



# Constitutional Considerations of Remote Voting In Congress

April 14, 2020

COVID-19 has had an impact on almost every facet of American life. Congress has not been spared. Largely because the risk of transmission of the disease is highest in concentrated groups, there have been [calls](#) to alter the internal operation of the two chambers to introduce “social distancing” into the legislative process. One high-profile suggestion—intended to limit the risks associated with Members’ physical presence on the House or Senate floor and travel back and forth from their districts—is to alter [House](#) or [Senate](#) rules to allow floor votes to be cast [remotely](#), i.e. with Members being virtually rather than physically present.

The prospect of remote voting has given rise to many issues and concerns, ranging from its impact on the [deliberative nature](#) of Congress to the [technological and security](#) hurdles inherent in its implementation. But there are also constitutional questions. A primary challenge, which both the [Supreme Court](#) and the [Department of Justice](#) have faced in various [contexts](#), is determining how technological advancements that the Framers could not have foreseen when drafting the Constitution should be treated. Remote voting presents such an unforeseen question, and perhaps one not amenable to a “[mechanical interpretation](#)” in the face of “advancing technology.” As the [House Rules Committee](#) recently put it, “remote voting is an untested principle” that “[i]f challenged ... would be a novel question for a court” with “no guarantee of a favorable ruling affirming its constitutionality.”

The Constitution gives the House and Senate discretion to set their own internal rules, including for voting, but not in a way that conflicts with other constitutional principles. Thus, any exercise of the rulemaking power that would allow Members to vote or participate remotely must take into account constitutional requirements, including [Article I, §5’s](#) requirement that a quorum of a majority of Members is required to trigger each chamber’s power to act.

## Setting Chamber Rules

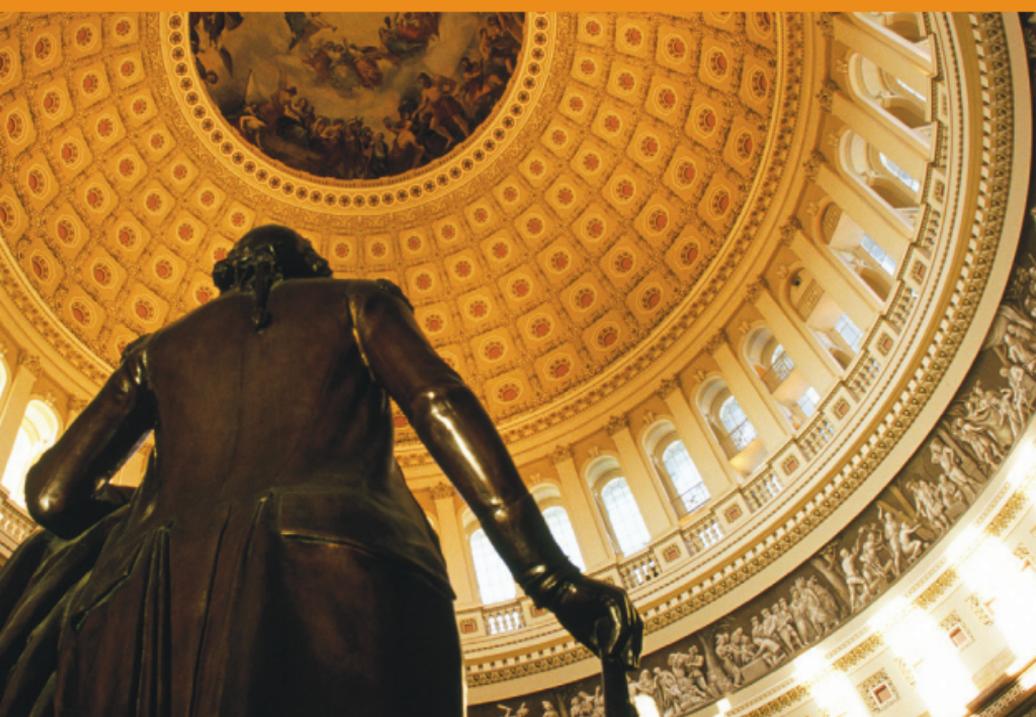
Rather than setting specific rules for the internal operations of each house, the [Constitution](#) provides each chamber with wide discretion to “determine the Rules of its Proceedings” (the Rulemaking power). The discretion embodied in this provision can be seen not only in the fundamentally different procedures by which the House and Senate operate, but also in each chamber’s approach to voting on the floor. The House, for example, allows [electronic in-person](#) voting, while the Senate does not.

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The Declaration of Independence  
The Constitution of the United States  
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Amendments XI–XXVII  
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“In the absence of express constitutional direction,” the federal courts have typically [deferred](#) to the “reasonable procedures Congress has ordained for its internal business.” The Supreme Court has [said](#) that “all matters of method are open to the determination” of the House and Senate in adopting internal procedures. But this discretion is not unlimited. While courts have generally been reluctant to review internal House and Senate rules, they have nonetheless [suggested](#) that neither chamber may “by its rules ignore constitutional restraints or violate fundamental rights.” The pertinent question then is whether a chamber rule allowing Members to vote remotely would conflict with a provision of the Constitution.

## Remote Voting in Constitutional Context

The text of the Constitution clearly envisions the House and Senate meeting and voting in person. As [noted](#) by the House Rules Committee, various provisions explicitly or implicitly contemplate the physical gathering of Congress. [Article I, § 4](#) and the [Twentieth Amendment](#) require that Congress “shall *assemble*” once a year; [Article I, § 5](#) authorizes a minority of Members to “compel the *Attendance of absent Members*” and states that neither house “shall, without the consent of the other, adjourn...to any other place than that which the two Houses shall be *sitting*”; and [Article I, § 6](#) makes Members immune from arrest “during their *Attendance* at the Session of their respective Houses,” and provides that Members “shall not be questioned in any other place...for any speech or debate *in either House*.” (Emphasis added in all quotes.)

But while these provisions may support a conclusion that the Framers envisioned a physical meeting of Congress (as it was of course the only possible method of meeting at the time), none would appear to clearly bar remote voting. Of the group, only the Twentieth Amendment and the clause relating to consent for adjournments (the [Adjournments Clause](#)) appear to impose any requirements on Congress. Congress has assembled “at least once” this year, satisfying the Twentieth Amendment. As to the Adjournments Clause, “any other place” has historically been [construed](#) by the House to be a location outside of the District of Columbia. It is not clear that implementing remote voting would require either the House or the Senate to adjourn to another “place.” or even how one would define the proper “place” of a virtual session. But if the Clause is triggered, Congress can satisfy the provision—as it has done in the [past](#)—by adopting a [resolution](#) authorizing each chamber to convene outside of Washington D.C. (Notably as well, a [federal statute](#) grants the President authority to reconvene Congress “at such other place as he may judge proper” if he determines that “the prevalence of contagious sickness” or “other circumstances” make it “hazardous to the lives or health of the members to meet at the seat of Government.”)

There is, however, one constitutional provision that has been thought by some to present a possible barrier to remote voting: the quorum requirement.

## The Quorum Requirement

Perhaps the strongest argument against the constitutionality of remote voting is [Article I, § 5’s](#) requirement that a “quorum” of a majority of Members is necessary for either house “to do Business.” The quorum principle—that a certain number of members of a governing body be present at a given meeting for the body to exercise its powers—was [well established](#) in parliamentary practice by the time of the Constitutional Convention. The debate then was not over whether to have a quorum requirement, but instead where to set it. [Some](#) felt a majority requirement was too high and would result in “great delay” and “great inconvenience” if either house consistently struggled to obtain a quorum. But others, including [George Mason](#), believed that setting the quorum requirement any lower would be “dangerous to the distant parts to allow a small number of members of the two Houses to make laws,” as the “Central States could always take care to be on the Spot and by meeting earlier than the distant ones....” The Framers, apparently [animated](#) by an understanding that too high a quorum requirement could debilitate Congress, but that too low a requirement would risk undue influence by the states in close proximity to the capital, set the quorum requirements at a majority of Members.

House and Senate voting and quorum procedures have evolved over time. In the [House](#) for example, “it was formerly the rule that a quorum was necessary for debate as well as business,” but that position changed in the 94<sup>th</sup> Congress. And until the Speakership of Thomas Reed, the House operated under the principle that those present, but not voting, were not counted towards a quorum. Speaker Reed, viewing that approach as encouraging obstructionism, [reinterpreted](#) the House rules in 1890 to allow the Speaker to count all Members present in the chamber, voting or not, towards a quorum. Speaker Reed’s interpretation was later formally [adopted](#) as part of the House rules.

That rule was then challenged after an 1890 law was adopted with a majority of Members present in the chamber, but not a majority voting. The case, *United States v. Ballin*, provided the Supreme Court with an opportunity to construe not just the Constitution’s quorum requirement, but also the breadth of the House’s authority to set the manner by which the presence of a quorum is determined. But the Court first had to determine whether, as a threshold matter, it had any authority to consider the “validity” of the rule. The Court determined that it did, holding that though the “advantages or disadvantages” and “wisdom or folly” of a House rule did not “present any matters for judicial consideration” the case before it presented “only one of power.” The [Court](#) then proceeded to set an important standard for the judiciary’s limited role in evaluating House and Senate rules, concluding that while each chamber is empowered to determine its own rules, it may not do so by ignoring “constitutional restraints . . . and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.” “Within these limitations,” the Court reasoned, “all matters of method are open to the determination of the house” and “beyond the challenge of any other body or tribunal.”

The Court next moved to interpreting the constitutional quorum requirement of Article I, § 5, holding that “[a]ll that the Constitution requires is the presence of a majority, and when that majority are present the power of the house arises.” The Court then granted significant deference to the House in deciding how the presence of a majority is to be determined, concluding that because “[t]he Constitution has prescribed no method of making this determination,” it is “within the competency of the house to prescribe *any method which shall be reasonably certain to ascertain . . . the presence of a majority*, and thus establishing the fact that the house is in a condition to transact business”(emphasis added). Thus, under *Ballin*, the Constitution leaves it to each chamber to select a method for counting a quorum but only so long as that method is “reasonably certain to ascertain” the “presence of a majority” such that the chamber is, constitutionally speaking, “in a position to do business.”

### *Applying the Quorum Requirement to Remote Voting*

Ultimately then, for the House or Senate to authorize remote voting in a way that satisfies the quorum requirement (and therefore permits either chamber to exercise its constitutional powers) it would appear that either a majority of Members must be available on the floor to be counted towards a quorum in the traditional way, or the chamber must establish that those absent, but voting or participating remotely [may nonetheless be counted](#) towards a quorum. The constitutionality of the latter approach appears to hinge on whether such a change to the rules would be “reasonably certain to ascertain” the “presence of a majority.” But what does it mean to be “present”? Or, as one [court](#) put it in a different context: “When the very concept of a quorum seems designed for a meeting in which people are physically present in the same place, what does it mean to be present or to participate in a decision that takes place across wires?”

One interpretation might conclude that “presence” refers to *physical* presence in the chamber. Historically, this has been the constant requirement for evaluating the existence of a quorum—neither the House nor Senate have previously adopted a method of determining the existence of a quorum disconnected from physical presence. For example, a 2005 change to the House rules for calculating a provisional quorum after catastrophic circumstances (which has never been triggered or challenged) sought to alter the total “number of Representatives upon which a quorum will be computed” rather than adjusting whether Members are considered present. This type of “[l]ong settled and established practice”

by one branch of government has generally been “a consideration of great weight” by a reviewing court in interpreting the Constitution. If a quorum under Article I § 5 requires physical presence, then a rule that allows Members to be counted who are not physically present would likely exceed the rulemaking power.

Another, more flexible approach could look to the discretion to determine the existence of a quorum recognized in *Ballin*, perhaps further noting that in that case the Court used the word “presence” in conjunction with the House’s “capacity to transact business.” If a system is established by which House or Senate Members are available remotely to *participate*, it would appear arguable that both they and the body to which they belong are “in a position to do business.” In light of the fact that the Constitution “prescribes no method of making” a quorum determination, supporters of a more flexible approach to the quorum requirement may also seek support in the underlying purposes of the quorum requirement as expressed at the *Constitutional Convention*. A rule permitting remote voting in the time of a pandemic could be viewed as responding to two articulated fears of the Framers: it would arguably ensure that the majority quorum requirement not lead to such “inconvenience” as to severely undermine the national legislature’s ability to operate; and remote voting might protect Members in far-off jurisdictions (and the interests of the regions they represent), who in the time of COVID-19 may be more disadvantaged by difficulties of travel than those within close proximity to Washington, D.C. who can return to the Capitol more easily. Under this approach, a rule that treats those participating remotely as “present” for purposes of a quorum would likely be a valid use of the rulemaking power.

The Supreme Court’s description of the relationship between presence and quorum in other contexts has at times reflected both of these general approaches. For example, in the 1949 case of *Christoffel v. United States*, the Court held in a criminal perjury case that in order to satisfy a quorum under the rules of a House committee, a majority of the committee must be “actually and *physically present*” (emphasis added). However, in the 2010 case of *New Process Steel, LP v. NLRB*, the Court stated in the multi-member board context that “[a] quorum is the number of members of a larger body that must *participate* for the valid transaction of business” (emphasis added). The *D.C. Circuit* has used similar reasoning. For example, where a statute established that three board members “shall constitute a quorum,” the circuit court held that a “quorum acting on a matter need not be physically present together” and that a board may “proceed with its members acting separately, in their various offices, rather than jointly in conference....” These cases suggest that context matters when considering quorum requirements, but their application to the Article I constitutional quorum requirement is unclear.

If House or Senate rules were changed to permit remote voting, there is, as the House Rules Committee noted, “no guarantee of a favorable ruling affirming its constitutionality” as it would be a question of first impression. But such a ruling would first require the Court to agree that it had power to hear the case. *Ballin* suggests that a court does in fact have authority to ensure that a House or Senate rule is consistent with the Constitution, including the quorum requirement. But there are constitutional and prudential doctrines that could conceivably limit judicial review in this context—such as the *political question doctrine*, the *enrolled bill rule*, and *equitable discretion*—that have become more developed since *Ballin* was handed down in 1892. The question of judicial review is an important one, as the answer could determine whether it is the courts or the individual houses of Congress that are empowered to issue a final and presumably dispositive interpretation of the Article I, § 5 quorum requirement.

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