PROXIES, QUORUM, AND LEGISLATIVE IMMUNITY

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On March 13, 2020, President Trump declared a nationwide emergency in response to the COVID-19 pandemic.[1] Two days later, on March 15th, public shutdowns began, and the government began to institute mandatory quarantines.[2] Two months later, the House of Representatives approved House Resolution 965, which authorized a process under which House Members could both cast votes and establish presence via proxy, allowing the House to meet quorum even though most members of Congress were physically absent.[3]

The passage of the Resolution faced stiff resistance from Republicans, with then-House Minority Leader Kevin McCarthy filing suit to argue that Article I, section 5 of the Constitution required a majority physically present to conduct business.[4] However, by the D.C. District Court's decision in August 2020,[5] most Republican signatories had withdrawn from the suit, following their Democratic colleagues by increasing time spent campaigning.[6]

The D.C. Circuit, not reaching the merits of the argument to quorum, dismissed the case for lack of jurisdiction under the Speech or Debate Clause. Under the Speech and Debate Clause, "any Speech or Debate in either House" are prohibited from being "questioned in any other Place."[7] "Here, the acts presented for examination," the Court concluded, "are quintessentially

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[1] Proclamation 9994, 85 FR 15337 (March 13, 2020).

[2] *Id.*

[3] H.R. Res. 965, 116th Cong. (2020).

[4] Chris Marquette, *What's in a House quorum? GOP wants the courts to rule on that*, ROLL CALL (June 4, 2020, 5:00 AM), https://rollcall.com/2020/06/04/whats-in-a-house-quorum-gop-wants-the-courts-to-rule-on-that/.

[5] *See* McCarthy v. Pelosi, 480 F. Supp. 3d 28 (D.D.C. 2020).

[6] Katherine Tully-McManus, *Supreme Court Denies Kevin McCarthy's Challenge to Proxy Voting in House*, POLITICO, (Jan. 24, 2022, 9:58 AM), https://www.politico.com/news/2022/01/24/supreme-court-proxy-voting-house-00001243; Mini Racker, *For Some in Congress, Proxy Voting Was a Game Changer. It's About to Go Away*, TIME (December 27, 2022, 7:00 AM) ("Some members have capitalized on their ability to vote by proxy to hit the campaign trail. Democrat Karen Bass voted by proxy this year while engaged in her successful bid for Los Angeles Mayor. Three Democrats who used proxy voting frequently in 2022—Reps. Charlie Crist of Florida, Tom Suozzi of New York, and Kai Kahele of Hawaii—did so while running for governor of their respective states. The *Honolulu Civil Beat* reported earlier this year that proxy voting allowed Kahele to avoid Washington for months as he not only campaigned, but worked as a pilot for Hawaiian Airlines… But many members of the House have assigned proxies for other kinds of politicking, like a Trump rally at the border"), https://time.com/6242920/proxy-voting-congress-going-away/.

[7] U.S. CONST. art. I, § 6, cl. 1.

legislative acts falling squarely within the [Speech or Debate] Clause[]. . . . [as] the 'act of voting' is necessarily a legislative act."[8] For the D.C. Circuit, proxy rules that "[govern] how Members may cast their votes" are legislative acts necessarily covered by the Speech and Debate Clause.[9]

While additional debate has continued on the House's proxy rules,[10] the Republican House majority reversed the proxy voting rules in the 118th Congress: "No more proxy voting," Speaker McCarthy tweeted, "[e]ffective immediately, Members of Congress have to show up to work if they want their vote to count."[11] While the House's refusal to extend the proxy rules from the 116th to 117th Congresses by declining to insert the necessary authorizing language resolved the immediate political question, Texas Attorney General Paxton has since filed suits alleging certain Congressional actions—including the Consolidated Appropriations Act, 2023, Pregnant Workers Fairness Act, and the Department of Homeland Security's Pilot Management Program—were unconstitutionally authorized on the basis of proxies.[12] Since then, Judge James Hendrix of the Northern District of Texas has held for Attorney General Paxton, thereby effectively rendering the Consolidated Appropriations Act, 2023, amongst others, unenforceable in Texas, writing that, "[b]ased on the Quorum Clause's text, original public meaning, and historical practice," the Quorum Clause "bars the creation of a quorum by including non-present members participating by proxy."[13] As a result, while Congress has temporarily suspended the use of proxy votes on the House floor, the legal question of proxy voting continues to cast a specter over the legitimacy of several statutes passed during the 116th and 117th Congresses.[14]

This essay argues that quorum cannot be established by proxy. Several primary sources, ranging from the Constitutional convention to various parliamentary manuals employed by the House support this position. My argument proceeds as follows: First, history and tradition in the American context deny support for employing proxies to meet quorum on the House floor. Second, the legislative action test—designed by the Supreme Court largely to immunize certain Congressional acts from judicial review under the Speech or Debate Clause as a safeguard to legislative independence[15]—fails to resolve proxy voting disputes because it ignores that quorum is a Constitutionally-fixed condition that is necessary to protect fair representation.[16] Accordingly,

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[8] McCarthy v. Pelosi, 5 F.4th 34, 39 (D.C. Cir. 2021).

[9] *Id.*

[10] *See, e.g.*, Emily Larson, Naomi Maehr, and Molly Reynolds, *Proxy voting takes on new meaning for Republicans*, BROOKINGS, January 20, 2022, https://www.brookings.edu/articles/proxy-voting-takes-on-new-meaning-for-republicans/.

[11] Chris Pandolfo, *House Speaker Kevin McCarthy Officially Ends Proxy Voting*, FOX NEWS, January 19, 2023, https://www.foxnews.com/politics/house-speaker-kevin-mccarthy-officially-ends-proxy-voting.

[12] Margot Cleveland, *How a Texas Lawsuit Could Nuke Biden's $1.7T Spending Spree,* THE FEDERALIST (Feb. 22, 2023), https://thefederalist.com/2023/02/22/how-a-texas-lawsuit-over-proxy-voting-could-nuke-bidens-entire-1-7-trillion-spending-spree/.

[13] Nate Raymond, *US judge in Texas rules congressional passage of 2022 spending bill unconstitutional*, REUTERS, February 27, 2024, https://www.reuters.com/legal/us-judge-texas-rules-congressional-passage-2022-spending-bill-unconstitutional-2024-02-27/.

[14] *See id.*

[15] Gravel v. United States, 408 U.S. 606, 637 (1972) (explaining that the purpose of the legislative action test is to ensure the independence of the legislature from a hostile judiciary or executive).

[16] *See* United States v. Ballin, 144 U.S. 1, 5 ("The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole; and the

because proxy voting violates the Constitution's Quorum Clause, the Court should reconsider the legislative action test's applicability to proxy voting rules.[17]

I. DEFINITION OF QUORUM AND PROXIES

A. Quorum

A quorum is the number of members required to be present for a constitutive body to transact business.[18] For the House of Representatives, the Constitution defines a quorum as a simple majority of Members,[19] which may slightly vary in the case of deaths or resignations.[20]

Between House rules, parliamentary manuals, comments, and opinions, a quorum is discussed on over five hundred occasions, with different requirements of quorum enumerated for different forms of the body or body-delegated authority. For example, in Jefferson's Rules the "Committee of the Whole" was distinguished from the actual floor of the House, in that the former only permitted debate and not the exercise of legislative power, and thus did not permit the Speaker to individually declare an absence of a quorum, given the Speaker must relinquish his seat during the Committee of the Whole—the effect of this process (that the House could debate a bill or resolution without obtaining a quorum, since the House was not legislating) was recognized in 1890, when the Committee of the Whole was given a set quorum of one hundred, a fixture that remains today.[21] The flexibility of quorum for Congress—that is, that the Constitutional boundaries of quorum only applied to true acts of legislation, as opposed to Committee actions merely discussing legislation—was therefore premised on the power of the body it applied to; as a result, when such a committee body could exercise the legislative power of the House in some capacity, the requirements of quorum were considerably tighter.[22]

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question which has over and over again been raised is, what is necessary to constitute the official action of this legislative and representative body.").

[17] *See id.* at 5. *But see* Doe v. McMillan, 412 U.S. 306, 340 ("Previous decisions of this Court have upheld the immunity of Members whenever they are 'acting in the sphere of legitimate legislative activity.'").

[18] *See, e.g.*, H.R. Res. 1507, 117th Cong. § 310 (2023) *reprinted in* CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 117-161, 1, 155 (2023) **(**"In general the chair is not to be taken till a quorum for business is present . . .").

[19] U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.").

[20] *See* RULES OF THE HOUSE OF REPRESENTATIVES, 118, r. XX, cl. 5(d) (2023).

[21] H.R. Doc. No. 117-161, *supra* note 19, at 164 ("The form of going from the House into committee, is for the Speaker, on motion, to put the question that the House do now resolve itself into a Committee of the Whole to take into consideration such a matter, naming it. If determined in the affirmative, he leaves the chair and takes a seat elsewhere, as any other Member; and the person appointed chairman seats himself at the Clerk's table."); H.R. Doc. No. 117-161, *supra* note 19, at 163 ("Until 1890 a quorum of the Committee of the Whole was the same as the quorum of the House; but in 1890 the rule (formerly clause 2 of rule XXIII, current clause 6 of rule XVIII) fixed it at one hundred (IV, 2966). Clause 6 of rule XVIII provides the procedure that is followed in the Committee in case of failure of a quorum."); *see also* RULES OF THE HOUSE OF REPRESENTATIVES 118, r. XVIII, cl. 6(a) (2023); *cf.* Christoffel v. United States, 338 U.S. 84, 87 (1949) ("Rule XV of the House provides for a call of the House if a quorum is not present, and it has been held under this rule that such a call, or a motion to adjourn, is the only business that may be transacted in the absence of a quorum.").

[22] *See Christoffel*, 338 U.S. at 87.

B. Proxies

Proxy voting enables one Member to vote on behalf of another Member, usually an absent one.[23] And although proxy voting does not necessarily interact with quorum—after all, the number of votes physically present may incidentally be the same as the quorum, even if there are votes conducted by proxy—H.R. Res. 965 authorizes proxy votes to count towards quorum, even if quorum would not be otherwise met.[24]

Furthermore, there is normally a general "prohibition against proxy votes" in committees, although Congress has acted on several historical occasions to provide exceptions to this rule.[25] Finally, within Jefferson's Manual and House Rules generally, discussion of proxies are rather scant, with most in reference to committees and virtually none in reference to proxies meeting quorum requirements.[26] Although the proxy question for committees is always adjacent to quorum for those committees, the question of proxies for quorum of the House as a deliberative body is fundamentally different, given committees are simply delegated agents of the body, and are not Constitutionally restricted.[27] As with any other rule of the House, such procedures can be amended with a simple majority of the House, unlike the Constitution.[28]

C. Interaction of Proxies and Quorum

The contested issue is whether the Constitution's quorum requirement compels a "majority" of members to be physically present, or if that majority can instead be represented by the number of votes cast.[29] If the Constitution does require such a majority be physically present on the House floor, then obtaining a quorum via proxy is prohibited since the necessary number of Members are not physically present. This is not merely an academic contention: the physical

[23] *See* H.R. Res. 965, 116th Cong. § 1(a) (2020). ("[a] proxy . . . may cast the vote of such other Member or record the presence of such other Member in the House."); *cf.* H.R. Res. 965, 116th Cong. § 3 (2020) (explaining that members can instruct the proxy prior to a vote, thereby limiting the proxy's autonomy).

[24] *Compare* RULES OF THE HOUSE OF REPRESENTATIVES, 118, r. III, cl. 2(a). ("A Member may not authorize any other person to cast the vote of such Member or record the presence of such Member in the House or the Committee of the Whole House on the state of the Union.") *and* RULES OF THE HOUSE OF REPRESENTATIVES, 117, r. XI, cl. 2(f) (2023) ("A vote by a member of a committee or subcommittee with respect to any measure or matter may not be cast by proxy") *with* H.R. 965, 116th Cong. § 3(b) (2020) ("Determination of Quorum. Any Member whose vote is cast or whose presence is recorded by a designated proxy under this resolution shall be counted for the purpose of establishing a quorum under the rules of the House.").

[25] *Compare* RULES OF THE HOUSE OF REPRESENTATIVES, 118, r. XI, cl. 2(f) (2023) ("A vote by a member of a committee or subcommittee with respect to any measure or matter may not be cast by proxy.") *with* RULES OF THE HOUSE OF REPRESENTATIVES, 116, r. XI, cl. 2(f) (2021) (citing H.R. Res. 5, 94th Cong. p. 20) ("the [proxy] rule was amended to permit proxies in committees with additional restrictions requiring an assertion that the grantor was absent on official business or otherwise unable to attend, requiring the Member to sign and date the proxy, and permitting general proxies for procedural matters.").

[26] *See id.*; *see also* H.R. Doc. No. 117-161, *supra* note 19, at 24 (applying *Ballin* to quorum proceedings but only discussing proxies once, and in application to H. R. Res. 965, 116th Cong. § 3 (2020)).

[27] *Cf. id*. at 157 (applying the same rule to the Committee of the Whole, that despite being near to or a majority of the House, such a committee does not have the power to legislate, but only to recommend a report to the House).

[28] *Compare* RULES OF THE HOUSE OF REPRESENTATIVES, 117, r. XVI (2022) *and* RULES OF THE HOUSE OF REPRESENTATIVES, 118, r. XVI (2023) *with* U.S. CONST. art. V.

[29] *See* U.S. CONST. art. I, § 5, cl. 1.

presence of members of a body to approve legislation is the very essence of a democratic body, without which there is, almost literally, "legislation without representation."[30]

I intentionally eschew the extensive common law history of proxies for two reasons: first, elaborating the whole "history and tradition" of voting methods—which in the Western tradition range as diverse as the Peloponnesian war and medieval English Parliament—is beyond the scope of this paper.[31] Second, the focus of this paper is to identify how proxies work or do not work within the American system, not if proxies are intrinsically disordered or if their employment in a body lacks prudence.

II. HISTORY AND TRADITION OF QUORUM AND PROXIES

A. Quorum and Proxies in the Constitutional Convention.

The Founders, having learned from the exploitation of quorum rules in colonial assemblies,[32] were keenly attuned to debates about the nature of quorum. The Supreme Court has also noted that proxy voting was also common in Founding-era state legislatures, subject to both advocates and critics.[33] Notably, prior to the Constitutional Convention, Benjamin Franklin proposed proxy voting in the Articles of Confederation,[34] only for the proposal to be subsequently rejected. And even within Benjamin Franklin's proxy-friendly proposal, proxies were excluded from being counted towards quorum.[35]

One such debate was over quorum busting. During the Convention, Governor Morris moved to fix quorum at 33 members in the House and 14 in the Senate (the majority at that time), arguing that without necessitating a majority present and voting, "[representatives] will generally attend knowing that advantage may be taken of their absence." That is, representatives may intentionally be 'absent' to avoid difficult votes, or, if in sufficient numbers, to frustrate a normal

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[30] *See* Wesberry v. Sanders, 376 U.S. 1, 13–14 (1964) ("The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' an idea endorsed by Mason as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives."); *see also* Raines v. Byrd, 521 U.S. 811, 827–31 (accepting that dilution of Congress's Article I powers could establish standing and on those grounds rejecting the Line Item Veto Act, which gave the President the power to cancel certain spending and tax provisions in bills passed by Congress.).

[31] *See* Alison McHardy, *The 'Hidden' Parliamentarians of Medieval England*, 35 MEDIEVAL PROSOPOGRAPHY 87, 91 (explaining the practice in the English Parliament of clergy to give letters of proctors, or proxies, to represent and vote on their behalf); *Cf.* HENRY M. ROBERT, III, ET AL., ROBERT'S RULES OF ORDER 33 (12th ed. 2006).

[32] ROBERT LUCE, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES 25–28 (1922).

[33] *See id.* at 27–31. It is notable that proxy voting was not only a contentious subject in Congress, but also in other institutions, such as the Electoral College. *See also* Chiafalo v. Washington, 140 S. Ct. 2316, 2325 (2020) ("[S]uppose in a system allowing proxy voting (a common practice in the founding era), the proxy acts on clear instructions from the principal, with no freedom of choice. Still, we might well say that he cast a "ballot" or "voted," though the preference registered was not his own. For that matter, some elections give the voter no real choice because there is only one name on a ballot (consider an old Soviet election, or even a down-ballot race in this country). Yet if the person in the voting booth goes through the motions, we consider him to have voted. The point of all these examples is to show that although voting and discretion are usually combined, voting is still voting when discretion departs.").

[34] Benjamin Franklin, FRANKLIN'S ARTICLES OF CONFEDERATION art. VIII (Jul. 21, 1775).

[35] *Id.* at art. VIII ("At every Meeting of the Congress One half of the Members return'd exclusive of Proxies be necessary to make a Quorum.").

majority.[36] Governor Morris also feared that a quorum count too high would permit representatives to "break up a quorum" so that such individuals could "seize a moment when a particular [part] of the Continent may be in need of immediate aid . . ."[37] Other representatives agreed with the necessity for a majority, but opposed the fixing of a majority as "extremely cumbersome," and so moved to substitute the motion so that not less than thirty-three in the House and not less than fourteen in the Senate, should constitute quorum, deferring increases in the quorum to Congress. [38] The substitute motion was lost, with 2 ayes and 9 noes.[39] As a solution to concerns about quorum-breaking, Madison moved to add to Governor Morris's motion a provision to grant Congress a potent method of enforcing quorum: that Congress could physically "compel the attendance of absent members in such manner and under such penalties as each House may provide."[40] It passed near-unanimously.[41] Notably, that same committee limited this power by unanimously agreeing that the "right of expulsion" must only be applied for a two-thirds (⅔), not majority, vote.[42] The House was thus given an extensive, meaningful power under the Constitution to coerce the majority required for a quorum, including the power to expel those offending members.

Admittingly, proxies are rarely mentioned explicitly during the American Constitutional Convention.[43] When they are mentioned, it is primarily in reference to the Hamilton Plan, which explicitly permitted proxies: "Representatives *may* vote by *proxy***.**"[44] Likewise, in the Senate, proxies were permitted, but limited each Senator to supporting only one proxy from another Senator.[45] Of course, the Hamilton Plan was rejected by the convention, in large part because it provided equal representation for the states in a unicameral legislature.[46] While the debate between large and small states dominated the question of how Congress was to be organized, the aforementioned discussions of proxies in the transcript illustrate that the issue was nonetheless pertinent to those at the Convention. More importantly, the very fact that the Framers settled on different methods of selecting Senators versus Members of the House—"The Great

[36] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 252–53 (Max Farrand ed., 1911).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 253–54.

[40] *Id.* at 254.

[41] *Id.*

[42] *Id.*

[43] Most references to proxies in the transcript of the Constitutional Convention involve how members can employ the proxies to corrupt or influence legislation. *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 394–95 (Max Farrand ed., 1911) (Mr. Hamilton explaining how offices held by proxy can be used to influence appointments).

[44] 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 620–21 (Max Farrand ed., 1911).

[45] *Id.* at 622.

[46] *See* FRANCIS NEWTON THORPE, CONSTITUTIONAL HISTORY OF THE UNITED STATES 386 (1970) ("[Western states would be] entitled to vote according to their population, all would be right and safe; but possessing an equal vote, a more objectionable minority than ever might give law to the whole. The relative merits of the two plans had now been thoroughly shown, and by a vote of seven States to three, the larger States against the small, the New Jersey plan was rejected for the Virginia. The vote indicated that the more perfect Union about to be formed would be national rather than federal in character."); *see also* Committee to Recall Robert Menendez From the Office of U.S. Senator v. Wells, 204 N.J. 79, 158 (2010) (Rivera-Soto, J., dissenting) ("Disputes among the states about how to balance representation between and among populous and sparsely-settled states which spawned the Virginia Plan, favoring the former, and the New Jersey Plan, which protected the latter, dominated the debate.").

Compromise"—at minimum suggests that delegates of the Convention were acutely aware of the importance of a member's presence for sufficient representation.[47]

B. Quorum and Proxies in Congressional Legislative History.

A second venue for understanding proxies is through legislative history. While committees, being inferior bodies, have been permitted by the House to employ proxies for voting,[48] such proxies were almost never historically used as a measure for quorum (a separate issue is on a 'catastrophic circumstance' which only modifies quorum without introducing proxies as a cure).[49] And even in the few approved situations for the employment of proxies, Congress has always historically recognized a key distinction between the deliberative assembly of the House and its inferior committees, almost always requiring members physically present in the former when determining quorum.[50]

One key debate recorded in Cannon's Precedents begins with the contested use of proxies, ironically enough, in committees. In 1929, Representative Reece, in debating a question to the speaker, referred to the use of proxies in committees.[51] A dispute emerged as to the actual use of proxies in committee.[52] The speaker recognized that proxies were allowed "by unanimous consent of the committee itself," and "[o]f course, a proxy could not be counted in making up a quorum."[53] A year later, Representative Johnson raised a parliamentary inquiry if a Member could sign onto a motion by proxy.[54] The Member, he alleged, was "absent on account of illness," and therefore requested Representative Johnson cast the motion in his stead.[55] The Chair denied Representative Johnson's request, stating that "there is no rule that the Chair knows of in the House of Representatives for any sort of proxy," and thus "the Chair is very clear that no member

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[47] *See* THE FEDERALIST NO. 58 (Alexander Hamilton) ("As connected with the objection against the number of representatives, may properly be here noticed, that which has been suggested against the number made competent for legislative business. It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority.").

[48] RULES OF THE HOUSE OF REPRESENTATIVES, 116, r. XI cl. 2(f) ("[I]n the 94th Congress . . . the rule was amended to permit proxies in committees with additional restrictions requiring an assertion that the grantor was absent on official business or otherwise unable to attend, requiring the Member to sign and date the proxy, and permitting general proxies for procedural matters.").

[49] *See*, H.R. Doc. No. 117-161, *supra* note 19, at 156 ("Although it was formerly the rule that a quorum was necessary for debate as well as business (IV, 2935–2949), in the 94th Congress the House restricted the Chair's ability to recognize the absence of a quorum (clause 7 of rule XX). Clause 5(c) of rule XX permits the House to operate with a ''provisional quorum'' where the House is without a quorum due to catastrophic circumstances. In the 116th and 117th Congresses the House adopted a provision, effective during a designated public health emergency, to count for purposes of establishing a quorum all Members voting or recording their presence by proxy").

[50] *Id.*

[51] 8 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 35 (Gov't. Printing Off. 1936).

[52] *Id.*

[53] *Id.*

[54] 7 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 144 (Gov't. Printing Off. 1935).

[55] *Id.*

can delegate to another the right to sign such a petition . . ."[56] Likewise, in 1933, when a Committee of the Whole House (not to be confused with a standing committee),[57] considered a bill to regulate banking assets, Representative Lehr's motion to make an amendment by proxy on behalf of a member, Representative Dingell, was denied.[58] The Chair ruled that "Amendments may not be proposed by proxy."[59]

The precedent to deny the use of proxies on the floor continued into more recent congressional history. As early as 1979, for example, the parliamentary rules of the House recognized that, "[a]lthough the House, of course, does not allow the use of proxy votes on the floor, the rules do permit their use in committees subject to certain restrictions."[60] And even then, it was equally recognized that even in committees "No measure or recommendation may be reported from any committee unless a majority of the committee were *actually present*."[61] Moreover, proxies were exercised only as an exception, rather than the norm, as committees were required to, "[limit] the exercise of the proxy to a specific measure or matter."[62] These examples demonstrate the principle the House has frequently deferred to: that while proxies may be used for in limited circumstances to vote on committee business, proxies may not be used to establish quorum. In effect, the House has attempted to divorce the process of deliberation, in other words, the process of "speech and debate," from the ambit of proxies in establishing quorum.

While precedent offers a normative rejection of proxies as a measure of quorum, it fails to address the actual controversy of why proxies harm the process. In 1971, Representative Cleveland, flustered that proxy voting approved an amendment for a resolution that reduced funding for the Committee on Internal Security, offered one reason: that because proxies allow votes without deliberation, they formulate a poor legislative process.[63] Representative Cleveland noted that "this particular result we have on the floor of the House . . . never would have occurred if there had not been proxy voting."[64] Because of an apparent lack of deliberation, Representative Cleveland argued that proxies were decisive "in the vote that resulted in the cut that has been characterized here as too drastic."[65]

While this review is certainly not an exhaustive history of proxies, it nonetheless illustrates that Members of Congress have expressed serious concerns about how proxy votes impact the legislative process, even in the most limited of contexts.

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[56] *Id*.

[57] 8 CANNON, *supra* note 53, at 433.

[58] *Id*.

[59] *Id*.

[60] 4 LEWIS DESCHLER, DESCHLER'S PRECEDENTS 2674 n.9 (Thomas J. Nicola, ed., 1994) (citing Rules of the House of Representatives, 96, r. XI cl. 2(e)(1) (1979)), https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V4/pdf/GPO-HPREC-DESCHLERS-V4.pdf.

[61] *Id.* at 2679 (emphasis added).

[62] *Id.*

[63] *Id.* at 2736.

[64] *Id.*

[65] *Id.* at 2737.

III. LEGISLATIVE IMMUNITY UNDER THE SPEECH OR DEBATE CLAUSE

In *McCarthy v. Pelosi*, the D.C. Circuit repeated the crudely designed legislative action test to determine if a legislative action can be reviewed: "The pivotal distinction . . . is between legislative acts and non-legislative acts."[66] But the legislative action test misses the Constitutional question on proxies because it ignores the fundamental, Constitutionally enumerated implication of quorum on proxies: the concern shared by the Founders and many Members of Congress that quorum was (and remains) a key pillar in the Constitution to protect fair representation, which proxies frustrate.[67]

A congressional rule is a legislative act if it is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation."[68] In *McCarthy*, the D.C. Circuit held that because it was difficult to "conceive of matters more integrally part of the legislative process than the rules governing how Members can cast their votes,"[69] it followed that "[the] recording of proxy votes–is itself a legislative act."[70] More specifically, because proxy voting was within the "'direct business of passage or rejection'" of legislation, it fell within Congress' power to "determine the Rules of its Proceedings."[71]

There are several important errors within this argument; first, from a purely textual basis, the power of each House to define the "Rules of its Proceeding" is clause 2, Sec. 5 while the quorum requirement is intentionally separated in clause 1, Sec. 5.[72] Thus, the D.C. Circuit erroneously equates the expansive deference for rules of proceeding to the quorum requirement; and in doing so, eschews the historical debate that underlies the intentional separation of the Quorum Clause and the rules of procedure in determining a majority.[73]

Second, more importantly, the precedent set by such an equivocation opens the door for the abusive, unconstitutional majority the Founders feared. Imagine, for example, that the House rules were amended to allow Congressional members to concentrate their proxies in the Speaker of the House; under this system, the Speaker could constitutionally pass legislation or suspend debate unilaterally.[74] For a Constitutional provision designed to protect "Speech and Debate" from external regulation, there is a deep irony that the court's interpretation would allow a single figure, empowered by a partisan majority, to deny the House both *speech* and *debate*. It was this exact debate over quorum as a necessary condition of representation that invigorated the founders at the Constitutional Convention,[75] prompted Delegates Randolph and Madison to offer

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[66] *McCarthy*, 5 F.4th at 41.

[67] *See* THE FEDERALIST NO. 58, *supra* note 49.

[68] *Gravel*, 408 U.S. at 625.

[69] *McCarthy*, 5 F.4th at 39.

[70] *Id.* at 41.

[71] *Id.* at 40.

[72] *Compare* U.S. CONST. art. I, § 5, cl. 1 *with* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

[73] *See* THE FEDERALIST NO. 58, *supra* note 49.

[74] *Cf.* H.R. Res. 965, 116th Cong. (2020).

[75] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 38, at 254; *see also* LUCE, *supra* note 34, at 25.

avenues for Congress to enforce physical attendance,[76] and that the Great Compromise contemplated in rejecting the Hamilton Plan's proxy provision.[77]

Third, the primary policy justification to a broad interpretation of the Speech or Debate Clause—in the words of Justice Harlan, to safeguard the "independence of legislature" from "an unfriendly executive and conviction by a hostile judiciary"—does not apply to proxies.[78] Start with the *McCarthy* court's reliance on *Gravel v. United States*.[79] In *Gravel*, Senator Gravel convened a midnight subcommittee hearing, wherein he read from the Pentagon Papers (which were classified) and placed the papers into the public record.[80] Senator Gravel then arranged for the publication of the papers by Beacon Press.[81] A grand jury subpoenaed Gravel's aide to testify as part of an investigation into the Pentagon Papers.[82] Gravel contended that the Speech or Debate Clause barred enforcement of the subpoena.[83] The Court held that Gravel's subcommittee disclosures were protected legislative acts, but his publishing arrangements with Beacon Press were not.[84] Here, the *McCarthy* court mistakes *Gravel's* physical proximity of the act to the legislative process as a necessary and sufficient—rather than only a sufficient—condition of the legislative action test. That is, just because Gravel' publishing arrangements fell outside the Speech or Debate Clause, does not mean analogous situations must be outside the physical proximities of a committee. As a result, Gravel's congressional record is not analogous to the proxy vote, as the former is unencumbered by a Constitutional necessary condition that the latter is subject to: namely, the Quorum Clause. Even if not, *Gravel* is particularly inappropriate to an exploration into legislative independence because it is related to third-party criminal acts and not to the substantive making of legislation.

Petitioner likewise cites to *United States v. Brewster*, which has the same problem.[85] In *Brewster*, a member of Congress accepted a bribe in exchange for specific legislative acts (voting).[86] The Court held that while the member's votes fell under protected legislative action, accepting the bribe itself was not.[87] But again, the condition about legislative action hinged on external criminal conduct, not the legislative process itself.[88] By contrast, *McCarthy* does not implicate the potential

[76] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 38, at 200.

[77] 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 620.

[78] *Gravel*, 408 U.S. at 636 (citing United States v. Johnson, 383 U.S. 169, 179 (1966)).

[79] *See McCarthy*, 5 F.4th at 40.

[80] *Gravel*, 408 U.S. at 609 ("It appeared that on the night of June 29, 1971, Senator Gravel, as Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a meeting of the subcommittee and there read extensively from a copy of the Pentagon Papers. He then placed the entire 47 volumes of the study in the public record.").

[81] *Id.*

[82] *Id.* at 608.

[83] *Id.* at 608–09.

[84] *Id.* at 621–23.

[85] Petition for Writ of Certiorari at 14–16, McCarthy v. Pelosi, No. 20-5240 (Sept. 9, 2021).

[86] United States v. Brewster, 408 U.S. 501, 502 (1972).

[87] *Id.* at 526 ("Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator.").

[88] *Id.* at 528 ("The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.").

immunity concerns that the *Gravel* court feared would place legislators above the law,[89] but whether Congress actually convened a valid vote.[90]

The Court's analysis of *Powell v. McCormack* is more analogous because it addresses how explicitly enumerated Constitutional processes affect the independence of the legislature.[91] In *Powell*, the House of Representatives voted to bar Representative Adam Clayton Powell from being seated in the 90th Congress based on allegations he had misused public funds,[92] despite Representative Powell's status as duly elected and constitutionally qualified.[93] The Court held the House was effectively expelling Representative Powell by a majority vote, rather than the Constitutionally required two-thirds;[94] and since the House had tried to maneuver around those procedural requirements, it had run afoul with the Constitution.[95] The *McCarthy* court argues that *Powell* has a secondary holding that distinguishes proxy voting: namely, that in *Powell*, the suit applied to those not directly involved in the legislative process, such as the Sergeant-at-arms.[96] This is pure legal pettifoggery.[97] What the *Powell* court actually focused on was the limiting principles enumerated into the Constitution. That is, because the "Convention adopted [Madison's proposal to limit expulsion to two-thirds] limiting the power to expel," it followed that allowing new procedures to avoid the Constitutionally enumerated requirements would vest "an improper & dangerous power in the Legislature."[98] Because quorum is textually enumerated, *Powell* limits congressional powers to maneuver around the constitutionally defined procedure.[99]

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[89] *Compare Gravel*, 408 U.S. at 621–22 ("The United States fears the abuses that history reveals have occurred when legislators are invested with the power *to relieve others from the operation of otherwise valid civil and criminal laws* . . . [This view] provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction. Neither does it immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act." (emphasis added)) *with McCarthy*, 5 F.4th at 39 ("The challenged Resolution enables Members to cast votes by proxy, and *the 'act of voting' is necessarily a legislative act*—i.e., something "done in a session of the House by one of its members in relation to the business before it." (emphasis added)).

[90] *See Gravel*, 408 U.S. at 621.

[91] Powell v. McCormack, 395 U.S. 486, 503 (1969) ("Legislative immunity does not, of course, bar all judicial review of legislative acts.").

[92] *Id.* at 490–94.

[93] *Id.* at 548 ("Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds. In short, both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote.").

[94] *Id.*; *see* U.S. CONST. art. I, § 5, cl. 2.

[95] *Id.*

[96] *McCarthy*, 5 F.4th at 41.

[97] In *Powell*, while the court dismissed the case against Members of Congress, the court retained it against House agents. Unlike the Gravel staffers—who were personally employed by Senator Gravel—the staffers in *Powell* were "House agents solely within the House" and not an "employee outside the House having a direct effect upon a private citizen." *See Powell*, 395 U.S. at 504. Perhaps there is an argument that petitioners sued the wrong individual; but even if petitioners did fail to plead sufficiently, they could simply bring the case back as a suit against House staff enforcing the rule.

[98] *See Powell*, 395 U.S. at 533–34.

[99] *Cf. Ballin*, 144 U.S. at 5.

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In the docket of Supreme Court cases, proxy voting—especially now that the House has discarded the practice in the aftermath of COVID-19—may seem pedantic. But proxy voting represents one of the most dangerous trends in modern American republicanism, one that the Founders sought to avoid by explicitly enumerating the requirement of quorum in the Constitution.[100] Proxy voting not only strikes at the heart of the American tradition, but also usurps the Constitution's textual requirement of a majority presence. In an age increasingly dominated by algorithmic subconscious prediction methodologies that can drive social trends and erode trust,[101] human presence is not only institutionally prudential but a Constitutional requirement. Accordingly, the Court should thus review its application of the legislative action test, and bar proxy voting for establishing quorum in legislative sessions in the House.

[100] *See* U.S. CONST. art. I, § 5, cl. 1.

[101] *See, e.g.*, Kimo Gandall et al., *Predicting Precedent: A Psycholinguistic Artificial Intelligence in the Supreme Court*, 14 CASE W. RES. J.L. TECH. & INTERNET 220, 228–29 (2023) (explaining that traditional institutionalist explains of Supreme Court behavior—such as a case specific background, or the legal rule in question—is only 70% accurate, while an algorithm with features built from sentiment was over 91% accurate).