations coming from the authorising or legislative committees (which can also change mandatory spending laws at any point in the year). In a second step, the appropriations committees prepare and Congress votes on appropriations bills, which are currently divided into 12 policy areas and allocate spending in detail. The President has to sign such spending into law.¹²

⁶ The European Parliament, Richard Corbett, Francis Jacobs, Michael Shackleton, 8th edition, London 2011, p. 264–65.

⁷ Ever Closer Union, Desmond Dinan, London 2010, p. 193.

⁸ [Preparing for complexity](#) – European Parliament in 2025 – The Answers, CSG EP 20125 Long-Term Trends Team, January 2013, p. 181, see also Rule 46 from the EP Rules of Procedure.

⁹ Article 225 TFEU; Rule 46, European Parliament's Rules of Procedure.

¹⁰ Article 1, Section 9, Clause 7 of the US Constitution.

¹¹ The European Parliament, Richard Corbett, Francis Jacobs, Michael Shackleton, London 2011, p. 274.

¹² [The Congressional Appropriations Process: An Introduction](#), Jessica Tollestrup, CRS, 14 November 2014.

2.2. Relationship between the European Parliament and the executive

Partisanship also plays a different role in the US than in Europe. Oversight is often used as a tool by a chamber of Congress dominated by one party to weaken an Administration from the other party. Oversight activities can serve the purpose of putting pressure on the government. By contrast, when the legislative and executive branches of government are under the control of the same party, oversight activities tend to be much more focused on actual facts.¹³ In the EU, the Commission college is appointed in the same year in which EP elections take place, and its appointment is increasingly a consequence of these elections, as shown in the recent *Spitzenkandidaten* procedure (pan-European lead candidates nominated by the European political parties to run for Commission President).¹⁴ Thus, it tends to be dominated by the same political groups as the EP. The EP is however always keen to extend its powers, and it uses oversight as a tool to control the Commission regardless of party allegiances.

This **tension** between the executive and legislative branches is nevertheless less pronounced in the EU than in the US. The EU as a system has always been subjected to a tension generated by the diametrically opposed concepts of supranationalism/neofunctionalism and intergovernmentalism. The Commission has been propelling EU integration forward, making proposals for new legislation and guarding the implementation of existing legislation. Together with the EP, it has been the advocate of supranationalism. The Council, on the contrary, represents the Member States' governments and has always been a guardian of their rights and sovereignty, being the intergovernmentalist branch of the legislative and budgetary authority.¹⁵ By design, the EP and the Commission are thus roughly 'on the same side'.

The EU produces regulations, which are directly applicable in all Member States, and directives, which require Member States to achieve a particular result without dictating the means of achieving it.¹⁶ When it comes to scrutinising the legal and practical **implementation** of legislation and spending programmes in the Member States and how well these work, the EP is not currently in a position to enforce the necessary legislative changes. Again, unlike in the US, the Commission's right of initiative stands in the way. Nevertheless, the EP can put pressure on the Commission to change legislation by scrutinising its implementation well. The EP's Petitions Committee has also become a watchdog over the way Member States implement EU legislation. When it, with the aid of citizens' petitions, discovers a breach of EU legislation, it alerts the Commission, which investigates and contacts the relevant Member State. In case of a persistent breach, this can escalate to an infringement procedure against the Member State concerned.

¹³ Interview: CTR fellow 3.

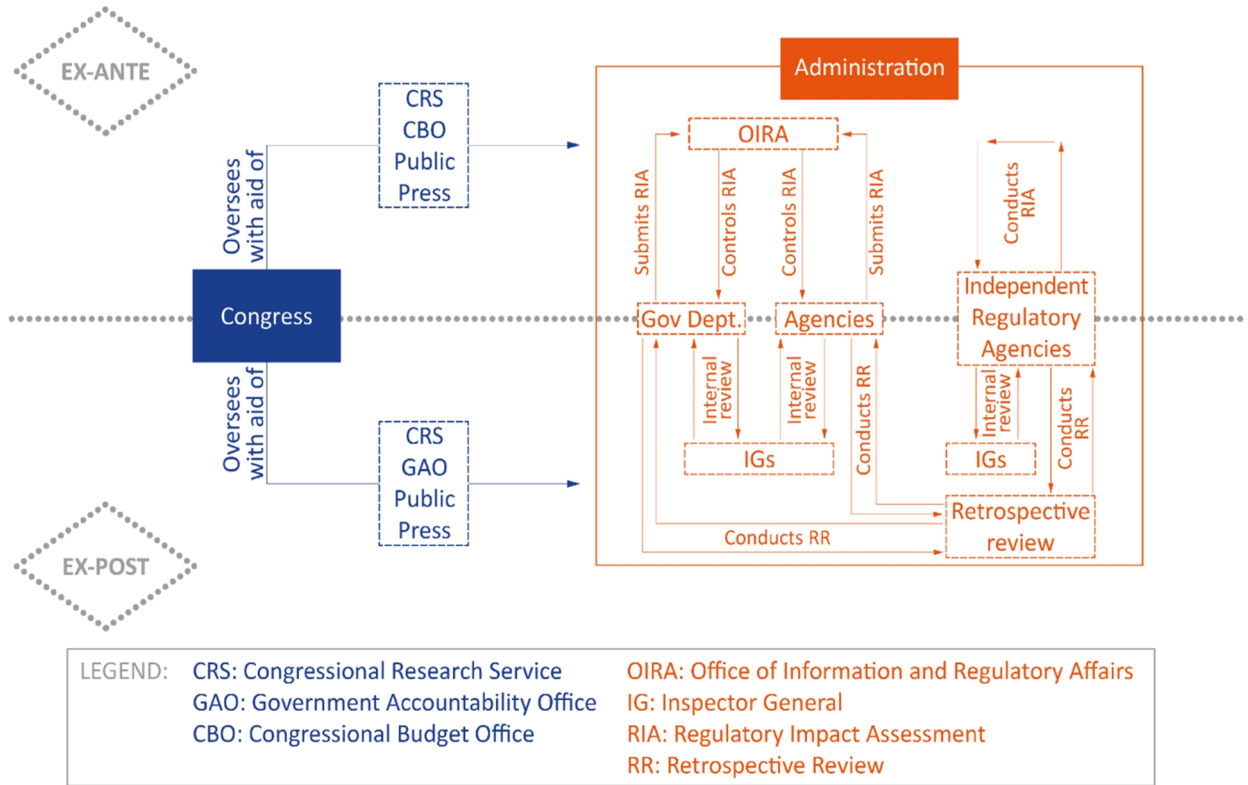
¹⁴ [Role and election of the President of the European Commission](#), Eva-Maria Poptcheva, EPRS briefing, 2014.

¹⁵ *Politics in the European Union*, Ian Bache, Stephen George, Simon Bulmer, Oxford 2011, p. 1–20.

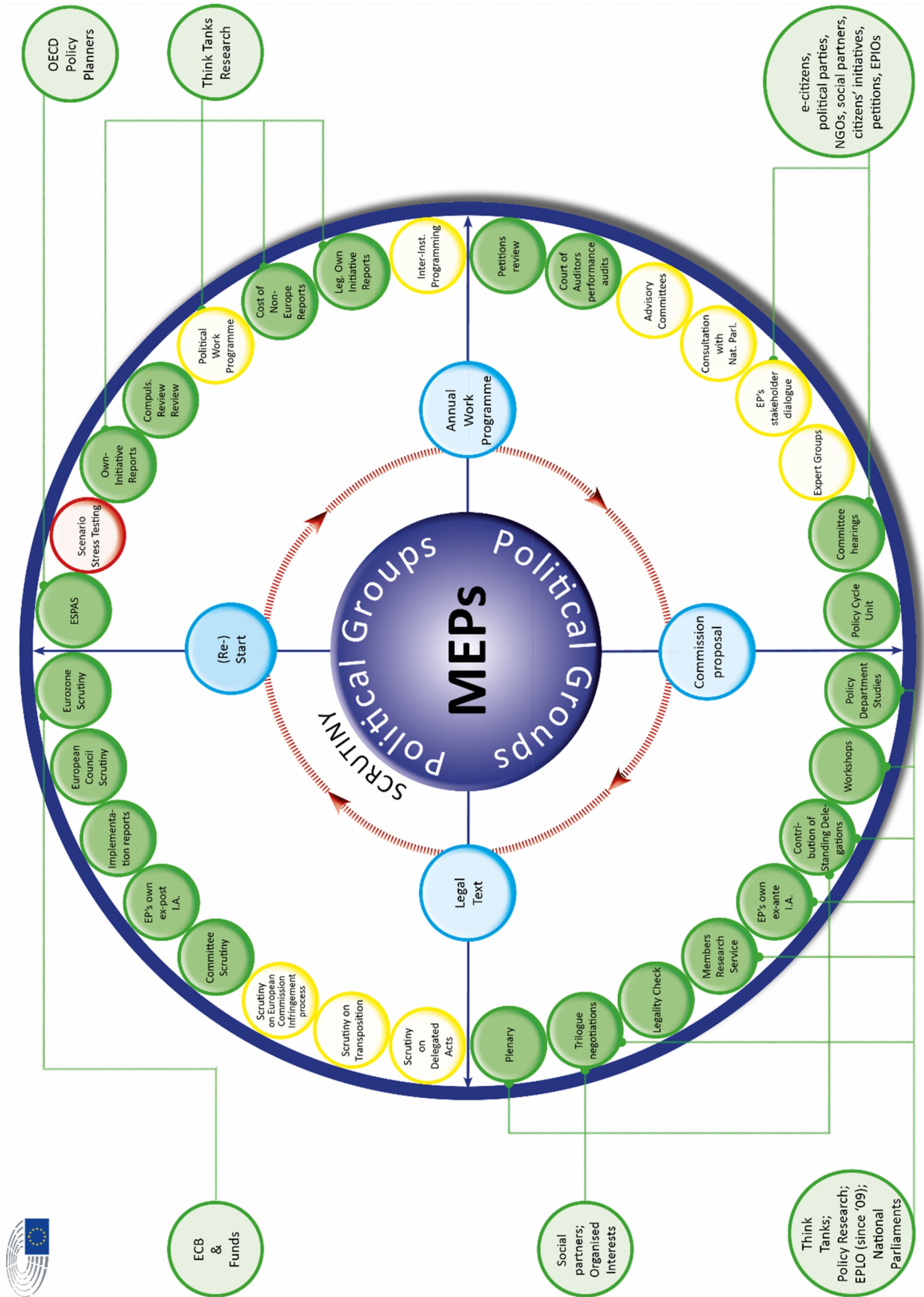
¹⁶ Article 288 TFEU.

3. Graphics on oversight in the US and the EU

US – Congressional oversight of the executive



Graphic by DG EPRS



EP – Completing the legislative cycle

Source: European Parliament Secretary-General Klaus Welle, 8 April 2016

4. Congressional oversight: How it works

4.1. Instruments used by the US Congress

Congress uses both formal and informal oversight instruments. Formal instruments derive from Congress's constitutional powers or are written into legislation, while informal ones mainly derive from Congressional practice.

The oversight instrument used in a particular case depends on the chair and ranking member (opposition leader) of a given committee. The House of Representatives and the Senate both have an oversight committee, while some authorising committees in each chamber have oversight subcommittees as well.

4.1.1. Formal oversight instruments

Committee hearings¹⁷ are the best-known tool for oversight in the US Congress. Committees will often invite members of the Administration, Congressional agencies (see below) or civil society to testify (answer questions from committee members). Committees regularly invite an agency's Inspector General (IG, see below) to report, or alternatively constitute a panel of witnesses on which the majority and minority members must agree. Typically, the majority fills more of the panel than the minority, for example by inviting three witnesses, and the minority two.

If a Congressional committee wants a particular senior Administration official to appear before it, but the Administration tries to substitute this person for someone else or refuses to send anyone, the committee might threaten to, or actually, issue a **subpoena**, a legal order forcing the official to appear. Subpoenas can also be issued to access documents that the Administration is reluctant to disclose. The importance of the right to use subpoenas has been confirmed by the Supreme Court, which has stated that 'a legislative body cannot legislate wisely or effectively in the absence of information...'.¹⁸ The use of subpoenas is also grounded in Senate and House rules.¹⁹ Issuing a subpoena usually requires either a vote of the committee or agreement between the chair and the ranking member. However, some committees authorise the chair to issue subpoenas directly. Oversight committees use the subpoena powers regularly, while other committees are much more restrictive. Congressional employees, nevertheless, state that the procedure for enforcing a subpoena, if the recipient does not comply, can take years.²⁰ If a government department or official does not comply with a subpoena, Congress can also vote to hold it/them in criminal contempt. It is, however, then up to the Department of Justice to prosecute a government official for contempt.²¹

Hearings and subpoenas can be part of regular oversight activities, as well as of **investigations**. These typically relate to a specific issue, such as Watergate or the Iran-Contra affair, and may be carried out by (temporary) select committees, as opposed to standing committees.²² Individual Senators or Representatives can also take initiatives to investigate executive-branch behaviour that they perceive as problematic. The chair

¹⁷ [Senate Rule XXVI, House Rule XI.](#)

¹⁸ Ruling [Eastland v. United States Servicemen's Fund, p. 421 U.S.](#) at 504.

¹⁹ Senate Rule XXVI(1) and House Rule XI(2)(m)(1).

²⁰ Interviews: CRS group interview; Senate employee 1.

²¹ ['Holder heading out, but contempt lives on'](#), Washington Times, 25 September 2014.

²² [Parliament and US Congress: Investigative powers compared – As MEPs ramp up their probe into EU member states' tax rulings, can US lawmakers teach them some tricks?](#), Brian Beary, Europolitics, 19 May 2015.

of the Senate Judiciary Committee, Chuck Grassley (114th Congress), has assigned a team of investigative attorneys mainly to react to alerts by agency or government department whistleblowers, often concerning alleged waste, fraud, abuse or maladministration. Congressional employees consider this method, alongside the help received through hearings and the press, to be an easier route to improving the way an agency operates than by changing laws, a process which requires agreement between the Senate and the House, as well as the President's signature. The investigative process starts with staff submitting questions to a government department or agency, and could escalate to the use of more formal mechanisms, such as subpoenaing documents.²³

Government departments and agencies exist because they have initially been authorised by Congress.²⁴ **Reauthorising** them provides Congress with an opportunity to take stock and change features that, according to the oversight conducted in the earlier authorisation period, have proven unsatisfactory. An authorisation generally establishes or continues an agency or programme, while also authorising future financial appropriations, sometimes with limits. However, it does not itself fund the agency or programme. The committees that prepare Congressional authorisations for a particular policy area are therefore known as 'authorising committees'. After authorisation, appropriation laws provide discretionary spending to fund the agency or programme.²⁵ These laws require the approval of Congress each fiscal year, in the form of annual Congressional appropriations bills.²⁶

Congress can also write **reporting requirements** into legislation. Some agencies have further developed these tools so as to periodically review their priorities and demonstrate to Congress that they are taking oversight seriously. For example, a Congressional employee commented positively on the Quadrennial Defense Review,²⁷ which also facilitates the budgetary planning process.²⁸

The **Senate** has an additional oversight function not shared with the House: it provides advice on and has the right to confirm appointments made by the US President,²⁹ often using hearings in the process.

4.1.2. Informal oversight instruments

In addition to the formal instruments at its disposal, Congress has developed various informal oversight mechanisms. These are often used as a first attempt to hold the Administration to account. Formal mechanisms could then be used in a second stage if the informal ones have not yielded satisfactory results.

Staff on the Senate Committee on Homeland Security and Governmental Affairs engage in many informal **discussions** with government departments. This often spurs civil servants to act,³⁰ and can also be seen as a first step towards policy evaluation on behalf of the Administration.

²³ Interview: Senate employee 4.

²⁴ US Constitution Article I, §9 and Article II, §2, cl. 2.

²⁵ As opposed to mandatory spending; for further explanations on the budgetary and appropriations process, see [Making the US federal budget: Process and hazards](#), Matthew Parry, EPRS, March 2015.

²⁶ US Constitution Article I, § 9, cl. 17; [Congressional Oversight Manual](#), pp. 19–20.

²⁷ [Quadrennial Defense Review](#), accessed on 15 July 2015.

²⁸ Interview: Senate employee 2.

²⁹ US Constitution Article II, § 2cl. 2.

³⁰ Interview: Senate employee 1.

Writing **letters** can be quite an effective oversight tool, although the Administration is not legally obliged to reply unless a committee adds a formal element, such as a subpoena.³¹ The government department to which such letters are addressed is more likely to take them seriously if they are signed by a committee chair and/or a ranking member. However, some letters are only written to attract publicity, and the members writing them do not expect an answer. In the absence of a subpoena, Congressional staff may make efforts to persuade the Administration of the importance of delivering an answer.³²

4.1.3. *The character of Congressional oversight*

Academics Cushman,³³ McCubbins and Schwartz,³⁴ just like most of the interviewees, consider Congressional oversight to be more ad hoc than systematic, mainly in the manner of responding to '**fire alarms**' rather than carrying out '**police patrols**'. Important factors that favour ad hoc activity are media attention in the case of a scandal and the lack of resources in terms of funds and staff. Congress does, however, make some efforts to conduct more regular oversight activities. In an empirical study, Balla and Deering come to the conclusion that despite past findings and popular assumptions, at least when conducting hearings, Congress performs more routine, 'police patrol' oversight activities than it provides event- or scandal-driven 'fire alarm' responses.³⁵

Congressional staff and think-tank fellows interviewed agree that oversight can be an effective instrument for improving policy, but on other occasions it is used merely as a **political tool** aimed at destabilising the party running the Administration.³⁶

Most observers underline that Congress is well advised to secure the support of the **public**, civil society and press, in order to help apply the necessary pressure on the Administration and increase the effectiveness of oversight. A political analyst and a Congressional employee concur that when such support is lacking or impossible to obtain, should the case involve classified material which cannot be distributed to the press and public, oversight becomes more difficult.³⁷ Other circumstances can, however, contribute to a more factual basis for oversight: in technical or less politicised contexts, bipartisan consensus can be easier to achieve, which may elicit more authority vis-à-vis government departments than an effort from only one party. At the other extreme, periods of divided government (with Congress being controlled by a different party than the one holding the White House) have witnessed an increased intensity of routine, police-patrol type oversight. As for fire alarms, they often see an increase during election years.³⁸

³¹ Interview: Senate employee 4.

³² Interview: Senate employee 1.

³³ An introduction to the U.S. Congress, Charles B. Cushman Jr., Armonk, New York/London 2006, pp. 103–115.

³⁴ [Congressional Oversight Overlooked: Police Patrols versus Fire Alarms](#), Mathew D. McCubbins, Thomas Schwartz, in: American Journal of Political Science, Vol. 28, No. 1 (Feb., 1984), pp. 165–179. Published by Midwest Political Science Association.

³⁵ [Police Patrols and Fire Alarms: An Empirical Examination of the Legislative Preference for Oversight](#), Balla, Steven, Deering, Christopher J., Congress & the Presidency. 2013, Vol. 40 Issue 1, p. 27–40.

³⁶ Interview: CTR fellow 3.

³⁷ Interviews: Donald Jensen, senior fellow at the Center for Transatlantic Relations; Senate employee 3.

³⁸ [Police Patrols and Fire Alarms: An Empirical Examination of the Legislative Preference for Oversight](#) / Balla, Steven J., Deering, Christopher J., Congress & the Presidency. 2013, Vol. 40 Issue 1, p.27–40.

Differences between the Senate and the House

Balla and Deering note that the media pays more attention to Senators than Representatives when they engage in oversight activities. They deduce that Senators therefore 'plausibly derive greater electoral benefits from responding to constituent fire alarms while at the same time having less incentive to perform oversight in aggregate'. On the other side of Capitol Hill, the House's rules³⁹ oblige its committees to publish a yearly oversight plan, and although not all committees do so, some of these plans are relatively detailed.⁴⁰ This shows the House's efforts to engage in more regular oversight activities.

4.1.4. Comparison to EP oversight

In order to wield influence at every stage of the policy and legislative process, the EP has created some instruments and support bodies of its own, while also working together with outside bodies, citizens, think-tanks and others.

Table 3: Activities and instruments used for completing the EU legislative cycle

Stage of the cycle	EP efforts and activity	Selected instruments	Collaboration
Agenda-setting	Influence the Commission's work programme and multi-annual programme	Own-initiative reports, legislative own-initiative reports, Cost of Non-Europe Reports, European Added Value Assessments,	OECD policy planners, think-tanks, research organisations
Consultation	Seek input on the topics addressed by the Commission in its annual work programme	Petitions review, committee hearings, implementation appraisals	Court of Auditors performance audits, advisory committees (Committee of the Regions and European Economic and Social Committee), national parliaments, political parties, NGOs, social partners, citizens' initiatives, petitions, EP information offices
Legislation	Play its full role in legislation and budget matters	Studies, workshops, contributions of standing delegations, EP work on ex-ante impact assessments, Members Research Service (for instance, 'Legislation in Progress' briefings), legality checks, trilogue negotiations, plenary	Think-tanks, policy researchers, EP Liaison Office with Congress, national parliaments
Scrutiny	Check implementation of the legislation and decisions taken at EU level	Committee scrutiny, implementation reports, Ex-post Impact Assessment Unit (European Implementation Assessments), European Council scrutiny, euro area scrutiny	European Central Bank and Funds, European Court of Auditors

³⁹ Rule X, clause 2 (d) 1, [Rules of the House of Representatives](#), version of 6 January 2015.

⁴⁰ CRS group interview; [Oversight Plan for all House Committees](#)/ House Committee on Oversight and Government Reform, 114th Congress; [Oversight plan of the House Committee on Financial Services](#), accessed on 12.10.2015.

The EP is obliged to do much more than Congress to contribute to **agenda-setting**, because Congress already has the right of initiative. The EP Administration points to Article 16 TEU, according to which 'the Commission initiates the annual and multiannual programming of the Union *with a view to reaching an inter-institutional agreement*'.⁴¹ As of April 2016, the EP has one more argument in support of its inclusion in the EU's agenda-setting process: the **Interinstitutional Agreement on Better Law-Making** stipulates that the Commission needs to consult the EP and the Council before and after the adoption of its work programme and 'will duly take account of the views expressed by the European Parliament and the Council at each stage of the dialogue, including their requests for initiatives'.⁴²

To influence the EU agenda, the EP has been using own-initiative reports for decades. These are, however, still too often ignored by the Commission (or the Council, in intergovernmental policy areas). Since 2013, the EP has been quantifying the costs that Europeans sustain as a result of certain areas not being covered by EU policy, through its Cost of Non-Europe Reports (see Section 5.5). These reports sometimes lead to legislative own-initiative reports requesting the Commission to make a proposal. An absolute majority of the EP's component members must adopt these latter reports.⁴³ In the case of probable financial implications, the EP obliges itself to indicate how sufficient financial resources can be provided. The committee responsible then monitors the Commission's follow-up activities regarding the dossier. At the very least, the Commission must give a reason for refusing to make a proposal.⁴⁴

During the **consultation** phase, the EP scrutinises the Commission's annual work programme (AWP). As there is already EU legislation in so many fields, much of the work programme involves amending legislation, which offers the EP an opportunity to assess whether the legislation and the spending programmes that the Commission wishes to amend are working well. The EP Administration appreciates the performance audits carried out by the European Court of Auditors (ECA), expects it to consult closely with the EP and the Council in their capacity as co-legislators, and to work on the basis of the AWP. Furthermore, the EP has now negotiated a partnership agreement with the EU's advisory committees, the Committee of the Regions and the European Economic and Social Committee, which includes the provision of timely advice on the Commission's AWP or its proposals to amend legislation. The EP also consults with other stakeholders during this phase, for example during committee hearings, and drafts its own implementation assessments (Policy Cycle Unit within EPRS, see Section 5.7).

Expertise can significantly improve **legislation**. The legislative process starts once a Commission proposal is published and sent to the EP and Council. The EP President, committees, delegations and rapporteurs are advised by the policy departments in the EP's Directorates-General (DGs) for Internal Policies (IPOL) and for External Policies of the Union (EXPO). These contract out external studies and write their own analyses.

⁴¹ [Strategic Planning for the Secretariat-General of the European Parliament](#), Klaus Welle, March 2015; [Total quality management along the whole legislative cycle](#) – A fresh look at better law-making, Klaus Welle, speech, 30 January 2014, emphasis in italics added by the author.

⁴² [Interinstitutional Agreement](#) between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, Art. 6, OJ L123, 12.5.2016

⁴³ See also [Parliament's legislative initiative](#), Eva-Maria Poptcheva, EP Library briefing, 24 October 2013.

⁴⁴ Article 225 TFEU; Rule 46, European Parliament's Rules of Procedure.

MEPs, including shadow rapporteurs and coordinators, are served by EPRS with its Members' Research Service.

In the **scrutiny** phase, the EP's implementation reports consider the transposition of EU legislation into national law and whether and how it has been implemented and applied. Ex-post impact assessments (see Section 5.7) help with this task. Committees have become more active in scrutiny, for example of external financing instruments and the work of the European External Action Service. Furthermore, the EP is continually verifying how European Council decisions have been followed up on.⁴⁵ The EP has also recently enhanced its scrutiny of delegated acts (see Section 5.7).

4.2. Congressional support agencies

Congress has several agencies at its disposal: the **Congressional Research Service (CRS)**, the **Government Accountability Office (GAO)**, and the **Congressional Budget Office (CBO)**. These are mandated to be non-partisan, and are staffed with civil servants hired on merit, as opposed to committee staff who work for either the majority or the minority. These agencies are widely regarded as being unbiased and offering balanced information. Appointments of the heads of these agencies are, however, highly political.

4.2.1. Congressional Research Service (CRS)

CRS serves Congress throughout the legislative process by:

- identifying or helping clarify policy problems and explore options for Congressional action;
- assessing the implications and potential impacts of policy alternatives; and
- assisting with Congressional oversight and review of legislative implementation.⁴⁶

Since CRS is often the first agency to which members of Congress and their staff turn, it has a role in **supporting oversight**, for example, when Congress needs a quick explanation of a regulatory impact assessment provided by an agency.⁴⁷ The CRS Congressional Oversight Manual, which helps members of Congress and their staff exploit the oversight instruments at their disposal, is a well-known publication within and outside Congress.⁴⁸

CRS also writes reports of general interest on a wide range of policy and legal issues. By statute, its reports are only available to members of Congress and Congressional staff, and are not formally made available to the **public**. This is in contrast to the policies of other Congressional agencies and has been criticised regularly.⁴⁹ CRS stresses the importance of confidentiality for the member of Congress asking for personalised research.

CRS employs about 600 **staff**, among them policy analysts, legislative attorneys and information professionals, grouped into six thematic divisions. Analysts write general reports for all members, and provide confidential memos to individual members,

⁴⁵ [European Council Conclusions: A Rolling Check-List of Commitments to Date](#), 9th edition, EPRS, European Council Oversight Unit, 18 October 2016.

⁴⁶ Overview of the Congressional Research Service, Mary B. Mazanec, presentation, April 2016.

⁴⁷ Interview: House employee 4.

⁴⁸ [Congressional Oversight Manual](#), Alissa M. Dolan, Elaine Halchin, Todd Garvey et al., Congressional Research Service, 19 December 2014.

⁴⁹ [Trying to crack open Congress's confidential think tank after a century of secrecy](#), Washington Post, Lisa Rein, 29 October 2015.

together with in-person briefings and personal email answers. In anticipation of a hearing, CRS can also prepare questions for witnesses or provide background information.

The service has a **budget** of US\$107 million for the financial year 2016. For 2017, it has asked for a 7 % increase to make up for past cuts. CRS Director Mary Mazanec told Congress in 2016 that staff levels had decreased by almost 10 % over the past five years, owing to budgetary constraints. She summed up some of CRS' activities as follows: 'By the end of the fiscal year, CRS produced over 3 600 new or updated written products, summarized over 8 000 bills for the legislative digest, and hosted over 300 seminars, briefings, and other events for more than 7 400 Congressional participants.'⁵⁰

4.2.2. Government Accountability Office (GAO)

GAO conducts **external audits** with the aim of verifying whether federal taxpayers' money has been used correctly, efficiently and effectively. Most of these compliance, performance and financial audits are done at the request of Congress, but some are at the discretion of the GAO head, the Comptroller General. GAO's approximately 3 000 staff⁵¹ produce some 900 reports a year, of which 90 % are at the direct request of Congress or are required by law. The chair or the ranking member of a committee may make requests, while some requests are bipartisan. The remaining 10 % of GAO's work is done at the Comptroller General's own discretion, and may be on issues of interest to several committees.⁵²

GAO **standards** are similar to international auditing standards. GAO uses data of its own or of governmental agencies. Around 80 %⁵³ of GAO's recommendations are implemented, though it has no enforcement authority. The average report takes 9.5 months to write and review, with GAO setting up audit teams to prepare them. Most of the work is done in-house, but when expert panels are needed, GAO may contract work out to national academies of science. Unless they concern a classified topic, GAO reports are public, which helps to put pressure on agencies to comply with their recommendations. GAO staff, however, stress the collaborative nature of auditing agencies: GAO does not rank its recommendations but discusses them with the audited agency during the process. In performance audits, GAO also includes cost-benefit analyses.⁵⁴ GAO reports often include a range of options for improvement, so that the agency concerned can choose the most effective approach.⁵⁵

Although the main GAO office is in Washington DC, 25 % of its staff work in its 11 field offices.⁵⁶ This allows the agency to do original research on the ground. The GAO **field offices'** location determines their activity to some extent. The Norfolk, Virginia office, for example, which is close to large military bases, specialises in oversight of the Department of Defense. An important focus of the Los Angeles office is on immigration and border

⁵⁰ Overview of the Congressional Research Service, Mary B. Mazanec, Director, CRS, presentation, April 2016; [Fiscal 2017 Budget Request](#), Mary B. Mazanec, statement before the Subcommittee on the Legislative Branch, Committee on Appropriations, US Senate, 15 March 2016.

⁵¹ [Fiscal year 2015](#), GAO, accessed on 9 August 2016.

⁵² Interview: GAO manager 1.

⁵³ [Performance Auditing](#) – The Experiences of the United States Government Accountability Office, 25 September 2013, data for recommendations made in FY2008.

⁵⁴ [Performance Auditing](#); Interview: GAO manager 1.

⁵⁵ GAO group interview.

⁵⁶ Interview: GAO manager 1; [GAO careers](#), accessed 30 September 2015.

issues. With the development of technological and communication facilities, however, staff numbers in the field offices have been reduced.⁵⁷

4.2.3. Congressional Budget Office (CBO)

Ex-ante evaluation of the likely consequences of a proposal for the federal budget is done with the help of the CBO. CBO currently employs about 235 staff,⁵⁸ most of whom are economists and public-policy analysts.

CBO was founded to enable Congress to eliminate the information disadvantage it faced vis-à-vis the Administration in budget debates. The Senate and House **Budget Committees** are CBO's main clients, with requests coming from chairs, ranking members, or the House or Senate leadership, though most CBO products respond to statutory (legal) requirements.⁵⁹

The agency provides Congress with information on the implications for the federal budget of proposed legislation over a five- to ten-year timeframe. Estimates touch upon three main components: discretionary spending, mandatory spending and revenues.⁶⁰ Such '**cost estimates**' – between 500 and 700 a year – are conducted for most bills adopted by Congressional committees and are required by the Congressional Budget and Impoundment Control Act of 1974.⁶¹ CBO also offers a large number of informal preliminary estimates to individual members and committees that are still considering what legislation to advance.

CBO's '**baseline projections**' aim to estimate budgetary and economic developments over the next ten years, assuming that current laws on revenue and spending remain in place. In addition to that, CBO provides Congress with projections of economic and budgetary outcomes, analyses of the President's budget, and analytical reports.

In line with its **methodology**, CBO does not present a range of figures for most of its estimates, but rather, a single value in the middle of the distribution of possible outcomes, so as to prevent being used in partisan struggles within Congress.⁶² It aims to communicate clearly the basis for those estimates, as well as the uncertainty surrounding them, in order to limit criticism. Until 2015, cost estimates did not take into account macroeconomic changes, but under a Republican majority in both chambers, Congress adopted a concurrent resolution on the budget for the financial year 2016 and put forward requirements for 'dynamic scoring': for major legislation approved by Congressional committees, CBO must now try to estimate the budgetary feedback of macroeconomic effects as well.⁶³

In addition, CBO explores policy options from a budgetary perspective. Produced about every two years, these '**budget options**' show different possibilities for reducing the

⁵⁷ GAO group interview; see also [GAO products](#), accessed 9 August 2016.

⁵⁸ Congressional Budget Office: [Organization and Staffing](#), accessed 8 August 2016.

⁵⁹ Interview: CBO manager 1.

⁶⁰ [Components of budget](#), CBO, graphic, accessed on 16 August 2016.

⁶¹ [Congressional Budget and Impoundment Control Act of 1974](#).

⁶² In other contexts, a range of figures might be useful, such as in a project management setting. The [Department of Energy](#) uses minimum and maximum figures.

⁶³ S.Con.Res.11 - An original concurrent resolution setting forth the Congressional budget for the United States Government for fiscal year 2016 and setting forth the appropriate budgetary levels for fiscal years 2017 through 2025, see: [SEC. 3112](#) – Honest accounting: cost estimates for major legislation to incorporate macroeconomic effects; [Dynamic Scoring at CBO](#), Wendy Edelberg, presentation, 22 September 2015.

budget deficit not only from a budgetary standpoint, but also from that of the qualitative implications these possibilities carry.⁶⁴

Limitations to the mandate / criticism

According to CBO's mandate, its focus is on costs to the US taxpayer, and not on wider societal benefits. This limitation in the mandate is often criticised for structurally enabling the mandate to favour 'low tax policies' over redistributive ones.⁶⁵ Furthermore, a proposal that would have few budgetary impacts, but larger impacts on the private sector, could still emerge from such an analysis as relatively inexpensive.⁶⁶ Due to lack of resources, CBO does not often review its past projections for their accuracy. It only provides estimates of a counterfactual situation (effect of the absence of legislation) when requested. For example, Congress asked for a budgetary analysis of a repeal of the Affordable Care Act ('Obamacare').⁶⁷

4.2.4. Comparison to EP support bodies

CRS finds its EP equivalent in EPRS's Members Research Service (MRS) and the Policy Departments (PDs) in the EP's DGs EXPO and IPOL.

EP committees, inter-parliamentary delegations and their chairs, rapporteurs and shadow rapporteurs are supported by the policy departments (PDs) in DGs IPOL and EXPO, which organise the work of the committees, and by the specialist Directorate for Impact Assessment and European Added Value within EPRS. Together they generate in-house analysis and commission external studies to a combined value of €10 million.

Individual members have the support of MRS and the Library of EPRS. In 2015, they answered some 3 000 substantive research requests from MEPs and their staff. The confidential answers provided use the most up-to date sources and include written tailored analyses and in-person briefings. The 81 policy analysts and 30 information specialists in the MRS are divided into five units – mirroring the PDs – which correspond to the groupings of EP committees. They cover all policy fields relevant to the EP and publish analyses on a regular basis (732 publications in 2015).⁶⁸

The EP does not have a strictly equivalent structure to the **CBO**. Both PDs and EPRS perform some of its functions, but neither their staff numbers nor their specialisation allow the making of systematic budgetary analysis of all Commission proposals. Policy Department D on budgetary affairs works mainly for the EP Committees on Budget and Budgetary Control with its eight policy analysts providing both in-house analysis and external studies. The MRS Budgetary Policies Unit has ten academic staff who publish budget-related material for all members and carry out confidential work for individual members. The EPRS also publishes regular analyses on 'How the EU budget is spent' across policy areas.⁶⁹

⁶⁴ Interview: CBO manager 1; for range of products, see www.cbo.gov/about/products

⁶⁵ [The Congressional Budget Office at Middle Age](#), Philip Joyce, University of Maryland, Brookings, 17 February 2015.

⁶⁶ Testimony of John D. Graham, Indiana University School of Public and Environmental Affairs, before the Subcommittee on Regulatory Affairs and Federal Management of the US Senate Committee on Homeland Security and Governmental Affairs, hearing: Examining federal rulemaking challenges and areas of improvement within the existing regulatory framework, 19 March 2015.

⁶⁷ [Budgetary and Economic Effects of Repealing the Affordable Care Act](#), CBO, 19 June 2015.

⁶⁸ [The work of EPRS: The first two years: 2014 and 2015](#), European Parliamentary Research Service, 2016.

⁶⁹ [How the EU budget is spent](#), EPRS, different authors.

Like **GAO**, the European Court of Auditors (ECA) is a supreme audit institution, but it is not an EP agency (see Section 5.7).

5. Internal oversight by the Administration

5.1. Inspectors General (IGs)

In the US, the government departments' inspectors general (IGs) conduct internal audits of legislation, policies, and spending programmes according to the Inspector General Act of 1978. Their mission is to promote economy, efficiency and effectiveness, and to prevent fraud and abuse. Congress and heads of departments are to be kept fully informed about problems encountered and progress in corrective action.⁷⁰ The 72 federal Offices of the Inspector General (OIGs) comprise approximately 14 000 employees, and, in 2013, identified US\$37 billion in potential cost savings.⁷¹ In the State Department, the OIG's activity is divided into inspections (of divisions and embassies), auditing (financial), and investigations (into fraud).⁷² The OIGs come together in the Council of Inspectors General on Integrity and Efficiency.⁷³

The Chair of the House Oversight and Government Reform Committee (114th Congress), Jason Chaffetz, would like IGs to be given more independent powers of investigation, for example to pursue former officials who have retired.⁷⁴ Since IGs are on the departments' payroll, their independence can be questioned.⁷⁵ The OIG of the Department of Veterans Affairs, for example, was severely criticised following retaliation against whistleblowers. Instead of seriously investigating complaints of employees, the OIG, in the words of one commentator, acted as a 'lapdog' to its department rather than as a 'watchdog'.⁷⁶ Additionally, in general, IGs can be removed by the same person or entity that appointed them. For example, IGs appointed by the President can be removed by the President, and IGs appointed by the head of an agency can be removed by that head. Congress does not have a direct role in the process of removal.

5.2. Linking internal and external oversight

According to GAO staff interviewed, GAO works very well together with the IGs. These internal and external audit bodies coordinate their work to avoid duplication, and there are rarely any disputes over competence, since the issues that IGs investigate are relatively narrow. Issues that IGs look at could concern, for example, a specific transaction within one department, whereas GAO has the possibility to look across departments. Its remit is generally wider.⁷⁷ IGs, on the other hand, theoretically have access to more internal documents than GAO, because they work for the government

⁷⁰ [Inspector General Act of 1978](#), see Article 2.

⁷¹ Statement by Michael E. Horowitz, Inspector General, US Department of Justice, before the House Committee on Oversight and Government Reform concerning '[Inspectors General: Independence, Access and Authority](#)', hearing, 3 February 2015.

⁷² Interview: Diplomat 1.

⁷³ Council of the Inspectors General on Integrity and Efficiency ([CIGIE](#)), accessed on 8 August 2016.

⁷⁴ Jason Chaffetz, [speaking to the National Journal](#), Washington DC, 2 June 2015.

⁷⁵ Interview: Diplomat 4.

⁷⁶ [VA Inspector General Confronted over Feeble Investigations](#), Daniel Van Schooten, Project on Government Oversight (POGO), 14 March 2016; [VA Whistleblowers Testify at Senate Hearing](#), Daniel Van Schooten, POGO, 29 September 2015.

⁷⁷ Interview: GAO manager 3.

department concerned, although quite often they find their work obstructed by a management afraid of revelations.⁷⁸

GAO, like all entities conducting oversight, also frequently has to battle with executive branch management for access to information. This interaction depends on the government departments; with some, working relations are strong, whereas other departments are very secretive.

The desire to evaluate the potential impact of proposed or potential new legislation, as well as review the effects of existing or recently enacted legislation, is present in Congress, even if it is still far from a systematic element in the Congressional process.

CBO analyses fall into the realm of ex-ante assessment, whereas GAO work generally takes place ex post.

5.3. Ex-ante: Regulatory impact analysis (RIA)

In order to anticipate possible major effects of regulation, government departments are obliged to conduct a regulatory impact analysis (RIA) if a proposed rule (regulation) falls under the definition of 'significant' or 'economically significant', as defined by Executive Order 12866 issued by President Bill Clinton.⁷⁹ Rules qualified as 'major' by the Congressional Review Act (CRA, see Section 5.4) are also subject to a RIA.

OIRA, the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) in the Executive Office of the President, sets out guidance for agencies and departments on how to conduct an RIA and reviews significant rules. OIRA work cuts across policy areas and analyses possible points of conflict between proposed rules or between a proposed rule and the Administration's general policies. A former OIRA employee considers that OIRA's main contribution in this process is to 'suggest a regulatory alternative that had not been previously considered by the regulatory agency'.⁸⁰ OIRA also develops surveys with statisticians that can feed into RIAs.

According to OIRA, the **purpose of an RIA** is to ensure that the likely consequences of a regulatory action have been considered. Agencies should only proceed with a regulation once it is reasonably certain that the benefits justify the costs (with some benefits and costs difficult to quantify). OIRA also points to the democratic function of the RIA and its importance for accountability, transparency and open government. An RIA should comprise the following **key elements**: an explanation of why there is a need for regulatory action; identification of a range of regulatory approaches, including taking no action; and an estimate of the costs and benefits (**cost-benefit analysis, CBA**). Costs and benefits have to be quantified and monetised as much as possible, in order to estimate, inter alia, direct compliance costs. When quantification is not possible, a qualitative approach can be envisaged. The agency either uses reliable data or considers developing the necessary data and research. An RIA should be written so that a 'qualified third party' can understand and reproduce the analysis. A plain-language executive summary should

⁷⁸ Statement by Michael E. Horowitz, 3 February 2015.

⁷⁹ [Executive Order 12866](#), 'Regulatory Planning and Review', 30 September 1993.

⁸⁰ Testimony before Subcommittee on Regulatory Affairs and Federal Management of the US Senate Committee on Homeland Security and Governmental Affairs, John D. Graham, Indiana School of Public and Environmental Affairs, 19 March 2015.

round it off. OIRA then offers step-by-step guidance for agencies on how to compile an RIA.⁸¹

In a performance audit for Congress, GAO analysed 109 significant rules as to whether they included the key elements. Executive agencies mostly complied when issuing economically significant rules, and so did independent regulatory agencies for major rules. For rules qualified as just significant, executive agencies included selected key elements less often. GAO recommends that agencies and OIRA increase the transparency of the rulemaking process by explaining why certain rules fell into the categories that made a CBA necessary. Thus Congress, the public and other agencies would better understand the significance of a future rule, and it would become easier for agencies to plan future regulation. GAO considers that OIRA/OMB should specifically explain its reasons when it qualifies an agency's initial assessment of a rule as non-significant.⁸²

Draft RIAs are made public, which allows the public to comment upon them. In its comments on the 2014 revision of the European Commission's Impact Assessment Guidelines,⁸³ the US government argues that this approach follows an OECD recommendation⁸⁴ and has the advantage that 'regulators can revise their analysis before making any final choices.'⁸⁵ An RIA is attached to a draft rule submitted for public consultation and then updated as the rule is made final.

Limits and criticism

The RIA process is not all-encompassing, as it only concerns those agencies that report to a government department: independent regulatory agencies are so far not under OMB control and not covered by the main provisions of Executive Order 12866. President Obama's Executive Order 13579 and Senate Bill S1607 aim at including independent regulatory agencies in the process of submitting RIAs.⁸⁶ However, these agencies still have to assess costs and benefits for 'major' rules according to the Congressional Review Act.

Moreover, OIRA has only 42 full-time staff. With such low staff numbers having to cover all policy areas, it does not seem surprising that businesses, citizens and Congress frequently complain about a lack of regulatory coherence.

A CBA included in an RIA is more complete than a purely budgetary assessment of the costs, and its use has increased over the past two decades.⁸⁷ Nevertheless, lawyer Pamela Gilbert, in testimony before Congress, attributes 'substantial inherent flaws' to the CBA, 'including a limited ability to quantify and value the potential benefits of regulation, the tendency to overestimate future compliance costs that are based on industry estimates that inflate cost estimates and ignore potential cost savings due to

⁸¹ [Regulatory Analysis: A Primer](#), OIRA, accessed on 19 August 2016.

⁸² [Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent](#) [Reissued on September 12, 2014], GAO, see table on p. 12.

⁸³ [Public consultation on the revision of the Commission's Impact Assessment Guidelines](#), 2014.

⁸⁴ [Recommendation](#) of the OECD Council on Regulatory Policy and Governance, 2012, Recommendation 4.

⁸⁵ [Comments of the United States Government](#) on the 2014 Revision of the European Commission Impact Assessment Guidelines, Public Consultation Document, 30 September 2014.

⁸⁶ [Executive Order 13579; Senate Bill S1607](#).

⁸⁷ Executive orders 12866 (58 FR 51735, 4.10.1993), 13353 (76 FR 3821, 21.1.2011) and 13579 (76 FR 41587, 14.7.2011).

innovation, and the practice of discounting the value of future benefits for current actions that may actually increase public protections in future decades'. She explains that sensible health and safety rules that would protect the public from harm often cannot be quantified in a meaningful way through a CBA and thus end up not being adopted.⁸⁸

Economist Frank Ackerman, in a study for the environmental NGO Friends of the Earth, points to the CBA's tendency toward 'overstating costs, toward trivializing the future, and toward replacing clear policy debates with obscure technical quarrels'.⁸⁹

5.4. Role of the US Congress in regulation

Even though Congress has no official role in RIAs, Senators and Representatives nevertheless try to **influence the regulatory process**. In a recent public hearing, Senators stressed that good regulation is important for public policy goals, such as food safety and preventing fraud. It should benefit everyday Americans without being excessive, and allow businesses a higher degree of certainty. Senator Joni Ernst criticised some agencies for not taking opinions of the public into account when regulating. Chair James Lankford and ranking member Heidi Heitkamp agreed that Congress was only at the beginning of overseeing regulation and that there was a long way to go to improve it. Senators also admitted to a lack of Congressional control over OIRA.⁹⁰ Furthermore, Congressional staffers explained that members of Congress do not have a systematic overview or control over whether the Administration fulfils 'Congressional intent' when it regulates in order to implement a statute.

Professor John Graham, a former OIRA Administrator (chief), said in a Congressional hearing that, although in general, Congress provides federal departments and agencies with statutory authority to regulate, sometimes the legislation it adopts is too detailed and too much resembles regulation. Very detailed legislation is, according to GAO, also one reason why agencies sometimes do not discuss alternative regulatory approaches in RIAs: the statutes passed by Congress only allow one option.⁹¹ In other instances, as after a national catastrophe, Congress has been known to pass legislation meant to solve the problem irrespective of costs. In such cases of **Congress passing regulatory legislation**, no RIA is carried out, which can cause excessive costs for the public, because the cost of, or alternatives to, the proposed legislation will not have been systematically explored.⁹²

The fact that the Administration makes available draft rules and RIAs gives Congress at least a theoretical chance of influencing regulation. In practice, however, it is rare that members step in at this point in the policy-making process. A notable exception recently has been a regulation of the Environmental Protection Agency (EPA, see Section 6.1).

In the view of John Graham, Congress should strengthen its **own capabilities** and requirements regarding RIA. Susan Dudley, director of the George Washington University

⁸⁸ Testimony before the Subcommittee on Regulatory Affairs and Federal Management of the US Senate Committee on Homeland Security and Governmental Affairs, Pamela Gilbert, Cuneo Gilbert & LaDuca, LLP, 19 March 2015.

⁸⁹ [Critique of Cost-Benefit Analysis, and Alternative Approaches to Decision-Making](#), Frank Ackerman, Tufts University, 2008.

⁹⁰ Subcommittee on Regulatory Affairs and Federal Management of the US Senate Committee on Homeland Security and Governmental Affairs, [Examining the Federal Rulemaking Challenges and Areas of Improvement within the Existing Regulatory Process](#), hearing, 19 March 2015.

⁹¹ [Federal Rulemaking](#), GAO.

⁹² Subcommittee on Regulatory Affairs and Federal Management of the US Senate Committee on Homeland Security and Governmental Affairs, 19 March 2015.

Regulatory Studies Center, explains Congress's past efforts to improve regulation in this way: since 1995, the Republican majority in Congress has been striving to make regulations in the social and environmental field less onerous and more cost-beneficial. Various laws have been passed with the aim of reducing the burden of regulation on local, regional and tribal governments as well as on small businesses. Furthermore, Congress has reauthorised OIRA and introduced the requirement for the OMB to report to Congress annually. The Congressional Review Act (CRA, of 1996) obliged agencies to submit final rules with supporting documentation to Congress and introduced expedited procedures for Congress to overturn regulation by a resolution of disapproval. Although this has only been used once, its threat, in the words of Dudley, 'may have compelled agencies to modify regulatory actions'.⁹³

5.5. Comparison to EU/EP ex-ante analysis

According to Professor Claudio Radaelli, impact assessments can function as instruments to exercise political control over bureaucracies, or to offer regulatory legitimacy. He observes that in Europe, implying EU Member States and institutions, impact assessments are used mainly by economic agencies, government departments dealing with industry, and supranational economic regulators such as the Commission. In the US, RIAs allow the President to discipline agencies responsible for sustainability and equity issues, such as the EPA, see Section 6.1. In Europe, the term used is impact assessment (IA) without R because the Commission not only performs IAs for regulatory proposals.⁹⁴

The **European Parliament** has an established role in ex-ante analysis: MEPs have the possibility to consider the Commission's ex-ante impact assessment alongside the legislative proposal, once the proposal has been formally adopted by the college of Commissioners. The reason for this difference is that in the US, RIAs and regulations (rules) are in the remit of the executive and follow after Congress has finished legislating. Comparing the US oversight system to the EU's, a senior GAO official considers that the US does not have an ex-ante instrument that is as disciplined or formal as the ex-ante impact assessment.⁹⁵

However, the US system has the advantage that the Administration makes draft rules and draft RIAs available for public comment, and that it updates its RIAs when issuing a final rule. Responding to a public consultation on the Commission's Impact Assessment Guidelines, the US government said that the Commission should consider permitting the public to comment on **draft impact assessments**. This would make it possible to subject the evidence base to more rigorous analysis, thereby making the whole impact assessment more robust.⁹⁶ The Commission does not make draft IAs available; however, the 2015 Better Regulation guidelines introduced a new type of assessment, the 'inception impact assessment', stipulating that it should be available for public comment. This type of assessment explains, among other things, the issues for which the proposed

⁹³ [Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future](#), Susan E. Dudley, George Washington University Regulatory Studies Center, in: *Case Western Reserve Law Review*, Vol. 65, issue 4.

⁹⁴ The political consequences of regulatory impact assessment, Claudio M. Radaelli, paper for the conference '[Governing the Regulatory State? Comparing Strategies and Instruments](#)', British Academy, London, 15 January 2009, pp. 5 and 9.

⁹⁵ Interview: GAO manager 1.

⁹⁶ [Comments of the United States Government](#) on the 2014 Revision of the European Commission Impact Assessment Guidelines, Public Consultation Document, 30 September 2014.

regulatory act can provide a solution, the reasons for taking action, the options available, and the foreseeable impacts.⁹⁷

The Commission conducts impact assessments on its most important initiatives and on those with the most far-reaching impacts: 'The Commission will carry out impact assessments of its legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts. The initiatives included in the Commission Work Programme or in the joint declaration will, as a general rule, be accompanied by an impact assessment'.⁹⁸

All draft IAs have to receive a positive opinion by the Regulatory Scrutiny Board (RSB), a new body which replaced the Impact Assessment Board in 2016. The RSB has broader competencies than the IAB, as it also reviews draft evaluations.⁹⁹

Finally, the US government considers that for their impact assessments, Commission DGs need more guidance on how to establish and use scientific data in order to enhance evidence-based policy-making.¹⁰⁰

In the **European Parliament**, a dedicated unit, the Ex-Ante Impact Assessment Unit within EPRS, helps committees appraise the Commission's impact assessments, thereby empowering MEPs and committees for performing scrutiny. This unit can also conduct impact assessments of major amendments proposed by the EP as well as complementary impact assessments at the request of committees.

The European Added Value Unit (also part of EPRS) considers counterfactual issues in its **Cost of Non-Europe Reports**, by gauging the potential economic cost involved if no EU-level action is taken within a certain policy area. It also conducts European added value assessments (EAVAs) for committees drawing up legislative own-initiative reports. This work can prepare the ground for future EU policy or legislation. An EAVA explains what social, economic and political costs and benefits may be associated with future European action.¹⁰¹

In respect of ex-ante impact assessment, it is altogether difficult to **assess** which system, the US or the European, is more predictable and logical, given that neither is covered by RIAs in a comprehensive way. Congress is not obliged to conduct RIAs when passing legislation, nor is the Commission for all measures it proposes or adopts.

5.6. Ex-post analysis

US government departments and agencies engage in a process called **retrospective review**. This can be mandated by Congress, if the original legislation demands that the executive branch provide regular reports. Review is also based on President Obama's Executive Orders 13563 and 13610. Analysis is normally carried out four to five years after a regulation has been fully implemented.¹⁰²

⁹⁷ [Better Regulation Guidelines](#) COM(2015) 215 final, 19.5.2015, Ch.III: Guidelines on Impact Assessment.

⁹⁸ [Interinstitutional Agreement on Better Law-making](#), Art. 13.

⁹⁹ [Better Regulation Guidelines](#), Ch.VI: Guidelines on Evaluation and Fitness Checks.

¹⁰⁰ [Comments of the United States Government](#) on the 2014 Revision of the European Commission Impact Assessment Guidelines, Public Consultation Document, 30 September 2014.

¹⁰¹ Example: [An EU mechanism on democracy, the rule of law and fundamental rights](#); Interim European Added Value Assessment, Tatjana Evas, Wouter Van Ballegooij, 27 October 2016.

¹⁰² OIRA and other administrative staff group interview; EO [13563](#); EO [13610](#).

Congress can **recast** the original legislation governing an agency if it deems a rule (regulation) to be dissatisfactory. Congress can also directly repeal a specific rule. While this hardly ever happens, Congress uses its budgetary lever more often. There are no government-wide standards for retrospective review. Some agencies are more systematic than others. For example, the Department of Transportation has an internal plan to review all its regulations every ten years.¹⁰³

Up to the present day, retrospective review does not systematically **feed back** into the policy process with a view to improving legislation or regulation. In a study for the Administrative Conference of the United States (ACUS), Associate Professor Joseph Aldy of Harvard University analyses the genesis of a number of rules from different agencies: '37 regulatory actions (were) identified for retrospective review. As of September 30 2014, these agencies had issued final rules on 25 of the 37 identified regulatory actions. ... While these 25 rules applied to actions identified in agency reports on their progress implementing retrospective review, only 14 of the 25 explicitly referenced retrospective review in the rule-making. This suggests that some of the rules promulgated under the retrospective review process may have been already in progress, perhaps under existing statutory review authorities. It also suggests a potential disconnect between agency staff responsible for coordinating retrospective review and those responsible for writing new rules.'¹⁰⁴

However, Michael Mandel of the Progressive Policy Institute concedes that such coherence is difficult to achieve, given that the original legislation was already the result of a political process and 'not a cost-benefit analysis of what regulation would be best'. He considers that retrospective review also lacks the wider perspective that takes into account the cumulative effect of the activities of different government departments.¹⁰⁵

Follow-up to oversight, including ex-post analysis, is largely left to the executive branch.¹⁰⁶ Representative Jason Chaffetz agrees, saying that the committee he leads is adept at its first function, 'oversight', meaning exposing scandals, but not as competent with regard to the second part of its name – 'government reform' – in effect the persistent follow-up aimed at changing the way government is run. For this, his committee has to partner with the respective authorising committee.¹⁰⁷

Reform proposals

The Government Performance Results Act (GRPA) Modernization Act was passed in 2010, but according to a GAO report, only implemented in part. It must, however, be conceded that this report only covers two years of possible implementation.¹⁰⁸ An important

¹⁰³ Interview: ACUS employee.

¹⁰⁴ [Learning from Experience](#): An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy, Joseph E. Aldy, Harvard University, 17 November 2014, p. 48; see also: [Retrospective Review of Agency Rules](#), ACUS, accessed on 8 August 2016.

¹⁰⁵ Written statement by Michael Mandel, Progressive Policy Institute, Senate Committee on Homeland Security and Governmental Affairs hearing, 'Toward a 21st Century Regulatory System', 25 February 2015.

¹⁰⁶ Interview: House employee 1.

¹⁰⁷ Interview at National Journal, Washington DC, 2 June 2015.

¹⁰⁸ [Government Performance Results Act \(GRPA\) Modernization Act](#), 5 January 2010; [Managing for Results](#): Implementation of GPRA Modernization Act Has Yielded Mixed Progress in Addressing Pressing Governance Challenges, GAO, September 2015.

feature of the act is the appointment of performance officers to evaluate programme effectiveness.¹⁰⁹

Various bills introduced in Congress would alter the system in a substantive way: The Regulatory Improvement Act would create a new commission that coordinates retrospective review. This was the only bill on this topic circulating in 2015 that President Obama said he would not veto.¹¹⁰

ACUS, on the other hand, proposes alterations that would work within the existing self-review system, but would give agencies stronger incentives to change things. An ACUS employee explains that for agencies to engage more in retrospective review, it has to become more cost-effective by involving the private sector or NGOs. When an agency adopts new legislation, it should already include rules as to how and when such legislation should be reviewed.

Other features of the proposal include:

- identifying agencies that are in particular need of a review;
- taking international regulatory cooperation into consideration;
- providing that significant changes in market forces would justify a retrospective review.¹¹¹

Finally, GAO work also generally takes place ex-post, but it has no formal retrospective review role covering the entire scope of an agency's activity.

5.7. Comparison to EU/EP ex-post analysis

Similar to the GAO, itself a supreme audit institution, the European Court of Auditors (ECA) is an independent EU body that is not an EP agency. Compared to GAO, the ECA engages in relatively few performance **audits**, with most still of a financial (or compliance) nature.¹¹² GAO works mainly on Congressional request, whereas the ECA determines its own agenda. GAO recommendations are not ranked according to priorities, in contrast to the ECA's.¹¹³ The ECA has 900 audit, translation and administrative staff, compared to GAO's 3 000.¹¹⁴

The EP Committee on Budgetary Control (CONT) uses ECA reports when scrutinising how EU money has been spent. Granting **discharge** to the Commission, which executes most of the EU budget, but also to other institutions is a powerful ex-post democratic oversight tool in the hands of the EP. It is, however, not the Commission, but the Council with which the EP has the most conflicts in this domain, having refused discharge to the Council every year since 2011 (for the financial year 2009).¹¹⁵

¹⁰⁹ Interview: Senate employee 1.

¹¹⁰ [S.708 – Regulatory Improvement Act of 2015](#); Interview: ACUS employee, see Michael Mandel written statement.

¹¹¹ Interview: ACUS employee.

¹¹² [Compliance audit versus performance audit](#), seen from the perspective of the European Court of Auditors, Vitor Caldeira, President of the ECA, 25 September 2013, p. 43–50.

¹¹³ [Performance Audit Manual](#), European Court of Auditors, accessed on 8 August 2016.

¹¹⁴ [Governance](#), ECA, accessed on 18 August 2016.

¹¹⁵ [Discharge for 2014 budget](#) – EU institutions other than the European Commission, Alessandro D'Alfonso, EPRS, 25 April 2016.

At a CONT Committee hearing, a high ranking GAO official explained GAO's approach to **performance audits**.¹¹⁶ The ECA President argued that the idea of having to choose between making a performance, compliance or financial audit is inappropriate, because all three are necessary: he explained that financial audit covers the reliability of financial reporting, while compliance audit concerns itself with regularity. All these fall within the ECA's legal responsibilities. Performance audits analyse whether the EU budget has been spent according to the principles of economy, efficiency and effectiveness. The three types of auditing are best used together.¹¹⁷

In broad terms, the **Office of Inspector General (OIG)** compares to the Commission's Internal Audit Service (IAS), although the remit of the latter is narrower than the OIG's: the IAS concerns itself with improving the effectiveness of risk management, control and governance processes.¹¹⁸

In the EP, **EPRS** also assists MEPs with **evaluation**: its Ex-Post Impact Assessment Unit assists committees in their work on implementation of legislation, notably by drafting 'European Implementation Assessments', whenever a committee undertakes a formal implementation report (which is increasingly common).

The EPRS Policy Cycle Unit provides implementation appraisals of legislation in force, whenever the Commission's annual work programme (AWP) includes plans to update it. This work is triggered as a response to the AWP, which is why the institution treats it as part of the legislative cycle's consultation phase instead of the scrutiny phase. The unit has also established a rolling check-list of recent findings of the ECA's special reports, updated to assist the EP with the discharge procedure,¹¹⁹ and aims to coordinate selected performance appraisal work with the ECA.

As for the power of Congress to recast the original legislation or repeal a specific rule, the EP is also in a position to repeal **delegated acts**. These non-legislative acts supplement or amend non-essential elements of an EU legislative act and are adopted by the Commission through powers delegated to it by the EP and Council. The EP (or the Council, as co-legislator) can unilaterally revoke the delegation written into a legislative act if it does not approve of the Commission's delegated act.¹²⁰

The EP has slightly weaker powers over **implementing acts**. The Commission, or in 'duly justified cases', the Council, adopts them when legally binding EU legislation needs uniform conditions of implementation. The EP, however, decides in the ordinary legislative procedure together with the Council on the rules and general principles regarding how Member States control the Commission's handling of the powers of implementation ('comitology').¹²¹

¹¹⁶ [Performance Auditing](#) – The Experience of the United States Government Accountability Office, Christopher Mihm, 25 September 2013.

¹¹⁷ [Compliance audit versus performance audit](#), see above.

¹¹⁸ [Mission Charter of the Internal Audit Service](#) of the European Commission, C(2015) 2451 final, 20.4.2015.

¹¹⁹ [Special Reports of the European Court of Auditors](#): A Rolling Check-List of recent findings, Biliانا Tzarnoretchka, Gabriella Zana-Szabo, EPRS study, 14 April 2016.

¹²⁰ Article 290(2) TFEU.

¹²¹ Article 291 TFEU; The European Parliament, Richard Corbett, Francis Jacobs, Michael Shackleton, London 2011, p. 330.

The **EP's Secretariat** recently enhanced its scrutiny of delegated and implementing acts,¹²² creating eleven additional posts in different committee secretariats in DG IPOL dedicated to such scrutiny.

6. Policy area case studies

6.1. US Environmental Protection Agency (EPA)

Environmental policy has been chosen as an example of a policy area with strong parliamentary scrutiny.

The specific case of the Clean Power Plan put forward by EPA is analysed in greater detail (see box below).

Since the beginning of President Obama's term in 2009, EPA has proposed and adopted numerous **rules** (regulations), implementing statutes (legislation) enacted by Congress, some decades ago. Others are based on retrospective reviews which EPA was obliged to carry out according to the original legislation, also enacted by Congress. EPA is very active in **retrospective review** and publishes annual reports demonstrating its progress in revising the regulations under its remit. Within these reports, a table mentions the rule being reviewed, whether a public consultation on a proposed change to the rule is ongoing or finished, as well as anticipated savings in costs and/or information-collection burdens, together with anticipated benefits.¹²³ This table already contains proposed changes to regulations and thus goes beyond a pure ex-post evaluation of current policy.

Members of Congress and the private sector have reacted strongly to EPA's recent rulemaking, **criticising** the agency for acting beyond the authority given to it by Congress, for underestimating the costs of proposed legislation and for ignoring the cumulative impacts of multiple regulations, etc. A Senate employee concedes however that Congress has been negligent in not writing implementing guidelines into legislation, as had been done previously. Arguably, discontinuing this practice has helped create a grey area into which the Administration has ventured to an extent greater than permissible.¹²⁴ EPA argues that all its rules do is implement statutes.¹²⁵ What this conflict reveals is that the border between legislation and regulation is not always clear cut and is often politically defined: currently, the Republican-dominated Congress considers that EPA is engaging in legislative activity instead of staying within the limits of regulation, meant to merely give life to laws.

A recent CRS report¹²⁶ provides background information on EPA's regulatory activity during the Obama Administration, giving an overview of the most controversial regulatory actions and setting out EPA's cost estimates (benefits are presented when available). CRS explains that the House in the 112th and 113th Congress, then under a Republican majority,

¹²² [Strategic Planning for the Secretariat-General of the European Parliament](#), Klaus Welle, March 2015.

¹²³ [Final Plan for Periodic Retrospective Reviews of Existing Regulations](#), EO 13563 Progress Report, January 2016.

¹²⁴ Interview: Senate employee 2.

¹²⁵ Senate Committee on the Environment and Public Works, Oversight Hearing on the Environment Protection Agency's (EPA) Proposed Carbon Dioxide Emissions Rules, 11 February 2015, reply by the EPA's Acting Assistant Administrator for the Office of Air and Radiation, Janet McCabe.

¹²⁶ [EPA Regulations: Too Much, Too Little, or On Track?](#), James E. McCarthy, Claudia Copeland, CRS, 9 February 2016.

conducted **vigorous oversight** of EPA. Since, in the 114th Congress, both chambers are ruled by the Republican Party, oversight has been accelerated yet further. At the same time, CRS mentions that not only Republicans have criticised EPA for overstepping its authority; such criticism has also come from the other side of the aisle.

Oversight instruments include bipartisan letters and hearings, for example on clean air and water issues. Within Congress, the opponents of EPA's initiatives have also tried to introduce 'riders' (elements unrelated to a legislative proposal; in this case non-budget related phrases) on appropriations bills that would limit the Administration's regulatory efforts, stand-alone legislation, and resolutions of disapproval under the Congressional Review Act (see Section 5.4). At times, Congress has tried to change underlying environmental statutes and to restrict EPA's veto authority on permits affecting water pollution. Most of these attempts have been thwarted by President Obama's veto. Some lawsuits (such as the Clean Power Plan, see box), put forward by opposing entities or states, have been escalated to the Supreme Court.¹²⁷

Clean Power Plan

In June 2014, EPA proposed a rule¹²⁸ for reducing CO₂ emissions from existing power plants by 30 % below 2005 levels by 2030. In its RIA, EPA did not limit its assessment of climate benefits to those received by the US (or its citizens), but rather used an estimate of global climate benefits.¹²⁹ Shortly after, the Brookings think-tank co-authored a paper¹³⁰ which reviews the history of regulatory impact analysis in the US and its virtually exclusive focus on national impacts (defined by geography or US citizenship) in benefit and cost estimates of regulations. The authors note that while there might be reasons for using a global damage estimate as opposed to a US damage estimate in cost-benefit analyses of US climate policy, until recently, all regulatory impact analyses made over several decades had focused exclusively on US impacts. They argue that if projected costs are national, benefits should also be calculated on a national basis.

The Clean Power Plan Final Rule was published on 23 October 2015,¹³¹ following much controversy, including during Congressional hearings.¹³² The final rule included an updated RIA.

In March 2016, the Supreme Court put a temporary halt to the disagreement within Congress by stalling complete enforcement of the Clean Power Plan until all lawsuits are resolved. EPA, in line with past practice, is however continuing work on the Clean Power Plan, aiming to publish model emissions-trading plans for the use of individual states.¹³³

6.2. Foreign affairs

Foreign affairs has been chosen as an example of a policy area from the domain of 'high politics', that is, touching the geo-political position of the US and its national interests, including many classified documents. Congressional employees explained the particular oversight challenges in this policy area, and the State Department officials interviewed

¹²⁷ [EPA Regulations: Too Much, Too Little, or On Track?](#), James E. McCarthy, Claudia Copeland, CRS, 9 February 2016.

¹²⁸ [Carbon Pollution Emission Guidelines for Existing Stationary Sources](#): Electric Utility Generating Units; Proposed Rule, EPA, 18 June 2014.

¹²⁹ [Regulatory Impact Analysis for the Clean Power Plan Final Rule](#), EPA, updated 23 October 2015, p. ES-14.

¹³⁰ [Determining the Proper Scope of Climate Change Benefits](#), Gayer, Ted; W. Kip Viscusi, 4 June 2014.

¹³¹ [Carbon Pollution Emission Guidelines for Existing Stationary Sources](#): Electric Utility Generating Units; Final Rule, EPA, 23 October 2015.

¹³² [EPA's clean power plan is wrong for states](#), Scott Pruitt, Jonathan Small, The Hill, 16 December 2014.

¹³³ [Supreme Court ruling on Clean Power Plan doesn't halt EPA action or change timeline](#), The Hill, 16 March 2016.

gave insights into the State Department's approach to oversight and relations with Congress and the Inspector General process.

In Congress, the committees with the main responsibility for foreign affairs are the House Committee on Foreign Affairs (HFAC) and the Senate Committee on Foreign Relations (SFRC). Kay King of the Council on Foreign Relations argues that these are adept at organising public hearings on matters in their jurisdiction, but that the **committee structure** in both chambers does not help to address cross-jurisdictional international issues that concern foreign policy, defence and intelligence. This lack of coherence affects especially work dealing with post-conflict environments. In addition, other cross-cutting policy areas, such as immigration, energy and trade, are assigned to committees whose focus is on the domestic arena. She also explains that HFAC and SFRC are not the most popular committees for members to join, because they provide little opportunity to directly serve one's district. Partly owing to the busy floor schedule of the Senate in particular, State Department activities have not been regularly guided by authorisation bills. Paradoxically, the executive branch has been content with this state of affairs, fearing Congress voting legislation that tightly controls executive action and includes detailed reporting requirements. As a result, foreign aid has been fragmented and is currently carried out by numerous agencies.¹³⁴

Two **House** employees said that the State Department was reluctant to allow Congress to oversee and influence its activities.¹³⁵ One explained that sources of conflict can be situations where civil servants overstep their powers, or where Congress occasionally steps in to represent the views of the people. Conflicts also arise where there is a mismatch of views: the district perspective of members of Congress as a factor influencing oversight is not always immediately obvious to civil servants. One of the House employees interviewed said that the House Committee on Foreign Affairs showed relatively good bipartisan collaboration. This was because of the smaller size of the committee and the good relationship between the chair and ranking member, with the former allowing the latter to call for hearings. In other committees, the majority would often block the minority. The character of the issues discussed might also play a role: according to the employee interviewed, it is easier to agree on sanctions against a foreign country than on measures against pollution with significant costs to US industry.¹³⁶

Two **Senate** employees agreed that foreign affairs was a policy area with good bipartisan consensus among members.¹³⁷ One deplored, however, that foreign policy has become more secretive in recent years: the Administration has been making increasing use of 'closed' (closed-door) briefings, even if nothing that is said is actually classified. The above Senate employee interpreted this as an attempt to limit access to the briefings.¹³⁸ Another Congressional employee confirmed this tendency, pointing out that it was true for all policy areas and quoting the Administration's recent designation of certain categories of information as being 'law enforcement sensitive' (LES). Although not classified, such information is distributed in a restricted way for fear of being used for criminal purposes. The employee explained that Congress has often had to argue with

¹³⁴ [Congress and National Security](#), Kay King, Council on Foreign Relations, 2010, accessed on 25 July 2016.

¹³⁵ Interview: House employee 2, 3.

¹³⁶ Interview: House employee 3.

¹³⁷ Interviews: Senate employee 2, CTR fellow Mike Haltzel.

¹³⁸ Interview: Senate employee 2.

the Administration about the handover of such information, to explain that it needs it for its oversight role and would not make it public.

The former staff director of the Subcommittee on European Affairs in the Senate Foreign Relations Committee, Mike Haltzel, considers that oversight in foreign affairs has always been a struggle for time and staff resources. Since the US is in demand as a global problem-solver, the committee's agenda was crisis-driven, with regular oversight activities often 'taking a back seat'. For his oversight tasks, he would travel to US embassies and be briefed by the ambassador, his deputy and other key personnel, such as the political affairs and public affairs officers, the CIA station chief and the political and economic counsellor. Sometimes the ambassador would ask him to take messages back to Washington: for example complaints about working conditions in the embassy. In such instances, the diplomats wanted Haltzel to do as much oversight as possible.¹³⁹

A **State Department official** active in working with Congress thinks that oversight is important and should not be seen as too antagonistic, as in 'Congress versus State Department', but as a collaborative function that can help improve policy and programme management. The official reported misconceptions in the civil service about Congress, for example many officials in different government departments worry, when asked to testify, that they have made a mistake. A Congressional employee confirmed this apprehension before hearings: the State Department is known to ask beforehand what the questions in a hearing will be.¹⁴⁰

By contrast, the State Department official said that it is incumbent upon Congress to know what agencies are doing and whether programmes are run effectively, so they see testifying about policies and programmes as normal. It pays off when officials notify Congress in advance what steps a department is taking to increase efficiency. State Department officials offer open and closed (door) briefings to Congress. Closed briefings sometimes contain no classified information as would warrant the classified setting.¹⁴¹ According to the State Department official, Congress is most interested in effectiveness and efficiency of programmes. Interest is generally proportional to federal funds spent and increases during budget negotiations. Because it is not a regulatory agency, the State Department does not deal with OIRA.

Many officials feel that the Department of Defense has a closer relationship with Congress than the State Department, because military bases are located all over the country and therefore in many Congressional districts. The State Department tries to point out that its activities are of value for all Americans, and that it has also modelled its reporting on the Quadrennial Defense Review, which has been well received in Congress.¹⁴² On the other hand, the **Quadrennial Diplomacy and Development Review (QDDR)**¹⁴³ sets out programme priorities and explains how the Secretary of State is trying to improve the organisational structure. The QDDR from 2015 builds on the first QDDR from 2009, which initiated a number of reforms, and reflects the 2014 Department of State and US Agency for International Development (USAID) Joint Strategic Plan. Many

¹³⁹ Interview: CTR fellow Mike Haltzel.

¹⁴⁰ House employee 2.

¹⁴¹ Interview: Senate employee 2.

¹⁴² Interview: Diplomat 2.

¹⁴³ [Quadrennial Diplomatic and Development Review](#) – explanations, accessed on 15 July 2016.

stakeholders were consulted, including from within Congress.¹⁴⁴ On publication, State Department officials were sent to Congress to offer explanations on the report.

The QDDR has a thematic part, comprising explanations on four strategic policy priorities:

- countering violent extremism;
- open democratic societies;
- inclusive economic growth; and
- climate change.

It concludes with a management or governance part:

- building dynamic organisations; and
- investing in an agile, skilled workforce.

As for relations with Congressional bodies, the State Department has a **GAO** liaison office and seeks to follow GAO recommendations as much as possible, communicating this to Congress. Should the State Department fail to follow recommendations or to respect deadlines related to GAO, its relations with Congress would be in danger. Whenever GAO prepares to draw up a report on diplomatic activities, the State Department might try to narrow the report's scope, but would nevertheless aim to establish good collaboration on it.

If the State Department wants to negotiate an international treaty to which the Senate has to consent, the Department often engages Congress at the beginning in order to muster support. Therefore, it lets Congress know whenever a treaty is to be negotiated.¹⁴⁵ This general approach can pay off later, in the form of much-needed funding or crucial support.

Like most executive branch agencies, the State Department oversees its own activities with the aid of an **Office of the Inspector General (OIG)**, which carries out:

- inspections (assessing management and operations of embassies and divisions);
- auditing (financial auditing of embassies or divisions); and
- investigations (into a particular area of fraud).

According to a diplomat who regularly works for the OIG, embassies should be inspected every five years, but in practice this happens less often, owing to lack of staff. Inspections of an embassy are prepared by sending confidential questionnaires to personnel, interviewing the State Department division to which the embassy reports, and so forth. The inspectors, between 15 and 20 people, spend one month on location, interviewing management and staff, and finish their report during the following month. They share a first draft with the ambassador, who comments on it. Because the OIG is ultimately accountable to Congress, the finished report is published online. A compliance office verifies if the recommendations have been followed up. Although there is no direct collaboration with GAO, the diplomat said that GAO is always interested in OIG reports. Twice a year, the OIG writes a report for Congress.¹⁴⁶

One element that has made oversight of foreign policy harder is the centralisation of policy-making in the White House, with the key role of the **National Security Council**

¹⁴⁴ [Quadrennial Diplomatic and Development Review](#), State Department, accessed on 8 August 2016.

¹⁴⁵ Interview: Diplomat 2.

¹⁴⁶ [Semiannual Report to the Congress](#), October 1, 2015 to March 31, 2016, press release, accessed on 1 August 2016; Interview: Diplomat 1.

(NSC). The President chairs the NSC, and its core members are the Secretaries of State and Defense. Its mission is to coordinate foreign policy and reconcile US diplomatic and military commitments and requirements. In recent years, especially since the response to the 9/11 attacks, the NSC has grown in power and independence.¹⁴⁷ An official said that while GAO should engage in more oversight of the NSC, this is proving difficult.¹⁴⁸ Richard Best of CRS explains that the NSC's head, the National Security Advisor, is not subject to Senate confirmation. Generally, Congress and its committees do not have the same relationship with the NSC as with its member departments and agencies. Congress has budgetary authority over the NSC, but little influence on its role or internal organisation.¹⁴⁹

6.3. Is strength of oversight policy-area specific?

It can be observed that Congress can exercise oversight more easily in some areas than in others, but not always for obvious reasons. Although classified information, used more extensively in foreign affairs than in environmental policy, makes it more difficult for Congress to play to its strength and oversee the executive with the help of the public, the Administration has also tried to create restricted settings for meetings and documents beyond the use of strictly classified material.¹⁵⁰ In addition, in the area of foreign affairs, members of Congress are more successful in achieving bipartisan consensus than in environmental policy. When committees speak with one voice, oversight becomes more fact-based and less an instrument of partisan fights or election campaigns.

7. Conclusions on the comparison between the US and EU systems of oversight

Many differences between oversight in the US and the EU are due to the contrasting right of initiative. In the US, Congress can **initiate** and amend legislation, while in the EU, the Commission retains a near monopoly of this right. The EP can request that the Commission make a proposal by using legislative own-initiative reports.

If policies do not have the effect desired by the legislative branch, Congress and the EP can amend their **budgets**. Nevertheless, when making changes to the federal budget, Congress is largely limited to the portion (one third) related to discretionary spending, unless it changes the underlying statutes to mandatory spending. The EP is only one arm of the budgetary authority, but its powers have in theory increased since the Lisbon Treaty with the ending of the distinction between compulsory and non-compulsory expenditure.¹⁵¹

¹⁴⁷ [Restoring FOIA's reach to the National Security Council](#), CommLaw conspectus [1068-5871] Yingling, Andrew yr:2014 vol:22 iss:2 pg:407 -432, here: pp. 414, 417, 419.

¹⁴⁸ Interview: Diplomat 1.

¹⁴⁹ [The National Security Council: An Organizational Assessment](#), Richard A. Best, CRS, 28 December 2011, accessed on 26 July 2015.

¹⁵⁰ See for example: [Do you have to keep the government's secrets?](#) Retroactively classified documents, the First Amendment, and the power to make secrets out of the public record, Jonathan Abel, University of Pennsylvania Law Review, Vol. 163, p. 1037; Interviews: Senate employee 2, 4.

¹⁵¹ The European Parliament, Richard Corbett, Francis Jacobs, Michael Shackleton, London 2011, p. 274.

Both Congress and the EP can count on **supporting expertise** during periods of agenda-setting and consultation, as well as while legislating and undertaking oversight. CRS-type activities are carried out by EPRS's Members' Research Service, by its Directorate for Impact Assessment and European Added Value, and by the EP's policy departments. CRS has a much larger staff (600) than both these services combined. The GAO, with its 3 000 staff, finds its approximate equivalent in the ECA, an independent EU body that is not an EP agency and has 900 staff. The 235 CBO staff cannot be matched by the EP's in numbers: some of its functions are divided across DGs and services, including Policy Department D on Budgetary Affairs and the EPRS Budgetary Policies Unit.

The EP also fulfils some functions which, in the US, are in the remit of the **executive branch** (RIAs and retrospective reviews). The EP considers RIAs at the same time as the Commission proposals, drawing on the help of the Ex-Ante Impact Assessment Unit in EPRS. It has been said that Congress should increase its capabilities in regulation, too. Ex-post, the EP scrutinises with the assistance of EPRS whether and how the Commission has carried out its policy evaluations, and draws up implementation reports of existing legislation. The inspectors general have no direct equivalent in the Commission; the remit of the Internal Audit Service is narrower.

Regulation (rules) in the US and delegated acts in the EU can be repealed by both parliaments, or can have their underlying legislation changed (according to the relevant legislative procedure). The EP has started to increase its scrutiny of delegated and implementing acts.

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Some 44 interviews with US policy practitioners conducted during 2014–2015.

Based largely on a set of interviews with policy practitioners and observers in Washington DC, this analysis aims first to examine the instruments and system for oversight of the US Administration by the US Congress, and then to draw comparisons with the equivalent instruments and systems in the European Union, and in the European Parliament in particular.

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