

A Brief History of Legislative Quorums

James Wallner · June 1, 2020

The House of Representatives recently changed its rules to let absent members vote by proxy during designated public health emergencies. The new rule allows members to vote on the House floor when they are not physically present. It creates the possibility that a House plurality may pass legislation on a recorded vote with a majority of its members voting remotely. The rule reverses centuries of practice in which *quorum* has distinguished between members who are physically present (whether they vote or not) and those who are absent (who are unable to vote whether they want to or not). In doing so, the new rule appears to violate the Constitution.

ORIGINS IN ENGLISH PARLIAMENTARY LAW

According to the Oxford English Dictionary, a *quorum* is “The minimum number of members of an assembly or society that must be present at any of its meetings to make the proceedings of that meeting valid.” It is derived from the Latin, *quorum*, which means “of whom.” The word was first used in English to refer to the justices of the peace whose presence in English counties was required for the transaction of business. Specifically, their commissions stated, “We have assigned you, and every two or more of you, *quorum aliquem vestrum*, A, B, C, D, etc., *unum esse volumus*.—i.e. *of whom* we will that any of you A, B or C, etc., shall be one.”

The meaning of quorum gradually evolved to refer to the minimum number of members whose presence was required for the House of Commons to conduct business. For example, records indicate that the House adjourned on April 20, 1607 due to the number of its members in attendance “being not above threescore.” And the House adopted a rule on January 5, 1640 that the Speaker cannot assume his chair until “there be at least forty in the House.”

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...and Forty or more Deputies in the Massachusetts Bay Colony, separated,

“And Forty or more Representatives at any time assembled, shall be accounted a Number Sufficient to constitute a House, Pass Bills, and to transact and do any Business proper to be done in that House; and such Acts to be esteemed valid and of effect.”

QUORUMS IN THE UNITED STATES

Maintaining a quorum in legislative assemblies was especially hard after independence. The Confederation Congress and state legislatures routinely sat idle as physically present members waited for the arrival of their colleagues to constitute a quorum. Similarly, the Federal Convention of 1787 was delayed by almost two weeks due to a lack of a quorum. The first entry in its official journal reads,

“On Monday the 14th of May. A.D. 1787. and in the eleventh year of the independence of the United States of America, at the State-House in the city of Philadelphia...a majority of the States not being represented, the Members present adjourned from day to day until Friday the 25th of the said month.”

Notwithstanding the delay in the Convention’s business caused by the lack of a quorum, the delegates included a quorum requirement for Congress in an early draft of the Constitution.

“A majority shall be a quorum for business; but a smaller

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punish nonattending members.”

– COMMITTEE OF DETAIL

Following English and colonial practice, the draft provision distinguished physically present members from absent members and stipulated that only the former could constitute a quorum. In the final version of the Constitution, the Qualifications and Quorum clause (Article I, section 5, clause 1) stipulates,

“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.”

– ARTICLE I, SECTION 5, CLAUSE 1

During debate over this provision, George Mason argued that a quorum requirement was “a valuable & necessary part of the plan” because it required members’ physical attendance in Congress to make law.

“In this extended country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two Houses to make laws.

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their patience, and outstaying them, could carry such measures as they pleased.”

– GEORGE MASON

Mason’s concerns about “distant parts,” “Central States,” and “overstaying,” underscore the connection between physical presence and a quorum.

James Madison affirmed this connection during the subsequent ratification debates. In Federalist 58, Madison argued that increasing the quorum requirement from a simple-majority of members to a super-majority would empower the minority instead of the majority. It would facilitate “the baneful practice of secessions” by which a minority of a legislature’s members deny it a quorum to conduct business by refusing to show up.

Affirming that connection in the republic’s early practice, Luther S. Cushing’s *Manual of Parliamentary Practice*, states, “In all councils, and other collective bodies of the same kind, it is necessary, that a certain number, called a quorum, of the members, should meet and be present, in order to the transaction of business.”

According to Cushing, the legislature cannot conduct business when a quorum is not physically present.

“No business can regularly be entered upon until a quorum is present; nor can any business be regularly proceeded with when it appears that the members present are reduced below that number; consequently, the presiding officer ought not to take the chair until the proper number is

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present, and, upon the members being counted by the presiding officer, such appears to be the fact, the assembly must be immediately adjourned.”

– CUSHING’S MANUAL OF PARLIAMENTARY PRACTICE

Prior to the adoption of its new rule, the House has not questioned the connection between quorums and members’ physical presence on a recorded vote. The House has debated whether all members physically present or only those who are physically present and voting should constitute a quorum. But until now it has not challenged the long-standing practice that a quorum must include members who are physically present.

The House has used its power under the Constitution’s Rules and Expulsion clause (Article I, section 5, clause 2) to define what constitutes business for the purposes of enforcing its quorum requirement. House precedents state that business is a “term of art” and that it does not apply to routine activities like the daily prayer or legislative debate. In those instances, the House assumes that a quorum is present. According to its precedents,

“A quorum is presumed to be present unless a point of no quorum is entertained and the Chair announces that a quorum is in fact not present or unless the absence of a quorum is disclosed by a vote or by a call of the House.”

– HOUSE PRECEDENTS

If a recorded vote demonstrates that a majority of members is not physically present, the plurality of members present can only

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QUORUMS AND PROXY VOTING

The special process for casting proxy votes outlined in the new House rule severs the connection between physical attendance and legislative quorums. It also violates the Constitution by empowering the House to conduct business when a recorded vote demonstrates unambiguously that a quorum is not physically present. Among its provisions, the new rule outlines a special process members must follow to cast proxy votes on behalf of their absent colleagues. The record of that process demonstrates conclusively how many members are present and how many are absent.

The Constitution's quorum requirement is effectively eliminated if the House has the power to assume that a quorum is present after a recorded vote demonstrates conclusively that a majority of its members are not present.



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