

May 13, 2020

Chairman McGovern and Ranking Member Cole
House Rules Committee
United States House of Representatives
H-312, The Capitol
Washington DC 20515

Dear Chairman McGovern and Ranking Member Cole,

I have been asked for my view as to whether the House of Representatives could constitutionally adopt a rule to permit remote voting by proxy. As explained below, I believe that this would be constitutional and it is very unlikely that any court would invalidate such a rule, especially in light of the current public health emergency.

My understanding is that the system of remote voting by proxy that is being considered would have some key features:

- Low-tech remote voting process through proxy voting
- Some number of Members would be present on the Floor for debate and in-Chamber voting
- Proxy would be used to establish a quorum and to register the yeas/nays
- The proxy holder would be another Member of the House
- The proxy holder would have NO discretion on the vote. Instead, the proxy holder would be required (through the rule and accompanying regulations) to cast the vote in accordance with the specific and exact instruction from the Member.

The Constitution bestows on each House of Congress broad discretion to determine the rules for its own proceedings. Article I, section 5 of the Constitution says: “Each House may determine the Rules of its proceedings.” This authority is expansive and would include the ability to adopt a rule to permit proxy voting. Nothing in the Constitution specifies otherwise.

Moreover, if this were challenged in court, it is very likely that the case would be dismissed as a political question. The Supreme Court has ruled that challenges to the internal operation of Congress are not justiciable in the federal courts. *See Field v. Clark*, 143 U.S. 649 (1892). Indeed, I have written, the Court often “has held that congressional judgments pertaining to its

internal governance should not be reviewed by the federal judiciary.” Erwin Chemerinsky, Constitutional Law: Principles and Policies §2.8.5 (6th ed. 2019).

Especially in the context of the current public health emergency, it is highly unlikely that any court would review and invalidate the procedures adopted by the House of Representatives that would allow it to conduct its business without endangering the health of its members and its staff. Every branch of government is devising new procedures to accomplish this. The Supreme Court, for example, will conduct oral arguments by telephone for the first time in its history. I am sure that the rules will ensure that the votes cast by proxy are accurate and carefully recorded.

I hope that this is helpful. Please do not hesitate to let me know if I can be of further assistance.

Sincerely,

s/

Erwin Chemerinsky