UNITED STATES DISTRICT AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

KEVIN OWEN McCARTHY, et al., Case Number 20-cv-1395

Plaintiffs,

v. Washington, D.C.

NANCY PELOSI, et al., July 24, 2020

Defendants. 2:00 p.m.

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TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE RUDOLPH CONTRERAS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by notereading.

P R O C E E D I N G S

THE CLERK: Civil Action 20-1395, Kevin Owen McCarthy, et al. versus Nancy Pelosi, et al. For plaintiffs, I have Mr. Charles J. Cooper and Mr. Jose J. Alicea. For defendants, I have Mr. Douglas N. Letter, Mr. Adam A. Grogg and William Havemann. Our court reporter today is Ms. Lisa Bankins. All parties are present.

THE COURT: Good afternoon.

MR. COOPER: Good afternoon, Your Honor.

THE COURT: So I've read all the pleadings. They're all very clear and very helpful. I obviously still have to dig into some of the cases that have been cited. But, you know, I have some ideas, but I've made no decisions yet in my mind. So I'm completely open to your persuasion today. So give me your best pitch and I'll get you onto the next level as quickly as practical.

MR. LETTER: Judge, this is Douglas Letter. There was a little trouble. Mr. Cooper couldn't hear me very well. If I speak like this, can you hear me well, Your Honor?

THE COURT: Yes.

MR. LETTER: Okay. Thank you, Your Honor. If for any reason at any point, Your Honor, you have trouble, would you please let me -- signal me and I'll make sure to

speak louder.

THE COURT: I will not hesitate to do so.

MR. LETTER: Thank you, Your Honor.

MR. COOPER: And, Mr. Letter, thank you. I can hear you much better now, too.

MR. LETTER: Thank you.

THE COURT: All right. Mr. Cooper, since it's your initial motion, why don't you get started?

MR. COOPER: Yes, sir. Of course. Thank you very much, Judge Contreras. And may it please the Court, Charles Cooper for the plaintiffs in this action, who are 160 members of the House of Representatives and five private citizens who are also constituents of five of those members of the House.

Your Honor, the plaintiffs have brought before you today a constitutional challenge, House Resolution 965, a resolution that for the first time in the nation's history authorizes absent members of Congress to be counted as part of the quorum necessary to do business in Congress and also to cast their votes on the floor of the House by giving their proxy to a present member of Congress.

The justification for this unprecedented proxy rule, Your Honor, is the Coronavirus crisis now confronting our country. But the Coronavirus pandemic,

Your Honor, is not the first public health crisis of its kind to plague our nation. In 1793, the country was ravished by a Yellow Fever epidemic and it was especially devastating to the City of Philadelphia, which was then the seat of the federal government. President Washington had received urgent requests to as he put it "to convene Congress at some other place in light of the calamitous situation in Philadelphia." And so we ask James Madison, no less an authority on the meaning of the Constitution, Your Honor, James Madison, whether he had such a power under the Constitution. Washington emphasized Mr. Madison that -- as I'm quoting again -- "that upwards of 3500 have died in Philadelphia and the disorder by all accounts was spreading and raging more violently than ever."

Now, Your Honor, in 1793, 3500 deaths was well over six percent of Philadelphia's entire population. So the crisis was orders of magnitude greater than the one we face today.

Madison advised the President that his power under Article II, Section 3 to "on extraordinary occasions convene both houses or either of them," authorized the President to determine the time of such a special session, but not a place. As Madison noted, although this provision, Article II, Section 3 does not expressly limit the place, it's -- and I'm quoting again from Madison --

"its obvious meaning is confirmed by other parts of the Constitution." Especially, he cited the arrest clause, Your Honor, one that's before you today. In Article 1, Section 6, "immunizing members of Congress" -- quoting again from the Constitution -- "from arrest during their attendance at the session of their respective houses and in going to and returning from the same."

Washington also asked Jefferson and Hamilton the same question, Your Honor, in 1793 and they, too, opined that the President has no power to protect the members of Congress from the danger of contracting Yellow Fever by convening them in a place other than Philadelphia. The Constitution precluded that in the President. It was a given, Your Honor, to all four of these founders that the members of Congress would have no choice but to convene in person in their respective houses at the seat of government despite the contagion that awaited them there. And so they did, Your Honor, in December of 1793 convene in Philadelphia and pursued their session through to June.

This founding error action of Congress, Your Honor, is especially meaningful and instructive and standing alone, we would submit, is decisive on the issue before you as a historical example. But that's by no means all. Your Honor, the Constitution's text explains why it didn't occur I'm sure -- though that's speculative

frankly -- to any of those founders at that time that perhaps the danger could be mitigated by authorizing proxy votes at Philadelphia. A practice, Your Honor, that was well known at the founding because the State of Maryland's legislature actually practiced it.

But, Your Honor, the reason it didn't is because the words and text of the Constitution itself preclude in a such interpretation of Congress' power under its rule making power. It is simply impossible I would submit to reasonably to read the Constitution and overlook its repeated and emphatic requirement that members of Congress be actually present in their respective houses when they vote. There are many provisions. But let me offer the Court just three of the key ones.

The first one is the Quorum Clause, Your Honor. Your Honor is familiar with these provisions I know, but bear with me. I want to quote them for the emphasis --

THE COURT: Yes.

MR. COOPER: -- that the particular words provide. "A majority of each house 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."

The Yeas and Nays Clause, Your Honor, of Article I, Section 5. It provides the yeas and nays of the

members of either house on any question shall at the desire of one-fifth of those present, of those present, Your Honor, be entered on the journal.

And I've already mentioned, Your Honor, the clause that was particularly cited, one of them, by Madison back to President Washington. The Arrest Clause. And again that protect members "from arrest during their attendance at the session of their respective houses and in going to and returning from the same." Their attendance at their respective houses, Your Honor.

Your Honor, there's much more. Sprinkled throughout the Constitution are phrases that bespeak the clear understanding and requirement, Your Honor, by the Constitution that for either the House or the Senate to do business and its members to participate, they had to be present. Let me share some of those phrase with you. They are sprinkled throughout. "The first meeting of Congress shall be assembled" and shall assemble "when sitting for that purpose." And that, of course, is the impeachment clause, Your Honor. When sitting for that purpose. Elsewhere, "two-thirds of the members present." Present. "Two-thirds of the senators present." Another phrase, "in the presence of the Senate and the House of Representatives." Finally, "nor to any other place than that in which the two houses shall be sitting." That

provision the Court will recognize is the one allowing either house to adjourn, but only for three days and not to adjourn to any other place than the seat of government if they adjourn, if they adjourn without the consent of the other house to any other place than that in which the two houses shall be sitting.

Your Honor, these clear textual provisions bespeak the framers' understanding that the House of Representatives and the Senate as well are deliberative bodies. They were understood to be deliberative legislative bodies where the people's representatives would gather together face to face to debate, to persuade, to listen, to argue and ultimately, Your Honor, to address the issues of the day through voting and through enacting or rejecting legislation.

Your Honor, coupled with these textual provisions is our constitutional history. I've shared with you the extraordinarily relevant and pertinent history from 1793 involving principal founders of our country and framers. The principal framer of our Constitution.

But that history doesn't stand alone, Your Honor, because throughout our nations history sadly, the nation's capitol has been beset by other crises. Crises that were the presence of the members optional, Your

Honor. The members and the Congress would surely have exercised that option from, Your Honor, the pandemic in 1918 of the Spanish Flu, which, Your Honor, in the country at that time killed some almost 700,000 people. And if extrapolated to today's population would be two million Americans. Two million. That 1918 pandemic, Your Honor, did not bring forward the option we're addressing today. Nor did the Civil War or the War of 1812.

Your Honor, the historical impetus, if you will, for the Congress to have enacted a provision of this kind and it certainly had many occasions after modern technology was available to it has been extreme and in fact even at least as extreme as it is now, Your Honor. But that unbroken American history and tradition, Your Honor, we would submit is clear confirmation, if you will, of the meaning of the words, the words themselves in one provision after another of the text of the Constitution.

And the Court will recall the many occasions when the Supreme Court has said an unbroken and settled historical practice speaks volumes, if you will, with respect to the proper interpretation of the -- the meaning of the Constitution's provisions. Most recently, I think in Noel Canning the Court made the point. But its most famous expression I think came in the Pocket Veto case.

Your Honor that concludes my affirmative

presentation. I, of course, know that my friend, Mr. Letter, and his colleague contend that the Court is precluded from reaching the merits of my case and I'm happy to address his standing arguments and his speech and debate arguments now or subside and proceed in any way that the Court believes is orderly.

THE COURT: Sure. I mean I'm in no rush today. So I'm going to let everyone say what they need to say. So we're going to be somewhat informal here. So why don't you just go ahead and address those issues now?

MR. COOPER: Sure. Very well, Your Honor. Thank you.

Standing. Your Honor, the House makes two main points as I read their papers with respect to standing. The first one is to simply argue that we or my clients, the plaintiffs lack standing because the plaintiffs' voting strength, that is the members of the House and derivatively, their constituents, the constituent plaintiffs, their voting strength is not diluted at all by the proxy rule. It's not diluted because on the rules face and in operation, it ensures only -- I'm quoting now from their papers -- "that each member is entitled to one and only one vote." And they also emphasize that each one of those absent members who's providing a proxy to a present member is in control of that vote. The proxy has

no discretion to deviate from the way that the absent member instructs. Although -- and I'll come back to this -- I don't think -- I think the constitutional status of either rule is identical and would be prohibited.

But, Your Honor, this argument by the House simply overlooks the Hornbook proposition that Your Honor, the Court, must assume the validity of my constitutional argument in order to assess the standing for my clients to make it. That's black letter. So you must assume that I'm right and the House Resolution 965 is unconstitutional. And that every vote cast on behalf of an absent member through a proxy by a present member is a nullity. That that vote doesn't -- is constitutionally null. And once that assumption is made and you realize that notwithstanding the assumption that is the constitutional nullity, it's being counted anyway, then it follows that the dilution of the votes who -- of those members of Congress who are present and who only vote their own vote a single vote, that those votes are diluted. And also, of course, that the voting strength of their constituents is necessarily diluted as well.

So, Your Honor, that injury again I guess it does assume that I'm right on the merits. But you must assume I'm right on the merits. And if you do, then it simply follows that the dilution exists every time an

invalid vote or an ineligible vote is registered, whether it be in an election for the local school board or for the President or in a vote on the floor of Congress. If an invalid vote is cast, it -- to a mathematical certainty as this Court framed it in the Michel against McConnell case, to a mathematical certainty, there's a dilution there. So, Your Honor, I'll proceed to their second argument --

THE COURT: Let me ask you a question about that, Mr. Cooper, because it's not crystal clear to me, but your argument didn't evolve a little bit on that back where initially you focused more on Congressman Raskin's vote counting seven times and then it evolved more on the nullity proposition that if using your numbers, if 200 members vote and 50 are by proxy, your position is the dilution is instead of being one out of a hundred and fifty, it's one out of -- it becomes one out of 200 if you count what other according to your contentions would be the null votes. Am I articulating that correctly?

MR. COOPER: Well, Your Honor, yes except I don't think your math with respect to my hypo is as at least I understand and as I tried to express it. And let me take a run at it this way, just using it in simple terms. And I certainly had not meant to pick on Representative Raskin in this. He just -- he's an old friend and I would never do that. But his -- he happens

to be proximate to Washington and so obviously, he's been a popular choice for casting proxy votes.

But at the time we put forward our briefs to you, Your Honor, I think he had received seven authorizations to cast proxy votes. If assuming he cast all seven of them plus his own eight, our proposition is simply that seven of those votes were cast on behalf of absent members and so they were null. They were invalid. It was as though they had been cast on the floor of the House by a let's say a former member or a staffer or somebody walking in off the street. They were simply invalid.

And if they were invalid as I believe the law requires you to assume for purposes of standing, then Representative Raskin actually cast eight votes. They were counted. They were counted. And so one valid vote plus seven invalid votes were counted at the instance of Representative Raskin. Those seven invalid votes, Your Honor, they changed the denominator from what it should have been. One additional vote cast validly by one present member to eight additional votes in that denominator because seven of them were null, nullities. They were invalid and so that's the dilution. Anyone who casts a valid single vote, his or her vote now is diluted by those seven invalid votes. It's just like invalid

votes being cast in the election for, you know, any public office. If say non-citizens are allowed to vote, if they were to vote, those would be invalid votes and they would necessarily dilute the valid votes that were cast. So that's the nature of our argument.

THE COURT: Okay. I think we were saying the same thing. But I understand.

MR. COOPER: Yes. And, Your Honor, I would now move to what I -- what their second standing argument is and it is that -- before I do, let me just I guess bring my first point to closure by pointing out that the circumstance I've just described and that is before you is factually indistinguishable from Michel versus Anderson, the D.C. Circuit case that held that members and their constituents, plaintiff members and their constituents had standing to challenge the mathematically certain dilution of their voting strength. That was caused in that case by a rule like this one, a rule that allowed five territorial delegates, that is delegates from Puerto Rico and other territories to cast a vote in the committee of the whole.

The D.C. Circuit held that those votes if invalid -- and they believed and they concluded that they were -- if invalid, would necessarily dilute the voting strength of every other member of Congress because, Your Honor, instead of having a voting strength of one over 435

members of Congress, the members of Congress had a voting strength of one over 440 votes. The members of Congress from the states and the delegates plus the five delegates from the territories. And so the court held that that plainly vested the constituent plaintiffs with standing and, of course, it acknowledged its earlier ruling that the -- in the Vander Jagt case that the members clearly would have standing as well to challenge the dilution of their vote.

And so I come then to the Raines case, Your Honor. The case that counsel for the House has advanced as essentially overruling the D.C. Circuit's precedent establishing the standing for those members whose votes have been diluted. And again, I would submit that the Michel against Anderson case, Your Honor, is on all fours with our case. But counsel says it was effectively overruled. Now the D.C. Circuit has never said that. It's never said that Michel and Vander Jagt were overruled. And so for Mr. Letter to carry his burden of persuading you that they've been effectively overruled, he must show that they are utterly irreconcilable. That they are incompatible, those two cases. But, Your Honor, they are entirely compatible.

In the Raines case, Your Honor, and just to I think put in a context that at least to me has made it

more accessible, if you will, the dispute that is before you is an intra-branch dispute. One between members of Congress against its other members of Congress essentially, against the House itself. Intra -- actually, it's intra-house dispute. The Raines case was an inter-branch dispute, one by members of Congress against the executive branch. And, Your Honor, I think that's a key to understanding why these cases are not at all incompatible.

In that case, a handful of members of Congress, both senators and members of the House sued the secretary of the treasury and the director of OMB, executive officers challenging the constitutionality of the Line Item Veto. And it was on the ground and I'm quoting now from the opinion. "It was on the ground that the act itself, Line Item Veto Act, unconstitutionally expands the President's power at the expense of the Congress." Again, an inter-branch struggle or conflict there, Your Honor. The court held that the members lacked standing for a specific reason, Your Honor.

And I want to share a passage from the case because I think it's dispositive and the passage is from 521 U.S. at 821, Your Honor. The court held that the members lacked standing because they "have not been singled out for specially unfavorable treatment as opposed

to other members of their respective body." Again an intra-branch reference as opposed to inter-branch, Your Honor.

THE COURT: I'm sorry. Could you repeat -- which case are you reading from?

MR. COOPER: Yes, Your Honor. I'm reading actually from the Raines case. The case that Mr. Letter has cited is effectively overruling the -- what we submit to is the controlling precedence in the D.C. Circuit. The Michel against Anderson. And I want to invite your attention to page 821, Your Honor.

THE COURT: All right. I'm there.

MR. COOPER: Okay. Yes, sir. In my version of it, Your Honor, it's in that carryover paragraph at the top there of 821. And the court said that the "members of Congress" -- and I'm quoting now -- "have not been singled out." Actually, it says first, "appellees have not been singled out."

THE COURT: Okay. I got it.

MR. COOPER: Okay. All right. Thank you. "Have not been singled out for specially unfavorable treatment as opposed to other members of their respective body." Again a reference to intra-branch or intra-house, the conflict. It continues. "Their claim is that the act causes a type of institutional injury (the diminution of

legislative power) which necessarily damages all members of Congress and both houses of Congress equally. And then they say and the court said "see Note 7 intra." So I'm going to come back to Note 7 because it's especially illuminating.

But before, Your Honor, I just want to emphasize this passage again because the court is saying that the Line Item Veto Act inflicted an institutional injury in which the executive's power was enhanced at the expense of the Congress as a whole. And here the court had before it six members of the House and Senate who were attempting to redress an injury that wasn't to them individually. It affected everybody in the institution. It was an institutional injury. Because it was institutional, the court said there's no standing in an individual member to redress an institutional injury such as was being alleged there.

The court even went on to distinguish a different case called Coleman from Kansas in which the members of that legislature had enough in numbers to actually serve as plaintiffs to redress an institutional injury. But half a dozen members of Congress who haven't been specifically authorized by Congress to bring that suit don't have standing to do it.

And Your Honor, the court then cites "see Note

7." I'd like to invite the Court's attention to that footnote. It's a couple of pages over.

THE COURT: I'm there.

MR. COOPER: And, Your Honor, the money quotation is a couple of lines down. But let me just read it if I may into the record from the beginning. "Just as appellees cannot show that their vote was denied or nullified as in Coleman" -- that's the case I just mentioned to you, the Kansas case -- "(in the sense that a bill they voted for would have become law if their vote had not been stripped of its validity) so are they unable to show that their vote was denied or nullified in a discriminatory manner." And here's the important phrasing. "(In the sense that their vote was denied its full validity, its full validity in relation to the votes of their colleagues denied its full validity.)" Here, Your Honor, our point is our plaintiffs' vote has been denied its full validity by the dilution created by proxy votes that are null and void.

But I continue with this footnote, Your Honor. "Thus, the various hypotheticals offered by appellees in their briefs and discussed during oral argument have no applicability to this case." And he cites the reply brief and in a parenthetical, it says positing hypothetical law in which "first term members are not allowed to vote on

appropriations bills." Your Honor, that hypothetical which the court specifically identified as not the kind of case that was before it, that hypothetical where the full validity of a vote was being compromised is the case that's before you. That is the case that was Michel against Anderson. That's the case we have brought to you. Again the -- whether a vote is diluted or whether it's denied all together is not an injury that is different in kind. You said that. Your Honor, this court said that in Michel against McConnell referencing Michel against Anderson, the case -- the D.C. Circuit case that we submit to you is controlling on this question of standing. If a vote is denied or if it's just diluted, it's the same injury, Your Honor.

And so Raines itself we would submit earnestly, Judge Contreras, is not in any way incompatible with the Michel against Anderson case at which -- again is quite controlling here.

Your Honor, the next point I would like to make on this head -- yes?

THE COURT: Well, are you moving to a different topic or are you still on standing?

MR. COOPER: I'm still on standing, Your Honor.

THE COURT: Okay. Go ahead.

MR. COOPER: Yes. Thank you. Because I'd like

to direct the Court's attention to a place where the D.C. Circuit subsequent to Raines distinguished Raines along precisely the lines that Raines distinguishes itself in the passages that I've just mentioned to you and that I am suggesting to you for why it is quite distinguishable. The case is Campbell against Clinton. It's at 203 Fed. 2nd. --

THE COURT: Mr. Cooper, if I could stop you for just a moment? If I can ask all the listeners, we're getting more feedback, if we can make sure that anyone who is not speaking, put their phone on mute.

MR. COOPER: Yes. Thank you. That helps. In the D.C. Circuit case, Your Honor, Campbell against Clinton after Raines was decided, the court distinguished Raines from the case I've brought to you on precisely these terms. At page 21, Footnote 2, this is what the court said. The court in Raines did not decide whether congressmen would have standing to challenge actions of Congress which diminished their institutional role. And, Your Honor, it's clear that the court was talking about challenge -- actions of Congress such as the resolution before you diminishing their institutional role within the Congress because they go on to cite Michel versus Anderson, the very case that the House is saying has been overruled and is of no effect. They cite that and they

have a parenthetical to describe it afterward. The parenthetical is as follows: "Congressmen had standing to challenge House rule which diluted their vote in the committee of the whole." So, Your Honor, again, the D.C. Circuit after Raines has recognized Michel and Anderson as good law.

But Your Honor, equally importantly here is that so have you, this court. You've had occasion as I've mentioned a couple of times before in Michel against McConnell to reference in the case where the voter, you know, brought you the proposition that Senator McConnell's conduct in not having a hearing for Judge Garland violated his vote, diluted his vote. Well, you rejected that claim, Your Honor, I would say, of course. But you've treated with Michel versus Anderson, Your Honor, as good law. You're recognizing that a mathematical dilution produces standing. Mathematical certainty dilution would vest standing in a voter or a member.

Your Honor, even if there was something about Raines that somehow prevented members of Congress from having standing, there is nothing in Raines that speaks to the constituent plaintiff. So at the end of the day, even if Mr. Letter is right and the members that are before you somehow lack standing after Raines, again there is nothing in Raines that would say that the voters, the individual

constituents before you lack standing and their dilution of their vote, even though derivative, is clearly an injury under all election law from Wesberry and Sanders and Reynolds and Sims to the census cases up to today.

Your Honor, that concludes my response to the standing points that counsel --

THE COURT: Let me ask you a question that goes back to the merits because I don't recall you touching on your non-delegation argument which you indicate is a separate reason. I think towards the end of the briefing, they merged a little bit more. But why don't you touch on that as well?

MR. COOPER: Thank you. I will do that. One of the plaintiffs before you, Plaintiff Swayze, is a constituent of a member who actually has provided a proxy or did provide a proxy. I'm not sure what the current state is with respect to that member, but did provide a proxy and his vote by proxy was cast on the floor of the House.

THE COURT: And that's the Charlie --

MR. COOPER: Yes, Your Honor. That's the one that relates to Plaintiff Swayze in particular.

THE COURT: Um-hum.

MR. COOPER: Our proposition, Your Honor, is this. That the voters in that district, they are the ones

that hold the genuine legislative power and that through their votes and through their choices elect particular and specific individuals to represent them, speak for them, argue for them, represent their values and their needs in the House. And that that vote, that power, that legislative power is one that the people, the voters delegate to that member of the House or the Senate. And that that delegation does not carry with it the authority to sub-delegate, if you will, the power to cast that vote, to be on the floor, to participate in the debate and do all the other things that the voters in that district contemplate and delegate to that specific member of Congress.

And so while I have no case whatsoever to cite to you to support this proposition because this has never been done, we believe that the common sense and the very nature of our republic form of government, the Court is familiar with Federalist Ten and all of Madison's writings why we opted for a republic instead of a direct democracy. It was so that the people themselves didn't have to gather -- did not have to gather themselves to make the decisions. They elected and delegated that power to specific individuals to then come and gather at the feet of government to represent them in all those ways. But the key way is to vote for them.

And, Your Honor, so our simple merits proposition is the Constitution, its structure. As surely as Congress cannot delegate without -- with no governing limiting standards, cannot delegate its legislative power to the President and certainly not to the courts, the same theory, if you will, limits -- we believe limits Congress' ability to effectuate a sub-delegation of the voter's power, the constituent's power by the person they elect. That's our argument.

THE COURT: Okay. So towards -- I think it was in your last pleading, you focused on that the -- what was being protected was that the Congress person had to cast the vote. That it's not a delegation of the decision because the proxy rule continues to allow the person giving the proxy to make the decision. But it's the actual power to cast the vote and that that has special significance. Is that --

MR. COOPER: Yes, Your Honor. We believe that standing quite alone and apart from any discretion that the absent member might vest the present member with to make a choice, that standing alone, the power to cast the vote can't be separated from the other elements, Your Honor, of representation. It's to represent and all of these things, to argue, to listen, to advocate, to learn, to debate and we'll be getting into the Speech and Debate

Clause momentarily, Your Honor. An element of representation. An element of the deliberative nature of these bodies that has constitutional protection. Well, those elements of representation, Your Honor, can't be disaggregated. And, yes, they culminate in the ultimate legislative authority, the vote itself.

But, Your Honor, I would also add that we don't see any difference at all in the constitutional status of a rule that authorizes an absent member to vote by proxy specifying how the vote will happen versus a rule that would authorize an absent member to give a general proxy instead of a specific proxy. That is a proxy that says you have my vote, you voted however you like. There would be no constitutional difference whatsoever, Your Honor, between those two rules. If the House is right and there's power to -- in the House to dispense with the necessity of the member being present and can vote through proxy, we see no constitutional provision that would somehow invalidate that rule if the member offered a general proxy, Your Honor.

THE COURT: So one of the things Mr. Letter argues and which is the point I want to get to is if what you're arguing is that that vote must be cast from the floor and not from afar, that the argument although perhaps theoretically separate merges with your primary

argument about no proxy votings at all.

MR. COOPER: Yes, Your Honor. I believe that is the case. We proceed from the -- from a fundamental -- what we believe -- fundamental premise that we believe is driven by the text of the Constitution and the history informing and we think confirming what the text of the Constitution means, which is that in order to, one, be counted as part of a majority that constitutes a quorum and, two, to actually vote in a recorded vote, one has to be present. You have to actually -- you have to be assembled. You must be present. You cannot be absent. You must be -- the House must be sitting. All of these words that and phrases, Your Honor, that bespeak again the necessity in the framers' contemplation that this is a deliberative body. One that even in 1793 with the seat of government ravaged by contagion, one that requires its members to be present in order to engage that deliberative process and function.

THE COURT: Okay. So the only thing I was actually trying to establish is that although in your briefs, you refer to those separate arguments as independent, in reality they're inextricably intertwined.

MR. COOPER: They both proceed from the same fundamental constitutional proposition, which is proxy votes are invalid. Yes, Your Honor. They do. But they

approach it from two different perspectives. One is the perspective of the constituent whose member will not proxy vote and so that constituent, his member is present or his or her member is present and is voting in person versus another constituent, one whose member has given a proxy. We think those are two different and independent harms, but they proceed from the same fundamental -- from the same fundamental constitutional premise that a proxy vote is invalid.

THE COURT: Okay.

MR. COOPER: Yes, Your Honor.

THE COURT: I got it.

MR. COOPER: Thank you.

Your Honor, I would proceed now with the Court's permission to another threshold argument that counsel for the House has made relating to Speech and Debate Clause. If I may?

THE COURT: Yes, you may. Go ahead.

MR. COOPER: Thank you. First, I guess kind of to set the stage for my points, I want to just articulate a couple of the basics of speech and debate more to help me in the order of the argument than you, Your Honor. But in the very recent case, D.C. Circuit case of Barker against Conroy, the D.C. Circuit emphasizes the Speech and Debate Clause. It emphasizes the scope of it. It says

first -- and, Your Honor, I'll pause for a moment if you'd like as you reach for Barker I guess.

THE COURT: Got it.

MR. COOPER: Yes, sir. Your Honor, I'm specifically referring to page 1127 for these passages at 921 Fed. 3rd. at 1127. And at that page, Your Honor, you will see that or close to it -- I hope I have the right page here -- but the D.C. Circuit said and here it's quoting, you know, venerable Supreme Court speech and debate jurisprudence. But it says the clause extends only to acts that are an integral part of the deliberative and communicative processes; that is, the processes of members pertaining to matters within their legislative jurisdiction. And it also says that it does not extend -- and I am quoting -- "it does not extend beyond what is necessary to preserve the integrity of the legislative process." And that was at page 1127. Your Honor, I'm not sure about the first quote.

But here is the more important part, Your Honor, for our purposes of Baker and Conroy because the Court of Appeals noted that the Supreme Court as well as the Court of Appeals has -- and I'm quoting now -- "drawn a key distinction, drawn a key distinction" and by the way, this is on -- this is at -- I'm sorry, Your Honor. This isn't in Baker against Conroy. This is from another Speech and

Debate Clause case called Walker versus Jones. Walker versus Jones.

THE COURT: I got it.

MR. COOPER: Okay. Thank you. And this is at page 933 of that precedent. And the circuit said that "the Supreme Court has drawn a key distinction between legislative speech or debate and associated matters on the one hand and" -- I'm continuing to quote here -- "executing a legislative order or carrying out legislative directions on the other hand." So, Your Honor, Walker versus Jones and many other cases draw this distinction. One is things that are at the -- involved with speech and debate itself, deliberative process and the members.

The other thing which is completely distinguishable are those acts taken in execution of a legislative order or carrying out legislative direction.

And the court went on in Walker versus Jones to say that the courts view with a jaundiced eye a decidedly jaundiced view, it said. Attempts to extend the clauses shield to acts that are performed in carrying out legislative direction. That is those administrative acts that, Your Honor, here we have asked the Court to review and ultimately to enjoin if the Court ultimately is persuaded of the merits of our case. The administrative acts by the Clerk of the House, by the sergeant of the

House, for example. And this Court has to view those acts in carrying out House Resolution 965 with a jaundiced view.

THE COURT: So let me get you -- I know you do so in your brief, but refresh my recollection as to how you distinguish Consumers Union.

MR. COOPER: That's their best case, Your Honor. Make no mistake.

THE COURT: That's why I asked.

MR. COOPER: That's their best case. Let me take a run at it. But before I do, if the Court please, I want to note for the Court that that is the only appellate case that they cite or that I'm aware of in which the Speech or Debate Clause immunity, legislative immunity has been extended to non-members, if you will; that is, extended to officers of the House and there even it was extended to this Publications Committee as well as the Sergeant-at-Arms who was responsible for, Your Honor, for policing the floor of the House in response to the decisions made by the Publications Committee.

But, Your Honor, in that case, the court -- if you will bear with me for one moment? In that case, the court emphasized that this was a function; that is, ensuring that the members when they were in the chamber itself were not approached or lobbied by people who were

permitted to enter the chamber as a result of their press credentials, the press gallery. That that essential function was one that the Periodical Committee and the Sergeant-at-Arms were protected from suit, if you will, and that activity was protected even from judicial review because it was essential.

And I'm reading now from the court's -- the D.C. Circuit's decision in Barker versus Conroy where it distinguishes Consumers Union and where it says that "that activity was essential -- essential to that determination was the fact that Congress had itself developed the press gallery rules to protect legislators' independence."

I'm continuing from Barker versus Conroy explaining and interpreting Consumers Union. "Congress designed the rules to ensure that the galleries would be used by bonafide reporters who would not abuse the privilege of accreditation by importuning members on behalf of private interests or causes."

And then the court goes on. "As we explained in a later case because the association's denial of the organization's application for access to the press gallery, because that application involved regulation of the very atmosphere in which law making deliberations occur, the Speech or Debate Clause barred us from hearing the suit." And they were quoting there from Walker versus

Jones. And, Your Honor, I think I may have -- and that -- and I've just read to you from Barker versus Conroy which is the 2019 case just last year from the D.C. Circuit. That's how the D.C. Circuit distinguished that case, Your Honor.

Even as it in Barker and in all these other Speech and Debate Clause cases that are before you, it did not shield legislative officers, if you will, from immunity when they were engaged in implementing or executing, if you will, carrying out a legislative directive that was said to be unconstitutional. And the reason that in Consumers Union the court did extend the shield of speech and debate immunity to those non-members was that they were engaged in an activity that had been performed by members from the founding which was essentially policing the access to the chamber itself and that was viewed as essential to the deliberations, you know, if you will to use the Gravel, Gravel versus United States classic test, that was viewed as an integral part of the deliberative and communicative processes. That is not the case with respect to the administrative matters, Your Honor, that we have called the Court's attention to that the Clerk performs, that the Sergeant-at-Arms performs under Resolution 965.

Your Honor, further to the Speech and Debate

Clause point, we believe that Consumers Union is distinguishable along the lines that the D.C. Circuit Court has distinguished it at least twice since it was decided. We also, frankly, believe, Your Honor, it is an outlier and the court has been coping with it since it was decided if I may be so candid as to observe.

THE COURT: It's irreconcilable with the other jurisprudence?

MR. COOPER: Well, Your Honor, I am at least content to be confident that it is distinguishable from this case at least as much as it was distinguishable from the other cases that the D.C. Circuit distinguished it in. I would submit that to your consideration.

THE COURT: Okay.

MR. COOPER: But the case that isn't distinguishable --

THE COURT: Do you agree that if the Speech and Debate Clause applies here, that that's case dispositive, there's nothing left of the case?

MR. COOPER: Your Honor, if the Speech and Debate Clause shield, Your Honor, extends not only to the members, for, one, enacting House Resolution 965, but, two, you know, casting votes that ultimately, are recorded in the journal as valid votes, and, three, to all of the administrative, if you will, and executing or carrying out

functions of the officers who are assigned under that resolution to do that, then, yes, Your Honor, I think that's -- I think it's game over and that would be extending legislative immunity I hasten to add beyond any -- we believe any of the cases that are relevant here or that have been offered by counsel.

And, Your Honor, I think it would be in the teeth of the leading Speech and Debate Clause case, the one involving Adam Clayton Powell or Powell against McCormack. We think this case is really materially indistinguishable from that case on every relevant metric.

You'll recall that member-elect, Congressman-elect Powell and his constituents filed a lawsuit challenging the constitutionality of a House resolution. One, that excluded him from his seat pursuant to the House's Article I, Section 5 power to judge the qualifications of its own members, a key and clear constitutional power of each house of Congress to judge the qualifications of their own members. Powell and his constituents challenged that as inconsistent, Your Honor, with the specific qualification articulated in Article I, Section 1 of the Constitution regarding, you know, age and the other specific qualifications.

Just as here, Your Honor, the plaintiffs in the Powell case claimed that the resolution infringed on his

rights as a member to enter the floor of the House and to cast his vote. Just as here, Your Honor, he sued the officials. He sued a number of members of Congress. But he more importantly, he sued the officials responsible for carrying out the resolution. And in particular, of particular importance here is he sued the doorman of the House, who was charged with essentially barring him from the floor of the House and thus from casting his vote. The Supreme Court held that Powell and his constituents -- and I'm quoting now -- "were entitled to maintain their action against the House employee, but not the members, Your Honor, the House employee, and to just judicial review of their constitutional challenge to the resolution.

So in that case, the court again drew the distinction that I mentioned earlier and that the D.C. Circuit has emphasized several times the distinction between members engaged in the activities integral to exercising their legislative jurisdiction as members on the one hand and, two, those acts taken in executing a legislative order or in carrying out those legislative directions, again to use the wording from Walker versus Jones. So the Supreme Court in Powell drew that very distinction and said that the employees were not shielded. And once again, Your Honor, the doorman there was just as

clearly exercising or executing a legislative order that lies at the core of the legislative function; that is, determining the eligibility and the qualifications of the members of the House.

THE COURT: Yet, the D.C. Circuit also said though that the focus is on the acts, not the actors as to whether something is a legislative act?

MR. COOPER: Well, yes and yes, the D.C. Circuit has said that and we don't quarrel with that. But in focusing on the acts, it is said when the acts before you are acts in execution of and acts in carrying out, you must view it with a jaundiced eye under speech and debate. And again the only case that we've seen which shielded such acts is this Consumers Union case. The other cases have not extended the shield of speech and debate to anyone, but these cases -- anyone members or otherwise who were charged with executing an allegedly unconstitutional House resolution. But, Your Honor, that is almost invariably officers --

THE COURT: Hold on, Mr. Cooper. There is someone listening that is not on mute and we can hear you. If anyone that is not speaking does not have their phone on mute, please put it on mute now. Thank you.

Go ahead, Mr. Cooper.

MR. COOPER: Thank you, Your Honor. Your Honor,

I'm going to now conclude my argument with respect to the Speech and Debate Clause with a final point. And that is if the defendant's argument and this argument -- this point I think extends as well to their standing arguments, not just their Speech and Debate Clause argument. But if the Speech and Debate Clause does bar the plaintiffs' action here in this court, it would also bar any claim that the House had unconstitutionally infringed a member's voting power. We don't think that any reasonable differentiation or distinction could be made, Your Honor, between this infringement of a member's voting power and more extreme examples that are sprinkled throughout the cases, Your Honor, and we have sprinkled throughout our briefing to the Court.

For example, to give one very extreme example. I'm going to borrow it from Raines itself. I mentioned it to you earlier from Footnote 7 of Raines. Imagine that the House passed a resolution prohibiting first-term members from voting on appropriations bills. Your Honor, the Speech and Debate Clause would not fail to shield that resolution if it shields Resolution 965 from this Court's review or again carrying it even farther, a resolution as we've mentioned in our case and as was suggested by one of our female plaintiffs in this case, a resolution denying women members of a vote, whether it's a vote generally or

a vote say on appropriation measures or to bring it perhaps a little more readily in line, though we don't think there's any distinction at all between dilution and denial, but to bring it into the realm of dilution, a resolution that counted every male member's vote twice, but only once for female members.

Your Honor, we don't believe that it can reasonably be said or concluded that the Speech or Debate Clause would bar the claims of members in these admittedly extreme for illustrative purposes hypotheticals. But if that is true, then it cannot bar this Court's review of the case we have brought forward.

With that, Your Honor, I hope I haven't consumed all of the time I might have had for rebuttal.

THE COURT: No. No. I appreciate the thoroughness and the care with which you have given.

All right. Mr. Letter, are you ready to go or do you need a break?

MR. LETTER: Your choice, Your Honor. I can take a break. I can go. Your choice.

THE COURT: I'm fine going forward.

MR. LETTER: Thank you, Your Honor.

THE COURT: Do you need a break, Mr. Cooper?

MR. COOPER: No. But thank you, Your Honor. I am fine as well.

(The Court asked the court reporter if a break was needed and the court reporter acknowledged that a break was not necessary.)

THE COURT: Go ahead, Mr. Letter. Let me ask you before you get started, Mr. Letter, let me ask you a couple of factual questions. Is it still the case that there has been an actual quorum present for each and every vote?

MR. LETTER: Yes, Your Honor.

THE COURT: Okay. And looking at the schedule, the House schedule online, it appears to me that there are votes next week, but then there's a break until essentially after Labor Day. Is that right?

MR. LETTER: That is right, Your Honor. But the House depending upon if there are emergency legislation that needs to be passed, the House can decide to stay in, Your Honor. That's within the power of the House leadership.

THE COURT: Okay. All right. Go ahead.

MR. LETTER: Thank you. And, Your Honor, I hope that I was able to reserve my right to ask for a break later if I need it.

THE COURT: Of course.

MR. LETTER: Thank you.

Your Honor, let me please begin by saying that,

first of all, I guess I'm addressing my esteemed opposing counsel, it is always a pleasure and an honor to appear against my long-time friend, Mr. Cooper.

I have a number of points to make. I hope everybody is comfortable. And what I want to do is begin with the exact opposite of Mr. Cooper. For obvious reasons, Mr. Cooper wanted to jump straight to the merits. As you well know, Your Honor, we don't think you should be coming anywhere near the merits here. But if you do, I've got answers on all of that as well and I will get to all of that in time.

So we have as you know quite a few jurisdictional/justiciability arguments and they're all independent. If we win on any of them, then this case must be dismissed.

I do have to admit, I was watching with great interest when you asked Mr. Cooper if we're right on speech or debate, does the case end. I think that was the longest yes that I've ever seen in court and I'm just going to tweak my friend if you don't mind.

So first, there's the no dilution theory that I'm going to talk about. Then I'm going to talk about Raines. I'm going to talk about the separation of powers concerns, how the D.C. Circuit has instructed you not to interfere with the internal operations of Congress. I'm

going to talk about speech or debate and only then will I get to the merits.

So first, I guess I don't recognize the rule that Mr. Cooper is talking about when he's making his argument about dilution because he -- and, you know, this ties in with what he spent a lot of time on that certain members, you know, Mr. Raskin, my friend and my representative is supposedly voting seven times, which by the way is very interesting because Mr. Raskin and that means was voting yes for himself, that he voted four times yes and then he voted four times no. So it's very interesting that that's how his seven votes go.

Mr. Raskin did not vote seven times. There is no way that you can read Resolution 965 and conclude that Mr. Raskin voted seven times. Mr. Raskin transmitted the votes of other members.

Now you can argue, you can say you're not allowed to do that, you're not allowed to transmit somebody else's vote. I can understand that argument. But there's no way to argue that Mr. Raskin actually voted seven times. He clearly did not. He acted as really no different from the electronic voting system in transmitting the vote of other members. He could by the rule, he could act only on their direct instructions on the specific matter that was before Congress. He had no

authority to do any thinking for himself. He couldn't refuse. He couldn't decline. He couldn't decide to vote something else, et cetera. He was merely transmitting the votes of other members of Congress just like the electronic voting system does. And I assume that Mr. Cooper and his clients are not challenging the electronic voting system.

It's also no different -- I'm sorry. Did Your Honor have a question?

THE COURT: I was just going to say I view it as closer to the tally clerk than the electronic system.

MR. LETTER: I was just getting there. So you beat me to it, Your Honor. It's the same as the tally clerk. Nobody thinks the tally clerk votes. So all these people are doing is transmitting the votes. And again it would just be the strangest thing given what Mr. Raskin did to say that he voted seven times.

Now Mr. Cooper said, well, this is no different from if a general proxy were given. Well, that's obviously not true. Congress did not give a general proxy. If Congress did that, we could have a case about that and decide whether that is or isn't constitutional. But that's nowhere near what was done here because as I said, Mr. Raskin and all the other proxy voters could do nothing other than the tally clerk does and transmit the

vote that they were given by the actual voting member.

THE COURT: So let's focus then on the dilution by virtue of the null votes under his theory.

MR. LETTER: Right. So we don't think that that -- what Mr. Cooper is trying to do is trying to take what he says is the injury -- he's saying the merits are that's not allowed and then make that into his injury. But there is no injury here because the other members all were allowed to vote. No member was deprived of his or her vote.

THE COURT: The theory is using the numbers he used in his original hypothetical. Let's say 200 members are going to vote on a piece of legislation. Fifty vote by proxy. The person, the member who was present, physically present, thinks his vote should be worth one out of a 150 because that's the only people physically present. Whereas under the proxy rule, it's only one out of 200. Why is that not a dilution?

MR. LETTER: We're not aware of a single case where that kind of situation has been called a dilution. Michel is exactly the opposite, you remember. Michel was votes were added. Other people were added in. People, who, you know, were not members of Congress. You know, they were territorial delegates. And so that changes the denominator. But it doesn't change the denominator at

all. Mr. Cooper's clients all still got one vote. So the -- and as I say, I listened. I didn't hear Mr. Cooper cite a single case that would support his vote dilution theory.

So let's move to Raines. First, I wanted to start with one of the last things that Mr. Cooper said. He said if there's no standing or speech or debate applies here -- remember those are independent claims -- then that would also mean there could be no claim, no case if somebody were targeted for individual discrimination. They were not allowed to vote because of their color or their gender or the fact that they were a new member or their vote counted less. Raines specifically reserved that question. So that's not before -- that wasn't before the court in Raines. It's not before the Court here. Obviously, none of Mr. Cooper's clients were in the slightest bit discriminated against. Every single one of them was allowed to vote. Under these rules, they were allowed to vote and they were allowed to vote by proxy if they wished to do that.

So Raines does apply to this case. In fact, Raines seems very closest. Well, now Mr. Cooper tried to draw a distinction, a very interesting one where he is saying, well, Raines involved a dispute, an inter-branch dispute and that's very different he said from an

intra-branch dispute. The problem with that is that Raines already dealt with that because remember what Raines did and Mr. Cooper concedes this, Raines overruled a series of D.C. Circuit decisions, some of which by the way I was the attorney on, where the D.C. Circuit had said there is standing, but then threw the cases out under a different ground.

In Raines, the court specifically mentions, for example, Michel and Moore as examples of the kind of -- types of cases that it is then overruling. Both Michel and Moore were internal congressional cases. So the distinction that Mr. Cooper wants to draw is not one that the Supreme Court adopted. In fact the Supreme Court rejected it because the Supreme Court made clear that it was overriding a theory that applied to all different cases and the D.C. Circuit has recognized that. So it was Chenoweth where the D.C. Circuit said that its line of cases are now untenable and that line is to say includes cases like Michel and Moore. So that distinction just doesn't work.

THE COURT: Okay. Do you have the pinpoint cite in Chenoweth handy?

MR. LETTER: I do, Your Honor. Fortunately, I have Mr. Havemann with me and he got it for me. So that the -- that is on 181 F.3rd, page 115. If I could, I'll

just quote a sentence for a moment? "Consequently, the portions of our legislative standing cases upon which the current plaintiffs rely are untenable in light of Raines." And earlier -- just above there, the court talks about the Moore case and says quite clearly that that's one of the ones that are no longer tenable. So and Moore as I say as I recall as I say I actually handled that case. It was I believe Moore versus U.S. House of Representatives. So it was -- it's directly on point.

I'm trying not to jump around. So I'm looking back at my notes to see if there were other points specifically about Raines. I'm not seeing any others -- oh, I'm sorry, Your Honor, and there's one more. Very interesting because it slightly preceded Raines. The D.C. Circuit's decision in Skaggs that we have heavily relied on and Skaggs was an internal House challenge, challenged the House rule requiring a super majority vote and the D.C. Circuit found there was no standing because there was no actual vote dilution because the House majority could at any time vote to suspend that rule by a procedural vote. So Mr. Cooper also has to deal with Skaggs.

Since I said that, I am going to jump to another point for just a moment if you don't mind. Mr. Cooper for obvious reasons doesn't like the Consumers Union decision and so he described it as an outlier. I'm not aware of

any case law and I doubt Mr. Cooper is either where a district judge has said, oh, thank goodness this decision is an outlier and so even though it's from the circuit, I can ignore it. So it's not an outlier.

THE COURT: Before you go on, Skaggs is a district court case rather than a circuit case or --

MR. LETTER: No. It's D.C. Circuit, Your Honor. Do you want a citation on that, Your Honor?

THE COURT: Hold on. Let me see if I can find it.

MR. LETTER: Yes, Your Honor. And it is cited in our -- cited and discussed in our brief.

THE COURT: I see it now. It looks like you cited the district court case in your initial brief. Okay. I got it.

MR. LETTER: It's -- yeah. Oh, we cited both, Your Honor.

THE COURT: Yeah. I got it.

MR. LETTER: So I don't remember anything else that I needed to say about Raines in response to Mr. Cooper. Obviously, Raines reflects a very important decision by the Supreme Court that changed the case law entirely in this area and it governs as the Supreme Court has never given any indication that Raines is not good law.

Now Raines is also extremely important because Mr. Cooper is heavily relying on the Michel decision. Raines expressly cited Michel as the Supreme Court was talking about the line of cases that it was overruling. So there's no question that Michel was not in the cites of the Supreme Court when it did that.

Now Mr. Cooper though still would like you to rely on Michel particularly with regard to constituent standing, but you can't do that because the Supreme Court in Raines says that the whole foundation on which Michel, Moore, Vander Jagt, Riegle, et cetera, all of those D.C. Circuit cases, Humphrey's stood is invalid.

So when in Michel, the D.C. Circuit said Michel has standing and then but the court said but Michel cannot proceed because of the remedial discretion doctrine, the discretionary doctrine that the D.C. Circuit had come up with, but then the individual constituent still can because they are not covered by remedial discretion. Well, remember as I say, Raines overrules Michel and says there is no standing. So the derivative argument here that Mr. Cooper is making is the constituents can sue despite the fact that they are piggybacking on members of Congress who under Raines because of separation powers have -- cannot go forward. There is no standing. So the Michel decision just does not help Mr. Cooper at all

anymore unless he convinced the Supreme Court to change Raines.

So again those are two independent grounds. Then the third is Hearst versus Black, a decision from the 1930's. And lest anybody say, well, that's an old decision, it's been cited since then. But more importantly, I've heard people chastised in the D.C. Circuit for suggesting that old decisions no longer count as precedent. They do. So Hearst versus Black, William Randolph Hearst was attempting to get a court to order the Senate, Senate staff not to look at material that the Senate had assertedly obtained unconstitutionally.

The D.C. Circuit said no, there's a major separation of powers problem here. It is not up to us to tell Congress how to operate and so the court said we can't get into this. We're not even going to get into a situation where the claim is the material was unconstitutionally obtained and therefore would be unconstitutionally used by the Senate and the D.C. Circuit said no can do.

Okay. Let's go to speech or debate and this is obviously where Mr. Cooper has an extremely serious problem. That's demonstrated by the fact that he's saying would you please ignore Consumers Union. As I say, you and I know you cannot do that.

Mr. Cooper it's possible that he misspoke. I don't know. I don't think I heard him incorrectly. He said Consumers Union is the only case where speech or debate has been used to bar cases other than against members. The Supreme Court did that in Eastland, said you can do it in Gravel. The D.C. Circuit did it in Rangel. So no, Consumers Union is not the only one. There are at least two Supreme Court cases and two D.C. Circuit cases that say that the Speech or Debate Clause applies just as well to people in Congress other than the members or the senators.

Since Consumers Union is the law of the circuit that is binding, let's focus on that. Consumers Union was a much harder case for speech or debate than this one was. As Mr. Cooper said, what you are required to focus on is the legislative action. It's simply tied in with Congress' legislating.

I find it more -- very difficult to think of something that is more central to legislating than voting, the voting by the members of Congress. Consumers Union, remember, what that dealt with was a journal that said that it had been wrongly excluded from a certain part of the press gallery. And the D.C. Circuit said that is still covered by speech or debate because the rules about the press gallery are designed to protect the members as

they are voting. Well, this case isn't one step removed like this. This is about voting. That's exactly what it is about. This is precisely why we have a Speech or Debate Clause. So we're at the very heart of it here.

Now Mr. Cooper relied on Barker. As an aside, I'm glad he did so because Barker there at the D.C. Circuit said that statements made to the court by my predecessor as general counsel of the House, Mr. Tom Hungar, about the meaning of rules of the House govern in the court. Well, I'm very pleased to have that because that means that when we're looking at the vote dilution and also when we get to the merits argument, what the House says about what its rules mean, its rule about voting means, that governs. So as I say, I'm quite pleased that Mr. Cooper wants you to read the Barker decision very carefully.

And what Barker reaffirmed is that the question must be tied again as I said before to the voting function. And the Consumers Union test there of a traditional legislative action test, as I say, it's just very difficult to see how you can get more central than this.

I'm also I'm continuing to consult my notes as I say in order to avoid -- oh, I know. Mr. Cooper, then switched to Powell versus McCormack. First of all, again

I'm sorry if I misheard him. I think he was saying that the Supreme Court there said that it held that the constituents could sue. What the Supreme Court -- the Supreme Court did not deal with the claims of the constituents. Those were remanded back to lower court to deal with.

Remember, Representative Powell, what he actually litigated and won on because certain parts of the case became moot was his claim to back pay. And so there was no speech or debate problem there the Supreme Court held. Well, again, that's not what this case is about. This case is about voting. So Powell provides no assistance to Mr. Cooper's argument here.

Moving for a moment about the delegation claim, I'm not sure, maybe -- this might be more of a merits claims, but I'm going to hit it now anyway. So Mr. Cooper was talking about the challenge by Mr. Swayze. So Mr. Swayze's challenge is against Representative Crist. It's not against the House. Now what he's asking you to do, he's one of the plaintiffs, he's asking the same thing as all the other plaintiffs and he's saying that the remote vote by Mr. Crist should not be counted. So I'm having a very difficult time figuring out how Mr. Swayze was injured by the fact that his representative's vote actually was counted. It seems to me that Mr. Swayze then

is arguing for relief that goes against himself.

So what Mr. Swayze really is saying is he wished that Mr. Crist had not used remote voting. But that's not a claim against the House. That's a claim against that Mr. Crist -- that Mr. Swayze thinks Mr. Crist should not have utilized that voting mechanism.

It would be interesting, for instance, if Mr. Swayze would say that Mr. Crist shouldn't be able to use the, you know, the ballot counter or the electronic machines or something like that. I guess he can do that. He can make those claims against Mr. Crist. I assume they would be barred by speech or debate. But he's suing the wrong person here because nobody in the House required Mr. Crist to vote in any particular way using any particular method.

In addition, there's obviously no delegation anyway. As I pointed out at the beginning, nobody is delegated the power to do anything other than to do what the electronic voting system or the counting clerk does in accepting a vote.

So then we get to I believe the merits at that point. If Your Honor has any questions about the standing or speech or debate issues, I'll take them. If Your Honor will indulge me for a moment, I'm going to look at my colleagues to see if they have anything that I missed on

those points. No. They are also satisfied.

So let's go to the merits. The first point I want to make is it's very interesting that this challenge is even being brought because what we have is the House leadership put in place and the House put in place a system that helps our democratic system to work. Our democracy is working here despite the extremely grave public health threat. We fortunately have a system now, a technological system that allows our democracy to continue working. If members can't vote because they're unable to because there's a deadly virus out there, I think we calculated that if those who voted by proxy weren't allowed to vote, that would have meant approximately 50 million Americans would not have had any say in the House. Because the House put into place this system, that meant 50 million Americans were represented in the House of Representatives.

As I said before, the Rule 965 is clear on its face. It doesn't allow the things that Mr. Cooper that some of the parade of horribles he mentioned, it doesn't go to any of that. It says each member gets one vote. Proxy voter is merely transmitting the vote to others. There's no delegation except the same as a voting machine.

So then we get to I think the heart of Mr. Cooper's argument which is, well, look at the

constitutional text and I would be delighted to do that because the Rules Committee and the House members did that. There is not a single word in the constitutional text that says that members have to be physically present in any particular room in order to be counted for a quorum or to vote. There is not a single word that says that.

Now Mr. Cooper says yeah, but dictionaries at the time seem to contemplate that. We pointed out in our reply brief I think at page 14 that one of the definitions to attend means to be present for some duty and present can mean ready at hand. Well, obviously, because of today's technology, members of Congress can be ready at hand even when there is a deadly virus out there.

A deadly virus that by the way, I read the other day is causing major problems with certain state legislators because a large percentage of their legislators are getting this deadly illness. And the House though, the House of Representatives has been able to avoid that and keep our democratic system going because technology allows our members to be ready at hand.

And what this calls to mind therefore is the Supreme Court's very recent opinion in Chiafalo. I hope I'm pronouncing that correctly. That was a decision at the very end of the term about the, you know, whether electors are required to vote as they said they would.

And there, Justice Kagan writing for a majority of the court says -- I want to make sure that I get this right. She says -- she's responding to the argument that the framers expected that electors would use their best judgment. And therefore, when electors actually vote in an electoral college, they should be allowed to vote using their best judgment.

What Justice Kagan writing for the majority says is that was that the framers "did not reduce their thoughts about electors' discretion to the printed page. And nowhere as I said before in the Constitution did the framers say anything about physical presence.

What we have are Supreme Court decisions such as the North Dakota versus Wayfair decision that recognizes that technology has changed our country. I'm not saying it has changed our Constitution. I don't have to argue that because nothing in the Constitution -- we're not violating anything that's actually in the Constitution. But there, the court recognized that the technology has changed things so now people can purchase things on the Internet and so that means that a prior Supreme Court doctrine about presence, actual presence in a state before somebody can be taxed was no longer a valid -- no longer made sense. And we agree completely. Technology here has enabled our democracy to work better even when it is

threatened by a global pandemic.

Now Mr. Cooper said, well, but President Washington asked Mr. Madison about this and got the answer that Mr. Cooper wanted. Well, first of all, that's not in the Constitution. But second is even more important. What Mr. Cooper was describing was could the President issue orders to Congress about where it would sit. Again it's great to have colleagues. Fortunately, my colleague, Mr. Grogg, has pointed it out that the letter that Jefferson sent to the President said that we, meaning the executive, has no power.

But nobody was asking if the House could have some kind of remote voting or proxy voting or anything. So that early example one was not reduced to any wording in the Constitution, no amendment was made in the Constitution to add it and, two, it didn't go to the issue here. And that raises the extremely key point that I am pretty sure Mr. Cooper never mentioned once. The Constitution says that the House and the Senate set their own rules. And the Supreme Court has made quite clear that it will not interfere with the rule making and procedural power of both houses of Congress to decide how they will operate.

Now if they operate in a way that as Mr. Cooper says what if they start discriminating against

individuals, et cetera, we could talk about that. We could see whether the rules how it doesn't apply that way, but that's not this case. It's not even close to this case.

So the rules clause is absolutely essential here and Mr. Cooper has to address it. He has to face it. He has to see, well, so the framers didn't say anything that you couldn't do this and the framers said it's up to the House to determine how it's going to work procedurally. That's a very powerful argument that he has not confronted.

This also raises another point that Mr. Cooper did not get into that is a serious I think fatal logical flaw in the position of the plaintiffs. The plaintiffs say that the unanimous consent power is constitutional. And in fact we have a chart with a count I forget what it is. Mr. McCarthy, all of the plaintiffs, the representative plaintiffs have made motions for unanimous consent in this Congress and the prior Congress. I think Mr. McCarthy, I think it's something like 80 times. So apparently, it is fully constitutional and we agree and Mr. McCarthy and all the other plaintiffs agree that the House can pass legislation when there is one member in the House. One member who is physically there. One member who is voting. So again Mr. Cooper will tell you that is

fully constitutional. So if that is constitutional, there is no logic to saying that, well, members nevertheless can't vote, they can't pass legislation if enough of them are not -- their feet aren't actually in the floor of the chamber because in the unanimous consent situation, there may be 434 who are not in the chamber. Well, if you have one in the chair and one other member. So 433 who are not in the chamber. And Mr. Cooper will tell you which his main client says that that is constitutional. That he may say, well, because that depends on the way that the House determines if there is a quorum and that's true. That's set by rules of the House. The House determines whether there's a quorum or not. Well, the House determined here that members who vote remotely by proxy count toward a quorum. And Mr. Cooper must tell you, well, I guess, yeah, that's for the House to determine. That's not for the courts to determine, which again as I say totally undermines the logic of his argument.

Again I'm going to just consult my notes and the one thing I wanted to note is that, you know, one of the things where I started that this rule serves the goals of the democratic government is that the Constitution is a broad charter for government. It's a way of governing and that's why, for example, unanimous consent is an appropriate way for both the House and the Senate since

the very beginnings of our nation have acted and it's again a way why given the technology we now have is perfectly appropriate for Congress to use its rules power to keep our democracy going.

The other point about Mr. Cooper saying, well, the Madison example shows that members can't be -- can't move Congress somewhere else except under certain circumstances. But the House is still convened in the Capitol. Mr. Cooper is talking about a different situation that is not here. There is no reason to take any position on. The House is convened in the Capitol. There were still -- in fact as Your Honor's first question to me asked, there was still a quorum even in Mr. Cooper's way of counting, there was still a quorum when every single one of these votes was taken in the Capitol. We're not saying anything here about that. And again that goes to nothing in the Constitution talks about physical presence of members whether they have to actually be physically in the -- under the Capitol dome.

Give me one more second to see if I have anything else in my notes that I wanted to cover.

(Pause.)

MR. LETTER: Your Honor, I believe that is everything I wanted to affirmatively cover. Mr. Havenmann and Mr. Grogg, nothing else. And again I'm happy to

answer questions. I hope I have not bored you.

THE COURT: You have not. So I guess the question raised by one of Mr. Cooper's points is under the Speech and Debate Clause, no matter how egregious or discriminatory this rule would be, under your theory it would be shielded by the Speech and Debate Clause?

MR. LETTER: Your Honor, I'm not taking that position because I don't have to. It may very well be. I'm just saying that in other cases, it might very well be that speech or debate doesn't -- wouldn't apply if something is highly discriminatory against a member of Congress for individual characteristics such as race or gender. Again I'm saying it might very well be. Fortunately, the House has not come anywhere close to doing that here. And so if there are limits on speech or debate, we're not involved with those.

And by the way, remember, Your Honor, that in the arguments that have been made against speech or debate, the claims have been, well, I'm making a constitutional claim. In Consumers Union, if they said it was a violation of their First Amendment rights. In these others, the other speech or debate cases, the claims were that their constitutional rights were being violated. In Clinton, they said the First Amendment rights of the veterans group there were being violated. In Gravel, I

believe it was also about constitutional rights. The fact that somebody makes constitutional claims doesn't matter.

The Supreme Court said in the Brewster decision, the court noted -- I think maybe it was with some sadness, but the court noted that the clause enabled "reckless men to slander and destroy others with impunity." But the Supreme Court says but that was a very calculated considered decision made by the framers because they were reacting against a practice of the king, that they felt it was so important that the members of Congress be able to do things like vote. That they did not want either the executive branch or the courts to interfere with that.

THE COURT: So in like Judge Henderson said in Rangel that his remedy was in the court of public opinion, there are injuries to which under the Speech and Debate Clause, there may be injuries to which there's no remedy in court?

MR. LETTER: Yes, Your Honor. Again I suspect with a tinge of sadness the Supreme Court was saying in Brewster, they recognized -- that was undoubtedly a very difficult decision for the framers to make because obviously, you are then balancing some really important things and yet, the framers obviously decided that it was too important not to allow the executive or the courts to interfere with the very basic elements of our democratic

system. So that is an absolutely clear decision that they made.

THE COURT: All right. Thank you.

MR. LETTER: Thank you, Your Honor.

THE COURT: Mr. Cooper, do you need a break?

MR. COOPER: Excuse me. No, Your Honor. Not unless you do. I can soldier on here.

(The court reporter was asked if a break was necessary and the court reporter did not need a break.)

THE COURT: Go ahead, Mr. Cooper.

MR. COOPER: Thank you, Your Honor. I do have a few points I'd like to make in response to my old friend, Mr. Letter's argument.

First of all, with respect to his point that the Congressman Raskin who voted eight times, one on behalf of himself, one on behalf of seven absent members by proxy, he noted that four of those votes were yes and four of them were no. Your Honor, and Mr. Letter said that Mr. Raskin clearly did not vote eight times. He transmitted seven votes and voted his own one time. Well, I agree, Your Honor. He did vote only once. But that's because he only had one valid vote to cast. He was present. He could cast his own vote. He voted seven invalid votes. The Court has to assume that is true for purposes of judging standing. And when he voted those

seven invalid votes, Your Honor, there were seven invalid votes that went into the denominator of the measure that passed. And so, Your Honor, I agree, he did only vote one time. But eight votes were counted as a result of him standing up and offering those seven invalid votes.

Mr. Letter likens this proxy process to the tally clerk or an electronic device communicating or signaling a present member's vote to the chair or to the clerk, whoever is collecting and counting those votes.

Your Honor, the method by which the House decides to actually have present voters signal their votes is indeed a matter that the House rules permit the House to determine so long as it is reasonable under the Ballin case. In that case the court examined whether or not the House could determine that members of Congress who had not voted but who were present in the House could be counted towards a quorum. And the court said yes, they can. The court can do that. It doesn't have to rely just on a member voting to determine if they are present for purposes of constituting a majority to make the quorum. And the court went on and said it can do it through any reasonable way. It can require a show of hands. It can have them walk through the turnstiles or any other method to actually demonstrate and establish their presence for determining whether there's a quorum there. The House can

certainly use a tally clerk or electronic device. That is a far cry, Your Honor, from permitting the House to allow an absent member not to be present and yet be counted towards creating the quorum, establishing the quorum or certainly from voting.

If the tally clerk, for example, if the tally clerk had transmitted the votes of a non-member, pursuant to a House rule that allowed the non-member to vote, that would still be clearly, Your Honor, under the Constitution an invalid vote and that House resolution would clearly be invalid and the fact that, you know, the tally clerk was the method for transmission would be irrelevant.

Counsel has said the Michel case was the opposite of our case. He makes the point that in Michel, there were votes added to the denominator, if you will, because delegates were allowed to vote. Your Honor, this is precisely what we have here. Just as the non-present vote -- members whose votes are counted are exactly like delegates whose votes cannot be counted. The non-present votes, Your Honor, again assuming the merit of my constitutional argument, those votes are invalid just as a delegate's vote would be invalid if cast in any context other than a committee, but in a context in which votes were cast on the floor and recorded.

I should also point out that the Court of

Appeals in Michel against Anderson also articulated several hypotheticals that they said would be no different. What if the House passed a rule that said that the Congressman from Georgia get no vote? Well, that would clearly be unconstitutional, Your Honor. So also it would also be unconstitutional if every other state but Georgia got an extra vote in the House. And again, it doesn't matter, Your Honor, that the rule just dilutes votes as opposed to denies them all together. That is a -- that is a difference in the injury in degree, but not in kind as the Michel court made clear and this Court has observed as well.

With respect to the hypotheticals that we've been discussing, some of them requiring discrimination, for example, the hypothetical about women members of Congress not being permitted to vote or their votes not counting, some of those are on invidious grounds, yes, and it's designed to bring into sharper focus the notion and how empty the proposition is that a member who is injured in that fashion would have no relief and that member's constituents would have no place in the federal court to turn for redress for that kind of a plainly unconstitutional injury. Your Honor, there is no distinction. The members in these hypotheticals would be injured in their status, their official status as members

of Congress. Not as private individuals. As members of Congress. And whatever unconstitutional basis, their vote might be denied all together or their vote might just be diluted, whatever that basis is, they would suffer an injury that would sustain their standing. If in any of those hypotheticals, then it would sustain their standing in all of them.

Counsel points out that, you know, or at least he argues that this Chenoweth case he cites recognize that everything that went before Raines in the D.C. Circuit was wiped off the page. Your Honor, I think it's telling that Chenoweth does not cite the Michel against Anderson case among the cases that that it says have been -- that have now been affected by the Raines decision. It doesn't cite Michel versus Anderson. And the Campbell case, Your Honor, from the D.C. Circuit that I walked the Court through earlier where the D.C. Circuit distinguished Michel versus Anderson from the case before it with a revealing and a passage that clearly understood -- reflected the Court understood what Michel versus Anderson held, that case postdates Chenoweth.

So, Your Honor, the governing thread of authority here goes from Michel against Anderson through Raines, through Chenoweth and to Campbell and for that matter, Your Honor, to Michel against McConnell, the case

you decided where the continuing vitality of Michel is accepted. In no case, if counsel had a case that said Michel versus Anderson is overruled, well, he would have cited it. And never has the D.C. Circuit said that and everything it said about it reflects the opposite. It continues to have vitality.

Counsel mentions the Skaggs case. In that case, members of Congress challenged a rule -- if memory serves me on this -- it challenged a rule that required a two-thirds majority to enact some type of a taxation measure. I think it was a tax measure. And the court there held that the injury claimed was not to an individual member, qua member, but to the majority of members, qua majority. And it held that that injury was illusory because there were other rules under which a majority, a simple majority could waive the two-thirds requirement and there had been many times, Your Honor, when that majority had done exactly that. And so the court held that there's no real injury here because the injury that's alleged is to the majority, qua majority. And it's not injury. It has the means of relief in its own hands and it has exercised them. That is not true of the members, Your Honor, that are before you now. And certainly not true of their constituent.

Counsel clings to the Consumers Union case.

Your Honor, we discussed that previously at some length. I've invited the Court's attention to two subsequent cases that have understood it and distinguished it in exactly the same way as we discussed. But he says that that rule that was at issue there about access to the press gallery and the concern about people who had that access importuning members of Congress on the floor to lobby them, that was for protecting the House for voting. And that is certainly true. Counsel is correct. We agree on that.

He goes further to say but this case is directly about voting. But, Your Honor, so was Powell. So was Powell. Powell was about voting.

Yes, counsel is correct. The existence of the claim in the case that Adam Clayton Powell advanced about his lost salary did keep the case alive. It was a live case in controversy. But the court did not in any way limit -- it decided the whole case, Your Honor. It decided that Congressman Powell and his constituents could and had standing notwithstanding the Speech and Debate Clause to bring forward their claims and including the claim against the doorman for blocking Congressman Powell from the floor and therefore, from voting.

Just consulting my notes, Your Honor.

THE COURT: Of course.

MR. COOPER: Counsel mentions as he then transitioned to the merits of the case and as I will as well, but I think his first point on that score was Plaintiff Swayze and the delegation point we've made here on Plaintiff Swayze's behalf and he says that Swayze's challenge is against Congressman Crist because Congressman Crist is the direct reason that Plaintiff Swayze was denied representation by the Congressman that Swayze and the other constituents had elected ultimately to represent them.

But, Your Honor, it is House Resolution 965 that authorized Crist, Congressman Crist to vote by proxy. And despite the moving presentation made by Mr. Letter about the exigency of the crisis that faces Congress and the rest of the American people, it is my burden to say that Congressman Crist when he offered his proxy at least in one episode that is outlined in our briefing was not -- was absent for reasons that had nothing to do with the pandemic, Your Honor.

THE COURT: He went to Cape Canaveral.

MR. COOPER: That's right, Your Honor, according to his own commentary. Further to the merits -- well, before I leave that, but for Resolution 965, presumably Congressman Crist would have been present in the House chamber. Not necessarily so. But he certainly would not

have had the authorization to vote while he was at Cape Canaveral absent 965.

I want to address myself, Your Honor, to Mr. Letter's comments about the text. It doesn't contain a word he said that members have to be physically present in the same room in order, one, to be counted towards establishing a majority that would constitute a quorum to do business or, two, to vote or otherwise do anything else that we say requires actual presence.

If what my old friend is saying is that it doesn't say that members of Congress have to be physically present, because it omits the word "physically," then he is right. And Your Honor, if in trying to discern the meaning of the Constitution and these many provisions that we have trudged through earlier this afternoon, it would be said that the intendment of these words and phrases which simply could not be clearer can be ignored and blinked because the word "physically" doesn't pertain, then, Your Honor, that would not be interpretation.

He's not inviting you to interpret these passages. He's inviting you and in fact he's asking you to ignore the plain and clear meaning of these passages. Yes, Your Honor. Nowhere in the Constitution does it say that the federal courts have the power to judicial review to review a statute enacted duly and properly by both

houses of Congress and signed by the President to determine if it is constitutional, that power. Nowhere does it say that in the Constitution.

But in Marbury versus Madison, Your Honor, and in countless other cases, the courts have been called upon to discern the meaning of the Constitution. It uses particular provisions such as the Quorum Clause which allows members, a number of members that fall short of a majority to what? To compel what? The attendance of the absence members. With due respect to my esteemed and old friend, this is not even a debatable proposition.

Wayfair. The Wayfair case. Yes, and this goes to counsel's point about technology. Technology, Your Honor, has made proxy voting a whole lot easier than it was in 1793 during the Yellow Fever epidemic. But it hasn't invented proxy voting. It was around then. The technology we are using right now, amazing as it is, it was preceded by technologies that would have made proxy voting quiet easy in 1918. A telegraph, other -- much more modern at that time modes of transportation, et cetera.

But, Your Honor, the reference to the Wayfair case is completely inapposite. That was the case that up-ended the actual presence rule that limited, if memory serves again, that limited the state's ability to tax

out-of-state retailers for sales made within their state. If they didn't have a warehouse, they didn't have employees, they didn't have a headquarters, they didn't have a store, the state couldn't tax them. The court reversed what was called the Quill Rule. Because of the -- the court believed it was wrong when it was decided, but it certainly was wrong in light of modern economic transaction.

But Wayfair, Your Honor, dealt with corporate retailers that can have a presence in many states at the same time. Members of Congress cannot. They can only be present at one place at one time.

Jefferson to be sure did say that no, the President does not have this authority to convene Congress. And he said and we don't dispute in the slightest that Congress would have that authority. But Jefferson made clear that even if the members of Congress had to journey to Philadelphia and meet in a field somewhere and then enact legislation that would permit them to meet somewhere else, they still would have to do that. And Your Honor, in 1793, the third Congress did pass the statute that -- and we have no doubt of this constitutionality that allowed the Congress to meet in circumstances that are emergent in a place other than the permanent seat of government.

But neither Congress nor the founders in the executive branch in the third Congress, Your Honor, considered the notion of mitigating the dangers through distant absent voting, proxy or otherwise.

Counsel quite justly points out that I did not mention in my presentation the rules power. That the each house has the power to adopt its own rules of proceeding and that's the power that the house has adopted here. And broad though that power may be, Your Honor, it's clear from the Ballin case if it's not clear from common sense that that power is limited by the Constitution. As the Ballin court said, the rules can't exceed constitutional restraint nor violate fundamental rights. That's not a direct quote. But that's a pretty close paraphrase.

And our case to you, Your Honor, is that this rule exceeds constitutional restraints. Restraints that proceed from the words and phrases used by the Constitution and are confirmed by the two and a half century history of practice.

I'm almost done. Just a couple more points, Your Honor.

THE COURT: Take your time.

MR. COOPER: I'm not sure I understood counsel's point, but to the extent I did, I think he said that members are permitted to vote and their presence is

permitted to be counted and recorded by proxy for a quorum in order to satisfy the Constitution's quorum requirement. And yes, that's true and that's one of our central complaints. Our whole point is that the Quorum Clause itself by its text even if the rest of the Constitution didn't contain passage after passage after passage indicating that actual presence is necessary, the Quorum Clause itself could not be interpreted I would submit as counsel suggests it may be. Members must be present. That's why the time-honored formulation, you know, noting the absence of a quorum or confirming the presence of a quorum, they must be present, Your Honor.

Let me turn now to the unanimous consent point. Unanimous consent predates the Constitution. It is a -- at least my research has educated me that practicing unanimous consent is not -- it's been around in the Congress from the founding and it is a feature of legislative bodies that predates the Constitution and that is commonplace. It is co-existed in other words with acknowledged requirement that only present members can be counted towards the establishment of a quorum and voting.

It's important to understand the theory of unanimous consent to understand why it is readily reconcilable with our argument and with the terms and phrases of the Constitution that plainly require actual

presence to constitute a quorum and to vote.

The unanimous consent is based on the presumption of a continuing quorum. That's the presumption that -- in that presumption at the root of it, at its premise is that a majority of members are actually present in the chamber. That's the presumption of a continuing quorum. It's not that nobody is there. It is that they are present. Even though in truth as counsel says, that is a fiction. But it is a presumption and that presumption is established whenever the presence of an actual quorum present, the presence of an actual quorum; that is, a majority of present members is established and is recorded on the journal of the House.

So at that moment, Your Honor, the presumption of the continuing quorum and the existence of the quorum and it is at that moment that the power of the House comes into existence as the court put it in Ballin when a quorum is established. And it can only be established, Your Honor, and it is established at the beginning of every session by an actual count of members present. From that point, that's recorded in the journal and then there's a presumption.

And that journal, Your Honor, as the Ballin case also makes clear must be assumed to speak the truth. The journal has a special constitutional status, Your Honor,

all of its own. And it is assumed to speak the truth as the court put it and it stands, Your Honor, as conclusive proof of the presence of a quorum, this presumed quorum until such time as the absence of a quorum is established by the actual head count. So any member can seek and question the existence and validity of that presumption and question the existence of an actual quorum. Nothing in the Constitution, Your Honor, prohibits the House from proceeding on that presumption of the presence of a quorum and actual -- the presumption that a majority are actually present in the chamber.

But, Your Honor, the presumption cannot come into existence until an actual majority of present members is established, Your Honor, and only -- and again that presumption can be rebutted by an actual count on the motion of any member.

With that, Your Honor, I believe I've answered every point that I was able to take down during my friend's presentation.

THE COURT: All right. Are we done, Mr. Letter?

MR. LETTER: Your Honor, may I have just a couple of minutes to make a few more points --

THE COURT: Sure.

MR. LETTER: -- if Your Honor pleases?

THE COURT: Not new points. Points that he

raised just now.

MR. LETTER: Exactly.

THE COURT: All right.

MR. LETTER: Exactly. Your Honor, would it help if I just speak very, very fast and --

THE COURT: That will cause problems for the court reporter.

MR. LETTER: Okay, Your Honor. First of all, with regard to my friend, Mr. Cooper, bringing up Ballin, the -- oh, I'm sorry. I had it right here and oh, I can't believe I did this. So Ballin says that the Constitution empowers each house to determine its rules proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights and there should be a reasonable relation between the mode or method proceeding established by the rule and the result which it has sought to be obtained.

And here that is fully met because as Mr. Cooper conceded, the Constitution nowhere says anything about physically present. And that gets to the very important point that Mr. Cooper made, that the unanimous consent procedure precedes the Constitution. So the framers were aware of it. So what that means is that the framers knew about the concept that present did not mean physically present because they were apparently we know perfectly

comfortable with the notion that nowhere near a majority of members could actually officially act and pass legislation even if only two of them are on the floor of the House and the Senate.

Then with regard to Mr. Crist, the fact remains that Mr. Crist did vote. Now Mr. Cooper notes that in the complaint meant complying that I think it is they said. Well, he went to Cape Canaveral. So obviously, he violated the rules. I'd only like to say that his complaint doesn't establish that. The complaint establishes that he went to Cape Canaveral. Mr. Crist is from Florida. That's obviously very, very different from traveling to Washington, D.C. I'm not here to debate whether he did or didn't violate a rule. All I wanted to point out is stating that he went to Cape Canaveral instead of traveling to Washington, D.C. does not by itself show that the rule was violated. And even if the rule was violated, that's not what Mr. McCarthy's claim is about. He's made a completely different claim that Mr. Crist's vote should be not counted because he violated the rule.

Two last points. Oh, by the way, if Mr. Cooper says what you look to is the journal and the journal is -- can't be questioned. The journal reflects that these members did vote. So we're fine with that rule.

And then two last points. We cited two opinions in our case, in our brief that are definitely worth looking at. Hurtado, the Supreme Court there was looking at a statutory language about attending in court. I'll give Your Honor a moment. Hurtado, the Supreme Court interpreted that term to cover even when those individuals were not actually in court. So attending was covered by the statute and they were therefore entitled to pay as if they had been actually physically in court whereas instead they were physically in jail. They were material witnesses who were being detained.

And then your colleague, Judge Boasberg, said in 2012 in the Chamber of Commerce decision that we cited, that an NLRB member can be present for purposes of a quorum even if they're not physically there. So just saying, well, physically means -- I mean present means physically present is just not true.

And, therefore, I am going to end if you don't mind with something, I think the Chiafalo decision from just a couple of weeks ago is very important. And if you don't mind, I want to read from one part of Justice Kagan's opinion that is four/eight justices.

"But even assuming other framers shared that outlook, it would not be enough. Whether by choice or accident, the framers did not reduce their thoughts about

electors' discretion to the printed page. All that they put down about the electors what we have said, that the states would appoint them and that they would meet and cast ballots to send to the Capitol. Those sparse instructions took no position on our independent front or faithful to party and popular preferences the electors' votes should be." And I'm about to get to the very key part.

"On that score, the Constitution left much to the future and the future did not take long in coming. Almost immediately presidential electors became trusted transmitters of other people's decisions."

If Your Honor has any questions, I'm happy to address them.

THE COURT: I do not.

MR. LETTER: Thank you, Your Honor.

MR. COOPER: Your Honor, one quick point in response to that last citation to the Chiafalo case.

THE COURT: Go ahead.

MR. COOPER: With respect to that last point, I think the passage that counsel have shared with the Court contains itself the seed of the doom of the point that counsel is trying to make because the court said as I heard the quotation and I don't have it before me, but all that they have said, that is all that the framers said in

the Constitution about going to the question of discretion of the electors and that they were sparse instructions I think I heard from the passage. Your Honor, the framers said one word and phrase after another in one provision after another. From Article I, Section 2 to the 23rd Amendment, Your Honor, the words of the Constitution are not sparse on this question. They are plentiful and overwhelming on the question whether or not the framers were creating a deliberative body, two deliberative body in the bicameral Congress. The presence of whose members were to be present and not absent and sitting, Your Honor, in assembly when they did business of the country. Thank you.

THE COURT: All right. So I will -- as I indicated earlier, I doubt I will be the last word on this. So I will get a decision out as quickly as practical so that I can send everyone on their way. All right. Anything else we need to resolve today?

MR. COOPER: Just thank you for your stamina and your patience this afternoon, Your Honor.

THE COURT: It's my pleasure. It's one of the greatest parts of a job are on days like today when everyone knows what they're talking about and writes clearly. The opposite happens all too frequently. All right. Thank you. Have a good weekend, everybody.

(Proceedings concluded.)

CERTIFICATE OF REPORTER

I, Lisa K. Bankins, an Official Court Reporter for the United States District Court for the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the preliminary injunction hearing in the case of the Kevin McCarthy, et al. Versus Nancy Pelosi, et al, Civil Number 20-cv-01395, in said court on the 24th day of July, 2020.

I further certify that the foregoing 84 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 27th day of July, 2020.

Lisa K. Bankins

Lisa K. Bankins
Official Court Reporter

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