

## LEGISLATIVE GRIDLOCK AND NONPARTISAN STAFF

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### INTRODUCTION

In a recent book, former Congressman Mickey Edwards blames much of the gridlock in Congress on the political parties because of their influence over both the electoral process and legislative governance. To address the latter issue, he would revise various congressional rules and procedures (including the Senate filibuster and the role of the House Rules Committee) and institute nonpartisan selection of leadership, committees, and committee staff in Congress.<sup>1</sup> This Essay considers his last suggestion—use of nonpartisan professional committee staff—separate from his other proposals. While his other ideas may have merit, they would require reversal of long-standing traditions in Congress.<sup>2</sup> In contrast, up until around 1970, the exis-

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1 See MICKEY EDWARDS, *THE PARTIES VERSUS THE PEOPLE* 91–128 (2012). His recommendation for nonpartisan staff echoes a similar call from a Congressman a century earlier, but is contrary to a proposal of an influential committee of the American Political Science Association in the middle of the twentieth century. See SAMUEL W. MCCALL, *THE BUSINESS OF CONGRESS* 59 (1911) (arguing that the “vast amount of information [needed by Congress] should not be collected by organs entirely partisan”); Am. Political Sci. Ass’n, *Toward a More Responsible Two-Party System: A Report of the Committee of Political Parties*, 44 AM. POL. SCI. REV. (SUPPLEMENT) 1, 1, 8–9, 63–64 (1950) (urging stronger party control of Congress, committees, and committee staff). Edwards also offers various proposals to reduce party influence over the electoral process. See EDWARDS, *supra*, at 35–87.

2 See GEORGE B. GALLOWAY, *HISTORY OF THE HOUSE OF REPRESENTATIVES* 128, 134–36 (1961) (reporting “embryonic party organization in the House as early as 1790,” and marked increase in party influence and powers of Speaker of the House beginning in 1890); 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES* 285 (Russell & Russell 1960) (1938) (describing party control of Senate committee system dating back to 1846).

tence of nonpartisan professional committee staff was more the rule rather than the exception in Congress. Further, Congress currently delegates important legislative tasks to nonpartisan professionals and has done so for many years. In addition, the significant role staff plays in the legislative process is well-recognized. Thus, a change to nonpartisan professional committee staff might be an idea that could be effected in the near term and have some impact on legislative outcomes.

Part I provides background on the principal nonpartisan professional staffs in Congress, past and present. It describes the use of nonpartisan professionals by the committees and a number of legislative support organizations. Part II then explores the impact of nonpartisan professional committee staff on legislative gridlock. It first sketches out a “theoretical case” for why such staff might help reduce gridlock. The case is premised on nonpartisan staff having an *expertise* distinct from that of partisans, and sufficient *influence* in Congress to effect legislative outcomes. The remainder of Part II then raises several questions about this theoretical case, including whether the required “expertise” and “influence” of nonpartisan staff are, to some extent, incompatible.

Before we begin, a few cautionary notes. The role of political parties in Congress is sometimes explained as a way to make the legislative process more efficient. Members of the same party are thought to have certain pre-existing relationships that can be drawn upon to help negotiate and produce legislative outcomes. Under this view, parties help to reduce the transaction costs of legislating.<sup>3</sup> Diminishing the role of the parties in Congress could, therefore, make legislative solutions more costly and even harder to attain.

Moreover, increased party influence in Congress (and the greater centralization of power that often accompanies it) has generally operated in the past to counter the decentralizing effect of the committee system (another labor-saving device used by Congress).<sup>4</sup> Reduced importance of the parties in Congress, therefore, could result in strengthened committees and subcommittees. Yet strong committees (and the seniority system) have themselves been blamed in the past for producing legislative stalemate.<sup>5</sup> Thus,

3 See CONGRESS: STRUCTURE AND POLICY 83–84 (Mathew D. McCubbins & Terry Sullivan eds., 1987).

4 See C. LAWRENCE EVANS & WALTER J. OLESZEK, CONGRESS UNDER FIRE 85–86, 129–31 (1997) (explaining trade-off); THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH 45 (2006) (same); BARBARA SINCLAIR, PARTY WARS 126–27 (2006) (describing impact of party leadership on House committees after 1994 election); Craig D. Margolis, *House Out of Order: Committee Reform in the Modern House of Representatives*, 11 J.L. & POL. 273, 273–76 (1995); Kenneth A. Shepsle, *Representation and Governance: The Great Legislative Trade-off*, 103 POL. SCI. Q. 461, 478–81 (1988).

5 See SINCLAIR, *supra* note 4, at 67–109 (describing reasons for and consequences of changes in the House between the era of committee government in the 1950s and the current, party-controlled era); David W. Rohde, *Committees and Policy Formulation*, in THE LEGISLATIVE BRANCH 201, 201–07, 213–16 (Paul J. Quirk & Sarah A. Binder eds., 2005) (same). Changes in the Senate have evolved somewhat differently, in part because of that chamber’s counter-majoritarian rules. See SINCLAIR, *supra* note 4, at 185–233.

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even if Edwards is correct that party control over congressional governance somehow contributes to gridlock, it is not clear that the default arrangement (if party influence is reduced) would be an improvement.<sup>6</sup>

In addition, although this Essay concerns the use of staff in Congress, it takes no position on what the proper role of staff should be. Some have questioned, for example, whether the prominence of staff activities and influence is consistent with principles of representative democracy.<sup>7</sup> This Essay simply accepts as a given the role staff plays, and explores whether the unelected nature of staff might provide some advantage to help Congress overcome the forces causing gridlock.

Finally, this Essay also assumes, without passing judgment on, the underlying premise of this symposium—the existence of gridlock in Congress. The remarkable lack of productivity of the nation’s divided government during the just-completed 112th Congress (2011–2012)—complete with a frantic, ludicrous effort at the very end of the Congress to unwind mechanisms the same legislature had created earlier to force itself to act on fiscal matters—nevertheless followed a two-year period of much greater legislative productivity (when control of government was unified under one party and the country faced a financial and economic crisis).<sup>8</sup> This small sample suggests that the legislature’s failure to act in the most recent Congress may be attributable as much or more to idiosyncratic, short-term factors (such as the fluctuating needs of the country (including the presence or absence of a national crisis) or political calculations (or miscalculations)) as opposed to structural defects in the electoral or legislative processes. What is needed to establish gridlock is some baseline measure of “expected” productivity of a reasonably well-functioning Congress under the circumstances in which it is operating. Rather than speculate on the existence of gridlock, this Essay has merely taken the symposium’s topic seriously and tried to evaluate constructively one proposal to reduce it.

This Essay considers nonpartisan staff employed in one particular context—within a highly partisan environment such as Congress. The discussion

6 Cf. RONALD BROWNSTEIN, *THE SECOND CIVIL WAR* 381 (2007) (warning against revival of seniority system in committees); Pietro S. Nivola & William A. Galston, *Toward Depolarization*, in 2 *RED AND BLUE NATION?* 235, 246–51 (Pietro S. Nivola & David W. Brady eds., 2008) (describing earlier efforts to suppress partisanship that had unforeseen side effects).

7 See PAUL S. RUNDQUIST ET AL., CONG. RESEARCH SERV., 92-90 S, *CONGRESSIONAL STAFF: AN ANALYSIS OF THEIR ROLES, FUNCTIONS, AND IMPACTS* 15–16 (1992); MICHAEL J. MALBIN, *UNELECTED REPRESENTATIVES* 239–51 (1980); Dennis J. Tuchler, *Has Congress Abdicated Its Legislative Authority to Its Staff?*, 19 ST. LOUIS U. PUB. L. REV. 107, 107–08 (2000); cf. Linda Gordon, *If the Progressives Were Advising Us Today, Should We Listen?*, 1 J. GILDED AGE & PROGRESSIVE ERA 109, 112–14 (2002) (explaining that Progressive faith in nonpartisan, professional expertise was in tension with representative democracy).

8 See Ezra Klein, *Good News: The 112th Congress’s Do-Nothing Reign Is Over*, WASH. POST, Jan. 4, 2013, at A2 (comparing productivity of 111th and 112th Congresses). For a brief review of the events leading to the “fiscal cliff” crisis at the end of 2012 and its resolution, see Wesley Elmore & Lindsey McPherson, *U.S. Goes Over Fiscal Cliff, but Just for a Day*, 138 TAX NOTES 12 (2013).

may not be relevant to staff working in other circumstances, such as within a nonpartisan public policy organization. As we shall see, the combination of nonpartisan staff serving partisan principals raises especially challenging questions.

# I. PRINCIPAL NONPARTISAN PROFESSIONAL STAFFS IN CONGRESS, PAST AND PRESENT

This Part briefly describes nonpartisan professional staff employed by the congressional committees and a number of legislative support organizations. The support organizations were created during two periods: towards the end of the Progressive Era (1914–1926) and the early 1970s.

## A. Committee Staffs

Committees officially began employing staffs in 1856 when appropriations were approved for both the House Ways & Means and Senate Finance Committees (which at the time still had jurisdiction over both appropriations and revenues). With the exception of the appropriations committees (formed after the Civil War), most committees in the latter half of the nineteenth century had few staff, and they were almost all clerical or secretarial aides (including many patronage appointments). By 1913, there was a total of only about 300 mostly nonprofessional aides in the House and Senate spread among 135 standing committees, and the number and type of staff remained largely unchanged for the next three decades.<sup>9</sup> During this period, the committees received some professional help not counted in the official records from both executive agencies and private groups.<sup>10</sup>

The Legislative Reorganization Act of 1946<sup>11</sup> marked the formal beginning of professional staff for the committees.<sup>12</sup> One of the purposes of the

9 See CHARLES L. CLAPP, *THE CONGRESSMAN* 255 (1963) (stating that among committee staff “[a]t the outbreak of World War II, only the . . . Appropriations committees and the [JCT] employed ‘well trained technically qualified staffs with continuity of tenure’” (citation omitted)); HARRISON W. FOX, JR. & SUSAN WEBB HAMMOND, *CONGRESSIONAL STAFFS* 171 tbl.3 (1977) (reporting 303 total staff for House and Senate committees in 1914); GEORGE B. GALLOWAY, *THE LEGISLATIVE PROCESS IN CONGRESS* 273 (1953) (reporting 135 standing committees in House and Senate in 1913); MALCOLM E. JEWELL & SAMUEL C. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* 214 (3d ed. 1977) (reporting that most staff were patronage appointees at end of World War II); George B. Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 45 AM. POL. SCI. REV. 41, 54 (1951) (reporting that prior to 1946 Act, there were a total of 356 staff employed by the House and Senate committees, and few were professionals). By contrast, congressional committees had total staff of about 2600 in 2010. See R. ERIC PETERSEN ET AL., *CONG. RESEARCH SERV.*, R41366, *HOUSE OF REPRESENTATIVES AND SENATE STAFF LEVELS IN MEMBER, COMMITTEE, LEADERSHIP, AND OTHER OFFICES, 1977–2010*, at 17–18 tbl.2, 24 tbl.7 (2010).

10 See BERTRAM M. GROSS, *THE LEGISLATIVE STRUGGLE* 280 (1953).

11 Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812.

12 See Roger H. Davidson, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1946*, 15 LEGIS. STUD. Q. 357, 357 (1990) (claiming that the “most enduring” aspect of 1946 legislation was authorization of professional staffing of committees); Gallo-

Act was to give Congress its own source of professional expertise, independent of the executive branch and private interests.<sup>13</sup> The law authorized each standing committee in the House and Senate (other than the appropriations committees)

to appoint, by a majority vote of the committee not more than four professional staff members . . . on a permanent basis without regard to political affiliations and solely on the basis of fitness to perform the duties of the office; and said staff members shall be assigned to the chairman and ranking minority member . . . as the committee may deem advisable.<sup>14</sup>

The decision to appoint staff “without regard to political affiliations” was consistent with congressional practice at the time. The appropriations committees had long hired on a nonpartisan basis,<sup>15</sup> as did legislative support organizations (described below) that had been created by Congress prior to 1946.

Subsequent to the 1946 Act, staffing practices on the congressional committees varied. At the beginning of the 81st Congress (1949), when Democrats took control of each chamber, about one-third of the professional staff of the committees turned over, giving some indication of the politicization of such staff at that time. Galloway estimated in 1953 that about half of the professional staffers appeared to be competent and well-trained, but the rest were hired for political reasons.<sup>16</sup> Committees generally followed two different patterns in hiring professional staff. Some hired staff to help with particular topics, whereas others allowed the majority and minority party members to make separate hires (even though the 1946 Act did not contemplate this practice). As a practical matter, hiring by topic became an effective way to prevent the minority members from having any staff since the topics of the committee were largely chosen by the chair and majority members of the committee.<sup>17</sup> The 1946 Act gave the power to the committee to appoint staff (and divide them between the majority and minority), which meant that the

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way, *supra* note 9, at 54 (describing the 1946 Act’s provision of professional staff for committees as “real innovation”).

13 See JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 402 (1981).

14 Legislative Reorganization Act of 1946 § 202(a), 60 Stat. at 834. The appropriations committees were given greater leeway to appoint staff. See *id.* § 202(b).

15 See EDWARD T. TAYLOR, *A HISTORY OF THE COMMITTEE ON APPROPRIATIONS*, H.R. DOC. NO. 77-299, at 15–16 (1941) (describing that during the seventy-six year history of the House Appropriations Committee from 1865–1941, there were twenty-one different chairmen but only three persons holding the position of professional staff clerk, which reflected the consistent policy of the committee to maintain permanent staff regardless of political control); GLADYS M. KAMMERER, *CONGRESSIONAL COMMITTEE STAFFING SINCE 1946*, at 3–6 (1951); cf. RICHARD F. FENNO, JR., *THE POWER OF THE PURSE* 150 (1966) (reporting same practice as of 1963).

16 See GALLOWAY, *supra* note 9, at 414; Galloway, *supra* note 9, at 55. About the same time, Kammerer estimated that about sixty percent of Senate committees and two-thirds of House committees had hired staff of professional competence. See Gladys M. Kammerer, *The Record of Congress in Committee Staffing*, 45 AM. POL. SCI. REV. 1126, 1127–28 (1951).

17 See GROSS, *supra* note 10, at 282; JEWELL & PATTERSON, *supra* note 9, at 226.

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majority party controlled both decisions. In some committees, the decisions were made exclusively by the committee's chairman, with only *pro forma* approval by the other majority members of the committee.<sup>18</sup>

In part to address minority party rights, the Legislative Reorganization Act of 1970 increased the number of professional staff for each committee to six, and specifically designated two staffers to be controlled by the minority party.<sup>19</sup> Thus, if 1946 was the formal start of the use of professional staff in the committees, 1970 was the formal switch from a "nonpartisan" to "bipartisan" structure. Despite designating certain staff for the majority and minority parties (and giving control of them to each party separately), the 1970 Act still provided that professional staff be appointed "without regard to political affiliation, and solely on the basis of fitness to perform the duties of their respective positions."<sup>20</sup> The number of professional staff per committee has increased in subsequent years, but the preservation of a bipartisan structure, with about one-third of staff reserved for the minority party, has generally been followed.<sup>21</sup>

#### B. Congressional Research Service (CRS) Staff

The idea for professional staff to help Congress with their research needs originated in the states and is generally credited to Dr. Charles McCarthy. McCarthy was working in the University of Wisconsin library while pursuing a Ph.D. in history when a state legislator asked if the library had "anything on railroads." The legislator was so overwhelmed by the mountain of books he received in response that he left without reading any of them. McCarthy became convinced that legislators should have at their disposal something more responsive to their needs—a service capable of collecting and digesting information, and providing quick and accessible material on any subject of legislative importance.<sup>22</sup> In 1901, McCarthy established a legis-

18 See KAMMERER, *supra* note 15, at 56; Kammerer, *supra* note 16, at 1127.

19 Legislative Reorganization Act of 1970, Pub. L. No. 91-510, §§ 301(a), 302(b), 84 Stat. 1140, 1175–77; see KENNETH KOFMEHL, PROFESSIONAL STAFFS OF CONGRESS 68–69 (3d ed. 1977) (criticizing "earmarking" of separate staff for minority); Walter Kravitz, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1970*, 15 LEGIS. STUD. Q. 375, 379 (1990).

20 Legislative Reorganization Act of 1970 § 301(a), 84 Stat. at 1176.

21 See COMM. ON HOUSE ADMIN., HISTORY OF THE HOUSE OF REPRESENTATIVES, 1789–1994, H.R. DOC. NO. 103-324, at 164 (1994); RUNDQUIST ET AL., *supra* note 7, at 1–6; JUDY SCHNEIDER, CONG. RESEARCH SERV., 90-153 GOV, MINORITY STAFFING: A CHRONOLOGICAL HISTORY 1 (1990) [ILL]; Kravitz, *supra* note 19, at 388. There is a wide variation of practice among the committees, depending upon its tradition and the attitudes of its chair and ranking member. In some committees, majority and minority staff are selected separately but work closely together.

22 See Congressional Reference Bureau: Hearings Before H. Comm. on the Library, 62d Cong. 44 (1912) [hereinafter *Hearings Before H. Comm. on the Library*] (statement of Dr. Charles McCarthy, Chief, Wisconsin Legislative Reference Department); Rex Mitchell Baxter, *The Legislative Reference Library*, 39 THE ARENA 674 (1908).

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lative reference bureau in Wisconsin that became a model for many similar state organizations during the next decade.<sup>23</sup>

McCarthy and his bureau were committed to nonpartisanship from the start. One of his “essentials” for a legislative reference bureau was for it to be “entirely nonpolitical and nonpartisan or else it will be worse than useless. If [there is a] choice between establishing a political department and no department at all take the latter.”<sup>24</sup> He emphasized this point in testimony he offered to Congress in 1912 when it began considering creation of such a bureau.<sup>25</sup>

The main point of contention in Congress was whether the bureau should incorporate both a reference service and bill-drafting. Some saw the two tasks as going hand-in-hand, but others thought the jobs should be separated.<sup>26</sup> Some also believed that although all members should have access to the reference service, only the committees and certain others needed help with bill-drafting.<sup>27</sup> Finally, although a nonpartisan reference service was relatively uncontroversial, there was disagreement on whether a bill-drafting service was needed,<sup>28</sup> and whether it should be nonpartisan or serve the members of each party separately.<sup>29</sup> In 1914, with the Senate unable to pass a comprehensive bill, Sen. LaFollette (R-Wisc.) inserted an amendment into an appropriations bill to fund creation of a legislative reference unit within the Library of Congress, and Congress approved it.<sup>30</sup> A substantially similar rider funded the service every subsequent year until 1946.<sup>31</sup>

23 Between 1901 and 1913, thirty-four states established similar organizations for their legislators. See *Hearings Before H. Comm. on the Library*, *supra* note 22, at 49 (statement of Rep. Townsend) (estimating the number around twenty-five); John B. Kaiser, *Scientific Law-Making*, 75 THE INDEP. 641, 641 (1913).

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24 HERBERT PUTNAM, LEGISLATIVE REFERENCE BUREAUS, LETTER FROM THE LIBRARIAN OF CONGRESS TRANSMITTING SPECIAL REPORT RELATIVE TO LEGISLATIVE REFERENCE BUREAUS, S. Doc. No. 62-7, at 7 (1911) (internal quotation marks omitted).

25 See *Hearings Before H. Comm. on the Library*, *supra* note 22, at 45 (statement of Dr. Charles McCarthy, Chief, Wisconsin Legislative Reference Department). Two witnesses urged for a nonpartisan corps of assistants who would present “simply information and not conclusions.” *Id.* at 70 (statement of Hon. Swagar Sherley, Member of Congress from Kentucky); see also *id.* at 28–29 (statement of Mr. Frederick Cleveland, Chairman, President’s Commission on Economy and Efficiency).

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26 See *id.* at 22–26 (statement of Hon. Herbert Putnam, Librarian of Congress) (arguing for separate jobs); *id.* at 76–77 (statement of Mr. Middleton Beaman, of New York) (arguing the jobs should be combined).

27 See *Legislative Drafting Bureau and Legislative Reference Division of the Library of Congress: Hearings on S. 8337 and S. 8335 Before the S. Comm. on the Library*, 62d Cong. 7 (1913) (testimony of Sen. LaFollette (R-Wisc.)).

28 See *infra* notes 34–38 and accompanying text.

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29 See *Hearings on S. 8337 and S. 8335* at 9–10, 22–23 (testimony of Sen. Owen (D-Ok.)) (proposing separate bill-drafters for members of each party).

30 See Appropriations Act of July 16, 1914, Pub. L. No. 63-127, 38 Stat. 454, 463 (1914) (appropriating funds to create legislative reference unit within Library of Congress); 51 CONG. REC. 10,467 (1914); *id.* at 11,207–09 (discussing approval of the Senate amendment).

31 See GALLOWAY, *supra* note 9, at 407–08.

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In 1946, the reference bureau was named the “Legislative Reference Service,” with its duties formalized and expanded. Up until that time, the reference bureau had hired on a nonpartisan basis, but the 1946 Act formalized the appointment of staff by the Librarian of Congress “without reference to political affiliations, solely on the ground of fitness to perform the duties of their office.”<sup>32</sup> In 1970, the service was renamed the “Congressional Research Service” and directed to help the committees evaluate legislative proposals “without partisan bias.” The Librarian of Congress was instructed to grant CRS “complete research independence and the maximum practicable administrative independence consistent with [its duties].” The rule requiring staff to be appointed “without regard to political affiliation” was retained.<sup>33</sup>

*C. The Offices of Legislative Counsel (OLC) Staff*

As noted, congressional interest in a bill-drafting service arose at the same time a reference service was being considered. Previously, legislative bills were drafted by the members themselves, sometimes with the assistance of volunteers or persons paid by the members. In 1913, the Senate debated a bill to create both the reference service and a “legislative drafting bureau,” with staff for the latter to be appointed “without reference to party affiliations, and solely on the ground of fitness to perform the duties of the office.”<sup>34</sup> In opposing the bill (which was not approved), Sen. Bacon (D-Ga.) stated:

I think it is the most astonishing piece of legislation I have ever heard proposed in this body. If the time has come . . . when Senators are going to need a schoolmaster to teach them how to draft a bill, I think it is about time that the Senators who are in such need should retire to their homes, resume their seats on their school benches, and let somebody else come here who is capable of doing such work.<sup>35</sup>

A decade later, at least some members of Congress continued to hold this view.<sup>36</sup> Indeed, to some members, the hiring of professional staff assistants was an “implied slur” upon the abilities of the members receiving the assistance.<sup>37</sup> Bacon also seemed to belittle the notion of a nonpartisan staff appointment, stating that if such an “all-wise man” with “great learning . . .

32 Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 203(a), (b)(1), 60 Stat. 812, 836.

33 Legislative Reorganization Act of 1970, Pub. L. No. 91-510, §§ 321(a), 84 Stat. 1140, 1181–82; see Kravitz, *supra* note 19, at 383, 386 (claiming that revision was intended “[t]o make the CRS more directly responsive to Congress . . . [and give] it complete research [and greater administrative] independence from the Library of Congress”).

34 50 CONG. REC. 2375–76 (1913) (debating Senate Bill 1240).

35 *Id.* at 2376.

36 See 64 CONG. REC. 2111–12 (1923) (statement of Rep. Sisson (D-Miss.)).

37 GROSS, *supra* note 10, at 282; see WILLIAM L. MORROW, CONGRESSIONAL COMMITTEES 52 (1969).



absolute sincerity of purpose and patriotism” could be found, Congress should install that person as the lawmaker of the country.<sup>38</sup>

Following defeat of the bill-drafting proposal (and pursuant to a program sponsored by Columbia University), Middleton Beaman and several others began working as volunteer aides in Congress to help with legislative drafting. The trial demonstration of professional staff help soon paid off. Rep. Kitchin (D.-N.C.), chairman of the House Ways & Means Committee and House Majority Leader, was initially reluctant to utilize the help of “university professors.” He relented, however, and the talents of Beaman (and the others) were used to draft several extremely challenging tax bills between 1916 and 1918.<sup>39</sup> In 1918, at the strong urging of the Ways & Means Committee, Congress created a permanent legislative drafting office in each chamber. Under the original statute, the directors of the House and Senate offices were appointed by the Speaker of the House and the President of the Senate (i.e., the Vice President), respectively, “without reference to political affiliations and solely on the ground of fitness to perform the duties of the office.”<sup>40</sup>

In 1924, the drafting service became the House and Senate Offices of Legislative Counsel, which continue to serve Congress today.<sup>41</sup> Beaman, who eventually served as House Legislative Counsel for thirty years, testified in 1945 that in the years since his appointment, no one had ever asked him about his politics.<sup>42</sup> The office was expanded in 1946 and described as having “permanent career staff independent of politics [rendering services] of the highest quality.”<sup>43</sup> In 1970, Congress described the purpose of the House OLC as “maintain[ing] impartiality as to issues of legislative policy” and “not advocat[ing] the adoption or rejection of any legislation.”<sup>44</sup>

38 50 CONG. REC. 2377 (1913); see Frederic P. Lee, *The Office of the Legislative Counsel*, 29 COLUM. L. REV. 381, 383–84 (1929).

39 See GALLOWAY, *supra* note 9, at 409; Lee, *supra* note 38, at 385–86.

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40 Revenue Act of 1918, Pub. L. No. 65-254, § 1303(a), 40 Stat. 1057, 1141 (1919); see H.R. REP. NO. 65-767, at 39 (1918). Kitchin by this point had become a strong supporter. See 56 CONG. REC. app. at 661, 701–02 (1918) (statement of Rep. Kitchin). The appointing officer for the director of the Senate office was changed to the president *pro tempore* of the Senate in 1941. See Revenue Act of 1941, Pub. L. No. 77-250, § 602, 55 Stat. 687, 726.

41 See Revenue Act of 1924, Pub. L. No. 68-176, § 1101, 43 Stat. 253, 353. The committee report described the drafting service as a “nonpolitical, non-patronage law office.” S. REP. NO. 68-398, at 47 (1924).

42 See James P. Gleason, *Legislative Counsel in Congress*, 38 GEO L.J. 277, 278 (1950); Harry W. Jones, *Bill-Drafting Services in Congress and the State Legislatures*, 65 HARV. L. REV. 441, 446 (1952) (reporting that there was no staff turnover at the OLC when control of either chamber changed).

43 Galloway, *supra* note 9, at 53.

44 Legislative Reorganization Act of 1970, Pub. L. No. 91-510, § 502, 84 Stat. 1140, 1202. The requirement to appoint staff “without regard to political affiliation” was retained. *Id.* §§ 521, 522, 84 Stat. at 1202–03.

*D. The Government Accountability Office (GAO) Staff*

From the nation's earliest days, Congress has struggled with controlling the use of federal funds by the executive branch. Congress has sometimes written detailed appropriations bills, but agencies have complained about the lack of flexibility and also been able to circumvent the limitations. Congress has also created internal checks, such as requiring multiple approvals of spending, but the system has sometimes become riddled with confusion and delays.<sup>45</sup>

At the beginning of the 20th century, the Progressive movement and the financial stresses of World War I heightened congressional interest in improving economy and efficiency in federal spending.<sup>46</sup> In 1919, Congress began considering legislative proposals to establish a budget office within the executive branch and an office of the comptroller general that would report to Congress on federal spending and be independent of the executive branch. A principal issue was determining the power of appointment and removal of the comptroller general. This issue raised both a separation-of-powers question and a policy concern of how to insulate the position from politics.<sup>47</sup>

In 1921, Congress passed the Budget and Accounting Act establishing an annual budget process and creating both the Bureau of the Budget (now the Office of Management and Budget) within the executive branch and the General Accounting Office (now the Government Accountability Office) as an establishment independent of the executive branch.<sup>48</sup> The comptroller general, who would head the new GAO, was to be appointed by the President (with advice and consent of the Senate) for a nonrenewable fifteen-year term, and could be removed by joint resolution of Congress only for reasons specified in the statute.<sup>49</sup> The purpose of the GAO was to investigate the use of public funds and recommend changes to provide greater economy and efficiency.<sup>50</sup>

Although congressional debate reflects an interest in the comptroller general being nonpartisan, there is no specific limitation imposed by the statute (other than the general restrictions on the appointment and removal

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45 See RICHARD E. BROWN, *THE GAO* 10 (1970).

46 See ROGER R. TRASK, *DEFENDER OF THE PUBLIC INTEREST* 16–19 (1996).

47 See *id.* at 23–35; *National Budget System: Hearings Before the Select Comm. on the Budget of the H.R.*, 66th Cong. 438–40 (1919) (testimony of Francis Oakey, Consulting Accountant, Bureau of Efficiency); *National Budget: Hearings on H.R. 9783 Before the S. Comm. On Consideration of a National Budget*, 66th Cong. 74 (1920) (testimony of Nicholas Murray Butler, President, Columbia University).

48 Budget & Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20.

49 See *id.* §§ 201, 207, 301–03, 42 Stat. at 20–24. A joint congressional resolution required the President's signature to take effect. An earlier version of the legislation was vetoed by President Wilson at the very end of his term because it provided for removal by concurrent resolution of each House of Congress, which would not have required the President's signature to be effective. See TRASK, *supra* note 46, at 35–38.

50 See Budget & Accounting Act of 1921 § 312(a).

process and the fixed, fifteen-year term).<sup>51</sup> There was apparently a general expectation that the appointment would be political, but that once in office, the appointee would act in an apolitical manner.<sup>52</sup> Over the years, the lengthy term of office has helped to preserve the independence of the comptroller general and the GAO.<sup>53</sup> In its first sixty years, there were only five comptrollers general and over half of the Presidents did not have an opportunity to make even a single appointment. By contrast, over the same period, there were twenty-five directors of the executive branch's budget office, with change of control of that branch regularly resulting in an appointment of a new director.<sup>54</sup>

### *E. The Joint Committee on Taxation (JCT) Staff*

The JCT is a bipartisan committee of ten members of the House and Senate tax-writing committees. The committee has no legislative jurisdiction and rarely convenes hearings or performs other traditional functions of a legislative committee; its principal purpose is to provide justification for having a staff.<sup>55</sup> The JCT and its staff were created in 1926 following a bitter, public feud between Sen. Couzens (R.-Mi.) and Andrew Mellon (who was in the midst of an eleven-year tenure as Secretary of the Treasury under three Republican Administrations).<sup>56</sup> The feud and its aftermath antagonized Congress's relationship with the executive branch, but improved cooperation between the House and Senate, and both were instrumental in the JCT's creation. Congress saw the need to have staff that could examine tax returns, investigate the tax agency's practices and administration of the law, monitor

51 A proposed amendment to reduce the term to seven years was criticized because it "would throw the office into politics rather than to take it out of politics." 61 CONG. REC. 1080 (1921) (statement of Rep. Knutson (R.-Minn.)).

52 See 61 CONG. REC. 1090 (1921) (statement of Rep. Good (R.-Iowa)) ("It was the intention of the committee that the comptroller general should be . . . a real critic, and at all times should come to Congress, no matter what the political complexion of Congress or the Executive might be, and point out inefficiency . . ."). The first comptroller general was John McCarl whose appointment, according to Trask, was "largely political." TRASK, *supra* note 46, at 50. McCarl, however, developed a reputation of resisting political pressure and scrutinizing the propriety of even the smallest expenditures. He helped establish a reputation of independence and integrity for the agency. See *id.* at 49–65.

53 See *id.* at 529–30.

54 See FREDERICK C. MOSHER, *A TALE OF TWO AGENCIES* 4–5 (1984).

55 See I.R.C. §§ 8002(a), 8004 (2006); CHRISTOPHER J. DEERING & STEVEN S. SMITH, *COMMITTEES IN CONGRESS* 14–15 (3d ed. 1997); Walter J. Oleszek, *House-Senate Relationships: Comity and Conflict*, 411 ANNALS AM. ACAD. POL. & SOC. SCI. 75, 81 (1974) (stating that the JCT "functions mainly as a holding company for staff"). Most of the information in this section is derived from George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2151409>. See Overview, THE JOINT COMM. ON TAXATION, <https://www.jct.gov/about-us/overview.html> (last visited Apr. 4, 2013).

56 See Revenue Act of 1926, Pub. L. No. 69-20, § 1203, 44 Stat. 9, 127–28.

the agency's enforcement activities, and help the tax-writing committees with the formation of tax legislation.

The principal duty of the staff—currently including about forty economists, lawyers, and accountants—is to serve as a policy advisor to the chairs, ranking members, and other members of the tax-writing committees. In this role, the staff helps to conceive, analyze, and evaluate many tax policy options for those committees and assists with all of the legislative tasks necessary for enactment of a proposal. The staff also provides the official revenue estimates used by Congress for all proposed tax legislation,<sup>57</sup> reviews all large tax refunds made by the IRS,<sup>58</sup> and monitors the agency's administration of the tax laws. Occasionally, the staff performs tax-related investigations, such as examining President Nixon's tax returns and the tax positions of the Enron Corp.<sup>59</sup>

From the beginning, the JCT staff has been nonpartisan, although the legislative background does not clearly explain the reason.<sup>60</sup> The Senator who conceived of the staff spoke of the need for “an independent body, something selected wholly separate from any influence” possibly because one role he saw for the staff was to examine confidential (and politically sensitive) tax return information.<sup>61</sup> The need for the staff had grown out of a dispute in which Congress thought the executive branch had committed various abuses, including using tax return information for political purposes. Another possible explanation was cost-savings; as we have seen, professional staff assistance for the committees was quite unusual in 1926, and nonpartisan (and joint) staff may have been more acceptable because it could avoid duplication of effort.<sup>62</sup> Also, to the extent Congress used professional staff, it was clearly the norm in 1926 to hire on a nonpartisan basis. There is no rule, however, specifying how staff are to be selected. At present, the selection of the Chief of Staff alternates between the House and Senate tax-writing com-

57 See 2 U.S.C. § 601(f) (2006).

58 See I.R.C. § 6405(a) (2006).

59 See *id.* § 8022(1).

60 See Letter from Laurence N. Woodworth, Chief of Staff, JCT, to Spiros J. Caramalis (Mar. 12, 1965) (on file in Nat'l Archives & Records Admin. (Wash., D.C.), RG 128, Ch. 23, Records of J. Comm. on Int. Rev. Tax'n (1926-75) (box #202) (“JCIRT 1965” file)) (reporting that since formation of the JCT staff in 1926, it had been nonpartisan with only three Chiefs of Staff, each of whom served under both Republican and Democratic regimes); Letter from Colin F. Stam, Chief of Staff, JCT, to Max M. Kampelman, Legis. Counsel to Sen. Hubert Humphrey (Aug. 6, 1953) (on file in Nat'l Archives & Records Admin. (Wash., D.C.), RG 128, Ch. 23 Records of J. Comm. on Int. Rev. Tax'n (1926-75) (box #185) (“JCIRT work” file)) (reporting that when Republicans took control of both chambers in 1953, there was no turnover among the JCT staff “except where members voluntarily resigned to accept positions offering greater remuneration”).

61 *Revenue Act of 1926: Hearings on H.R. 1 Before the S. Comm. on Fin.*, 69th Cong. 216 (1926) (statement of Sen. Jones (D-N.M.)).

62 Cf. 1 HAYNES, *supra* note 2, at 315 (claiming that “service of joint committees . . . might avoid enormous waste of time and duplication of effort”); MORROW, *supra* note 37, at 37–38, 215–17; THOMAS J. REESE, *THE POLITICS OF TAXATION* 64 (1980) (questioning whether Congress would pay for two staffs the size and quality of the JCT staff).

mittee chairs (with at least acquiescence by the other chair),<sup>63</sup> and the chief then selects all other staff with *pro forma* approval by the JCT.<sup>64</sup> Of all of the legislative support organizations, the duties of the JCT staff most closely parallel those of committee staffs. Unlike most committee staffs, however, the JCT staff is not affiliated with any party and is not separated into majority and minority party staff members.<sup>65</sup>

#### F. *The Office of Technology Assessment (OTA) Staff*

The OTA was created in 1972 “to provide early indications of the probable beneficial and adverse impacts” of new technological developments.<sup>66</sup> The office was largely the brainchild of Rep. Emilio Daddario (D.-Ct.), who chaired the House Technology subcommittee during the period of the office’s conception. From the beginning, the exact mission of the office was somewhat vague, and it soon provided policy analysis on a range of issues, including health care, energy policy, environmental issues, land and resource management, international trade, and defense.<sup>67</sup>

The statute authorizing the OTA created a three-part organizational structure. First, it established a thirteen-member “Technology Assessment Board,” consisting of twelve members of Congress (six each from the House and Senate, divided equally by party) and the director of the office (who had no vote). House members were appointed by the Speaker, and Senators were appointed by the president *pro tempore* of the Senate. The Board set the policy for the office, appointed its director (to a six-year term), and became involved to some extent in policy implementation. The Board, for example, approved each study of the office before it began, and sometimes reworded conclusions of reports to soften language found to be too pointed. The Board also retained veto power over staff selected by the director and, more importantly, could instruct the director to appoint certain staff (a procedure known as “Rule 12”). Board members could also request that certain studies be performed.<sup>68</sup>

Second, the statute authorized a twelve-member “Technology Assessment Advisory Council,” consisting of ten public experts, the comptroller

63 See REESE, *supra* note 62, at 63 (1980) (reporting that “[t]he chief of staff has always been someone who is acceptable to both chairmen”).

64 See KAMMERER, *supra* note 15, at 40–41.

65 One observer has suggested that the highly technical nature of tax legislation tends to demand restrained partisanship (among other things). See JOHN F. MANLEY, *THE POLITICS OF FINANCE* 64, 71 (1970). During roughly the last four decades, however, both the Ways & Means and Finance Committees have employed partisan staff who have worked alongside the nonpartisan JCT staff on tax legislation.

66 Technology Assessment Act of 1972, Pub. L. No. 92-484, § 3(c), 86 Stat. 797, 797.

67 See BRUCE BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS* 8, 26 (1996); DONALD LAMBRO, *FAT CITY* 248 (1980).

68 See Technology Assessment Act of 1972 §§ 3(b), (d)(2), 4(a), (d), 5(a), 86 Stat. at 797–99; BIMBER, *supra* note 67, at 29–30, 53. Committee chairs could also request studies, and about one-fourth were performed for chairs who were also board members. See *id.* at 33.

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general of the GAO, and the director of CRS. The Council advised the Board on the selection of projects and helped evaluate the office's reports. Both the CRS and GAO were also required to provide various supplemental services to the OTA.<sup>69</sup>

Finally, the work of the office was performed by a director and staff. The first director was Daddario, who, by the time the office was formed, had left Congress and lost a campaign to be governor of Connecticut. Other than his service as subcommittee chair, Daddario (who was a lawyer, war veteran, and elected public official beginning at the age of twenty-eight) does not appear to have had any particular background in science or technology prior to becoming OTA director.<sup>70</sup>

Except for one reference in the OTA statute to Congress's need for "competent, unbiased information,"<sup>71</sup> there is no indication that the office and its staff were organized to be nonpartisan.<sup>72</sup> Indeed, the structure and initial steps taken to form the office—including the selection of Daddario as director, the placement by individual Board members of their "own" staff on the OTA staff pursuant to Rule 12, the Board's involvement in the actual operations of the office, and the domination over the office by Sen. Kennedy (D.-Mass.) (who was the first Board chairman)—led to the exact opposite conclusion.<sup>73</sup> By the end of its first half-dozen years, the OTA was "highly politicized" and "appeared to be an utter failure at providing neutral expertise."<sup>74</sup> The OTA staff's experience in trying to become less politicized and more influential is instructive, as discussed in Part II.

### G. *The Congressional Budget Office (CBO) Staff*

The final example of nonpartisan professional staff is that of the CBO, formed in 1974. The CBO may presently be the best known of the legislative support organizations because of the pervasive importance of budget issues in evaluating policy options. The office publishes each year a ten-year and long-term analysis of the country's budgetary situation, and an analysis of the President's budget proposal. In addition, the CBO periodically publishes analyses of the budget and economic effects of various major policy propos-

69 See Technology Assessment Act of 1972 §§ 7(a), (b), 8, 9, 86 Stat. at 800–02.

70 See Daddario, *Emilio Quincy*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000001> (last visited Apr. 4, 2013); 156 CONG. REC. S6859 (daily ed. Aug. 5, 2010) (statement of Sen. Dodd (D.-Ct.)) ("Remembering Congressman Emilio Daddario").

71 Technology Assessment Act of 1972 § 2(d)(1), 86 Stat. at 797.

72 One of the original public supporters of the OTA commented that the office was intended to provide nonpartisan, neutral competence. See BIMBER, *supra* note 67, at 50 (quoting Harvey Brooks).

73 Sen. Kennedy indicated that he saw no conflict in staff being responsible to both a Board member and the OTA. Sen. Humphrey (D.-Minn.) (another Board member) stated that he would allow a staff person to be responsible to Daddario, but only with the understanding that the person would be available to Humphrey whenever needed. See *id.* at 54.

74 *Id.* at 51; see *id.* at 20; LAMBRO, *supra* note 67, at 248.

als, testifies regularly on those issues, supports the annual congressional budget process, and provides cost estimates of all spending proposals.<sup>75</sup>

The Congressional Budget Act of 1974,<sup>76</sup> which created the CBO, was enacted to centralize Congress's control over the budget and to improve the legislature's budget resources. Ever since the 1921 Act establishing the executive branch's annual budget process and creating the Bureau of the Budget, that branch had been viewed as having the upper hand on budget matters. The 1974 Act also arose because of specific conflicts Congress had with the executive branch, including frustration with the Johnson Administration's budgeting for the Vietnam War and Great Society programs (including Medicare and Medicaid) during the late 1960's, and the Nixon Administration's impoundment of funds and insistence on congressional spending ceilings during the early 1970s. Finally, Congress approved the Act in the hope that it would help avoid the frequent and unpopular task of raising the debt ceiling. In addition to the CBO, the law created the House and Senate Budget Committees and an annual congressional budget process.<sup>77</sup>

Under the law, the CBO director is appointed "without regard to political affiliation and solely on the basis of his fitness to perform his duties" jointly by the Speaker of the House and president *pro tempore* of the Senate after considering recommendations from the two Budget Committees.<sup>78</sup> By custom, the two Budget Committees alternate making a recommendation, and their selection has been accepted by the appointing officers.<sup>79</sup> The director's term is four years, and begins on January third of the year preceding a presidential election (i.e., roughly the middle of the term of a sitting President). Thus, the director's appointment is insulated somewhat from presidential politics but still occurs immediately after a congressional election (and a possible change of control of either chamber). The director may be removed by resolution of either chamber. The director appoints the rest of the staff, again "without regard to political affiliation and solely on the basis of their fitness to perform their duties."<sup>80</sup>

#### H. Summary

The following table summarizes the appointment process of the head of each of the staffs described. It sets out who appoints the staff chief, any non-partisan condition of appointment, the term of appointment (if any), and the conditions for removal of the staff chief. For most committees after 1970,

<sup>75</sup> See Our Products, CONGRESSIONAL BUDGET OFFICE, <http://www.cbo.gov/about/our-products> (last visited Apr. 4, 2013).

<sup>76</sup> Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297.

<sup>77</sup> See *id.* §§ 101-311, 88 Stat. at 299-316; PHILIP G. JOYCE, THE CONGRESSIONAL BUDGET OFFICE 15-16 (2011).

<sup>78</sup> Congressional Budget Act of 1974 § 201(a)(2), 88 Stat. at 302.

<sup>79</sup> See ROBERT KEITH & MARY FRANCES BLEY, CONG. RESEARCH SERV., RL31880, CONGRESSIONAL BUDGET OFFICE: APPOINTMENT AND TENURE OF THE DIRECTOR AND DEPUTY DIRECTOR 2 (2005).

<sup>80</sup> Congressional Budget Act of 1974 § 201(b), 88 Stat. at 302.

TABLE 1: APPOINTMENT CONDITIONS OF HEADS OF VARIOUS CONGRESSIONAL STAFFS

	Committees, 1946-70	Committees, post-1970	CRS	OLC	GAO	JCT	OTA	CBO
Appointed by:	committee	maj/min of	Librarian of Congress*	S office — VP** H office — Speaker	President, w/ advice & consent of Senate	H & S tax- writing committee chairs (alternate)	OTA Board***	Joint apptmt by Speaker & pres pro tem of Senate on advice from Budget Comms (alternate)
Nonpartisan condition	W/O – PA****	W/O – PA	W/O – PA	W/O – PA	None specified	None specified	None specified	W/O – PA
Term	None specified	None specified	None specified	None specified	15 years	None specified	6 years	4 years, beginning Jan. 3 of year prior to Presidential election year
Removal condition	None specified	None specified	None specified	None specified	Jt. Congr. Resolution only for specified reasons	None specified	None specified	Resolution of either House

\* Appointed by President with advice and consent of Senate.

\*\* Changed to president pro tem of Senate in 1941.

\*\*\* Voting members are six Senators appointed by president pro tem of Senate and six Representatives appointed by Speaker, each group equally divided by party

\*\*\*\* “Without regard to political affiliation and solely on the basis of fitness to perform the duties of the office.”



there is a separate chief of the majority and minority staff who is appointed by the majority and minority members, respectively, of the committee.

II. NONPARTISAN PROFESSIONAL COMMITTEE STAFF AND GRIDLOCK

A. *A Theoretical Case for Nonpartisan Staff*

Aside from claiming that it would lessen the influence of the parties in the legislature, Edwards does not clearly explain how nonpartisan staff would help to reduce gridlock. This Section outlines a theoretical case for why such staff might accomplish that end. The argument is applicable whether gridlock is primarily caused by the parties or by two related factors—an excessive focus in Congress on campaigning and reelection (as opposed to governing),<sup>81</sup> or extreme ideological polarization.<sup>82</sup>

Staff serve in Congress without being elected to it, and can continue to serve without being reelected. Thus, to the extent there are party or ideological filters that restrict the type of person who can be elected to serve, staff may avoid them. Further, to the extent reelection worries activate the same filters to restrict how members can behave once in Congress, or simply reduce the amount of time that can be spent governing effectively, staff may avoid these restraints as well. In short, at least in theory, staff can work in Congress with one principal objective—to help develop workable legislative solutions to the nation’s problems.

Staff functions in Congress vary considerably, but in general, staff perform virtually all of the legislative tasks (short of voting) necessary for enactment of a bill. At a minimum, professional staff assimilate, condense, and synthesize information for members of Congress. Staff may obtain this information from sources external to Congress (by, for example, organizing and briefing members on hearings, reviewing and summarizing hearing testimony and other written submissions, meeting with constituents, interest

81 See AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE* 2–5 (2012) (attributing inability to reach compromises to focus of legislators on campaigning and reelection).

82 See ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER* 5–6 (2010) (attributing gridlock to increased polarization and anti-majoritarian aspects of political system); SARAH A. BINDER, *STALEMATE* 68, 79–81 (2003) (claiming increased polarization of parties encourages deadlock); BROWNSTEIN, *supra* note 6, at 11 (blaming partisanship and extreme polarization); SINCLAIR, *supra* note 4, at 355–61 (showing increased partisan polarization reduced the rate of successful legislative outcomes); David W. Brady et al., *Polarization and Public Policy: A General Assessment*, in 2 *RED AND BLUE NATION?*, *supra* note 6, at 185, 195–205 (showing that polarization increases gridlock on issues of strong ideological differences); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 276–81, 329–33 (2011) (attributing legislative gridlock and paralysis to radically polarized politics that were unleashed by the Voting Rights Act of 1965). But cf. Barbara Sinclair, *Spoiling the Sausages? How a Polarized Congress Deliberates and Legislates*, in 2 *RED AND BLUE NATION?*, *supra* note 6, at 55, 79 (noting that George W. Bush presidency was not characterized by legislative gridlock); Klein, *supra* note 8 (indicating that the 111th Congress (2009–2010) was quite productive).

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groups and executive branch representatives, and performing research), or internal to it (by obtaining intelligence from congressional offices, committees, caucuses and other *ad hoc* organizations in Congress, leadership, and the other chamber).

Some staff, however, carry out much more significant duties. They may interrogate witnesses at hearings (and not just organize and prepare their members for them), prepare or solicit policy analyses (and not just assimilate and summarize work already performed by others), organize support and build coalitions among interest groups and the executive branch in favor of legislative initiatives (and not just convey concerns of those groups to members of Congress), and ultimately, conceive, negotiate, and help implement legislative solutions in Congress (and not just advise their members about such possibilities). Some staff may also influence how their members vote. Some observers have suggested that there should be “term limits for staff” because of how influential some staff are in the legislative process.<sup>83</sup>

How exactly might *nonpartisan* staff improve the prospects for reaching legislative outcomes? Supporters of nonpartisans in the past have been somewhat vague about their benefits, referring generally to persons who would be “objective,” “independent,” and not subject to political influence.<sup>84</sup> In contrast, Brownstein has characterized partisans as offering only “either-or alternatives” as opposed to “solutions built on the principle of both-and.”<sup>85</sup> To him, partisan solutions are like “trying to cut a piece of paper by using only one blade of a scissors.”<sup>86</sup> From these nebulous descriptions, we might

83 Barbara S. Romzek & Jennifer A. Utter, *Career Dynamics of Congressional Legislative Staff: Preliminary Profile and Research Questions*, 6 J. PUB. ADMIN. RES. & THEORY 415, 419, 426–27, 429 (1996); see RUNDQUIST ET AL., *supra* note 7, at 10–19 (describing staff functions and impact); ROCHELLE JONES & PETER WOLL, *THE PRIVATE WORLD OF CONGRESS* 154–65 (1979) (describing critical role of Senate staff); MALBIN, *supra* note 7, at 5 (describing important staff activities); Christine DeGregorio & Kevin Snider, *Leadership Appeal in the U.S. House of Representatives: Comparing Officeholders and Aides*, 20 LEGIS. STUD. Q. 491, 498 (1995) (reporting survey showing slightly more than one-third of people selected as “House leaders” (people who, through their positions, forcefulness of ideas, and tactical prowess, play a central role in lawmaking) are staff, especially committee staff); Susan Webb Hammond, *Recent Research on Legislative Staffs*, 21 LEGIS. STUD. Q. 543, 544–52 (1996) (reviewing literature on staff activities and influence and concluding that “staff are major actors and important participants (and leaders) in the policy process”).

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84 See DAVID E. PRICE, *WHO MAKES THE LAWS?* 196 (1972) (describing nonpartisanship as “neutral competence—performance according to explicit, objective standards rather than . . . personal or party or other obligations and loyalties” (alteration in original) (internal quotation marks omitted)); Galloway, *supra* note 9, at 56 (describing nonpartisan committee staff authorized by the 1946 Act as providing Congress with an “unbiased, competent source of expert information and analysis”); John F. Manley, *Congressional Staff and Public Policy-Making: The Joint Committee on Internal Revenue Taxation*, 30 J. POL. 1046, 1050–52 (1968) (describing role of nonpartisan JCT staff as professional, independent, highly reliable, objective, and neutral).

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85 BROWNSTEIN, *supra* note 6, at 10.

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86 *Id.* at 389. Brownstein offers a number of examples of how principles of inclusion and concession might help to resolve some of the nation’s problems. See *id.* at 388–99; see

hypothesize nonpartisan staff as offering several potential advantages over partisans. At a minimum, they may collect and provide to members of Congress information that is more complete and balanced than what a partisan would provide. Some studies have suggested exactly this result.<sup>87</sup> This difference might be important if one of the reasons for gridlock is the failure of members to understand the multiple sides and aspects of complex issues. Moreover, nonpartisan staff may be able to analyze options differently than partisans, in a manner that might be persuasive to members of Congress with differing viewpoints. Their analysis may reveal more clearly to a range of members the relative merits of pursuing various courses of action. Finally, nonpartisan staff playing a more significant role in the legislative process may be able to conceive, develop, and negotiate legislative solutions that simply elude partisans (or partisan staff) because of their strong pre-commitments to particular outcomes.<sup>88</sup> Nonpartisan staff may also help to reduce the “echo chamber” effect when like-minded persons share and reinforce their pre-existing views, and push one another to more extreme positions that ultimately become irreconcilable with the views of non-like-minded persons.<sup>89</sup> As Barbara Sinclair has explained: “[the lives of House Members] now take

also LEWIS L. GOULD, *AMERICA IN THE PROGRESSIVE ERA, 1890–1914*, at 41 (2001) (describing Progressive era view of politics “as an unsavory, inherently corrupt enterprise that rarely produced good results for society”); John A. Lapp, *Non-Partisan Government*, 9 AM. POL. SCI. REV. 313, 314–15 (1915) (distinguishing a nonpartisan, who can be expected to provide “greater efficiency,” from blind partisan, who “insists upon ignorant, unyielding and unswerving party fealty”).

87 See MALBIN, *supra* note 7, at 141–45 (providing case study of distorted report prepared by partisan staff and concluding that it was “a piece of propaganda, pure and simple”); *id.* at 149–65 (describing other questionable practices of partisan staff); *id.* at 186 (reporting that nonpartisan staff helped Congress understand complex material and provided information that “has not been distorted to meet the chairman’s or anyone else’s political needs”); Marjorie E. Kornhauser, *The Rise of Rhetoric in Tax Reform Debate: An Example*, 70 TUL. L. REV. 2345, 2356–66 (1996) (contrasting less informative and accurate report by partisans with that prepared by nonpartisans); Michael J. Malbin, *Congressional Committee Staffs: Who’s in Charge Here?*, 47 PUB. INT. 16, 29–31 (1977) (reporting how partisan staff “repeatedly reported only that part of the story that best fit its preconceptions”); *id.* at 35 (explaining danger of partisan staff “shut[ting] off some ideas that would flow to a less partisan staff”); *cf.* THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS* 62–67 (2012) (reporting misinformation circulated by partisan media).

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88 During the Progressive Era, there was faith in nonpartisan experts being able to resolve seemingly intractable stalemates. See ARTHUR S. LINK & RICHARD L. MCCORMICK, *PROGRESSIVISM* 61 (1983) (describing belief in “impartial experts . . . empowered to gather the facts, analyze them according to the methods of science or social science, and render rational decisions on the basis of their knowledge”); Gordon, *supra* note 7, at 111 (the “common denominator” among Progressives was that “expertise could resolve seemingly unresolvable political stalemates”).

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89 CASS R. SUNSTEIN, *GOING TO EXTREMES* 159 (2009); see *id.* at 2, 8. Sunstein, however, also reports on “biased assimilation,” in which mixed groups (such as partisans of different stripes) sometimes produce more polarization. *Id.* at 50. Each side essentially discounts information that is contrary to preexisting views and inflates the significance of supporting evidence. See *id.* at 50, 52–53.

place mostly within their party. All this amplifies both intraparty cohesion and interparty polarization even beyond what constituency-based ideological homogeneity would dictate.”<sup>90</sup>

In summary, a theoretical case for nonpartisan staff reducing gridlock is generally premised on persons having (1) particular *expertise* to gather and analyze information, and be persuasive to members of Congress with differing viewpoints, in a manner different from partisans, and (2) sufficient *influence* in Congress to be able to effect legislative outcomes (despite not having a vote). The remaining Sections in this Part raise questions about this theoretical case.

### B. *Who Are Nonpartisan Staff, and How Are They Selected and Retained?*

A threshold question is determining exactly what is meant by “nonpartisan” staff. As described in Part I and shown in Table 1, to the extent “nonpartisan” has been defined among the staffs discussed, it seems to refer to staff hired “without regard to political affiliations and solely on the basis of fitness to perform the duties of the office.”<sup>91</sup> Thus, only one characteristic—“political affiliation”—is specifically identified as an unacceptable employment attribute. Moreover, even if faithfully followed, the test does not actually exclude persons by reason of their political affiliation. The test is commonly implemented by simply *not asking* applicants about their political affiliation, and preventing them from providing that information voluntarily.<sup>92</sup> Sometimes, the test is implemented by also excluding applicants who have previously engaged in political activities.<sup>93</sup> Thus, as commonly applied, the test is an early version of “don’t ask, don’t tell,” with the possible addition of “don’t have any history of acting out.” If the theoretical case is premised in part on staff not, in fact, having any specific political affiliation, the current tests do not achieve that goal.

Furthermore, the test is silent on other possibly unacceptable employment attributes. Specifically, ideology is not referenced as a disqualifying attribute for any of the staffs.<sup>94</sup> Yet persons with a strong ideological bent—

<sup>90</sup> Sinclair, *supra* note 82, at 70.

<sup>91</sup> Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 202(a), 60 Stat. 812, 834; *see also* Revenue Act of 1918, Pub. L. No. 65-254, § 1303(a), 40 Stat. 1057, 1141 (1919); 50 CONG. REC. 2375–76 (1913) (debating Senate Bill 1240);

<sup>92</sup> *See* Kammerer, *supra* note 16, at 1128; David E. Price, *Professionals and “Entrepreneurs”: Staff Orientations and Policy Making on Three Senate Committees*, 33 J. POL. 316, 328 (1971) (describing JCT practice).

<sup>93</sup> *See* Lee, *supra* note 38, at 398 (describing test used by legislative drafting service).

<sup>94</sup> *Cf.* PRICE, *supra* note 84, at 194 (JCT staff chief’s promise to remove politics from the staff in reality “often left him free to implement his and his mentors’ decidedly conservative preferences”); Kammerer, *supra* note 16, at 1129 (explaining that lack of turnover of staff when Democrats gained control of Congress in 1949 reflected fact that incoming Democratic chairmen had policy views similar to their Republican predecessors); Manley, *supra* note 84, at 1052–55 (discussing the conservative views of former Chief of Staff of the Joint Committee on Taxation, Colin F. Stam, which frustrated Democratic Senators due to his influence over tax policy).

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even if not tied to any particular party—may well lack the openness to ideas and objectivity that would contribute to the distinctive expertise necessary for the theoretical case. In 1951, Gladys Kammerer warned that this concern may be especially pertinent to highly trained professionals:

Any expectation that so-called “experts[,]” even the most competent persons available, will be above possession of an ideological slant in the field of their expertise is naive, to say the least. As a matter of fact, it is not too hard to believe that the better informed and more highly trained one may be in a special field of study, the more likely is he to have arrived at a philosophy or at least a set of standards for action in his field. The less likely, therefore, is he to be able to work passively and happily on legislation which runs counter to his philosophy.<sup>95</sup>

Aside from views arising from education and training, personal biases and institutional influences (described in the next Section) may also affect a staff member’s openness and objectivity.

Conceivably, the “solely on the basis of fitness to perform the duties of the office”<sup>96</sup> portion of the test might be interpreted as precluding the hiring of strong ideologues, or a staff who all subscribe to one particular ideology, but such an interpretation seems pretty heroic and unlikely. Of course, any test based on ideology, and any more stringent test involving political affiliation, would raise further questions of how the disqualifying attribute would be determined. The general point is that if the hoped-for distinctive expertise of nonpartisan staff conceives of persons with greater receptivity towards different party or ideological positions, or at least assumes a collection of persons with diversity of such viewpoints, the current-law tests do not necessarily ensure that result.<sup>97</sup>

Obviously, a further issue is the faithful execution of any test. Table 1 shows the range of persons responsible for making the appointment of the staff chief of the various offices (who generally has authority to hire all other staff members). The one common feature of those appointing the chief is that they are all directly or indirectly partisans.<sup>98</sup> The experience with committee staffs in 1946, where a directive to hire staff “without regard to politi-

95 KAMMERER, *supra* note 15, at 57; see Malbin, *supra* note 87, at 25 (“[I]t is impossible to be both expert and neutral on all questions of policy.”).

96 Legislative Reorganization Act of 1946 § 202(a), 60 Stat. at 834; see *supra* note 91.

97 Cf. KAMMERER, *supra* note 15, at 34 (indicating that Senate Finance Committee found a tax specialist with a “sympathetic political philosophy”); Malbin, *supra* note 87, at 22 (describing dissatisfaction with former JCT Chief of Staff who was viewed as politically, but not ideologically, impartial); David Whiteman, *The Fate of Policy Analysis in Congressional Decision Making: Three Types of Use in Committees*, 38 W. POL. Q. 294, 299–304 (1985) (describing problems when staff begin with particular policy positions). In 2012, a Republican Congressman accused a member of the CBO staff of being a liberal partisan based on the staff person’s entries on his Facebook page and public records of his political contributions. See Erica Martinson, *John Shimkus Blasts CBO Economist over Facebook Page*, POLITICO (May 17, 2012, 7:16 PM), <http://www.politico.com/news/stories/0512/76467.html>.

98 The director of the CRS is appointed by the Librarian of Congress who may be nonpartisan but is appointed by the President with advice and consent of the Senate.

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cal affiliation” resulted in perhaps one-third to one-half of staff being hired for political reasons, shows the potential difficulty of ensuring that any test is properly applied. In one instance, Congress changed the law to prevent this type of behavior. The Senate removed the authority of the Vice-President to appoint staff for the Senate Legislative Counsel’s office (and transferred the authority to the president *pro tempore* of the Senate) when the Vice-President was viewed as trying to make a political appointment to that office.<sup>99</sup> That case, however, was probably seen by Congress as an intrusion into its prerogatives by the executive branch. Congress would likely have a much more difficult time policing the hiring practices of one of its own members, as the 1946 experience suggests. As Kammerer has written, “[i]n a body so highly political as is the Congress, it might be too much to expect persons whose thinking has been attuned almost entirely for years to manipulation for party or personal advantage to discard such considerations easily or quickly.”<sup>100</sup>

In some cases, the test of hiring “without regard to political affiliation” may not even be intended to be taken seriously. As noted, the 1970 Act retained that test for committee staff even though one of the main purposes of the Act was to permit separate hiring of staff by the majority and minority parties. Since 1970, despite the rule contained in the Act, the norm seems to be partisan hiring by the committees, with the majority and minority members each hiring their “own” staff.<sup>101</sup> There is also ample evidence of partisan hiring on individual member staffs. In one instance, when a Senator changed party affiliation, many of his staff members resigned to prevent hurting their chances of future employment with offices of the original party affiliation.<sup>102</sup>

The combination of a lengthy term of office and stringent conditions for removal of the staff person (such as those applicable to the comptroller general of the GAO) provides an alternative way to insulate a staffer from partisan influence. But that method seems infeasible for committee staffs. Unlike the comptroller general, committee staff chiefs typically have close working

99 See Revenue Act of 1941, Pub. L. No. 77-250, § 602, 55 Stat. 687, 726; Jones, *supra* note 42, at 444 n.10.

100 KAMMERER, *supra* note 15, at 60; see CONG. QUARTERLY INC., CONGRESSIONAL QUARTERLY’S GUIDE TO CONGRESS 586 (4th ed. 1991) (describing the internal pressures that political parties and congressional leadership can apply to individual members); MORROW, *supra* note 37, at 53–56 (reporting in 1969 that professional staffing on committees “is a highly partisan matter”).

101 See EVANS & OLESZEK, *supra* note 4, at 134–35 (describing heightened partisanship in committees after 1994); MALBIN, *supra* note 7, at 12–14; SUNDQUIST, *supra* note 13, at 405 (indicating that by mid-1970’s, “the concept in the [1946 Act] that professional staff members should be politically neutral . . . had long since been discarded by most committees as unworkable”); Malbin, *supra* note 87, at 20 (reporting that most committee staffs “are partisan *de jure* as well as *de facto*”).

102 See Barbara S. Romzek & Jennifer A. Utter, *Congressional Legislative Staff: Political Professionals or Clerks?*, 41 AM. J. POL. SCI. 1251, 1267–68 (1997) (describing experience when Sen. Ben Nighthorse Campbell (Colo.) switched from Democrat to Republican in 1995).

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relationships with the members of their committee, including especially the chairman of the committee. Any fixed, lengthy term for the staff chief would undoubtedly result in some uncongenial pairings that would, at a minimum, undermine the influence and effectiveness of the staff person (and, therefore, tend to blunt the theoretical case).<sup>103</sup> For the same reason, it is probably unrealistic to expect nonpartisan committee staff to be as independent of partisan influence as staff of a legislative support organization.<sup>104</sup>

### C. *Staff Incentives*

This Section assumes that people without strong pre-commitments to political party or specific ideology can be properly identified, hired, and retained as staff. Would that be enough to ensure the “distinctive expertise” assumed by the theoretical case? The answer to that question depends importantly on staff incentives once they begin working in Congress.<sup>105</sup>

Some staff incentives may relate primarily to career opportunities during or after congressional service, including (1) maintaining the staff member’s existing position, (2) getting promoted within the current office or staff, (3) obtaining a new position with a more influential or prestigious office in Congress, (4) obtaining a position in the executive branch, (5) working in the private sector doing legislative- or non-legislative-related work, and (6) running for political office.<sup>106</sup> Since, in general, both Congress and the executive branch are run by partisans, most of these career goals might entice a staff member to assume partisan (and/or ideological) positions (even if they

103 Cf. Kammerer, *supra* note 16, at 1129 (questioning whether uncongenial pairing would be consistent with representative democracy). A variation is to have a partisan staff chief but with nonpartisan staff serving under that person, such as in executive agencies. *See id.* at 1130–31 (describing short-term trend on some committees to have both a partisan “clerk” and nonpartisan, professional “staff director”); Malbin, *supra* note 87, at 38–40 (arguing for “dual staffing” with “a core of nonpartisan professionals . . . supplemented by partisan” positions).

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104 See MALBIN, *supra* note 7, at 194 (“Let’s not kid ourselves. Staffs work for chairmen and chairmen have their own policies and ideologies. You are nonpartisan in the sense that you will work for any chairman who comes along, but you have got to work with the chairman you have.” (quoting Walter Kravitz, a former staff director of the Budget Committee)).

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105 Cf. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 51 (1989) (explaining that rewards and penalties influence person’s behavior more than attitudes).

106 See RUNDQUIST ET AL., *supra* note 7, at 7–10 (describing staff characteristics and work environment); Beth M. Henschen & Edward I. Sidlow, *The Recruitment and Career Patterns of Congressional Committee Staffs: An Exploration*, 39 W. POL. Q. 701, 706 (1986) (providing data showing that staff activists on policy committees tend to “burn out” quickly and “use their Hill experience to gain other positions both in and out of government”); Paul S. Herrinson, *Congress’s Other Farm Team: Congressional Staff*, 27 POLITY 137, 138 (1994) (describing staff position as training ground for elective position); Romzek & Utter, *supra* note 83, at 423–27 (describing career dynamics of staff). These career opportunities may be more pertinent to committee staffs than the legislative support organizations, which may employ many staff who devote their entire professional careers to service for that organization.

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didn't exist prior to congressional service) in order to gain notice and favor from the appropriate current (or future) principal or patron.<sup>107</sup> The typical staff profile and working conditions may contribute to this consequence; in general, staff are young, ambitious people working in demanding, high turn-over jobs with short career ladders, so there may be a strong interest in obtaining favorable notice and opportunity quickly. As Malbin has explained: "[g]iven their need to protect themselves against the uncertainties of their jobs, staff members would have to be inhuman not to be affected [by the DC-related career opportunities constantly before them]."<sup>108</sup>

To be sure, not every staff career goal leads inevitably to that result. For example, a staff member who simply wants to return to practicing law (not involving legislative work) following congressional service may not feel any particular political or ideological tug while working in Congress. Indeed, a reputation for performing nonpartisan, non-ideological work may actually enhance that type of future job opportunity. But these cases may be relatively few in number. People who self-select into working on Capitol Hill may especially value the special opportunities opened up by that particular experience. Also, while helping to develop certain skills (such as networking), Hill experience sometimes allows other skills (such as the ability "simply to practice law") to go stale. Thus, even staff members who desire to return after their service to a position unrelated to Congress may find that their opportunities to do so have been diminished. The larger point is that staff behavior while in Congress—and whether their work will likely further the theoretical case—is shaped to some extent by the institution in which they work and the incentives they face.

Some staff, although cognizant of career issues, may be motivated primarily by the nature of the job on Capitol Hill including, specifically, the opportunity to work in the vortex of the nation's law-making. As Romzek and Utter have stated, the "fundamental motivation of congressional staffers is to be part of a process that affords opportunities to influence public policy."<sup>109</sup> As previously noted, staff with this primary motivation may include those who begin their congressional service with a commitment to particular policy out-

107 Interest groups and public policy "think tanks" may also be increasingly aligned with one party or the other. See SINCLAIR, *supra* note 4, at 308–09, 326–27. Thus, staff who desire to perform legislative-related work in the private sector after their Congressional service may also find it advantageous to "pick sides" while they work in Congress.

108 MALBIN, *supra* note 7, at 24; see *id.* at 19–23 (explaining influence of members of Congress over future job opportunities of staff); Christine DeGregorio, *Staff Utilization in the U.S. Congress: Committee Chairs and Senior Aides*, 28 POLITY 261, 264 (1995) (explaining that staff must remain in good graces of bosses); DeGregorio & Snider, *supra* note 83, at 494, 508 (claiming that staff power is derivative of members); Romzek & Utter, *supra* note 83, at 424, 435–36; Robert H. Salisbury & Kenneth A. Shepsle, *Congressional Staff Turnover and the Ties-That-Bind*, 75 AM. POL. SCI. REV. 381, 383–85 (1981) (concluding that overwhelming majority of staffers "are tied to a principal or patron").

109 Romzek & Utter, *supra* note 83, at 422.

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comes.<sup>110</sup> Although the test of “nonpartisanship” may not be stringent enough to prevent such persons from becoming part of a nonpartisan staff, it is not clear that their presence would provide the openness and objectivity important for the theoretical case. But this group may also include those simply committed to seeing enactment of “good” public policy, regardless of the partisan or ideological direction of the legislative solution.<sup>111</sup> The following final two Sections of this Part consider some of the potential issues for this staffer.

#### *D. Preserving the Influence of Nonpartisan Staff*

The theoretical case for nonpartisan staff is premised to some extent on such staff being influential enough in Congress to affect legislative outcomes. How is the influence of nonpartisan staff best enhanced and preserved?

This question was addressed by Bruce Bimber in describing the experience of the OTA’s staff. As discussed in Part I, the OTA was not organized with the same protection against partisan influence as most of the other legislative support organizations, and it began as a politicized organization. During its first six years, “[i]t was widely viewed as dedicated to a narrow set of political interests, and its technical credibility suffered as a result.”<sup>112</sup> According to Bimber, the politicization of the office was gradually reduced, and its credibility and influence enhanced, once it followed strictly a “strategy of neutrality,” which involved not making specific policy recommendations.<sup>113</sup> The office “refused to endorse specific congressional action. It provided a range of policy options, and presented arguments for and against each, but carefully avoided recommending action.”<sup>114</sup>

The key to this strategy was to recognize, and take advantage of, the decentralization of power in the legislature.<sup>115</sup> Because Congress has heterogeneous political and policy interests, there is space for, and potentially heightened value derived from, analysis that is perceived as objective. Analysis so perceived might possibly be persuasive to differing interests on Capitol Hill, and therefore be more valuable than mere “partisan” analysis that speaks to (and persuades) only one side. In describing the GAO’s experience, Mosher arrived at a similar conclusion. In contrast to the Bureau of the Budget (and OMB)—which retained its influence only by becoming partisan offices espousing the views of the administration in power—the GAO has been able to remain influential despite being nonpartisan in part

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110 See *id.* at 433 (describing career committee staffers who are interested in influencing public policy “in ways that are consistent with their own policy biases”).

111 See Romzek & Utter, *supra* note 102, at 1268 (describing how nonpartisan staff pride themselves on developing the best policy “as opposed to promoting the positions of either party”).

112 BIMBER, *supra* note 67, at 20.

113 *Id.* at 66.

114 *Id.*; see *id.* at 51, 67 (noting that following the adoption of this strategy, “OTA had developed into one of the most well-respected analysts of policy in the country”).

115 See *id.* at 22–24.

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because of the more decentralized power structure in the legislature.<sup>116</sup> The “strategy of neutrality” was the OTA staff’s approach to develop and protect a reputation for independence and objectivity.

The OTA staff also learned that any contrary strategy was doomed to fail. If the office made specific policy recommendations, its conclusions would inevitably satisfy some congressional constituents but not others. The end result, however, would not be balanced because “[l]egislators with reason to object . . . could make trouble for the agency that far outweighed whatever accolades might come from those whose position the agency might have supported. Favoritism did not seem to pay; a better approach was to offer something for everyone.”<sup>117</sup> Thus, as a practical matter, the OTA really could not afford to be anything other than neutral.<sup>118</sup>

Much the same strategy was adopted by the CBO when it was first organized. Alice Rivlin, the office’s first director, understood that it was not enough to produce fair and objective analysis; to be influential, the CBO had to maintain such a reputation in Congress. Thus, although she accepted the fact that CBO analyses would inevitably be used for partisan purposes, she thought it critical that the office never be branded as partisan. Her solution was to have the office avoid making policy recommendations. In her view, if it made such recommendations, “‘there would be no way to resist political pressure or the perception that [the CBO] succumbed to political pressure.’”<sup>119</sup> She distinguished policy recommendations from “technical” recommendations, which the office would provide to Congress.<sup>120</sup>

This “strategy of neutrality” raises a number of questions. For one thing, as Malbin has pointed out, a commitment to make “no policy recommenda-

116 See MOSHER, *supra* note 54, at 181.

117 BIMBER, *supra* note 67, at 59; *see id.* at 66.

118 *See id.* at 67 (quoting Senator Orrin Hatch reaching that conclusion).

119 JOYCE, *supra* note 77, at 29 (emphasis added) (quoting Alice Rivlin). Stanley Surrey has described the task of serving effectively members of Congress from different parties and chambers, and with different ideologies, as like “living in a constant state of tension.” Stanley S. Surrey, *Tribute to Dr. Laurence N. Woodworth: Two Decades of Federal Tax History Viewed from This Perspective*, 32 NAT’L TAX J. 227, 234 (1979).

120 The CBO’s current website states that “CBO does not make policy recommendations.” *Overview*, CONG. BUDGET OFFICE, <http://www.cbo.gov/about/overview> (last visited Apr. 4, 2013). The JCT staff seems to have had a similar experience. Larry Woodworth, the person who is generally considered its most successful Chief of Staff, has described a process of laying out all of the options for members of Congress but not making any recommendations. *See* Manley, *supra* note 84, at 1052 (describing Woodworth’s position). His successor has also drawn a distinction between policy and “technical” recommendations because “‘there’s no side in technical revisions.’” MALBIN, *supra* note 7, at 184 (quoting Bob Shapiro, Woodworth’s successor). During one period when the staff was asked to be more of a policy advocate, its overall influence apparently declined. *See id.* at 179–81 (describing changed role of staff when Rep. Al Ullman (D-Ore.) became chair of Ways & Means); Malbin, *supra* note 87, at 22–24. *But see* REESE, *supra* note 62, at 77–81 (describing methods by which JCT staff in fact made policy recommendations); Surrey, *supra* note 119, at 230 (describing Woodworth’s actions when he encountered tax recommendations “that he did not share”).

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tions” may be quite misleading. Although a nonpartisan office may not specifically advocate a particular course of action, it may do the equivalent by laying out “technical” objections to all but one or two options.<sup>121</sup> Staff policy views may also be infused (either intentionally or inadvertently) into congressional debate more subtly, such as by deciding how the questions of an analysis are framed, what models are used, how data is interpreted, and how results are presented.<sup>122</sup> Even the order in which various options are presented to Congress may have policy implications.<sup>123</sup> Similarly, bill-drafters—even if sincere in being agnostic towards policy—no doubt must make choices in their work that ultimately help to decide policy for Congress.

In addition, a “no policy recommendations” rule may simply be infeasible. To illustrate, consider the task of estimating the budget consequences of legislative proposals, one of the important duties currently delegated by Congress to nonpartisan staff. Under current budget accounting rules, staff are not given the luxury of providing a typical economist’s “two-handed” response when confronted with an issue involving a high degree of uncertainty. Staff are also generally not allowed to give a range of the estimated budget consequences, such as a confidence interval. Instead, the current rules generally require “point” estimates of the budget effects of a proposal in each of a specified number of years following enactment of the proposal. To make those estimates, staff must make choices on matters that may not be well-resolved in the professional literature.<sup>124</sup>

This type of judgment might be viewed as a “technical” rather than a “policy” recommendation, but the two questions are sometimes intertwined. For example, in 1990, the first Bush Administration made a legislative proposal to reduce the taxation of capital gains, which then (as now) was a very contentious policy issue on Capitol Hill (controlled at the time by Democrats). The two scorekeepers—the Treasury and the JCT—differed on the projected revenue effect of the change, with the Treasury estimating that it would raise revenue and the JCT estimating the opposite.<sup>125</sup> Upon examination, it was determined that a slight difference in one parameter (the estimated elasticity of taxpayer response to a change in the capital gains rate)—a

121 See MALBIN, *supra* note 7, at 218–19.

122 See BIMBER, *supra* note 67, at 97.

123 See REESE, *supra* note 62, at 77–78; Michael J. Graetz, *Reflections on the Tax Legislative Process: Prelude to Reform*, 58 VA. L. REV. 1389, 1420 n.101 (1972).

124 See STAFF OF THE JOINT COMM. ON TAXATION, JCX-46-11, SUMMARY OF ECONOMIC MODELS AND ESTIMATING PRACTICES OF THE STAFF OF THE JOINT COMMITTEE ON TAXATION 3 (2011) (describing budget process requirements); STAFF OF THE JOINT COMM. ON TAXATION, JCX-1-05, OVERVIEW OF REVENUE ESTIMATING PROCEDURES AND METHODOLOGIES USED BY THE STAFF OF THE JOINT COMMITTEE ON TAXATION 3 (2005) (same); BIMBER, *supra* note 67, at 86 (“[S]ince the result of much of [CBO’s] work is numerical . . . equivocation is more difficult.”); MALBIN, *supra* note 7, at 197 (“At some point, the economists must settle on something and use it.”); *id.* at 203 (describing infeasibility of staff simply laying out budget assumptions and allowing members to decide).

125 See STAFF OF THE JOINT COMM. ON TAXATION, JCS-10-90, PROPOSALS AND ISSUES RELATING TO TAXATION OF CAPITAL GAINS AND LOSSES 15–16 (1990).

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disagreement within the range of professional knowledge at the time—explained the different budget consequences.<sup>126</sup> Yet, given the importance of budget rules, this “technical” difference had a clear potential impact on the policy that would be approved by Congress.

By addressing how staff work is *perceived*, the “strategy of neutrality” also introduces a new consideration—the views of the persons whose perception matters (i.e., the members of Congress). This raises the possibility that what is “neutral” and objective is a relative term; as the identity of those making the judgment changes, the concept of “neutrality” might also change.<sup>127</sup> The OTA’s decision to avoid taking sides on policy issues, but instead to reach results that “offer something for everyone,”<sup>128</sup> suggests exactly this type of balancing. Moreover, describing the concept of “being neutral” as a matter of *strategic choice* (to protect the turf and influence of the nonpartisan institution) seems somewhat distant from its being a distinctive, *inherent* attribute of nonpartisan staff that contributes to its special expertise necessary for the theoretical case.<sup>129</sup>

Finally, a strategy of neutrality may be contrary to the goals of the nonpartisan staff performing the work. Recall that one possible motivation for staff is simply to see that “good” public policy is enacted.<sup>130</sup> Would they be satisfied if their role were reduced to being, in effect, “policy eunuch[s]” under a strict strategy of neutrality?<sup>131</sup> Although they may have no strong commitments to political party or ideology, they may well have clear ideas about the comparative merits of various solutions from a policy standpoint.<sup>132</sup>

In the end, the OTA’s strategy to retain influence on Capitol Hill proved unsuccessful, for the office was defunded following the Republican takeover

126 See Jane G. Gravelle, *Can a Capital Gains Tax Cut Pay for Itself?*, 48 TAX NOTES 209, 209–15 (1990).

127 Cf. Malbin, *supra* note 87, at 24 (suggesting that JCT staff’s recommendations were consistent with moderate views of tax-writing committees at the time).

128 BIMBER, *supra* note 67, at 59; see *supra* note 117 and accompanying text.

129 Bimber was explicit that the “neutrality” of the office was a form of subterfuge, and not an inherent attribute of the staff: “It is not the case that experts at OTA had no values, no opinions, no position on policies. What is interesting is that the agency chose not to reveal those positions in its work.” BIMBER, *supra* note 67, at 97.

130 See REESE, *supra* note 62, at 66 (describing the strong desire of Larry Woodworth, former JCT Chief of Staff, “to influence the nation’s future tax laws” (internal quotation marks omitted)); *supra* note 111 and accompanying text.

131 Manley, *supra* note 84, at 1056 (stating that “it may be unrealistic to ask any man to be a policy eunuch”).

132 Another problem with a strategy of neutrality is ensuring that all staff strictly adhere to the policy. The flat organizational structure of most Hill staffs, combined with a very fast pace of activity, creates many opportunities for individual staffers to interact directly and informally with congressional constituents. Thus, there is certainly the possibility of individual staffers providing analysis and policy recommendations to individual members of Congress even as the staff as a whole attempts to pursue a strategy of neutrality. This would be tempting behavior if staff are inclined to be policy activists and therefore become frustrated with the neutrality stance of their office.

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of Congress in 1994.<sup>133</sup> Bimber has suggested that the decision was merely a symbolic prize of the Republican budget-cutters, with OTA losing out “not because [its budget] was too large, but because it was so tiny.”<sup>134</sup> This explanation is not very satisfactory, however; in the same year, for example, the appropriation for the JCT (which survived) was only about thirty percent of OTA’s.<sup>135</sup> A different explanation is that the 1994 election dramatically changed the landscape in Congress, and that what may have appeared to be “neutral” prior to it may not have been perceived that way after it.<sup>136</sup> It is also possible that the election centralized power in Congress, at least initially, and that OTA’s strategy—founded on a decentralized governing organization—then became less effective.<sup>137</sup> Serious deficiencies of the office may have contributed even more to its demise.<sup>138</sup> But this experience is a reminder of yet another issue limiting the independence and influence of nonpartisan staff in Congress: the control of their purse strings by partisans.

All that said, probably the most troubling aspect of a “strategy of neutrality” is its implications for the expertise of nonpartisan staff. That issue is taken up in the last Section.

133 See BIMBER, *supra* note 67, at 69.

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134 *Id.* at 77; *see id.* at 71.

135 The OTA appropriation was about \$20 million whereas the JCT’s was about \$6 million. *See id.* at 71; John Godfrey, *Archer Calls for No Cuts to JCT Budget*, 66 TAX NOTES 1095 (1995).

136 See Vary Coates, Book Review, 53 TECH. FORECASTING & SOC. CHANGE 309, 312 (1996) (reviewing BIMBER, *supra* note 67) (suggesting that Republicans may have been resentful of OTA analysts, most of whom “almost surely, could have been described as liberals”); Jeffrey K. Stine, Book Review, 39 TECH. & CULTURE 815, 816 (1998) (reviewing BIMBER, *supra* note 67) (noting that “nonpartisan” director of OTA assumed a partisan position with Democratic Clinton Administration following demise of office).

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137 See Coates, *supra* note 136, at 311–12; Anne M. Khademian, Book Review, 16 J. POL’Y ANALYSIS & MGMT. 492, 496 (1997) (reviewing BIMBER, *supra* note 67).

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138 For example, the office’s reports took an average of two years to complete. *See* BIMBER, *supra* note 67, at 34, 80. On Capitol Hill, two years may be an eternity. As one observer has noted:

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[A]s often as not, when the report was finished, the requesting committee was no longer much interested—hearings had been held, the legislation written or the contending stakeholders placated, or the time for action had gone by. Often the staff members who had asked for the study . . . were no longer on the staff. Sometimes the member in whose name the request was made was also gone . . .

Coates, *supra* note 136, at 311; *see also* James A. Thurber, *Policy Analysis on Capitol Hill: Issues Facing the Four Analytic Support Agencies of Congress*, 6 POL’Y STUD. J. 101, 108 (1977) (quoting comment that OTA reports are often “‘delivered long past the point of great usefulness’” (citation omitted)). There also seems to be some question regarding how valuable the office’s work was, apart from its lack of timeliness. *See* BIMBER, *supra* note 67, at 94 (“[O]ne must peer through a strong microscope to see a direct connection between the agency’s research and the outcome of most public policies.”); LAMBRO, *supra* note 67, at 248 (describing OTA’s studies as “duplicative, frequently shoddy, not altogether objective, and often ignored”).

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*E. Utilizing the Expertise of Nonpartisan Staff*

If taken seriously, a strategy of neutrality may simply leave a void in Congress. The legislative process involves a constant battle of ideas between the branches, the two chambers, the parties, and public and private interests, and most participants in that struggle generally do not present their views in a “neutral” fashion. Thus, to engage effectively in that debate, Congress (particularly the committees) needs the assistance of staff who can reach conclusions and make recommendations among the onslaught of arguments and proposals presented. Indeed, as we have seen, this was one of the principal reasons why Congress authorized professional staff for the committees in the first place.<sup>139</sup> Yet, under a strategy of neutrality, nonpartisan staff potentially “pass into the background whenever a really ‘hot’ issue comes up,”<sup>140</sup> presumably to be replaced by partisan staff.<sup>141</sup> In effect, a strategy of neutrality forces nonpartisan staff to surrender some of their expertise. They would still be able to gather information for Congress and identify the possible pros and cons of various options. But their critical ability to *weigh* the advantages and disadvantages—which might lead to conclusions and recommendations broadly persuasive in Congress—would be lost. In short, a strategy of neutrality is justified as a way for nonpartisan staff to retain their influence, but the question is: influence to do what?<sup>142</sup>

This issue arose prominently in connection with a disagreement between the CRS and Louis Fisher, a constitutional law expert on separation-of-powers issues who worked as a senior specialist at CRS from 1970 until 2006.<sup>143</sup> In 2003, Fisher published an academic article sharply critical of the decision to go to war in Iraq.<sup>144</sup> CRS analysts are allowed to publish outside writings on controversial matters, including issues within the analyst’s area of specialization with CRS, but only if they explicitly disassociate their views from those of the CRS and the Library of Congress.<sup>145</sup> Fisher’s article criticized the Bush

139 See MALBIN, *supra* note 7, at 5 (asserting that without committee staffs, “Congress would quickly become the prisoner of its outside sources of information in the executive branch and interest groups”); *supra* note 13 and accompanying text.

140 GROSS, *supra* note 10, at 282; *see id.* at 421–22; MALBIN, *supra* note 7, at 204 (claiming that nonpartisan staff who merely lay out options or suggest possible compromises “have an easier time maintaining their nonpartisan credibility but, however useful they may be, . . . seem to be unable to serve all of Congress’s needs”).

141 Even if all committee staff were nonpartisan, there would undoubtedly remain some partisan staff in Congress, such as those serving congressional leadership, the party caucuses, and individual members.

142 See Malbin, *supra* note 87, at 25 (“Congress would not be helping itself if it hired experts and then asked them to shed their expertise in the name of neutrality.”).

143 Fisher is the author of twenty books and hundreds of articles, and has testified before congressional committees about fifty times. See Louis Fisher, CATO INSTITUTE, <http://www.cato.org/people/louis-fisher> (last visited Apr. 4, 2013).

144 See Louis Fisher, *Deciding on War Against Iraq: Institutional Failures*, 118 POL. SCI. Q. 389 (2003).

145 See LIBRARY OF CONG. REG. 2023-3, § 3(B) (1998) (covering “Outside Employment and Activities”).

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Administration for providing flimsy and inconsistent justifications for using military force in Iraq.<sup>146</sup> It also faulted Congress—especially the Democrats—for allowing political considerations to dictate their response to pressures from the executive branch.<sup>147</sup> Fisher concluded that in passing the Iraq resolution in October 2002, Congress transferred the decision to go to war to the executive branch and thereby failed to uphold its constitutional responsibility.<sup>148</sup> Although Fisher’s analysis came after the pertinent events had occurred, it was potentially instructive for future cases involving the same issue.

In January 2004, CRS Director Daniel Mulhollan issued an agency-wide “Director’s Statement” on “outside activities” that implored CRS staff to avoid

even the appearance that we have our own agenda as an agency; that one or more of our analysts might be seen as so set in their personal views that they are no longer to be trusted to provide objective research and analysis; or that some have developed a reputation for supporting a position on an issue to the extent that CRS is rendered “suspect” to those on the other side.<sup>149</sup>

He concluded that staff should “think carefully before taking a public position on matters for which you are responsible . . . [and] do so in full observance of the neutrality required of your work here.”<sup>150</sup>

Eight days later, Fisher responded to Mulhollan. Even though the Director’s Statement expressly concerned only “outside activities” by analysts, Fisher explained that the directive could be applied with equal force to work done for CRS itself. Fisher questioned whether a goal of “neutrality” was consistent with the mission of the service:

No one disputes that our work must be non-partisan. But if the front office puts the emphasis on neutrality, balance, and even-handedness, there is little room for careful, expert analysis. . . . Objectivity means looking at all the relevant material and presenting a report that has integrity, credibility, and logic. “Neutral” and “balanced” writing implies that we take no positions and reach no conclusions. We should do more than merely identify arguments on each side of an issue and leave it to a congressional office to figure out the rest. Professional analysis means that we evaluate an issue on the weight of the evidence. Otherwise, we fall back on “she says this, he says

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146 See Fisher, *supra* note 144, at 390–95.

147 *Id.* at 397–98, 403, 405–07.

148 *Id.* at 407, 410.

149 DANIEL P. MULHOLLAN, CONG. RESEARCH SERV., DIRECTOR’S STATEMENT, OUTSIDE ACTIVITIES: PRESERVING OBJECTIVITY AND NON-PARTISANSHIP 1 (2004). Although Mulhollan’s statement refers only to “[r]ecent incidents” and does not mention Fisher or his article by name, the statement was apparently motivated by that article and the reaction to it. *Id.*; see LOUIS FISHER, DEFENDING CONGRESS AND THE CONSTITUTION 290–92 (2011). Fisher eventually received a “memo of rebuke” from Mulhollan. Among other things, Fisher’s article did not include the required disclaimer. See Letter from Louis Fisher, Senior Specialist, Cong. Research Serv., to Daniel Mulhollan, Dir., Cong. Research Serv. 1 (Jan. 18, 2006), available at <http://pogoarchives.org/m/gp/gp-lfisher-20060118.pdf>.

150 MULHOLLAN, *supra* note 149, at 2.

that” descriptive writing . . . with no opportunity to fulfill . . . our “reputation for excellence.”<sup>151</sup>

Moreover, Fisher doubted that Mulhollan’s message was consistent with what Congress wanted or needed from the CRS.<sup>152</sup> He noted that in today’s environment, there is much information readily available to congressional offices through simple Lexis/Nexis or Google searches. What Congress needed from CRS was not merely a description of an issue’s pros and cons, but rather the expertise and judgment of their analysts to evaluate the information:

In my prepared statements at congressional hearings, I regularly take positions on institutional and constitutional questions. I reach those positions based on analysis of available information and theories. I am invited to testify *because* I have a position. . . . The expectation is not that what I say will please everyone, but that what I say is constructive, well grounded, and contributes to the legislative debate.<sup>153</sup>

The Congressional Research Employees Association (CREA), a labor organization representing some employees at CRS, issued a statement supportive of Fisher’s position:

[M]erely because a staffer has reached a *conclusion* or has an *opinion* on a public policy matter in outside writing which is based upon nonpartisan, independent[,] and generally accepted methodologies of analysis and scholarship, does *not* indicate that one is no longer “objective” nor “unbiased” on that subject. . . . [W]hen one’s outside writings, and the opinions and conclusions contained therein, are drawn from and based upon a fair consideration, analysis[,] and application of the known facts and of the appropriate, competing theories and hypotheses, such writings and conclusions are “objective” by definition.<sup>154</sup>

The Fisher dispute highlights the potential paradox faced by nonpartisan staff working in Congress. Fisher and CREA focused on the type of work qualifying as objective and nonpartisan—it should draw from “fair consideration” of “known facts” as well as “appropriate, competing theories and

151 Memorandum from Louis Fisher, Senior Specialist, Cong. Research Serv., to Daniel P. Mulhollan, Dir., Cong. Research Serv. 2 (Jan. 31, 2004), *available at* <http://www.fas.org/sgp/crs/fisher013104.pdf>. According to Fisher, the statutory mission of CRS since at least 1970 is to provide analysis and reach conclusions. *See* FISHER, *supra* note 149, at 289–90, 293; *cf.* THOMAS L. HASKELL, OBJECTIVITY IS NOT NEUTRALITY 150–53 (1998) (contrasting objectivity and neutrality).

152 *Cf.* Price, *supra* note 92, at 335–36 (questioning whether Congress is well served by neutral and nonpartisan staff). R

153 Memorandum from Louis Fisher to Daniel P. Mulhollan, *supra* note 151, at 3 (emphasis in original). R

154 Position Statement, Congr. Research Emps. Ass’n, Outside Writing, Lecturing Activities by CRS Staff: Objectivity 3–4 (May 12, 2004) (emphases in original), *available at* <http://www.fas.org/sgp/crs/crea051204.pdf>; *see also* Position Restatement, Congr. Research Emps. Ass’n, CREA on Outside Writing (Jan. 12, 2010), *available at* <http://www.creaunion.org/Documents/CREA%20on%20Outside%20Writing.pdf> (restating importance of outside writing’s contribution to public discourse).



hypotheses” and employ “generally accepted methodologies of analysis and scholarship.” All of these characteristics might be considered necessary to have the distinctive expertise that is critical to the theoretical case. Mulhollan, however, as well as the OTA and CBO before him, focused on another part of the theoretical case—the need for staff to be influential in the legislative process. To Mulhollan (as well as to the OTA and CBO), to retain influence in a highly partisan environment like Congress, the staff’s work must be “neutral” so that it does not appear to be biased or partisan. Yet, as Fisher pointed out, such a stance would seem to be inconsistent with the full utilization of the nonpartisan staff person’s expertise (and therefore would diminish such person’s ability to reduce gridlock under the theoretical case).<sup>155</sup>

Another recent dispute, also involving the CRS, may illustrate the same tension between influence and expertise. A CRS economic report analyzing the relationship, if any, between top federal income tax rates and economic growth, was withdrawn by the office following objections raised about the report’s findings.<sup>156</sup> The CRS director, Mary Mazanec, indicated that the report was withdrawn so that it could include “more extensive documentation and explanation of the methodology underlying the economic analysis.”<sup>157</sup> The report was issued, however, just six weeks prior to a presidential election in which the topic of the report was a key point of disagreement between the candidates, and some observers suggested that the report was withdrawn in response to political objections as well as possible concern over its impact on the CRS’s budget.<sup>158</sup>

<sup>155</sup> Following another dispute, Fisher was transferred out of CRS in 2006 and re-assigned to the Law Library at the Library of Congress. In 2010, Fisher retired from government service and is currently a Scholar in Residence at the Constitution Project, a non-profit think tank that makes bipartisan policy recommendations on constitutional issues. See Brief for Louis Fisher and Morton Rosenberg as Amici Curiae Supporting Plaintiff-Appellee, *Davis v. Billington*, No. 11-5092 (D.C. Cir. Sept. 9, 2011), at 5, available at [http://www.constitutionproject.org/wp-content/uploads/2012/09/90911\\_morris-davisamici\\_louisfishermortonrosenberg.pdf](http://www.constitutionproject.org/wp-content/uploads/2012/09/90911_morris-davisamici_louisfishermortonrosenberg.pdf); *Louis Fisher*, THE CONSTITUTION PROJECT, <http://www.constitutionproject.org/bio/louis-fisher> (last visited Apr. 4, 2013).

<sup>156</sup> See THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., R42729, TAXES AND THE ECONOMY: AN ECONOMIC ANALYSIS OF THE TOP TAX RATES SINCE 1945 (2012); Jonathan Weisman, *Tax Report Withdrawn at Request of G.O.P.*, N.Y. TIMES, Nov. 2, 2012, at B1, available at <http://www.nytimes.com/2012/11/02/business/questions-raised-on-withdrawal-of-congressional-research-services-report-on-tax-rates.html>.

<sup>157</sup> Letter from Mary B. Mazanec, Dir., Cong. Research Serv., to the Hon. Sander M. Levin, U.S. House of Representatives (D-Mich.) (Nov. 6, 2012), available at <http://levin.house.gov/sites/levin.house.gov/files/documents/Resources/pdf/CRS%20first%20response%20to%20Levin%2011-6.pdf>.

<sup>158</sup> See Bruce Bartlett, *How Not to Refute a Tax Study You Don’t Like*, 137 TAX NOTES 1007, 1011 (2012) (suggesting possible impact on CRS’s budget); Editorial, *Congressional Research Hit Job*, WALL ST. J., Nov. 2, 2012, at A12, available at <http://online.wsj.com/article/SB10001424052970203880704578086771452127606.html>; Eric Kroh, *CRS Faces Allegations of Bias*, 137 TAX NOTES 714, 714 (2012) (attributing withdrawal to objections raised by Senate Republicans); Weisman, *supra* note 156, at B1 (same). Citing the confidentiality of CRS’s relationship with its congressional constituents, Director Mazanec refused to con-

CRS eventually released essentially the same report, with its conclusions moderated very slightly, in December 2012 (about five weeks after the election).<sup>159</sup> Thus, unlike the Fisher dispute, this incident did not involve the conclusive nature of the report's findings. Moreover, since there was almost no legislative activity during the period between the two reports, the delayed release does not seem to have affected any legislative outcomes.<sup>160</sup> Nevertheless, in another circumstance, the timing of a report can have a critical impact on legislative decision-making. Thus, if the timing of this report was affected by political considerations, the incident demonstrates how easily the views of nonpartisan staff can be removed from legislative debate—and the staff's impact on gridlock compromised—in order to protect the influence of the office utilizing a strategy of neutrality.

#### CONCLUSION

This Essay has outlined some of the issues presented if nonpartisan professional staffs are used to help reduce gridlock in Congress. A theoretical case in favor of such staff assumes that they have an expertise distinct from that of partisans and are also influential enough to affect legislative outcomes. This Essay has explored practical and conceptual questions about each condition. The meaning of “nonpartisan” is somewhat nebulous and incomplete, and it may be difficult to identify, select, and retain persons with the attributes necessary to support the theoretical case. Staff incentives during congressional service may further undermine the existence of those attributes. Finally, the Essay suggests that the two components of the theoretical case—a distinctive expertise and the existence of sufficient congressional influence—may to some extent be incompatible with one another. If nonpartisan staff must be “neutral” on policy issues in order to maintain their influence in Congress's partisan environment, they may, in effect, be forced to surrender some of their expertise—their ability to analyze and persuade (in a manner different from partisans) why certain policy options are prefera-

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firm or deny whether there had been any congressional request to retract the report. See Letter from Mary B. Mazanec, Dir., Cong. Research Serv., to the Hon. Sander M. Levin, U.S. House of Representatives (D-Mich.) (Nov. 16, 2012) <http://levin.house.gov/sites/levin.house.gov/files/documents/Resources/pdf/CRS%20second%20reponse%20to%20Levin%2011-16.pdf>.

159 See THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., R42729, TAXES AND THE ECONOMY: AN ECONOMIC ANALYSIS OF THE TOP TAX RATES SINCE 1945 (UPDATED) (2012); Eric Kroh, *CRS Reaffirms Controversial Report on Taxes and Economy*, 137 TAX NOTES 1280 (2012).

160 It was reasonably clear at the time the first report was issued that Congress would be in session for at most one more week prior to the election, and there seemed little likelihood that the topic addressed by the report would be a matter for immediate legislative action. See Alan K. Ota, *Leaving Town Early*, CQ WEEKLY, Sept. 10, 2012, at 1816, available at <http://library.cqpress.com/cqweekly/weeklyreport112-000004147999>. In that regard, the controversial timing of the first report would seem to have been largely a self-inflicted wound by the CRS, whose mission is to work exclusively for Congress. See *Congressional Research Service Careers*, LIBRARY OF CONG., <http://www.loc.gov/crsinfo> (last visited Apr. 4, 2013).

ble to others. This “muted” expertise may impair any effect they might have on reducing gridlock.

In the end, the Essay illustrates the importance of considering the context of any change. So long as Congress remains sharply divided along partisan lines, it is unclear whether reducing the partisan influence over some aspect of Congress can have much impact. Moreover, the “theoretical case” presupposes the existence of legislative solutions that, for some reason, are not being developed and seriously considered by Congress. But if Congress’s divisions merely reflect those of the broader society, this underlying assumption may not be valid.<sup>161</sup>

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161 Cf. Nivola & Galston, *supra* note 6, at 238 (reminding that some polarizing pressures have emanated from the bottom).

