

Constructing Doctrines for Modern Legislative Realities

Author : Leigh Osofsky

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Jesse M. Cross, [The Staffer's Error Doctrine](#), 56 *Harv. J. Leg.* 83 (2019).

In recent years, legal scholars have begun to focus in earnest on the realities of the legislative process. Just to name a few topics, this research has included studies about [congressional drafting and canons](#), [agency involvement in legislative drafting](#), [how legislative drafting has changed over time](#), [how statutory drafters make discrete drafting decisions](#), and much more. Understanding these realities is essential to how we use, and make meaning of, the statutes that pervade our legal system.

[Jesse Cross's](#) recently published article, [The Staffer's Error Doctrine](#), is an important contribution to this body of work. In this article, Cross provides a deep account of how Congress has come to rely upon what Cross calls a "staffer delegation model." Cross explains that Congress has not always relied so extensively on congressional staff to draft legislation. Rather, Congress previously used a mix of committees and delegation to agencies. Cross argues that concern over executive power, along with expanded internal bureaucracy, has prompted Congress instead to increasingly turn to an army of congressional staffers to draft legislation. As Cross explores, members of Congress have acknowledged that this turn to staffers gives staffers not only clerical tasks, but also significant power to make policy through legislation. And, as Cross persuasively argues, this is a systematic byproduct of a Constitution that creates generalist legislators, notwithstanding a world that increasingly requires subject-matter experts to create good law.

Cross embellishes this staffer delegation model by answering a puzzle not yet addressed by the legal literature: If members of Congress only concern themselves with legislation at a high level and staffers engage in the nitty gritty of legislative drafting, how do members of Congress learn about what is in the legislation and how much do they actually learn? Drawing on his own experience as a drafter of congressional statutes and interviews with twenty-five congressional staffers, Cross reports that members of Congress overwhelmingly rely on memoranda, summary documents, briefings, and conversations for their information about proposed legislation. Critically, many of Cross's interviewees emphasized the premium placed on brevity and high-level summaries in these staffer reports. This yields what many referred to as the "one-page rule," which, at least in many chambers, requires staffers to distill often extremely lengthy and complicated proposed legislation into one page of high-level text for members of Congress. To be sure, Cross details how these one-page summaries are often accompanied by other information, including conversations between staffers and members of Congress. But these conversations are also often high-level and brief, leaving staffers with the principal responsibility for the content of legislation. Cross's exploration of the staffer delegation model through details such as the one-page rule crystalizes in a particularly poignant way how members of Congress themselves have ceded the detailed work of actually drafting and reviewing the laws that they pass.

In so crystallizing this phenomenon, Cross forces us to more seriously consider a question that has been an undercurrent in much of the recent legislation literature, but has not received sustained attention: how can we legitimate staffers' extraordinary roles in the legislative process? Cross argues that staffers have become a modern bureaucracy themselves, akin to the administrative state. This leads Cross to propose a "staffer's error" doctrine, which would "direct judges to identify instances in which the work product of staffers (viz., statutory text) undermined rather than advanced decisions made directly by members of Congress (viz., the selection of overarching policy goals)." Cross even offers a persuasive case that this is what the Court was doing in [King v. Burwell](#), even without having explicitly embraced this doctrine. Cross anticipates some of the objections a more transparent embrace of a staffer's error doctrine: Congress actually votes on the legislation its staffers produce, unlike in the administrative

context. However, Cross's study helps push readers to consider how meaningful this distinction really is, given the realities of legislative practices.

Aside from deepening our knowledge about the legislative process generally, Cross's work has practical significance for the burgeoning study of the tax legislative process. [Shuyi Oei](#) and I have studied [how tax law drafters make particular drafting decisions](#). In more recent work, I have examined the [many drafting mistakes that were made as part of the 2017 tax reform](#). The latter work details how agencies, like the [IRS](#), often quietly go about [fixing such mistakes](#), as was the case with the sexual abuse drafting mistake from the 2017 tax reform. How we feel about such fixes should include an understanding of the legislative process that went into making the mistakes. Cross's article, with its elaboration of the "one-page rule" and other details, is a real contribution to this understanding.

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