

## The Speaker Of The House Cannot Be Just Anyone

By **Michael Ellis and Gregory Dubinsky** (February 2, 2023, 3:13 PM EST)

The political divisions on display in last month's election for speaker of the U.S. House of Representatives led some observers to suggest that the House could have broken a deadlock by electing a speaker from outside of the House.

Anyone, proponents of this view say, can be selected as speaker. Rep. Matt Gaetz, R-Fla., even voted for former President Donald Trump, and then posted a photo of Trump holding the speaker's gavel on social media.

A closer look at the original public meaning of the Constitution, however, shows that this notion is flawed. Under the Constitution, the speaker must be a member of the House.

The claim that anyone can be elected speaker relies entirely on a seeming omission in the text of the Constitution. Article I states that the House "shall [choose] their Speaker and other Officers," and proponents infer from the fact that the clause does not expressly state that the speaker must be a member that anyone can be speaker.

Such mere textual silence in one clause, in and of itself, is weak evidence of anything, and tried-and-true indicia of constitutional meaning — settled practice, history and constitutional structure — cut strongly the other way.

As a matter of long-standing practice, every speaker has been a member, a tradition that dates back to the first Congress.

As the Congressional Research Service notes, the first recorded votes for nonmembers to be speaker occurred in 1997, and since then no nonmember has ever obtained more than a scattering of votes in a speaker election.[1]

This historical practice bears heavily on the constitutionality of electing a nonmember as speaker. As the U.S. Supreme Court explained in its 2014 *National Labor Relations Board v. Canning* decision, the long-standing practice of the government is "an important interpretive factor" and "can inform [the] determination of 'what the law is.'"[2]

That is in line with former President James Madison's view that "'a regular course of practice'" can



Michael Ellis



Gregory Dubinsky

"liquidate and settle the meaning" of ambiguous constitutional provisions.[3]

The history of legislative speakers in the Anglo-American tradition strongly suggests that only a member of the House can be its speaker.

The practice of the House selecting its own speaker dates back to at least the 14th century in England, where for centuries Parliament wrestled with the monarchy to assert its independence against royal control by securing the right to independently choose its own speaker from its members.

That power struggle extended to colonial America, where monarchy-appointed governors attempted to select the speaker of provincial assemblies to control political debate.

Against that backdrop, the 1780 Massachusetts Constitution declared that the state House would choose their own speaker, free from executive control.

Similarly, the 1781 Articles of Confederation — the predecessor to the U.S. Constitution that was adopted in the closing days of the Revolutionary War — made clear that the Congress had the power "to appoint one of their number to preside" over the body.

The formulation in Article I of the Constitution, while more concise than the clauses in the Massachusetts Constitution and the Articles of Confederation, must be interpreted in light of the historical understanding of the role of speakers as of the time of the founding era.

Constitutional structure also shows that the speaker must be a member of the House.

Article VI requires constitutional oaths of office only from senators and representatives; state legislators; and all federal and state executive and judicial officers. It would make little sense to require an oath of office from these officials while exempting a nonmember speaker of the House.

Moreover, Article I vests all legislative powers in the U.S. Senate and the House, and the House is composed of members elected every two years. Unlike the other officers elected by the House, like the clerk and sergeant-at-arms, the speaker engages in legislative functions.

Most importantly, the speaker is tasked by statute with signing enrolled bills before they are presented to the president and taking and administering the oath of office.[4] Thus, the signature of a nonlegislator on an enrolled bill could leave the law vulnerable to future legal challenge.

Consider the other thorny problems that could arise if the speaker was permitted to be a nonmember. Could the House constitutionally elect a member of one of the other branches as speaker?

That would seem to violate the spirit of Article I, Section 6's prohibition on any person "holding any Office under the United States" — meaning certain executive or judicial officers — from being "a Member of either House during his Continuance in Office."

It would be anomalous to bar, say, the secretary of state or the chief justice from being a member of Congress, but allow them to serve as the far more powerful speaker of the House.

All of this shows that the Constitution's careful design does not contemplate a nonmember speaker.

The idea that anyone can be elected speaker may create fodder for congressional protest votes and humorous social media memes. But considering settled practice, centuries of history and the Constitution's structure, the rule is clear — the speaker's gavel must remain in the hands of a member of the House.

---

*Michael Ellis is general counsel at Rumble Inc. He has served in senior positions in Congress, the White House and the U.S. Intelligence Community, including as general counsel of the House Permanent Select Committee on Intelligence.*

*Gregory Dubinsky is a partner at Holwell Shuster & Goldberg LLP.*

*This article was written in the authors' personal capacity. The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] <https://sgp.fas.org/crs/misc/RL30857.pdf>.

[2] 573 U.S. 513, 525 (2014).

[3] Id. (quoting Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)).

[4] 1 U.S.C. 106; 2 U.S.C. 25.