



**Testimony of Noah L. Wofsy, Deputy Legislative Counsel, Before the Select Committee on the Modernization of Congress, April 28, 2022**

**“Modernizing the Legislative Process”**

Chair Kilmer, Vice Chair Timmons, and members of the Select Committee, good morning. I am honored to speak with you today and share my thoughts on modernizing the legislative process, which is the process by which an idea becomes law. I’m especially honored to do so on behalf of my colleagues at the House Office of Legislative Counsel. For over 100 years, the Office has provided professional legislative drafting and related services to the Members, committees, and leadership offices of the House. We are the ones who get the call when a Member says, “There ought to be a law.” We are proud of our service to the House, especially during the challenging times the House has faced over the past several years. I believe that the House is pleased with our service for no other reason than the simple fact that our business is booming.<sup>1</sup> We must be doing something right.<sup>2</sup>

At the same time, we need to assess how well we are doing and to continue to adapt to the extremely dynamic environment of the House. That’s why we are especially interested in participating in today’s discussions of the process by which an idea becomes law. We share your interest in making the process more effective and more responsive to the needs of the House. Indeed, we are uniquely positioned to discuss this process, because for most legislation, the proponent of an idea of a law will at some point ask us to turn that idea into actual legislative text.

**Drafting as an Iterative Process**

Let me begin by telling you about how people present us with their ideas, because the way people present their requests for legislation varies. Sometimes requests come in

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<sup>1</sup> See Statement of E. Wade Ballou, Jr., Legislative Counsel, Before the House Subcommittee on Legislative Branch Appropriations for Fiscal Year 2023 <https://docs.house.gov/meetings/AP/AP24/20220406/114592/HHRG-117-AP24-Wstate-BallouW-20220406.pdf>

<sup>2</sup> See Congressional Record of 12/16/21, “Thanking the Office of the Legislative Counsel” <https://www.congress.gov/117/crec/2021/12/16/167/217/CREC-2021-12-16-pt1-PgE1379-4.pdf>

the form of policy specifications, perhaps laid out in bullet points or in some narrative. Sometimes requests come in the form of draft legislative text, sometimes in the form of text that's clearly a rough draft, and sometimes in the form of text that appears to be polished and comprehensive. Sometimes we are given another bill that's already been introduced, often from a previous Congress. Sometimes we are given a bill from the Senate or a draft prepared by our counterparts in the Senate Office of Legislative Counsel.

No matter what form a request takes, what matters most to us is whether we will be able to carry out our mission when we respond to that request. As set forth in our charter, our mission is to assist the House, its Members, and its committees and leadership offices in the achievement of a clear, faithful, and coherent expression of legislative policies.<sup>3</sup> That means that we cannot ourselves provide the policy; rather, we can only provide language which will hopefully express the policy of the proponent of the legislation. In other words, we can't fill in the blanks.

It also means that for our drafts to express policy clearly, faithfully, and coherently, we need a sufficient understanding of the policy. In many, many instances, the words people present to us don't convey enough information, so we need to ask questions. We may need to clarify the scope of the policy, meaning to whom or to what the policy applies. For example, does a policy that applies to the States apply to the territories and the District of Columbia? We may need to clarify how and by whom the policy is meant to be carried out. For example, if the Federal Government is responsible for carrying out the policy, what specific agency or office is involved? We may need to clarify the timing of the policy, so that it's clear, for example, whether the policy is meant to change current behavior or only affect future behavior, and whether a transition is desired. And often, the most important and the most complex issue is to clarify the extent to which existing law already addresses the idea behind the policy or how the application and enforcement of existing law will be affected by the policy.

It's for these reasons that we assign drafting requests to attorneys who have expertise in the subject matter of the request. Many of these attorneys have spent years and even decades drafting law in the subject matter and are therefore able to engage in a high-level of analysis and shed light on issues that an attorney who is less familiar with the subject matter might overlook. Moreover, an attorney with expertise in the subject matter of a legislative request will be able to respond both more effectively and more quickly than one who is unfamiliar with that subject matter. At a time when fewer and fewer House staff, especially staff in Member offices, stay around long enough to develop expertise in the legislative process, let alone in specific areas of law, the existence of a core of legislative policy experts is crucial to the ability of the House to

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<sup>3</sup> See 2 U.S.C. 281a

[https://uscode.house.gov/view.xhtml?req=\(title:2%20section:281a%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title2-section281a\)&f=treesort&edition=prelim&num=0&jumpTo=true](https://uscode.house.gov/view.xhtml?req=(title:2%20section:281a%20edition:prelim)%20OR%20(granuleid:USC-prelim-title2-section281a)&f=treesort&edition=prelim&num=0&jumpTo=true)

turn its ideas into law that works. To put it another way: In an institution that is increasingly staffed by generalists, we are the specialists.

Note that these issues apply even in the case of a request which consists of pre-drafted legislative text, including a bill from the Senate. If we don't know the policy intent which generated the idea that was behind the text in the first place, we have no way of knowing whether the legislative text accomplishes the goal of translating the idea into law. A bill may be drafted perfectly on a technical level. It may use the appropriate terms and citations, follow the general rules of formatting and style, and even be easy to read and understand, but if it doesn't fix the problem that inspired the idea behind the bill, the bill is not legally effective.

Our questions are meant to inspire answers, and sometimes further questions in return. We will respond with our own answers and questions and continue until everyone involved is satisfied with information that's been generated. This kind of iterative process gives us the best chance to draft legislation that meets the standards of clarity, faithfulness, and coherence, so that the legislation is truly responsive to the idea behind it. Moreover, it helps the Members understand the issues which may arise if the idea is enacted into law. Even if the questions don't get answered, we can at least make the Member aware of the issues, and that can be valuable as the idea behind the legislation continues to circulate.

This process is time consuming, and sometimes it's just not possible or practical to engage in extensive iterations of notes and drafts. Nevertheless, it remains the goal. Ideally, we treat every draft as if it has the chance of becoming law, because it could happen.

### Document Integrity

Other features of the Office, as set forth in our charter<sup>4</sup>, promote not only the drafting of effective legislation, but help to ensure the integrity of the legislative documents that the House produces and considers. What I mean by document integrity is the idea that anyone who encounters a document can feel secure that the document reflects an accurate and honest statement of the current state of the legislation involved. Our Office is in a unique position to ensure this kind of integrity because of these features, which do not apply to Members, committees, or leadership or their staffs.

First: The Office is not only nonpartisan, meaning that we don't work for or represent either the majority or the minority, but we are prohibited from advocating for the adoption or rejection of any legislative proposal, even a proposal which enjoys overwhelming bipartisan support. This provides the House with an important benefit. If we suggest changes to legislative text or point out what we believe are its flaws, the

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<sup>4</sup> See 2 U.S.C. 281a

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proponent of the text can be assured that we are not trying to undermine them or otherwise oppose their goal of turning their idea into law. Moreover, if we are responsible for editing and maintaining a document, Members and committees will know that we will not use that authority to promote our own agenda.

Second: We are also required under our charter to keep our communications and work product with our clients confidential. We take this very seriously. If we prepare a draft for an office, whether it's for a Member, a committee, or the leadership, we cannot share it with anyone else without the express consent of that office. Even if doing so could promote collaboration and efficiency, we can't do it and we don't do it. For example, if we prepare an amendment for the majority staff of a committee which will be offered at a markup, and we receive a request from the office of a member who serves on the same side of that same committee to draft that same amendment, we can't share the amendment with that member. We can't even tell that member that we've already received the request. That means that if a document is under our control, Members and committees will know that it will not be disclosed without their consent.

Finally: We work only for the House. We cannot provide drafting or other services to people from the outside, including lobbyists, constituents, or people from the executive branch even if they are nonpartisan professional staff. The only exception is if someone from the House authorizes us to work with them. Even then, we cannot prepare a draft or make changes to a draft without the express direction of the House client. Again, even if doing so could promote collaboration and efficiency, we can't do it and we don't do it. That means that if a document is under our control, the Members and committees will know that the only changes which will be made to it are the changes they alone authorize.

As you explore methods of promoting collaboration and efficiency, we encourage you to keep in mind the advantages of having documents edited and maintained by nonpartisan professionals who are required to keep information confidential and who may act only at the direction of the Members, committees, and leadership, advantages that are especially important during times of intense partisan conflict.

### Responding to Challenges of Capacity

As I mentioned at the beginning of my testimony, the Office of Legislative Counsel has been extremely busy during the 117<sup>th</sup> Congress. It is a great challenge for our attorneys to meet the deadlines requested by staff. We have adopted several policies which are designed to ease the workload of attorneys. For example, we are sending more and more of the requests we receive for simple resolutions and reintroductions to our law clerks and paralegals. They can respond to these requests with minimal supervision from the attorneys, freeing attorneys up to work on more substantive requests. We also continue to work on establishing drafting teams for the various subject matter areas of law, so that multiple attorneys will be able to cover especially busy areas of legislative activity.

At the request of the Committee on Appropriations, we prepared and submitted a plan for increasing the capacity of the Office to meet the demands of the House. I will highlight its three fundamental components: First, to increase the number of attorneys and support staff of the Office through expanded recruiting and to retain attorneys for longer periods of time through increases in salary and flexibility in work arrangements. Second, to expand the education programs we provide to the House, including through the Congressional Staff Academy, so that Members and staff will know more about the drafting process and the best practices for working with our attorneys, and to also expand education opportunities for our attorneys so they may develop even deeper expertise in their subject matter areas. Third, to continue to explore developments in technology, building on the efforts related to the Comparative Print Suite, shared document standards for our legislative documents, and other initiatives with the Office of the Clerk, the Government Publishing Office, and other legislative branch organizations.

### Conclusion

Thank you again for inviting me to speak on behalf of the Office of the Legislative Counsel. I have been with the Office for over 35 years, and much has changed over that time. What's remained the same, however, is the commitment of our Office to the best possible process of turning ideas into law, and to the goal of helping the House achieve the clear, faithful, and coherent expression of its legislative policies. I look forward to answering your questions, and to continuing the dialogue between the Office and the Select Committee.