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Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress

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CLOSING THE LEGISLATIVE EXPERIENCE GAP: HOW A LEGISLATIVE LAW CLERK PROGRAM WILL BENEFIT THE LEGAL PROFESSION AND CONGRESS

DAKOTA S. RUDESILL[*]

This fall, like every fall, is a time of keen competition among the nation's best third-year law students and recent graduates, as they pursue prestigious legal apprenticeships as federal court law clerks, Executive Branch "Honors" program attorneys, law firm junior associates, and fellows and new faculty at law schools. This year's round of musical chairs is unusually intense in the wake of the Great Recession's elimination of countless cushy seats at law firms, great and small.[1]

In this gloomy hiring season there is at least one increasingly bright spark, one that may light the way to a new kind of apprenticeship experience for future participants in the highly competitive national clerkship market.[2] Pending in the U.S. Senate is House Bill[3] 151,[4] and its

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∗ Visiting Professor of Law, Georgetown University Law Center. J.D., Yale; B.A., St. Olaf College. I personally read every biography and C.V. analyzed for this second phase of my empirical study and the vast majority were read at least twice. For his dedicated work helping me compile and check the data in this article, and for his terrific research assistance generally, I sincerely thank James Cailao. James's work was invaluable, but I bear sole responsibility for any errors herein. For their support of the congressional clerk legislative initiative I thank Deans Larry Kramer, Harold Koh (now Legal Advisor at the U.S. Department of State), and Alex Aleinikoff; Professors Robin West, Chai Feldblum, and William N. Eskridge; and key allies in the halls of Congress. For reading and commenting on drafts of this article I thank Jeffrey Kaliel, Christopher Mandernach, Tim Nelson, Nick Patterson, and Justin Schardin. Additionally, it was a pleasure to work with Jason Batts and Lauren Battaglia, Editor in Chief and Chief Comments Editor, respectively, of the *Washington University Law Review*.

1. *See, e.g.*, AmericanLawyer.com, The Layoff List, http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202425647706 (last visited Nov. 21, 2009) (listing reported layoffs at some of the largest law firms in the country).

2. As I explained in a previous article, the law clerk market is the labor pool of the nation's most promising law school graduates, and has been analyzed in a series of articles. *See* Dakota S. Rudesill, *Keepers of the U.S. Code: The Case for a Congressional Clerkship Program*, WASH. U. L. REV. SLIP OPINIONS (Nov. 5, 2008), n.5, http://lawreview.wustl.edu/slip-opinions/keepers-of-the-us-code-the-case-for-a-congressional-clerkship-program/.

3. I thank the *Washington University Law Review* for the opportunity to register here my respectful yet strong disagreement with Rule 13.7(a) of the Bluebook, which requires replacement of the correct S. and H.R. designations for U.S. Senate and U.S. House legislation with "Senate Bill" and "House Bill." The correct nomenclature is in common usage by Congress, the Executive Branch, the Supreme Court, the private federal bar, scholars, the popular media, and general public. There is,

Senate companion, Senate Bill 27,[5] that would for the first time create a law clerk program in the U.S. Congress analogous to other legal apprenticeship opportunities. Prospects for the program are encouraging, thanks to the House's overwhelming 381–42 vote in March 2009.[6]

As I explain, however, this legislation may die in the Senate as it did last session, unless the legal profession and Congress come to a better and more broadly held understanding of a congressional clerkship program's potential benefits.

One is that over time it would begin to correct the profound comparative lack of legislative work experience among the legal profession's leaders that my empirical research has identified. Here, I present new data demonstrating that the incidence of legislative work experience among the profession's top 500 lawyers, as ranked by Lawdragon.com, trails badly behind experience working for courts, government executive bodies, in private practice, and in academe. These empirical findings supplement my study in this publication in 2008, which focused on federal appellate jurists and law professors at Top 20 law schools.[7]

I argue that closing the legislative experience gap ultimately will benefit the profession and Congress by helping both of these key legal players better understand—and take more seriously—an under-appreciated reality: *legislative work is legal work*. I conclude by refuting objections, and encouraging lawyers to engage with Congress in support of the bill.

I.

Congress is the Constitution's first branch, with enumerated, sweeping powers to act as the primary author of federal law.[8] In accord with the foundational principle of self-government, our nation's most potentially powerful legal institution is also the most accountable to the people. Yet of the three branches of the federal government, Congress is by far the least influential on the constitutional perspective of the nation's most influential lawyers. That is because it is the least accessible to them in their formative first years: Congress lacks a formal legal apprenticeship program similar to those of the judiciary and executive agencies. Congress is also less influential than two other major players in the apprenticeship

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therefore, no confusion from which we need the Bluebook to save us.

4. Daniel Webster Congressional Clerkship Act, H.R. 151, 111th Cong. (2009); H.R. REP. NO. 111-65 (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports &docid=f:hr065.111.pdf.

5. S. 27, 111th Cong. (2009).

6. 155 CONG. REC. H4189-54 (daily ed. Mar. 31, 2009) (roll call vote, Daniel Webster Congressional Clerkship Act of 2009).

7. Rudesill, *supra* note 2.

8. *See* U.S. CONST. Art. I, § 8.

of young lawyers—the private sector and legal academe—that are still less democratically accountable.

A year ago in this publication's online supplement I made the case for a congressional clerkship program as a first step toward a corrective.[9] Legislative work experience is not in strong demand by our best young lawyers, not because it is unimportant, but—I argued—because there is comparatively little supply.

New lawyers have much to gain in practical terms from firsthand legislative work experience. The U.S. Code is central to federal legal practice and is produced via an extremely complex process that—like trying a case or writing an appellate brief—is best learned by doing. Although more law schools are now requiring coursework in statutory interpretation and starting legislation clinics, virtually all prioritize instruction in judge-made law and clinical experiences involving judicial process.[10] Law firms overwhelmingly focus on litigation rather than legislation, and the dry contract-like construction of legislation means that few new lawyers study statutes on their own time.[11]

The immediate benefits to Congress of a clerkship program could be considerable, as well. Legislative assistants, counsel, and committee professional staff members, particularly for the most active Members and committees, are generally over-tasked—often with policy, political, and press-related work. Basic legislative responsibilities—statutory research, analysis, and drafting—too often get too little focused attention,[12] reflected in scrivener's errors and ambiguity in Congress's legal product.[13] Law

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9. Rudesill, *supra* note 2.

10. For discussion, see Leigh Jones, *Shift in Harvard Curriculum Reflects Larger Trend Toward Global Law*, THE NATIONAL LAW JOURNAL, Oct. 24, 2006, http://www.law.com/jsp/article.jsp?id=1161606920757&hbxlogin=1 ("Harvard Law School's recent announcement that it is making the most sweeping changes to its first-year curriculum in 100 years heralded a major shift in legal education, including a new emphasis on global law . . . . Harvard will begin requiring first-year students to take three new courses, including a class on legislation and regulation . . . ." Said one faculty member, "To postpone introduction to legislation and regulation is to communicate to students that it's an add-on . . . .").

11. "Reading statutes makes reading legal opinions look like a water park. It's deathly. But legal reporters need to be as knowledgable [sic] about legislation as case law." Dahlia Lithwick, *The Anna Effect*, THE AMERICAN LAWYER, June 1, 2007, *available at* http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=900005482437. If Lithwick is right that good legal reporters should read statutes, then law students who hope to be good lawyers and practicing lawyers who want to master their craft definitely should.

12. I speak from personal experience: I worked for Congress for nearly nine years, as a professional staff member with the Senate Budget Committee, as legislative assistant to Sen. Kent Conrad (D-ND), and intern for then-Rep. Byron L. Dorgan (D-ND).

13. Of course, another explanation for ambiguous statutes is that their authors wanted ambiguity. Disagreements among Members are often resolved, and log-rolling coalitions created, through deliberately unclear or even incoherent language. *See* Daniel Bernstein, Congressional Clerkships 15 (May 19, 2008) (unpublished manuscript, on file with author) (discussing the "phenomenon of deliberate ambiguity" as arising from the political pressure inherent in legislative functioning).

clerks would not be just extra staffers, but rather "keepers of the U.S. Code," focused on the basic legal work of the institution.

Over time, a congressional clerkship program would begin to redress the profound relative dearth of legislative work experience among the legal profession's leaders, who are extremely influential in shaping public and policymaker understanding of the law. As representative samples of the nation's most influential lawyers, in my prior study I chose for analysis federal appellate jurists (U.S. Supreme Court justices and circuit court judges) and professors at the Top 20 law schools as ranked by *U.S. News & World Report*.[14] I read their web-posted biographies and tabulated prior experience in five types of legal institutions: private practice, academe, legislatures, executive agencies, and judiciaries.

The legislative experience deficit is dramatic. While strong majorities of federal appellate jurists have prior private practice, executive, and judicial experience, and nearly half have academic experience, the biographies show that only *14 percent* have ever worked for a legislature—any legislature—and seen from the inside how the statutes they interpret are made.[15] Remarkably, this low rate of firsthand legislative experience among jurists is still nearly *three times* what it is among Top 20 law professors. On the most prestigious law faculties, only *5 percent* of professors have worked for a legislative institution—local, state, federal, or international. At Top 20 schools, executive branch experience is nearly six times as common, judicial experience is nine times as common, private practice experience is ten times as common, and other academic experience is fifteen times as common as legislative experience. At the time of my study one Top 20 law school, with a professorial faculty of 49 and a storied history training leaders in the law, had not a single full-time professor who had worked for a legislative body and therefore could teach about legislating from personal knowledge.

When my findings were published, prospects were good for Congress to create a clerkship program. In 2005, Stanford Law Dean Larry Kramer had organized a supportive letter to Congress signed by the deans of 145 law schools.[16] After several years refining the legislation,[17] in late 2008 the House passed by voice vote House Bill 6475, a bill to create a pilot program with six clerks in each chamber.[18] Under the bill, clerks would be

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14. My use of the *U.S. News* rankings does not imply endorsement of them, only recognition that the rankings are widely used by the profession and the public as a metric for identifying the most prestigious legal academic institutions in the country.

15. *See* Rudesill, *supra* note 2.

16. Letter from Dean Larry Kramer et al., to Sen. Arlen Spector, Chairman, Senate Judiciary Comm., and Rep. James Sensenbrenner, Chairman, House Judiciary Comm. (July 20, 2005) (on file with author).

17. For a history of the initiative's first years, see Bernstein, *supra* note 13, at 19–23.

18. 154 CONG. REC. H8038-39 (daily ed. Sept. 11, 2008).

selected competitively for year-long terms, and once placed focus on legislative legal work in committee or Member offices.

According to Capitol Hill contacts,[19] the Senate Majority and Minority leaders polled their caucuses and found no opposition to passing the bill by unanimous consent.[20] That is, with one exception. Reportedly, a single Senator, a Republican, objected to the unanimous consent request to pass House Bill 6475—along with 100 or so other bills that also fell afoul of the Senator's self-created budget rule that legislation that authorizes funding subject to a later appropriations bill must be offset as if money is actually being spent.[21] What really mattered was the Senator's implicit threat to mount a filibuster.[22] But that required broader support for House Bill 6475 than existed, and more time on the Senate calendar than was available. The bill died when the Senate adjourned.

Two factors make the outlook better this year for the bill, re-introduced by Reps. Zoe Lofgren (D-CA) and Dan Lungren (R-CA) as House Bill 151[23] and by Sen. Charles Schumer (D-NY) and then-Sen. Hillary Rodham Clinton (D-NY) as Senate Bill 27.[24] One is the 381–42

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19. They remain anonymous.

20. I am aware of this thanks to conversations with Senate contacts who are not authorized to speak on the record, and my own Senate experience. Generally, before a unanimous consent request is made formally on the Senate floor, the Democratic and Republican floor staffs "hotline" the unanimous consent request to staff in Senate offices via recorded phone message. If no one objects, the unanimous consent request is then formally made on the Senate floor by the Democratic or Republican caucus leadership and approved without objection or recorded vote. On the other hand, if a Member or staff (on behalf of a Member) has concerns, they are obligated to call their caucus's floor staff promptly. These objections can be made openly or—by request of the objecting Senator—anonymously. Further informal process generally follows at that point, often including attempts by a bill's sponsors and their party leadership to alleviate the concerns of the objecting Senator. If those efforts fail, a Senator will usually seek time from their caucus leadership for the bill to be considered formally on the Senate floor, try to get the bill worked into a larger bill or package of bills that has more support, or else drop the matter. The latter was the case in 2008 with House Bill 6475 in the Senate.

21. This rule is not on the books. *See* U.S. Senate, Standing Rules of the Senate, *available at* http://rules.senate.gov/public/index.cfm?p=RulesOfSenateHome.

22. Breaking a filibuster requires a number of time-consuming steps. First, assuming a filibustering Senator is opposed even to proceeding to consideration of a bill, 16 Senators have to sign a cloture petition under Rule XXII to cut off debate on the motion to proceed. The Majority Leader then has to schedule a vote on the cloture motion, under the Rule no sooner than one day later. The cloture motion needs 60 votes to pass. Assuming it does, and the objecting Senator persists, the Senate then has to debate the motion to proceed for up to 30 hours. Thereafter, the Senate has to vote on the motion to proceed. Assuming the motion carries, the process would have to be repeated to defeat a filibuster on the bill itself. See *id*. For discussion of filibusters, see RICHARD S. BETH & STANLEY BACH, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE (Mar. 28, 2003), *available at* http://www.senate.gov/ CRSReports/crs-publish.cfm?pid=%270E%2C*PLW%3D%22P%20%20%0A.pdf.

23. Cosponsors of House Bill 151 include Reps. Charles A. Gonzalez (D-TX), Earl Pomeroy (D-ND), and Betty McCollum (D-MN). Thomas (Library of Congress), H.R. 151 Cosponsors, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00151:@@@P (last visited Nov. 16, 2009).

24. The current cosponsors of Senate Bill 27 are Sens. Byron L. Dorgan (D-ND) and Kent Conrad (D-ND). Thomas (Library of Congress), S.27 Cosponsors, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00027:@@@P (last visited Nov. 16, 2009). The two original cosponsors have

vote to pass House Bill 151 in the House on March 31, 2009.[25] Such an overwhelming bi-partisan vote carries weight in the Senate. The second development is that the Senate Democratic Caucus has eight more seats.[26] That potentially matters not because the congressional clerkship initiative is partisan—it is bi-partisan—but because the bill's lead sponsor in the Senate happens to be a Democrat. A Democratic majority is likely to be more willing to put its weight behind defeating a filibuster by a Republican than would the Republican leadership.

Nevertheless, the reality is that House Bill 151 could die in the Senate this year, just as did House Bill 6475 in late 2008. With the Senate Democratic Caucus having 59 votes, now one shy of the 60 votes needed to break a filibuster (thanks to the January 19, 2010 special election in Massachusetts to fill the seat of the late Sen. Ted Kennedy, a cosponsor of Senate Bill 27), at least one Republican supporter would be necessary to defeat a filibuster by another Republican. More importantly in the case of a bi-partisan but minor bill such as House Bill 151 / Senate Bill 27, it takes a week to break a filibuster – and the Senate will not spend that kind of time on one bill unless sufficient Senators press for it.[27] Broadening Senate support requires persistence and a strong case, the latter of which is greatly helped by new objective evidence in the initiative's favor.

II.

As discussed above, my earlier article presented empirical evidence demonstrating that few of the profession's leaders on the federal appellate bench or at the heights of the ivory tower have work experience in legislative bodies, as compared to work for firms, academe, courts, and executive agencies. My new study expands this research, analyzing a prestigious guide to what leading lawyers themselves regard as the law's most accomplished ranks. Here, the legislative experience gap is only wider.

I selected for analysis the top 500 lawyers nationwide as ranked by Lawdragon.com.[28] According to the website, the Lawdragon 500 "sets the

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left the Senate: the late Sen. Edward M. Kennedy (D-MA), and Sen. Hillary Rodham Clinton (D-NY), now the Secretary of State. As my Georgetown colleagues Chai Feldblum and Katie Corrigan suggested, re-naming the bill for Sen. Kennedy, perhaps together with a Republican Senator, would be a fitting tribute.

25. *See* Roll Call Vote, *supra* note 6.

26. *See* Wikipedia, 111th United States Congress, http://en.wikipedia.org/wiki/111th_United_States_Congress (last visited Jan. 19, 2010).

27. If the congressional clerkship bill were considered on its own, presumably it would need the support of at least 16 Senators, enough to file a cloture petition under Rule XXII. Alternatively, with the agreement of the Majority Leader the bill could be included in a package of several bills that together have enough supporting Senators to file the petition and sustain an effort to break the filibuster. The latter scenario is more likely for a relatively minor bill.

28. The most recent list is the 2008 edition. Lawdragon Lawyer Profiles and Legal News,

standard for the best of the legal profession" and is "a guide that reflects geographic and practice diversity while always underscoring excellence."[29] The list reflects the opinions of (unidentified) top lawyers themselves through a process featuring nominations and balloting by attorneys and independent research by Lawdragon.[30]

As with jurists and law faculties, and as is explained more fully in the Appendix, I created a dataset for the Lawdragon 500 by reading each of their web-posted biographies and tabulating employment of more than three months in five types of institutions.[31] Table A below reflects Lawdragon prior employment as compared to federal appellate jurists and Top 20 law professors, while Table B reflects data for current Lawdragon employment. I made no distinction among experience at the international, federal, state, or local levels.

The legislative experience gap among the legal profession's elite, as selected by lawyers themselves and Lawdragon.com, is remarkable. Table A below indicates that *less than 4 percent* of the biographies of these legal superstars—19 out of 500—reflect work inside a legislature. Academic experience is more than four times as common, private practice and judicial experience are nearly six times as common, and executive branch government experience is nearly seven times as common.

The professional experience of top counsel as ranked by Lawdragon.com generally is narrower across all categories compared with federal appellate jurists and Top 20 law faculties, and in most cases dramatically narrower.[32] This pattern holds true regarding legislative work experience, as well. Table A shows that the half-thousand lawyers on the Lawdragon list have legislative service at slightly less than the meager one-in-twenty rate of top academics, and at less than one-third of the comparatively low 14 percent rate of our most powerful jurists.

Lawdragon 500 Leading Lawyers in America, Oct. 16, 2008, http://www.lawdragon.com/index.php/newdragon/leading_08/. The importance of the Lawdragon 500 ranking is evident in its prominent, frequent mention in the official biographies of selectees. *See, e.g.*, Biography of Kenneth L. Bachman, Jr., Clearly Gottlieb, http://www.cgsh.com/lawyers/bio.aspx?lawyer=c21d1388-c08b-47a4-a25b-26e202b90902.

29. *Id.*

30. *See* Lawdragon Lawyer Profiles and Legal News, Lawdragon Methodology, http://www.lawdragon.com/index.php/newdragon/fullstory/lawdragon_500_methodology/ (last visited Nov. 16, 2009).

31. For the full data set, see http://lawreview.wustl.edu/comments/closing-the-legislative-experience-gap/.

32. Only two categories are even close: the paltry rates of legislative and executive branch experience of Top 20 law professors and the Lawdragons.

TABLE A: PRIOR EMPLOYMENT EXPERIENCE COMPARED: FEDERAL APPELLATE JUDICIARY, PROFESSORS AT TOP 20 LAW SCHOOLS,[33] AND LAWDRAGON 500 TOP LAWYERS

	(#)	*Private Practice*	*Academic*	*Legislative*	*Executive*	*Judicial*
Federal Appellate Jurists	(266)	89% (237)	44% (117)	14% (36)	72% (192)	79% (210)
Top 20 Law Professors	(1,407)	53% (752)	75% (1,060)	5% (67)	28% (396)	46% (649)
Lawdragon 500 Top Lawyers	(500)	23% (113)	18% (92)	4% (19)	27% (136)	23% (114)

33. Again, data for the jurist and professor samples are provided in my prior article. *See* Rudesill, *supra* note 2.

While only 19 of the Lawdragon 500 have ever worked for the legislative bodies that write the law they practice, as Table B shows, *not one* lawyer among "the best of the legal profession" is currently a member of a legislative body or on staff as counsel.

TABLE B: CURRENT AND PRIOR EMPLOYMENT EXPERIENCE: LAWDRAGON 500 TOP LAWYERS

	(#)	*Private Practice*	*Academic*	*Legislative*	*Executive*	*Judicial*
Lawdragon Current Employment	(500)	95% (475)	9% (44)	0% (0)	1% (4)	2% (11)
Lawdragon Prior Employment	(500)	23% (113)	18% (92)	4% (19)	27% (136)	23% (114)

Full data set available on Wash. U. L. Rev. website. See supra note 31.

How do we account for the virtual non-existence of legislative work experience on such a legal all-star team? One theoretical but unlikely possibility is that lawyers with legislative backgrounds are uninterested in becoming legal eagles (or dragons). Alternatively, because my data set is dependent on the underlying Lawdragon study, perhaps the explanation lies there. The guide's purpose—to identify the best "private attorneys from a wide range of practices; in-house counsel; law professors; judges and neutrals; government attorneys; and public interest lawyers"[34]—could have been conceived narrowly by Lawdragon.com or by the lawyers consulted to exclude serving members of legislative bodies, despite the fact that many legislators are legally trained.[35] While perhaps explaining the utter lack of current U.S. Senators or state legislators or county commissioners on the list, however, this theory would not explain the total absence of current legislative staff members. Nor would it begin to explain the less than 4 percent rate of *prior* experience in legislative bodies among

34. *See* Lawdragon 500, *supra* note 27.

35. According to a study of congressional biographies, 35 percent of Democratic House Members and 25 percent of Republican House Members are lawyers. In the Senate, 45 percent of Democrats and "about half" of Senate Republicans are "practicing lawyers." *See* Andrew Ruben, *Does the Democratic Congress Have 'Business Experience'?*, HUFFINGTON POST, Sept. 14, 2009, http://www.huffingtonpost.com/andrew-ruben/does-the-democratic-congr_b_285071.html. The reference to practice begs two questions. First, for lawyers, is legislative service law practice? I would say it is law practice at its most elemental. Second, for non-lawyers, is legislative service still law practice? At the least, it is legal work.

the Lawdragons, nor the dramatically higher incidence of prior judicial, executive, and other private practice experience.

More plausible explanations are rooted in perceptions of the law and the profession among the leading lawyers consulted by Lawdragon.com or among Lawdragon.com's analysts. These selectors of the Lawdragon 500 may well view the model lawyer as an attorney in private practice, advising or litigating for private clients. This theory would find strong support in the facts that 95 percent of the Lawdragon list are in private practice, and that most of the 3 percent total who work in the public sector are famous.[36] If the most influential members of the profession do not see legislative work as meritorious law practice, or do not view getting legislative experience as valuable training for practice, then aspiring dragon-lawyers likely get little encouragement to acquire it.

The Lawdragon data provides additional compelling evidence of the legislative experience gap evident in the jurist and professorial data I published a year ago, adding new weight to my conclusion that

> To whatever extent . . . demand-side explanations pertain, I argue that they derive significantly from [a] supply-side problem . . . . 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 fill the profession's most influential ranks with lawyers who have not learned about legislation from the inside, much less become personally invested in Congress's constitutional role as federal law's first architect. Not recognizing the value of legislative experience, leading lawyers in turn have not encouraged its acquisition by the next generation. Meanwhile, as the years pass, the profession of law risks drifting ever further from the legislatures that operate as the primary lawmaking mechanism of the people, who, as sovereign under our Constitution, own the law.[37]

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36. Three of the four executive branch Lawdragons are well known to anyone who regularly reads law-related articles in the paper: New York Attorney General Andrew Cuomo; Special Counsel Patrick Fitzgerald, who led the investigation into the blowing of CIA officer Valerie Plame's cover; and Lt. Commander Charles Swift, who argued the *Hamdan* Guantanamo Bay case in the U.S. Supreme Court. A majority of the 11 jurists among the Lawdragon 500 are also well known: U.S. Supreme Court Chief Justice John G. Roberts, Jr.; Associate Justices John Paul Stevens, Antonin Scalia, and Anthony Kennedy; Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit; and Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia, who has handled high-profile Guantanamo Bay cases and until 2009 was a member of the Foreign Intelligence Surveillance Court. Rounding out the list is a U.S. district court judge from Louisiana and four state jurists, three of whom are from preferred commercial law forum Delaware.

37. Rudesill, *supra* note 2.

III.

If one understands *legislative work as legal work*, and the legislative process as the primary means of keeping the law accountable to the people, it is hard not to be alarmed by my empirical studies showing that the nation's most influential lawyers are not working inside legislative bodies and therefore are not getting the professional opportunity to see problems of law and policy from a legislative standpoint. Furthermore, it is reasonable to infer from my data that America's legal olympians do not regard legislative work as important—and reasonable to speculate that they are undervaluing legislation as a solution for problems of law and policy.

Undoubtedly, many legal problems are appropriately resolved by litigation; for example, disputes about property, contracts, alleged torts, and discrimination. Yet for disputes implicating questions of public policy, where impact litigators bill countless hours, consider the legislative virtues:[38]

- *Legislation is constitutionally favored*. The structure of our Constitution, with Congress as the first branch, suggests that lawmaking starts with the legislature.
- *Legislation is democratically accountable.* Thinkers as varied as Robin West and Dennis Jacobs, U.S. Second Circuit Chief Judge, have observed that resolving public policy questions through litigation short circuits democratic decision making—particularly where a policy preference is litigationally read into the Constitution and thereby insulated from legislative change.[39] With policy debates refracted through the lens of courts and constitutional doctrine, discussion about what the polity *should do* can get drowned out by court argument about what it *can do*.[40] Ultimately, the policy space for self-government can become narrowed, undermining the sense of constitutional responsibility among citizens and legislators.[41]

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38. Most of the legislative virtues I identify would pertain to most legislatures at the state and local levels (although part-time legislatures, for example, are generally less responsive than a full-time legislature like the Congress). For brevity's sake, and because I am considering legislative virtues with an eye to Congress creating a clerkship program, my discussion here focuses on the national legislature.

39. Robin West, *Ennobling Politics*, *in* H. JEFFERSON POWELL & JAMES BOYD WHITE, EDS., LAW AND DEMOCRACY IN THE EMPIRE OF FORCE 68–69 (2009); Dennis Jacobs, *The Secret Life of Judges*, 75 FORDHAM L. REV. 2855, 2857–58 (2007).

40. *See* West, *supra* note 38, at 66–88.

41. This is James Bradley Thayer's classic concern. *See* James B. Thayer, *The Origin and Scope*

- *Legislation is prospective, and of general application*. Courts generally rule on the claims of particular parties about past events; future applicability happens in the next retrospective case by analogy. Congress can write law for the future and general welfare.
- *Legislation can be rapid*. Resolving a complicated, contested question of law by litigation generally takes years, particularly where appeals are involved. Congress can act with dispatch.
- *Legislation is agile, of flexible scope and precision*. Courts prefer to rule on narrow legal issues, leaving big questions and details of application unresolved. One bill can articulate broad principles and fine details.
- *Legislation can create*. Courts most naturally constrain (e.g., a losing government agency or private actor) or cancel (e.g., a statute, or private party's action). Within its enumerated powers, Congress may conceive and create.

Of course, Congress can also collectively choose not to act quickly or wisely, or at all. Yet over time, by fostering a greater sense of the potential of legislation among top new lawyers destined for the profession's highest ranks, a congressional clerkship program could facilitate awareness that in the lawyer's toolkit there is a legislative alternative to the litigational instrument. That, in turn, could spur a renaissance in the idea of the legislative lawyer: a public servant in the bar's finest tradition, located conceptually between the current archetypes of the litigator-lawyer and the lawyer-lobbyist. Firms, law schools, executive agencies, and courts employing such legislative lawyers may get better legal advice, reflecting a fuller understanding of our law-creating process under the Constitution.

Ultimately, Congress stands to gain, as well. A more legislatively-informed legal profession would become more comfortable providing quality advice and young talent to the nation's legislature. And, greater contact between the legal profession and Congress, I posit, would lead inevitably to greater scrutiny of Congress by lawyers, and in turn greater attentiveness by Congress to its process and products as a legal institution.

IV.

No focused case has been made against congressional clerkships. Isolated arguments have been floated, but none are compelling.

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of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129 (1893).

First, most of the 42 House Members who voted against House Bill 151 reportedly did so out of general opposition to government and spending. The reality is that the program would cost less than $1 million per year,[42] quite worth it in view of the more balanced constitutional perspective it could foster among the lawyers who interpret, administer, and practice the statutory law Congress writes.

Second, one can speculate that the players who now dominate the law clerk market might not like the competition if Congress gets in the game. But judges, executive agencies, firms, and law schools would benefit because they could recruit from ranks of congressional clerks and benefit from their statutory expertise.[43]

Another potential criticism is that clerking for Congress will foster political or institutional bias. If working for politicians were such a pox on the profession, however, then the bar would disfavor lawyers who have served in the White House. It does not. And if institutional bias were such a risk, the profession would disfavor lawyers who have been court clerks or prosecutors.[44] Here again, it does not. Increasing the diversity of experience among the profession's leaders would be for the good.[45]

Trust is at a premium on Capitol Hill, and some Members could be concerned about loyalty and confidentiality.[46] That could be addressed by subjecting Congress's clerks to the same strict ethical code as those in the judiciary, and to the profession's attorney-client privilege.[47]

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42. That is the opinion of the Congressional Budget Office. *See* H.R. Rep. No. 111-65, *supra* note 4, at 4 (appending the CBO cost estimate for the bill).

43. A related benefit is that in the case of congressional clerks, judges and other employers would have another year by which to evaluate potential hires. Finally, there is unlikely to be a clerk shortage. Judges receive hundreds more applications from qualified young lawyers than they have clerkships to offer.

44. This criticism is analogous to one leveled at the Supreme Court's hiring of clerks who have prior non-judicial experience: high court clerks who have served previously at the Justice Department's Office of Legal Counsel will be "primed to defend the position of the executive branch." *See* Tim Wu, *Clerk-Off: Are Law Clerks Staffers?*, SLATE, Feb. 23, 2006, http://www.slate.com/id/2136881. Others are uncomfortable with judicial nominees who have focused overwhelmingly on federal civilian law and institutions, rather than (e.g.) state or military law. *See* Posting of Fabio Rojas to Orgtheory.net, http://orgtheory.wordpress.com (July 1, 2007, 06:38 EST) ("A career dedicated primarily to judging, federal work, and academia probably indicates strong ideological commitment, either liberal or conservative." In contrast, "a mixture of experience at the state and national levels, with occasional academic work" provides lawyers "with a richer sense of what the law is about.").

45. Chief Justice Roberts has made a similar point while expressing concern about the trend over the past half century of fewer appointments of federal district court judges from private practice and more from public sector work. John G. Roberts, Jr., 2006 Year End Report on the Federal Judiciary, THE THIRD BRANCH, Jan. 1, 2007, *available at* http://www.uscourts.gov/ttb/2007-01/2006/index.html ("It changes the nature of the federal Judiciary when judges are no longer drawn primarily from among the best lawyers in the practicing bar"). *Cf.* William N. Rehnquist, 2001 Year End Report on the Federal Judiciary, THE THIRD BRANCH, Jan. 1, 2002, *available at* http://www.uscourts.gov/ttb/jan02ttb/jan02.html (expressing concern at the increasing difficulty of finding qualified candidates for federal judicial vacancies coming from private practice). For further discussion, see RUSSELL WHEELER, BROOKINGS INST., THE CHANGING FACE OF THE FEDERAL JUDICIARY 6–9 (2009).

46. *See* Bernstein, *supra* note 13, at 32.

47. For these reasons, I predict Congress's clerks would leak less than their non-lawyer

A higher altitude objection might be elitism: Congress is composed of the elected representatives of the people, and an influx of ivy league lawyers may erode Congress's connection to the people. I disagree because the number of clerks would be relatively small. And, the net effect would run the other way. I predict that the legal profession's rising elite stand to gain more from greater contact with the people than the Congress would stand to lose in having tomorrow's legal leaders in its employ.

A final objection is whether legislative work experience is really necessary. Every day attorneys without it do able statutory analysis. But just as the reality that one can be a good lawyer without having been a court clerk is not an argument against judicial clerkships, I disagree that a congressional clerkship program is not worth the profession's support.

V.

I am confident that the long-term benefit of a congressional clerkship program would be considerable. Yet because Congress is self-governing under the Constitution, if Congress wants to take action to close the legislative experience gap, it will have to decide for itself that a congressional law clerk program is a good place to start. That, in turn, requires that the profession engage on this matter with Congress.

The good news is that Congress is responsive to well-considered arguments and persistent engagement from informed constituents. I therefore urge all lawyers, whether current or aspiring, to visit the website of the *Law Review* (www.lawreview.wustl.edu), download the one-page summary of the case for a congressional clerkship program I have prepared, and send it to your Senator with a request to co-sponsor Senate Bill 27 and support House Bill 151 when it comes before the Senate. The legislative experience gap within the profession can be closed, but it will not happen without the legal profession telling Congress why it needs to happen---both for the nation's legislature, and the lawyers who practices the law Congress writes.

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colleagues. For the judicial clerk rules, see FEDERAL JUDICIAL CENTER, MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL LAW CLERKS (2002), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Ethics01.pdf/$file/Ethics01.pdf/377.

APPENDIX: METHODOLOGY

As in my 2008 study of Article III federal appellate jurists and Top 20 law faculties, regarding the Lawdragon 500 I analyzed *current and prior professional employment experience* mentioned in web-posted biographies. There is little overlap among the data sets because there are so few jurists and academics on the Lawdragon list. Lawdragon.com generally has minimal biographical information, and so I often went elsewhere, usually to the lawyer's page on the website of their law firm, to find biographical information for this study.

Inevitably, this empirical study reflects judgments by the individuals themselves and their employers about what experience warrants mention. It also reflects judgments by Lawdragon.com and the lawyers Lawdragon.com polled about who deserves to be among the 500. Lawdragon.com does not explain how it selected the lawyers it consulted to select the profession's leaders, nor does the website name these individuals.

The data set also reflects some ball and strike calling on my part as I have sorted at-times cryptic references to varied professional endeavors into five categories for analysis. If legislative (or other kinds of professional experience) is excluded from web-posted biographies of the Lawdragon 500 at a significant rate, that itself says something about the priorities and biases of the profession.

To allow comparison across all five institutional categories of the backgrounds of individuals presently in different institutions, in my analysis of the *prior* professional experience of these lawyers I generally do not record their primary current position, with the exception of part-time law teaching (prior or current) by justices and judges and temporary appointments (prior or current) by academics, such as visiting professorships at other academic institutions, year-long fellowships working in government, and the like.

Furthermore, assuming that *professional activities* in each institution are in relevant part substantively similar at each level of government, I made no distinction between experience at the federal, state, or local level. For example, I suspect that Justice Breyer's experience as U.S. Senate Judiciary Committee counsel was just as likely to have given him a legislative perspective on the law as if he had served a state legislature. I also count work experience in international governmental organizations.

Additionally, I focused on *employment experience* because such inside experience is far more likely than outside interactions—such as arguing a case, giving testimony, or consulting—to have a definitive effect on one's perspective. Finally, because absorption of institutional perspectives generally is a function of investment of substantial time and

energy, I also excluded brief experiences of three months or less, such as internships and summer associateships.

I applied the following definitions:

- *Private Practice*: Any non-academic, non-government practice of law totaling more than three months, including practice at public interest organizations. I excluded summer and term-length associateships and internships, nor did I credit as private practice experience writing briefs, providing counsel, or arguing a case outside of a firm or other private practice setting. Prior private practice experience is generally not scored where it appeared that the lawyer was merely promoted within a firm (e.g., from associate to partner) because they retain substantially the same job in the same institution. I essentially asked whether someone had in their career another private practice job.
- *Academic*: Any post-college teaching or fellowship, including non-legal, of more than three months. I generally excluded teaching and fellowships during law school because such positions are part-time. I did score as a prior, distinct academic experience visiting professorships and fellowships involving a plainly different job or employment at a different institution, and part-time teaching positions by jurists (including current part-time teaching positions). A prior position at one's own academic institution that is significantly different is credited—such as a professorship before one became dean—but I generally did not score prior experience where one was merely promoted but retained substantially the same job (e.g., promotion from assistant professor to associate professor). I essentially asked whether an academic in their career had another academic job.
- *Legislative*: Any position in a legislature (international, federal, state, or local), including elected member and staff positions but excluding internships of three months or less. I did not credit legislative experience where the biography merely reflects testimony before, lobbying of, or other outside advisement of a legislative body.
- *Executive Branch*: Any position within an executive government agency or office, including both legal (e.g., prosecutorial) and non-legal positions, including military service. All government employees interpret and are governed by public law as they implement it, and therefore

government service is likely to influence one's understanding of the law whether or not one is acting as a lawyer. Here again, I excluded internships, etc., totaling three months or less, and outside advisory work.

- *Judicial*: Judgeships or clerkships, again excluding internships or short-tenure clerkships of three months or less. I scored a prior judgeship at a different level of the judiciary as prior judicial experience because the roles and responsibilities of jurists differ sufficiently at the magistrate, district, circuit, and Supreme Court levels to be considered separate jobs.