

James Wallner
R Street Institute

Testimony

“The Constitutional Framework for Congress’s Ability to Uphold Standards of Member Conduct”

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary

House of Representatives

March 11, 2021

Chairman Cohen, Ranking Member Johnson, Members of the Subcommittee,

Thank you for the opportunity to testify about Congress’s power under the Constitution to discipline its members. It is an honor to appear before you today. And I look forward to your questions.

INTRODUCTION

It is important to acknowledge at the outset of my remarks that the committee is considering the extent of Congress’s power to discipline its members just weeks after a violent mob attacked and ransacked the Capitol. Like most Americans, I was shocked, appalled, and saddened by that tragic event.

We cannot go back in time, regrettably, to change what happened that day. But we are able to learn from it. And I believe that the most important lesson that the event can teach us is that it is better to resolve our disagreements via debate, deliberation, and compromise instead of through force, violence, and intimidation.

I believe that this context matters given recent calls for Congress to discipline members who objected to Arizona’s and Pennsylvania’s electoral results when the House and Senate gathered in joint session on the day of the attack to count the votes for president and vice president.¹ Proponents of taking disciplinary action against those members appear to believe that they aided and abetted the Capitol attack by using procedures authorized by the House and Senate.

¹ The Constitution requires that Congress count the electoral votes for president and vice president in joint session. Specifically, it stipulates, “The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President.” U.S. Const. art. II, § 1, cl. 3.

The individuals at the center of the current debate over Congress's ability to discipline its members used procedures authorized by the Electoral Count Act of 1887 (Public Law 49-90) to adjudicate their concerns about Arizona's and Pennsylvania's electoral votes. Among its provisions, the Electoral Count Act of 1887 directs the vice president to "call for objections" to the states' electoral votes as they are read and counted in joint session. Members of Congress who object must do so in writing. That is, they must "state clearly and concisely, and without argument, the ground" on which they base their objections. Two members (one from the House and one from the Senate) must sign an objection to a state's electoral votes. In the event that the required number of members object to a state's electoral votes, the House and Senate meet separately to weigh the merits of the objection and to determine whether it should stand.

The Electoral Count Act also establishes special procedures to govern debate in the House and Senate over whether the objection that prompted the separate meetings should stand. Specifically, the law caps debate in each chamber at no more than two hours. It also prohibits members from speaking more than once on the question and limits members' speeches to five minutes. After two hours - or when no member seeks recognition to speak - the chambers vote on whether to sustain the objection or to reject it. Both the House and Senate must vote separately to sustain the objection for it to stand. If one chamber votes to sustain the objection and the other chamber does not, Congress counts the electoral votes.

Of course, Congress has the power to discipline its members for using the procedures authorized by the Electoral Count Act of 1887 to adjudicate their concerns about the 2020 elections on the House floor. The question, however, is whether it should use that power.

Notwithstanding the details of this specific case, I believe that disciplining members for using authorized procedures to participate in the legislative process undermines that process and makes it harder for Congress's members to debate, deliberate, and compromise as envisioned in the Constitution. Penalizing members for acting in ways that do not violate specific rules also reinforces the status quo and makes it harder for those opposed to it – people like the civil rights activists of the 1950s and 1960s, members of the women's suffrage movement, and abolitionists – to change public policy inside Congress.

THE CONSTITUTION

The Constitution empowers Congress to discipline its members (or prospective members) in three ways. First, its Qualifications and Quorum clause allows a majority in the House and Senate to block candidates from taking their seats after an election if the members believe that the candidate in question does not meet the Constitution's eligibility requirements. The scope of this power, however, is limited to the membership qualifications enumerated in Article I of the Constitution.²

² "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." U.S. Const. art. I, § 5, cl. 3. Alexander Hamilton notes in *Federalist 60* that "the qualifications of the persons who may choose or be chosen...are defined and fixed in the Constitution; and are unalterable by the legislature." The Supreme Court similarly ruled in *United States v. Powell*, "The Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." *United States v. Powell*, 379 U.S. 48 (1964).

Second the Constitution's Rules and Expulsion clause gives the House and Senate plenary power over the rules of their proceedings. Majorities in both chambers have used their power to adopt, among other things, standards of official conduct. The Constitution's plenary grant of power also empowers House and Senate majorities to censure, reprimand, or fine their members when they violate those standards or otherwise engage in "disorderly behavior."³

The Constitution also limits the scope of Congress's rule-making power. In the 1892 case, *United States v. Ballin*, the Supreme Court conceded that House and Senate majorities are free to adopt rules. But the Court also acknowledged that Congress's power to adopt rules to regulate its proceedings is not unlimited. Justice David Brewer pointed out that while "the Constitution empowers each house to determine its rules of proceedings," the House and Senate cannot, by their rules, "ignore constitutional restraints or violate fundamental rights."⁴

Finally, the Rules and Expulsion clause empowers the House and Senate to expel members. However, the clause does not define the appropriate grounds for expulsion. It instead raises the number of votes required to expel a member to a two-thirds majority. Delegates to the 1787 Federal Convention that crafted the Constitution set a higher threshold to expel members because they wanted to make it harder for majority factions in the House and Senate to use the power to silence their political opponents. For example, James Madison worried during the delegates' debate on this question that the expulsion power would be "dangerously abused" by majority factions if the threshold was not set at a two-thirds majority.⁵

A CRUCIBLE OF CONFLICT

The Constitution empowers Congress to discipline its members to protect the integrity of the legislative process and to safeguard Congress's role as a crucible of legitimate political conflict by protecting the space inside the House and Senate where Americans' elected representatives gather to participate in the activity of self-government on their behalf. Constitutional provisions like the Privilege from Arrest and Speech and Debate clauses suggest that the activity of members inside Congress is important.⁶

If self-government is an activity in which citizens or their representatives participate, then it requires a shared space, or venue, in which that activity can occur. In classical Athens, that shared space was denoted by the *polis*. In Rome, it was called the *res publica*. In America, the

³ Article I, section 5, clause 2. "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the concurrence of two thirds, expel a Member." U.S. Const. art. I, § 5, cl. 2. See also, "Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives," *Congressional Research Service* (June 27, 2016).

⁴ *United States v. Ballin*, 144 U.S. 1 (1892).

⁵ *Records of the Federal Convention of 1787*, Max Farrand, ed. Vol. II (New Haven: Yale University Press, 1911), 254.

⁶ The Privilege from Arrest clause stipulates, "The Senators and Representatives...shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." The Speech and Debate clause stipulates that members "shall not be questioned in any other Place" for their "Speech or Debate in either House." U.S. Const. art. I, § 6, cl. 1.

institutional venues established by the Constitution - places like the House and Senate – create the space where self-government happens.

Human plurality makes the Constitution's institutional venues essential to self-government. For example, members of Congress need a venue where they can make collective decisions because they are all equal. Members are equal in the sense that they each represent separate and distinct constituencies. Moreover, no two individual members can be considered the same in any respect other than the fact that they are both unique, each possessing their own abilities, characteristics, interests, hopes, and fears. Consequently, adjudicating their disagreements inside Congress is the only way that members can form a greater understanding of reality in the round. And it is that understanding that makes compromise possible.

Self-government is what happens when Americans with different views come together to debate, deliberate, and compromise in a shared space governed by rules. And because Americans with different views participate in the act of self-government on the basis of equality, their political activity in places like the House and Senate inevitably generates disagreement, or political conflict. That is why rules and legislative procedures are essential to making Congress work. They make it possible for members to compromise when they disagree with one another.

While conflict is inherent in the legislative process, members of legislatures have throughout history have tried to find a substitute for the legislative process that does away with the unpleasant realities of self-government altogether. However, all such attempts eventually end in the transformation of politics into something else entirely. This is because taking steps to assert control over the act of self-government, to make its outcomes predictable, and to shield citizens and their elected representatives from the consequences of their actions implies imposing a standard on the legislative process from outside that process, which itself requires restricting legislators' ability to participate in it. Such standards can serve to facilitate debate, deliberation, and compromise only when they are imposed on all members equally and in advance.

THE ROLE OF RULES

Rules are vital to what Congress does because its members can compensate for the problems inherent in self-government by preserving their faculties of forgiving one another and making and keeping promises. When members cannot know with certainty the outcomes of their actions, the ability to forgive is vital. Without it, they are locked in a chain reaction process of action and reaction, unable to break free from the original deed that set it in motion. Similarly, the ability to make and keep promises in the form of rules and norms, according to the political theorist Hannah Arendt, creates "islands of predictability" and "goalposts of reliability" in politics.⁷ In other words, they make it possible for members to form expectations about how politics will be conducted in the future. That, in turn, makes it easier for members to settle for suboptimal outcomes (i.e., to compromise) in the present.

⁷ Hannah Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 1958), 237.

Disciplining members for following the rules undermines their ability to serve this role and it makes enforcing the rules arbitrary. It also complicates members' ability to form expectations about how those rules will be implemented in the future.

POLITICS AS PRODUCTION

While the Constitution understands self-government to be an activity in which citizens, or their elected representatives, participate to make collective decisions, Americans today generally understand what happens inside the House and Senate as a production process. That is, they see the House and Senate as factories and their members as workers on an assembly line where they execute their assigned roles instead of participating in a particular practice at a distinct place and time.

Viewing the Congress in these terms changes how we think about the practice in which its members are engaged. That is, we no longer understand them to be participating in an activity on our behalf - the acts of debating, deliberating, and compromise that are essential to lawmaking. Members become, in our minds, craftsmen who apply technical knowledge to make policy widgets. Like all production processes, members' work follows an existing blueprint that is designed by someone else in another place and time.

The problem with this view is that no one person or factory foreman can control Congress and its members. Consequently, outcomes in the House and Senate cannot be known in advance. Instead, they are determined by members participating in an activity that takes place, for the most part, inside Congress using authorized rules and procedures as leverage to participate in negotiations with one another. Congress passes legislation in this process as a result of the decisions individual members make over the course of a debate as they act and react to one another.

Understanding Congress in terms of a factory undermines the rules members need to make this process work. Viewing the legislative process as a means to a higher-end (or policy widget) functionalizes it. And it renders political conflict inside the House and Senate something against which Congress must be insulated.

It is easier for members to rationalize departures from the rules when doing so is believed to be necessary to achieve their ends and to condemn such departures by their opponents when they are not. It is also easier for members to rationalize disciplining their political opponents when they follow the rules to achieve their goals. When coupled with the rising toxicity of our current politics, members' tendency to disregard the rules when doing so helps them, to call for their strict enforcement when it does not, and to discipline their opponents for following the rules, exacerbates Congress's present dysfunction and makes it harder for the House and Senate to operate as envisioned by the Constitution.

POLITICAL CONFLICT VS. VIOLENT CONFLICT

Calls to discipline members for following the rules in the past instead of changing the rules moving forward highlights a pervasive view in politics at present that political conflict makes it

harder for Congress to debate, deliberate, and compromise. This view is premised on a sliding-scale understanding of disagreement in which political conflict is located at one end of the continuum and violent conflict at the other end. It assumes that too much political conflict eventually leads to violence.

But politics and violence are two different ways to resolve disagreements in society. Violence occurs when people reject politics and turn to force and intimidation to adjudicate their disagreements. In contrast, politics happens when people opt for debate, deliberation, and compromise to resolve their differences.

The activity of individual members of Congress inevitably generates conflict in the House and Senate spaces where they persuade, bargain, negotiate, and compromise with one another. That makes conflict between members an inescapable, and essential, part of the practice that constitutes legislative politics. To wall-off congressional deliberations from that conflict- may make it easier for members to negotiate deals- thereby increasing Congress's legislative productivity in the short term- but doing so also undermines its overall lawmaking capacity over time. This is because insulating Congress from political conflict makes it harder for people opposed to the status quo to change it.

A sliding-scale understanding of conflict makes it harder to acknowledge that disagreeing in Congress can drive members to compromise with one another in the absence of consensus. The effort required for different members to prevail in such contests using procedure as leverage inside institutional spaces like the House and Senate also means that a genuine desire for compromise is not a precondition for achieving a deal. Instead, the dynamics of legislative politics organically produce a deal that members support as long as they want to win. The practice does so by regularly bringing members who want to prevail in a debate into conflict with one another over the course of that debate in a shared space governed by rules. Perhaps most important, the contested nature of legislative politics also serves to reconcile the losers in a debate to its outcome.

CONCLUSION

Congress is not merely a medium of mechanistic transmission through which forces exogenous to the House and Senate determine outcomes. Rather, the debates and confrontations in which members participate inside the House and Senate as the process unfolds represent them acting at cross-purposes to prevail over one another. Over the course of a debate on a controversial issue (e.g., civil rights), members are reconciled to a single outcome because the dynamic nature of legislative politics generates new options that make a compromise possible where none was previously (e.g., the Civil Rights Act of 1964).

To appreciate that conflict is not antithetical to compromise and is instead a necessary precondition for the emergence of compromise agreements whenever members disagree requires that we first acknowledge the adverbial nature of self-government and the importance of rules to making it work. Conflict facilitates compromise because it entails effort on the part of members. Increasing the effort required of members to prevail in a debate imposes costs on them. Those costs accumulate and, in the process, create the space where negotiation and bargaining can

occur. It is that bargaining process that makes compromise possible in the first place.

For these reasons, Congress should refrain from using its constitutional power to discipline its members for following the rules and should instead focus its effort on changing those rules moving forward. The ability of its members to debate, deliberate, and compromise depends on it.

Thank you.