



State Legislative Oversight: **Colorado**



Capacity and Usage Assessment

Oversight through Analytic Bureaucracies:	High
Oversight through the Appropriations Process:	High
Oversight through Committees:	High
Oversight through Administrative Rule Review:	High
Oversight through Advice and Consent:	Limited
Oversight through Monitoring Contracts:	Minimal
Judgment of Overall Institutional Capacity for Oversight:	High
Judgment of Overall Use of Institutional Capacity for Oversight:	High

To read the full 50 state study report or to discuss the Colorado state report, please contact Benjamin.Eikey@wayne.edu.

Legislative Oversight in Colorado

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Summary Assessment

Evidence suggests that the Colorado Legislature possesses extensive formal capacity to engage in oversight of the executive branch. The analytic bureaucracies are especially strong, well-funded, and well-staffed. The Office of State Auditor (OSA) authority includes fiscal and agency oversight, while the Committee on Legal Services (CLS) has oversight over administrative rulemaking. There are automatic oversight mechanisms in place that require regulatory review and sunrise review of new agencies.

Major Strengths

The State Measurement for Accountable, Responsive, and Transparent Government Act (SMART), which ensures that standing committees take an active role in monitoring the work of state agencies, is especially useful in promoting oversight in Colorado. Under this act, all audit reports must receive a committee hearing. Additionally, balanced partisan membership on the oversight committees establishes a norm of bipartisan oversight. The audit agencies provide legislators with reports showing agency compliance with audit recommendations. These reports are used in standing committee and appropriations hearings to “persuade” agencies to comply with audit recommendations through the legislative power of the purse. The OSA also suggests legislative actions needed to fix problems identified in its audit reports. OSA encourages legislative follow through by tracking the number of these suggested bills that were sponsored and enacted (six enacted in 2017). The legislature plays an active role in the review of administrative rules, and these rules are reviewed on a regular basis. Colorado is making effective use of audits to monitor state contracts despite having only limited authority in this arena.

Challenges

This is a hybrid legislature that does not meet year-round, and it is also a legislature with term limits, which constrain legislators’ ability to develop expertise. The rule review process

allows agencies to adopt a temporary rule when the legislature is not in session even a rule that the legislature has challenged. Finally, although most oversight often appears to be motivated with public welfare in mind, there are instances in which special interests and partisans use oversight to achieve their personal goals. But overall, the Colorado Legislature illustrates some “best practices” that other states could emulate.

Relevant Institutional Characteristics

Colorado has what the National Conference of State Legislatures (NCSL) calls a hybrid legislature, which means that while legislators spend more than two-thirds of their time on state work, they are not paid enough (\$30,000 to sustain a middle-class life style on the state’s pay alone).²⁶⁷ Despite that, one-third of the legislature identifies as full-time lawmakers (Gray, Hanson, & Kousser 2017). Colorado State University professor John Straayer speculates that many of those who identify as full-time lawmakers are retirees or individuals who aspire to use state legislative experience to launch political careers (Kane, 2018).

Colorado is currently ranked 12th according to the Squire Index (Squire, 2015) of state legislative professionalism. There are 228 permanent staff members and another 88 staff members are classified as session-only (Gray, et al., 2017). The legislature is classified as part-time because the legislative session is limited to only 120 calendar days (CO Const. Art. V, Sec. 7).²⁶⁸ Between legislative sessions, the members have no district or personal staff.

Colorado has a relatively small legislative body with a total of 100 members, 65 in the house and 35 in the senate. There are term limits in place for representatives and senators. Senators can serve no more than two consecutive four-year terms. Representatives can serve no more than four two-year terms (CO Const. Art. V, Sec. 3).²⁶⁹ Once legislators meet the term limit in one chamber of the legislature, they can run for a seat in the other chamber. A legislator can run again for either office after being out of office for one full term. Colorado is currently a divided legislature—Republicans control the senate, while Democrats control the house. Only recently has a divided legislature persisted for more than one election cycle with a narrow 18-17 Republican control of the senate in 2014 and 2016. Prior to 2014, the Democratic Party controlled the governorship and both the house and senate.

Compared to other states, Colorado has a slightly below average share of local and state government employees as a percentage of its workforce. The national average is 11.3%, while Colorado has 10.4%, according to the CATO Institute (Edwards, 2006). Of these employees, Colorado does not have any agencies that fall into what the CATO Institute classifies as the “Biggest Bureaucracies” or “Smallest Bureaucracies”.

There are several constraints on gubernatorial power in Colorado. The Governor Institutional Power Index (GIPI) score for Colorado is 2.92 compared to an average of 3.23,

²⁶⁷ <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx>, accessed 6/28/18.

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<https://advance.lexis.com/container?config=0345494EJAA5ZjE0MDIyYy1kNzZkLTRkNzktYTkyMS04YmJhNjBlNWUwYzYKAFBvZENhdGFsb2e4CaPI4cak6laXLCWYlBO9&crd=5a478a24-6041-4ccf-8eb6-8d4667004eb3&prid=22101207-4be6-491b-a7f5-b46c8685cfb8>, accessed 6/28/18.

²⁶⁹ <https://advance.lexis.com/container?config=0345494EJAA5ZjE0MDIyYy1kNzZkLTRkNzktYTkyMS04YmJhNjBlBINWUwYzYKAFBvZENhdGFsb2e4CaPI4cak6laXLCWYlBO9&crd=5a478a24-6041-4ccf-8eb6-8d4667004eb3&prid=22101207-4be6-491b-a7f5-b46c8685cfb8>, accessed 6/28/18.

placing it in the bottom half of the states regarding institutional power. The index is composed of a range of factors, and Colorado ranks high in some dimensions and low in others. First, the governor's responsibility for the budget is shared with the legislature, and the legislature has unlimited power to change the executive budget (Council of State Governments, 2015). Second, Colorado is one of only five states whose legislative bodies develop a budget independent of the governor.²⁷⁰ Third, constitutional provisions on spending, revenues, and expenditures also limit the fiscal power of the governor (CO. Const. Art. IX, X, XI).²⁷¹ These provisions establish that money for the schools fund may not be transferred for the use of any other purpose including any interest accrued (IX), restrictions on public indebtedness (XI),²⁷² and forbids the elimination of corporate or corporate property taxes (X). This limits the discretion of the governor with respect to tax cuts that occur in many other states, but it also restrains the legislature from these activities.

On the other hand, Colorado grants some important powers to its governor. The governor has line-item veto power over appropriations, although the veto can be overridden with a special majority vote of 2/3rd of the legislators present or 3/5th of the legislators elected (Council of State Governments, 2015). The governor can issue executive orders, as with other governors, but here there is no legislative review. The governor's appointment power is considered slightly above average compared to other states (Council of State Governments, 2015). This is because some key appointments do not require senatorial approval. For example, the heads of the budget, economic development, energy, elections, information systems, and planning departments do not require confirmation by the senate (Council of State Governments, 2014). But this power is tempered by Colorado's civil service system, which limits gubernatorial appointments.²⁷³ Moreover, Colorado allows its voters to separately elect the secretary of state, attorney general, treasurer, University of Colorado Board of Regents, and the state board of education. Thus, when considering appointments to major state agencies, including but not limited to K-12 education, corrections, and health, Colorado's governor is powerful, but not exceptionally so.

Political Context

Historically, the political environment of Colorado was moderate to conservative, leaning toward the Republican Party, until the 21st century. Beginning in the 1970s, divided government

²⁷⁰ <http://www.ncsl.org/research/fiscal-policy/the-power-of-the-purse-legislatures-that-write-st.aspx>, accessed 6/28/18.

²⁷¹ <https://advance.lexis.com/container?config=0345494EJAA5ZjE0MDIyYy1kNzZkLTRkNzktYTtxMS04YmJhNjBINWUwYzYKAFBvZENhdGFsb2e4CaPI4cak6laXLCWYLB09&crd=5a478a24-6041-4ccf-8eb6-8d4667004eb3&prid=22101207-4be6-491b-a7f5-b46c8685cfb8>, accessed 6/28/18.

²⁷² "The state shall not contract any debt by loan in any form, except to provide for casual deficiencies of revenue, erect public buildings for the use of the state, suppress insurrection, defend the state, or, in time of war, assist in defending the United States; and the amount of debt contracted in any one year to provide for deficiencies of revenue shall not exceed one-fourth of a mill on each dollar of valuation of taxable property within the state, and the aggregate amount of such debt shall not at any time exceed three-fourths of a mill on each dollar of said valuation, until the valuation shall equal one hundred millions of dollars, and thereafter such debt shall not exceed one hundred thousand dollars; and the debt incurred in any one year for erection of public buildings shall not exceed one-half mill on each dollar of said valuation; and the aggregate amount of such debt shall never at any time exceed the sum of fifty thousand dollars (except as provided in section 5 of this article), and in all cases the valuation in this section mentioned shall be that of the assessment last preceding the creation of said debt."

²⁷³ https://ballotpedia.org/File:Colorado_exec_org_chart.png, accessed 4/19/18.

was common, but then the state began to swing from control by one political party to the other. For example, from 1999 to 2000 and 2003 to 2004, the Republican Party controlled the governorship and both houses of the legislature, and from 2007-2010 and 2013-2015 the Democrats did.²⁷⁴ The state is currently known as a purple state and very competitive (Haider-Markel 2009, p. 393). Yet, the state is still considered politically moderate. The current governor, John Hickenlooper, is a Democrat, and Democrats control the house while the senate is controlled by Republicans.

Dimensions of Oversight

Oversight Through Analytic Bureaucracies

The state auditor is a constitutionally created position that heads the Office of the State Auditor (OSA), which was created in 1965 (CO. Const. Art. V, Sec. 49).²⁷⁵ The OSA has approximately 75 non-partisan staff members and a 2015 state appropriation of \$7.3 million to fund its work.²⁷⁶ During 2018 it produced 50 reports of which 13 were listed a performance audits, while 31 were described as financial audits.²⁷⁷ It reports to and is governed by the Legislative Audit Committee (LAC) and its head, the state auditor, is appointed by the legislature. This committee, which plays a crucial role in the oversight process, consists of four representatives and four senators with equal representation from the two major political parties.²⁷⁸ The LAC is responsible for making a recommendation to the general assembly for the appointment of the state auditor for a five-year term. The LAC is also responsible for approving audit requests from the legislature and governor's office.

The state auditor must be a Certified Public Accountant (CPA) licensed in the state of Colorado. The current state auditor, Dianne Rey, has been recognized as Colorado's top administrator in 2015, received the President's Award from the National Association of State Auditors, Controllers, and Treasurers (NASACT) in 2014, the National Legislative Program Evaluation Society's Excellence in Evaluation Award in 2013, and was head of the office when it was recognized for producing two exceptional reports by NASACT, once in 2011 and once in 2014 (Bunch, 2015).²⁷⁹ Colorado's analytic bureaucracy is noteworthy for its recommendation compliance rate, its recommendations that result in statutory change, and its auditing process, which requires mutually supporting interactions between the legislature and the analytic bureaucracy at key steps in the auditing workflow.

The authority of the state auditor is outlined in Section 2-3-103 of the Colorado Revised Statutes (CRS).²⁸⁰ According to its website, the "Office of the State Auditor has broad authority to conduct performance, financial, IT audits of all state departments and agencies, public

²⁷⁴ https://ballotpedia.org/Party_control_of_Colorado_state_government, accessed 6/28/18

²⁷⁵ <https://advance.lexis.com/container?config=0345494EJAA5ZjE0MDIyYy1kNzZkLTRkNzktYTtkxMS04YmJhNjBINWUwYzYKAFBvZENhdGFsb2e4CaPI4cak6laXLCWYlBO9&crd=5a478a24-6041-4ccf-8eb6-8d4667004eb3&prid=22101207-4be6-491b-a7f5-b46c8685cfb8>, accessed 6/28/18

²⁷⁶ <http://www.ncsl.org/Documents/legismgt/StaffingData1979-2015.pdf>, accessed 4/19/18.

²⁷⁷ https://leg.colorado.gov/sites/default/files/2018_annual_report_final_8-21-2018.pdf, accessed 12/25/18.

²⁷⁸ <https://leg.colorado.gov/committees/legislative-audit-committee/2016-regular-session>, accessed 4/19/18.

²⁷⁹ https://www.nasact.org/accountability_awards, accessed 5/7/18.

²⁸⁰ <https://law.justia.com/codes/colorado/2016/title-2/legislative-services/article-3/part-1/section-2-3-103>, accessed 6/26/18.

colleges and universities, the Judicial Branch, most special purpose authorities, any state entity designated as an enterprise, and other political subdivisions as required by law.”²⁸¹ Section 2-3-107(2)(a), C.R.S., provides the state auditor or designated representative “access at all times...to all of the books, accounts, reports, vouchers, or other records or information in any department, institution, or agency.” In addition to this access, section 2-3-107(1), C.R.S., grants the LAC the power to subpoena witnesses, documents, and records, and to take testimony under oath.

The main work product of the OSA is the agency audit and the recommendations embedded within. The OSA is responsible for oversight over all state agencies, general audits, financial audits, and single audits. Audits may vary in scope based on the agency and the purpose of the audit. Agency audits include fiscal affairs and performance of the agency. During fiscal years of 2012 through 2016, which encompasses July 2011 through June 2016, the OSA made 2,224 financial, performance, and information technology audit recommendations to state agencies and other audited organizations. The OSA tracks the status of all recommendations to hold these entities accountable and to provide information to policy makers and the public.²⁸² OSA received commitments for implementation of 99% of these recommendations. As of October 2017, audited organizations had implemented 96% of the recommendations they had agreed to adopt. The *Annual Report: Status of Outstanding Audit Recommendations* was distributed to all eight legislators serving on the LAC and included a section on actions needed by the legislature to encourage agency compliance with the 4% of outstanding audit recommendations. As part of the report, the state auditor suggests that legislators on the “committee of reference” for the non-compliant agencies ask why the audit recommendations have not been implemented. In addition to recommendations to the audited agency, the OSA makes recommendations to the legislature for statutory change. For example, the 2017 OSA Annual Report cites six bills sponsored and six bills enacted as a result of audit activity.

Although Colorado’s legislative session is limited to 120 days, minutes posted on the LAC website show that committee hearings are ongoing, with a break in April and May. For the year of 2017, there were 12 hearings (see “LAC 2017 Minutes”). Audio recordings of four hearings from 2017 indicate that legislators actively question auditees, OSA staff, and other actors included in the hearing. Interviewees typify legislative involvement as generally interested in the improvement of government performance rather than attempting to score political points. They note that it is typical for an outgoing legislator to express gratitude for serving on a bipartisan committee that fosters collaboration and provides objective solutions for improving government performance (interview notes, 2018).

Tracing the audit process in Colorado reveals a relationship between the LAC and OSA that ensures audits are relevant to legislative priorities, grants a level of participation to legislators in the process, and ensures there is an end user of the reports. The OSA’s workflow ensures a high level of legislative participation at every step, from initiation to audit recommendation follow-up. There are four sources of an audit's initiation; 1) as required by federal law or statute; 2) citizens; 3) legislators, and; 4) the governor. Audits required by law or statute are put on the OSA work plan for assignment to an available audit team without any additional scrutiny. Requests by citizens are conducted at the sole discretion of the state auditor. Requests by legislators or the governor must be submitted according to LAC rules, which require the request to be written on the official's letterhead, signed by the official, and given to the state auditor. According to experts, often these requests are preceded by an informal conversation with

²⁸¹ <https://leg.colorado.gov/agencies/office-state-auditor/about-us>, accessed 6/26/18.

²⁸² https://leg.colorado.gov/sites/default/files/osa_11-13-17.pdf, accessed 4/19/18.

the OSA to determine whether any audits in process might have answers to their questions or clarify the purpose of the audit. Interviewees say that in some cases the intent is purely political and would have very little merit in the accountability environment. In such cases the requestor is often persuaded to pursue another course. Once a request is made, the state auditor must seek approval from the LAC to conduct initial research to determine the reasons for the audit and its feasibility. After the initial research, the OSA submits the findings to the LAC. Section 2-3-108 requires a majority vote of the LAC to proceed with performing the audit. Experts say that the process is objective and rarely used to play politics (interview notes, 2018).

Once initial research is completed, and the LAC approves the creation of an audit, then an audit team develops an audit plan, conducts field work and produces the audit report. The audited agency participates in all phases of the audit. A completed audit will list recommendations with responses from the audited agency and the agency's planned actions, if any, to meet the recommendations, including an implementation date. Experts point to negotiation and collaboration in the audit process as an explanation for the high rate of agreement in recommendations, around 99%. The LAC is not involved in the production of the audit. Sections 2-3-103(2) and 2-3-103.7(1), C.R.S. prohibit public disclosure during the audit process—only the OSA and the audited agency are allowed access to the report while it is being produced.

Once a final audit document is completed, a copy is given to the LAC and the audited agency in advance of the LAC hearing in which the document is made public. At the hearing, the OSA presents its conclusions, findings, and recommendations to the LAC. The audited agency is included at the hearing to respond to the recommendations and findings. The OSA may recommend statutory changes or the auditee may appeal to the LAC to sponsor legislation in order to meet an audit recommendation. A performance audit takes from “9 to 11 months to complete,” according to the OSA website. However, due to high demand, in particular legislator-initiated requests, there is an 18-month backlog for performance audits.

The OSA uses multiple strategies to ensure its reports are used and relevant to the legislature. In November, at the start of the budget process, the state auditor presents the *Annual Report: Status of Outstanding Audit Recommendations* to the Joint Budget Committee (JBC). This presentation documents every state auditor recommendation for the past five years for every agency. It also notes whether the recommendation has been adopted or not. Interviewees liken this document to “your mom and dad getting the report card in the mail—it’s not meant to shame anyone, it’s just how you are doing at this particular time” (interview notes, 2018). The timing of this presentation (at the beginning of the budget process) is strategic, and it sends a signal to any agency not currently in compliance with recommendations. Experts stated that this practice began in 2014 to add teeth to recommendations and give agency heads a basis for funding requests (interview notes, 2018). As one interviewee said, “[The OSA] wanted to create a pathway that could help departments improve their performance and linking [the OSA’s] recommendations into the appropriations process made sense” (interview notes, 2018).

The OSA also sends staff to SMART Act hearings when agencies are not in compliance. SMART requires that, prior to the start of each legislative session, each joint committee of reference hold hearings with each department assigned to the committee with jurisdiction over the agency.²⁸³ The hearing will review the “department’s regulatory agenda, budget request, and

²⁸³ Committee assignments pursuant to the SMART Government Act are detailed in a October 23, 2013 Colorado Legislative Council Staff memo addressed to the Members of the General Assembly titled “Committee of Reference SMART Government Act Hearings Appendix A” located at the following link:

any associated legislative agenda,” along with its performance plan (Mourik, 2013). SMART hearings also allow the legislative branch to ensure that departments are implementing laws as intended and to learn about planned changes to administrative rules. Experts said that dissemination of OSA audits to legislators has increased since the SMART Act (interview notes, 2018). Before, the OSA thought of its audience as the LAC and legislature, but now the OSA thinks more about the committees of reference²⁸⁴ and how their reports will be received in these SMART Act hearings. Experts also said that the OSA thinks carefully about whether an audit will have a legislative champion upon completion (interview notes, 2018). In a term-limited state this includes whether a particular champion is likely to be serving by the time the audit is completed. Both the state auditor’s presentation and its staff’s participation in SMART Act hearings are attempts to leverage the appropriations process to force compliance and hold agencies accountable. These activities will be discussed further in the section below “Oversight Through the Appropriations Process.”

The OSA also plays a role in monitoring contracts and procurements. Findings will be discussed in the section below titled "Oversight Through Monitoring State Contracts."

Vignette: The OSA’s Performance Audits: Colorado Regional Tourism Act

The performance audit conducted on the Regional Tourism Act illustrates the interactive nature of performance audits, between the OSA, LAC, and legislature broadly. These interactions are formalized in statute. For example, key products of the OSA, the audit plan, and audit publication, must be approved by vote in the LAC. These interactions are mutually supportive, resulting in collaboration between analytic bureaucracy and the legislature. The audit of the Regional Tourism Act illustrates multiple points of interaction.

Projects awarded money through the RTA produced losers as well as winners among communities throughout the state, which attracted attention from legislators curious about how money was being awarded (interview notes, 2018; Asmar, 2015). The enabling legislation, the Regional Tourism Act (RTA) passed in 2009 for the purpose of funding large-scale projects using tax increment financing. The Economic Development Commission (EDC) and the Office of Economic Development and International Trade (OEDIT) were tasked with reviewing RTA applications with the final say on which projects would be funded (RTA fact sheet). As of this writing, the ability for money to be awarded through RTA has expired, no new money has been allocated to RTA. EDC awarded money to five projects, and of those five projects, none are complete and two have not yet broken ground. These projects drew the attention of a group of legislators interested in learning the basis for the awards (interview notes, 2018; Svaldi, 2015). To that end, Democratic Senator Guzman of Denver sought an audit at the March 10, 2015 LAC meeting. Interviewees indicate that this request formed the basis for initiating the audit (interview notes, 2018).

Minutes and audio recordings from the LAC hearing (March 10, 2015) document the LAC’s discussion about whether to allow initial research by the OSA into the RTA audit. Both the LAC and OSA participated in these discussions. Senator Guzman is currently the minority leader and chaired the LAC in 2015. In these hearings, Senator Guzman said her purpose "was

<https://www.colorado.gov/pacific/sites/default/files/13SMART%20Act%20Hearings%20Overview%20Memo.pdf>, accessed 6/26/18.

²⁸⁴ The committee of reference is the term the Colorado legislature uses to refer to substantive or policy that meet only during legislative sessions. See <https://leg.colorado.gov/content/committees>, accessed 10/10/18.

to investigate the processes and policies of how the RTA was administrated by OEDIT, and not to single out individual RTA grants." ²⁸⁵ Of the eight LAC members, seven voted yes and one voted no. The single no-vote was cast by Democratic Representative Ryden of Aurora. Aurora is the site of a RTA project that local community actors tout as a major win for the community. It had already broken ground by 2015. Contemporaneous to the audit vote, the EDC weighed an application for funds to build a convention center, the National Western Center, in Denver. That project was approved on November 12, 2015 (Rupp, 2018; Sirota, 2018). Some sources suggested that the RTA audit was in part motivated by the established hotel industry in Denver (interview notes, 2018). That industry worried that the RTA, specifically the convention center, was being used to pick winners and losers, rather than the original, distributive intent. The discussions on March 10, 2015, focus a great deal on the technical dimensions of the audit in terms of scope and feasibility, particularly on the part of the OSA. ²⁸⁶ The political dimensions can only be inferred from the contemporaneous reporting and experts close to the situation. Experts characterized the early stages of the audit initiation as more politically divisive than normal, stating the LAC approval is "typically... a place for the exchange of information and ideas in an objective way where you can improve the function of government" (interview notes, 2018).

The initial discussion about the audit was not a one-shot, simple interaction between OSA and LAC. Instead, it took several meetings to clarify the audit objectives, discuss important points, and bargain over key outputs. At the LAC hearing on March 30, the state auditor presented the initial audit approach. The state auditor specified that the audit would be forward-looking only, because there are no enforcement mechanisms to collect money already given out. At the subsequent June 1, 2015, LAC hearing, the committee voted unanimously (including Rep. Ryden) to approve the RTA audit. The hearing included some pointed questions from Rep. Guzman to OEDIT regarding the Gaylord Entertainment project in Aurora, Rep. Ryden's district and the site of an RTA project that had already broken ground. The Aurora project was challenged in the courts by the hotel industry and a taxpayer's rights group in separate cases (Denver Business Journal Staff, 2016; Westergaard, 2016; Sirota, 2018). Interviewees suggest the RTA audit was another vehicle to undermine the Aurora project and the Denver convention center (interview notes, 2018). However, the initial hearings about the audit specify that the moneys already awarded to Aurora and the moneys that would be awarded to Denver would not be jeopardized regardless of the audit conclusions. Instead, the initial audit design composed by the OSA and approved by the LAC defined an audit scope that would retrospectively evaluate the award process but would limit any changes to being prospective only. This is a key point that shows that despite the political origins of the audit, it was transformed into a technical audit concerned with the performance of government. Therefore, while it is exceptional for the politics to be so overt in the LAC audit process, the fact that the process itself resulted in an audit that transcended the politics demonstrates the power of the process. While the political jockeying boiled just under the surface, the process, which included the OSA, ensured the objective and technical aspects were ultimately the focus.

Once the initial audit design was approved, the OSA prepared the audit. The audit was made public at a Legislative Audit Committee Hearing on October 30, 2017, 29 months from approval of initial research. Experts state this is likely the result of OSA's significant backlog, since audit reports typically take a maximum of 11 months to complete. Once the audit was

²⁸⁵ https://leg.colorado.gov/sites/default/files/2015_minutes.pdf, accessed 6/26/18.

²⁸⁶ https://leg.colorado.gov/sites/default/files/2015_minutes.pdf, accessed 6/26/18.

finalized, the report was given to all parties two weeks before the hearing. All eight LAC members, OSA, OEDIT, and EDC were present at the hearing. All parties were actively involved in discussions. Both the minutes and the audio are available.²⁸⁷ Experts indicate that it is typical for both legislators and their staff to be equally familiar with the report (interview notes, 2018).

The audit found that EDC and OEDIT did not properly administer the RTA. EDC adopted projects that did not have the support of the OEDIT director. Controls were inadequate to ensure that those projects given funding were actually using the money for its intended purpose. OSA recommended adding guardrails for the projects that were funded and recommended that, if any additional funding is allocated to the RTA, it needs to have clear, unambiguous criteria in place to judge the worthiness of a project for funding.

The public presentation of the audit findings at the LAC hearing provided a forum for the auditee, the state auditors, and legislators to discuss policy. Often the legislative intent was discussed—large distributive projects that would attract out-of-state tourists—which was then compared with the projects that were funded. There was sufficient evidence to show that the process could have been improved to rely on better criteria for selecting projects. For example, the incremental state sales tax calculations used by the EDT were greater than the calculations produced by a third-party analyst suggesting the projects were given more financing from the state than appropriate.

In contrast, there was also evidence that the program was an effective distributive policy, which the auditee cited to show that the project attracted tourists who would not have otherwise come to Colorado. Specifically, a survey of out-of-state customers for 500,000 pre-booked hotel nights, which found that 85% said their conference had never been held-in Denver and, without the convention center, would not have been held in Denver (Svaldi, 2017). This claim supports the notion that the RTA awards were in fact distributive and would be a net benefit to the established hotel and tourist interests. Experts close to the issue stated (interview notes, 2018) that the audit found many more indicators of good performance than of bad. At the hearing, OEDIT committed to the recommendations proposed by the OSA in its report. This also gave legislators in attendance the opportunity to consider additional legislation. At the meeting the LAC committed to route the report to several standing committees and to hold a joint meeting with an appropriations committee on the audit findings with the auditee and auditors present.

To produce the audit, OSA met several times with LAC. In these meetings, the auditors and legislators collaborated to define the audit in objective terms. This generated unanimous support for the audit. In subsequent meetings specific commitments were made by the auditees to address deficiencies. OSA is responsible for follow-up to ensure that these recommendations are implemented using two of its standard procedures: the November OSA presentation, which highlights any agencies not in compliance with audit recommendations, and in the yearly review document. In addition, the committee with subject matter jurisdiction over the RTA was notified of the audit findings. One very clear outcome of the RTA is that it killed any talk of additional funds for the RTA and likely killed any similar, future efforts (interview notes, 2018). The interactive process involving both legislators, auditors, and the agency itself facilitated effective oversight of this program.

Colorado's various legislative committees exercise oversight through multiple different government processes, and those oversight activities will be described intermittently throughout the remainder of this discussion. Three committees in the Colorado Legislature -- the LAC, the

²⁸⁷ <https://leg.colorado.gov/committee/granicus/810931>, accessed 5/8/18.

Joint Budget Committee (JBC), and the Committee on Legal Services (CLS) -- have substantial oversight responsibilities. All three of these committees are what Colorado calls “year-round committees,” which means that they meet even when the legislature is not in session. Oversight actions of the JBC are described extensively in the section on the appropriations process. The CLS oversees administrative rules, which we discuss in a section on that topic. Other committees, for example committees of reference that meet only when the legislature is in session, exercise oversight through the State Measurement for Accountable, Responsive, and Transparent (SMART) Government Act (HB 12-1299), reenacted in 2013 (CRS 2-7-101). This bill requires that, prior to the start of each legislative session, each committee with jurisdiction over an agency (the committee of reference) hold hearings with that agency²⁸⁸ to review the “department’s regulatory agenda, budget request, and any associated legislative agenda,” along with its performance plan (Mourik, 2013).

Oversight Through the Appropriations Process

Unlike most states, Colorado’s legislature has primary budgetary authority (CO. Const. Art. X). The legislature is responsible for a balanced budget and creates a budget independently of the governor. These budgetary powers provide the legislature with knowledge about the agency’s performance that facilitates oversight. The JBC is the key legislative budget actor, but the SMART Act involves committees of reference in the appropriations process by granting them a role in their respective subject matter jurisdiction. Specifically, these committees help develop the department’s yearly performance plans, which are used by the JBC in the allocation of agency budgets. There are several resources for these key legislative actors that provide information used in oversight through the appropriations process. These are: the state auditor’s November presentation on noncompliance, audits routed to committees with oversight authority, public hearings including investigations, SMART Act hearings, and investigative hearings, which include staff of standing committees, field trips to agencies, legislative staff-to-agency staff communication, Requests for Information (RFIs) to the governor’s office, footnotes in statutes, and institutional budgeting knowledge provided by joint budget committee staff. Legislative intervention to rein in an agency, which includes the ultimate threat—complete defunding, is often applied through informal relationships, threats to embarrass, technical fixes, and larger political fights over policy. Thus, the Colorado Legislature has a high degree of control over the budget process, and there is evidence that it utilizes this power for legislative oversight.

The JBC, whose members include the appropriations committee chairs in both chambers, is primarily responsible for the management, operations, programs, and fiscal needs of the departments of the state government. The JBC is responsible for drafting an omnibus appropriations bill (called the Long Bill). The budget recommended by the JBC must then be approved by party caucuses in each chamber before moving forward. The house and senate appropriations committees have the power to make amendments. Changes, however, are rare.

²⁸⁸ Committee assignments pursuant to the SMART Government Act are detailed in a October 23, 2013 Colorado Legislative Council Staff memo addressed to the Members of the General Assembly titled “Committee of Reference SMART Government Act Hearings Appendix A” located at the following link: <https://www.colorado.gov/pacific/sites/default/files/13SMART%20Act%20Hearings%20Overview%20Memo.pdf>, accessed 6/26/18.

For example, in 2007, there were more than 100 proposed amendments to the budget, but few were adopted.²⁸⁹ The 2019 fiscal year budget saw 179 proposed amendments in both the house and senate, with only 20 making it into the final budget bill (Wirthman 2018). One of the reasons amendments often fail is a Colorado House Rule that requires any amendments that recommend an increase in the budget to identify a source for funding the increase. This rule is in place to ensure a balanced budget.

The JBC is also responsible for reviewing the gubernatorial budget and holds hearings with each agency prior to the start of the session. This review includes the budget for the judicial branch as well as executive branch agencies. To prioritize budget funds, the JBC reviews the performance plans for agencies to inform budget decisions.

Committees of reference are involved in the budget process by way of the SMART Act. The Act requires any committee with subject matter jurisdiction over an agency to hold a SMART Act Hearing with the agency to review its performance plan and make recommendations for its improvement. SMART hearings allow the legislative branch to ensure that departments are implementing laws as intended and to learn about planned changes to administrative rules. The committees of reference are also notified when agencies have not completed an audit recommendation and when it does not adopt required or authorized rules. The performance plans and the SMART Act hearings are used by the JBC to inform its allocations.

The JBC has significant budgetary powers compared to the rest of Colorado's legislature. There is some concern within the legislature that the six JBC members have too much power vis-à-vis the rest of the chamber. Interviews reveal that this issue triggered various reforms over the years with one common theme: distribute authority for the appropriations process throughout the legislature. Two Republican legislators express this in the editorial provided below.

Require committees of reference to be briefed, hold hearings about and create departmental budgets for their areas of oversight. These budgets would then be referred to the JBC by a date certain. At present, the JBC and its staff spends time with agency heads discussing proposed budget increases, but they rarely have time to discover whether a particular program is necessary, effective or wisely managed. That job is simply too large, even for the most talented and dedicated six people. The flip side of the current over reliance on the few is an under use of the many; to be more specific, there are scores of Republican and Democrat members whose experience and expertise could be useful to the budgeting process. Among current members are businessmen, financial planners, pilots, farmers, entrepreneurs, homemakers, lawyers, and others whose real-life experience with budgets and departments could ensure the state budget is given the scrutiny and insight it deserves. Their input will ultimately benefit the people of Colorado (Fort Morgan Times Editorials, 2017).

Accurate information is a critical component of legislative oversight. Colorado's legislature relies on a variety of sources of information: the state auditor's annual presentation, as discussed in the section on the analytic bureaucracy, gives a presentation once every year in November at the start of the budget process. This presentation identifies every agency and whether it has met the agreed to recommendations over the past five years. The report that

²⁸⁹ <http://www.ncsl.org/research/fiscal-policy/the-power-of-the-purse-legislatures-that-write-st.aspx>, accessed 6/28/18.

accompanies the presentation is called the *Annual Report: Status of Outstanding Audit Recommendations*. Experts on Colorado identified this presentation as a key input because it highlights which audited departments have not adopted audit recommendations and gives something like an over all, “report-card-like” grade for every agency with clear instruction for improvement (interview notes, 2018). It is a ready-made tool for holding the agency accountable for its actions or inaction. Another observer described the presentation as "serving notice to agency heads by giving the legislature at a crucial time information on their performance" (interview notes, 2018).

There are several sources of information in these processes, including: public hearings, including investigatory hearings triggered by an event, SMART Act hearings held by committees to review department performance plans, or LAC hearings on audits; and reports furnished at regular intervals by the agency to the committees of reference.²⁹⁰

In contrast to non-budget committee staff, budget staff rely less on reports furnished by agencies. Rather, they are more likely to go to the agencies directly and get what they need. For example, staff field trips to the agency worksite or talking to the department—staff-to-staff—are both considered more common among budget staff. In general, budget staff feels like these informal conversations and site visits provide the information they need about the day-to-day operations of the agency (interview notes, 2018).

Budget staff also relies on requests for information (RFIs) to the governor’s office and the inclusion of footnotes in bills, especially when their information needs require more than informal interaction. A "request for information" or "RFI" consists of a letter sent to the governor’s office. The quality of this information is mixed. In the past, budget staff has had protracted battles, but at some point, the governor learns that cooperation is better. The relationship between the budget staff and the current governor was characterized as good, and the information provided by his office is generally considered to be of good quality (interview notes, 2018). Prior to the practice of RFIs, budget staff relied primarily on writing footnotes or stipulations into bills about how agencies would spend money and specifying required information from the agency. Non-budget committee staff demonstrates little familiarity with footnotes or RFIs. The privileges that budget staff have in making recommendations compared to other staffs were emphasized by the interviewee (interview notes, 2018).

A Colorado Supreme Court decision in the early 2000s determined that this practice was a violation of separation of powers. Since then the legislature has narrowly defined footnotes in statute to meet the court's definition and uses footnotes much less. A recent example of footnotes was an attempt by the legislature to stipulate the number of full time equivalent positions and tie

²⁹⁰ For example, one budget briefing document states that a change in an agency disbursement cycle from one-year to two-year is accompanied by a requirement that the agency provide information to the relevant committee. The additional information written into statute provides a feedback mechanism and tool for the committee with jurisdiction over the agency to ensure the agency complies with legislative intent of the change in the disbursement cycle. This requirement for an agency update appears to be a typical pattern (interview notes, 2018). In this particular case, the intent was to allow well capping contractors to work through June 30 to July 1 without having to shutdown, which is required by procurement rules, thus saving in some cases \$10,000 or ¼ of a given project’s cost by avoiding shut downs. Sources have indicated that reports written into legislation are somewhat common and help committees of reference keep tabs on agency activity. But, one source also said that they are not sure who is reading many of the reports furnished by agencies to the committee. Moreover, they expressed uncertainty about the use made of these reports (interview notes, 2018).

them to a dollar figure. The governor has not cooperated with the legislature's desire for FTE information and instead provides information using the dollar figure (interview notes, 2018).

In addition to RFIs, footnotes, conversations with agency staff, and field trips, interviewees identified broad institutional knowledge as a major source of information for budget staff. Budget staff members, in many cases, don't feel like they need much or any additional information from agencies (interview notes, 2018). Instead, they rely on experience or knowledge of past budget formulae or prior expenditures for a given agency to make most general determinations.

We are told by sources that the differences between budget staff and non-budget staff are not only reflected in the sources of information they rely on, but some sources indicate that the difference is codified in statute, while others say that it is simply a difference in practice, as well. The 13-budget staff and their director are the only staff who can make recommendations to the legislature about proposed legislation. Other legislative staff is barred from doing so²⁹¹ (interview notes, 2018).²⁹²

Some legislative oversight through the appropriations process relies on technical fixes rather than sweeping reform. The latter appears to be the purview of the standing committees. For example, in response to 14 explosions and four deaths resulting from petroleum and gas wells and well lines improperly inactivated, the funding for orphaned wells was changed. Capping of orphaned wells had not caught up with demand as more and more wells were being

²⁹¹ We are told by one source that the difference is statutory and we await the statute. Another source suggests the statute might be 2-3-204, which the first source rejects. The second source doubts the existence of a statutory basis for the difference and suggests that it is the result of cultural, functional, and organizational differences between staff. Furthermore, this source posits that there are four kinds of staff: audit, budget, committee of reference, and legal. Audit and budget make recommendations on proposed bills as a matter of function and the respective committees, Legislative Audit Committee and Joint Budget Committee, rely on them to do so, e.g. recommending a bill to address an audit issue or providing fiscal analysis on a bill. Whereas legal and committee of reference staff do not, the former is prohibited by statute (2-3-5053) from lobbying and only their involvement on the statutory revision commission allows them to make recommendations dealing with defects and anachronisms in law while the latter does not have a statute barring them, there are fewer opportunities.

²⁹² (1) The committee shall interview persons applying for the position of staff director as to qualifications and ability and shall make recommendations thereon to the executive committee, which shall appoint the staff director as provided in section 2-3-303 (3). The staff director shall be responsible to the committee for the collection and assembling of all data and the preparation of reports and recommendations. The staff director shall also be responsible for preparing for consideration by the committee analyses of all requests for funds. With the approval of the committee, the staff director may appoint such additional professional, technical, clerical, or other employees necessary to perform the functions assigned to the committee. The staff director and such additional personnel shall be appointed without reference to affiliation and solely on the basis of ability to perform the duties of the position. They shall be employees of the general assembly and shall not be subject to the state personnel system laws. The committee shall establish appropriate qualifications and compensation for all positions. With the consent of the committee, the chairperson may contract for professional services by private consultants as needed.

<https://advance.lexis.com/documentpage/?pdmfid=1000516&crd=a7d3b6c2-b0ba-44a3-94b3-bc7778bc8ce8&nodeid=AACAADAABAACAAE&nodepath=%2FROOT%2FAAC%2FAACAAD%2FAACAAD AAB%2FAACAADAABAAC%2FAACAADAABAACAAE&level=5&haschildren=&populated=false&title=2-3-204.+Staff+director%2C+assistants%2C+and+consultants&config=014FJAAyNGJkY2Y4Zi1mNjgyLTRkN2YtYm E4OS03NTYzNzYzOTg0OGEKAFBvZENhdGFsb2d592qv2Kywlf8caKqYROP5&pddocfullpath=%2Fshared%2F document%2Fstatutes-legislation%2Furn%3AcontentItem%3A5T3S-CJD0-004D-115D-00008-00&ecomp=-Jh89kk&prid=f28f27e0-c83d-44f9-8289-328c8cbbfdb6>, accessed 10/10/18

abandoned due to energy price declines. A staff budget briefing argued for spending of funds for well capping over a two-year period.²⁹³ This would facilitate paying contractors for this work. Interviewees described this as a technical fix--a legislative action through the appropriations process that improved government efficiency with no cost or fanfare. In contrast, Matt Jones, member of the Senate Agriculture, Natural Resources, and Energy Committee, is seeking wider and sweeping changes in what he calls the "Protect Act." This reform has largely failed at the time of this writing (Fryar, 2017). We will discuss these attempts further in the section "Oversight Through Committees."

Interviewees pointed to the broad and overall authority of the legislature over the purse strings and the informal ways this power is leveraged to induce compliance from an agency (interview notes, 2018). Good working relationships provide channels to resolve disputes over forecasting and budgeting. But interviewees reported that these good working relationships could stop if the executive didn't respect legislative prerogatives. One interviewee described the legislature's role with respect to the other branches in very clear terms:

Think of it like the kid coming to his dad for a candy bar. Dad decides whether he gets one or not. The kid is probably going to approach his dad some different ways to get a candy bar but will learn that asking nicely is the way to do it (interview notes, 2018).

Moreover, these fights are rarely out in the open because public image plays a crucial role in the process. Informal negotiations that avoid embarrassment typified these conflicts (interview notes, 2018). The relationship is reciprocal. For example, while the legislature doesn't have to consider the governor's budget priorities, the legislature generally does so to maintain good working relationships (interview notes, 2018).

Oversight Through Committees

As previously discussed, other committees, including committees of reference, have oversight authority established by a joint resolution, JR 25b and through the processes established by the SMART Act. In contrast to the informal relationships and behind the scenes negotiation that characterize oversight through the appropriations process, other committees appear to take a more assertive approach, using public funding battles to induce agency compliance, even defunding programs. Media reports on defunding of the Colorado Energy Office by the legislature illustrate this approach (interview notes, 2018). As report in the Grand Junction Daily Sentinel:

Because of policy disputes from both sides of the political aisle last year, the office was allowed to expire without new funding. Democrats wanted the office to continue to focus on promoting renewable energy, while Republicans said it shouldn't turn its back on traditional energy sources (Ashby, 2018).

²⁹³ https://leg.colorado.gov/sites/default/files/fy2018-19_natbrf2.pdf, accessed 5/8/18.

Media describe a similar fight over defunding the Colorado Civil Rights Commission (CCRC) (Olabi, 2018a). The Joint Budget Committee voted to withhold funding pending a sunset review, the first of which was held February 13, 2018 by the House Judiciary Committee. Legislative oversight of the Civil Rights Commission reflects a hot-button, culture war political fight that originated from the Commission's decision to require a baker to make a cake for an LGBT couple and the political fury that ensued. Defunding, the intended use of the sunset, and a sharp confirmation vote—described in the section on gubernatorial appointments—demonstrate politically motivated oversight rather than bipartisan efforts to improve program efficiency or effectiveness.

Committees of reference, as well as other committees, gather information through questions at hearings posed by legislators to agency staff, statutory reports the agency is required to provide the legislature, and research produced by legislative staff. Questions at hearings arise from both staff input and legislative interest/initiative rather than from information in statutorily mandated reports (interview notes, 2018). As we noted above, these reports were not seen as a tool for appropriations staff to use in legislative oversight. Additionally, we found no indication that these reports were used by budget staff (interview notes, 2018).

Vignette: Oversight by a Committee of Reference: The Colorado Oil and Gas Conservation Commission

A current controversy over pipeline safety typifies how complicated and intense oversight by standing committees can be. An explosion on April 17, 2017 killed two people and injured two others. In response to this accident, two committees are reconsidering longstanding regulations governing orphaned wells. The explosion was caused by natural gas leaking from a well line six feet from the home (CBS Denver, 2017). The tragedy increased public attention on the dangers posed from leaking gas lines, not just to the homes and families who live in them, but also the environmental impact the lines pose to soil and water—a threat that could endanger thousands (Finley, 2017). In the wake of the explosion, the agency tasked with regulating the oil and gas industry, the Colorado Oil and Gas Conservation Commission (COGCC), ordered companies to identify and test all pipelines near occupied structures (Elliott, 2017).

In 2016, the COGCC deployed a team of three to monitor the thousands of miles of lines connected to 53,000 active wells and 36,500 inactive wells, including auditing companies' internal records (Finley, 2017). The April 2017 explosion fueled public pressure to publish the location of flowlines. The COGCC advocates updating the standards for designing, testing, permanently shutting down flow lines, and reporting the location of flowlines to the 811 number that property owners can call to have underground line locations flagged in advance of digging. The governor argues that making public a map showing the location of flow lines would be too dangerous, citing the risk of terrorism and thieves (Associated Press, 2018).

Legislators have deferred to COGCC and the executive branch, allowing them to address the hazards produced by the oil and gas industry. But, COGCC knows legislators are monitoring the issue, with the intent to draft legislation. The split legislative chamber has stalled the long overdue regulatory action (interview notes, 2018). These divisions within the legislature are urban and rural, rather than partisan (interview notes, 2018).

A hearing²⁹⁴ held on March 7, 2018, by the Senate Agriculture, Natural Resource, and Energy, on HB18-1071, illustrates the current political divisions and coalition formation.²⁹⁵ HB 1071 seeks to codify an appellate court ruling charging COGCC to prioritize environmental concerns rather than balancing environmental and commercial interests, as it has in the past. Various interests including commerce, resource extraction, workers, mineral rights, and residents who live near wells and well lines testified in opposition to the bill.²⁹⁶ They cited economic benefits, the overall safety or lack of evidence of environmental harm, and the technological achievements made possible by fossil fuels. Proponents of the bill included the interests of the environmental, school children, and residents living near wells and well lines. These groups cited the health impacts of chemicals released, the danger to public water, the violence done by explosions, and danger to the public health. The committee chair, a Republican, sought to enforce a rule that would exclude references to the explosion, which led to a shouting match between himself and one of the proponents, a resident living near a well and well line (Olabi, 2018c).

Democrats hold the majority in the house, including the Agriculture, Livestock, and Natural Resources Committee with oversight responsibility of COGCC that passed HB18-1071. Republicans hold the majority of the Senate Agriculture, Natural Resource, and Energy Committee responsible for COGCC oversight, which held the hearing on March 7, 2018. This particular hearing is emblematic of the politics on this issue (interview notes, 2018).

As these examples illustrate, Colorado's committees of reference may be actively involved in oversight, but the quiet resolution of issues through relationships that typify budget negotiations can be replaced by partisan battles, citizen activism, interest group pressures, and contention interactions. Moreover, oversight by these committees often resembles fire alarm rather than police patrol monitoring.

Oversight Through the Administrative Rules Process

Administrative rule review is authorized through the State Administrative Procedure Act (APA), which provides the legislature with authority over executive rulemaking. Administrative rules are effective for only a limited time, expiring annually on May 15, unless they are included in the legislature's annual "rule review bill," which must pass both chambers and be signed by the governor. This annual piece of legislation allows for the continuance of selected agency rules.

To initiate the rule formulation process, executive agencies are required to submit newly adopted or amended rules to the Office of Legislative Legal Services (OLSS) (CRS 24-4-103), a non-partisan support agency that provides legal counsel to the entire legislature. OLSS takes direction from and works closely with the Joint Committee on Legal Services (CLS), which has 10 members, five from each chamber. CLS reviews rules to determine if they fall under the rulemaking authority of the agency and tracks legislation that requires new rules, notifying the sponsor of the legislation when the rules have been adopted.

²⁹⁴ http://coloradoga.granicus.com/MediaPlayer.php?view_id=39&clip_id=12167, accessed 6/19/18.

²⁹⁵ Audio link to Colorado General Assembly Agriculture, Natural Resources, and Energy hearing held March 7, 2018; http://coloradoga.granicus.com/MediaPlayer.php?view_id=39&clip_id=12167, accessed 6/19/18.

²⁹⁶ http://coloradoga.granicus.com/MediaPlayer.php?view_id=39&clip_id=12167, accessed 6/19/18.

Agencies adopt rules and send them to the attorney general, who may reject them on constitutional or legal grounds only. The attorney general then files them as final. The agencies then have 20 days to submit them to the OLLS. The OLLS reviews each rule promulgated by an executive agency. If there is an issue with a rule, OLLS contacts the relevant agency for an explanation of the rationale for the rule. If the explanation by the agency is acceptable, the rule stands. There are two options available if the explanation is not acceptable. First, the agency may agree that there is a problem and start a separate rulemaking initiative. Second, if the agency believes that the rule is valid, it opts for a hearing before the JCLS. If rules are found to be improper, they will be identified in the rule review bill introduced in the next legislative session as rules that should not be continued. Rules with problems will be set for expiration on May 15 of each year. As noted above, JCLS introduces the rule review bill annually in both chambers to extend rules that are within the statutory authority of the agency. Rules that are outside of agency authority or conflict with the law or inconsistent with changes in statutes are allowed to expire. The agency determines the next course of action when a rule expires. The expiration of a rule can cause a gap and may result in non-compliance with statute. In general, they choose to promulgate a new rule to address the issue. According to an interviewee, “sometimes, the agency chooses to take no action, either because it leaves a ‘clean’ hole or some other reason” (interview notes, 2018). A “clean” hole means that the entire rule related to something that the agency does not have any rule making authority over and the entire rule does not get extended. This would leave nothing stranded in the rule. However, if the rule is supposed to address issues (a) through (e) and it only addresses issues through (d), due to a “sin of omission,” that’s not a clean hole, and they have to create a new rule to comply with the statute.

In circumstances where gaps may occur due to administrative rules not being authorized, agencies do have the option to adopt a temporary or emergency rule (CRS 24-4-103 (3a) (6)). Emergency rules are allowed to stay in effect for 90 days. If the emergency rule expires prior to the agency adopting a permanent rule or a second emergency rule adoption, the expired emergency rule is removed leaving nothing in its place.

Only occasionally will the OLLS contact agencies regarding issues with rules. The estimate given was less than 15% of rules require contact with the agency. Sometimes the person responsible for reviewing the rule misunderstood and overlooked something. Sometimes the agency is complying with a federal requirement that may require interpretation. The interviewee indicated that “in a significant number of cases, the agency ultimately agrees, and if there’s enough time they will try to fix it before [the OLLS] move[s] forward to the public hearing” (interview notes, 2018).

Oversight Through Advice and Consent

The senate is responsible for confirmation of gubernatorial appointments unless the specific office is constitutionally or statutorily exempt from confirmation. The governor appoints most, but not all, department heads, as well as hundreds of seats on commissions and boards, most of which require senatorial confirmation. As noted in the political context discussed at the outset of this discussion, the heads of the budget, economic development, energy, elections, information systems, and planning departments are exceptions that do not require confirmation by the senate (Council of State Governments, 2014).

The recent split in control of the house and senate produces some tension in the appointment process. As previously mentioned, the CCRC has drawn political attention. Animus grew when, due to a reporting error, Commissioner Heidi Hess, an LGBTQ rights organizer, was erroneously identified as the business representative to the board. Despite having served and been confirmed every year since 2013, she was not confirmed in 2017 on an 18-17 vote with Republicans citing objections from the business community that she was being appointed to their seat on the board. Democrats argued, to no avail, that she wasn't the business representative, that this was a website error that had been corrected (Sealover, 2017). In the ensuing maneuvering the governor refused to nominate a replacement, allowing Hess to continue as commissioner. A 2018 bill to address the dispute was drafted. It sought to prevent the governor from appointing an individual to a state office if the appointment is rejected by the senate (Olabi, 2018b). SB43 says if a person has a negative confirmation vote, the governor can't reappoint them, even during a recess, and that the pick cannot serve even temporarily while a replacement is being found (Olabi, 2018d; Olabi, 2018b). The CCRC was reauthorized in a compromise bill at the end of the 2018 session by HB 18-1256. The bill adds another business representative to the commission, balances party membership, and ensures that a rejected gubernatorial appointment has no authority to act on the commission (Brasch, 2018).

Conflicts between the executive and legislative branches over when a non-confirmed appointee can act predate the current split government. The senate failed to confirm a gubernatorial appointment to the Water Conservation Board when members of the same party split over whether to conserve water in the Rio Grande Basin or prioritize access to water for the growing population on the Front Range (interview notes, 2018). The governor appointed, during the recess, the candidate the senate blocked. Although the newly appointed commissioner attempted to participate in these controversial issues, the water conservation board specified under section 3760-104, subsection 1, "member of a board may not vote until they are confirmed." This effectively blocked a board member's vote. This regulation reflects a longer running effort to rein in the power of the executive branch (interview notes, 2018).

These incidents combined with the proposed legislation to limit gubernatorial recess appointments indicates that the Colorado Senate exercises its oversight prerogatives with respect to gubernatorial appointments much more vigorously than many state legislatures do.

In Colorado, the governor can use executive orders to manage emergency situations, to reorganize government, to fill vacancies, and to influence policy. During 2018, Governor Hickenlooper issued an executive order to prohibit the separation of children from their parents or legal guardians based on immigration status. The legislature has not power to review these orders other than to pass legislation prohibiting the governor's orders, and if the governor vetoed such legislation, try to override his or her veto.

Oversight Through Monitoring of State Contracts

The legislature does not have oversight over state contracts with vendors, although the legislature or its auditors could, as in other states, choose to examine contracts. The Office of State Purchasing and Contracts under the Office of the State Controller is responsible for coordinating the purchasing process, including bids for contracts. The only aspect of contracts that has any legislative oversight deals with personal services contracts. Each department must report annually information on personal services contracts to the standing legislative committees

of reference in each chamber of the general assembly with oversight responsibilities for the department (CSR 24-102-205(7)). This type of oversight is an effort to maintain the integrity of the civil service system.

The 2017 annual report of the Office of the State Auditor indicates that the legislature is actively using the limited contract oversight mechanism that is in place to monitor the procurement process of state agencies. An example can be found in the *2017 Office of State Auditor Annual Report*. As a result of a legislative request, the OAS completed a performance audit of the process for contracting services and for personnel selection in the Department of Human Services. The audit revealed that the department did not adhere to the Procurement Code,²⁹⁷ procurement rules, or its own established process for half of the RFPs audited. The OAS made three major recommendations and the Department of Human Services agreed to comply.

Oversight Through Automatic Mechanisms

Colorado was the first state to use sunset provisions in 1976. States can use different forms of sunset review: comprehensive review, regulatory reviews, selective reviews, and discretionary reviews. Baugus and Bose (2015) classify Colorado as a state with regulatory sunset reviews of agencies, boards, and government functions. A sunset review in Colorado is scheduled by the legislature, which sets a date on which an agency, board, or function of government will cease to exist unless its life is explicitly extended. The current list of scheduled sunset reviews includes nearly 150 entities and functions scheduled for review during the next decade.²⁹⁸ Among the entities currently scheduled for review are the Public Service Commission and the Gaming Board. Most of the reviews are of specific licenses for professional groups, however.²⁹⁹ The sunset review is conducted by the Colorado Office of Policy, Research, and Regulatory Reform (COPRR)³⁰⁰ prior to the sunset date that the legislature set. COPRR is a division under the Colorado Department of Regulatory Affairs (DORA), an executive branch agency responsible for ensuring a fair and competitive marketplace and consumer protection. COPRR is specifically responsible for regulating professions, occupations, and businesses, sunset, and sunrise review. COPRR issues an annual advisory report on the agencies, boards and functions it has reviewed. This report is sent to the Executive Director of DORA and to the legislature with findings and recommendations for termination or continuation of reviewed agencies, boards, or regulations. Based on sunset reviews, the legislature must pass a bill that lists the entities and functions it wants to retain. Those not listed are terminated on their sunset date.

Other sunset reviews are completed by the legislative committees of reference. Colorado state law provides criteria to assess whether a public need exists for an agency to continue. These sunset provisions provide an opportunity for legislators to challenge the existence of boards and commissions for reasons that might be political rather than evidence-based oversight. For example, Republicans in the Colorado Senate, some of whom object to the mission of the state's

²⁹⁷<https://www.colorado.gov/pacific/sites/default/files/Unofficial%20Procurement%20Code%20and%20Rules%208-18-2009.pdf>, accessed 6/26/18.

²⁹⁸ <https://www.colorado.gov/pacific/dora-oprrr/node/143201/>, accessed 7/17/18.

²⁹⁹ <https://www.colorado.gov/pacific/dora-oprrr/node/143201/>, accessed 7/17/18.

³⁰⁰ <https://www.colorado.gov/pacific/dora-oprrr/coprrr-sunset-reviews>, accessed 6/28/18.

Civil Rights Commission (CRC), are using a variety of oversight tools, including sunset reviews to restructure this commission. On February 7, 2018, the Joint Budget Committee used the appropriations process to defund the commission starting July 1, 2018 (Goodland, 2018b). Republicans argued that their vote to defund was actually for the purpose of reforming the commission through the sunset review process (Roberts, 2018). Democrats, who control the house, argue that it is inappropriate to defund a commission just because you disagree with its mission. Republicans counter that the commission is likely to survive the sunset review, but they seek to change how it operates including making it more business friendly and changes to the process of selecting civil rights commissioners. A subsequent funding measure for the Civil Rights Commission did pass both chambers, granting a year of funding in what would be considered a phase-out year unless reauthorization was granted during the sunset (Herrick, 2018). The House Judiciary Committee passed a clean reauthorization bill for nine years and did not include any of the sunset review recommendations, for example increasing the minimum penalty from \$50 for the first violation to \$5,000 (Goodland, 2018a). Both Republicans in the house and senate pushed for additional changes. Ultimately, a compromise was reached on the last day of session, business would get a stronger voice on the commission, the governor would not be able to reappoint a person already rejected by the senate, and the Civil Rights Commission would be reauthorized for nine years saving it from a phase-out year in 2019 (Paul, 2018).

The COPRR is also responsible for completing a sunrise review of requests for new regulations, boards, or other entities. The creation of a new regulatory board must be justified with a benefit-cost analysis, along with any additional information that can justify and support a new board. As noted earlier in this discussion, Colorado also uses sunrise review for administrative rules.

Methods and Limitations

For Colorado, out of the 19 people that were contacted, 14 people were interviewed. For committee hearings, agendas in both chambers are typically available and audio appears to be always available.³⁰¹ Live and archived video as well as agendas are available for floor debates in both chambers.³⁰² The Legislative Audit Committee is required by statute to keep minutes, though, it appears other committees either rarely or do not publish meeting minutes.³⁰³ There is no indication that transcripts are available online. There is no video for the Legislative Audit Committee or for the committees in the house or senate (interview notes, 2018).

³⁰¹ <https://leg.colorado.gov/watch-listen>, accessed 12/18/18.

³⁰² <https://www.coloradochannel.net/watch-meetings/#>, accessed 12/18/18.

³⁰³ https://leg.colorado.gov/sitewide-search?search_api_views_fulltext=minutes, accessed 12/18/18.

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