

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON RULES
OFFICE OF THE MAJORITY



**Majority Staff Report Examining
Voting Options During the
COVID-19 Pandemic**

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This report was compiled by the majority staff and has not been officially adopted by the Committee on Rules.

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I. INTRODUCTION

This is a moment of national emergency. One that comes with a unique set of challenges. Americans are being asked to stay home. Americans are being asked to socially distance themselves from their neighbors, colleagues, friends, and even family. Yet others are being asked to put themselves at risk to take care of the sick, protect their communities, and keep the supply chains running. Likewise, Congress must be prepared to do the urgent work of responding to the massive challenges we face as a country. That work must proceed thoughtfully, while keeping public safety at the forefront and at the same time preserving the integrity of the institution.

Since the onset of the COVID-19 pandemic, the Rules Committee has heard from Members who want to come back to Washington and vote on critical legislation, and Members who want to implement remote voting due to concerns Congress will be unable to pass legislation while also protecting the health of Members, staff, and the public. While these concerns are completely valid, implementing remote voting would raise serious security, logistical, and constitutional challenges.

Security and reliability are hallmarks of the current system and any divergence from current practices must retain the same level of integrity. Although off-the-shelf products exist to allow a Member to videoconference their vote, for example, they have not been tested under the sort of pressure they would face from enemy states or other bad actors trying to force the system offline or prevent individual Members from accessing it. Such a system has to be extensively tested, not used for the first time on must-pass legislation.

A rule change of this magnitude would also be one of the biggest rule changes in the last century, in one of the most critical institutions in our country. It would require major changes to foundational House rules surrounding deliberation, voting, and attendance, which would almost certainly cause unintended consequences if not done with adequate forethought and discussion.¹ Remote voting is also a novel method of voting with no parliamentary history or basis. Some may argue that it runs counter to the Constitution's references to the House meeting to conduct business in the chamber. While arguments can be made in favor of its constitutionality, to avoid a court challenge, it is inadvisable to use unprecedented parliamentary procedures on critical legislation.

It may be prudent to consider the feasibility of remote voting for certain emergency situations, but that decision should be a multi-committee effort with substantial study and

¹ For a list of House rules impacted by remote voting, please see Appendix I. In particular, rules XX (Voting and Quorum Calls) and XXI (Committee of the Whole) would require modification throughout.

development. This change cannot be implemented overnight, and likely cannot be accomplished in time to address the current crisis. Without complete consensus, which we do not currently have, it would also require us to come back to Washington to vote to change House rules to allow for remote voting. However, there are several other routes the House may take in order to pass legislation addressing COVID-19.

II. OPTIONS UNDER EXISTING RULES

A. *Unanimous Consent and Voice Votes*

By far the best option is to **use the existing House rules and current practices**. During the 1918 Influenza Pandemic, the House did not adopt a method of remote voting – e.g. by telegraph or correspondence. Instead they eventually utilized a unanimous consent agreement to pass critical legislation despite not having a physical quorum present, recognizing the importance of conducting business in the chamber at a time of national crisis.²

Likewise, today, the House could pass legislation by **unanimous consent**, which does not require a quorum; or by a **voice vote**, where the House presumes a quorum is present unless a point of order is made. Members could submit a statement for the Congressional Record stating how they would have voted had there been a recorded vote. Congress could even vote on a symbolic resolution supporting the legislation after the crisis passes and Members return to Washington.

Advantages: Unanimous consent agreements and voice votes are longstanding practices that have stood the test of time, and successful use of them is not out of the realm of possibility given the fact that any critical legislation would have to have broad bipartisan support to reach the President’s desk and receive a signature. Their use would also ensure that Members do not have to travel back to Washington in order to vote, potentially keeping Members and staff from exposing themselves and the public to the virus.

² History, Art & Archives – U.S. House: “less than 50 Members were in attendance. But, in a remarkable step, those present had agreed to a ‘*modus vivendi*’—as Speaker Clark explained from the rostrum—to consider the PHS bill under a unanimous consent agreement that would only work if no one ask for a quorum call.”

<https://history.house.gov/Blog/2018/December/12-14-Flu/>

Disadvantages: A single Member could object to a unanimous consent agreement, or make a point of order that a quorum is not present and call for the yeas and nays after a voice vote. While this is clearly the best option before us, it may be the most difficult to use.

B. Recorded Votes

Should travel become necessary, the House could pass legislation by a **recorded vote** but limit Member and staff exposure by holding votes open longer than normal and having Members vote in shifts, sanitizing voting stations between uses, and controlling how many people are in the chamber and their proximity to each other.

Advantages: This would allow Members to record their votes, and unanimous support would not be required.

Disadvantages: If there are large numbers of absences due to Members being under quarantine or unable to travel, the voting membership may not reflect the current majority/minority ratio. In other words, the minority party could have a majority of the votes, which would not reflect the outcome of the latest election.

C. Paired Voting

The House could **utilize a “paired voting” process**, or another process that formalizes Members recording how they would have voted. House rules currently permit paired voting. A pair was an informal agreement between Members on opposite sides not to vote on a specific question or for a stipulated time during their anticipated absence from the House. Since the pairing Members were on opposite sides, their absences did not affect the result of the vote. Pairs were not counted in vote totals, but their names were recorded in the Congressional Record, allowing Members to indicate their position when absent. The rules were changed during the 106th Congress to now only allow for "live pair" voting where one Member votes present and the other is absent. Previous to this change the rules allowed for a pairing of Members who were both absent (known as a "specific pair"). Pairing was a common practice when travel to and from Washington, D.C. was difficult, and Members were absent for extended periods of time.

Advantages: Paired voting sets up a more formal structure than simply telling Members to insert how they would have voted in the Congressional Record, even though it is in essence the same outcome. It could give Members in “pairs” peace of mind that their absence will not change the outcome of the vote. It would not require a change to House rules, only a change to current practice.

Disadvantages: It is complicated to explain and requires coordination by the cloakrooms in order to pair Members. It also does not solve the quorum problem, so

it would need to be combined with utilizing the provisional quorum process (below) if over half the body is absent.

D. Provisional Quorum

If over 215 Members are quarantined or otherwise unable to travel to Washington, the House could **reset the necessary quorum to a provisional amount**. A House rule³ adopted three years after the attacks of September 11th, 2001, allows the House to use a provisional quorum based on the number of Members able to return to the Capitol if, post-catastrophe, a traditional quorum cannot be achieved after 96 hours of attempts due to a “natural disaster, attack, contagion, or a similar calamity rendering Representatives incapable of attending the proceedings of the House.” This rule was put in place after years of study by the Rules Committee and outside experts.

Advantages: It would provide a backstop for the quorum problem, ensuring that Congress is able to act on critical legislation in the face of mass vacancies even if the majority of Members are unable to attend a session.

Disadvantages: Several Democrats questioned the constitutionality of this provision when it was adopted in 2005. While there are strong arguments in favor of its constitutionality, this process has never been used. As is the case with any recorded vote with mass vacancies, the voting provisional membership may not reflect the current majority/minority ratio.

III. POTENTIAL RULE CHANGES

While passing legislation without a recorded vote is the easiest path procedurally and the best option for Member and public safety, it may not be possible since any single Member can prevent it. If universal agreement is not reached, a time-limited change like enhanced unanimous consent or proxy voting could be adopted to help the House function.

Remote voting – in addition to facing logistical and security challenges – is untested constitutionally and there is no precedent for its use in Congress. Using this process to pass legislation could run the risk of legislation being challenged in court, for example by an outside group opposing the legislation. Although there are potentially winning arguments to be made regarding constitutionality, any challenge could delay implementation of critical legislation. Remote voting would almost certainly require

³ Clause 5(c) of rule XX

hundreds of Members to return to Washington to vote on the rule change. The same could be the case for proxy voting, however, proxy voting has precedent in the House and Senate, and would not face many of the technology and security problems faced by remote voting.

A. Enhanced Unanimous Consent

The House could adopt a resolution stating that, for a prescribed period of time, **the number of Members required to object to a unanimous consent request is increased** to a specific number.

Advantages: This would prevent a single Member or small cohort of Members from derailing critical legislation that is broadly supported by Members of the House. The House's current guidelines requiring clearance by both leaderships would likely need to remain in place.

Disadvantages: Members who frequently disagree with the majority of the House might object to this change; therefore, it could require a recorded vote to adopt it.

B. Proxy Voting on the Floor

There is currently no perfect solution to allow absent Members to vote on the floor. However, proxy voting is likely the best of the options available under the circumstances. The House could **implement proxy voting**, in which an absent Member gives a present Member their proxy to cast an actual vote for them, for a prescribed period of time. Legislatures in Oklahoma and Pennsylvania are implementing proxy voting for the duration of the COVID-19 pandemic, but in the House it could raise some of the same constitutional questions as remote voting – namely, whether a Member must be physically present in the chamber to vote. However, many scholars argue that the House has the right to determine its own rules, and that the courts would be unlikely to question the process the House used to pass a bill, if the House determined that it was within the bounds of the House rules. And unlike remote voting, proxy voting has a basis in parliamentary tradition⁴ and is not accompanied by the same security and technology concerns.

If the House adopts a novel voting practice such as proxy voting, a process should be put in place by which the Sergeant at Arms certifies that an emergency situation exists before

⁴ While proxy voting on the Floor would be unprecedented, there is precedent for it in House committees where the practice was in place until the 104th Congress when it was disallowed as part of then-Speaker Newt Gingrich's slate of changes to the House rules. Proxy voting also has precedent in the Senate where it is still used in committee.

proxy voting could be used. Various decisions would have to be made on how proxy voting would function procedurally. In practice, absent Members could potentially communicate their vote to their Regional Whips or to a Member of Leadership, and could certify with the Clerk which Member is serving as their proxy. For extra transparency, the Clerk could call the roll, with the Member serving as proxy announcing that they are a proxy and verbally casting a vote for the absent Member.

Advantages: Proxy voting would give Members the option of casting their votes on legislation without traveling to Washington, which could help limit the spread of COVID-19. These votes would count toward the vote total. Of course, Members who can reach the Capitol and wish to vote in person on the floor would still be able to.

Disadvantages: Proxy voting would require a change to House rules, which would have to be adopted on a record vote if universal agreement could not be reached to utilize unanimous consent or a voice vote.

C. Remote Voting

The House could implement a system by which **Members could cast their votes remotely** for a prescribed period of time.

Advantages: Members who are unable to travel to Washington due to the COVID-19 pandemic would be able to cast votes on legislation from their home or district office.

Disadvantages: Significant security and logistical concerns surround remote voting, and opponents of the legislation could raise constitutional questions surrounding the process. Allowing remote voting would require major changes to the House rules for this purpose – and much smaller changes have taken years of study and consideration to implement. The House and outside experts studied the continuity of Congress following the attacks of September 11th, 2001, and it took years of careful deliberation to agree to change the quorum rule for catastrophic circumstances. While remote voting deserves similarly thoughtful study, to create a secure, reliable, and user-friendly system while in the midst of a crisis is not realistic.

For a more in-depth examination of the challenges surrounding implementation of remote voting, please see the following sections.

IV. SECURITY OF REMOTE VOTING

The electronic voting system on the House floor is a closed system with no access to the internet, and it took almost 100 years and over 50 bills and resolutions to finally put it in place in 1970.⁵ The House regularly tests and reviews this system to ensure the security and integrity of votes. In order to allow Members to vote remotely from all over the country, a new electronic system would have to be put in place, raising several security concerns: foreign and domestic cyber-attacks, interference by third parties, and challenges authenticating Members' identities as they cast votes remotely.

In the age of the internet, foreign and domestic cyber threats are a near certainty for any system Congress would implement to allow remote voting or participation. The Pentagon has already reported that cyber-attacks on the Department of Defense's networks have increased as more employees telework and take precautions to slow the spread of COVID-19.⁶ The Department of Health and Human Services suffered an attack on its own computer systems – part of a campaign to spread disinformation to undermine the department's response to the pandemic.⁷

In the wake of the 2016 election interference and potential 2020 election interference, implementing a secure method for voting would be critical and require an expert staff dedicated to ensuring there are no foreign or domestic attacks threatening the integrity of a vote by any Member, or threatening the system's functionality as a whole. Even with such a staff, we may not be able to thwart a cyber-attack that could prevent Congress from acting or delegitimize any vote Members take.

Cyber interference is not the only risk associated with remote voting. The House chamber provides Members with a central location to deliberate and vote without being subject to the influence or interference of third parties. If voting were decentralized away from one secure chamber, there would be no way to ensure Members casting votes remotely are doing so without undue interference by a bad actor. This would require the availability of secure voting locations in every state for Members to cast their votes. Such infrastructure

⁵ History, Art & Archives – US House: “Between 1886 and 1970, more than 50 bills and resolutions related to electronic or mechanical voting were introduced in the House, but most never made it out of committee. Ultimately, the Legislative Reorganization Act of 1970 amended House rules to allow votes to be taken electronically and authorized funding to build an electronic voting system.” <https://history.house.gov/Exhibitions-and-Publications/Electronic-Technology/Electronic-Voting/>

⁶ Defense One – 3/16/2020: Attacks on DOD Networks Soar as Telework Inflicts 'Unprecedented' Loads <https://www.defenseone.com/threats/2020/03/attacks-dod-networks-spike-telework-brings-unprecedented-loads/163812/>

⁷ Bloomberg – 3/16/2020: Cyber-Attack Hits U.S. Health Agency Amid Covid-19 Outbreak <https://www.bloomberg.com/news/articles/2020-03-16/u-s-health-agency-suffers-cyber-attack-during-covid-19-response>

may already exist, but this raises logistical concerns for staffing and maintaining these locations in times of crisis.

Finally, remote voting systems come with challenges in authenticating Members' identities as they cast their votes. Currently, Members may use their Member ID cards to cast their votes on the House floor. This is an in-person verification of a Member's identity. Entrance into the chamber is regulated by the Sergeant at Arms. Remote voting raises serious concerns for the potential for another person accessing a Member's system and voting on their behalf, including "deepfakes" in a video-based system. One method of authentication could be biometric, such as fingerprint scanners, eye scanners, or facial recognition. However, this technology would take time to put into place.

One possible way to improve the security of a remote voting system would be to use a system similar to that used by Executive Branch officials who need to access classified information while traveling. In these cases, they go to a secure federal building or military facility and use their existing secure communications infrastructure. However, use of a classified system could conflict with ensuring transparency.

V. LOGISTICS SURROUNDING REMOTE VOTING

There are countless logistical challenges associated with remote voting that would need to be addressed, some with solutions that could fundamentally change the operations and public's perception of the House of Representatives.

Iowa Caucuses Case Study

The 2020 Iowa Caucuses provide an instructive example of the dangers of placing matters of immense importance in the hands of untested technology: the app that the Iowa Democratic Party commissioned to count and report results was not properly tested at a statewide scale, and the results of the elections are still disputed over six weeks later.

According to the *New York Times*, the app was quickly put together in the two months leading up to the Caucus date. This resulted in inconsistencies in the reporting of three sets of results due to human error while using the app. A computer science and law professor at Georgetown University said that any technology should be tested and retested by the broader cybersecurity community before being publicly introduced. The

app was not created with transparency or shared with the Iowa precincts, and was not vetted by the Department of Homeland Security.⁸

Additionally, on February 27th, 24 days after the Iowa Caucuses on February 3rd, the Associated Press reviewed updated results released by the Iowa Democratic Party and declared that it would not call a winner, given the remaining concerns surrounding whether the results as reported by the party are fully accurate.⁹

House Floor Case Study

A disputed House vote in 2007 provides an example of factors such as technology failure and human error that can cause Members – and the public – to lose confidence in a voting system even when everyone is voting in the same room. In August 2007, an inconsistency between the Electronic Voting System’s display and the Chair’s announcement of a vote total led to a disputed vote and resulted in the creation of the Select Committee on the Voting Irregularities of August 2, 2007. The Committee was charged with investigating the circumstances surrounding a record vote¹⁰ requested by Rep. Lewis (R-CA) on a motion to recommit. The confusion surrounding the vote was due to an inconsistency between the Chair’s announcement of the vote total and the vote total that was displayed on the Electronic Voting System’s summary board. The Select Committee found¹¹ that there was human error at play in a premature announcement of the total by the Chair and a cascading series of errors, including a failure to process “well card votes” submitted by the Minority and Majority Leaders. In addition, the Select Committee found that there was a failure in the Electronic Voting System, which prevented the House from immediately moving onto the next vote. All of this undermined many Members’ confidence in the integrity of the vote. This error – which spurred the creation of an investigative committee – occurred during an in-person vote on well-tested equipment. One can imagine the complications that could arise if multiple new electronic devices were introduced to the live voting environment without proper testing.

⁸ <https://www.nytimes.com/2020/02/03/us/politics/iowa-caucus-app.html?>

⁹ <https://apnews.com/fc6777e93b8c50b2fd20e0d31fcc43b3>

¹⁰ Roll Call vote 814, 110th Congress

¹¹ House Report 110-885

Logistical challenges that would face any House remote voting system include, but are not limited to:

Technology Hardware & Software – 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. Right now, Members and staff use many varying platforms with varying degrees of reliability, support, and general understanding of the technology. Additionally, if the secure remote system were ever compromised there would need to be a back-up system in place, in particular given that remote voting is being contemplated by some for must-pass legislation.

Connectivity – Every participant would need access to secure connectivity with the capacity to transmit potentially large amounts of data (in the case of a video system) quickly, consistently, and securely. Power grid security to ensure connectivity is also a vulnerability. While such a system is possible in theory, it would be difficult to implement with 100% consistency using existing equipment. Additionally, in a crisis, travel is often restricted. Many Members could be unable to access the system if away from their connected hardware or be unwilling to remain with or retain the necessary hardware in light of a crisis or evacuation.

Transparency – Congress has a fundamental responsibility to be transparent to the public with their actions and deliberations. Some level of significant transparency would have to be maintained in any forum establishing remote deliberation or legislative activity let alone voting, especially with outstanding questions about the legitimacy of such a practice.

Staff Support – On the floor, Members frequently ask questions of staff or other Members about a vote. There would be far less opportunity for assistance when a Member isn't in the chamber, or to correct mistakes in real time.

Vote Timing – Currently, a vote cannot be closed if a Member is in the chamber and attempting to vote. With a remote voting system, the chair would be unable to determine if a Member is trying to change their vote, is logging on late and about to vote, or is experiencing connectivity issues while attempting to vote.

VI. REMOTE VOTING AND THE HOUSE RULES

Providing for remote voting would require significant changes to multiple core House rules—it would not be possible to simply add a clause allowing Members to vote from elsewhere. Alterations much smaller than the ones contemplated have taken years of deliberation and debate. Rules that would require significant changes include, among others:

- Rule XX (“Voting and Quorum Calls”) to address issues including how quorums are determined, how the House can compel attendance of non-appearing Members, and how “rising” would work remotely.
- Rule XVIII (Committee of the Whole) to include similarly widespread modifications to function.
- Rule III, clause 1 (“Voting”) to remove the in-person requirement.
- The application of “unanimous consent” as it has been understood since its roots in the Parliamentary system, to address non-present Members wishing to object.

A longer list of major rules that would be impacted is included in Appendix I.

VII. CONSTITUTIONALITY OF REMOTE VOTING

The constitutionality of remote voting is an untested principle. As a threshold question, this uncertainty should give the House pause from transitioning wholesale to any remote voting or “virtual presence” scheme of conducting business. If challenged, remote voting would be a novel question for a court and there is no guarantee of a favorable ruling affirming its constitutionality. Engaging in an untested practice, especially when considering complex and critical legislation in response to an historic pandemic, presents risks.

Article I of the Constitution mentions in various places the need to bring Members together to conduct business. The Constitution speaks of “meeting” (Art. I, Sec. 4, Cl. 2), “assembling” (Art. I, Sec. 3, Cl. 2), and “attendance” (Art. I, Sec. 5, Cl. 1) in describing how Congress would conduct its business. Yet, the Constitution also explicitly provides each house with the ability to make its own rules (Art. I, Sec. 5, Cl. 2).

Given this uncertainty and the risk of pursuing a novel mode of voting on legislation, working within the current rules and practices of the House – such as passing legislation via unanimous consent or voice vote – is preferable. However, should the situation deteriorate in such a way that remote voting becomes necessary, 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.

VIII. HISTORY

After the terrorist attacks of September 11th, 2001, Congress spent substantial time reviewing the possibilities of establishing a remote voting system for the House of

Representatives. This effort, led by Rep. Baird (D-WA), was eventually dissolved without successfully implementing a comprehensive solution. There was not enough Congressional or public support to make the difficult decisions and investments needed to address challenging questions that were identified.

However, a number of other changes were examined, and some were adopted – largely focused on the post-catastrophe challenges of establishing a quorum and filling vacancies in the House.

A. Rules Committee Action

Several changes to the House rules have been adopted since 9/11 to help the House continue its work in the face of an emergency. The most notable change was the adoption of clause 5(c) of rule XX in 2005, which allows the House to reset the necessary quorum to a provisional amount if, post-catastrophe, a traditional quorum can't be achieved after 96 hours of attempts due to a “natural disaster, attack, contagion, or a similar calamity rendering Representatives incapable of attending the proceedings of the House.” If travel were to become impossible, this provision could be triggered to permit proceedings with only those Members who are able to return to the Capitol.

This provision, the constitutionality of which remains untested, did not happen overnight. It followed a years-long effort by the Committee on Rules from 2002-2005 to improve the continuity of Congress. In addition to examining changes to rule XX, the Committee on Rules spent significant time considering alternate scenarios, including holding a full committee hearing in 2004 specifically to discuss proposed changes. Witnesses included the Parliamentarian, two Deputy Parliamentarians, and the Attending Physician. The hearing built on work by a bipartisan task force formed in 2002 to examine the issue of continuity, chaired by Reps. Christopher Cox (R-CA, then-chair of the Republican Policy Committee) and Martin Frost (D-TX, then-chair of the Democratic Caucus). Please see Appendix II for a summary of the hearing's findings.

Then-Chairman Dreier (R-CA) also introduced, and the House adopted, a concurrent resolution in 2003 to establish a joint committee to review House and Senate rules to assure the continuity of Congress. It did not receive Senate action. Following the Rules Committee hearing on the topic, Chairman Dreier co-authored legislation in 2004 requiring expedited special elections to fill mass vacancies, which passed the House 306-97. Similar legislation was subsequently enacted into law in the 109th Congress.

Other changes to the House rules regarding the continuity of Congress include a rule requiring the Speaker to designate in writing a list of Members who would serve as Speaker pro-tempore in the event of the Speaker's death or disability; a rule authorizing the Speaker and the chair of the Committee of the Whole to declare an emergency recess when notified of an imminent threat to the House's safety; and a rule authorizing the

Speaker to convene the House in a place other than the Hall of the House. Please see Appendix II for a more comprehensive list of changes to the House rules and statute to assist with the continuity of Congress.

B. Continuity of Government Commission

The events of 9/11 also prompted experts outside the chamber to look seriously at how best to ensure the continuity of Congress. The American Enterprise Institute and the Brookings Institution formed the Continuity of Government Commission, spearheaded by Norm Ornstein and Thomas Mann. The Commission's 2003 report focused on the potential problem of filling mass vacancies in Congress, as House Members in particular must be elected and Congress would be unable to function without a quorum. Even if the House could operate with a handful of Members, the Commission pointed out that it could be seen as illegitimate or could be unbalanced if the majority of Members were from a single party or region. The Commission concluded that the vacancies issue could only be addressed with a constitutional amendment. For a complete summary of the Commission's findings, please see Appendix III.

APPENDIX I

RULES IMPACTED BY POTENTIAL INCLUSION OF REMOTE VOTING

Below is a list of House rules that would require modification in order to permit remote voting — it does not include changes to cross-references nor the (much longer) list of rules that would need to change to allow greater remote participation beyond voting.

Note that this list is likely not comprehensive.

House Proceedings

- Rule XX throughout (Voting and Quorum Calls)
- Rule XVIII throughout (Committee of the Whole procedures)
- Clause 1 of rule I (to address whether a Member can demand a Journal vote remotely)
- Clause 6 of rule I (reference to voting procedures under rule XX)
- Clause 8(b)(3) of rule I (due to potential arguments that the office of Speaker is vacant due to “physical inability”)
- Clause 12(c) of rule I (if an impairment to the place of convening needs to be first established)
- Clause 1 of rule III (to remove the in-person voting/attendance requirement)
- Clause 6(a)(1) of rule XIII (to permit 2/3rds votes for same-day rule, remotely)
- Clause 1 of rule XV (to permit 2/3rds votes for suspensions, remotely)
- Clause 5 of rule XV (quorum required to dispense with call of the Private Calendar)

Committee Proceedings

- Clause 2(f) of rule XI (to specify that remote voting does not constitute proxy voting)
- Clause 2(g) of rule XI (to not require permitting physical attendance of the public)
- Clause 2(h) of rule XI (to adjust quorum-taking procedures)
- Clause 2(k)(5) of rule XI (to permit non-physically present Members to assert defamatory testimony is being given)
- Clause 2(m) of rule XI (to explicitly permit subpoena proceedings remotely)

APPENDIX II

SUMMARY OF POST-9/11 ACTIONS BY THE RULES COMMITTEE ON THE CONTINUITY OF CONGRESS

Rules Hearing: Incapacitations and the Quorum (2004)

– *Barriers to Changing the Quorum:*

- The Constitution requires the presence of a majority of the House to do business. However, the Constitution leaves it to the House to determine what is business. **Clause 7(a) of rule XX** states that the mere conduct of debate, where the Chair has *not* put the pending proposition to a vote is not “business”, thus does not require a quorum.
- The Supreme Court upheld in *United States v. Ballin* that the authority of the House to transact business is “created by the mere presence of a majority.” Since 1890, the point of order regarding lack of quorum has been that a quorum is not present, not that a quorum has not voted.
- In 1906, consistent with *Ballin*, Speaker Cannon held that once the House is organized for a Congress “a quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House.”
- Neither the Constitution nor the *Ballin* decision contemplate any notion of “virtual presence.” The founders provided for Houses of Congress that “assemble” and “meet” and forge bicameral consent to adjourn for any extended period or to meet elsewhere. They provided for Houses of Congress that keep a journal, adjourn day to day, and easily admit votes by the yeas and nays. Even if the House chooses to approve journals less frequently than every day, the availability of daily votes by the yeas and nays on adjourning, alone, should rule out any notion that the founders contemplated any 18th-century analog to the “virtual presence” that today might be achieved by proxy or by teleconferencing or by discounting incapacitated Members.

– *Idea Proposed:*

- If the House were to devise a plan to recalculate its number for the purpose of computing a quorum, under specified catastrophic circumstances, departed from the current living-and-sworn standard, we could change the measuring device to “physical attendance.”

Cox-Frost Task Force on the Continuity of Legislative Operations (2002)

- In the 107th Congress, Reps. Cox and Frost created a bipartisan task force. Their work was conducted privately in order for Members to freely and openly discuss their own possible demise and a plan for the continuity of Congress.
- Chairman Dreier issued a statement that said the three major categories of the Continuity of Congress are 1) vacancies, 2) mass incapacitation, and 3) administrative questions.
- Chairman Dreier also stated that the House voted to work with the Senate in a bipartisan manner to see where they could agree on continuity issues, but the Senate declined to work with the House.
- As a result of the Commission, Chairman Dreier co-authored with Rep. Sensenbrenner (R-WI) H.R. 2844, the Continuity in Representation Act of 2004.¹² It passed 306-97. The legislation requires the states to conduct expedited special elections to fill vacancies created by the deaths of large numbers of Members. It was not voted on by the Senate.
- In the April 2004 Rules hearing, Dreier referenced a discussion draft developed by majority staff. Dreier says in summary that the draft does not define incapacitation itself; rather, it addresses the question for the House: how will the House be able to act if there are large numbers of Members incapacitated?¹³ The discussion draft suggests that the inability of Members to respond to multiple and lengthy calls of the House when coupled with measures designed to confirm to the Speaker that a catastrophe has occurred, may allow for a House to proceed with a provisional quorum. This temporary, provisional quorum, existing only in a time of catastrophe, would consist of a majority of those able to respond to the calls of the House. A similar idea was instituted in the Rules Package for the next Congress.

Rules Changes Regarding the Continuity of Congress

- **Rule I, clause 8(b)(3):** Requires the Speaker to designate in writing a number of Members who would serve as Speaker pro tempore in the event of the Speaker's death or disability, until a successor Speaker or Speaker pro tempore could be elected by the House. Soon after a new Congress convenes, the Speaker's list is

¹² <https://www.congress.gov/bill/108th-congress/house-bill/2844/text>

¹³ https://archives-democrats-rules.house.gov/archives/incap_CDD_open.htm

delivered to the Clerk, and the delivery is announced on the House floor. See “Recall Designee” and “Announcement by the Speaker Pro Tempore” *Congressional Record, daily edition, Jan. 6, 2009, p. H24.*

- **Rule I, clause 12(b)(1):** [H. Res. 6](#) in the 110th Congress authorized the chair of the Committee of the Whole, when notified of an imminent threat to the House's safety, to declare an emergency recess subject to the call of the chair. The change eliminated potential confusion over whether the Committee of the Whole would need to rise (to return to the House sitting as the House) so that the Speaker could declare an emergency recess.
 - *Amended Rule I, clause 12, from the 108th Congress (2003-2004), which simply granted the Speaker and chair of the Committee of the Whole emergency recess authority subject to the call of the Chair.*
- **Rule I, clause 12(d):** In the 114th Congress, [H. Res. 5](#) provided the Speaker with authority to reconvene the House during an adjournment or recess of less than three days at a time other than the appointed time and to notify Members. The Speaker was directed to consult the Minority Leader, to decide when the public interest warranted, and to act within the limits of Article I of the Constitution. This change included in House rules separate orders from the 112th and 113th Congresses. The rule change also allowed the Speaker to name designees to exercise the reconvening authorities listed in this new subparagraph and two existing subparagraphs of Rule I.
 - *In the 115th Congress, [H. Res. 5](#) contained a technical, one-word change to the rule allowing the Speaker to convene the House in the District of Columbia at a place other than the Hall of the House in the Capitol "if" rather than "whenever" it was in the public interest.*
 - *Amended Rule I, clause 12 from the 108th Congress (2003-2004) that declared that the Speaker was authorized to convene the House in a place at the seat of government other than the Hall of the House, when warranted, by the public interest.*
 - *During the 108th Congress, both chambers agreed to H. Con. Res. 1, regarding consent to assemble outside the seat of government. The measure authorized the Speaker of the House and the Majority Leader of the Senate, or their respective designees, acting jointly after consultation with the Minority Leader of the House and the Minority Leader of the Senate, to convene the House and Senate at a place outside the District of Columbia whenever, in their opinion, the public interest warranted it.*

- **Rule II, clause 2:** The 115th Congress rules resolution [H. Res. 5](#) clarified that an acting Speaker pro tempore would hold priority over the Clerk of the House in preserving order and decorum pending the election of a new Speaker.
- **Rule XX, clause 5(c):** In the 113th Congress, [H. Res. 5](#) allowed the designees of the Majority leader or Minority leader to consult with the Speaker in the event of catastrophic quorum failure report, rather than solely the two leaders. In practice, the Speaker or Speaker pro tempore now typically announces a revised whole number of the House in light of changes in the membership of the House, but the question of whether a provisional quorum is constitutional has not been addressed.
 - *Amended Rule XX, clause 5, from the 109th Congress (2005-2006) which originally established a provisional quorum after catastrophic circumstances, formally codifying longstanding House practice that a quorum is a majority of the Members elected, sworn, and living.*
 - *In 1906, under Speaker Cannon, the House established the precedent that “a quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House.” Hind’s Precedents of the House of Representatives of the United States, vol. IV (Washington: GPO, 1907), p. 64.*

Statutory Action

- In addition to rules changes, during the 109th Congress, legislation (*2 U.S.C. 8(b)*) was enacted to require states to hold special House elections when extraordinary circumstances cause mass vacancies in the House. The act provides that extraordinary circumstances exist following an announcement by the Speaker of the House that vacancies in the chamber have exceeded 100 seats. States in which a vacancy exists in its House representation are then required to hold a special election within 49 days, subject to some exceptions. States are required to (1) make a determination of the candidates who will run in the special election not later than 10 days after the vacancy announcement by the political parties authorized by state law to nominate candidates, or by any other method the state considers appropriate; (2) ensure to the greatest extent practicable that absentee ballots for the election are transmitted to absent uniformed services voters and overseas voters not later than 15 days after the Speaker announces that the vacancy exists; and (3) accept and process any otherwise valid ballot or other election material from an absent uniformed services voter or an overseas voter, as long as the ballot or other material is received by the appropriate state election official not later than 45 days after the state transmits the ballot to the voter. *2 United States Code 8(b)*.

APPENDIX III

SUMMARY OF THE FIRST REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION

The Problem of Mass Vacancies/Incapacitated Members

- With 535 Members, Congress would struggle to fill a potential large number of vacancies. Due to quorum requirements, if fewer than 218 Members of the House were alive, Congress could not function until the vacancies were filled. Therefore, Congress couldn't do things like elect a new Speaker, confirm a new appointment of a President, Vice President, etc.
- The Commission believed that in the current system, it would take over four months to reconstitute full membership in the House because the Constitution says that the House can only fill vacancies by Special Election and not by appointment.
 - There are a limited number of ballot printing companies and, if many special elections needed to be held at once, ballot printing could be a barrier.
 - Confusion and chaos after an attack or major event could also play a role in delaying a special election to occur.
- For the Senate, the 17th Amendment to the Constitution states that a state can designate a person to appoint a temporary Senator when there is a vacancy. Most states have given that power to their Governor.
- There is no way to fill what is, in effect, a temporary vacancy.
- The Commission believed that mass incapacitation is worse than mass vacancies in three ways:
 - Mass incapacitation affects both the House and Senate.
 - The temporary vacancies caused by incapacitation would not be filled for an indefinite amount of time— only until the Member recovers, resigns, dies, or the term of office ends.
 - Mass incapacitation makes it virtually certain that Congress would be unable to reach its quorum requirement under its most lenient interpretation.

Quorum Requirements

- Defined by precedent, the quorum requirement in the House is that of Members who are “chosen, sworn, and living.”
- Defined by precedent, the quorum requirement in the Senate is “a majority of the Senators duly chosen and sworn.”

- Therefore, the current definition would allow the House to operate with a handful of Members. The Commission believes that there are several problems with that, most importantly it would question the legitimacy of government after a catastrophe. *Other problems the Commission states are listed below.*
 - An attack could wipe out most of one party while not affecting another, leaving Congress politically imbalanced in comparison to the country.
 - The commission questioned whether a Congress with just a handful of Members would be considered legitimate once the vacancies were eventually filled.
 - A lenient quorum requirement might result in a small number of Members acting as the whole Congress and calling into question the legitimacy of congressional actions.
 - There is currently no plan or rule for Members who are incapacitated.

Ideas to Solve the Problem of Mass Vacancies

- *Constitutional Amendment:* The Commission believed that there is no way to quickly fill mass vacancies without a constitutional amendment.
 - Their recommendation was “a constitutional amendment to give Congress the power to provide by legislation for the appointment of temporary replacements to fill vacant seats in the House of Representatives after a catastrophic attack and to temporarily fill seats in the House of Representatives and Senate that are held by incapacitated Members.”
- *Location of Congress:*
 - Rules originally enacted in the 108th Congress allow the Speaker to reconvene the Congress to another location and provide for successors to do the same.

Why Changes to House Rules Alone Cannot Fill Vacancies

- The Commission believed that an approach to appoint Members through a change in House rules would be unconstitutional.
- The House could provide a rule that its current Members supply a list of successors who would serve as temporary replacements for the Members in case of catastrophic attack. An appointed person (e.g. the Governor) could choose the successor from that list. [Advocates for this plan cite *U.S. v. Ballin.*]
- The courts were clear that the House rules could not violate constitutional restraints.

- “The House could no more provide for the filling of vacancies by method other than special elections than it could decide by House rules that less than a two-thirds vote is needed to override a presidential veto or pass a constitutional amendment.”

Argument Against Temporary Appointments in the House

- Temporary appointments could change the party make-up of Congress.
- People should be able to choose their representatives in the People’s House.
 - “While the elected character of the House is extremely important, the principle that all the people should be equally represented is essential to its democratic character.”
- Even if a Governor or other appointee appoints a temporary replacement, they could appoint people solely from their political party, which could differ greatly from the original delegation’s composition.
- The commission questioned if there should be two separate protocols on filling vacancies, one for ordinary circumstances and one for emergency circumstances.

Commission Report Development

- The commission consulted with current and former Members of Congress, legal and constitutional scholars. In addition, the commission held two public meetings where they heard testimony from expert witnesses.