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We Badly Need Congress to Act. We Don't Need Congress to Act in Person.

by [Deborah Pearlstein](#)

March 23, 2020

Even as governors across the country impose increasingly restrictive – and eminently necessary – measures to promote teleworking and other forms of social distancing to stem the coronavirus tide, and as lawmakers themselves face [the news](#) that they have [tested positive](#) for the virus or otherwise must self-isolate, too many members of Congress have [remained puzzlingly reluctant](#) to make social distancing possible in their own institution. There was even news on Sunday that Sen. Rand Paul (R-Ky.) had been spotted at the Senate gym the same morning he found out he'd tested positive for the virus. As Democratic Representatives Eric Swalwell, Katie Porter, and Van Taylor urged in [a letter](#) to House leadership last week: “[W]e cannot stand on tradition if it puts lives – and our ability to be the voice of our constituents – at risk.” At an absolute minimum, they argued, Congress must allow them to vote on bills remotely, without requiring all 435 Members to show up in person, breaching even the president’s guidance about gatherings in groups. Yet it is not at all clear the relevant (modest) rule changes being proposed will appear in the stimulus legislation Congress is now racing to pass.

The advantages of these changes to normal congressional procedure are clear. Social distancing is essential to protect the health of lawmakers, their families, and their constituencies – and by extension the entire U.S. population. As young people and others across the country continue to disregard this critical advice, Congress is indispensable in setting a national example at a time when federal leadership has never been more important, or, tragically, less in evidence. Permitting remote voting would recognize the reality of what it means for working parents, members of Congress and their staffs among them, that more than [90 percent of the nation’s](#) public schools have now suspended in-person instruction. And remote voting critically helps ensure that Americans are not effectively disenfranchised if and when their representative becomes [unable to show up in person](#) – and helps ensure that Congress as a whole is not

incapacitated by failing to secure a constitutionally required quorum should worst-case virus scenarios materialize.

So why the hesitation? To the extent it is possible to discern specific objections, they seem to be fourfold. The first concern is perhaps the easiest to address, namely, whether the Constitution allows the House to adopt rules for remote voting. While the framers could scarcely have imagined the technological options for implementing remote voting available today – even my favorite low-tech option, voting via the live C-SPAN call-in line, would have been inconceivable – there is nothing in the text of Article I setting forth the rules for how Congress does its business that precludes remote voting, and plenty in the text that suggests the House (and Senate) have vast discretion to design their own rules of procedure. Take, for example, Article I, Section 5, which provides in key part: “[A] majority of each [house] shall constitute a quorum to do business.” The vast bulk of congressional business has long been conducted with far fewer than a majority of members actually in attendance on the floor at any given time. This is not to say the quorum requirement is meaningless; any member can in principal trigger a “quorum call,” effectively requiring the clerk to take actual attendance to ensure a quorum is present. But in the Senate, for instance, such calls are quite commonly handled by simply voting to proceed by what is called “unanimous consent.” And the Constitution is fine with this. As the very next clause of the Constitution emphasizes, “each House may determine the rules of its proceedings.” Indeed, the Supreme Court itself has long since [made clear](#) that each house determines for itself whether a quorum is present. It has thus been the case for decades that Congress has had continuity of government plans in place, just as has the executive branch. These plans have been [updated repeatedly](#) over time, if not often enough, to account for the prospect that an attack or other catastrophic event may render ordinary systems inoperative. While it is certainly the case that House rules, for example, may need to be amended to provide specific procedures for remote voting, this requires no constitutional amendment, only a simple majority of the House, to accomplish.

The remaining concerns are far more about policy objections than legal ones. How can remote voting be [accomplished technically](#) and logistically while safeguarding the security and integrity of members’ votes? How can the press, NGOs, and other lobbying interests retain access to members and their staffs to ensure the voting public remains

able to know and influence their representatives' actions? Perhaps most striking among the current objections is: How will Congress ever be able to secure the physical presence of its members again once it becomes clear that remote operations are actually possible? Indeed, this slippery slope problem is particularly understandable – and [hardly unique to Congress](#). It is a hardship in the best of times for members (especially those from districts more remote from Washington, D.C.) to balance duties in Washington with duties in their districts. And Congress' [track record](#) in allowing putatively temporary measures to turn into a new legislative normal is far, far from perfect.

I do not discount any these concerns for even a moment. Ensuring the integrity and legitimacy of congressional votes; protecting access to members of Congress by the public and the free press; maintaining enough of an institutional infrastructure to make it possible (indeed, ideally make it more possible than it is today) for members to communicate and work together across partisan divides – these are interests that go to the core of a functioning constitutional democracy. But there is reassurance available on each of these fronts.

First, thanks to the extraordinary work scholars and others have devoted to showing us how to better protect elections nationwide, there is a vast pool of [technical knowledge](#) available about how best to conduct reliable elections, in situations that present vastly greater technical challenges than this one. What have we learned? Among other things, paper trails are good. Backup systems are good. Transparency is good. Of the vast technical and resource challenges our country currently faces, accurately and publicly recording the votes of 535 members of Congress seems rather the least of it. Equally, we should all be working from home to the extent our employers afford us that luxury. That means members of the press, public, NGOs and other organizations are already operating under many of the same restrictions Congress should be by now. With reporters restricted in their social interactions already, it is not clear how much harder it would be for reporters to reach members via phone in their districts versus on Capitol Hill. Either way, lawmakers should be making extra efforts already to expand access to the press, through regular teleconferences, virtual town halls, or whatever method best suits their district. And all the more reason to ensure whatever technical solutions Congress develops pays special attention to ensuring enough transparency for public accountability to function.

As for the danger that members may like remote voting so much, they may never want to give it up – the most important safeguard against such an eventuality is in the drafting of the remote voting rules. Limit the rules’ application to circumstances as narrow as possible, for example, to circumstances where the Department of Health and Human Services and/or the Centers for Disease Control can produce documented evidence that the public health and safety require it. Sunset the time during which remote voting is allowed, for example, by providing remote voting rules that expire after 60 days unless a majority of Congress votes to reauthorize the procedure. It may well be that over time, Congress decides to consider more conditions under which remote voting is allowed. As with much of what we are learning, there may be benefits to new processes that transcend this particular crisis. But that longer-term question need not – and should not – be answered now, when time is short, other work abounds, and fear risks drowning out reflective reason.

Congress has an indispensable role to play, and must be capable of acting swiftly now and in the months ahead. Far beyond just appropriating money for economic stimulus, Congress should be taking direct action to, for example, compel production of essential personal protective equipment for health care workers so long as the president fails to exercise his authority under the Defense Production Act; enacting legislation to protect the rapidly approaching 2020 election, including providing states funding to pay for the cost of processing [absentee ballots](#); and blocking efforts by President Donald Trump and the Justice Department to [seize extraordinary powers](#) on the pretext they are necessary to address our current national emergency.

Given where we now are, the United States is facing challenges both unprecedented and immense. Figuring out how to keep Congress running safely and effectively should not be one of them.

Image: US Senate Majority Leader Mitch McConnell arrives to attend a meeting to discuss a potential economic bill in response to the coronavirus, COVID-19, in Washington, DC, on March 20, 2019. Photo by SAUL LOEB/AFP via Getty Images

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