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# ANYBODY’S GAVEL: WHY CONGRESS CAN CHOOSE A SPEAKER FROM OUTSIDE ITS RANKS

Russell Spivak\*

*The Constitution stipulates only that the House may choose its own leader, or Speaker. This essay argues that the Constitution’s text in no way restricts such choices to those already serving as a Representative. The essay then buttresses this argument by juxtaposing the barren constitutional Clause against the Qualifications Clause, which strictly delineates the criteria for election to the House, as well as the analogously sparse language lacking any limitations in contemporaneous state constitutions and current House rules. Next, this essay briefly reviews the history of speakership votes cast without objection for individuals not currently serving. Finally, the essay argues that such an election would not upset democratic principles upon which the House is founded.*

## INTRODUCTION

The night of the 2018 midterm elections, Dallas Mavericks owner and political provocateur<sup>1</sup> Mark Cuban tweeted an intriguing suggestion: “[i]f democrats are smart they will elect @BarackObama as #speakerofthehouse.”<sup>2</sup> Democratic representatives did not follow Cuban’s sage wisdom, instead calling on wartime consigliere, California Representative, and former Speaker, Nancy Pelosi.<sup>3</sup> Legal and political aficionados that watched the roll call precipitating Speaker Pelosi’s Phoenician act may have noticed something somewhat akin to

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\* J.D., Harvard Law School, 2017.

1. Cuban flirted with a Presidential run in 2016. See David Jackson, *Mark Cuban is thinking of running for president*, USA TODAY (Sept. 14, 2015, 12:44 PM), <https://www.usatoday.com/story/news/nation-now/2015/09/14/mark-cuban-run—president/72257278/>. Cuban is reportedly mulling a 2020 run as well. See Thomas Franck, *Mark Cuban says he’s giving more thought to running for president as speculation swirls around Howard Schultz*, CNBC (June 5, 2018, 8:02 AM), <https://www.cnbc.com/2018/06/05/mark-cuban-said-hes-giving-more-thought-to-running-for-president-as-speculation-swirls-around-howard-schultz.html>.

2. Mark Cuban (@mcuban), TWITTER (Nov. 6, 2018, 8:45 PM), <https://twitter.com/mcuban/status/1060030486402293760?lang=en>.

3. Clare Foran & Ashley Killough, *Nancy Pelosi elected House speaker, reclaims gavel to lead Democrats’ new majority*, CNN: POLITICS (Jan. 3, 2019, 3:21 PM), <https://www.cnn.com/2019/01/03/politics/nancy-pelosi-house-speaker-vote-new-congress/index.html>.

Cuban's advice: two votes were cast for Illinois Senator Tammy Duckworth, one vote was cast for former Vice President and potential Presidential nominee Joe Biden, and one vote was cast for former State Senator and Georgia Democratic Gubernatorial candidate Stacey Abrams.<sup>4</sup> Why these Members did this is largely a political question.<sup>5</sup> But the votes give rise to an interesting legal question: must the Speaker of the House be a Member of the House? The reflexive answer is yes. A deeper dive into the Constitution, however, debunks this intuition.

Setting aside whether such a choice is a desirable and or savvy political maneuver—or, assuming so for argument's sake—this essay seeks to ascertain its legality. Part I examines the Federal Constitution to determine if any rules would bar such a vote, using similar language in state constitutions drafted in the same era to inform this judgment. Thereafter, it looks to the House of Representatives' rules to determine if the House has imposed a limit on itself. Part II then turns to historical precedent and the potential democratic principles invoked by such a structure. Both Parts espouse the position that Congress is empowered, should it so choose, to elect whomever it wants as Speaker.

## I. CONSTITUTIONAL TEXTS AND HOUSE RULES

Article 1, Section 2, Clause 5 of the Constitution states: “The House of Representatives shall chuse their Speaker and other Officers[.]”<sup>6</sup> Notwithstanding the old English spelling, that is the entirety of our founding document's discussion regarding the House's choice of its leader. The debates before the Constitutional Congress demonstrate that no other mechanism or even distinct language was discussed.

Had the framers wanted to strictly limit the universe of potential Speakers to those already in the Chamber, they clearly could have; they did not, however, do so. As the Supreme Court has stated with respect to the legislature's impeachment powers—which rest just a Section below in Constitutional geography—when confronted with “limitations [that] are quite precise, . . . their nature suggests that the Framers did not intend to impose additional limita-

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4. Cristina Marcos, *The 15 Democrats who voted against Pelosi*, HILL (Jan. 3, 2019, 2:13 PM), <https://thehill.com/homenews/house/423724-the-15-democrats-who-voted-against-pelosi>.

5. This was almost certainly due to those members' campaign promises that they would not support Representative Pelosi's bid for speakership. See *Colorado Democrat Jason Crow Votes Against Nancy Pelosi For Speaker*, CBS DENVER (Jan. 3, 2019, 2:23 PM), <https://denver.cbslocal.com/2019/01/03/colorado-democrat-jason-crow-didnt-vote-for-nancy-pelosi-for-speaker-of-the-house/>; Mary Kay Linge, *NY Congressman-elect reaffirms he won't back Pelosi*, N.Y. POST (Nov. 17, 2018, 8:19 PM), <https://nypost.com/2018/11/17/ny-congressman-elect-reaffirms-he-wont-back-pelosi/>; Kathleen Rice, *Nancy Pelosi has served America well, but it's time for new Democratic leadership*, WASH. POST (Nov. 18, 2018), [https://www.washingtonpost.com/opinions/nancy-pelosi-has-served-america-well-but-its-time-for-new-democratic-leadership/2018/11/18/a3fd29d6-eb7e-11e8-8679-934a2b33be52\\_story.html](https://www.washingtonpost.com/opinions/nancy-pelosi-has-served-america-well-but-its-time-for-new-democratic-leadership/2018/11/18/a3fd29d6-eb7e-11e8-8679-934a2b33be52_story.html); Mark Weiner, *Anthony Brindisi won't support Nancy Pelosi for House Democratic leader*, SYRACUSE.COM (May 3, 2018), [https://www.syracuse.com/politics/index.ssf/2018/05/anthony\\_brindisi\\_wont\\_support\\_nancy\\_pelosi\\_for\\_house\\_democratic\\_leader.html](https://www.syracuse.com/politics/index.ssf/2018/05/anthony_brindisi_wont_support_nancy_pelosi_for_house_democratic_leader.html).

6. The Clause in its entirety reads: “The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.” U.S. CONST. art. I, § 2, cl. 5.

tions.”<sup>7</sup> In fact, this point is made even more clearly when the Clause is read against the rest of Section 2, which *explicitly* delineates the numerous criteria for election into the House in the first instance: an age requirement,<sup>8</sup> a citizenship requirement,<sup>9</sup> and a location or jurisdictional requirement.<sup>10</sup> And the Clause governing the Senate’s choice of President Pro Tempore in the absence of the Vice President is similarly sparse,<sup>11</sup> though would-be Senators also face analogous age, citizenship, and geographic requirements.<sup>12</sup> Because there is no limiting principle as to who may be chosen as “their Speaker,” the plain text of the Constitution supports the view that the Speaker need not be from within the ranks of Congress.<sup>13</sup>

Courts have also looked to state constitutions as additional indicia of constitutional meaning. In *D.C. v. Heller*, for example, a majority of the Supreme Court looked to state constitutions drafted contemporaneously with the Federal Constitution.<sup>14</sup> Specifically, the court concluded that how such a state constitution’s right to bear arms was interpreted was “strong evidence” of the way in which the federal constitution was to be interpreted.<sup>15</sup> This reasoning would certainly apply here. Of the applicable state constitutions drafted at this time, *all* have similar language insofar as they fail to designate additional qualifications for Speaker.<sup>16</sup> In fact, many of the state constitutional clauses were identical to their federal counterpart.<sup>17</sup>

Yet another indicia of original understanding, *The Federalist Papers* also lends support to a broad construction. The only mention of a Speaker in the seminal works appears in *The Federalist No. 50*, in which Madison writes that at that time “[i]n Delaware . . . [t]he speakers of the two legislative branches are vice-presidents in the *executive* department.”<sup>18</sup> That Delaware clearly elected a

7. *Nixon v. United States*, 506 U.S. 224, 230 (1993).

8. 25 years of age. *Id.* art. I, § 2, cl. 2.

9. A citizen of the United States for at least seven years. *Id.*

10. *See id.* art. I, § 2, cl. 3.

11. *Id.* art. I, § 3, cl. 5.

12. *See id.* art. I, § 3, cl. 3.

13. *See id.* art. I, § 2, cl. 5.

14. *See, e.g., D.C. v. Heller*, 554 U.S. 570, 600–03 (2008).

15. *Id.* at 603.

16. *See infra* note 17.

17. *See* CONN. CONST. of 1818, art. III, § 7 (“The house of representatives when assembled, shall choose a Speaker, Clerk and other officers.”); DEL. CONST. of 1776, art. V (“each house shall choose its own speaker”); GA. CONST. of 1777, art. VII (“the house shall choose its own speaker”); MASS. CONST. of 1780, ch. 1, § III, art. X (“The House of Representatives shall . . . choose their own Speaker . . .”); MD. CONST. of 1776, § 8 (“That not less than a majority of the Delegates, with their Speaker (to be chosen by them, by ballot) constitute a House, for the transaction of any business other than that of adjourning.”); N.C. CONST. of 1776, art. X (“That the Senate and House of Commons, when met, shall each have power to choose a speaker and other their officers . . .”); N.J. CONST. of 1776, art. V (“That the Assembly, when met, shall have power to choose a Speaker, and other their officers . . .”); N.Y. CONST. of 1777, § 9 (“That the assembly, thus constituted, shall choose their own speaker . . .”); PA. CONST. of 1776, § 9 (“The general assembly of the representatives of the freemen of Pennsylvania, and shall have power to choose their speaker, the treasurer of the state, and their other officers . . .”); S.C. CONST. of 1776, art. IX (“That the general assembly and legislative council shall each choose their respective speakers and their own officers without control.”).

18. *Id.* (emphasis added)

legislative speaker who did not sit in the Legislative Branch—the exact structure contemplated herein—and then subsequently adopted language that did not bar the practice is nothing short of assent thereof.

Absent constitutional strictures, we turn next to the Rules of the House of Representatives. The Rules, presided over by the Clerk and one of the first bills, lay out the powers and duties of the Speaker as well as “[o]ther Officers and Officials.”<sup>19</sup> Nowhere in the Rules are Members restricted in whom they may vote for as their Speaker. Notably, the Rules do stipulate that other elected officers of the House—a Clerk, a Sergeant-at-Arms, a Chief Administrative Officer, and a Chaplain—must be “chosen and qualified,” though it does not specify what makes one “qualified.”<sup>20</sup> As was the case in the constitutional realm, declaring that certain officials must have some particular qualifications demonstrates that the legislature could have, but chose not to, impose particular, even if undefined, qualifications on the Speakership; thus, Congress’s decision to forego placing such a requirement was deliberate.

## II. HISTORICAL PRACTICE AND DEMOCRATIC PRINCIPLES

The House has never elected a Speaker from without its ranks. And while novel actions that implicate constitutional issues are often viewed with increased skepticism, novelty alone is not a death knell. As Justice Kennedy wrote, “[h]istory and tradition guide and discipline the inquiry *but do not set its outer boundaries*.”<sup>21</sup> That historical precedent weighs heavily makes sense. “Respect for . . . the customary operation of the . . . Legislative Branch[ ] gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”<sup>22</sup>

The first Speaker of the House, Frederick Muhlenberg, was elected on April 1, 1789,<sup>23</sup> nearly four weeks after the First Congress convened on March 4, 1789 in New York City’s Federal Hall<sup>24</sup>—the “first day the new House

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19. See generally RULES OF THE HOUSE OF REPRESENTATIVES, 114TH CONG., R. I, II (2015), <http://clerk.house.gov/legislative/house-rules.pdf>.

20. See *id.* at R. II.1.

21. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (emphasis added). See also *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (“longstanding ‘practice of the government’ can inform our determination of ‘what the law is.’”) (first quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 401 (1819); and then quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *Pocket Veto Case*, 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions . . .”).

22. *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring in part).

23. *The First Speaker of the House, Frederick A.C. Muhlenberg of Pennsylvania*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES [hereinafter *The First Speaker*], <https://history.house.gov/Historical-Highlights/1800-1850/The-first-Speaker-of-the-House,-Frederick-A-C—Muhlenberg-of-Pennsylvania/> (last visited Feb. 18, 2019).

24. *The First Federal Congress*, NAT’L ARCHIVES, [https://www.archives.gov/exhibits/treasures\\_of\\_congress/text/page2\\_text.html](https://www.archives.gov/exhibits/treasures_of_congress/text/page2_text.html) (last visited Feb. 18, 2019).

achieved a quorum.”<sup>25</sup> Circumstances beyond simple partisanship are theorized to have driven Muhlenberg’s election: moderating power between the South (represented by President Washington of Virginia) and the North (represented by Vice President Adams of Massachusetts),<sup>26</sup> Pennsylvania’s underrepresentation in the Executive and Judicial Branches (as stated, Massachusetts and Virginia were already to be represented, and John Jay of New York was to be the First Chief Justice);<sup>27</sup> and his previous experience presiding over the Pennsylvania Legislature.<sup>28</sup>

Over time, and particularly in the hands of Representative Henry Clay, the role of Speaker became a chiefly political post.<sup>29</sup> Nevertheless, Members have not strictly voted along party lines. Indeed, “[f]rom 1913 through 1943, more often than not, some Members voted for candidates other than those of the two major parties. The candidates in question were usually those representing the ‘progressive’ group[.]”<sup>30</sup> Thus, while the post has taken a more partisan turn, symbolic votes for political purposes were also cast.

In recent years, these symbolic votes have taken a new turn altogether. “In the 1997, 2013, 2015 (both instances), and 2019 elections, votes were cast for candidates who were not then Members of the House”<sup>31</sup> without any objection from the House Parliamentarian. The first such instance was in 1997, when Bob Michel and Robert Smith Walker—both former Members of Congress that had not sought re-election in the 1995 and 1997 terms respectively—each received a vote for Speaker. Michel, the Republican leader until his retirement, drew the ire of Newt Gingrich,<sup>32</sup> the figurehead of a different faction in the Republican Party who would lead the party after Michel and be named Speaker in 1995. Following an ethics probe into Gingrich’s fundraising that culminated with “the House vot[ing] overwhelmingly, 395-28, to reprimand Gingrich and to fine him \$300,000,”<sup>33</sup> Representative Jim Leach of Iowa voted for Michel, an overt jab at Gingrich.<sup>34</sup> The ethics probe and general distrust of Gingrich’s leadership

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25. CHARLES A. STEWART III & JEFFERY A. JENKINS, *FIGHTING FOR THE SPEAKERSHIP: THE HOUSE AND THE RISE OF PARTY GOVERNMENT*, ch. 2, at 3 (2012), [http://web.mit.edu/cstewart/www/papers/Jenkins\\_Stewart.pdf](http://web.mit.edu/cstewart/www/papers/Jenkins_Stewart.pdf).

26. See *The First Speaker*, *supra* note 23.

27. See STEWART & JENKINS, *supra* note 25, ch. 2, at 3.

28. See *The First Speaker*, *supra* note 23.

29. See STEWART & JENKINS, *supra* note 25, ch. 1, at 19–20.

30. VALERIE HEITSHUSEN, CONG. RESEARCH SERV., *SPEAKERS OF THE HOUSE: ELECTIONS, 1913-2017* i (2019), <https://fas.org/sgp/crs/misc/RL30857.pdf>.

31. *Id.*

32. See Bob Levey, *Robert Michel, longest-serving minority leader in U.S. House, dies at 93*, WASH. POST (Feb. 17, 2017), [https://www.washingtonpost.com/politics/robert-michel-longest-serving-minority-leader-in-us-house-dies-at-93/2017/02/17/8c49b51c-f511-11e6-8d72-263470bf0401\\_story.html](https://www.washingtonpost.com/politics/robert-michel-longest-serving-minority-leader-in-us-house-dies-at-93/2017/02/17/8c49b51c-f511-11e6-8d72-263470bf0401_story.html).

33. Peter Overby, *Revisiting Newt Gingrich’s 1997 Ethics Investigation*, NAT’L PUB. RADIO (Dec. 8, 2011, 4:00 AM), <https://www.npr.org/2011/12/08/143333594/revisiting-newt-gingrichs-1997-ethics-investigation>.

34. *Final Vote Results for Roll Call 3 on Election of the Speaker*, OFFICE OF THE CLERK: U.S. HOUSE OF REPRESENTATIVES (Jan. 7, 1997), <http://clerk.house.gov/evs/1997/roll003.xml>.

also prompted Linda Smith to vote for Robert Smith Walker, a Gingrich ally who did not carry the Speaker's ethical baggage.<sup>35</sup>

This, too, was the case in January. Representative Kathleen Rice, who publicly advocated for new Democratic leadership,<sup>36</sup> was "impressed" with Stacey Abrams: "[y]ou want to talk about really trying to make Congress work, how great would it be to bring someone in who knows how to legislate, which she does; would be a history-making speaker, which she would be; who's beholden to no special interest whatsoever, which she's not."<sup>37</sup> Max Rose and Jason Crow, two combat veterans, both voted for another combat veteran in Tammy Duckworth, with apparent, albeit unconfirmed, symbolic value.<sup>38</sup>

To be sure, the counterargument is powerful: a handful of votes in a handful of elections is far from precedential, and a Speaker has *never* been chosen, or even seriously considered, from without.<sup>39</sup> But, per the Supreme Court, so long as Congress does "not by its rules ignore constitutional restraints or violate fundamental rights"—which, established earlier, it would not—the question falls to the House's own interpretation.<sup>40</sup> It is therefore instructive that Members have not felt constrained in electing a Speaker from only within their ranks during the last 20 years.

Now, interpretive understanding does "not rely solely on an analysis of the historical evidence, but instead [augments] that analysis with 'an examination of the basic principles of our democratic system.'"<sup>41</sup> As such, precedent dictates we question whether the appointment of an outside party to serve as Speaker would compromise our democratic principles. The short answer is, not necessarily.

The principles of democracy come from the vote itself. A common voter must be able to vote for the Representative she feels best represents her ideals and values, if not also her political interests. Part of that voter's calculus is whether the Congressperson will represent her well in Washington, D.C., including a Representative's Speakership vote. It does not in any way repress or dilute the voter's interests that her Representative then votes for a Speaker who does not herself sit in the House—especially if the Representative campaigned on this idea.

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35. See *Smith, Linda*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/21861> (last visited Feb. 18, 2019).

36. See Rice, *supra* note 5.

37. See Tamar Hallerman, *Lewis, Abrams nominated for House speaker by Pelosi opponents*, ATLANTA J.-CONST. (Jan. 3, 2019), <https://www.ajc.com/news/state—regional-govt—politics/lewis-abrams-nominated-for-house-speaker-pelosi-opponents/DZDwpt28qD9M4BST14FwQN/>.

38. See Linge, *supra* note 5. Rose's campaign team also featured a former Duckworth consultant. See *Max Rose Announces Campaign Team*, MAX ROSE FOR CONGRESS (Aug. 8, 2017), <https://www.maxroseforcongress.com/index.php/campaign-updates/max-rose-announces-campaign-team/>.

39. See HEITSHUSEN, *supra* note 30, at i.

40. *United States v. Ballin*, 144 U.S. 1, 7 (1892).

41. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 548 (1969)).

Moreover, democracy is founded on the principle of accountability: if the voters have come to conclude that a Representative no longer adequately represents the jurisdiction's interests, they have the right to oust him or her via the next election. Because a Speaker may be removed more immediately than a two-year electoral term, he or she is arguably more accountable to the people, albeit through their Representatives. Again, that House Members campaigned on their Speakership votes is proof positive of such accountability.<sup>42</sup>

Finally, there is the question of Presidential succession. The Constitution, for better or worse, created the Electoral College to elect the President. But the same Clause empowered Congress to delineate who is to succeed the President and Vice President in the event of "Removal, Death, Resignation or Inability, both of the President and Vice President."<sup>43</sup> Congress has enacted statutes stipulating succession thrice: 1792, 1886, and 1947.<sup>44</sup> The 1947 Act statutorily appoints the Speaker as the first person to assume the presidency upon the President death, inability, impeachment, or resignation (assuming the Vice President's incapacity as well), amending the 1886 iteration, in which the Senate Pro Tempore was first in line.<sup>45</sup> If circumstances dictated that the Speaker were to be elevated, would it be permissible for an unelected individual to potentially serve as the Acting President? In short, yes.

The Constitution does not dictate how Congress must determine succession order or the qualifications for those who may ascend to the Oval Office. Instead, succession must only comport with other constitutional constraints on the Presidency including term limits and citizenship requirements.<sup>46</sup> Moreover, succession has long included unelected individuals appointed by an elected individual: Cabinet Secretaries. Indeed, criticisms of the Act stated that Presidential succession should *only* include Cabinet Secretaries and other appointed federal officers from the Executive branch that were similarly not elected.<sup>47</sup> Appointing a Speaker who is not already a Member of Congress would simply shift presidential succession from the Executive Branch's chosen-by-the-elected choice to the Legislative Branch's chosen-by-the-elected choice.

#### CONCLUSION

Consider a future Congress that adopts Mr. Cuban's underlying thinking. Perhaps the legislators aim to compel a former leader to reprise his or her role atop a party's perch when leadership is lacking but needed; perhaps the party seeks to propel an apolitical figure to national prominence as a proving ground

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42. See *supra* note 5 and accompanying text.

43. U.S. CONST. art. II, § 1, cl. 6.

44. See *Presidential Succession Act*, SENATE HISTORICAL OFFICE: U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Presidential\\_Succession\\_Act.htm](https://www.senate.gov/artandhistory/history/minute/Presidential_Succession_Act.htm) (last visited Feb. 18, 2019).

45. *Id.*

46. See U.S. CONST. art. II, § 1, cl. 5.

47. See generally Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional*, 48 STAN. L. REV. 113 (1995).

for national office. Irrespective of why, the move will certainly be scrutinized—and for good reason—but the action nevertheless ought to be sustained. The Constitution has no rule against such a decision. That Congresspersons have voted to enact such a structure for over two decades—even if done out of protest or symbolically—demonstrates that they do not feel bound by any implied stricture. And if our duly elected representatives in Congress feel that someone from outside their ranks is indeed the best person for the job, democracy would not be impinged from its enactment. Mr. Cuban’s words may have been tongue-in-cheek, but Americans should take them seriously. As a country, we strive for meritorious achievement and leadership; the Speaker’s gavel is no place to sell ourselves short of such ideals.