

## ***DISCUSSION DRAFT***

### **Keepers of the U.S. Code: The Case for a Congressional Clerkship Program**

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#### **100 WORD TEASER:**

Under the Constitution, Congress drives the federal lawmaking process. Yet every year our best new lawyers focus their competitive energies not on jobs with the nation's legislature but rather on judicial clerkships and other prestigious apprenticeships with executive agencies, law firms, and academe.

Congress should be concerned. But it needs to understand that this demand deficit has grown from a supply problem. Unlike the courts, agencies, firms, and academe, Congress lacks an apprenticeship program to capture the interest, harness the abilities, and shape the minds of the law's young elite. Legislation passed by the House is a terrific starting point for a successful congressional clerkship program.

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For the first time in the legal literature,<sup>2</sup> I here set out the full case for a congressional clerkship program analogous to that of the judiciary. After explaining Congress's current comparative inaccessibility, and identifying several benefits of such a program, I argue that it would be a good first step toward redressing the dramatic dearth of legislative experience among the profession's elite demonstrated by my new empirical analysis. I conclude by explaining what Congress needs to do to make successful over the long run the pilot program that would be created under a bill that passed the House on September 9, 2008.

## I.

Two years ago, Robin West<sup>3</sup> was right to call for a congressional companion to the judiciary's clerkship program, through which young lawyers spend an intensive year helping judges draft opinions. But West was wrong to imply that Congress does not seek out qualified assistants. Members and committees do complex legal work and are keenly interested in the best and brightest. Every year Congress hires hundreds of able young people, many of whom have J.D.s, as legislative assistants (LAs), counsels, and committee professional staff members (PSMs) – the influential staffers without whom Congress could not write the law.<sup>4</sup>

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<sup>2</sup> The only discussions in the legal literature are Robin West's (unheeded) call in late 2006 for such a program (Robin West, *A Response to Goodwin Liu*, 116 YALE L.J. POCKET PART 157, 161-162 (2006), available at <http://thepocketpart.org/2006/11/21/west.html>), and two passing references in unrelated works. See AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 216-217 (2005) ("top students graduating from elite law schools are far more apt to apprentice by clerking for a federal judge than by interning for a representative or senator"); and Andrew P. Morriss, *The Market for Legal Education & Freedom of Association: Why the "Solomon Amendment" is Constitutional and Law Schools Are Not Expressive Associations*, 14 WM. & MARY BILL RTS. J. 415, 448 n.154 (2005).

<sup>3</sup> West, *supra* note 2.

<sup>4</sup> Of course, Congress already has a number of professionals in its employ called clerks. In some cases the chief of staff or office manager for a committee or subcommittee is designated the clerk. The Clerk of the House, an office dating to 1789, superintends a variety of administrative functions including coordinating the flow of legislative paper; see <http://clerk.house.gov/about/duties.html>. The Clerk of the House's counterpart since the First Congress has been the Secretary of the Senate, to whom reports the Senate parliamentarian, bill clerk, legislative clerk, enrolling clerk, journal clerk, and executive clerk; see [http://www.senate.gov/artandhistory/history/common/briefing/secretary\\_senate.htm](http://www.senate.gov/artandhistory/history/common/briefing/secretary_senate.htm) #4. However, none of these clerks are law clerks as lawyers today generally understand the position: an assistant lawyer, usually in apprenticeship, who researches the law. Designating the new congressional staff members I propose "Congressional Law Clerks" or "Legislative Law Clerks" should minimize confusion.

Rather, where Congress has erred is in not understanding that the “law clerk market”<sup>5</sup> – the labor pool of the nation’s top law graduates – is composed of the profession’s future leaders. They will staff the courts that interpret, the agencies that implement, the firms that practice, and the law schools that teach the law Congress writes. In contrast, each of these other dominant market players recognizes that top law graduates are very able and that their first jobs after law school shape their view of the law. Accordingly, each has an apprenticeship program: federal judges hire two to four clerks each through a unified law clerk hiring plan; executive branch agencies have “Honors” programs and recruit at top law schools; law firms have analogous junior associate programs and platinum-plated recruiting efforts; and, law schools annually hire junior faculty and fellows.

To get a sense of Congress’s comparatively ad hoc, idiosyncratic hiring system, consider my own experience. For nearly nine years before law school I did legislative work for the Senate, nearly all of it as a PSM for the Budget Committee and an LA for a senior Senator. I did the same statutory analysis and drafting done by my J.D.-equipped colleagues, and landed my first job through the same process that frustrates most young lawyers who want to work for Congress.

As is usual in Capitol Hill hiring, it took more than good grades to get in the door. Before I ever inked my cover letter, I had already met the Senator during a campaign and impressed people he knew personally. I knew about the opening thanks to a half year of hunting, was in the market at the precise moment the position became available, and could start immediately. I was also willing to accept compensation at a level common for the Hill but barely sustainable for someone servicing both undergraduate and law school loans. Finally, I was willing to take a less substantive position – legislative correspondent – before becoming an LA.

These circumstances do not always pertain but they are not atypical. And what meant opportunity for me means relative inaccessibility for most young lawyers compared to the alternatives.

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<sup>5</sup> The law clerk market has been analyzed in a series of articles. See, e.g., Edward R. Becker, Stephen G. Breyer, & Guido Calabresi, *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207 (1994); Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097 (1992); Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991), and Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152 (1990). More recently, Christopher Avery, Christine Jolls, Richard Posner, and Alvin E. Roth have written two influential articles on the federal judicial law clerk market: *The New Market for Federal Judicial Law Clerks*, 74 CHI. L. REV. 447 (2007), and *The Market for Federal Judicial Law Clerks*, 68 CHI. L. REV. 793 (2001).

Even in the rare instances where top third year law students and graduates are aware of the immediate openings cryptically described in congressional employment bulletins, they weigh them against judicial, agency, firm, and academic opportunities for which personally knowing your employer or people they know is the exception; interviews are conducted every fall; offers are made 9-12 months in advance of the start date; and young lawyers are paid sufficiently to service student debt. Furthermore, court clerks, agency Honors lawyers, junior associates, and assistant professors do substantive legal work from day one. In contrast, policy, press, or constituent services duties<sup>6</sup> dominate the days of many legislative staffers. As an alternative some seek Hill internships, but these are rarely substantive and are usually over in three months time -- too little to see even one full session's budget, legislative, and oversight cycle.

## II.

The net effect of the Hill's short-notice ad hoc hiring, the existence of more accessible alternatives, and the shortcomings of internships is that the nation's best new lawyers are not getting firsthand legislative experience. Nor do they necessarily get it secondhand in law schools, all of which focus their curricula on caselaw and only a few of which require a course in legislation. Despite the U.S. Code's central place in federal law and the fact that statutory interpretation is the bread and butter of federal legal practice (indeed, it has made up more than half of the Supreme Court's docket in recent years),<sup>7</sup> it is typical for new lawyers to analyze statutes without ever having spent a day helping write one. That is unfortunate because statutory interpretation can be extremely challenging, owing to the complicated legislative history generated by the byzantine legislative process.<sup>8</sup>

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<sup>6</sup> To be clear: such work is vitally important to the representation Members provide to the people. Strictly speaking it is not, however, legal work, which is what should be the focus of congressional clerkships for new lawyers who intend to spend their careers in the law.

<sup>7</sup> And this when the pace of enactment of public laws has declined under Democratic and Republican congresses alike. See Elizabeth Williamson, *As U.S. Economic Problems Loom, House, Senate Sweat the Small Stuff*, WALL ST. J., Aug. 19, 2008; and Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, N.Y. TIMES, Dec. 7, 2006.

<sup>8</sup> For an overview, see <http://thomas.loc.gov/home/lawsmade.toc.html>; [http://www.senate.gov/pagelayout/legislative/d\\_three\\_sections\\_with\\_tasers/process.htm](http://www.senate.gov/pagelayout/legislative/d_three_sections_with_tasers/process.htm).

Congress is losing out, too. Although it has many extremely able, experienced, and knowledgeable assistants,<sup>9</sup> the comparatively low pay and unpredictable hiring schedule mean that most legislative staffs (especially in Member offices) are composed primarily of young people without legal training. To be sure, many staffers with undergraduate educations do terrific legislative work (I hope I did). But having gotten a legal education after Senate staff service, I know I would have benefited from the deeper understanding a J.D. would have provided of the constitutional context of Congress's work.

Even where expert Members and staff are involved, severe time pressures and varied responsibilities mean that too often basic legislative work gets short shrift. During my years on the Hill, I often saw amendments filed that were decidedly unclear about what precisely was being amended or the net effect of the new law. A law clerk or two at key committees and Member offices dedicated to legislative research, analysis, and drafting – a keeper of the U.S. Code, if you will – would be valuable indeed.<sup>10</sup>

Both of these points – the practical benefits of a congressional clerkship program to young lawyers, and to congressional offices – were mentioned in a 2005 letter to Congress organized by Stanford Law Dean Larry Kramer and signed by the deans of many of the nation's top law schools.<sup>11</sup> But the central point of the deans letter was even more interesting. The program “could, over time, help counterbalance the profession's current court-centered focus,” an orientation they argued has grown in part from the influence of court clerkships on the young lawyers who over the course of their careers exert profound influence on the law and public perception of our government.

Whether the deans are right about court centrism is beyond the scope of this article. But there is no question that the profession

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<sup>9</sup> Like writing good briefs or judicial opinions, “[t]he drafting of statutes is an art that requires great skill, knowledge, and experience.” See <http://thomas.loc.gov/home/lawsmade.bysec/sourceofleg.html>.

<sup>10</sup> This role is performed in substantial part by the Legislative Counsel offices of the Senate and House, which are staffed by attorneys who assist Hill offices with legislative drafting. The problems I discuss persist despite their valiant efforts. Congressional law clerks would supplement rather than duplicate their efforts, and the Legislative Counsel offices could provide a central focus in each house for guidance and mentorship of law clerks working for Members, committees, and the Counsel offices.

<sup>11</sup> Dean Larry Kramer, et al., Letter to Sen. Arlen Specter and Rep. James Sensenbrenner, Chairmen, Senate and House Judiciary Committees, [DATE] (on file with author).

attaches far greater emphasis to *litigation* than legislation as a solution for problems of law and policy and a practice activity. Court clerkships probably have something to do with that, but so do the firms, for which multi-year litigations make more money than multi-amendment public law improvement efforts. At law schools, clinics doing litigation overshadow those doing legislation, while in courses on legislation statutory problems are reflexively analyzed from the perspective of judges or courtroom counsel. For its part, the executive branch reserves its most prestigious legal gigs for Supreme Court litigators in the Office of the Solicitor General.

Members of Congress have repeatedly complained of litigiousness, “judicial activism,” and other ills of the legal profession. The deans therefore had good reason to think that Congress would respond to their 2005 letter by creating a clerkship program and becoming more influential on how the legal profession understands the lawmaking process that produces the law the profession practices. Three years on, however, Congress only now has begun to move.

### III.

Admittedly, these have been busy years. But it is also likely that Congress, like the legal establishment itself, is unaware of just how few leading lawyers have ever worked for legislative bodies. As my empirical analysis demonstrates, far more common among the legal elite is employment experience in the nation’s other key legal institutions.

As reasonably representative samples of the profession’s elite, I selected for analysis the biographies of federal appellate jurists (U.S. Supreme Court justices and circuit court judges) and professors at the nation’s Top 20 law schools as ranked by *U.S. News & World Report*.<sup>12</sup> Our nation’s top jurists and professors are among the profession’s most influential members, have discrete and publicly known memberships, have enough members (2,200 people plus) to be statistically significant, and have *curricula vitae* that are relatively standardized and readily accessible via the *Almanac of the Federal Judiciary* and the websites of law schools. As explained more fully in Attachment A (Methodology), the dataset summarized in Tables 1 and 2 was created by reading each biography and identifying prior employment of more than three months in five types of institutions: private practice, academe, legislatures, executive agencies, and judiciaries. To allow comparison across all five institutional categories of the backgrounds of individuals presently in different institutions, I recorded *prior* professional experience and did not

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<sup>12</sup> <http://grad-schools.usnews.rankingsandreviews.com/grad/law/search>.

record an individual's current primary institution of employment. Finally, because an institution's essential function is similar at any level of government, I made no distinction among experience at the international, federal, state, or local levels.

The comparative lack of legislative employment experience among the legal profession's leaders is profound. Fourteen percent of federal appellate jurists have served in a legislature as a member or an employee. In contrast, nine in ten jurists have private practice experience, eight in ten judicial, seven in ten executive, and just under half have academic experience.

Legislative experience is even rarer among top law faculties. Just *four percent* of Top 20 law school professors -- 72 out of 1,988 -- have worked for a legislative body. In contrast, over half have prior private practice or academic experience. Executive and judicial experience is less than half as common in academe as on the appellate bench, but is still roughly seven and ten times more common, respectively, than legislative experience.

There are several possible explanations for the wide gap between legislative and other kinds of experience among top jurists and academics. The most obvious is the most doubtful: lack of interest in judgeships or academe among lawyers with legislative backgrounds. A better theory is relative lack of interest in gaining legislative experience among those who aspire to the appellate bench and the ivory tower. That self-selection explanation could flow in part from employer-selection bias: lack of recognition of the value of legislative experience among legal employers.

To whatever extent these demand-side explanations pertain, I argue that they derive significantly from the supply-side problem I describe above. For top young lawyers, Congress is comparatively inaccessible because it lacks a clerkship program. Without a ready supply of legislative experience, young lawyers tend not to compete for it and employers prioritize other qualifications. Over time, these supply-based demand patterns operate to sort into the profession's elite circles those who do not have legislative experience. Not recognizing its value, leading lawyers in turn have not encouraged its acquisition by the next generation.

#### IV.

Congress created the judicial clerkship program and there are encouraging signs that Congress will create a pilot program for itself starting next year. On September 9, 2008, the House passed H.R.

6475,<sup>13</sup> a bill introduced by Reps. Zoe Lofgren (D-CA) and Dan Lungren (R-CA) that would create six year-long paid clerk positions each in the Senate and House, divided equally between majority and minority offices.<sup>14</sup> The bill leaves design of the program to the Senate and House Committees on Rules and Administration. For the program to thrive and become competitive over the long run with court clerkships and other apprenticeship alternatives, Congress should expand the pilot program and develop it with the following five elements in mind.

- **(1) Legal Substance.** To compete in the law clerk market, Congress must guarantee a year of intensive work on bills, hearings, or chamber procedure.
- **(2) Sufficient Supply.** There will not be enough positions to generate sustained interest if the program is limited to only a dozen positions. It also should not be focused mainly on the Judiciary Committees. All committees, Member offices, Legislative Counsel, the parliamentarians, and other Hill offices do legislative work.
- **(3) Competitive Schedule.** Today, new lawyers put judges, firms, agencies, and academe ahead of Congress in part because they hire ahead of Congress. Congress should hire on the same fall schedule, interviewing a year in advance of start dates.
- **(4) Comparable Compensation.** Chief Justice Roberts has warned that federal judges make “about the same as (and in some cases less than) *first-year lawyers*” at top firms.<sup>15</sup> Members of Congress earn the same.<sup>16</sup> Congress cannot match top firm wages

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<sup>13</sup> See [http://thomas.loc.gov/home/gpoxmlc110/h6475\\_ih.xml](http://thomas.loc.gov/home/gpoxmlc110/h6475_ih.xml) (bill text); [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_reports&docid=f:hr831.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr831.110.pdf) (text of H. Rpt. 110-831, Sept. 8, 2008, House Committee on Administration).

<sup>14</sup> Additionally, Sen. Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee, has created in his office a term-length clerkship for law students, which looks to be an exception to the rule that Hill internships have little legal substance. See <http://leahy.senate.gov/office/lawclerk.html>.

<sup>15</sup> John G. Roberts, Jr., Chief Justice of the U.S. Supreme Court, 2007 Year-End Report on the Federal Judiciary, Jan. 1, 2008, at 7, <http://www.uscourts.gov/newsroom/2007yearendreport.pdf> (emphasis original).

<sup>16</sup> Robert Barnes, *Chief Justice Argues for ‘Vital Legislation’ to Raise Pay for Federal Judges*, WASH. POST, Jan. 1, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/31/AR2007123102591.html>.



but it can pay clerks as much as does the judiciary, about \$60,000 per year.

- **(5) Partnership.** On the demand side, to jumpstart interest Congress should partner with the law school deans in urging judges, agencies, firms, and academe to seek applicants with legislative experience.

H.R. 6475 helpfully provides that clerks in its pilot program would be compensated at the level of district court clerks. The bill also states that the rules and administration committees will select the clerks, who would then interview with interested offices. A two-step approach is a familiar one, commonly used by Hill offices that hire fellows from the military, the American Political Science Association, and other organizations. To prevent allegations of patronage, however, the Committees should appoint a non-partisan panel to do the initial selection of clerks and provide advice as the program is administered and developed.

## **V.**

As a former staffer I assure you that writing Congress really does work. I have prepared here a one-page outline<sup>17</sup> of the case for congressional clerkships and prerequisites for the program's long-term success, which you could enclose with or modify into a letter or email to your Senator<sup>18</sup> or Representative.<sup>19</sup> You can also urge your legal employer to be supportive.

As legislation goes, a clerkship program is a small step. But this small step today could make a big difference tomorrow in the profession's understanding of the U.S. Code it writes and which we, as lawyers, practice.

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<sup>17</sup> [Attachment B]

<sup>18</sup> See <http://www.senate.gov>.

<sup>19</sup> See <http://www.house.gov>.