

The Election Crisis We Dodged

A proposal to prevent the seating of House members from states with 'bad' election laws would be disastrous.

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After nearly a week of drama over who would wield the speaker's gavel, the members of the new House of Representatives have been sworn in and started their work. That gets the nation safely past one crisis that didn't happen, this time at least: a partisan push to prevent the seating of members or whole delegations as having been elected under flawed laws.

I'm not talking here about the case of New York Rep. George Santos, who won election on Long Island after lying extravagantly about his biography and qualifications. The Supreme Court made sufficiently clear in the 1969 case of *Powell v. McCormack* that so long as candidates meet the constitutional prerequisites for service and are duly elected, they must be seated.

I'm referring instead to the audacious proposal laid out by Democratic election lawyer Marc Elias in 2021. Elias had been among outspoken critics of laws passed in Georgia and other states—notoriously described by President Joe Biden as “Jim Crow in the 21st Century”—that did things like roll back some pandemic-driven expansions of early and by-mail voting, tighten voter ID provisions, and make it easier to remove inactive voters from the rolls. What Elias proposed, as *Roll Call* politics editor Herb Jackson described it, was “that the House Democratic majority refuse to seat newly elected Republicans from states that imposed the restrictions.”

“Congress should reaffirm the House's promise in 1965 to refuse to seat, or to unseat, members who benefit from discriminatory voting laws,” Elias wrote. “If there ever was a need for it to do so, it is now.”

In other words, the House could refuse to seat either individual members or entire delegations from Georgia, Texas, Florida, Iowa, and numerous other states whose laws Elias railed against as discriminatory over this period because a majority of seated members refused to recognize them as having been duly and legitimately elected. Whatever else one can say about the outcome of the midterm elections, the Democrats' loss of their majority did spare us any suspense about whether Elias' scheme would have gained any footing with the party's post-Pelosi leadership in the House.

As I and others have argued before, most of the measures assailed as voter suppression fall well within the mainstream of election law as recently practiced in the 50 states. That doesn't guarantee that the bills are optimal as policy—it's perfectly legitimate to argue that different rules would be better at advancing values of voter convenience and turnout. For what it's worth, turnout rose in Georgia after the recent changes—not that surprising given that the state's voting rules remained more permissive along multiple dimensions than those in such liberal

Northeastern strongholds as New York, Connecticut, and Delaware. (On top of all that, Biden and others persistently misrepresented what the Georgia bill would do.)

It's dangerous, in fact, to describe voting laws you may disagree with—requiring re-registration by those who haven't voted in years, or providing only a few days of early voting rather than weeks—as though they somehow “disenfranchised” electors. For one thing, it's a bit of an insult to people who actually have been stripped of the franchise.

The wider danger of rhetorically assailing these procedural variations as somehow literal disenfranchisement is that you might start getting high on your own supply. The Constitution and historical practice, after all, allow for some drastic remedies in cases of literal disenfranchisement. Why not treat a relatively stale controversy like that over voter ID laws as if it furnished the basis for a new Reconstruction?

It would be nice to report that Elias' proposal reflected a mere personal foible. But in a *California Law Review* symposium, Harvard law professor Nicholas Stephanopoulos cited the Constitution's Judging Elections Clause (Article I, Section 5) under which “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members,” and explained how it might be put to use here:

Given the history and law of the Judging Elections Clause, the most familiar way for a congressional chamber to enforce the provision would be by refusing to seat candidates-elect whose elections the chamber deems defective. ... Imagine that, in the wake of the 2020 election, states under unified Republican control enact stringent new voting restrictions: photo-ID requirements, cutbacks to early and mail-in voting, voter roll purges, and so on. Also imagine that, in these states, several Republican candidates receive slightly more votes than their Democratic opponents in the 2022 election. Then, after that election, it would be a conventional application of the Judging Elections Clause for a chamber to decline to seat these Republican candidates-elect (and even to seat their rivals) because they owed their victories to voter suppression. This is exactly what the House and Senate have done many times before, especially in the decades after the Civil War.

Stephanopoulos goes on to concede that a naked exercise of this power by a Democratic majority in Congress “would be perceived as highly partisan,” and that Republicans “would accuse Democrats of a naked power grab, of exploiting their majority status to entrench themselves in office, of trashing the tradition of state control over elections.” Well, yes. They would say these things. They might even be right! To pull the sting, Stephanopoulos suggests Congress delegate the recommendation to seat or oust to a panel composed of “administrators experienced in running elections, attorneys involved in election litigation, and academics (like political scientists and law professors) who study the theory, doctrine, and practice of elections.” Let the experts decide!

Schemes of this sort don't deserve to be called “pro-democracy.” They're perilously anti-democratic, proposing to strip states and voters of representation in the national legislature because they made democratic choices deemed somehow wrong in structuring their own elections.

They would also be deeply polarizing and escalatory, worsening the danger that a large faction of American voters would come to see Congress itself as the illegitimate result of a naked (or thinly disguised) power grab. We're lucky we dodged it this time.

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