

Summary and Analysis: House Rules Committee Democrats Report on Remote Voting

March 24, 2020¹

INTRODUCTION

Yesterday evening, House Rules Committee Democrats released a short report entitled *Voting Options During the COVID-19 Pandemic* (“the Report”).² The purpose of the Report was to evaluate, per the charge of Speaker Pelosi, how the House of Representatives could pass legislation during the Coronavirus pandemic where it may be unsafe, unwise, or impossible for Members of Congress to physically return to Washington, D.C. to deliberate and vote in the Hall of the House.

The Report provides an overview and summary analysis of options that currently are available under existing House rules and pursuant to potential rules changes. The options under existing rules include (1) unanimous consent and voice votes; (2) recorded votes; (3) paired voting, and (4) provisional quorum. Potential rules changes include (1) enhanced unanimous consent, (2) proxy voting on the floor, and (3) remote voting.

In the following sections, we analyze the Report, its strengths and weaknesses, and make recommendations concerning how the House of Representatives and House Rules Committee Democrats should move forward. We believe the Report did not evaluate the question of remote voting by teleconference, and its recommendations should be reconsidered in that light.

We acknowledge that allowing for remote voting by teleconference would be a significant change for the House of Representatives. The House has made more significant changes to its rules in the past, including for emergency situations, and it must adapt now if it is to be able to assure its viability should it become unwise or impossible for Members to convene in person.

Simply put, the House of Representatives must instantiate the option for emergency remote voting by teleconference that can be invoked during the Coronavirus pandemic. This option should not be a first resort. Indeed, the House should try to continue its operations under current House rules. However, the House Rules Committee should convene, consider, and recommend establishing a remote voting by teleconference emergency rules change so that the House can begin planning and preparing in case that option needs to be enabled. We would rather have a House of Representatives that can deliberate remotely than a House of Representatives unable to deliberate at all.

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² https://rules.house.gov/sites/democrats.rules.house.gov/files/StaffReport_VotingOptions.pdf

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SUMMARY OF LACUNAE IN THE RULES COMMITTEE REPORT

Our review of the Rules Democrat's Report found it contains significant lacunae that undermine its conclusions.

The Report does not analyze remote voting by teleconference.

The Report does not consider whether it would be technically feasible and within the bounds of the Constitution for Members of the House of Representatives to participate in an on-line video conference, where they can be seen and heard, and cast votes by roll call or unanimous consent, with the votes recorded by the Clerk of the House. This is the approach³ favored by civil society and many Members of Congress. Instead, it apparently contemplates the creation of an online tool where members push a button on an app to record a vote.

The Report does not contemplate an extended absence from the Capitol.

Implicitly, the Report appears focused on the upcoming Coronavirus supplemental vote, set for this week, and does not consider whether it is possible for the House to continue to operate for weeks, months, or longer without being able to deliberate in person. This is an important lacuna, as it is essential for the House and its committees to continue to function — to move spending legislation to keep the federal government open, consider the National Defense Authorization Act, and address other important bills that will come up for Coronavirus response, as well as to conduct oversight of the Trump administration.

The Report does not provide appropriate weight to the alternatives.

Both proxy voting and remote voting would constitute significant changes to the House Rules. But remote voting is singled out as requiring “a multi-committee effort with substantial study and development,” and “cannot be implemented overnight.” In our view, the same Constitutional concerns apply to proxy voting as apply to remote voting — perhaps more so — and the question of remote voting was already debated in the aftermath of 9/11, with the major objection being that it would widen the door to non-emergency remote voting.⁴

Furthermore, only remote voting, not proxy voting is described by the report in these stark terms: “without complete consensus, which we do not currently have, it would require us to come back to Washington to vote to change House rules.” This final point is why we had argued that Speaker Pelosi should put the new rule in place before allowing Members to disburse to

³ *Memo for Legislatures on their Continuity in Emergencies* (March 17, 2020) https://s3.amazonaws.com/demandprogress/reports/Memo_for_Legislatures_on_their_Continuity_in_Emergencies_2020-03-17.pdf

⁴ See https://books.google.com/books?id=KWBRilQgJXMC&pg=PA114&lpg=PA114&dq=brian+baird+remote+voting&source=bl&ots=Hp_u6wxFkZ&sig=ACfU3U17XGZSuenCwtYgCEy-dM6izcl8gQ&hl=en&sa=X&ved=2ahUKEwj5warXjrPoAhW7knIEHfwCBewQ6AEwCXoECAoQAQ#v=onepage&q=brian%20baird%20remote%20voting&f=false

their districts, but it is a point equally applicable to proxy and remote voting. As a result of the choice to disperse, it likely will be harder for the House to move the Coronavirus supplemental bill because the requirements for agreement are so hard to obtain. From now on, legislative questions will all be hard to obtain unanimity — and the House needs flexibility — which is why a provisional rule should be drafted, debated, and approved to get House support offices working on testing and implementation right now.

The Report does not address committees.

The Report does *not* address whether and how committees may engage in deliberations and conduct oversight. It could easily be misinterpreted to take a hard line against remote voting, which may give committees the impression that they cannot conduct remote deliberations, where in fact they could change their rules — or the House could change its rules — and permit deliberations by this means.

LACUNAE IN THE REMOTE VOTING ANALYSIS

The Report analyzes remote voting on the following four bases: security, logistics, Constitutionality, and feasibility to implement in the House Rules. Each of these analyses proceed from two imprecise premises.

Imprecise premise #1: The model used by the report presumes some kind of electronic vote system where a Member would push a button on an app and their vote would be recorded. While some may have that model in mind, the emergency measure discussed by Members of Congress, experts on Congress, and civil society is instead an online teleconference tool, like Zoom, where Members of Congress can see and hear each other and the vote is recorded by the Clerk. (Zoom is a service approved by the CAO for general use by the House.) The push-button model has clear flaws in a way that remote online deliberation does not.

Imprecise premise #2: “Proxy voting has precedent in the House and would not face many of the technology and security problems faced by remote voting.” Proxy voting has not been used on the House floor; it is at least as hard to confirm that the proxy vote has been properly given to another member; proxy voting is inflexible and cannot easily handle changing circumstances; and it is at least as susceptible to Constitutional challenge for violation of quorum rules as is remote voting. While proxy voting and remote voting may be considered as alternatives, and one may be more *politically* palatable than another, from an authentication and Constitutional perspective, proxy voting is not superior.

We will briefly review the four bases on which the Rules Committee report analyzed remote voting: (1) security, (2) logistics, (3) Constitutionality, and (4) feasibility.

1. Security

The model of security applied by the Report is inapt for the form of remote voting by teleconference under consideration.

The Report's security analysis presumes a push-button model for remote voting as opposed to the teleconference model of remote voting. Thus, its concern about cyber-interference with tracking the votes is inapt, as vote counts would be done by the Clerk of the House, just like current practice. In addition to having a live, recorded video feed of the deliberations that anyone can review, any interference with a vote, as well as the final vote tally, could be addressed by members through the processes they currently use when votes may be mis-tallied.

The Report's model of the House floor as a sanctuary away from Members being influenced or interfered with by third parties is not credible. It is true that there is “no way to ensure Members casting votes remotely are doing so without undue influence by a bad actor,” but the same is true for Members casting votes in person. They are just as subject to blackmail, coercion, and threats. A live video feed, however, would help allay concerns that someone else is voting for the Member.

The Report's model of authentication of identity is inapt. Members do use their Member ID cards to cast votes on the floor, although it has been true from time to time that Members vote for other Members. Remote voting by teleconference would make it possible to authenticate the Members and their vote because you could hear and see them as they vote, with official email as a backup system to verify the accuracy of a vote. Discussion in the report of fingerprint scanners, eye scanners, and facial recognition is not relevant in this context.

The House of Representatives' Chief Administrative Officer has already approved five video-conferencing software as appropriate for House use: Office 365, VSee, WebEx, Zoom, and Skype. Presumably, the CAO has evaluated questions on hackability and cybersecurity when it approved the use of these technologies. In addition, the military and the intelligence agencies use remote video-conference software to coordinate their secret activities. For public deliberations, high-quality commercial-grade software with extensive and broad adoption may be sufficiently resilient.

2. Logistics

The Report concerning the logistics of remote voting is also inapt to the teleconferencing model of remote deliberations. Its conclusion that some “solutions could fundamentally change the operations and the public's perception of the House of Representatives” is likely inaccurate for the teleconference model, which closely mirrors how the House already deliberates. The concerns raised here regarding logistics are inapplicable.

The Report makes a non-germane comparison to the failures of the Iowa Caucuses app to record vote tallies at polling places. As we are discussing remote voting by teleconference, where the House Clerk watches each member vote on screen and tallies the results, this comparison is inapt. We agree that any technology should be tested and retested, and the 12.92 million monthly users of Zoom teleconference, for example, suggests that this

commercial software has passed that test.⁵ It has not been tested in the context of the House of Representatives' floor deliberations, and we believe it should be.

The House Floor Case study, where the House's Electronic Voting System display erroneously displayed vote results, points in favor of remote voting by teleconference, as the House can continue to use its robust error-checking systems to make sure votes are cast correctly.

The Report correctly points out the need for robustness of technology. "Any remote voting system would rely on every Member having reliable, connected technology, knowledge of how to use that technology, and access to round-the-clock technical support." At this time, every or nearly every member of Congress has or has access to a smart vote, a tablet, a computer, or a staffer who can help them with access.

For Members without a smart device, the House of Representatives could provide a mobile device, like an iPhone, to any Member and download and configure the Zoom app. At \$600 per iPhone, the cost to provide all Members a phone with Zoom would be \$264,600. There likely would be a \$50 monthly charge for connectivity, or an additional \$21,750 a month. This seems well within the realm of practicality. And as the commercial platforms can work on virtually any device: Apple, Android, PC, Mac, tablets, etc., this would provide for significant redundancy.

Connectivity. Nearly every place in the country has a wireless phone connection, which addresses the question of internet connectivity. At worst, Members could go to their district offices, which should already be equipped with an internet connection, for the times when they need to vote. I find it hard to take seriously the concerns about power grid security, but should that be a real concern, we could provide each member with a solar-powered device charger with a hand-crank, or simply a backup battery. Such devices are available online for \$20.

Transparency. As remote video-conferencing software allows for both live-streaming of proceedings and an online recording, the requirement that the press and public see their Members deliberate is satisfied. It would be akin to watching the House live-feeds from the floor or the committees.

Staff support. The Report says Members frequently ask questions of staff or other Members about a vote. The Clerk could set up a hotline for Members to call, or the Members could call their staff directly.

Vote timing. The Report says that, under current rules, a vote cannot be closed if a Member is in the chamber or attempting to vote. As the Clerk would be calling the role, this would afford a member the opportunity to vote. If they are experiencing a connectivity issue at the time they

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<https://www.cnbc.com/2020/02/26/zoom-has-added-more-users-so-far-this-year-than-in-2019-bernstein.html>

must cast their vote, they could have a hotline or simply email the Clerk. In the rare circumstance where the vote would be decisive, that matter could be addressed.

Member training on remote voting is essential. Implementation of a remote voting teleconference system would require Member training on how to do this. It would likely require several mock sessions. Now is the time to get these systems up and running and to allow for mock proceedings with subsets of the membership, to help assure that the technology is working properly and Members are familiar with the tools.

3. Constitutionality

We agree with the Report when it says “any changes to current house rules must be as analogous to the current in-person voting practices as possible and must have appropriate safeguards in place to ensure transparency, fairness, and legitimacy.” It is our contention that remote deliberations via teleconference is most akin to voting in person. It allows Members the opportunity to be heard, to raise points of order, to offer amendments, to vote and to be seen voting. No other remote deliberation process comes close — not even proxy voting, where Members would not be participating in the debate. While remote deliberations by teleconference lack physical presence, it retains everything else: the substantive parts of deliberation.

The Report indicates the “constitutionality of remote voting is an untested principle.” Also untested is the constitutionality of proxy voting and the emergency reduction in the numbers of Members required to Constitute a quorum. One would hope that remote voting should never be implemented — but it should be there as a back-up, in case it becomes necessary — just like the emergency reduction in the number of Members necessary to constitute a quorum, which has potential Constitutional issues.

It is true that remote voting, if brought before the courts, would pose a novel legal question. The courts face many novel questions, and that is not a reason to shy away, especially when circumstances demand it. At this moment, the House is in the business of balancing risks: would it prefer a remote voting House or the House unable to deliberate? That is the choice.

The courts would clearly see that choice as well. They would recognize that the House has the power to establish its own Rules under Article I, Section 5. It would recognize that the Supreme Court held in 1892 that “the Constitution has prescribed no method of making this determination [of the presence of a majority], and *it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain this fact.*” (emphasis added)

The most likely result is that the district and appellate courts would not enjoin the laws duly enacted by Congress, and by the time any appeals could work their way up, Congress would be able to reconvene in person and ratify its decisions, making such questions moot. Moreover, we believe the Court would defer to Congress on this question, especially under the circumstances.

4. Feasibility

The final concern raised in the Report is the feasibility of changing the House rules to allow for remote voting. We do not think it too difficult to accomplish for the capable staff of the House Rules Committee, in consultation with the Parliamentarian. Adding a temporary, emergency rule to deem Members to be present when they are present virtually would address most of the concerns, combined with a delegation of rulemaking authority on how to implement the technology to the House Administration Committee.

We have articulated principles on what the Rules changes should be:

- Amend the rules to deem legislators to be present if they are present via electronic means, such as by video-conference.
- Permit the counting of votes cast by Members present via electronic means.
- Provide for these amendments or suspension of chamber rules to be in effect only upon the declaration of legislative leadership; be in effect only for a limited time, such as 30 days; and be renewable by a vote of the legislative body as remotely assembled.

The House of Representatives routinely suspends its rules and enacts temporary rules. Once the House is empowered to hold remote votes, the House Rules Committee could craft additional rules to ensure its smooth operations.

Conclusion

We respectfully recommend that House Rules Committee Democrats reconsider their Report's recommendations regarding establishing a temporary and emergency provision that would allow House leadership to trigger emergency remote voting should it become unsafe or impossible for the House of Representatives to convene in the Hall of the House and other methods for its continued operation become unworkable. We further urge that such a rule be drafted, debated, and implemented now, in preparation for those circumstances that may arise in the upcoming weeks and months.