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5-15-2020

## Response Letter to Chairman McGovern on Remote Voting

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### Recommended Citation

Pearlstein, Deborah, "Response Letter to Chairman McGovern on Remote Voting" (2020). *Testimony*. 2. <https://larc.cardozo.yu.edu/faculty-testimony/2>

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# CARDOZO LAW

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May 15, 2020

Dear Chairman McGovern:

I read with interest an article by Mssrs. Mark Strand and Tim Lang introduced into the record during yesterday's hearing of the House Rules Committee on H. Res. 965 - Authorizing remote voting by proxy in the House of Representatives.<sup>1</sup> Having written elsewhere in detail about my conviction that the rules change under consideration readily passes constitutional muster, I am grateful for the opportunity to explain why the Strand and Lang position fails to persuade.

Mssrs. Strand and Lang offer no objection to the proxy voting process as such, but rather argue that the Constitution would permit votes by designated proxy *only if* a quorum of Members is already physically present in the House chamber as provided for under existing House rules. Their objection is to the rule change proposed as part of H. Res. 965 that would allow Members voting by proxy to count toward the establishment of a quorum "to do business" required by Article I, Section 5 of the Constitution. The authors cite no case law to support their view that the Constitution's Quorum Clause requires Members' physical presence, relying instead on two lines of argument: (1) the bare text of the Quorum Clause, and (2) the interpretive claim that, because other provisions of the Constitution refer to Members' "presence" or "absence," it must be that the Quorum Clause itself must be read to mandate physical presence. Neither argument is persuasive.

In defining the scope of the quorum requirement, the Quorum Clause itself says solely: "a Majority of each shall constitute a Quorum to do Business." The Clause does not provide any method or test for determining the existence of a majority. Neither does it define what measure each House must use to establish the existence of a majority. The Clause itself thus provides no basis for determining whether the "majority" must be, for example, "a majority of Members present," or "a majority of Members elected," or "a majority of Members able to vote," or some other metric altogether.

The authors must instead rely heavily on their interpretive claim that, because other provisions of the Constitution refer to Members' "presence" or "absence," the Quorum Clause itself must be read to include an implied requirement of physical presence, as if the Clause had been written to mandate "a Majority of members present shall constitute a Quorum." That is, of course, not what the Constitution says. On the contrary, the absence of the word "presence" in the Quorum Clause cuts as much against the authors' argument as in its favor. The framers of the Constitution knew exactly how to require

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<sup>1</sup> Mark Strand and Tim Lang, "Voting Present By Proxy is an Unconstitutional Oxymoron," CONGRESSIONAL INSTITUTE, May 5, 2020, available <https://www.congressionalinstitute.org/2020/05/06/voting-present-by-proxy-is-an-unconstitutional-oxymoron/>.

“presence” when they wanted to; they do so, for example, just a few lines earlier in the text, in Article I, Section 3, providing: “The Senate shall have the sole power to try all impeachments.... [N]o person shall be convicted without the concurrence of two thirds of the members present.” The failure to include such a requirement in the Quorum Clause, or indeed to modify or define the Quorum Clause majority requirement in any way, suggests the framers did not intend to include presence as such as part of the quorum determination.

Particularly when coupled with the Clause immediately following the Quorum Clause – according each House broad discretion to “determine the rules of its proceedings” – it makes no sense to imagine the framers meant here to tie the hands of future congresses from using what reasonable, verifiable means might be available to adjust its procedures to accommodate a crisis. On the contrary, as both judicial opinion and the historical record referenced in my earlier letter make clear, the House’s discretion to adopt rules reasonably adapted to suit changing circumstances is precisely as broad as the Constitution’s text suggests.

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

Sincerely,

Deborah N. Pearlstein