

CARDOZO LAW

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Dear Chairman McGovern:

Thank you for your statement today recommending the implementation of temporary remote voting procedures in Congress during this tragic pandemic. As a professor of constitutional law, and a scholar who has written extensively on separation of powers issues in U.S. Government, I believe adopting procedures to allow for remote voting under these extraordinary circumstances is not only lawful, but essential to the maintenance of our constitutional democracy. Recognizing that specific procedures for remote voting may still be in development, the analysis offered here focuses foremost on the broad scope of Congress' constitutional authority to regulate its voting procedures.

As with much else in the Constitution, the description the text provides of how Congress is to fulfill its legislative "duties" once members have been elected is relatively brief. Article I, Section 5 provides that there must be "a Quorum to do business," which the Constitution defines as constituting simply "a Majority" of each House. The same Section likewise specifies that each House must keep a "Journal of its Proceedings," which must be published "from time to time," and which may, if a sufficient number of members desire, reflect how every member voted "on any question." The Constitution adds that neither House can adjourn for more than three days, or move the session to some other place, without the consent of the other House – a provision designed to prevent a single House from thwarting all congressional action by simply absenting themselves indefinitely.

There can be little question that the Framers imagined the legislature would do its work while assembled in some physical location. In 1787 when the Constitution was drafted, they could scarcely have imagined any other functional way of proceeding. Various other constitutional provisions thus refer to Congress as "meeting" (Art. I, Sec. 4) or "assembling" (Art. I, Sec. 3), and one even provides a mechanism by which members can compel "the Attendance of absent Members," (Art. I, Sec. 5) meaning presumably those members not otherwise present where Congress is meeting. Of course, none of the clauses in which those terms appear address how Congress casts or counts its votes. Indeed, neither the document itself nor any Supreme Court decision defines what counts as "attendance" or "assembling," much less how such "attendance" may be taken, or such "assemblage" may be accomplished. The Constitution equally contains no specific requirement of physical presence for Members to vote. What the Constitution does instead – as the courts have repeatedly recognized – is leave it up to each House of Congress to "determine the Rules of its Proceedings." (Art. I, Sec. 5) As the Supreme Court explained in *United States v. Ballin*, 144 U.S. 1 (1892), so long as there is a

“reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained,” the content of those rules are “beyond the challenge of any other body or tribunal.”

Indeed, it is just such constitutional flexibility that has enabled Congress to embrace the various informal solutions it has adopted over the years to “do business,” including relying on members to give “unanimous consent” to a vote even if something less than an actual majority of members is physically present on the House floor. But while such well settled procedures are surely constitutional, they may not always function to advance the system of majority rule the Constitution so plainly contemplates. As we recently saw when Congress enacted a substantial stimulus bill just last month, it is possible for one House member, acting alone, to single-handedly defeat the manifest preference of the bipartisan majority by insisting upon an actual demonstration that a majority of members were “present” (a term contained in House Rules, not in the Constitution itself). This forced House leaders to make a choice the Constitution cannot be understood to compel – between surrendering the will of the majority to the demands of a single man, or insisting, as they did, that Members jeopardize their safety (and thus their ability to effectively represent their constituents going forward) by defying lawful public health restrictions to travel and meet in Washington, D.C.

It is precisely in order to avoid such absurd results that Congress has embraced a variety of measures throughout its history to adjust to developing technologies and changing demands. Thus, for example, current House Rules provide that in the event the existing electronic voting system is “inoperable,” the Speaker may direct the vote to be conducted through alternative methods, including through the use of “tellers” designated by the Speaker to “record the names of the Members voting on each side of the question.”¹ The teller system was an innovation put in place before the current electronic system was available, one among key reforms designed to strengthen Congress’ ability to maintain a public record of Members’ votes.² The particular challenge of ensuring that Congress could continue to operate during the outbreak of infectious disease was indeed the subject of one of Congress’ first efforts to provide for alternative rules of operation. Following Congress’ return after the yellow fever epidemic that devastated the then-capital of Philadelphia in the summer of 1793, Congress adopted a law providing that in circumstances when “the prevalence of contagious sickness” made it “be hazardous to the lives or health of the members to meet at the seat of Government,” the President could “convene Congress at such other place as he may judge proper.”³ If Congress can delegate to the President the power to move congressional operations entirely, surely it can reserve for itself the lesser power to make whatever far more modest amendment to process is required to ensure Congress is able to vote in the same, extraordinary circumstances.

Finally, the temporary remote voting procedures as you have sketched them thus far appear to bear an entirely “reasonable relation” to the goal you aim to achieve, namely, ensuring that Congress preserves the ability to vote in a way that maintains the institution’s representative character, protects the transparency of its operations, and fairly and accurately reflects the will of the American people. By keeping remote voting procedures tied as closely as possible to the existing system, the proposed approach protects Members’ ability to participate in votes regardless of geographic location, technical

¹ Rules of the House of Representatives, 116th Congress, Jan. 11, 2019, Rule XX(4)(a).

² See Marjorie Hunter, *First Recorded Teller Vote Is Taken in the House*, N.Y. TIMES, p. 21, Mar. 4, 1971, <https://www.nytimes.com/1971/03/04/archives/first-recorded-teller-vote-is-taken-in-the-house.html>.

³ Act of Apr. 3, 1794, c. 17, 1 Stat. 353, codified at 2 U.S.C. §27.

knowledge or means; minimizes the risk of foreign or other unlawful interference in the vote; and maximizes Congress's ability to fairly reflect the will of the majority of the people even during the present crisis. The proposed approach contains essential safeguards to ensure that Members' preferences are fully and accurately recorded; as you emphasized in your recent statement, Members designated to submit voting cards on behalf of other elected Representatives may only act pursuant to the direct, express instruction of the elected Representative, retaining no discretion in carrying out the ministerial function they play in the modified voting process. As ever, Members remain subject to all the disciplinary powers the House possesses to ensure the appropriate exercise of their duties.

In short, with limited reforms that maximize Members' ability to represent the wishes of their constituents, while minimizing disruption and confusion in House operations, Congress can succeed in preserving the essential constitutional function of the legislative branch even amidst an unprecedented pandemic. It is a critically important initiative in these extraordinary times.

As ever, I thank you for your efforts, and for the opportunity to share my views.

Sincerely,

Deborah N. Pearlstein