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HOW YOUNG LAWYERS CAN HELP RESTORE CONGRESSIONAL CAPACITY

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INTRODUCTION

Nearly eighty percent of Americans disapprove of the way Congress does its job.¹ Much of the blame can be attributed to its failure to substantively address many of the policy issues with which the public is concerned. And although some of this can perhaps be attributed to partisan gridlock and short congressional calendars, a substantial reason is simply that Congress does not have the appropriate capacity.

A large factor in this lacking capacity is a dearth of available, dedicated policy staff. In recent decades, Congress has cut vital committee staff and has minimized important research wings, like the Congressional Research Service. Compounding this problem is pressure for current staff to focus on other personal office and committee needs, such as communica-

1. "Congress and the Public," Gallup, Aug. 12, 2018. <https://news.gallup.com/poll/1600/congress-public.aspx>.

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tions and constituent services. In addition to these departures from policy work, Congress also suffers from frequent turnover. Often serving as staff or legislative assistants, low pay, unpleasant work environments and a lack of professional development opportunity means that younger staffers rarely stay on the Hill for long.

In order to combat this problem, there are various large-scale reforms that must be taken, such as increasing staffer pay, and establishing formal training and mentorship programs. However, there are also other, more immediate measures Congress should take to beef up its staffing resources. Accordingly, this paper recommends that Congress take steps to attract more young lawyers to serve as junior staff. The benefits of doing so are many and include having "in house" legislative drafters and analysts at the disposal of personal offices and committees, and having more young professionals with varied past experiences, ingrained work ethics, and strong research and writing skills.²

CONGRESS'S STAFFING PROBLEM

The number of congressional staff has significantly diminished over recent decades. Since 1979, House and Senate committees have cut over 1,200 staff, a decrease of over 33 percent.³ Over the same period, the General Accountability Office and Congressional Research Service—offices that

2. Importantly, this paper does not fight the maxim that "there are too many lawyers serving in Congress." This paper is not about the educational background of members of Congress, but rather the immediate qualities young lawyers offer for overburdened congressional committee and personal offices.

3. "Congressional Staff and Operating Expenses," *Vital Statistics on Congress* (Brookings, 2008), pp. 1-2. https://www.brookings.edu/wp-content/uploads/2017/01/vital-stats_ch5_full.pdf.

provide important, nonpartisan information to Congress—have cut over 2,500 or 41 percent of their employees.⁴⁵

In addition to diminishing staffing resources, in recent years, the focus for many congressional offices has shifted from positions that require substantive policy analysis to communications positions or constituent service staffers housed in district offices. One of the authors of this paper has focused extensively on this phenomenon and recently found that “the number of communications aides on House panels has increased by about 40 percent since 2001, while the number of policy-focused aides has stagnated.”⁴⁶ The Senate revealed similar staffing changes: “a 20 percent increase in communications staffers, a 5 percent drop in policy staff and a roughly 30 percent decline in senior staff—even as committee staffing overall has shrunk by 15 percent.”⁴⁷ The author’s findings support an obvious trend: In Congress, “show horses have crowded the other horses out of the stable.”⁴⁸ Or, put simply, growing constituent demands (based, in part, on more constituents per district than ever before and on modern technology’s ability to mobilize large groups to contact their representatives) have resulted in members hiring more communications and constituent service at the expense of aides responsible for researching, authoring and advancing legislative solutions.⁹ In fact, even staffers with legislative responsibilities are expected to execute constituency service. According to one survey, nearly 30 percent of legislative staffers spend a “great deal” of their time drafting responses to constituent inquiries and managing mail turnaround,¹⁰ and over 50 percent report having to work on constituent services “occasionally.”¹¹

4. Ibid. Note that the number of personal staff in the House and Senate has remained largely the same. Yet, during the same time, the U.S. population has grown by over 100 million, resulting in thousands of more constituents for each member of Congress. The size of the U.S. federal budget has also swelled to a \$4 trillion enterprise. See U.S. Census Bureau, “National Intercensal Tables: 1900-1990,” accessed Sept. 26, 2018, <https://www.census.gov/data/tables/time-series/demo/popest/pre-1980-national.html>; and “U.S. and World Population Clock,” U.S. Census Bureau, accessed Sept. 26, 2018, <https://www.census.gov/popclock>.

5. Another victim of congressional belt-tightening during this period was the Office of Technology Assessment (OTA), “an expert advisory agency that served as a think tank within Congress from 1972 to 1995, and made important contributions to shaping technology policy in the United States and abroad.” See Zach Graves and Kevin Kosar, “Bring in the Nerds: Reviving the Office of Technology Assessment,” *R Street Policy Study* No. 128, Jan. 24, 2018, p. 1, <https://209ub0417chl2lg6m43em6psi2i-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/Final-128-1.pdf>.

6. Casey Burgat and Charles Hunt, “Why was the Peter Strzok hearing such a circus? Because Congress wanted it that way,” *The Washington Post*, July 17, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/17/why-was-the-peter-strzok-hearing-such-a-circus-because-congress-wanted-it-that-way/?utm_term=.a193d0aa7e5d.

7. Ibid.

8. Ibid.

9. Alexander C. Furnas, “Legislative staff are spending an increasing amount of time on constituent services,” *LegBranch*, April 11, 2018, <http://www.legbranch.com/theblog/2018/4/11/legislative-staff-are-spending-an-increasing-amount-of-time-on-constituent-services>.

10. Ibid.

11. Ibid.

This shift away from legislative policymaking limits Congress’s ability to make laws. Indeed, research focused on House committee staffing shows that a greater number of staff increases the likelihood that legislation will be reported out of committee and passed on the floor; there is also an increase in the number of hearings held.¹² The same study finds the particular skills and expertise of staff in researching and producing legislation is relevant to what is ultimately passed by the lower chamber.¹³

In addition to its difficulty in passing laws, Congress has proven increasingly incapable of overseeing the executive branch. Under our constitutional framework, the executive is charged with implementing and executing the laws passed by Congress.¹⁴ In turn, Congress plays a key oversight role in ensuring that executive branch agencies are faithfully engaging in these duties.¹⁵ But given Congress’s diminished state—particularly at the committee level—it struggles to fulfill this role.

Congress’s resource disadvantage alone illustrates the problem. Whereas the executive branch encompasses several hundred agencies and 2 million civilian employees,¹⁶ congressional support staff hovers around 19,000 full-time employees.¹⁷ Further, in 2016, Congress allocated \$4.36 billion to itself in order to run its operations, which amounts to merely 0.4 percent of total federal spending.¹⁸ The result is that Congress has, in large part, ceded its title as the nation’s chief lawmaking entity. According to scholar Clyde Wayne Crews, in 2016, federal agencies enacted 3,853 rules compared to only 214 laws passed by Congress.¹⁹ In short, the combination of diminished staffing and the prioritization of political communications has limited Congress’s ability to fully consider wide-ranging policy and to enact influential legislation.

Even senior congressional staffers agree. Last year, the Congressional Management Foundation (CMF) released a

12. Casey Burgat and Charles Hunt, “How committee staffers clear the runway for legislative action in Congress,” *LegBranch*, June 13, 2018, <http://www.legbranch.com/theblog/2018/6/13/how-committee-staffers-clear-the-runway-for-legislative-action-in-congress>.

13. Ibid.

14. U.S. Const. art. II, § 3.

15. U.S. Const. art. I, § 8, art. II, §§ 2-4.

16. Clyde Wayne Crews, “Nobody Knows How Many Federal Agencies Exist,” *Competitive Enterprise Institute*, Aug. 26, 2015, <https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist>.

17. *Vital Statistics on Congress*, p. 2, https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch5_full.pdf.

18. Kellie Mejdrich, “Group Strives to ‘Make Congress Great Again,’” *Roll Call*, March 30, 2017, <https://www.rollcall.com/news/policy/group-strives-make-congress-great>.

19. Clyde Wayne Crews, “How Many Rules And Regulations Do Federal Agencies Issue?”, *Forbes*, Aug. 15, 2017, <https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/#6404646d1e64>.

report²⁰ based, in part, on surveys of senior staff working in both the Senate and House of Representatives. The report reveals that, by wide margins, senior staff believe that Congress lacks the resources and staff to adequately understand, consider and debate pressing national issues.²¹ These results are stark. According to the report, only 15 percent of senior staffers are “very satisfied” that the “knowledge, skills and abilities” of their staff “are adequate to support Members’ official duties.”²² Even worse, only 11 percent are “very satisfied” that their congressional office “has adequate capacity and support (staff, research capability, infrastructure, etc.) to perform its role in democracy.”²³ This demonstrates that even the staff members themselves understand the reality that they are too few in number to perform the job adequately.

The survey also reveals another issue in congressional staffing: Tenures for congressional aides are strikingly short, which ultimately results in a lack of long-term institutional knowledge. According to the same CMF report, “there are no staff positions in Senate or House committees or personal offices with a median tenure of more than *four years*.”²⁴ While overall staff turnover is comparatively low at 18.5 percent per year on average,²⁵ service on Capitol Hill is often seen as a stepping stone rather than a career; aides stay long enough to develop valuable contacts and experience only to depart for more lucrative job prospects.

What are the causes of such short stints on the Hill? Low pay is regularly the first—and most cited—culprit.²⁶ Indeed, congressional salaries have stagnated or even decreased in recent years.²⁷ And, as cost of living and salaries in other industries continue to rise in the D.C. metropolitan area,²⁸ it is possible that a greater percentage of staff will leave to pursue other, more lucrative opportunities in the region.

A second culprit is long hours and a chaotic work schedule. According to one survey, nearly 40 percent of staffers who left their congressional jobs cited the need for better work-life balance.²⁹ As summarized by one House staffer:

These days we just work, work, work [. . .] in terribly crowded and inadequate facilities with no privacy, for extremely long hours, and not knowing whether or not we can count on Congress being in session or not for Thanksgiving or Christmas holidays. These jobs are very hard on family life, and frankly, I’m getting tired of it.³⁰

A third culprit is the lack of professional development. Given the independent and autonomous structure of every personal office and committee, there are few institutional human resource policies that govern congressional staff as a whole. Moreover, there are no institutionalized training programs to educate new staffers in the convoluted ways, language and processes of Congress. The result is a frustrating work experience for young staffers who arrive in Washington expecting to impact policy, only to spend their first few years giving Capitol tours or answering constituent phone calls.

For example, many staffers begin their careers in Congress as an intern or staff assistant, focusing on general office duties. If they stay and express an interest in policy, they may ultimately become a legislative assistant. Legislative assistants focus on a myriad of policy topics, which they are expected to quickly understand and then to develop wide-reaching coalition networks of stakeholders and office superiors. But young staffers often do not have an educational background in their new policy field and office superiors have little time (or interest) in offering guidance. As a result, without formalized trainings and with increasing demands, staffers are left to their own devices to understand their new responsibilities, often with unsatisfying results.³¹

Finally, many members of Congress are simply bad bosses. Beyond the demanding work environment found in all congressional offices, many members have proven to churn through their employees at much higher rates than their colleagues.³² Many recent accounts have detailed lawmakers who berate their staff behind closed doors, demean them

20. “State of the Congress: Staff Perspectives on Institutional Capacity in the House and Senate,” Congressional Management Foundation, 2017. http://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf-state-of-the-congress.pdf.

21. Ibid.

22. Ibid., p. 9.

23. Ibid.

24. Ibid., p. 12 (emphasis added).

25. Casey Burgat, “Congressional staff turnover isn’t usually a problem. But when it is, it’s bad,” *The Washington Post*, July 31, 2018. https://www.washingtonpost.com/news/posteverything/wp/2018/07/31/congressional-staff-turnover-isnt-usually-a-problem-but-when-it-is-its-bad/?utm_term=.3eb8594e1c96.

26. “Life in Congress: Job Satisfaction and Engagement of House and Senate Staff,” Congressional Management Foundation and Society for Human Resource Management, 2013, p. 57. http://congressfoundation.org/storage/documents/CMF_Pubs/life-in-congress-job-satisfaction-engagement.pdf.

27. Lee Drutman, “Congress Needs More and Better-Paid Staff,” *Roll Call*, March 21, 2016. <http://www.rollcall.com/opinion/congress-needs-better-paid-staff>.

28. Bureau of Economic Analysis, “Real Personal Income for States and Metropolitan Areas, 2016,” U.S. Dept. of Commerce, May 17, 2018, pp. 1-3. <https://www.bea.gov/newsreleases/regional/rpp/2018/pdf/rpp0518.pdf>.

29. “Life in Congress,” p. 57. http://congressfoundation.org/storage/documents/CMF_Pubs/life-in-congress-job-satisfaction-engagement.pdf.

30. Ibid., p. 55.

31. Congressional staffers often seek guidance from the CRS, which suffers from its own staffing and institutional limitations. See Kevin R. Kosar, “Why I Quit the Congressional Research Service,” *Washington Monthly* January/February 2015. <https://washingtonmonthly.com/magazine/janfeb-2015/why-i-quit-the-congressional-research-service>.

32. “Congressional staff turnover isn’t usually a problem.” https://www.washingtonpost.com/news/posteverything/wp/2018/07/31/congressional-staff-turnover-isnt-usually-a-problem-but-when-it-is-its-bad/?utm_term=.7c3b2122de4b.

with duties such as dog-walking, and even instances of sexual harassment and gender discrimination.³³

Although these reasons are nonexclusive,³⁴ they provide an insight as to why many young congressional staffers quickly leave Congress. The result is an ineffective legislative body, which, in turn, pragmatically alters the structure of the federal government. As one author has noted, diminished staff, frequent turnover and inadequate training not only paralyzes Congress's ability to make good policy, but "inevitably lead[s] to increased lobbyist influence and executive branch legislating."³⁵

HOW YOUNG LAWYERS COULD HELP

Staffing decreases, shifting priorities and institutionalized turnover are damaging trends for the legislative branch. Policy staffers often lack the time or resources to adequately understand their legislative portfolio. Consequently, staffers are unable to properly scrutinize or generate sophisticated legislation. The result is a dysfunctional Congress led, not by elected representatives, but by party leaders, lobbyists and a ballooning executive branch.

Because law and legislative policymaking are directly intertwined,³⁶ more young lawyers working in personal offices or committees could help turn or—at the very least—repel this tide. Moreover, in an era of 2,000-page bills³⁷ and a colossal Code of Federal Regulations,³⁸ legislation is more complex than ever. As such, trained lawyers add substantial value to the legislative process by offering the practical skills provided by their legal training.

First, young lawyers can offer a legal analysis of pending legislation—the most obvious advantage of which is to determine whether a particular law can withstand a future legal challenge. Consider this: Legislator A wants to write a bill that limits money in politics. On its face, the bill is popular among her constituents and staff but without prior legal anal-

ysis, the legislator may be unaware her bill raises legitimate First Amendment concerns, interferes with other longstanding statutes and unintentionally alters certain federal regulations. Indeed, it would be a tremendous waste of resources for both the legislature and the legislators to consider and support a law that may be struck down quickly by the courts.

Second, young lawyers can serve as effective legislative drafters.³⁹ Some may contend that this is unnecessary due to the presence of the Office of Legislative Counsel (OLC), located in both the House and Senate. On the surface, this contention might seem fair. After all, the OLC is tasked with drafting bills, resolutions and, at times, even with offering legal and technical advice on proposed legislation, among other responsibilities.⁴⁰

But there is something legislative drafters in personal offices or committees offer that the OLC cannot: personalization and individualized advocacy. By rule, the Office of Legislative Counsel is neutral and serves all members equally.⁴¹ Consequently, an office without a legislative drafter may miss an opportunity to submit preferred language in a statute.⁴² Worse still, staff without such expertise may miss important language proposed by leadership or other offices, which may result in a law that undercuts a preferred policy result.⁴³ Moreover, with a legislative drafter, an office need not rely on the OLC for substantive drafting and revision and may only send drafts for smaller, non-substantive tweaks.⁴⁴

Third, young lawyers can offer substantive policy input. Notably, many were professionals in a myriad of fields before attending law school. Those who served in law enforcement, for example, could advise on criminal justice issues. Likewise, former members of the military could speak on national security matters and those who worked in finance could counsel on trade.

33. See, e.g., John Parkinson, "Disgraced former congressman Blake Farenthold won't repay \$84K sexual harassment settlement," *ABC News*, May 15, 2018, <https://abcnews.go.com/Politics/disgraced-congressman-blake-farenthold-wont-repay-84k-sexual-story?id=55175396>.

34. See, e.g., "Life in Congress," p. 57, http://congressfoundation.org/storage/documents/CMF_Pubs/life-in-congress-job-satisfaction-engagement.pdf.

35. Casey Burgat, "From staff cuts to lagging technology, Congress has a capacity problem," *Brookings Institution*, Sept. 11, 2017, <https://www.brookings.edu/blog/fixgov/2017/09/11/congress-has-a-capacity-problem>.

36. See, e.g., Dakota S. Rudesill et al., "A Program in Legislation," *Journal of Legal Education* 65:1 (2015), p. 78, <https://jle.aals.org/cgi/viewcontent.cgi?article=1308&context=home>.

37. Chris Cillizza, "2,322 reasons to hate Congress," *CNN*, March 22, 2018, <https://www.cnn.com/2018/03/22/politics/omnibus-analysis/index.html>.

38. See Philip Wallach and Kevin R. Kosar, "The Case of a Congressional Regulation Office," *National Affairs*, Fall 2016, <https://www.nationalaffairs.com/publications/detail/the-case-for-a-congressional-regulation-office>.

39. Many law schools now have dedicated legislative clinics or courses focused on legislation and legislative drafting. See Standing Committee on Pro Bono & Public Service, "Public Interest Clinics," American Bar Association, July 18, 2018, https://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_pi_clinics.html.

40. See *Office of Legislative Counsel: House*, Congressional Research Service, May 21, 2014, p. 1, https://www.everycrsreport.com/files/20140521_RS20735_5602d53c959671a784d097fa270331147ae8a89d.pdf; and *Office of Legislative Counsel: Senate*, Congressional Research Service, May 21, 2014, p. 1, https://www.everycrsreport.com/files/20140521_RS20856_b17d145738947b1e8bbbc8484b8ec128df53238a.pdf.

41. Jarrod Shobe, "Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting," *Columbia Law Review* 114:4 (May 2014), p. 828, <https://columbialawreview.org/wp-content/uploads/2016/04/May-2014-6-Article-Shobe.pdf>.

42. *Ibid.*, p. 829.

43. *Ibid.*, p. 827. See also, Ganesh Sitaraman, "The Origins of Legislation," *Notre Dame Law Review* 91:1 (December 2015), p. 114, <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4623&context=ndlr>.

44. Deborah A. Widiss, "Making Sausage: What, Why and How to Teach About Legislative Process in A Legislation or Leg-Reg Course," *Journal of Legal Education* 65:1 (2015) p. 104, <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2838&context=facpub>.

Finally, young lawyers can offer other services not directly related to law. For one, many leave law school with improved research and writing skills. These staffers would have the ability to tailor their research quickly and to produce memos (or policy papers) that condense and succinctly explain a number of complicated topics. Another benefit would be their generally strong oral communication skills and the ability to think quickly on their feet. This would no doubt be useful to staffers working with other congressional offices, the media or the public at large. An additional skill would be the experience working in a fast-paced environment with tight deadlines, which is a significant attribute for any congressional staffer.

As best summarized by Professor Dakota Rudesill, “legislative work is legal work.”⁴⁵ As such, lawyers are vital for the legislative process. For this reason, many young lawyers are especially capable of serving as effective congressional staffers, as they can give legal analysis of pending legislation, draft the legislation itself, offer substantial policy proposals and have particular skillsets that are suited to the demands of the job. In short, given Congress’s current staffing limitations, young lawyers could offer a much-needed resource.

CURRENT OBSTACLES TO ATTRACTING YOUNG LEGAL TALENT

The Salary and Calendar Problem

A significant reason why young, talented lawyers cannot work in Congress is the same reason why so many staffers leave in the first place: low pay. For many law school graduates, this is not a decision based on greed but rather necessity. Today, the average congressional salary is just over \$50,000.⁴⁶ To compare, the cost of attending an elite law school is often well over \$50,000 *each year*,⁴⁷ and the average student debt has surpassed \$100,000.⁴⁸ As a result, for most newly minted lawyers, working in Congress after law school is simply not an affordable option.

Traditional legal jobs simply offer far better salaries. Law firms are especially attractive for recent law school gradu-

ates. Elite law firms in the nation’s largest cities, for example, offer up to \$190,000 salaries for first-year associates.⁴⁹ Less-prestigious law firms are not far behind. According to the National Association for Law Placement, the median salary for all first-year associates is \$135,000.⁵⁰ For smaller firms (with 50 or fewer lawyers), the median salary is still \$90,000.⁵¹

Law school graduates who wish to pursue legal public service careers also, on average, do better than young congressional staffers. For those interested in federal service, there are generally two avenues: clerking for a federal judge or joining a federal agency through a law “honors” program. In both positions, first-year lawyers are paid according to a federal salary scale.⁵² Accordingly, a law school graduate clerking for a judge or working in an agency in Washington would earn approximately \$68,000 in the first year and, after two or three years, could expect a salary close to \$100,000.⁵³

Furthermore, young attorneys with clerkship experience often reap lucrative bonuses upon leaving government service. Law firms often compete with one another to hire recent judicial clerks as a way of enhancing the profile and prestige of their workforce. Firms that frequently have cases before a particular court also seek to hire former clerks from that court to provide special insight into a particular judge’s decision-making process. Numerous firms offer clerkship bonuses north of \$75,000,⁵⁴ with bonuses for Supreme Court clerks ranging as high as \$350,000.⁵⁵

Even young lawyers in local government typically fare better than their peers in Congress. The median salary for an entry-

45. Dakota S. Rudesill, “Closing the Legislative Experience Gap: How A Legislative Law Clerk Program Will Benefit the Legal Profession and Congress,” *Washington University Law Review* 87:3 (2010), p. 2 (emphasis added). <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1293&context=facpub>.

46. Marilyn Icsman, “Here are the congressional offices that pay staffs the highest and lowest salaries,” *USA Today*, March 23, 2018. <https://www.usatoday.com/story/news/politics/onpolitics/2018/03/23/here-congressional-offices-pay-staffs-highest-and-lowest-salaries/450064002>.

47. “Best Law Schools 2019,” *U.S. News & World Report*, 2018. <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?int=9c0f08>.

48. Farran Powell, “11 Law Schools Where You Can Pay Off Your Debt,” *U.S. News & World Report*, May 31, 2018. <https://www.usnews.com/education/best-graduate-schools/top-law-schools/slideshows/10-law-schools-where-you-can-pay-off-your-debt>.

49. Debra Cassens Weiss, “Several firms follow Cravath after it beats Milbank on associate pay raises and adds bonuses,” *ABA Journal*, June 14, 2018. http://www.abajournal.com/news/article/several_firms_follow_cravath_after_it_beats_milbank_on_associate_pay_raises.

50. “Associate Salaries Rise in Some Markets, But National Median Remains Unchanged,” National Association for Law Placement, June 1, 2017. <https://www.nalpl.org/uploads/Research/AssociateSalarySurveyReportPressRelease.pdf>.

51. Ibid.

52. See, e.g., “Qualifications, Salary, and Benefits,” U.S. Courts, Feb. 1, 2018. https://oscar.uscourts.gov/qualifications_salary_benefits; “Entry-Level (Honors Program) and Experienced Attorneys – Attorney Salaries, Promotions, and Benefits,” U.S. Dept. of Justice, Aug. 5, 2015. <https://www.justice.gov/legal-careers/attorney-salaries-promotions-and-benefits>.

53. Ibid. See also, “Judiciary Salary Plan,” U.S. Courts, Jan. 8, 2018. http://www.uscourts.gov/sites/default/files/jsp_washington_dc_2018_0.pdf; “Salary Table 2018-DCB,” Office of Personnel Management, 2018. <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/DCB.pdf>.

54. David Lat, “Clerkship Bonus Watch: Will \$75K Become The New Standard?,” *Above the Law*, Jan. 20, 2016. <https://abovethelaw.com/2016/01/clerkship-bonus-watch-will-75k-become-the-new-standard/>.

55. Katelyn Polantz, “Wilkinson Walsh Lures SCOTUS Clerks With \$350K Bonuses, Hires in 3 Cities,” *Law.com*, Aug. 21, 2017. <https://www.law.com/nationallawjournal/almID/1202796052352/?slreturn=20180630112425>.

level public defender is \$58,300.⁵⁶ Local prosecutors see a similar starting salary at \$56,200.⁵⁷ The median salary for both positions after five years is north of \$65,000.⁵⁸ Lawyers working in public interest and legal services organizations often see starting salaries comparable to young congressional staffers.⁵⁹ Yet these lawyers can expect substantial raises in just a few years and often work in areas with a lower cost of living than Washington, D.C.

In addition to pay, Congress's random and volatile hiring schedule impacts its ability to hire talented law school graduates. When a staffer leaves a personal office or committee, that office expects to fill the vacancy immediately. This is understandable, as only one vacancy could devastate an already overburdened staff. But other legal employers are systematically ahead of the hiring curve.

Consider law firms: Many law students work for firms in the summer before their final year. These programs are essentially ten-week job interviews, where firms will give job offers roughly a year before students can begin full-time work.⁶⁰ Similarly, federal agencies also hire law students well before graduation. The Department of Justice's Attorney General's Honors Program, for example, requires law students to send applications in early September and makes hiring decisions soon after, well in advance of graduation and the bar exam.⁶¹ Federal judges likewise make offers a year (or even earlier) before a clerkship is set to begin, and often time the start of the clerkship to coincide with a young attorney's graduation from law school.⁶²

The Allure of Other Legal Jobs

Even if a young lawyer has the opportunity to work for Congress, many will consider more rewarding experiences. Beyond availability and superior pay, many legal jobs⁶³ have

attributes that congressional jobs do not: job satisfaction, training, autonomy and mentorship opportunities.

The most illustrative example of this divide is the typical experience between a young congressional staffer and a post-graduate law clerk. Law clerks typically work with a state or federal judge, conducting legal research and drafting legal memos and opinions.⁶⁴ These law clerks often have the opportunity to observe hearings or trials and interact with attorneys and other judges. For new attorneys, the experience is invaluable. In one study, former clerks were asked to rate their experience on a scale of 1 to 10. Approximately 85 percent of respondents rated their experience an eight or above, and one-third gave their experience a perfect 10.⁶⁵ Only 3.7 percent of respondents rated their experience a five or below.⁶⁶

While clerkship experiences can vary depending on the judge for whom a clerk is working, often, clerks also enjoy significant autonomy in their roles. Many are tasked with overseeing numerous cases on a judge's docket, which means they take the lead in conducting the legal research relating to the case and usually take the first crack at drafting the judge's final decision. This structure allows clerks to exercise individual decision-making skills and develop their own thought processes, while at the same time receiving valuable mentorship and feedback as their draft opinion gets revised and reworked by the judge.

Despite this autonomy, law clerks also enjoy excellent training opportunities. In the federal courts, for example, the Federal Judicial Center develops numerous training programs and seminars for law clerks.⁶⁷ And, at least in one federal circuit, law clerks are invited to a multi-day seminar to learn more about case management, applicable court rules and legal topics they may encounter in their work.⁶⁸ These and other experiences have proven beneficial for clerks as they continue in their career. In the same study referenced above,

56. "Findings from the NALP/PSJD 2018 Public Service Attorney Salary Survey," National Association for Law Placement, June 2018. <https://www.nalp.org/0618research>.

57. Ibid.

58. Ibid.

59. Ibid.

60. See, e.g., "Historical 2L Summer Employment Sectors," Yale Law School, accessed Sept. 26, 2018. <https://law.yale.edu/student-life/career-development/employment-data/historical-2l-summer-employment-sectors>.

61. "The Attorney General's Honors Program," U.S. Dept. of Justice, Feb. 9, 2018. <https://www.justice.gov/legal-careers/entry-level-attorneys>.

62. See, e.g., "Federal Law Clerk Hiring Plan," U.S. Courts, February 2018. https://oscar.uscourts.gov/federal_law_clerk_hiring_pilot.

63. Like many high-pressure careers, the authors acknowledge that not all legal jobs are rewarding or happy experiences. Indeed, whether because of their careers or otherwise, there is substantial scholarship showing that lawyers disproportionately suffer from substance abuse and other mental health issues. See, e.g., Patrick R. Krill et al., "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," *Journal of Addictive Medicine* 10:1 (January/February 2016). https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx.

64. See, e.g., "Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges," Federal Judicial Center, 2017, p. 1. <https://www.fjc.gov/sites/default/files/2017/Law%20Clerk%20Handbook.pdf>.

65. National Association for Law Placement, "Table 63: Rating of Overall Clerkship Experience," *Courting Clerkships: The NALP Judicial Clerkship Study*, October 2000. https://www.nalp.org/clrktb46_66#61.

66. Ibid.

67. See "The Federal Judicial Center: Education and Research for the U.S. Federal Courts," Federal Judicial Center, accessed Sept. 26, 2018. <https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf>.

68. See, e.g., "Alumni Events," University of Richmond School of Law, 2016. <https://calendar.richmond.edu/page.html?eventid=14454&informationid=casData.startdate:2018-10-12,enddate:2018-10-12,starttime:000000,endtime:000000>.

nearly all respondents agreed that clerkships enhanced their legal knowledge and abilities.⁶⁹

Another signature advantage law clerks receive is mentorship. During their clerkship, they work closely with their judges, who often serve as invaluable mentors. This dynamic often continues throughout their legal career.⁷⁰ As summarized by one former clerk:

[The Judge] was deeply interested in his clerks' progress and development as well as their career after they left the clerkship, and, therefore, was more than happy to share his wealth of life stories and lessons with them. As I reflect upon my two years with the Judge, I know that while I worked on some very interesting and challenging legal matters, it is the time I spent with the Judge talking with him, listening to his many stories and historical anecdotes, and trying to learn from them that I will always cherish most. In just two years, the Judge provided me with an abundance of knowledge with which to proceed confidently into my post-clerkship life. The things that I learned have equipped me to be successful not only professionally, but personally as well.⁷¹

A final advantage of judicial clerkships is that they are almost always term-limited, lasting a year or two but no longer. This means both the clerk and the judge understand the temporary nature of the clerk's employment, thereby allowing the clerk to openly search for post-clerkship job opportunities without appearing disloyal. Because of this, judges can provide direct career advice to clerks about post-clerkship opportunities and how to obtain them, a setup that is often impossible in non-term-limited positions such as a congressional staff position.

CONSEQUENCES

Today, there are few leaders of the legal profession with legislative experience. According to one study, only 14 percent of federal appellate judges and 5 percent of top law school

professors have legislative experience.⁷² In contrast, 72 percent of federal appellate judges and 28 percent of top law school professors have worked in the executive branch.⁷³ The ratio is similar for elite practicing lawyers: Only 4 percent have ever worked in the legislature while 27 percent have worked in the executive branch.⁷⁴

Without substantive change, there is little reason to believe this will change in the future, and this is a problem for Congress's influence and effectiveness. Indeed, lawyers without legislative experience will be the same lawyers that "will staff the courts that interpret, the agencies that implement, the firms that practice, and the law schools that teach the law Congress writes."⁷⁵ Congress is not properly served if these graduates have solely executive or judicial branch experience.

Young lawyers themselves also suffer from this lack of legislative experience. Operating as a legislative counsel differs significantly from other types of legal employment, which means that the skills derived from time working in the legislative branch are underrepresented in today's legal marketplace. Young attorneys in private practice or serving as judicial clerks primarily engage with case law, meaning they litigate or decide individual cases. Lawyers working in the executive branch are often involved in administrative proceedings that mirror many of the facets of a court case or they oversee the promulgation of discrete regulations.

Rather than being case law-centric like other legal jobs, legislative counsel work involves turning broad and sometimes vague policy ideas into concrete legislative language. As noted above, legislative attorneys must draft bills that implement policy ideas while ensuring they do not step on constitutional landmines or run afoul of existing laws and precedents. By and large, attorneys in private practice lack the skillset of a legislative attorney—one that can be valuable for attorneys engaged in lobbying activities or seeking to advance a client's interest via legislation rather than litigation. Having more young attorneys with legislative counsel experience would thus help not only Congress but lawyers themselves.

RECOMMENDATIONS

The decline of dedicated policy staff and the wounds of short tenures among young staffers has negatively impacted Con-

69. See National Association for Law Placement, "Table 58: Skills the Clerkship Helped to Enhance or Develop," *Courting Clerkships: The NALP Judicial Clerkship Study*, October 2000. https://www.nalp.org/clrk46_66#58. Specifically, 98.3 percent of respondents agreed that their clerkship either "significantly" or "moderately" enhanced their general legal ability or judgement; 97.5 percent agreed that their clerkship either "significantly" or "moderately" enhanced their general knowledge or experience.

70. See, e.g., Harvey Gee, "Judicial Perspective and Mentorship at the Supreme Court: A Review Essay on *In Chambers: Stories of Supreme Court Law Clerks and Their Justices*," *Duquesne Law Review* 51:1 (2013), p. 218. [https://www.westlaw.com/Document/11bc7cae2983611e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/11bc7cae2983611e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

71. Joseph B. Shumofsky, "Dedication: Judge David N. Edelstein: My Boss, My Mentor, My Friend," *Fordham Law Review* 69:1 (2000), p. 7. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3660&context=flr>.

72. "Closing the Legislative Experience Gap," p. 8. <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1293&context=facpub>.

73. Ibid.

74. Ibid.

75. Dakota S. Rudesill, "Keepers of the U.S. Code: The Case for a Congressional Clerkship Program," *Student Scholarship Papers* 71 (2008), p. 3. https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1071&context=student_papers.

gress's ability to do its job. More young lawyers staffing Congress could help. Yet, many of the most qualified ones are unwilling to serve in the legislative branch due to its unreliable hiring schedule and the availability of more lucrative and rewarding job opportunities. To address this issue, the following steps should be taken both in the long and short-term.

First, Congress must take steps to reduce the epidemic of continuous turnover and many of the bugs that prohibit lawyers from considering public service on the Hill. Doing so requires addressing the issues of low pay, low job satisfaction and the lack of professional development opportunities. Accordingly, Congress should commit to increasing staff pay and allowing personal offices and committees to increase their policy staff. The benefits are obvious, as more qualified staff increases legislative activity.⁷⁶

Yet due to politics and perception, it is unlikely that Congress can do either of these things in the near future. But it can take other, long-term actions. One is establishing a formal training program for incoming and established staff. Although some outside organizations already offer education and training to congressional staff,⁷⁷ an internal program would make such opportunities more accessible and a more common practice among the many personal offices and committees. Another is a mentorship program. As seen in other professional environments—such as in judicial chambers—a culture of senior mentorship and collaboration improves job satisfaction and is an attractive feature for employee recruitment. However, even if the aforementioned measures attract more young lawyers, Congress still suffers the “calendar” problem.

One solution would be for Congress to implement a legal “honors” program, akin to the post-graduate legal opportunities available in the judiciary or executive branch. Professor Dakota Rudesill, among others, has advocated for such a program.⁷⁸ Under Professor Rudesill's vision, the program would begin as a pilot, with the Committee on Rules and Administration in both the House and Senate each selecting six graduating law students to serve as congressional law clerks for one year.⁷⁹ The six clerks chosen by the Sen-

ate would have the choice to interview and clerk with any Senate committee, personal office or independent office, like the Office of the Parliamentarian. The same options would be available to the six selected House law clerks.⁸⁰

Although modest in scope, this program would begin to address many of the current staffing deficiencies described above. Specifically, it addresses the “calendar problem” by allowing Congress the flexibility to recruit and select law students before they graduate.⁸¹ It also addresses the current pay gap by, “if practicable,” compensating congressional law clerks equal to those serving in the judiciary or executive branch.⁸²

Law schools can also do their part, including encouraging students to look at nontraditional legal opportunities, like working for Congress (or their respective state legislatures). Law schools should also place more emphasis on courses that focus on legislative policymaking and statutory interpretation. As Justice Antonin Scalia remarked on numerous occasions: “We live in an age of legislation, and most new law is statutory law.”⁸³ Despite this, the vast bulk of legal education focuses on common law (i.e., reading and analyzing judge-made law stemming from court holdings in legal cases). As such, law students are often unexposed to the tasks most predominately associated with legislative counsel work: interpreting statutes, drafting legislative language, ascertaining agency jurisdiction and so on.

If more law schools dedicated more curriculum space to legislative counsel-type training—such as offering courses taught by former legislative counsel practitioners or establishing legislative clinics that allow law students to serve in legal externship roles in Congress—more young lawyers might form an interest in working on Capitol Hill. Given its influence over the curriculum of American Bar Association-accredited law schools, the ABA could also play a supporting role in this effort. In short, to create more legislative attorneys for Congress, our nation's law schools need to equip students with the particular skills those roles require.

CONCLUSION

Currently, Congress lacks the tools to fulfill its role as the First Branch of government. Fortunately, there is some momentum on both sides of the aisle for change. Republicans like Sen. Mike Lee (R-Utah) and Sen. Ben Sasse (R-Neb.), for example, have publicly stated their frustrations with

76. “How committee staffers clear the runway for legislative action in Congress,” <http://www.legbranch.com/theblog/2018/6/13/how-committee-staffers-clear-the-runway-for-legislative-action-in-congress>.

77. See, e.g., “Our Work,” Congressional Management Foundation, accessed July 26, 2018, <http://congressfoundation.org/about-cmf/our-work>.

78. See Abbe Gluck and Dakota Rudesill, “Introducing the Congressional Clerkship,” *Balkinization Blog*, Dec. 8, 2016, <https://balkin.blogspot.com/2016/12/introducing-congressional-clerkship.html>; “Closing the Legislative Experience Gap,” <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1293&context=facpub>; and “Keepers of the U.S. Code: The Case for a Congressional Clerkship Program,” http://digitalcommons.law.yale.edu/student_papers/71.

79. The program was introduced this Congress as the Daniel Webster Congressional Clerkship Act, with bipartisan support in the House and Senate. See S. 1604, 115th Congress (2017-18), introduced July 20, 2017; and H.R. 5527, 115th Congress (2017-18), introduced April 17, 2018. As of publication, however, neither bill is expected to reach a full vote.

80. *Ibid.*

81. *Ibid.*

82. *Ibid.*

83. Erika Bachiochi, “A Matter of Interpretation,” *Ethics & Public Policy Center*, Feb. 16, 2016, <https://epcc.org/publications/a-matter-of-interpretation>.

Congress's self-imposed limitations.⁸⁴ And Rep. John Sarbanes (D-Md.) recently called for a bipartisan select committee to “find ways to improve Congressional capacity so that Congress works better for the American people.”⁸⁵

Among the oft-cited reforms—such as strengthening congressional committees⁸⁶ and eliminating rules that punish lawmakers for defying party leadership⁸⁷—Congress must prioritize the growth and enrichment of its policy staff. Indeed, failure to do so will negate all other reforms. After all, diminished staff—plagued by frequent turnover and inadequate training—will continue to cripple substantive oversight and the production of non-delegating legislation, irrespective of other reforms.

An immediate way for Congress to do so is to promote the hiring and retention of young lawyers. Such an effort offers several benefits, including more “in house” legal analysts and legislative drafters in personal offices and committees, staffers with substantive prior policy experience in a myriad of applicable fields, and staffers with excellent research and writing skills.

To recruit young lawyers, Congress must enact substantive changes that similarly repel many other potential staffers: low pay, low job satisfaction and limited training opportunities. Congress must also establish programs or incentives in order to compete with traditional legal employers, which attract the majority of young lawyers and law school graduates. Proposals like the congressional clerkship program are creative and promising approaches—and avoid many of the identified hiring pitfalls.

In closing, Article I of the Constitution states, “All legislative Powers herein granted shall be vested in a Congress of the United States.”⁸⁸ If given the opportunity, students of the Constitution can help Congress restore the strength of its intended lawmaking authority.

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84. See, e.g., Michelle Cottle, “Mike Lee’s New Crusade,” *The Atlantic*, Feb. 12, 2016. <https://www.theatlantic.com/politics/archive/2016/02/mike-lee-article-one-project/462564>; Office of U.S. Senator Ben Sasse, “Sasse on Kavanaugh Hearing: ‘We Can And We Should Do Better Than This,’” Sept. 4, 2018. <https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this>.

85. Democracy Reform Task Force, “Sarbanes Urges Congressional Leaders to Study and Improve the Way Congress Works,” Sept. 14, 2018. <https://democracyreform-sarbanes.house.gov/newsroom/press-releases/sarbanes-urges-congressional-leaders-to-study-and-improve-the-way-congress>.

86. See Kevin R. Kosar and Adam Chan, “A Case for Stronger Congressional Committees,” *R Street Policy Study* No. 66, August 2016. <http://www.rstreet.org/wp-content/uploads/2016/08/66.pdf>.

87. Jonathan Bernstein, “Republicans Want to Change the Rules. They Know It’s a Bad Idea,” *Bloomberg Opinion*, Sept. 13, 2018. <https://www.bloomberg.com/view/articles/2018-09-13/republican-rule-change-ignores-need-to-strengthen-house>.

88. U.S. Const. art. I, § 1.