A PROPOSAL FOR A CONGRESSIONAL COUNCIL OF REVISION

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I. Introduction

James Madison left the 1787 Convention disappointed.[1] Although he had played a prominent role in designing the Constitution, one of his key proposals had been soundly defeated. The proposal called for a Council of Revision [hereinafter Council], whereby bills passed by both houses of Congress would be submitted to the President *and* to members of the Supreme Court for review prior to becoming law.[2] The Council would review state legislation in a similar manner. Madison feared that, in the absence of such a Council, poorly drafted legislation would soon clutter both the federal and state codes, providing mischief in the form of ambiguity, inconsistency, and unintended consequences, which at least in some cases could be averted.[3] He also viewed the Council as a means of guarding against the excessive accumu-

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1 Rakove, *Mr. Meese, Meet Mr. Madison*, ATLANTIC MONTHLY, Dec. 1986, at 84 [hereinafter *Meet Mr. Madison*].

2 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (M. Farrand ed. 1911) [hereinafter RECORDS OF THE CONVENTION]. The Council of Revision was proposed in the Virginia Plan as follows:

> [Resolved] that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, [and] every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [] of the members of each branch.

Id.

3 *See Meet Mr. Madison*, *supra* note 1, at 82, 84; 2 RECORDS OF THE CONVENTION, *supra* note 2, at 74. In debate, Madison argued that the Council

> would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity [and] technical propriety in the laws, qualities peculiarly necessary; [and] yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check [against] a pursuit of those

lation of power, both by Congress *vis à vis* the Executive and by the individual states *vis à vis* the federal government.[4]

Madison's proposal, seconded by James Wilson, was opposed by Luther Martin, Elbridge Gerry, and others in debate on the grounds that the Court should not interfere with the legislative function, in accordance with the doctrine of separation of powers.[5] How could judges avoid bias in interpreting laws which they have previously had a hand in approving or revising? Here, as elsewhere, Madison favored a more interlocking of function among the three branches of government, but in this instance his motion was defeated.[6] Many framers believed that the provision for presidential veto provided a sufficient safeguard against inappropriate legislation,[7] and such a belief was reasonable in 1787, given the complexity and scope of issues foreseen to be seeking legislative remedy.

Somewhat surprising from the debates of 1787, however, was the fact that no one argued for the possibility of retaining Madison's basic idea by changing the composition of the Council to avoid the opposition of delegates who had rejected the proposal on grounds of separation of powers.[8] The inclusion of members of the judiciary was not crucial to the vitality of the Council concept, and replacing the judiciary with individuals appointed exclusively to the Council may have diffused opposition. However, the tactic of separating the Council from the inclusion of the judiciary was not advanced. Perhaps this option was considered privately, but for some reason was not voiced in debate. Perhaps the option was not even contemplated, given the need for delegates to consider so many other constitutional issues in such a brief span of time at the 1787 Convention.

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unwise [and] unjust measures which constitute so great a portion of our calamities.

2 RECORDS OF THE CONVENTION, *supra* note 2, at 74.

4 2 RECORDS OF THE CONVENTION, *supra* note 2, at 75.

5 *See id.* at 75-79. Elbridge Gerry, for example, protested against an "improper coalition between the Executive and Judiciary departments." *Id.* at 75. Unlike other critics, however, Gerry did offer an alternative, suggesting the appointment of one or more individuals to draw bills for the legislature, following the example of Pennsylvania. *Id.*

6 *Id.*

7 *Id.*

8 *See generally id.*

In this article, a modern version of Madison's Council is proposed, motivated by the realization that present-day legislation continues to suffer from the very drawbacks that Madison feared, including preventable doses of ambiguity, inconsistency, and a failure to deal with a sufficiently broad range of foreseeable circumstances and consequences. Although legislators often strive valiantly to draft and pass bills whose intent is closely matched by the plain language contained in the measures, little progress has been made since Madison's time in perfecting the craft of legislative drafting.[9] As a result, the negative consequences associated with ambiguities, loopholes, and inconsistencies is compounded in proportion to the magnitude and complexity of legislation, which is far greater than contemplated in 1787. Today, as in Madison's time, a good deal of legislative shortsightedness is simply unavoidable, given severe limitations on human decision making under uncertainty. Yet, beyond this set of bills lies a definable area of preventable legislative "mistakes," and it is the number of these bills or "mistakes" that the contemporary version of Madison's Council is intended to reduce.

II. The Problem

In some ways, it is remarkable that statute law is as well crafted as it is today. A given piece of legislation must survive a rigorous set of tests before becoming law, and the final product is seldom the equivalent of the initial proposal.[10] In many cases, the various stages of the legislative process serve as a valuable means

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[9] *See generally* R. DICKERSON, MATERIALS ON LEGAL DRAFTING (1981); J. WHITE, THE LEGAL IMAGINATION (1973); C. NUTTING, S. ELLIOT & R. DICKERSON, CASES AND MATERIALS ON LEGISLATION (1969); H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, MATERIALS ON LEGISLATION (4th ed. 1982); Edwards & Barber, *A Computer Method for Legal Drafting Using Propositional Logic*, 53 TEX. L. REV. 965 (1975); Wason, *The Drafting of Rules*, 118 NEW L.J. 548 (1968); Mason, *The Logical Structure of a Proposition of Law*, 11 JURIMETRICS J. 99 (1971). The formulation and application of drafting principles in these and similar works have provided valuable insights. Nonetheless, we lack a cognitive theory of drafting that adequately captures the essence of this complex skill. Moreover, drafting itself seldom can be entirely divorced from the rarely understood activity of legal problem solving that precedes and often overlaps it. When legislative sponsors delegate the drafting activity to other individuals, the matter of trying to provide a close match between intent and plain language becomes even more complex.

[10] *See generally* F. CUMMINGS, CAPITOL HILL MANUAL 33-74 (2d ed. 1984) [hereinafter CAPITOL HILL MANUAL].

of developing a bill, but the stages and the sheer amount of time that passes from a bill's original drafting to its passage also leave ample opportunity for the introduction of new difficulties.[11] This process can produce a serious mismatch between the bill's intent and its plain language interpretation.[12]

At the federal level, a bill first must pass the critical test of committee review.[13] Hearings provide a means for the members of Congress to obtain information pertinent to the bill's rationale and range of likely consequences, as perceived from different viewpoints.[14] In some cases, hearings are particularly useful in revealing possible consequences of a bill that were not clearly envisioned during its original drafting.[15] After hearings conclude, a markup session is held during which committee members attempt to refine the bill, hammering out detailed issues of drafting prior to presenting the bill before the full house.[16] Once on the floor, further amendments might be proposed and approved.[17] In some instances, the final form of the bill, including amendments, is considered for passage under severe time pressure.[18] Consequently, there is not much time to carefully deliberate on the merits of recent amendments, their consistency with the rest of the bill, and their impact on the bill's likely consequences. Often, compromise brought on by political considerations plays a key role at this late stage, and the amendments born of such compromise are not always consistent with the bill's logical structure.[19]

For the most part, members of Congress and their staffs are quite adept at filtering legislation even under severe deadline pressure. Nonetheless, it is not uncommon for a bill to pass and

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11 *See generally id.*

12 *See, e.g., id.*; W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES (1985) [hereinafter THE AMERICAN LEGISLATIVE PROCESS].

13 *See* CAPITOL HILL MANUAL, *supra* note 10, at 36-59; THE AMERICAN LEGISLATIVE PROCESS, *supra* note 12, at 174-97.

14 *See* CAPITOL HILL MANUAL, *supra* note 10, at 41-47; THE AMERICAN LEGISLATIVE PROCESS, *supra* note 12, at 175-83.

15 *See* THE AMERICAN LEGISLATIVE PROCESS, *supra* note 12, at 176-77.

16 *See id.* at 207-10; CAPITOL HILL MANUAL, *supra* note 10, at 47.

17 *See* CAPITOL HILL MANUAL, *supra* note 10, at 62; THE AMERICAN LEGISLATIVE PROCESS, *supra* note 12, at 207-10.

18 *See generally* THE AMERICAN LEGISLATIVE PROCESS, *supra* note 12, at 207-10.

19 *See, e.g.*, T. EAGLETON, WAR AND PRESIDENTIAL POWER (1974) [hereinafter PRESIDENTIAL POWER].

later present unintended negative consequences of a sort that could have been prevented by more astute drafting.[20] Contrary to the intent of some framers, the President has seldom addressed such problems when a bill is presented for his signature or veto.[21] For the most part, Presidents have utilized the veto power more as a means to block the enactment of major policy with which the President disagrees, than as a fine-tuning device to suggest beneficial revisions to a bill whose general intent is agreed upon by Congress and the President.[22] Some Presidents have been very reluctant to use the veto privilege at all,[23] and it is clear from the history of the veto's use that it has not served the function that Madison had intended for the Council of Revision. As the number and complexity of bills presented to the President have increased, quite dramatically within the past fifty years,[24] it has become virtually impossible for the President and his staff to exercise this positive filtering function in all but a few salient cases each term. It is not enough that a bill be checked assiduously for internal consistency and clarity. The bill's possible interactive effect on other legislation must be considered, and the complexity of such interaction of course grows in proportion to the number of statutes already in existence.

A modern Council of Revision could help to fine-tune legislation at its source and would be permitted under the Constitution in the same fashion as the presidential veto. While article I, section 1, of the Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives,"[25]

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20 *See generally id.*

21 *See generally* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957 (1957) [hereinafter THE PRESIDENT]; Lee, *Presidential Vetoes from Washington to Nixon*, 37 J. POL. 522 (1975).

22 *See generally* THE PRESIDENT, *supra* note 21, at 277-82.

23 As President, Madison exercised the veto power only seven times. Some Presidents have exercised the power much more frequently. For example, Franklin Delano Roosevelt had 633 vetoes, Grover Cleveland had 413 and Harry S Truman had 250. J. KALLENBACH, THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP 355 (1966).

24 *See, e.g.*, N. ORNSTEIN, T. MANN, M. MALBIN & J. BIBBY, VITAL STATISTICS ON CONGRESS 1982 (1982) [hereinafter VITAL STATISTICS]; Griswold, *The Explosive Growth of Law Through Legislation and the Need for Legislative Scholarship*, 20 HARV. J. ON LEGIS. 267 (1983).

25 U.S. CONST. art. I, § 1.

the "powers" enumerated in the remainder of article I clearly refer to specific content areas, such as the power to declare war[26] and the power to tax.[27] If "powers" also referred to the full range of *procedures* involved in the legislative process, then the presidential veto specified in section 7[28] would itself represent an internal inconsistency. Clearly, then, the powers granted to Congress in article I do not preclude the formation of a Council of Revision.

Aside from its negative function, the Council could help Congress in making difficult decisions about certain details of legislation that are currently left to federal agency regulation. In many instances, leaving such details for administrative agencies is intentional and in keeping with the need to avoid obsolescence of certain types of legislation in the face of rapidly changing circumstances.[29] In others, omitting such details erodes legislative intent, and in such instances the Council could help Congress to restore its rightful legislative powers. Aside from regaining some of the legislative power it has effectively delegated to executive agencies, Congress would also recover some of the power it has inadvertently placed in the hands of the judiciary. Therefore, judicial interpretation will always play an appropriate role in the application of statute law to new circumstances and borderline cases not handled clearly at the time of drafting. However, the amount of interpretive flexibility afforded the judiciary should be constrained by careful drafting in a manner that retains legislative power and limits judicial activism to matters that are beyond the scope of legislative purview.

III. The Council's Charge and Composition

The broad objective of the Council would be to examine legislation, after its passage by both houses, but before presentation to the President, to discover preventable shortcomings. These would include technical matters of linguistic ambiguity, internal inconsistency within the document, and external inconsistency with other laws, as well as shortcomings that might pertain to a

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26 U.S. CONST. art. I, § 8.
27 U.S. CONST. art. I, § 8.
28 U.S. CONST. art. I, § 7.
29 *See* THE AMERICAN LEGISLATIVE PROCESS, *supra* note 12, at 332-34.

broad range of foreseeable circumstances and consequences. To address these areas adequately, the Council should include, but not be limited to, legal experts. Council members might be selected to represent expertise in a variety of subject matters, possibly paralleling the areas represented by executive departments. Former elected and appointed officials might be appropriate appointees to such a Council.[30]

To avoid the problems that beset Madison's original proposal,[31] the Council should include members who hold no other elected or appointed office. Aside from this restriction, the Council's method of appointment and term of service present several options, given the goal of fostering bipartisan and competent appointments. One method of appointment would involve a sharing of appointment powers between the President and the Supreme Court, with each allotted four appointments, subject to congressional confirmation. The involvement of the Court is suggested because Justices would have particular competence in selecting members for this role.

An alternative possibility is to vest appointment power with Congress and to regard the Council as an extension of the legislative branch. This option seems to offer the best prospects for enhancing the cooperative nature of the interaction between the Council and Congress and thus is recommended here. Because the work of the Council necessarily involves a critical review of

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30 *See generally* Robinson, *The Renewal of American Constitutionalism*, in SEPARATION OF POWERS—DOES IT STILL WORK? 38 (R. Goldwin & A. Kaufman eds. 1986). In proposing a series of major constitutional reforms, Robinson suggests that former elected and appointed officials might form a National Council with duties that include, but are not limited to those proposed here for the Council of Revision. Robinson envisions a large council of about one hundred members, responsible for calling elections and superintending their conduct in addition to reviewing legislation. Robinson suggests a sixty-day limit on legislative review. Aside from Robinson's proposal, which occupies a few paragraphs in a broad-ranging and fascinating chapter that deals with major restructuring of the federal government, I have been unable to find other proposals that build on Madison's Council of Revision concept. For a comprehensive bibliography, see K. HALL, 4 A COMPREHENSIVE BIBLIOGRAPHY OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, 1896-1979, at 2245 (1984). It reveals no scholarly works devoted primarily to the council notion. Moreover, recent treatments of legislative reforms focus on other procedural matters. *See* J. CLEVELAND, WE PROPOSE: A MODERN CONGRESS (1966); LEGISLATIVE REFORM: THE POLICY IMPACT (L. Rieselbach ed. 1978); LEGISLATIVE REFORM AND PUBLIC POLICY (S. Welch & J. Peters eds. 1977).

31 *See supra* notes 1-4 and accompanying text.

legislation, it seems highly desirable to make every effort during the appointment process to foster a sense of collaboration between Congress and the Council. While some members of Congress might view the Council as a burdensome watchdog, others will probably agree with Madison, that even the most talented legislators need all the help they can get in drafting their product.[32] As a cognitive task, legislation drafting is about as complex as any task attempted. There is no shame in admitting that legislation is highly subject to human fallibility and limited foresight. The Council offers no panacea, and its establishment would be counterproductive if viewed as a remedy for poorly drafted legislation. Rather, the Council represents one additional opportunity for the fine-tuning of legislation at the stage when such fine-tuning is most needed, but seldom provided.

An eight-year term of appointment is proposed. A shorter term duration might be insufficient to capitalize on members' cumulative expertise in the role, whereas a longer duration might vest excessive power in individual members. In addition, a longer duration would decrease the flexibility of making new appointments in response to emerging legislative trends and problems that might not have existed at the time of earlier appointments. The matching of an eight-year term with an eight member Council would permit a system of rotation whereby one Council member would be replaced each year, provided that initial appointments are appropriately staggered,[33] as indicated below.

IV. Enabling Legislation

Article I, section 7, of the Constitution states "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it. . . ."[34] Because the work of the Council would be interposed between the passage of a bill by both houses of Congress and presentation to the President, it would not interfere with the stipulations of this section. However, just as time is

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32 *See Meet Mr. Madison*, *supra* note 1, at 82.

33 The author favors a similar rotation scheme.

34 U.S. CONST. art. I, § 7.

of the essence in requiring the President to sign within ten days during congressional sessions,[35] so too the work of the Council must be constrained to avoid unwarranted legislative delay.

If the Council finds a bill to be defective or can suggest further improvements, it would send the bill back to the house of origin with recommendations. Both houses could override, as in the case of a presidential veto, or could choose to adopt the recommendations and pass the newly amended bill. To avoid undue confrontation between Congress and the Council, no bill would be reviewed more than once by the Council. Consequently, a second review will not occur even if both houses pass a newly revised version subsequent to Council review which is at variance with the Council's specific suggestions. Repeated review by the Council could be of benefit in rare cases, but incorporating such a provision seems to extend too much power to the Council at the expense of Congress.

How often might the Council suggest useful improvements, and is there danger that the Council might serve to obstruct legislation in a partisan fashion? The congressional override,[36] in combination with the selection process for Council members, should mitigate against such danger. Generally, it is believed that the Council would play a role only in unusual circumstances of major oversight or error that has somehow escaped the notice of congressional staff at earlier stages of drafting.[37] The Council would return a bill infrequently, but when it does, such action is likely to be quite consequential.

Currently, aids to legislative drafting are for the most part limited to the pre-passage stage.[38] Members of Congress receive assistance from as many as six different sources: the Office of Legislative Council; congressional committee staff; interest group experts, who more than occasionally present a drafted bill in search of a congressional "author"; experts in the executive branch; the Parliamentarians of the House and Senate; and academic experts, including law school faculty and specialists in various areas of legislation.[39] With all this assistance, it is reasonable

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35 U.S. CONST. art. I, § 7; THE PRESIDENT, *supra* note 21, at 280.

36 U.S. CONST. art. I, § 7.

37 *See generally Meet Mr. Madison*, *supra* note 1.

38 *See generally* THE AMERICAN LEGISLATIVE PROCESS, *supra* note 12.

39 *See* CAPITOL HILL MANUAL, *supra* note 10, at 24-32.

to ask whether we should further assist the pre-passage drafting process rather than add an independent Council after a bill has passed. If a large percentage of bills introduced in Congress eventually became laws, such refocusing would be desirable. However, only a small fraction of all bills introduced are passed by both houses,[40] and it seems advisable to focus the Council's work on bills that have already received general approval by Congress. In effect, the Council serves to provide especially close scrutiny for only those bills where much is at stake. Prior to this stage, the members of Congress and those who aid in the drafting process are often concerned not only with obtaining close correlation between the bill's intent and its plain language, but also with obtaining passage in a highly demanding political arena.[41]

Senator Eagleton's recounting of the passage of the War Powers Resolution in 1973[42] illustrates how political considerations can play such a prominent role that attention to crucial details of substance are eclipsed, sometimes yielding consequences that are virtually the opposite of those intended. As Eagleton and others who have studied the Resolution point out, the reporting provision of the War Powers Resolution gives the President great latitude in conducting undeclared war for a period of up to sixty days, whereas the general intent of the Resolution was to harness rather than extend the President's war-making power.[43] In a fascinating turnabout, Senator Goldwater, a staunch opponent of the original Resolution, noted during a debate with Senator Eagleton on the Senate floor that Goldwater might actually vote in favor of the latest version of the Resolution now that its plain language had become favorable to presidential war-making power.[44] Meanwhile, Eagleton, who had played a key role in the

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40 VITAL STATISTICS, *supra* note 24, at 134.

41 *See* CAPITOL HILL MANUAL, *supra* note 10, at 8-39.

42 PRESIDENTIAL POWER, *supra* note 19.

43 *See* Highsmith, *Policing Executive Adventurism: Congressional Oversight of Military and Paramilitary Operations*, 19 HARV. J. ON LEGIS. 327 (1982); Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16 WM. & MARY L. REV. 823 (1975); Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407 (1984); Note, *The Recapture of the S.S. Mayaguez: Failure of the Consultation Clause of the War Powers Resolution*, 8 N.Y.U.J. Int'l L. & Pol. 457 (1976); Torricelli, *The War Powers Resolution After the Libyan and Persian Gulf Crises*, 19 SETON HALL L. REV. 154 (1989).

44 PRESIDENTIAL POWER, *supra* note 19, at 206-07.

inception of the Resolution, found himself voting against it, perceiving as Goldwater did, that its language would not serve the general intent of reinstating congressional power to declare war as stated in article I of the Constitution.[45] Moreover, Eagleton was unable to persuade colleagues to vote against the Resolution, largely because they desired to strike a political blow to President Nixon by overriding his presidential veto.[46] According to Eagleton's account, the political pressure to override Nixon's veto, whose earlier vetoes had been sustained uniformly, so eclipsed concern for the Resolution's detailed wording that relatively few senators took the time to consider the Resolution's final draft or be on hand to hear the final floor debate.[47] Proponents of the Resolution further confused the issue by referring during the debate not to the final draft of the Resolution, but to an earlier version.[48] The earlier version was less objectionable to Eagleton and to others who seriously wanted to constrain the presidential power to initiate warlike activities in all but defensive circumstances.[49] Here, as in other instances of vital legislation, political concerns fueled by the rush to quick passage can conspire to eclipse the sort of careful deliberation on a measure's final form that is needed to maximize the correlation between the measure's intent and its plain language interpretation. Thus, the new Council would be well placed to review legislation at the critical juncture subsequent to passage, but prior to submission to the President.

The discussion of the War Powers Resolution raises another issue. What happens if the Council approves a bill, but the President subsequently vetoes it? Under such circumstance, Congress would reconsider the bill as it would under existing procedures, and congressional override would have the force of law.

There appears to be a particular advantage to having a recently passed bill scrutinized by a panel of experts who are at some distance from the political conflict associated with bill passage and the numerous competing demands on time of members of Congress. In addition, it seems appropriate that the Council

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45 *Id.* at 211-12.
46 *Id.* at 215.
47 *See generally id.* at 216-20.
48 *See generally id.* at 192-211.
49 *See generally id.* at 192-94.

should do its work at the stage after passage by both houses, but before presentation to the President. Since only a small fraction of bills introduced to Congress are passed by both houses,[50] Council scrutiny at an earlier stage would be largely pointless. Alternatively, the Council could be applied after the President signs or vetoes the bill, but only if the Constitution were further revised to indicate that a bill would not become law upon presidential signature,[51] but rather upon approval by the Council. This alternative might give the Council too important a role in legislation and would stand little chance of adoption.

A proposed text of the enabling legislation for the Council appears in draft form below.

A BILL TO ESTABLISH A COUNCIL OF REVISION TO ASSIST CONGRESS IN IMPROVING THE QUALITY OF LEGISLATION.

1. The Council of Revision shall consist of eight members, each of whom shall be a citizen of the United States.
2. Members shall be appointed by Congress, four by the Senate and four by the House.
3. Each member shall serve for a period of eight years, except for members appointed to the first session of the Council. Initial appointees shall serve from one (1) to eight (8) years by lot, with each appointee serving a different number of years. Appointees whose initial appointments require four years or less are eligible for reappointment for an eight year term. All other appointees are not eligible for reappointment. The appointees shall hold no other public office during time of service on the Council.
4. Upon passage by the House and Senate, a Bill or Joint Resolution shall be presented to the Council immediately, prior to presentation to the President. The Council will examine the document and present a report within ten days, not including Sundays, to both houses of Congress and to the President. If the Bill or Joint Resolution is deemed satisfactory by the Council, Congress shall present the measure to the President for signature or veto. If the Bill or Joint Resolution is deemed unsatisfactory, it shall be returned to the house of

50 VITAL STATISTICS, *supra* note 24, at 130-33.

51 U.S. CONST. art. I, § 7.

origin with a statement describing any shortcomings and suggestions for improvement.

5. The statement of grounds for the return of a Bill or Joint Resolution must refer to the degree of correlation between the measure's express intent and its substantive provisions. The Council is prohibited from returning a measure because the Council disagrees with the measure's intent per se.
6. If the Council deems a Bill or Joint Resolution unsatisfactory, both houses can either vote on a revised version of the document or can override the Council by a two-thirds (2/3) majority in both houses. In either case, no Bill shall be reviewed by the Council more than once.
7. Members of the Council shall serve whenever Congress is in session and for up to ten days beyond the end of a session.
8. Members who do not serve their full term shall be replaced by members appointed from the same source for the unexpired duration of the term.
9. The Council shall begin its functioning at the beginning of the first session of Congress after which eight members have been appointed.

Three salient features of the legislation as drafted here deserve special comment. First, the method of appointment provides for congressional control of the Council composition. Because the House and Senate share equal responsibility for any bill which is passed by both houses, and since cooperation between the two houses seems desirable at the stage of Council review, the proposal provides that each house appoint half of the Council's membership. Liaison between the committees initially charged with appointing all eight members will be needed to avoid the possibility of duplicate nominations, but such liaison will eventually become unnecessary in normal circumstances under the system of rotation specified.

Secondly, the term of duration provides a system of rotating membership whereby one new member is appointed each year. Such a system of rotation equalizes the distribution of appointment opportunities across congressional session, providing some prevention against overly partisan appointments. In addition, such a system provides for the continual infusion of "fresh blood" to the Council, without overly disrupting the Council's current membership.

Finally, the method of reconsideration by Congress and override in the case of an unsatisfactory document deserves examination. As drafted here, Congress can override the Council in the same manner it can override a presidential veto, providing a safeguard against the Council's excessive power in the negative. A further safeguard prohibits the Council from reviewing amended legislation which has already been deemed unsatisfactory once by the Council, regardless of whether the amended legislation as passed conforms to the revisions suggested by the Council. Even further weakening of the Council's power could be implemented by rendering its reports wholly advisory in nature, with Congress simply retaining the option of whether or not to reconsider before presentation to the President.

The enabling legislation does not specifically address the Council's budget, which must be set by Congress. The salary for Council members might be tied to the salary for members of Congress. This linkage would render membership on the Council reasonably attractive to prospective members and would deter Congress from ever lowering the salary of Council members for partisan reasons. Aside from former elected and appointed officials, members of the Council could be recruited from law, science, academia, medicine, and business. Members recruited from science and medicine might be particularly helpful in providing advice on a variety of bills in important domains that are underrepresented professionally within Congress itself. Aside from salaries, it is expected that the budget for the Council would be rather small, including funds for a library containing materials generally pertinent to legal drafting and revision as well as funds for requisite staff.

The wording of the present enabling legislation for the Council produces no inconsistencies with other aspects of article I dealing with the passage of legislation and presentation to the President. Nowhere in article I is there any indication that presentation to the President must be immediate.[52] Because article I, section 7, does imply that presentation must emanate from Congress rather than another body, the enabling legislation conforms to that implication.[53]

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[52] U.S. CONST. art. I.

[53] U.S. CONST. art. I, § 7.

Detailed procedures for the Council's working operation have not been included in the legislation to provide flexibility as circumstances arise. Ordinarily, it is expected that the Council will study major pieces of legislation as a committee of the whole, examining not only the bill itself, but transcripts of congressional hearings, floor debates, and a variety of other sources of information pertinent to the bill's contents. While the primary responsibility of the Council will be to refine aspects of drafting which maximize the degree of fit between intent and plain language, the Council also will be free to consider possible consequences and circumstances that might apply to the bill. As indicated in the enabling legislation, however, the examination of both content and form by the Council does not give it license to reject a bill on the grounds that it disapproves of the bill's intent, and any infringement on the rights of congressional intent would require judicial intervention.

V. Conclusion

Good legislation, like good poetry, can perhaps always be improved, and the formation of an independent Council of Revision is considered here as a means of refining legislation at the stage just prior to its becoming law. Originally, Madison proposed a Council, including members of the judiciary and the President,[54] to provide a check against inappropriate legislation, but the framers rejected the notion in favor of the presidential veto.[55] However, the veto has seldom served the fine-tuning function originally intended to be served by the Council.[56] By separating the Council from the notion of including the judiciary, it is possible to provide a new forum for improving the quality of legislation, without incurring the objection of judicial intervention in the legislative function. As the complexity and scope of legislation has increased, along with the need for members of Congress to devote much of their time to nonlegislative activities, the need for such a Council has increased proportionately. In most instances, legislation involves difficult decisions that must be formulated and applied to the details of legal drafting princi-

54 *See supra* note 2 and accompanying text.
55 *See supra* notes 5-7 and accompanying text.
56 *See supra* notes 20-24 and accompanying text.

ples. Drafting itself is painstaking work and requires both cognitive and linguistic talents in great measure. In addition, the consequences associated with poor drafting can be enormous and result in unintended interpretation that are at variance with the intent of the legislative sponsors and Congress as a whole. Madison's concern with the vagaries of legislative drafting[57] were properly placed, even more so now than in 1787. In contrast to Madison's original proposal,[58] the present one excludes both judicial involvement and review of state legislation, avoiding the complexities which befell the original plan. The involvement of the judiciary seems inappropriate now for the same reasons cited in debate in 1787, while the review of state legislation can be accomplished by the establishment of state councils of revision.

As viewed here, the modern Council of Revision would provide a unique opportunity to engage the talents of one of our nation's most neglected resources: former elected and appointed officials. It has become customary for such individuals, if still in their active years upon leaving office, to return to a private law practice or business, to engage in consulting, or to join a university faculty. For many former officials, the post-office years offer a good opportunity to make use of their government experience, while diminishing the heavy burdens associated with public office.[59] The Council offers a similar opportunity within the federal government itself, providing the additional advantage of a group forum in which such key "national elders" can exchange ideas with each other and with newcomers on major issues of legislation. If established and conducted properly, the Council could become one of the government's most highly regarded bodies, providing valuable service to Congress and the nation.

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57 *See supra* note 32 and accompanying text.
58 *See supra* notes 1-4 and accompanying text.
59 *See supra* note 8 and accompanying text.