

**CONTINUITY OF SENATE OPERATIONS AND
REMOTE VOTING IN TIMES OF CRISIS**

ROUNDTABLE

BEFORE THE

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

APRIL 30, 2020

Available via the World Wide Web: <http://www.govinfo.gov>

Printed for the use of the
Committee on Homeland Security and Governmental Affairs



CONTINUITY OF SENATE OPERATIONS AND REMOTE VOTING IN TIMES OF CRISIS

CONTINUITY OF SENATE OPERATIONS AND REMOTE VOTING IN TIMES OF CRISIS

ROUNDTABLE

BEFORE THE

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

APRIL 30, 2020

Available via the World Wide Web: <http://www.govinfo.gov>

Printed for the use of the
Committee on Homeland Security and Governmental Affairs



U.S. GOVERNMENT PUBLISHING OFFICE

40–791 PDF

WASHINGTON : 2020

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

RON JOHNSON, Wisconsin, *Chairman*

ROB PORTMAN, Ohio	GARY C. PETERS, Michigan
RAND PAUL, Kentucky	THOMAS R. CARPER, Delaware
JAMES LANKFORD, Oklahoma	MAGGIE HASSAN, New Hampshire
MITT ROMNEY, Utah	KAMALA D. HARRIS, California
RICK SCOTT, Florida	KYRSTEN SINEMA, Arizona
MICHAEL B. ENZI, Wyoming	JACKY ROSEN, Nevada
JOSH HAWLEY, Missouri	

GABRIELLE D'ADAMO SINGER, *Staff Director*
DAVID M. WEINBERG, *Minority Staff Director*
LAURA W. KILBRIDE, *Chief Clerk*
THOMAS SPINO, *Hearing Clerk*

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

ROB PORTMAN, Ohio *Chairman*

RAND PAUL, Kentucky	THOMAS R. CARPER, Delaware
JAMES LANKFORD, Oklahoma	MAGGIE HASSAN, New Hampshire
MITT ROMNEY, Utah	KAMALA D. HARRIS, California
JOSH HAWLEY, Missouri	JACKY ROSEN, Nevada

ANDREW DOCKHAM, *Staff Director and Chief Counsel*
AMANDA NEELY, *Deputy Chief Counsel*
JOHN KILVINGTON, *Minority Staff Director*
KATE KIELCESKI, *Chief Clerk*

CONTENTS

Opening statements:	Page
Senator Portman	1
Senator Carper	3
Senator Romney	5
Senator Hawley	5
Senator Lankford	24
Prepared statements:	
Senator Portman	35
Senator Carper	37

WITNESSES

THURSDAY, APRIL 30, 2020

Martin B. Gold, Partner, Capitol Counsel, LLC	6
Lorelei Kelly, Director of Congressional Modernization, Beeck Center for Social Impact and Innovation, Georgetown University	8
Joshua C. Huder, Ph.D., Senior Fellow, Government Affairs Institute, Georgetown University	10

ALPHABETICAL LIST OF WITNESSES

Gold, Martin B.:	
Testimony	6
Prepared statement	39
Huder, Joshua C. Ph.D.:	
Testimony	10
Prepared statement	55
Kelly Lorelei:	
Testimony	8
Prepared statement	50

APPENDIX

Staff Memorandum	61
Statement submitted by Seth Barrett Tillman	90

ROUNDTABLE: CONTINUITY OF SENATE OPERATIONS AND REMOTE VOTING IN TIMES OF CRISIS

THURSDAY, APRIL 30, 2020

U.S. SENATE,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met by video conference, pursuant to notice, at 9:04 a.m., Hon. Rob Portman, Chairman of the Subcommittee, presiding.

Present: Senators Portman, Lankford, Romney, Hawley, and Carper.

OPENING STATEMENT OF CHAIRMAN PORTMAN¹

Chairman PORTMAN. Good morning. This roundtable will now come to order.

I hope everyone is staying safe and healthy during these unprecedented times. It is certainly an unusual time. Overnight, this coronavirus seems to have changed our basic way of life in so many ways. Businesses are shuttered and millions of Americans are teleworking for the first time; churches and schools are closed. Health care workers are working around the clock. In the last 5 weeks, based on the numbers I saw this morning, it looks like nearly 30 million Americans have filed for unemployment. Most believe we are already approaching the highest percentage of unemployment since the Great Depression.

Now more than ever, Americans need to know that their leaders are working for them and that they have a voice as we work to navigate in this pandemic. In a world where it is no longer safe to be within 6 feet of each other, Congress has to learn how to adapt.

This is not the first time we have needed to ensure the continuity of Congress, by the way. For example, with the nuclear threat during the Cold War, the U.S. Government actually constructed a large bunker for Congress should we be required to meet outside of Washington. However, this may be the first time in the modern era when it is not a physical meeting location at risk but, rather, elected officials themselves and others we would be in contact with.

We are a Subcommittee of the Homeland Security and Governmental Affairs Committee (HSGAC), which has jurisdiction over

¹ The prepared statement of Senator Portman appears in the Appendix on page 35.

congressional organization. It is appropriate that we look at this issue of how to govern during these sorts of times. From that perspective, and while we wait for guidance from the Rules Committee on how to conduct more formal hearings remotely, today's discussion is an attempt to move Congress forward in times of crisis when we cannot meet in person. It seems fitting that our topic for today should be remote proceedings in Congress, including remote voting. Today our gathering itself is really part of our case. This is, as I understand it, the first time we have been able to do this in the U.S. Congress, certainly in the Senate. We want to show that it is possible to have a hearing without physically being in a hearing room. We are told this is a first for the U.S. Senate.

In my view, remote congressional proceedings should never be the norm. It should be limited to times of true nationwide emergencies and only when it is not feasible for Senators to be in the same place. Any authorization to proceed remotely, whether it is Committee meetings, debates, or votes, should be limited in duration, and any extension of such an order should require a vote by the entire Senate. Our goal should be to bring both our country and our Congress back to work in person as soon as it is safely possible. But there are times when that is not possible.

These principles are outlined in the bipartisan remote voting resolution that I introduced with Senator Dick Durbin last month. Specifically, the resolution allows the Majority and Minority Leaders to jointly agree to put in place a temporary voting arrangement for remote voting in times of an extraordinary crisis. But after 30 days, Senators would have to vote to continue to allow that remote voting; otherwise, the temporary mandate would expire.

Today our Subcommittee is releasing a report containing both a legal analysis and technical security recommendations for remote voting and remote governing.

Legally, the Supreme Court has made it clear that the Constitution allows the U.S. Senate to make its own rules. The Court has a long history of giving deference to Congress in determining its processes and procedures when it comes to issues surrounding voting. Based on our legal analysis, we expect remote proceedings to enjoy the same deference. I also believe that the Founders would be supportive of the legislative branch being heard during emergencies.

We need to address the technical issues, of course, that surround remote proceedings. In my view, Senators should be required to authenticate their identity and verify their vote through an encrypted platform for remote voting. There are several off-the-shelf solutions for that that the Senate could use to create a secure and reliable voting platform. We have worked with a lot of outside experts, and we will hear about some of that today. We do not need to reinvent the wheel.

I urge people to review this report, which I believe puts to rest many of the concerns I have heard raised about temporarily authorizing the Senate to proceed remotely in times of crisis. We very much look forward to hearing from our witnesses today about these issues.

The Senate would not be the first legislative body to work remotely. Several States have decided to continue legislative business

in the past month, including allowing members to vote remotely. Across the Atlantic, the European Union (EU) has implemented a remote voting system for its legislative body, while the Parliament of the United Kingdom (UK) is beginning to experiment with holding virtual proceedings.

While a lot is uncertain about when life will return to normal, one thing should be clear: Congress should be able to continue to represent the American people—to do its job—even in times of crisis.

I want to thank Senator Carper for working with me on this event today but also on this broader issue of remote governing. I appreciate him working so closely together in a bipartisan way to make sure that Congress can continue to operate and provide needed support for all Americans.

With that, I turn to Senator Carper for his opening remarks.

OPENING STATEMENT OF SENATOR CARPER¹

Senator CARPER. Thanks, Mr. Chairman. I want to thank you for your leadership on this issue. This is an extremely important topic, as we know. I am pleased that we are able to have this discussion even as we continue to work together remotely.

I wanted to come on and say I am sitting here in my pajamas. Actually, I am not, but this is the first time I have put on a tie in quite a while, and it was hard to find in my closet, but I finally have. I am glad to be here with all of you.

My service on this Committee, Mr. Chairman, started less than a year before the attacks on September 11, 2001, less than one year before those attacks. As our colleagues and many members of our staffs will recall, one of the planes hijacked that morning was likely headed for the U.S. Capitol. In the wake of that tragic day in our Nation's history, we started a conversation about issues like how to assemble Congress in a secure, remote location in the event that we could not meet in Washington, D.C. Mr. Chairman, I seem to recall discussion about the Greenbrier, like a special underground facility at the Greenbrier in West Virginia. There were also tough conversations about how to reconstitute Congress in the event of significant vacancies in the House and the Senate. It was a scary and challenging time.

The new challenges that we face today as a result of Coronavirus disease (COVID-19) are no less scary and no less challenging.

As COVID-19 deaths throughout our country continue to grow, it is essential that those of us serving in the Congress are able to respond quickly and effectively to the events of this day. Our top priority right now should be to do all we can to provide support to first responders, health professionals, businesses, and State and local governments, many of whom are stressed almost to the breaking point by the toll this virus has taken.

With that thought in mind, I believe this is a good time to restart those sobering discussions from almost 20 years ago and begin to figure out how we can make sure this Congress and future Congresses are able to function during a major crisis that might make it difficult for us to assemble in Washington, D.C.

¹The prepared statement of Senator Carper appears in the Appendix on page 37.

Whenever I am confronted with a difficult policy decision like this one, I am reminded of three adages.

The first one is: “If it ain’t broke, don’t fix it.” As we look at the rules governing emergency operations in the Senate, I have asked myself, “Well, are they broken?” I suppose one could point to the fact that we have been able—with strong bipartisan support—to enact trillions of dollars in spending to fund badly needed programs in recent weeks and argue that things are working just fine. At the same time, though, much more needs to be done, and divisions are starting to show as we debate from afar and in the media about what to do next and when. It may be that unanimous consent (UC) is no longer an option; however, inaction is not an option either. If a remote voting system for the Senate allows us to move to the next stage in our response to COVID-19, we need to consider it.

But as we consider some of the changes that have been proposed to the Senate recently, I am reminded of a second adage, and that is: “Do no harm.” We should not allow any remote voting system established to deal with the impact of COVID-19 to be abused to further unrelated, partisan goals. It would be truly unfortunate if a system we set up to allow us to deal with this virus were also used in the coming months, for example, to confirm controversial nominees.

Potentially even worse than that, though, would be future Senate Majority Leaders using remote voting ever more frequently in future years to conduct routine Senate business so that members can remain in their home States rather than returning to Washington to do our Nation’s business.

Just about every significant legislative success that I have been a part of as a member of this body—and some of them with you, Mr. Chairman—has come out of personal relationships that I have been fortunate to develop with our colleagues during our time in Washington and through face-to-face discussions and negotiations in the Capitol and in our offices. Losing those relationships and the ability to work closely with our colleagues could well mean losing forever the Senate as we have known it in the past and likely accelerate all of the negativity and the partisanship that has made Congress so unpopular with voters in recent years.

Let me close, Mr. Chairman, if I can, by acknowledging that there are more than a few tough questions that we will need to confront as we try to decide what course to follow with respect to this issue.

Helping us on that journey is my third, and final, adage of the morning, and that is, “Find out what works and do more of that.” After all, our country is not alone in grappling with this global outbreak. We would be wise to look closely at how other countries and legislative bodies are dealing with these same issues, including a number of States that are taking bold steps, and see what lessons we can learn from their experiences.

Thank you again, Mr. Chairman. Sorry for the technical difficulties. I think we have worked our way through them. I want to thank our staffs for all the work that they have put into getting us together to have this conversation.

To our witnesses, let me welcome each of you. I think our witnesses are Martin Gold, Joshua Huder, and Lorelei Kelly. It sounds

like a good Irish lass there. But we are happy to welcome all of you. We look forward to hearing from you and to a productive and timely conversation on a topic that needs to be addressed at this critical time in our Nation's history.

Mr. Chairman, I think I might have seen at least one other Member of our Committee. I think it is Senator Mitt Romney who has joined us, and there may be some others. It is good to be with all of you. I look forward to being with you in person next week.

Chairman PORTMAN. Thank you, Senator Carper. I am looking forward to being back with you as well.

I know that Senator Romney has joined us. Senator Romney, without giving you any notice, would you like to make any opening comments? We may have other colleagues who will join us. I think there were three or four others who were interested in joining us later. But, Senator Romney, anything for the good of the order before we get started?

OPENING STATEMENT OF SENATOR ROMNEY

Senator ROMNEY. Mr. Chairman, thank you, and, Mr. Ranking Member, it is good to see you and to see Marty Gold on the line as well. I look forward to hearing from him and the other panelists. I think it is an important topic.

Several weeks ago, almost 2 months ago, I raised with leadership the possibility that we might need to vote remotely, and it was suggested that that was an idea for another time, and I am glad this is that other time. I wish you the very best in the process. I clearly think that we have to have a provision of this nature in place, and for me the biggest issue is making sure that a true emergency was taking place as opposed to this becoming a political tool that could be used by perhaps a Majority or Minority Leader to accomplish something that the membership at large was not in favor of.

We have seen the emergency designation used by the President in a way that some of us thought was excessive, and I think being able to define what is a true emergency and what would require remote voting would be something that we would need to pay attention to.

With that, thank you for convening this hearing, and I look forward to hearing from the panelists.

Chairman PORTMAN. Senator Hawley has also joined us. Senator Hawley, are you able to join us? Can we see if we can hear your audio?

Senator HAWLEY. How about this, Mr. Chairman? Can you hear me now?

Chairman PORTMAN. You sound great.

OPENING STATEMENT OF SENATOR HAWLEY

Senator HAWLEY. OK, great. Thank you. My video is not working, but I am able to see you and able to hear the audio, and I will just second your remarks, Mr. Chairman. Thank you for holding this timely hearing on this very timely subject. It is an unprecedented moment in our Nation's history, and I think we have to consider responsible, reasonable options to make sure that we can continue to do our work no matter what the physical circumstances are.

Thank you for pursuing this hearing so we can explore these possibilities, and I look forward to hearing from the witnesses.

Chairman PORTMAN. Great. Thank you, Senator Hawley.

I see that Senator Lankford has now joined us as well. Senator Lankford, do you have any opening comments? We are just getting started. We are about to go to the witnesses. I wondered if you had anything for us at the outset.

Senator LANKFORD. Thank you. No. I am glad to be able to join you. I just look forward to the witnesses' testimony and giving me a chance to be able to listen in from there.

Chairman PORTMAN. Great. Thank you, Senator.

I do not know if any other Senators are on. If you are, please speak up now.

[No response.]

OK. We will turn to our witnesses.

The first witness has been referenced. Martin Gold is a partner at Capitol Counsel, LLC. In my view, he literally wrote the book that is considered the foremost authority on Senate rules and procedures. It is called "Senate Practice and Procedure," and his expertise is renowned in terms of how the Senate can and should operate based on his extensive background in the Senate.

We also are pleased to have with us Lorelei Kelly. Ms. Kelly is a Fellow at the Beeck Center for Social Impact and Innovation at Georgetown University. She leads their Resilient Democracy Coalition, which has been at the forefront of looking at ways data and technology can be used to modernize Congress. We thank you very much for joining us. I know you are out West. This is early for you. Thank you for finding a way to be with us.

Finally, we have Joshua Huder with us. Joshua is a senior fellow at the Government Affairs Institute at Georgetown University. Dr. Huder holds a Ph.D. in political science and focuses his research and teaching on congressional procedure and politics. Having read his testimony, you will see he has a lot of interesting points to make dealing with some of the potential concerns that Senator Carper raised.

I would ask you each to keep your opening statements to 5 minutes. We will submit your full written testimony for the record, of course, and we will post it on the Subcommittee's website.

Mr. Gold, we will start with you.

Mr. GOLD. Can you hear me, Mr. Chairman?

Chairman PORTMAN. I can hear you well.

TESTIMONY OF MARTIN B. GOLD,¹ PARTNER, CAPITOL COUNSEL, LLC

Mr. GOLD. Thank you very much. Mr. Chairman, good morning. Good morning, Senator Carper and other Members of the Subcommittee. Thank you for your invitation.

Senate leaders have worked thoughtfully to mitigate the impact of the coronavirus on the chamber. The question is: Is there more that the Senate can do to retain its deliberative character while protecting its membership and staff?

¹ The prepared statement of Mr. Gold appears in the Appendix on page 39.

Proposals, like yours, Mr. Chairman, have been made to use technology to augment or replace customary operations. Assuming that those ideas are technologically feasible, are they constitutional?

The core issue arises from the mandate that a majority of each House constitutes a quorum to do business. Your remote voting resolution stipulates that participation by a majority of Senators in a virtual vote satisfies this requirement. I believe that is correct.

While Congress' power of self-governance is not absolute, it is very ample. The Supreme Court addressed this point in *United States v. Ballin*, which was litigation involving an 1890 House rule that altered how quorums were determined. Later in 1890, Congress passed tariff legislation to increase tariffs on certain goods. Mr. Ballin was an importer, so he sued, contending that the legislation was infirm because a quorum of one House was not present—the House of Representatives. The case involved the juxtaposition of two constitutional provisions: the quorum requirement and the rulemaking power.

Justice David Brewer in the *Ballin* Court explained that Congress may not govern itself in a way that violates constitutional restraints or fundamental rights but otherwise would write rules to suit its needs. It was up to the House to decide how to ascertain a quorum, said Brewer. He proclaimed judicial deference to the rulemaking authority, saying that within the limitations suggested, it was “absolute and beyond the challenge of any other body or tribunal.” So the Supreme Court upheld the statute.

In the 2014 Noel Canning case, the Supreme Court unanimously invalidated three recess appointments made between pro forma sessions. Again, the issue was judicial deference. Citing *Ballin*, Justice Stephen Breyer wrote, “The standard we apply today is consistent with the Constitution’s broad delegation of authority to the Senate to determine how and when to conduct its business.”

Please consider the purpose of the quorum requirement itself. The Framers looked at other options but settled on a majority, believing it fostered broad representative participation in Congress’ work. As George Mason of Virginia said, “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.” Remote voting and virtual proceedings fully serve the quorum objective.

Would the courts invalidate legislation by applying a requirement for a physical meeting if Congress declares it is unsafe to convene one? As Justice Robert Jackson once observed, it is useful to temper “doctrinaire logic with a little practical wisdom.” Failure to do so, he said, could convert the Constitution into a “suicide pact.”

If the Senate authorizes virtual proceedings, it must either amend or override some existing Senate rules, specifying either that such proceedings satisfy the rules or that exception is made to them. The Senate must also consider precedents or orders that operate notwithstanding contradictory language in the rules so as to avoid an inadvertent impact on them.

Mr. Chairman, the Senate could adopt a standing order that would temporarily override the rules without amending rules text. That is something you can do if you are worried about the implica-

tions of amending the text. That is exactly what the Senate did in 2013 with S. Res. 15, which was a standing order to reduce post-cloture time on certain nominations. That standing order expired at the end of the Congress.

Virtual proceedings are not a substitute for normal Senate. The opportunity for Senators to interact with each other, with party leaders, and with staff is diminished if committees, the cloakrooms, and the floor do not function customarily. Moreover, Senators have the right to debate and the right to amend. Neither of those rights is vindicated by a process that allows for remote voting without virtual proceedings.

It may be necessary to implement things in phases, like the British Parliament, in this case beginning with remote voting. However, as soon as possible, proceedings should replicate the Senate floor.

Virtual operations are suboptimal, but even worse would be a Senate that needs unanimous consent to legislate while in pro forma sessions or one that must convene in hazardous conditions if there is an objection or a quorum call.

Finally, some procedures explicitly refer to the need to prevail with 60 votes. In-person sessions with many absentees will have the distorting effect of making those thresholds crippling.

I appreciate the opportunity to share these perspectives with you.

Chairman PORTMAN. I really appreciate your insights.

Ms. Kelly, we will now turn to you for your opening statement.

TESTIMONY OF LORELEI KELLY,¹ DIRECTOR OF CONGRESSIONAL MODERNIZATION, BEECK CENTER FOR SOCIAL IMPACT AND INNOVATION, GEORGETOWN UNIVERSITY

Ms. KELLY. Senators, thank you for the opportunity to testify. My name is Lorelei Kelly, and I work on congressional modernization at the Beeck Center for Social Impact and Innovation at Georgetown.

We are at a pivotal moment in our democracy. The urgency to restore a functional legislature increases with every moment. Will Congress join the rest of society, not to mention several other legislatures here in the United States and around the world, and let the technology enable us to carry on with the vital operations of the first branch? Will we maintain the promise set forth in Article I of our Constitution? Or will we let more and more time slip away as unprecedented taxpayer dollars are spent, as checks and balances go awry, and as Americans far and wide look to congressional leaders to inform us, unify us, and to help push through this crisis? Let us choose the first option. If you remember anything from this testimony about continuity of the Senate and remote participation, let it be that we can do this. Indeed, we are doing it right now here today. It is hard, but we are watching it happen. The more apt question for you is: How do you want to operate existing technology?

Like this video conference roundtable today, millions of Americans are moving their work and their relationships to online video

¹ The prepared statement of Ms. Kelly appears in the Appendix on page 50.

platforms. You can be sure that this workspace will be different than what you are used to in the Senate chamber. You can still get a lot done, and we know some things already.

For example, glitches are inevitable. Lagging will happen. We need to figure out how to multitask. How do you signal or raise your hand? How are you supposed to communicate in confidence with your staff? Figuring out how to answer these questions is now our challenge. Some of them, like authentication, methods for remote voting, and encryption, are already in practice in other countries. We can do this, even while we are dispersed across the country. I am talking with you today from the cab of a pick-up truck with a hot spot on a farm in San Juan County, New Mexico. Your excellent staff helped me make this work. They can help the entire Senate.

It is also important to remember that the Senate has adapted in a crisis before. To be sure, today's challenge is not a technical one. It is an emotional and intellectual one. We require a change of heart, and change is hard. But the good news is that there is a lot of heart to share. So many people love and admire this institution. We all want it to be better than ever on the other side of this pandemic, and we all stand ready to help.

Most of us in this roundtable probably remember Senate Life Before BlackBerry (LBB). This was when a staffer could lose a Senator on a site visit. That does not happen anymore because mobile connectivity in most of the work flow is a norm.

I was a congressional fellow in 2001, and I was working on the Hill through September 11th and the anthrax attacks. I will never forget the experience of my friend on Senator Domenici's staff. Her Hart Building desk was sprayed with foam in an attempt to neutralize any possible contamination. The offices were evacuated in mid-October. They had no access to important documents, to each other, to files, or to their workplace. Then they could not return until January of the next year. Four months went by while they worked in makeshift spaces, near Union Station or in hideaways in the Capitol. Senate staff was strewn everywhere, and at that time connectivity was maybe 10 percent of what it is today.

This experience accelerated mobile adaptation. I am not excusing the lack of a continuity plan at that time. We needed one then, and we need one now. But this time around we are so much more capable. If I could flip a Senate master switch tonight, I am sure that this chamber would race up the learning curve. If you give them permission, your colleagues and staff will rise to this occasion. This chamber has nearly 4,000 employees. Many of them are young and accustomed to technology integrated throughout their lives. Remote voting in an emergency is vital. But so is the deliberative process. Let us use this time to reimagine how committees operate. Start with field hearings. Their rules are not bound by geography in the first place.

Before we catch our breath, we will have built the foundations of a 21st century institution. Just think of how better informed we could be with remote technology capacity in the Senate. Imagine the realtime situational awareness we could have if local first responders, medical professionals, cashiers, teachers, health care

workers could fill your Committee panels during this pandemic. With this roundtable today, we are on the right track.

Finally, although temporary remote voting and online deliberations are now imperative, know that they will never take the place of in-person convening. Like all of our most important life experiences, relationships leverage technology, not the other way around. More than anything else, the Senate is about human relationships, and those ties will remain top priority. They will remain paramount.

I have confidence in this abiding truth and in your leadership on this, and I stand ready to help. Thank you for having me here today.

Chairman PORTMAN. Thank you, Ms. Kelly. Very well done. I like your studio, the cab of a pick-up truck. Perfect.

Dr. Huder, we will now hear from you.

**TESTIMONY OF JOSHUA C. HUDER, PH.D.,¹ SENIOR FELLOW,
GOVERNMENT AFFAIRS INSTITUTE, GEORGETOWN UNIVERSITY**

Mr. HUDER. Chairman Portman, Ranking Member Carper, and Members of the Subcommittee, thank you for the opportunity to testify before you today. My name is Joshua Huder. I am a senior fellow at the Government Affairs Institute at Georgetown University, where I teach and research congressional operation. We gather today in a virtual forum at an unprecedented moment in American history.

Now, more than at possibly any other time, the American people are relying on Congress to guide us through this pandemic. Rising to that challenge will require Congress to adopt some new and creative processes to continue its operation.

I want to make three points about remote voting as a possible alternative.

First, it is imperative Congress adopt methods for absent members to participate in drafting, debating, and passing legislation to address the COVID-19 pandemic, as well as processes to formally and publicly oversee their implementation and execution.

Second, remote voting may be necessary, but it also poses serious institutional consequences. It should, therefore, remain strictly and narrowly limited to emergency situations only and not adopted as part of the regular proceedings.

Finally, I will highlight what I view as some of the best alternatives to address the current situation.

The COVID-19 pandemic has disrupted, and will continue to disrupt, normal congressional operation, and it is critical that Congress creates committee and floor processes to fulfill its constitutional role and responsibilities. If Congress does not, it risks abdicating that authority. It would delay congressional responses to the pandemic, omit important sources of information from the policy-making process, and limit oversight.

As trillions of dollars are doled out at record pace, Members of Congress are, in many ways, the best situated to understand the response's successes, failures, and needs. Convening to debate and

¹The prepared statement of Dr. Huder appears in the Appendix on page 55.

oversee these programs is critical to ensure the programs Congress creates are executed as the Congress intends. Congress' role in our political system cannot be substituted or replicated in this way. Effectively addressing this crisis will require the input of every Representative and Senator, and that means ensuring the representational link between constituents and government is not disrupted.

However, Congress should also be wary of the potential damage remote legislating could inflict. This roundtable's primary focus is remote voting, but functionally it is a discussion of remote legislating, and legislating incorporates a much broader set of activities than a simple vote. It involves deliberating in committee rooms, members' offices, hallways, and the chamber floors. It involves coordinating action, building relationships, and forming alliances. Congress is not merely an institution of disconnected representatives voting independently on separate matters. It involves much more than just voting. Remote legislating distances members from this process, and physical distance also entails informational distance.

In this sense, remote legislating creates several problems. The gulf between rank-and-file members and the substance of legislating would only get larger. Today members are blocked from offering amendments; giant omnibus packages reduce individual influence and scrutiny; and less room exists for Senators and Representatives to craft and negotiate major deals. Remote legislating would only worsen this problem, enabling chamber leaders to negotiate in secret and keep rank-and-file in the dark.

Also, it could possibly worsen polarization by reducing member interaction. Even in one of the most polarized periods in American politics, members from radically divergent ideological backgrounds foster fruitful political relationships through personal interaction. This highlights the importance and value of the Capitol. Seemingly trivial personal connections can and have influenced the entire chamber. Congress has always been substantially shaped by the interaction of its members, and convening online reduces opportunities for members to form those important relationships. Physical barriers between members only increase reliance on party leaders to facilitate lawmaking, which limits the political and policy possibilities and increases the divide between the parties. Limiting these procedures to emergency situations would protect members from individual influence.

As alternatives to regular proceedings, I believe some of the best approaches in State legislatures and elsewhere blends an in-person participation component with streamed proceedings and proxy voting. This offers two advantages. The first is that it is quick. It can be implemented through chamber rules and simple changes to existing procedures. Second, it safeguards against permanent remote voting, which I see as a danger. Institutional consequences should remain limited to emergencies only, and proxy voting offers the best alternative to safeguard its limited use.

Thank you for the opportunity to testify before you today. I look forward to your questions.

Chairman PORTMAN. Dr. Huder, thank you very much.

We will now go to Members' questions, and each Member will have 7 minutes to ask questions. We will have a second round or even a third round if there is interest. Again, I want to thank all three witnesses for their testimony. Your expertise is really helpful right now as we look at this.

I would like to make one general observation and then ask a couple of questions. Marty, you said it is not a good thing that Congress cannot convene, but it is even worse if the Senate cannot operate during emergencies—in other words, if the legislative branch's voice is not heard. That is kind of how I come at this. I have been promoting this for over 25 years now going back to House legislation when I was in the House of Representatives. For me, this is not about this pandemic. This is a broader question.

Ms. Kelly, you mentioned this. This is also about the possibility of a terrorist attack or other reasons that Congress would not be able to meet.

This is something that I think should be looked at strictly in terms of the pandemic but the general concern that there are times when Congress either cannot physically or should not be gathering.

To the point about relationships, interactions, and the preference of being in-person, again, I do not disagree with that. I think it is good for in-person. I do think it is kind of interesting to hear some people say that Congress has all these personal relationships, and that helps. As they would say, it provides the ability to get more done in a bipartisan way. We have lost a lot of that in Congress, and I can say that as someone who was in the House for 12 years and now has been in the Senate for over 10 years. This is unfortunately a place where bipartisanship is more difficult, not easier; Senator Carper's relationship that he talked about earlier with me and mine with him I think have been helpful to us working together. We do a lot of bipartisan work together, as I do with other members. But it is possible that actually remote interaction on a more normal basis could help that as well.

To give you an example, we are typically off about one-third of the year. One-third of the year Congress is not in session, even under normal circumstances. I would ask my colleagues, do you ever interact with your colleagues on your side of the aisle much less colleagues on the other side of the aisle during that period? The answer is probably never or rarely. We really do not get together. We are also only usually in session Monday afternoon until Thursday afternoon, and so the rest of the week we have very little interaction with our colleagues.

Some of us take great pride in our ability to get things done on a bipartisan basis and believe that is the most important part of the job to achieve things for the people we represent, which, by definition, have to be bipartisan to get through. But I do not think that remote interaction, whether it is the process of legislating or even the interactions you have in a remote roundtable such as this, necessarily take away from that. In fact, Ms. Kelly, you kind of spoke about this—that there is an opportunity here actually to increase interaction with members, particularly during those times when we are not in session, which, when you add it all up, is really the majority of the days of the year we are not in session. I would just put that out there as my general observation.

On questions, I think, Marty, you did a good job talking about the constitutional issues, and I appreciate that. I think you are correct. I do believe that great deference is given to the Senate to come up with its own rules, as it should be.

The one you did not mention, I do not think, at least extensively, was this issue about the enrolled bill rule and how that would affect the Supreme Court's review of laws passed through remote voting. This enrolled bill rule is a Supreme Court doctrine that says the courts should not look past the enrollment bill once the congressional leadership has signed off to determine whether Congress passed a law according to proper procedure. Once it is enrolled, that becomes the legislative branch's legislation it sends to the President.

Could you speak to that for a moment?

Mr. GOLD. There are several doctrines that the Supreme Court has observed in one form or another to speak to the question of judicial deference to Congress. For example, the *Ballin* case did not rely on the enrolled bill doctrine. Nevertheless, the enrolled bill doctrine that you have just properly depicted, Senator, that says that if you have the leaders of the House and the Senate who are authorized to sign the bill affixing signatures to the bill, then the Supreme Court or the courts generally will not look behind that to determine what kind of procedures were used or whether they were properly formatted and so forth in order to get you to the end result.

It very much, by the way, is the same thing that is the case in Senate rules. Senate Rule XXVI says that if you have a quorum of a committee that has reported a piece of legislation, then the Parliamentarian and the Chair will not look behind that and determine whether committee procedures were properly followed. It is a sense that you should defer to the final action of the committee or in this case the final action of the chamber without going behind it to try to pick apart what might have been done getting to the end.

The enrolled bill doctrine is certainly one of the reasons for deference. Political question doctrine is another major reason for deference. The equitable discretion, the idea that courts should not go in and rewrite congressional rules, is a further reason for deference.

There are a number of different doctrines on which a court could rest in terms of deciding whether or not the rulemaking power should be invaded, and my sense of it is that if Congress says, A, it is unsafe to meet; B, they have adopted a rule to operate in lieu of the actual physical meeting; and, C, that they declare in the rule that the participation by a majority of members, for example, in a remote vote represents a quorum, and so forth, I believe that all of those doctrines in one form or another would be sufficient to create the deference you want.

Chairman PORTMAN. Therefore, the constitutionality of remote proceedings and remote voting. Thank you very much.

I want to turn to my colleagues in a second here, but, Ms. Kelly, one issue that I think is interesting to put on the table. For this roundtable, we did not come up with a new system from scratch. This is off-the-shelf technology that is available in the Senate

today, so for those who raised the technological concerns, just to make it clear that we are proceeding today with technology that is readily available and could be improved further, as we saw earlier. But any comments on that quickly?

Ms. KELLY. I think that there are any number of platforms that are off the shelf and could be configured or formatted specifically for the procedures of the House and the Senate. I think that the tech industry would be glad to help work with us on the legislative status steps and look at what is needed where and how to do it. This is a really hard problem, but it is not an impossible one. I think it would be a great endeavor to work together with the tech industry to bring D.C. and California at long last together in a common goal. Yes, I agree with you.

Chairman PORTMAN. Great. Thanks, Ms. Kelly.

I now turn to Senator Carper.

Senator CARPER. Ms. Kelly, let me ask you a question. The pickup truck that you are sitting in, is that your truck?

Ms. KELLY. This is a 1998 Dodge truck that is used for hauling out here on this farm. It is my sister's truck.

Senator CARPER. No kidding? I am at my home in Delaware, and in the garage of our house is a 2001 Chrysler Town & Country minivan. The next time I do one of these, I am going to do it from there.

Ms. KELLY. It is very cozy, and I have a hot spot here. I am having the full rural broadband experience out here on the farm. [Laughter.]

That is another conversation, but it is a thing.

Senator CARPER. I thank each of you for your testimony. When you gave your testimony, were you giving it extemporaneously? Were you reading? How were you doing that?

Ms. KELLY. This is something I will be happy to share. I found a teleprompter that is a sort of open source and available online. I will send it. It is called "CuePrompter.com," and I cut-and-pasted into the box, and it turns it into this beautiful scroll, and you can control the speed. Then you can start and stop it. I am glad that it looked like I knew what I was doing. [Laughter.]

I tried a couple of times, and I guess it worked, so thank you.

Senator CARPER. Mr. Chairman and colleagues, I want to say if we get nothing else out of this, I think we have just gotten a mother lode right here. Thank you.

I am reminded of something, as I approached this hearing, that Joe Biden, who was elected seven times to the U.S. Senate before becoming Vice President, I am reminded of something that he used to say, and he still says. He says, "All politics is personal." He adds to that a P.S.: "All diplomacy is personal." I would be inclined to agree with both of those observations.

Let me ask, if I could, for each of you, one or two points where you think you agree with the other panelists. Do you want to go first, Ms. Kelly?

Ms. KELLY. I think that the most important—and I am not a constitutional lawyer. I did work on the Hill. But I think that what I heard both my fellow panelists say is that the sort of legacy of the past and the rules and the quorum and the 200-some-year-old traditions are not hard and fast obstacles in the place of moving

forward and adapting. We have needed to do this for some time, and now we just need to do it more urgently than ever before. But this has always been possible, and now it is mandatory.

Senator CARPER. Let me ask you, Dr. Huder, what do you think, a point or two where the three of you agree?

Mr. HUDER. I think clearly we all agree that some process needs to be created. We need some way for the Senate to convene. This is a great example of the possibilities that are out there for Congress to maintain its constitutional role and function within the legislative process, but also in overseeing responses to this.

Second, I think that we all agree that there is little substitute for the in-person nature and the personal relationships that make the Senate what the Senate is. More than any other legislative body in the world, the Senate is very much driven by its personal relationships and its social interaction. I think that removing that or severely limiting it would be something that we would all lament.

Senator CARPER. All right. Thank you.

Marty Gold.

Mr. GOLD. Thank you, Senator. I absolutely agree with Dr. Huder's statement about the importance of personal interaction in the Senate. Not only what he said in his oral statement but in his written submission as well, he made a very strong point about that. I do not think there is anybody who really thinks that remote participation is a substitute for the actual Senate. Senator Portman made a comment in his opening remarks, and it is really embraced in the resolution that he offered with Senator Durbin, about limiting circumstances so that you do not resort to this on a basis other than in emergency conditions.

If you begin from the premise that there is no substitute for the actual Senate and that the best thing you are doing is working in a suboptimal circumstance to do the best you can in circumstances where it is physically dangerous to convene, then you build guardrails around what you do so that you do not use this on too casual a basis. The proposal that Senator Portman and Senator Durbin have introduced, also one, for example, that Senator Paul introduced, has that characteristic or those characteristics. On what basis do you initiate it? On what basis do you continue it? On what basis do you sunset it? On what basis do you renew it?

In other words, the point is if this were a substitute for the actual Senate—which Dr. Huder has made a very clear point that it is not, and I agree—you would not worry about those things so much. If it is not a substitute for the actual Senate, then you have to build in the protections and the guardrails, which these resolutions that I have seen so far absolutely do.

Senator CARPER. All right. Thanks.

Let me turn back to Dr. Huder again for a moment. Dr. Huder, you have noted that remote participation could further concentrate power in the hands of congressional leadership. You have also argued that if members want to hold leadership accountable, to quote you, I think you said, they “need to at a minimum be physically present.”

Two questions. One, can you expand on the ways in which remote voting and participation could empower leadership at the expense of other members?

Mr. HUDER. Yes. One of the ways that remote voting empowers leaders is that they will be the ones who are in the Capitol itself. Even with any remote voting process, there are going to be people that are going to have to be in the chambers to make the rules, motions, and procedures that are going to be necessary to pass law. If lawmakers are not there, then they are significantly removed from the information process of lawmaking. That creates a situation where, if they are not there to learn the information through first or secondhand experience, it is going to be much harder for them to get involved in the lawmaking process, to understand what is going to happen, what negotiations are going on, and what policy provisions are in play. If they are not there, there is a transfer of power that leaders have more leeway to move.

Senator CARPER. Thank you.

A related question, Dr. Huder, if I could. In your view, would remote participation allow for regular members to make contributions to the substance of legislation? Or would they likely be limited on a practical level, simply voting yes or no?

Mr. HUDER. They are absolutely limited. They would not be present, and it is unclear—maybe there is a process or a technology that could make them a little more remotely enabled, if you will, to make a motion or a point of order or offer an amendment or whatever it may be. But it is going to be very difficult for them to participate as they would if they were in the chamber. Legislating is a lot more than simply voting yes or no. In order to stop a bad idea, you have to prevent it from getting to the vote. That is just one example of many where being in person really is not a substitute for voting remotely.

Senator CARPER. All right. Thank you. Thank you all very much.

Chairman PORTMAN. Thank you, Senator Carper.

I believe Senator Romney is up next. Senator Romney, are you on?

[No response.]

Chairman PORTMAN. All right. Let us turn to Senator Lankford. Are you on? I know you had another call.

[No response.]

Senator Hawley, are you available?

Senator HAWLEY. Yes, I am, Mr. Chairman. Thank you very much.

Chairman PORTMAN. Great.

Senator HAWLEY. Thank you again for doing this. Thanks to all the witnesses for being here.

Mr. Gold, could I just start with you, and could we go back for a moment to the British Parliament? We know that the British Parliament is moving toward a virtual parliament, and I wonder, what are some lessons do you think that the U.S. Congress could learn from the British experience thus far?

Mr. GOLD. The British experience thus far has involved the use of remote proceedings on something that was quite suited to those remote proceedings, and that was Prime Ministers' questions. Now, they did a hybrid proceeding in the House of Commons, so they

had some members there, although a significant majority of the members were not present. But, nevertheless, Prime Ministers' questions was the kind of thing that was not unduly complex to do by a remote proceeding mechanism. So that is what they did. The idea was that they would begin with that and phase in other aspects of the legislative procedures of the House of Commons as it became apparent that those things were technologically feasible and could be managed.

That was actually the point I wanted to make in the statement that I made, which is that it is not necessarily necessary for Congress to do everything it ought to do all at the same time, because there may be proceedings that can be attuned to a remote voting or remote participation process more easily than other proceedings. The fact that you cannot do everything at once does not mean that you should not start someplace and then proceed on from there. It is also the reason that I said that maybe we should take some care in terms of amending Senate rules which have a more permanent character and look to the possibility of perhaps a standing order that allows things to be done on a more experimental basis with a sunset clause in that standing order so that if things are not properly accomplished, then the rules do not have to be amended again in order to take care of something.

This is obviously an experiment like the British Parliament is an experiment. I would caution not to go too deeply into the experiment all at once. Do it in the phases that can be managed, like the parliament has done, and to consider doing it on a temporary basis until one has a clearer picture of what ought to be done on a more permanent basis.

Senator HAWLEY. I am intrigued by your point just now that the British Parliament's experience with Prime Ministers' questions in adopting virtual proceedings for some of its work, not necessarily all of its work, it raises the possibility in my mind, which is what I think you are suggesting, that one way for the U.S. Congress to proceed is to stagger our workload, as it were. We do not have to go virtual for everything. Of course, we do not have to do everything all at once.

I wonder if you could just say a little bit more about what sort of congressional proceedings you think are particularly good places to start in terms of working virtually, implementing these virtual technologies. If we were to stagger our workload in the face of an extended emergency like this pandemic, what might that look like? Where would you counsel us to begin?

Mr. GOLD. The Portman and Durbin resolution begins with voting, and so the premise is that members have been informed about the content of legislation, but they want to have an ability to express themselves on the record as to their position on that legislation as opposed to saying something can only pass by unanimous consent or a voice vote or their individual opinions are not expressed. It seems to me that if you could find the kind of secure platforms that Senator Portman was talking about in his opening Statement, that might be a place to begin.

Now, Dr. Huder has talked about the difficulty of the give-and-take on the floor: somebody wants to offer an amendment, somebody wants to make a point of order, somebody wants to put a

quorum call in—all of those things that we are accustomed to in the normal operation of the Senate.

I made the statement that ultimately I thought that the Senate should embrace as much of that as possible because the legislative process is more than voting. If you begin with remote voting and say, well, at least in that sense members have had the opportunity to express themselves in a meaningful way on the passage or defeat of a proposal, whether it is the final passage of the legislation or an amendment to the legislation, whatever the vote may be, if you begin there, I do think that is a place to start; and I think that that is attuned to technology. If you can establish that the technology is available to begin to mimic as closely as you can floor proceedings, then the greater degree that you can expand this to look like the normal Senate, the better, understanding probably that at no point will it actually look like the normal Senate.

Senator HAWLEY. Dr. Huder, let me just turn to you, if I could. On the point on voting, could you just give us a word about any security concerns with setting up a remote voting system that you are aware of that you might have? Talk us through that.

Mr. HUDER. Senator Hawley, I am not a technology expert, and I also do not know the platforms that are out there, so this is really not my forte to discuss the security issues. My understanding is that in many of the State legislatures they are doing this through other forms of technology, either through some face-to-face communication with a proxy that is in the chamber or taking a picture of a vote or a paper vote and sending it to a proxy in the chamber. But in terms of actually voting through technology, I would not be the person. I believe Ms. Kelly would probably have a better answer.

Senator HAWLEY. Can I just ask you, on the State legislatures, Dr. Huder, do you have any assessment yet of the different approaches that the State legislatures who are experimenting with remote proceedings, how those are going, or any assessment of their various approaches and what you think of them, what you think is promising, what you think is not so promising?

Mr. HUDER. Yes, I think that there are several State legislatures that everybody is in this in the very beginning; we are all kind of experimenting with it, and places like Pennsylvania and Oklahoma were a couple instances that I highlighted because I thought it brought an interesting and novel approach to a very difficult problem given this pandemic. They are doing a sort of proxy and remote participation component where members can participate or at least watch a live stream while voting when necessary.

I think the concern comes when you start to bring in more controversial measures and there is disagreement within the ranks. I think that many State legislators were expressing some concerns that as the process becomes more unwieldy and more controversy arises, that it may become more difficult to enact or execute the processes that they have been using.

Senator HAWLEY. Very good. Thank you very much. Thanks to all the witnesses, and thank you, Mr. Chairman.

Chairman PORTMAN. Thank you, Senator Hawley.

Senator Lankford, when you are available—I know you are on another call—just chime in. We would love to hear from you.

Let me, if I could, back up a little bit to the general premise here that we believe that the legislative branch ought to be able to express itself at all times, including times of emergencies when we cannot gather or should not gather. Again, this does not relate just to the pandemic, but for me I think about this in terms of, as was noted earlier, during the Cold War we had a bunker set up on a mountaintop in West Virginia somewhere for fear we could not gather. Certainly during 9/11 we saw this happen where it was viewed to be unsafe to be in the Capitol immediately after the attacks of 9/11.

We have had a concern in our country for some time about bioterrorism, and bioterrorism is not a natural virus, but it has some similar aspects to it and the inability potentially for us to gather. But to me this is about continuity. As I said earlier, it is also about the fact that in the Constitution and among our Founders there was a sense that we are the people's voice. We are the ones representing our individual constituents in our districts and our States and that we should be heard, particularly during times of national emergencies or, as is the case now, at a time when we are making huge decisions on behalf of our country, at a time when our economy is in free fall and we have a serious health crisis that is affecting so many Americans, having already resulted in so many fatalities, as many as we had in the entire Vietnam War, just in the last 3 months. This is a time when we should be heard, and so that is my premise to this.

I had a question for you, Dr. Huder. I agree that when we can meet, we should meet, and I think many of your observations are in theory maybe more applicable than they are in practice in terms of how Congress operates. I wish there was more personal interaction, and I certainly try to practice that, but that can be done remotely as well, particularly, as I said earlier, most of the year, most days of the year we are actually not in session. But to say that there would be a concentration of power and leadership in relation to remote voting I think belies the reality of what we have seen in the last couple of weeks. Congress passed legislation last week that provided over half a trillion dollars of your tax dollars and all of our constituents' tax dollars to address this pandemic. Think about that, over half a trillion dollars. As you know, normally we have significant heartburn and debate over \$100 million here, \$100 million there. We are talking about hundreds of billions with a "B." As someone once said, a million here, a million there, it begins to add up. Now it is a billion here, a billion there, it begins to add up, or even a trillion here, a trillion there. Yet because of, I think, the necessity for us to act and the inability for us to gather, there was significant concentration of power in those who were working on this in Washington, and this was the Republican leadership and the Democrat leadership. But there was no input from members. There was no debate. There were no amendments. There was no vote.

I think the notion that somehow remote voting leads to more concentration, I think at least in the experience that I have had in this particular pandemic and my sense as to how this could work in the future should, God forbid, there be an attack on our country as there was on 9/11 or some other way that we were not able to gath-

er, my concern is that people would not have their representatives being heard.

So whether it is voting, which is the ultimate sacred responsibility, or whether it is all of the processes that lead up to that, including hearings like this one, including the opportunity to have debate, offer amendments, to be heard, it seems to me that that would help to ensure that democracy, small “D,” is exercised.

What am I missing? What are your thoughts on that?

Mr. HUDER. Mr. Chairman, I think you are exactly right that Congress needs to be voting at this moment and they need to be signing on the record or disagreeing on the record with the decisions that are being made and the types of policies that are being passed. I think that is critical.

I think it also highlights the importance and concerns with remote voting. When we are discussing massive trillion-dollar or half-trillion-dollar response packages, the type of speed necessary to pass these packages in a timely manner is going to necessitate circumventing normal legislative procedures where you have committee hearings vetting the proposals and the policies, you have oversight hearings. The necessity of getting something out quickly means that you are going to have to obscure some of the deliberative processes that are normal to the legislative process.

The concern comes when you start to turn to more routine legislation that Congress will need to be adopting later on this year. For example, the National Defense Authorization Act will be something that Congress may need to pass as this pandemic continues, or appropriations bills or a continuing resolution of some sort, and it may need to be addressed while the pandemic still rages on.

My concern is that remote voting comes to limit the deliberation that you would see on some of the very important matters that Congress will have to adopt that are not emergency response packages. This is why I believe that your resolution and many of the other things that would enable remote voting and remote participation are absolutely critical at this moment. There are also some long-term concerns that may limit the deliberation that would otherwise exist on very important legislation.

Chairman PORTMAN. Getting back to what Mr. Gold said earlier on, which is that the best would be if we could be together—and I could not agree with that more—but our worst is that we have a situation where we cannot gather and our voices are not heard. As a practical matter, as a professor who studies political science and particularly the U.S. Congress and our processes and procedures, a lot of this has to do with balance of power. The Constitution was set up to ensure that the legislative branch, the executive branch, and the judicial branch had this delicate balance and that there was deference where appropriate but not overreach. Without the legislative branch being able to convene and to be able to speak, obviously power then shifts to the other branches, particularly to the executive branch, which I think is counter to what the Founders intended, and goes back to this notion that we are asked to represent our States, our districts. I thank you for that.

My time has expired. We will turn to Senator Carper. I do have some questions on the technical aspects on this that I will come back to, Ms. Kelly. Senator Carper.

Senator CARPER. Thanks, Mr. Chairman.

One of the most valuable expenditures of my own time in the Senate has been actually not necessarily the time we have spent in a committee hearing or on the Senate floor voting, although those can be very helpful. Some of the most valuable time I have had in terms of building relationships is when we have traveled together on the congressional delegation trips. I know Senator Portman has been on any number of those. I have had the pleasure of being on some of them, too, as has he.

I am going to think out loud here for a minute, which is a scary proposition, but the idea of—as I said earlier, let us find out what works, do more of that; find out what does not work, do less of that. There are other countries, other States around the United States who have been experimenting in this arena for a while. Just like the way that States are taking a different approach to opening up, coming back to normal, we are going to find out from the States what worked and what does not work.

I wonder how we would go about finding out around this country, and around the world what works and what does not work. It would be interesting, I think, for us to hear from parts of the world as well and maybe to hear from some of the places, whether it is States or another country, where they have tried this and failed miserably, and we will see what we can learn from both of them. This might be a stretch, but the idea of where we could put on an airplane folks from the Senate who would have some expertise in this area, maybe let them go visit a couple of countries together, and they will learn something from those countries, but also have a chance to get to know each other better and to build some of the bonds that I think are helpful to getting things done.

I just want to lay that out there off the top of my head. It may be a good idea, it may not be. But it might work on a couple different levels. Much of my success, what success I have enjoyed in the last almost 20 years, but much of it has been the result of forging relationships with people on the other side of the aisle and building trust through interpersonal interaction. James Lankford is on this call, and he is going to be joining us again shortly. One of those examples for me was Tom Coburn, a Republican from Oklahoma, a successful businessperson, a doctor, obstetrician, a House Member, and a Senator. We built over the years a close bond which made the rest of the Committee on Homeland Security and Governmental Affairs, I think to look back, and he passed away a month or so ago, but it was the interpersonal interactions that we had that enabled us to develop a trust to lead. Efforts like that to overcome partisan divides I think are more important now than ever.

A question of Ms. Kelly, if I could, and then a question of Dr. Huder, if I could. Ms. Kelly, do you have any recommendation based on your work for sustaining personal relationships between legislators, even in a remote setting?

Ms. KELLY. Yes, thank you for that question. Actually, I have been involved with a couple of what we called “mock hearings,” and we used Zoom to mimic some of the basic functions of a hearing. We in the second one had a member of the U.K. Parliament present. She was so generous, so happy to help, and so interested in what was going on in the United States as well.

The good news is that there are two websites that have a continually updated scroll of what is going on in State legislatures in the United States. The National Conference of State Legislatures has a whole COVID-19 banner, and continuity of government is one of the boxes they have checked. You can go there and see continually what States are doing. Just from your membership on your Committee—California, Kentucky, Oklahoma, Utah—they have all taken steps, or they are all doing something, and they have done it differently. It is really interesting to go through, and they are linked right to the legislative language.

In terms of international progress forward on this, the International Parliamentary Union (IPU), which has an entire section that looks at information technology (IT) in legislatures, and it has for many years, has a legislative data and transparency conference in the U.S. Capitol every year that all the Congress nerds go to, those people who keep things running behind the scenes. I think we can take real confidence knowing that the institution of Congress has made great strides in the last 10 years. Congress is a mostly machine-readable organization now. There are treasure troves of data that are structured and made available online now. A lot of what we are talking about here has the foundation in place.

To your point about global parliamentarians and members of other legislatures, as you said that, I thought of the North Atlantic Treaty Organization (NATO) Parliamentary Assembly, which is one of these groups that started during the Cold War to bring legislators together. The U.S. Congress used to have a much more robust international program also that was run out of the Library of Congress that could be brought back. The foundations are there.

I was a national security staffer on the Hill and worked a lot on NATO, and it seems to me that right now, for many reasons, including information weaponization, that the technological and the technical architecture of legislative bodies should be considered critical infrastructure and should be looked at through a security framework, and certainly continuity of government brings it into stark relief. But for a lot of different reasons, including security, continuity, and access, these are issues that so many countries are facing. Even though parliaments are very different than Congress, part of the problem is Congress cannot be a parliament, and that is one of the reasons it gets stuck when you try to force things down on it. But the truth is a lot of these technologies that we are talking about have already not only been piloted but metabolized into systems of governing. We can take a lot of confidence in that they will share it with us. For that question, it is important, and I can share those links with you, how to get informed daily on it.

Senator CARPER. Thanks so much.

Mr. Chairman, I have a related question for Dr. Huder, but I would be happy to yield at this point to one of our colleagues if one of our colleagues is waiting to speak.

Chairman PORTMAN. Senator Carper, go ahead with your question.

Senator CARPER. All right. Thank you.

A similar kind of question, Dr. Huder, if I could. How would a move to remote participation impact the social aspect of congress-

sional work and the opportunity to build or at least try to build bipartisan coalitions?

Mr. HUDER. I think one of the problems with remote participation is typically you only call or reach out in instances where you already know somebody. I do not randomly call strangers, for example. I meet people and then we exchange numbers, and then we build a relationship where phone calls and text messages and interaction can be done. I just see it as a difficult layer to the process. So much of Congress is face-to-face interaction. It is members bonding over their dogs. It is members talking to one another in the hallway or in the elevator. I find that hard to replace in the remote voting setting.

I think that is one of the parts that makes it very difficult, is that if you do not have the opportunity for a space for members of different parties to co-exist, you kind of lose many of those informal touches, so to speak, that build those relationships. There has been a lot of anecdotal evidence about how air travel, for example, and the changing congressional calendar have reshaped the way that Members of Congress interact and who they work with. Whether that is part of a broader political divide, that is probably partly the case; but it is also partly the case that Members of Congress just do not socialize as much because they do not live in D.C. They do not have common social circles, or their kids do not go to the same school anymore.

A lot of these sort of informal social connections were many of the political connections that formed bridges across the aisle, and remote legislating as a permanent sense would, I think, damage an already damaged situation in that particular circumstance. While it is necessary, I do not think it is a long-term solution.

Senator CARPER. All right. Ted Kennedy told me a story early on in my time in the Senate about how the Senate on certain days of the week during the summer would have picnic dinners out on The Mall with their colleagues and families. Ted Stevens told a great story once that I have often shared with others—I will not go into it now—about the fact that he car-pooled early in his time in the Senate with three other Senators—two Democrats, two Republicans. They lived in, I think, Northern Virginia. Just the ability to work together across the aisle just from car-pooling was pretty extraordinary. Thank you very much.

Chairman PORTMAN. Thank you, Senator Carper.

I have some technology questions, but I am compelled to comment again. I wish Congress operated more the way Dr. Huder explained. There is unfortunately not as much interaction as there was when I first got elected back in the 1990s in the House. Certainly I lament that, but I do not know that remote voting is going to make it any worse at a time when we cannot otherwise gather. In fact, I think just the opposite; it gives us the opportunity to come together, which I think Senator Carper would agree it has been a month now since we have had any bipartisan interaction of any sort unless members have reached out, as I have with Senator Carper and some other distinct colleagues, but there has been no interaction. That is the reality. It may not be the theory, but that is the practical reality.

One, this is to be used for emergencies only, not to be used as a regular procedure, of course. But, two, I think it actually has opportunities, remote interaction, to enhance rather than limit the interactions we have with our colleagues. I think it is a matter of using technology, as so many people are today. Probably half the people I represent in the State of Ohio are working remotely today, in whole or in part, they are teleworking, they are on conference calls with their colleagues, but they are interacting with them. At a time like this when we cannot be together, I certainly think it is appropriate for Congress not just to vote remotely but also have more interaction remotely, and I think the technology is there and it is very possible.

Ms. Kelly, I keep telling you I am going to come to you on technology, and I am going to dig into this issue and drill a little deeper. But I see that my colleague Senator Lankford has rejoined us, and I am going to give him the opportunity now to ask questions, and I will come back to you. Senator Lankford.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Great. Thanks, Senator Portman. I appreciate that, and I appreciate the dialogue that we have to be able to be here in this back-and-forth time period. This is exceptionally helpful. It is exceptionally important for us to be able to talk through how we maintain this. All of us are interacting with constituents. It is almost like a live hearing at this point for me, Senator Portman, because I had to step out into the hallway to be able to visit with a constituent. Literally during this time period, I was stepping into the hallway because I was also connecting with a group from the panhandle of my State, listening to some questions that they had, and then coming right back to this hearing. This is more real life happening for us as we are multitasking away from the Hill as well as being back all connected on it. But I do want to ask some specific questions, though.

For Marty Gold, there has been a longstanding requirement for wet signatures for things for the Parliamentarian and some process things like that that require physical presence. In your advice, how many things would have to be dealt with for dropping a bill, for doing an amendment on a bill, for engagement on any kind of changes that would really have to have pretty dramatic changes in our back-of-house operation for how we actually implement bills and vote on them?

Mr. GOLD. Senator, thank you for that question. You are exactly correct. When we start to think about this just from the perspective of remote voting and then we begin to extend it beyond that to all of the rest of the Senate operations that are connected with having a bill become a law, we find all manner of rules, precedents, orders, and practices that are implicated in this. Somebody is going to have to take a very good inventory of all of that to determine what has to be done in each case to make sure that you have checked a necessary box so you can get the final point of the enrollment of a bill and tell the courts that they ought to be deferring to Congress because the bill has been properly enrolled and all of the necessary steps have been taken to lead to that moment.

This is exactly the reason why I do not think that the Senate should be going about amending its rules without having given a lot of study to that question. But for the same reason, I do not think the Senate needs to paralyze itself, understanding that all those things are out there. In other words, you can figure out what it is that you can do at the moment and figure out how to put a standing order into effect and ask the Parliamentarian what the Parliamentarian believes are necessary boxes to check to make that work, see how it works, let it sunset or let it be renewed as the case may dictate, and then in the meantime determine what it is that you need to do on a permanent basis.

I will say this: Nothing distorts the situation more than Congress being absent. That is the biggest thing. Dr. Huder made the point about how this empowers the leadership against the individual member. I agree with that. I will also say it empowers the individual member against the leadership. If you have to get unanimous consent to pass something in a pro forma session and somebody objects, where are you? Or if you try to have a pro forma session and do some business and somebody puts a quorum call in and you have not got members around, where are you? Or the point I was making in my Statement about the fact that many of the Senate procedures require 60-vote thresholds to get you from Point A to Point B, like the cloture rule or budget waivers or many, many other things, if you are talking about 60 out of 100 Senators, that is one thing. If you are talking about 60 out of 75 or 80 Senators because you have a lot of people absent, that is another thing. Senator Portman talked about the absence of Congress and the distortion that creates relative to the power of the executive branch and its relationship to the Congress.

The one thing that we know for sure—or there are two things that we know for sure. This is suboptimal, and you have to see what boxes need to be checked. Then write procedures that allow them to be checked. That is one thing you know for sure. But the other thing you know for sure is that nothing distorts the situation more, including all the personal relationships we have been talking about, than for Congress to be completely absent.

Senator LANKFORD. One of the grand challenges that we have is there is a perspective that if only we would allow Congress to be able to make a big Zoom call and be able to vote yes or no, then this solves the voting issue. One of the things that you bring up there that I want to be able to bring up as well is this issue there is a lot of back-of-the-house that has to be done, and it has to be done legally and appropriately that cannot cleanly be done by everybody connecting online and just saying “aye” or “nay.” That is something we are going to be able to work through the process on.

One of the other questions I wanted to be able to ask you was the type of bill that should be engaged, because I think we all have agreement that this should be extremely limited and it should be extremely temporary. We would all say, hey, there are moments like this that we should be able to be engaged more. But we also know of moments all the way back to 1814 when the Capitol was burned down and we had to be able to move offsite, for times like 9/11 we moved away, times during wartime and we have had limited access. This is not the first time nor will it be the last time

that we have had time that Congress has not been able to meet or has had to look for other places to meet or other methods to meet.

Part of the challenge that we would have with remote voting in particular, more so than remote committee meetings, like what we are doing right now, or a roundtable, this is relatively simple to be able to do. But when you get into remote voting and such, it is trying to find what bills should be appropriate to do, because it is not uncommon to get into the middle of a debate, you get into heated debate on the floor on an issue, and suddenly there is a quorum call that just basically sets things aside so members can get a chance to talk and work out differences. You cannot do that in a remote setting the same way that you do at other times.

Is there advice from anyone that you would be able to raise to say, "In my perspective"—and, again, we will have a different one, but "In my perspective," you would say, "here is the type of vote or the type of bill that should be addressed in this type of moment and bills that should not be addressed in this type of moment?"

Mr. GOLD. That is a wonderful question. I think my own sense is that it is very difficult to determine that in advance because you do not understand the kind of circumstances that will apply at the moment that you have to exercise this power.

For example, at the moment we are not having to do appropriations. At the moment we are not having to deal with that. Now, what happens if Dr. Fauci is correct and the coronavirus comes back in the fall, particularly, let us say, during the time of the lame duck session, which always happens after the election, or has in recent Congresses certainly, when a lot of legislation that has been left over, big omnibus legislation that is left over, now has to be addressed? Perhaps it comes back in such a virulent form—nobody knows that now, but perhaps it comes back in such a virulent form that it is obviously a health hazard for Congress to convene. If you have restricted the kind of legislation that can be addressed by this mechanism, you may defeat the purpose of the mechanism. The purpose of the mechanism is to allow for Congress to participate, for members to express themselves, to represent constituents, not to just have it funneled through the leadership and have it funneled by unanimous consent. Some things cannot pass by unanimous consent.

We do not know the kind of circumstances that may necessitate for this to operate. We may be in a posture—or it is set up now, and then in the summer months for whatever reason it is not necessary, and then the coronavirus or some mutation of the coronavirus comes back in the fall, and all of a sudden it is very necessary. I would not advise hamstringing the kind of legislation ahead of time.

Senator LANKFORD. Mr. Chairman, I have one last question.

Chairman PORTMAN. Absolutely.

Senator LANKFORD. I know I am a minute over time, and I appreciate that.

Let me give you an example of this, of a type of vote that could occur. As any Congress, any Senate especially needs to do, we have both legislation and personnel. We have nominations that need to occur. We are very behind on nominations right now both because we have been out of session for a month and just the slowdown in

the nomination process in general over the last several years. Should it, for instance, be appropriate to say we are going to come back into session, we are in remote, we are going to try to get through 20 different nominations in the course of the day today in 2-hour voting blocs, we are going to continue to be able to just move 24 hours a day moving through nominations, even though we are not physically at that point to be able to have a moment like that? Would you consider that to be appropriate? Should there be appropriate guidelines or boundaries that are set for that type of voting as well?

Mr. GOLD. Senator, I know that there will not be partisan agreement on this point. I know that. But my own sense is that that is a constitutional responsibility of the Senate. It is a constitutional responsibility to deal with advice and consent to treaties, and it is a constitutional responsibility to deal with legislation. In other words, I do not think that the constitutional responsibilities of the Senate should be hived off from one another, say that these responsibilities can be addressed and those responsibilities cannot.

I think that you would probably be better off if you had some sort of agreement between the leadership on how you were going to exercise those responsibilities. But just as I do not think that there is a particular piece of legislation that ought to be hived off, I also do not think there is a Senate function that should be hived off, even though, for purposes of comity, it is probably better off to get some kind of understanding between the leadership on what the Senate will do while it is operating in suboptimal circumstances.

Senator LANKFORD. Great. Thank you.

Mr. Chairman, thank you for allowing me to ask one last question. I appreciate that.

Chairman PORTMAN. Let me say that the other challenge we face right now where we have not been able to gather for a month is that we have nominations, as Senator Lankford has talked about, but specifically nominations related to COVID-19. We have executive branch nominees that are needed for a response to COVID-19 who are not controversial particularly, where there would not be, I do not believe, much partisanship around them. Yet we cannot move on them because we are not able to remote-vote or even remote-discuss. As I said earlier, we have not had any such sessions.

Let me, if I could, Ms. Kelly, ask you a couple technical questions, as I said, dig a little deeper here, and then I am going to ask Senator Carper for his thoughts as we begin to wrap this up. I know everyone has other responsibilities, and we said we would get you out of here before 11 a.m.

With regard to security, what technical requirements would you think are necessary for a platform that Senators would use to vote remotely?

Ms. KELLY. I am not a computer scientists or a technical expert. I have run with a lot of techies who can answer your question in great detail. I do know, however, that our access to expertise is very significant and that a lot of the folks especially in D.C. who have worked on this have set up whole systems for the executive branch, including the Department of Defense (DOD).

I was looking at a Research and Development (RAND) Corporation paper the other day on Central Intelligence Agency (CIA) telecommuting where they had to create some kind of a sensitive compartmented information facility (SCIF) in their home office. I think that there are interesting ideas coming out of the House. I heard one which would be to make use of the Federal Bureau of Investigation (FBI) local offices or military facilities in States and districts. I think those are good short-term possibilities.

I do know also that there are real constitutional challenges in using things like a common cloud. Security for Congress has to be almost a bespoke system. It is probably one of the reasons why we have not built one yet. It is very expensive, and you can only sell one. I think that is one of the challenges. That does not excuse us not having moved ahead on building a modern technology system for Congress.

One of the places I would also refer you to as you move forward is the Select Committee on Modernization in the House. That Committee has—25 percent of its members are from Washington State, and there is something in the DNA or in the water in Washington State that makes it such a tech-literate civic society. I think that that would be a place to turn. I know that Suzan DelBene, Derek Kilmer, Mr. Newhouse, they continually brought up—because I sat through all of the hearings over the last year and a half, 16 hearings. This was an issue that came up continually.

As for security in remote voting, I would suggest looking at the link that I put in my written testimony to the Parliament of Brazil, which actually for years now has had a hacker lab inside the parliament, which, in other circumstances when there was not a pandemic, has experimented throughout the chambers with methods and really got, like Mr. Gold was saying, sort of a digital mimic of really specific functions and niche needs. I think that that is the kind of thing that we can do now. Maybe we need something like a chamber challenge. Challenges are very typical in technology. It is crowdsourcing ideas. I think you could crowdsource ideas within the Senate and the House themselves and share lessons learned in some kind of a cross-chamber repository.

To another point that you brought up, I think something that we do not know yet, because it is not visible, is that there is a really large sort of invisible constituency out there for explanation and collaboration and moving forward and kind of—I call it like a “maker space of modern civics,” is the States. I did all this district research in States and districts for 18 months, and I was just amazed at what citizens are coming up with in collaboration with their elected leaders, certainly in Congress. The Ohio State University is like the mother ship of a lot of this innovation. I have partners at the Ohio State University. You have Kettering in Dayton. You have really amazing infrastructure already to help us sort of dig ourselves out of this civic memory hole that we have been in.

I would also recommend this article that is probably 8 years old now called “Interested Bystanders.” It was a collaboration between, I think, Google Civics and—I am trying to remember—an individual named Kate Krontiris, who is a civic researcher. It really talked about sort of the reorganization of civics and how much more sort of interpersonal and individualized people desire to inter-

act with their government. It is really a beautiful kind of iteration of what we already have, and so I want you to have courage and know that there is a lot going on out there, but we have not named it yet. It has everything to do with how we are going to organize ourselves now going forward, to tap those resources. They are there, and I would be happy to share the ones I know. But I think if we make a place for them to show up—so it is not just about a vote, but it is about a voice. That is why I think that I am so interested in the deliberative process, which is how do we reimagine committees during this time and maybe we can pull some of our new best practices out and continue forward with them when we can show up in person again.

In any case, I can find you the people to answer the very specific technical questions, but I hope that you continue on with this concern for renewing civics, because I think it is there.

Chairman PORTMAN. Great. Thank you, Ms. Kelly, and I will say those people have found us, and we have found them, and some of them are actually associated with Georgetown University, as you know, Dr. Huder. I wrote an op-ed in the New York Times with one of those technical experts 2 days ago along with Senator Durbin. We are working with outside groups that have some very strong views on this, and there are different platforms. We are focusing on two things, really: just authentication that it is the right person, verifying that, and this is done in financial transactions all over the world; and then encryption to be sure that it cannot be hacked, that it is safe.

We think, as you said in your opening statement, this is not so much a technical challenge; it is, you said, I think, an emotional and psychological challenge. I think that is the issue. It is just tradition. It is hard to leave tradition.

All of us want to be together when we can be together. The question is: When you cannot be together, how do you perform your necessary functions? I would say on top of that I think technology and remote interaction can actually improve how Congress operates even outside of a crisis, not for voting but just for interaction, as we have done today, which I think has been very positive.

With that, I would like to turn back to Senator Carper for any additional questions and for his closing comments. Again, I appreciate his partnership in this venture, as we have partnered on so many other things together. I think this has been a very useful exercise. Senator Carper.

Senator CARPER. Mr. Chairman, I perked right up when Ms. Kelly mentioned Ohio State University.

Chairman PORTMAN. Yes.

Senator CARPER. As the Chairman knows, I spent 4 years there as a Navy ROTC midshipman right in the middle of the Vietnam War and have a great fondness and connections and go back there from time to time. I have now one more reason to go back, and, Ms. Kelly, I think you have called Ohio State the “mother ship.” Folks in Ann Arbor call us different things, not quite that kind. But thank you for that piece of information.

I have been jotting down, Mr. Chairman, colleagues, and to the witnesses, I have been jotting down every now and then when someone says something that I think is especially relevant or im-

portant, and I want to mention some of those as we wrap up here. One of the things I jotted down is the technology that we are talking about should not be used routinely necessarily, particularly when we are voting, but if we used it basically in emergencies and to at least make sure to do it with that in mind.

I also wrote down that the idea here is to enhance interpersonal relationships, not to diminish them. I mentioned earlier Vice President Biden's admonition that all politics is personal, all diplomacy is personal. I think that is true. The idea, as we embrace the technologies that we are talking about, is to do so in a way that enhances interpersonal relations and interaction.

One other comment I wrote down was "extremely limited" and the word "temporary." I wrote down that nothing distorts the process more than for Congress to be completely absent, and I would certainly agree with this.

Another comment, for the purpose of that comment, is to enhance the ability of Congress to enhance the ability of Congress to participate, not to diminish it.

I am going to ask in closing for each of our witnesses to give us one or two bullet points, very short admonitions of maybe what to do and not to do as we prepare to wrap up. But this has been fascinating, and, Mr. Chairman, you are known by all of us as a very thoughtful, reasonable, and nonpartisan Member of the Senate who focuses on getting things done and who is not unwilling to take on difficult issues, and this is not an easy one either.

Maybe I could wrap it up and ask each of our witnesses—and we will start with Marty Gold, if you will—just one or two things that you would like to leave us with. When we were in our training courses, going through the preflight or flyover missions, happened to be in classes for those purposes, at some point in a lecture or presentation to us as ensigns and midshipmen, they would come to a point that was a really relevant point that was going to be on the test, if you will, they would stomp their feet. But we are not going to know today if you were stomping your feet, but if you were, give us a couple of foot stompers as we prepare to close out things; if you do not remember anything else, remember this. Ms. Kelly, would you start us off, please? You are there in the pick-up.

Ms. KELLY. In the pick-up, yes.

Senator CARPER. What is the area? New Mexico?

Ms. KELLY. I am in the Four Corners in New Mexico. This is where I am from. This is where I grew up.

Senator CARPER. Oh, wow.

Ms. KELLY. But I made it to D.C. My thoughts, as you were talking, are that this is a crisis, but it is also a tremendous long-term opportunity. What I would suggest is let us ask the tech industry for help. Let us ask them to—like we did in the 1930s and 1940s, put aside these immediate short-term profits and go for an Eyes on the Prize movement forward, a meta challenge for all of us, but especially for the technology industry. I like to call this sort of a moment that we have an Article I renaissance. We could come out of this with a renewed understanding of how important the first branch of government is. The first branch of government owns the real estate of democracy. It really does, far more than the execu-

tive. We can do this. We have the bone structure. A lot of it is just rethinking it and bringing it into the modern era.

This has been true for decades at this point, so I do not want to lose that. I know we are in a crisis, but we have already got momentum, the fact that we have this continuity working group together, it has this great group of people working here on this panel today, people who have thought about these challenges already and can bring their skills to bear right now. Let us not forget that this is our moment to have this renaissance in Article I and to move forward into the 21st century at long last as a much improved democratic system.

Senator CARPER. Your words, Ms. Kelly, remind me of something that Albert Einstein used to say: "In adversity lies opportunity."

Ms. KELLY. That is right.

Senator CARPER. There is plenty of adversity here, so there has to be some opportunity as well. I think it was Rahm Emanuel who came up with it, saying, "Never waste a good crisis."

Ms. KELLY. That is true, too. [Laughter.]

Senator CARPER. Those words of wisdom come to mind at this time. So thanks so much.

Ms. KELLY. Yes.

Senator CARPER. Dr. Huder, please?

Mr. HUDER. I want to thank the Chairman and Ranking Member for gathering us together today. We are in a very difficult moment right now as a country, and this is a very important issue, how Congress continues to function when health risks emerge and it literally cannot convene under normal circumstances. Holding this hearing is in many ways a validation that it can work, it can continue to operate in these difficult moments, and it is important that we continue to draw attention to the ways that Congress can continue to operate.

Senator CARPER. All right. Thank you. Marty Gold, please.

Mr. GOLD. Thank you, Senator. I would emphasize the importance of being willing to experiment with new things. The Senate is a venerable institution. The Senate changes very slowly, as you know. The "Continuing Body" does not tend to adapt itself much to new circumstances and so forth. But I am reminded of the television in the Senate and the controversy that that caused when it first came up. It was originally proposed by Senator Mansfield for use in the Nixon impeachment trial that never happened. It was adopted for one moment in 1974 when the Senate swore in Nelson Rockefeller as Vice President, and then the place was dark again for more than a decade.

The House of Representatives put in television in 1979, and when Senator Baker, my old boss, became Majority Leader of the Senate, he proposed it in 1981, and, boy, was that resisted. It was resisted for 5 years past the time that he actually served in office until finally, in 1986, Senator Dole and Senator Robert C. Byrd, the two Leaders at the time, put in the television in the Senate resolution, and then on an experimental basis. It was only after it was in effect for several months that the Senate finally decided to proceed with it. To tell you the truth, that entire experience, the decade between Mansfield's proposal and the final implementation of television, is very much emblematic of the Senate. It moves slowly.

But if the Senate had not been willing to experiment with that, think of where we would be today where the public would regard the Senate, I think, as an artifact of the Constitution rather than a central part of the government.

The Senate needs to experiment with this, and I would very much encourage it along the lines of the commentary that has been made this morning.

Senator CARPER. Thank you. Thank you all.

Mr. Chairman, if I could, I would like close on a humorous note. We have legislative correspondence, as my colleagues know, each of us has legislative correspondence we respond to, to the people who contact our offices. It used to be we would reply to mail that we would get, and I am a welcome advocate in making use of the U.S. Postal Service (USPS). I think my colleagues, especially in rural parts of our country, [inaudible]. But I asked my mail team, the so-called mail team—and it is comprised of four women. Their supervisor is this fellow named Kevin, and Kevin has come to describe these four women as the “ladies of the quill.” The ladies of the quill, it turns out, use modern technology to respond not so much to the mail we get like they used to about 20 years ago, but for every email we receive, [inaudible]. Last month, [inaudible] for every letter that we get—and there are something like 500 emails for every one letter. In fact, the people who contacted me, all due respect to the Postal Service now, it is important to support the Postal Service, they are not doing that through snail mail. They are doing it through email. We have changed very much the way we communicate with our constituents. In fact, we communicate [inaudible] better for them and maybe even do their jobs more effectively.

I want to close by saying when I first got here to the Senate, I had somebody say, well, we [inaudible]. The world changes, and we need to be able to change with it. My hope is that as we go down this path, we do so in a way that [inaudible] it has been a real comfort, and I think maybe if we are smart about it [inaudible].

I just want to thank our friend and colleague Rob Portman in particular [inaudible] for bringing this together and bringing in [inaudible]. It is great to see all of you. [inaudible].

Chairman PORTMAN. Thank you, Senator Carper. I appreciate it. To the point of things are changing, we had another Facebook live town hall yesterday. We have done one every week during this month-long absence from Washington. And, that is where people are. They are online. The interaction we are talking about with Members of Congress that could be enhanced through technology in my view, even outside of a crisis, also relates to our constituents, of course, and our ability to communicate with them could be enhanced through not just remote voting and remote governance but remote participation as we have had today.

First of all, I want to thank all of our witnesses. This has been a tremendous opportunity to glean from your expertise, your knowledge, and your backgrounds. To Marty Gold, thank you. As usual, you have your foot firmly planted on the traditions of the Senate but also how to move forward and make the Senate more effective. As you said, it moves slowly, but we have made a lot of

changes. You were not around before the filibuster, but think what a big change that has resulted in.

Ms. Kelly, thank you very much for your focus on the technological opportunities here.

Dr. Huder, thank you very much for your willingness to share with us some of your concerns about the need for us to do this in a way that results in more not less interaction so that we are not going further down this track of Congress being polarized. I think those were very good points. I thought the opening statements were great, but also, as I told you, you will have the opportunity to make a longer statement for the record, which you will have online.

By the way, to that point, I would urge everyone who is watching today or listening today, check out the report.¹ This is a bipartisan Permanent Subcommittee on Investigations (PSI) report. As Senator Carper will tell you, we try to do things together, and, we have come up with a consensus document that I think is very helpful. When you think about this issue broadly, you will see a lot of the issues we discussed today outlined and additional issues as well. You can find it on hsgac.senate.gov. “HSGAC” is the name of the Committee. That is H-S-G-A-C dot Senate dot gov. So hsgac.senate.gov. Go to the PSI link. That is the Subcommittee that we are in currently. So hsgac.senate.gov, and then the PSI link to find the report.

Senator Carper, thank you again for being a great partner today and showing how we can function even during a national crisis. I look forward to the time when both of us can be back together in the hearing room and working on our other PSI projects, as we have many that are in the works. Meanwhile, I think this was a very successful experiment, and it is an example of what can happen. It is really a Senate first, and I hope it will be one that other committees and subcommittees will look at as an example of what we can do, even at a time when we are not able to gather physically.

I also want to thank the Senate staff who made this possible. Karl Jackson and the Senate Recording Studio team, thank you all very much. Thanks for dealing with our challenges as we have worked through this the last couple weeks. As I said, this technology is off-the-shelf Senate technology, so it is available to others, but it is one that we had to perfect, and we thank you for your work on that.

I also want to thank all the other staff who have been so helpful: Dan Muchow—we heard from Dan earlier—has been terrific. Kate Kielceski—she is not going to cut me off because I am only going to say nice things about her. But, seriously, Kate has done a great job in monitoring this today. Also, of course, our team—Amanda Neely, Sam Mulopulos, Andy Dockham, John Yaros, and others—we want to thank you. Senator Carper and I appreciate all of you helping to make this happen. This is an opportunity for us to show what can be done through technology and specifically today to get more information out there about remote voting, and I think we have come up with actually some very good principles that ought

¹ The memorandum referenced by Senator Portman appears in the Appendix on page 61.

to apply not just in this situation—as Mr. Gold has said, this may be replicated down the line, sadly—but in all situations, to have that tool in the toolbox in case it is needed to ensure that the legislative branch, the Article I branch, as was said, the first branch, has the ability to continue to express itself.

Thank you again. Thank you, Senator Carper and all the witnesses, and I look forward to seeing you all in person soon.

This roundtable is adjourned.

[Whereupon, at 11:03 a.m., the Subcommittee was adjourned.]

A P P E N D I X

STATEMENT OF CHAIRMAN ROB PORTMAN
U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
*Continuity of U.S. Senate Operations and
Remote Voting in Times of Crisis*
April 30, 2020

Good morning. I hope everyone is staying safe and healthy during these unprecedented times. Seemingly overnight, the coronavirus pandemic changed our way of life. Many businesses are shuttered and millions of American are teleworking for the first time; churches and schools are closed. Health care workers are working around the clock. And in the last five weeks, over 26 million Americans have filed for unemployment. Most believe we are approaching the highest percentage of unemployed since the Great Depression.

Now, more than ever, Americans need to know their leaders are working for them, and that they have a voice as we work to navigate this pandemic. In a world where it's no longer safe to be within six feet of each other, Congress must adapt.

This is not the first time we've needed to ensure the continuity of Congress. For example, with the threat of nuclear attack during the Cold War, the U.S. government constructed a large bunker for Congress to meet should Washington be attacked. However, this may be the first time in the modern era when it is not a physical meeting location at risk, but rather elected officials themselves.

We are a Subcommittee of the Homeland Security and Governmental Affairs Committee, which has jurisdiction over congressional organization. From that perspective, and while we wait for guidance from the Rules Committee on how to conduct formal hearings remotely, today's discussion is an attempt to move Congress forward in times of crisis when we cannot meet in person. And it seems fitting that our topic for today would be remote proceedings in Congress, including remote voting. Today, our gathering is part of making our case. We want to show that it is possible to have a hearing without physically being in a hearing room. We are told this is a first for the U.S. Senate.

In my view, remote congressional proceedings should never be the norm. It should be limited to times of nationwide emergencies, and only when it is infeasible for Senators to be in the same place. Any authorization to proceed remotely should be limited in duration, and any extension of such an order should require a vote by the entire Senate. Our goal should be to bring both our country—and our Congress—back to work in-person as soon as safely possible.

These principles are outlined in the bipartisan remote voting resolution I introduced with Senator Dick Durbin last month. Specifically, our resolution allows the Majority and Minority Leaders to jointly agree to put in place a temporary remote

voting arrangement in times of extraordinary crisis. After 30 days, senators would have to vote to continue to allow remote voting—otherwise, the temporary mandate would expire.

Today, our Subcommittee is releasing a report containing both a legal analysis and technical security recommendations for remote voting.

Legally, the Supreme Court has made clear that the Constitution allows the Senate to make its own rules. The Court has a long history of giving deference to Congress in determining its processes and procedures when it comes to issues surrounding voting. Based on our legal analysis, we expect remote proceedings to enjoy the same deference. I also believe that the founders would be supportive of the legislative branch being heard during emergencies.

We also need to address the technical issues surrounding remote proceedings. In my view, senators should be required to authenticate their identity and verify their vote through an encrypted platform. There are several off-the-shelf solutions that the Senate could use to create a secure and reliable remote voting platform. We don't need to reinvent the wheel.

I encourage people to review the report, which I believe puts to rest many of the concerns that I have heard raised about temporarily authorizing the Senate to proceed remotely in times of crisis. We very much look forward to hearing from our witnesses today about these issues.

By the way, the Senate would not be the first legislative body to work remotely. Several states have decided to continue legislative business in the past month, including allowing members to vote remotely. Across the Atlantic, the European Union has implemented a remote voting system for its legislative body, while the Parliament of the United Kingdom is beginning to experiment with holding virtual proceedings.

While a lot is uncertain about when life will return to normal, one thing should be clear: Congress should be able to continue to represent the American people—do its job—even in times of crisis.

I want to thank Senator Carper for hosting this event with me today. I appreciate him working with me to make sure that Congress can continue to operate and provide needed support for all Americans.

Opening Statement of Ranking Member Tom Carper
“Continuity of Senate Operations and Remote Voting in Times of Crisis”
April 30, 2020

Thank you, Mr. Chairman, for your leadership on this issue. This is an extremely important topic, and I'm pleased that we are able to have this discussion even as we continue to work remotely.

My service on this committee started less than a year before the attacks on September 11th, 2001. As our colleagues and many members of our staffs will recall, one of the planes hijacked that morning was likely heading for the U.S. Capitol. So in the wake of that tragic day in our country's history, we started a conversation about issues like how to assemble Congress in a secure, remote location in the event that we couldn't meet in Washington, DC. There were also tough conversations about how to reconstitute Congress in the event of significant vacancies in the House and the Senate. It was a scary and challenging time.

The new challenges that we face today as a result of COVID-19 are no less scary and no less challenging.

As COVID-19 deaths throughout our country continue to grow, it's essential that those of us serving in Congress are able to respond quickly and effectively to events. Our top priority right now should be to do all we can to provide the necessary support to first responders, health professionals, businesses, and state and local governments, many of whom are stressed almost to the breaking point by the toll this disease has taken. With that thought in mind, I believe this is a good time to restart those sobering discussions from almost 20 years ago and begin to figure out how we can make sure this Congress and future Congresses able to function during a major crisis that might make it difficult for all of us to assemble in Washington, DC.

Whenever I'm confronted with a difficult policy decision like this one, I'm reminded of three adages. The first one is, "If it ain't broke, don't fix it." So as we've looked at the rules governing emergency operations in the Senate, I've asked myself "Are they broken?"

I suppose one could point to the fact that we've been able – with strong bipartisan support – to enact trillions of dollars in spending to fund badly needed programs in recent weeks and argue that things are working just fine. At the same time, though, much more needs to be done, and divisions are starting to show as we debate from afar and in the media about what to do next and when. It may be that unanimous consent is no longer an option; however, inaction is not an option either. So if a remote voting system for the Senate allows us to move to the next stage in our response to COVID-19, we need to consider it.

But as we consider some of the changes that have been proposed to Senate procedures recently, I'm reminded of second adage: "Do no harm." We should not allow any remote voting system established to deal with the impact of COVID-19 to be abused to further unrelated, partisan

goals. It would be truly unfortunate if a system we set up to allow us to deal with this disease were also used in the coming months – for example – to confirm controversial nominees.

Potentially even worse than that, however, would be future Senate Majority Leaders using remote voting ever more frequently in future years to conduct routine Senate business so that members can remain home in their home states rather than returning to Washington to do our Nation's business.

Just about every significant legislative success that I've been a part of as a member of this body has come out of personal relationships that I've been fortunate to develop with my colleagues during our time in Washington, and through face-to-face discussions and negotiations in the Capitol and in our offices. Losing those relationships and the ability to work closely with our colleagues could well mean losing forever the Senate as we have known it in the past, and likely accelerate all of the negativity and partisanship that has made Congress so unpopular with voters in recent years.

So let me close, Mr. Chairman, by acknowledging that there are more than a few tough questions that we'll need to confront as we try to decide what course to follow with respect to this issue. Helping us on that journey is my third – and final – adage of the morning: "Find out what works and do more of that." After all, our country is not alone in grappling with this global outbreak. We would be wise to look closely at how other countries and legislative bodies are dealing with these same issues – including a number of states that are taking bold steps – and see what lessons we can learn from their experiences.

I want to again thank you, Mr. Chairman, as well as the members of our respective staffs, for the work that went into pulling this discussion together. And to our witnesses, let me welcome each of you. We look forward to hearing from you and to a productive and timely conversation on a topic that needs to be addressed at this critical time in our nation's history.

Statement of Mr. Martin B. Gold

Roundtable of the Permanent Subcommittee on
Investigations, Senate Committee on Homeland
Security and Government Affairs

“Continuity of Senate Operations and Remote
Voting in Time of Crisis”

April 30, 2020

Mr. Chairman, Ranking Member Carper, and members of the Subcommittee, good morning. My name is Martin Gold. Nearly a half century ago, I began working at the United States Senate for my mentor, Senator Mark O. Hatfield of Oregon. I served on his personal staff, and by his appointment on the Senate Select Committee on Intelligence and on the Senate Rules Committee. Later, I was privileged to assist two Senate Majority Leaders, Howard Baker and Bill Frist. I have studied and loved this institution all my adult life, and have the highest respect for the role it plays at the center of our constitutional system. Thank you for your invitation to participate in this roundtable.

Senate leaders have worked thoughtfully to mitigate the impact of the coronavirus on the chamber's deliberations. For example, extended roll call votes, social distancing on the Floor, the substitution of conference calls for in-person meetings, restrictions on access to the Capitol and the office buildings, and pro forma sessions are useful strategies to minimize exposure to disease. When the Senate returns to business, many of these steps may continue. But is there more the Senate can do to retain its deliberative character while protecting its membership and staff?

Proposals have been made to use technology to augment or replace customary operations. Mr. Chairman, you and Senator Durbin have legislation to permit remote voting.

Senator Paul has a separate resolution providing a different means to the same end. More proposals may emerge. Assuming they are technologically feasible, are they constitutional?

At issue are provisions in Article I that a quorum be present to conduct business and may compel the attendance of absent Members,¹ that Congress shall assemble at least once a year in a meeting,² and that neither House, without the consent of the other may adjourn to a place other than that in which they are both sitting.³ Will virtual proceedings satisfy these requirements? And if they do, what must be done to amend or override Senate rules to make them happen?

The most basic issue arises from the mandate that a majority of each House shall constitute a quorum to do business. If the absence of a quorum is shown, the Senate must either establish a quorum, adjourn, or recess pursuant to a previous order. Both your resolution and Senator Paul's stipulate that participation by a majority of Senators in a virtual vote shall constitute a quorum. Would that be sufficient? Given Article I authority for Congress to self-govern, I believe it would.

While the rulemaking power is not absolute, and cannot be arbitrarily exercised, it is ample. The Supreme Court addressed this point in United States v. Ballin,⁴ a case that challenged legislation enacted under an 1890 House rule concerning the way quorums were established.

¹ Article I, Section 5, Clause 1.

² Article I, Section 5, Clause 2, as amended by the Twentieth Amendment, Section 2.

³ Article I, Section 5, Clause 4

⁴ United States v. Ballin 144 U.S. 1 (1892)

Prior to that year, it was the practice of the House to recognize for a quorum only those Members who participated in a vote. This arrangement led to the frequent tactic of “quorum breaking,” in which Representatives who were present in the House blocked legislation by simply declining to vote.⁵ On January 29, 1890, the House considered a contested election case, *Smith v. Jackson*.⁶ Attempting to obstruct a resolution to seat Smith, members of the minority, who had vigorously debated the issue, refused to vote on the motion to consider it. The outcome was 161 yeas, 2 nays, and 165 not voting. Combined with true absentees, less than a majority of all sworn Representatives had voted. “No quorum!” exclaimed Representative Charles Crisp of Georgia, a leader of the opposition.

Speaker Thomas Reed conducted a count of Members in the chamber.⁷ He took note of all Members present, not just the ones who had voted, and announced that a quorum was present. The Speaker’s ruling ignited a parliamentary fracas that stretched over three days. At the end, the House affirmed him. In February, it memorialized the change by adjusting its rules to make them consistent with the new precedent.

Later in 1890, Congress passed legislation increasing tariffs on certain goods. Mr. Ballin was an importer. He contended the legislation was not properly enacted, because a quorum of the House was not present. The tally on the tariff bill was 138 yeas and zero nays, with 189

⁵ “As early as John Quincy Adams’ time, members had realized that on a matter where the sides were closely divided... if the minority simply refused to vote, it would usually mean there would be no quorum for considering business. The majority was almost certain to have a few absentees, and so the votes cast would number fewer than half of the members of the House.” Richard B. Cheney and Lynne V. Cheney, *Kings of the Hill: How Nine Powerful Men Changed the Course of American History* (1983, 1996), p. 104.

⁶ The dispute arose from a contested 1888 election in the Fourth District of West Virginia.

⁷ Reed stated, “The Chair directs the to record the following names of members present and refusing to vote.” *James Grant, Mr. Speaker: The Life and Times of Thomas B. Reed: The Man Who Broke the Filibuster* (2011), p. 259.

Representatives shown as not voting. However, apart from the 138 Congressmen who voted, the Speaker noted that 74 other Members were also present. Taken together, the 212 represented a quorum of the House. Reed declared so and the bill passed.

The Ballin litigation involved the interplay of two explicit constitutional provisions. One requires that a quorum be present to pass legislation. The other grants Congress the right to manage its own proceedings. After addressing the sweep of this rulemaking power, and limitations on its arbitrary or overreaching exercise, the Supreme Court upheld the validity of the statute.

Justice David Brewer explained, “The Constitution empowers each house to determine the rules of its proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.”⁸

Brewer continued, “Within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just.”⁹

It was up to the House to decide how to ascertain a quorum, said the Court, “The Constitution has described no method of determining the presence of a majority, and therefore it is within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact.”¹⁰

⁸ 144 U.S. 1, 5.

⁹ *Ibid.*

¹⁰ 144 U.S. 1, 6.

Brewer described a duty of judicial deference to this power. "It is no objection to the validity of the rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."¹¹

Accordingly, Congress may alter longstanding procedures to meet changing conditions.¹²

The Senate has also changed the way it determines that a quorum is present. Prior to the Civil War, the Senate considered a quorum to be a majority of Senators entitled to be sworn. However, with the secession of the Confederate states, 18 seats of Southern Senators were abandoned and left vacant. Because those states were deemed still part of the Union, although in rebellion, counting a quorum the old way would mean that more than two-thirds of the Senators who remained would be needed to do business. Confronted with this untenable situation for much of the war, the Senate finally amended its rules so as to construe a quorum to be a majority of Senators chosen and sworn.¹³ In the present day, this construction is expressed in Senate Rule VI.

¹¹ Ibid.

¹² For example, subsequent to the September 11 terrorist attacks, the House of Representatives provided for a revised way to count a provisional quorum in the event that catastrophic circumstances prevented a majority of Members from assembling. House Rule XXII states that such circumstances include "natural disaster, attack, contagion, or similar calamity rendering Representatives incapable of attending the proceedings of the House."

¹³ Senator John Sherman of Ohio proposed the resolution. The resolved clause read, "That a quorum of the Senate shall consist of a majority of Senators duly chosen." Sherman explained the problem. "The framers of the government never intended that their schemes should be broken up and this government disorganized by the absence of the representatives of some of the States, caused by death, secession, or anything of the kind. We are now just in that critical condition when we cannot call for a division on a question. We are afraid to call for a division, we are afraid to take a sense of the Senate, for fear we shall be left without a quorum." Congressional Globe, May 4, 1864, p. 2051. By 26-11, the Senate adopted Sherman's resolution. Congressional Globe, May 5, 1874, p/ 2087.

In National Labor Relations Board v. Noel Canning, et. al.,¹⁴ the Supreme Court unanimously invalidated three recess appointments to the National Labor Relations Board in between pro forma sessions. In making the appointments, the Executive argued that pro forma sessions were merely an artifice to prevent exercise of the recess appointment power.

Once again, a major consideration in a constitutional dispute was judicial deference to a coordinate Branch. Citing the Ballin precedent, Justice Breyer stated, “The standard we apply today is consistent with the Constitution’s broad delegation of authority to the Senate to determine how and when to conduct its business.” Breyer added, “The Constitution thus gives the Senate wide latitude to determine whether and when to have a session, as well as how to conduct that session. This suggests that the Senate’s determination about what constitutes a session should merit great respect. Furthermore, this Court’s precedents reflect the breadth of power constitutionally delegated to the Senate. We generally take at face value the Senate’s own report of its actions.”¹⁵

In Convention on August 10, 1787, the Framers debated the proposal that a majority of members in each House would constitute a quorum to do business.¹⁶ Although they considered lesser and greater numbers, they settled on a majority, believing that it would foster broad representative participation in Congress’s work. As George Mason of Virginia argued, “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.”¹⁷

¹⁴ National Labor Relations Board v. Noel Canning, et. al. 573 US 513 (2014)

¹⁵ Noel Canning, slip opinion at 34-35.

¹⁶ The requirement emanated from a recommendation of the Committee on Detail. On August 6, 1787, the Committee reported to the Constitutional Convention.

¹⁷ James Madison, Debates in the Federal Convention of 1787, Volume Two, p. 376. The opening of the First Congress met this objective. The Senate convened on March 4, 1789. Eight Senators from five states were

Permitting remote voting and virtual proceedings fully serves, and closely relates to, this central constitutional objective. Related to it is the power to compel attendance of absentees. Exercise of this authority is discretionary, obviously more difficult with remote voting. However, that fact does not tarnish the validity of deeming participants to be present.

The Article I requirement of an annual meeting has already been satisfied for 2020. Courts have never had to construe this mandate. It therefore presents a true case of first impression whether Congress must gather in person at least once in 2021, or if it would suffice to have contemporaneous participation from Members scattered in different locations, coupled with a statement from Congress that the requirement had been met. The same considerations apply to convening either or both Houses upon a call of the President.

Would the courts invalidate legislation by applying a requirement for a physical meeting if Congress declares is unsafe to convene one? As Justice Robert Jackson once observed, it is useful to temper “doctrinaire logic with a little practical wisdom.” Failure to do so, he said, could convert the Constitution into a “suicide pact.”¹⁸

If the Senate decides to authorize virtual proceedings, it must either amend or override a body of Senate rules, specifying either that such proceedings satisfy the rules or that the rules are expressly waived. It must also take account of any precedents or orders that may operate notwithstanding contradictory language in the rules, to avoid inadvertent impact on them.¹⁹

present, an insufficient number for a quorum. Another Senator appeared on March 19, one more on March 21, and yet another on March 28. Finally, on April 6, the necessary twelfth Senator arrived, so that eight states in total were represented. The Annals of Congress states, “Richard Henry Lee of Virginia, then appearing, took his seat and formed a quorum of the whole Senators of the United States.” 1 Annals of Congress, Proceedings of the Senate of the United States at the First Session of the First Congress, Begun at the City of New York, March 4, 1789.

¹⁸ Terminiello v. City of Chicago 337 U.S. 1 (1949), Justice Jackson dissenting

¹⁹ All are exercises of the rulemaking power and stand on an equal constitutional basis. The latest in time overrides previous exercises, to the extent of an inconsistency.

One rule involves committee action.

- Rule XXVI, paragraph 7, requires that before a measure, matter, or recommendation can be ordered reported from committee, a majority of committee members be contemporaneously present²⁰ and that a majority of those Senators vote to report it.²¹ Committees have discretion whether to permit proxy voting, but proxies cannot circumvent these requirements.

Once something is available for consideration in the full chamber, other rules are implicated.

- Rule VI, already discussed here, specifies quorum requirements, optional mechanisms to produce a quorum, and a prohibition against a Senator absenting himself from service of the Senate without leave.
- Rule X, essentially defunct in modern practice, specifies a requirement for a two-thirds vote in order to create a special order for consideration.
- Rule XII provides for the process by which roll call votes shall be conducted and conditions under which a Senator may be excused from voting.²²

²⁰ Senate Rule XXVI, paragraph 7, clause 1. Its origins are in the Legislative Reorganization Act of 1946.

²¹ Senate Rule XXVI, paragraph 7, clause 3. This rule further stipulates that "Action by any committee in reporting any measure or matter in accordance with the requirements of this subparagraph shall constitute the ratification by the committee of all actions theretofore taken by the committee with respect to that measure or matter, including votes taken upon the measure or matter or any amendment thereto, and no point of order shall lie with respect to that measure or matter on the ground that such previous action with respect thereto by such committee was not taken in compliance with such requirements."

²² S. Res. 548 amends this rule to permit remote voting for a 30-day period upon a determination by the Majority and Minority Leaders (or their designees) that "an extraordinary crisis of national extent exists in which it would be infeasible for Senators to cast their votes in person." The designation may be renewed for 30-day periods by an affirmative vote of three-fifths of Senators duly chosen and sworn. Senators voting remotely are deemed present for quorum purposes. Senator Paul's proposal, not yet introduced, makes in order a privileged motion to authorize remote voting, specifies procedures for its consideration, sets a three-fourths supermajority threshold for passage, and deems Senators voting remotely to be present for quorum purposes.

- Rule XV requires that amendments and instructions accompanying motions to recommit be reduced to writing, and be provided to the desks of the Majority Leader and the Minority Leader before being debated; the Rule further provides that all motions shall be reduced to writing on demand, before being debated.
- Rule XIX sets out debate procedures. It provides for recognition by the Presiding Officer and provisions concerning protocol for the conduct of debate, along with mechanisms to address alleged violations of such protocol.

Mr. Chairman, if the Senate is wary about amending its rules, while being mindful that the contagion is active and could recur, it might adopt a Standing Order that would temporarily override the Rules without changing their text. This is what the Senate did in the 113th Congress with S. Res. 15, providing a Standing Order to reduce post-cloture time on certain nominations, and guaranteeing a limited right to offer amendments in exchange for capping debate on a motion to proceed to legislation. The Standing Order expired at the end of the 113th Congress.

It may be sensible to enter a Standing Order that responds to immediate and near-term emergency conditions, while acting more deliberately on making permanent changes to the Standing Rules.

Whether proceeding by Standing Order or Rules amendment, the Senate should consider:

- What are the conditions and mechanisms that permit conversion to a virtual Senate?
- For what duration does the authority for a virtual Senate remain in effect? What is necessary to extend that authority and at what intervals?

- If this is done via Standing Order, for how long shall it remain in effect?
- What proceedings are covered? Is it only voting, or also debate, amendments, and the full range of other Senate deliberations?

Virtual proceedings are not truly a substitute for normal Senate operations. The opportunity for Senators to interact with each other, with party leaders, and with staff is clearly diminished if committees, the cloakrooms, and the Floor do not function normally. Moreover, as Senator Robert C. Byrd often said, the two great rights of Senators are the right to debate and the right to amend. Neither of these rights is vindicated by a process that allows remote voting without accommodating the need for virtual proceedings. Both the quantity and quality of Senators' engagement would be diminished.

It may be necessary to implement a virtual process in phases, beginning with remote voting. However, to the greatest degree and earliest time feasible, proceedings should be extended to replicate the Senate floor.²³

Virtual proceedings are sub-optimal, but even worse would be a Senate that needs unanimous consent to operate for prolonged periods in pro forma sessions, or one that must convene in hazardous conditions if there is an objection.

Again, I appreciate the opportunity to share these perspectives with you and I am pleased to respond to your questions.

²³ For example, the British Parliament has authorized virtual proceedings, phasing them in rather than converting all at once. On April 22 Parliament instituted a hybrid Prime Minister's Question Time, with a minority of Members present in the House of Commons and most Members able to join virtually. Parliament is reviewing how to expand virtual proceedings to other aspects of its business.

**Testimony of Lorelei Kelly
Fellow, Data + Digital and
Director of Congressional Modernization
Beeck Center for Social Impact + Innovation
Georgetown University
Before the Senate Homeland Security and Government Affairs Committee
Permanent Subcommittee on Investigations
April 30, 2020**

Chairman Portman, Ranking Member Carper, Members of the Subcommittee, thank you for the opportunity to submit testimony. My name is Lorelei Kelly and I work on congressional modernization at the Beeck Center for Social Impact + Innovation at Georgetown University.¹ The Center is a distributed workplace and my colleagues and I collaborate across time zones and geographies using video conferencing every day. Our mission is to find and scale methods for positive social change. To that end, I'm excited to share information about why this virtual subcommittee gathering is a vital milestone on Congress' path to becoming a resilient, 21st century legislature. If we do this right, these institutional steps forward during the pandemic will facilitate Congress joining the rest of society, a move that will benefit everyone.

I have worked on improving congressional capacity for two decades--ten of them here on Capitol Hill. From 1997-2006 I organized a bipartisan national security study group shared by the House and Senate. Although I worked on a House side staff, my partner office here in the Senate was the late Senator Richard Lugar of Indiana. It made perfect sense for him to support our knowledge sharing venue because our main focus was nuclear security. Over time, our program grew to include the many global threats that were revealed after the end of the Cold War. These challenges and threats are still with us today, including information overload, information weaponization and the decline of trust and legitimacy in governing institutions.

Today we have a chance to begin to remedy these challenges.

First, a Congress that can carry out its duties from a distance is a national security imperative. This institution's information architecture should be considered critical infrastructure. Indeed, a secure communications system for voting and deliberation in the legislative branch is a modern requirement to uphold Article One in our Constitution. I would never wish it upon us, but this pandemic pause gives us a chance to build momentum for a technology transition that has been a long time coming. The question is not can we make video conferencing work? It does work. We are watching it happen. The more apt question is how do you want to operate existing technology? And after this roundtable, we will have lessons learned. It is important to remember that we've gone through a dramatic technology transition before. Many of us here today likely have fuzzy memories of the Senate LBB--Life Before Blackberry --when staff could lose a Senator on a site visit or down a long marble hallway. Indeed, September 11, 2001 fundamentally spurred forward operational changes like constant mobile connectivity--that have now become workflow norms.

¹ Please see the report [Modernizing Congress. Bringing Democracy into the 21st Century](#) produced by the Beeck Center for Social Impact + Innovation at Georgetown University, 2019.

Last October, I co authored a memo to the House Select Committee on Modernization. It described the dangerous technology gap in our continuity of Congress planning. In the memo we asked what will we do if movement is prohibited at a time when members are dispersed across the USA? When it is too dangerous or impossible to reconvene in DC? We recommended that Congress prioritize and secure its remote capacity and technology, leveraging its existing district office structure, to prepare for such an event. The pandemic happened just a few months later.

Today the absence of preparation is alarmingly obvious. Both the House and Senate lack emergency rules to allow for temporary remote voting. We have little surge capacity and we still are missing a continuity plan. I believe that we cannot call ourselves a resilient democracy until Members of the House and Senate --actually the entire First Branch--can carry out their duties from afar. But there's good news. This roundtable today shows that we are on the right track. Moreover, building this system will be an incremental but fundamental step forward in restoring the checks and balances in our government. The Executive Branch has an emergency communications system, after all. It's called "First Net." We should all be asking ourselves where is the First Net for Congress? Where is the modern and safe digital infrastructure for the world's most powerful national legislature?

Equally important, if we make video conferencing platforms an option, we will be able to create new methods to improve trust and legitimacy in this governing institution. A remote system has the potential to reinvest Americans' belief in Congress because it will change who gets to participate regularly in the workflow of the Senate. With remote technology, the range of potential witness invites becomes huge. How often do small businesses in your state get to come testify? How frequently do non profit organizations connect in a meaningful way to the deliberative process? Today funding and time constraints limit who gets called as a witness to a committee hearing. These boundaries make Congress seem insular, exclusionary and even uninterested in the feedback of regular people. Just think of the real-time situational awareness we could have if local first responders, medical professionals, teachers and health care workers could fill your committee panels during this pandemic. We know this remote inclusion can happen because we're doing it right now. I'm sitting here talking to you from a horse corral in San Juan County New Mexico. One of the nation's most intense pandemic hotspots is the Navajo Nation, just on the horizon behind me. I'm here because--like everyone else-- I could not drive 4 days back to Washington, DC.

And then there's the Senate itself. A remote system for voting and participation will bolster this chamber's strong suite--the deliberative process. The Senate is built to provide due diligence in the nation's policymaking. Technology assisted hearings could be the sorting and filtering mechanism required to succeed in today's overwhelming and often weaponized communications environment. The need for improved content moderation is a common challenge in today's world. Fortunately, there is a rigorous discussion and many examples of participation rules and terms of engagement across all sectors from organizations that use digital platforms for broad participatory discourse. Configuring a platform that promotes authentic and productive information exchange is an art and science. We can learn from the moderators themselves, or those who have successfully set up a curated comments section in a newspaper or from Reddit, a popular online discussion forum. We can even learn from and build on Congress' own franking rules--the original content moderation guidelines.

More specifically, it's important to note that the PSI subcommittee is the perfect institutional champion for making progress on the remote technology front. Why? Because the

muscle memory of this committee includes assuring an informed and connected nation. This is the committee that handles Information systems; national connectivity is in its DNA. HSGAC started out as the Postal Committee when the US post office embodied the operational promise of American democracy- that everyone would be able to communicate and that the US Government would guarantee it.

Today's hearing is one way to build confidence here in this chamber and in the American public that the First Branch of Government is an informed, responsive and effective part of our national leadership during this pandemic. We can look to states for models of progress. Several state legislatures have moved on ahead with remote capacity. But there's more. I recently spent 16 months conducting field research in states to learn how House members are innovating new methods for constituent input into the policy process. Based on that experience, I can tell you that states are more than the laboratories of democracy. Today they are maker spaces for modern civics. New ideas are flourishing. I worked in New Hampshire, Arkansas, Tennessee and Massachusetts. I also have research partners in California and Ohio. I look forward to visiting every one of your states to learn how you, your colleagues and your constituents are innovating to make our government more informed, responsive and effective.

State-based government locations are already being actively discussed as a substitute for congressional activities outside of DC. One recent proposal for remote activities is for Congress to use FBI or military facilities during the suspension of activities in the capital. This is a good idea for now, but it should not suffice as a substitute for our own comprehensive and nationwide communications system. Here's the thing: the most important real estate in our democracy belongs to the First Branch. To be sure, Congress is not geographically contained on Capitol Hill. This institution exists in 900 district offices in every corner of our nation. Nearly half the staff of the Senate are outside of DC. Not only does the First Branch contain the institutional memory of our country's government, it owns the national network that is the Federal Depository Library System. Public and land grant universities are another local entity to leverage for remote processes. The Washington State legislature recently ran a pilot distance witnessing experiment with community colleges, and I'm sure they'd be happy to share the outcomes. Today we should be asking ourselves if there is a way we can experiment now in order to bolster a digital extension capacity through the cooperative extension program. Perhaps one of its modern functions could be to organize, curate and contribute authentic local data during the formative stages of lawmaking.

My most important message here today is that we can do this.

The topic of this hearing sounds technical, but enabling remote functions in the lawmaking process is not really a technical problem. It is, rather, a cultural change. And we've needed it for some time now. I want to stress that I'm not downplaying the importance of showing up in person. Politics is the ultimate human endeavor and convening in person will remain desirable and even imperative. But allowing temporary remote activities like voting and deliberations will not create a distracted "couch potato" legislature. The requirement to repeatedly refresh permission for remote activities is in the Portman/Durbin bill. And other democratic legislatures have already figured out secure remote methods during this pandemic and for use in other circumstances. Despite being convenient, these new methods are not enticing them to do away with in person convening.

And besides, we should all take comfort in knowing that Congress is already on the right track. The House Modernization Committee is a good example of institutional progress on technology recommendations. But there's more. Behind the scenes here on Capitol Hill, the technology gears have been sparking: Congress has been machine readable for several years. Data is available in bulk. Both House and Senate data is consolidated at [Congress.gov](https://www.congress.gov). A treasure trove of congressional data is now open and available to the public. Paper based systems are slowly transitioning to an integrated, digital workflow. We've got a solid foundation in place. On top of that, the private sector has decades of experience building secure information sharing systems across time zones and diverse geographies. When we do decide to move forward, we will surely have the benefit of world-class private sector assistance.

Indeed, let's reflect on what we can learn about national unity from this crisis. This pandemic pause is a chance to re establish a nation-wide common experience. Americans are coming together to help each other in every state. Despite frustrations, Congress has taken vital stabilizing steps to provide relief. As far as remote technology goes, it's likely that every American either knows someone or has personally moved an entire workflow to an online video conference system. They are having the same experience as we are today. You can be sure that this workspace will be different than what you are used to in the Senate chamber, but you can still get a lot done. And, we know some things already. For example, glitches are inevitable. Lagging will happen--it's hard--and we have to deal with it. We know we need to figure out how to multi task. How about time limits, or raising your hand? How are you supposed to communicate in confidence with your staff? Figuring out how to answer these sorts of questions is now our challenge.

Most important, we must make sure that voting or deliberation using remote technology is a simple process that everyone can understand. Other democratic countries are sharing lessons learned every day. Please make sure to view the [video explainer](#) that the Parliament of Brazil provided for remote member participation.² Finally, we should have confidence that remote functions here on the Hill are doable. This won't be too hard if we work together. The House Veterans Affairs Committee conducted a virtual gathering just two days ago. Moreover, members began piloting new platform methods before the COVID19 even arrived.³ We need to make sure that we are sharing newly gained knowledge across the Hill during this time of rapid change. I recommend that the leadership of both parties here in the Senate designate staff to create a shared mechanism for lessons learned.

I hope what I have offered here in my testimony today helps build confidence to keep the momentum for remote voting and deliberation going forward. I am positive that today's hearing and the steps that follow will benefit this institution and the American people. To be sure, my endorsement of remote capacity is not extraordinary. What we are discussing here today would be expected of any modern public-facing organization. And thanks to this subcommittee, what I'm saying is not just theoretical. We are at this very moment showing how our institutions can rise to the occasion and how our leaders can begin to build the groundwork for a more capable Congress, a stronger Article One and a more resilient democracy.

² Please see www.crowd.law at NYU for many international examples.

³ Please see these examples: a member led district level SIDE hearing (Stakeholders, Individuals, Data and Evidence, case study forthcoming from Beeck Center, a collaborative editing platform used by a [House Committee to write a bill with individuals](#) distributed across the USA and [Elevator, a mentoring app built to assist new members](#).

I look forward to following up and assisting you with any further information.

**Testimony before the Permanent Subcommittee on Investigations
Committee on Homeland Security and Government Affairs
United States Senate**

**Joshua C. Huder
Senior Fellow, Government Affairs Institute at Georgetown University**

April 30, 2020

Chairman Portman, Ranking Member Carper, and members of the Committee, thank you for the opportunity to testify before you today. My name is Joshua Huder. I am a Senior Fellow at the Government Affairs Institute at Georgetown University.

We gather today in a virtual forum at an unprecedented moment in American history. In addition to a public health crisis, the coronavirus pandemic has brought catastrophic economic hardship, strain, and uncertainty as we try to slow the spread of the disease.

Now, more than at possibly any other time in our history, the American people are relying on Congress to guide us through this crisis. Rising to that challenge will require Congress to adopt some creative processes to continue its operation.

In my testimony, I want to make three points about remote legislating as a possible option for Congress.

First, in order to fulfill its constitutional role, it is imperative Congress adopt methods for absent members to participate in drafting, debating, and passing legislation to address the COVID-19 pandemic, as well as processes to formally and publicly oversee their implementation and execution.

Second, remote legislating may be necessary under these extraordinary circumstances, they also pose serious institutional consequences for Congress. They should therefore remain strictly and narrowly limited to emergency situations only and not adopted as part of regular proceedings.

And finally, I will highlight some of the practices and difficulties associated with remote legislating processes.

Remote Participation Processes

It is critical Congress creates processes to fulfill its constitutional role and responsibilities. The COVID-19 pandemic has disrupted, and will continue to disrupt, normal congressional operation. Members' weekly commute, by air or train, is now a public health risk. Committee hearings, where members sit side-by-side to oversee programs and consider legislation, now violate safe social distancing practices. Merely being in the same space to vote turn normal lawmaking procedures into dangerous opportunities to spread the life-threatening virus. There are several downsides in failing to adapt to his extraordinary circumstances.

If Congress does not adopt novel, remote procedures, it could delay congressional responses to the pandemic. The past few weeks we have seen both chambers of Congress¹ use extraordinary processes to avoid convening their full memberships to pass historically large rescue packages. While each chamber ultimately succeeded, both experienced delays due to missing quorums and routine procedural hurdles because they were unable to conduct normal roll call votes. These delays, while short, were unnecessary. Further, these processes raised the bar for passage to near unanimity, which is unsustainable over the duration of the pandemic. If Congress cannot safely convene, it risks its ability to pass timely legislation to address constituents' urgent health and economic needs.

Furthermore, the inability to convene in committee or the floor robs the policymaking process of deliberation. Deliberation in a representative democracy is a public good. The process of considering alternatives, giving voice to diverse constituencies, and illuminating public problems and concerns make Congress more than a policy machine. As the most democratic branch of government, Congress is the closest reflection of the American people – even if it is imperfect.² And while its politics are sometimes ridiculed, there is no other institution that better voices the diverse experience of the American public. Representatives' voices need to be heard as Congress debates, enacts, and oversees historically large emergency measures.

Without deliberative processes the pandemic response omits important sources of information. As trillions of dollars are doled out at record pace, members of Congress are, in many ways, the best situated to understand the response's successes and failures. Constituent casework is a critical source of oversight and information.³ Members of Congress will be among the first to hear if stimulus checks are delayed, if health care funding is inadequate, which industries suffer acute challenges, and what state and local governments need.

In other words, the inability to meet and share information through normal legislative channels could make government responses less well targeted. If committees cannot hold hearings, Congress will be unable to oversee the programs' implementation, demonstrate its concerns to agencies executing the programs, or illuminate to the public how COVID response efforts positively or negatively affect their constituents. Oversight is critical to ensure the programs Congress creates are executed as the Congress intends. The pandemic has and will strain communities differently. Diverse representation better informs policymaking. If Congress cannot convene its committees, we risk enduring a historic pandemic flailing blindly in the dark, unable to see problems in advance or understand them in hindsight. Effectively addressing this crisis will require the input of every representative and senator, and that means ensuring the representational link between constituents and government is not severed even amid historic social disruption.

¹ Heather Caygle and Sarah Ferris, "House passes \$2 trillion coronavirus package — but not without last-minute drama," *Politico*, March 27, 2020, <https://www.politico.com/news/2020/03/27/house-vote-2-trillion-coronavirus-package-deal-150869>; Emily Cochran and Nicholas Fandos, "Senate Approves \$2 Trillion Stimulus After Bipartisan Deal," *The New York Times*, March 25, 2020, <https://www.nytimes.com/2020/03/25/us/politics/coronavirus-senate-deal.html>.

² Lawrence C. Dodd, "Congress as a Public Mirror," in *Thinking about Congress: Essays in Congressional Change* (Washington D.C.: Routledge, 2012).

³ John R. Johannes, "Casework as a Technique of U.S. Congressional Oversight of the Executive," *Legislative Studies Quarterly* Vol. 4, No. 3 (August, 1979), pp. 325-351.

Congress is a substantially public institution engaged in public deliberation with other government actors to enact and ensure proper implementation of its will.⁴ Members gathering to deliberate, take positions, and engage in that debate is critical component of government operation, representation, and American politics more generally.⁵ Given the health and safety concerns of physically convening, Congress must consider extraordinary processes – such as remote participation, voting, and deliberation – to ensure it continues to perform its constitutional role in authorizing, appropriating, and overseeing the government’s pandemic response.

Institutional Consequences

That said, remote voting and participation present long-term institutional consequences if adopted permanently or allowed to become routine alternatives.

Remote voting distances members from the policymaking process. Members’ ability to influence lawmaking is largely a function of information they can obtain: knowledge of the process creates opportunities to influence it. Unfortunately, physical distance also entails informational distance. In this sense, remote participation creates problems for rank-and-file members.

Among the worst features of the current process is the gulf between rank-and-file members and the substance of legislating. Members are shut out of the floor amendment process.⁶ Leaders structure major agreements and present them to membership at the last moment as take-it-or-leave-it packages.⁷ Omnibus legislation forces members to accept sometimes dozens of policy riders that would otherwise receive greater vetting if considered and voted upon individually. Agencies receive less routine oversight and formal direction because regular but important reauthorizations fail to garner floor time or political attention. Agency spending escapes greater chamber scrutiny by passing as minibuses or omnibus legislation rather than separately.⁸ These trends correspond with the expansion of party leaders’ role in shaping legislation over the last 40 years.⁹ And while those changes all occurred in the absence of remote participation, remote legislating has the potential to further exacerbate an already bad problem. It gives leaders even more opportunity to legislate in secret, manipulate the process, and otherwise keep the rank and

⁴ Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* (New Haven: Yale University Press, 2017).

⁵ David Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974); David Mayhew, *America’s Congress: Actions in the Public Sphere, James Madison through Newt Gingrich* (New Haven: Yale University Press, 2000).

⁶ Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, 5th edition (Washington D.C.: CQ Press, 2017);

⁷ Steven S. Smith, *Party Influence in Congress* (New York: Cambridge University Press, 2007).

⁸ Peter C. Hanson, *Too Weak to Govern: Majority Party Power and Appropriations in the U.S. Senate* (New York: Cambridge University Press, 2014).

⁹ John H. Aldrich and David W. Rohde, “The Consequences of Party Organization in the House: The Role of the Majority and Minority Parties in Conditional Party Government,” in *Polarized Politics: Congress and the President in a Partisan Era*, (Washington D.C.: CQ Press, 2000); Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, 5th Edition (Washington D.C.: CQ Press, 2017); Steven S. Smith, *Party Influence in Congress* (New York: Cambridge University Press, 2007); Steven S. Smith, *The Senate Syndrome: The Evolution of Procedural Warfare in the modern U.S. Senate* (Norman: University of Oklahoma Press, 2014).

file in the dark.¹⁰ For rank-and-file members to hold the process and their leaders accountable, they need to be near the process. “Remoting it in,” in this sense, has consequences.

Congress is a social institution. It operates through rules, precedents, norms, but also importantly, relationships.¹¹ Throughout my career interacting with and interviewing current and former members of Congress and staff, each impressed upon me the importance of their relationships. Members from radically divergent ideological backgrounds have fostered fruitful political relationships from common personal experiences, hobbies, and affinities. Former Senators Kennedy (D-MA) and Hatch (R-UT) formed a working relationship over decades of service together, most famously on the child health insurance program. Countless other bills passed because of unusual political relationships formed from personal bonds. This social glue is very much a part of Congress’s DNA. Unfortunately, there is no way to mimic this dynamic virtually. There is no congressional Match.com linking legislators with common personal or legislative interests across the aisle. Remote procedures, if adopted permanently, would only create more distance between legislators, undermining the social space that helps form dynamic bipartisan relationships even in one of the most polarized periods in American politics.¹²

This highlights the importance and value of lawmakers sharing space in the Capitol. This roundtable’s primary focus is remote voting but functionally it is a discussion of remote legislating. Legislating incorporates much broader set of activities. Congress is not an institution of disconnected voters. Lawmakers do much more than that. The work of legislating occurs well before a vote. Legislating involves deliberation in committee rooms, members’ offices, and chamber floors. It involves coordinating action, building relationships, and forming alliances. This institution and its work is substantially shaped by the interaction of its members. In this space, seemingly trivial personal connections can influence an entire institution. The work of Congress occurs in a shared space where lawmakers give voice – publicly and privately – to their constituents. Congress is theoretical and physical embodiment of the American deliberative process. Put simply, representative democracy cannot be replicated online.

Remote legislating could also feed negative perceptions about Congress. Congress is often subject to attacks about its lack of output, days in session,¹³ and days in recess.¹⁴ While this is an unfair characterization of members’ workload and purpose,¹⁵ it is nonetheless a real concern for Congress’s public standing. Congressional approval has hovered in the mid-teens to low-twenties

¹⁰ James M. Curry, *Legislating in the Dark: Information and Power in the U.S. House of Representatives* (Chicago: Chicago University Press, 2015).

¹¹ Nils Ringe, Jennifer Nicoll Victor and Justin H. Gross, “Keeping Your Friends Close and Your Enemies Closer? Information Networks in Legislative Politics,” *British Journal of Political Science* 43, no. 2 (July 2013): 601-628.

¹² Nolan M. McCarty, *Polarization: What Everyone Needs to Know* (Oxford: Oxford University Press, 2019).

¹³ Philip Bump, “Since 1978, Congress has worked a full week 14 percent of the time,” *The Washington Post*, September 22, 2014, <https://www.washingtonpost.com/news/the-fix/wp/2014/09/22/since-1978-congress-has-worked-a-full-week-14-percent-of-the-time/>.

¹⁴ Philip Bump, “Both chambers are in session for only 12 days this month because that’s what Congress does,” *The Washington Post*, September 5, 2017, <https://www.washingtonpost.com/news/politics/wp/2017/09/05/both-chambers-are-in-session-for-only-12-days-this-month-because-thats-what-congress-does/>.

¹⁵ Joshua Huder, “Congress out of session does not mean Congress isn’t working,” *Christian Science Monitor*, September 23, 2014, <https://www.csmonitor.com/USA/Politics/Politics-Voices/2014/0923/Congress-out-of-session-does-not-mean-Congress-isn-t-working>.

for the last decade.¹⁶ Increasing opportunities for members to stay home while Congress works would only deepen those well-entrenched prejudices.

Lastly, the history of congressional reform is littered with unintended consequences. Seemingly minor adjustments introduce profound disruptions to congressional politics and operation. For example, electronic voting was adopted in the House as part of the 1970 Legislative Reorganization Act, a full 87 years after the idea was first introduced.¹⁷ The reform improved efficiency of House voting but also altered its politics. The ease of voting contributed to an explosion of roll call votes, altered amendment tactics,¹⁸ floor politics, and contributed to larger recorded political polarization.¹⁹ Likewise, broadcasting congressional proceedings changed debate in committee rooms and chamber floors as Congress and its members became more media-conscious.²⁰ The introduction of new technologies to the legislative process have been a double-edged sword. Therefore, the Senate should weigh remote legislating against the institutional consequences we understand and may not be able to currently foresee.

Practical Difficulties of Remote Participation

Congress has, over time, interpreted and reinterpreted what constitutes a quorum to satisfy its Article I, Section 5 requirement that “a Majority of each shall constitute a Quorum to do Business.” The constitutional authority that, “Each House may determine the Rules of its Proceedings”²¹ has been understood as the authority to codify its own internal constitution.²² The definition of a quorum has been interpreted and reinterpreted in each chamber over time through rulings of the chair as well as changes to standing rules.²³ Remote participation procedures constituting a quorum would represent a significant expansion of prior interpretations and chamber rules.

At a practical level, implementing a fully inclusive remote participation system is extremely challenging. Legislative deliberations require members to make motions, amendments, and points of order with precise timing.²⁴ This will be very difficult in a virtual setting. Members will undoubtedly experience connection lags, microphone problems, and other technological issues inhibiting their participation. Similarly, lawmakers will experience acute information shortages.

¹⁶ “Congress and the Public,” *Gallup*, <https://news.gallup.com/poll/1600/congress-public.aspx>.

¹⁷ Jacob Straus, “Electronic Voting System in the House of Representatives: History and Evolution,” *CRS Report RL34366*, February 11, 2008.

¹⁸ Stanley Bach and Steven S. Smith, *Managing Uncertainty in the House of Representatives: Adaptation and Innovation in Special Rules* (Washington D.C.: The Brookings Institution, 1988).

¹⁹ Steven S. Smith and Jason M. Roberts, “Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971-2000,” *American Journal of Political Science* Vol. 47, No. 2 (2003): 305-317; Jason M. Roberts, “The Statistical Analysis of Roll-Call Data: A Cautionary Tale,” *Legislative Studies Quarterly* Vol. 32, no. 3 (2007): 341-360.

²⁰ Timothy Cook, *Making Laws and Making News: Media Strategies in the U.S. House of Representatives* (Washington D.C.: The Brookings Institution, 1989).

²¹ Article I, section 5, clause 2.

²² Josh Chafetz, *Congress’s Constitution*, Chapter 8.

²³ 4 Hinds’ Precedents §2885-2895.

²⁴ Floyd Riddick, *The United States Congress: Organization and Procedure* (Washington D.C.: National Capitol, 1959); Walter J. Oleszek, *Congressional Procedures and the Policy Process*, Ninth Edition (Washington D.C.: CQ Press, 2013).

Remote legislating does not provide comparable access to staff for policy or procedural questions. Lawmakers in states experimenting with similar remote adaptations remote have expressed concern about how the legislature will handle controversial legislation under remote processes.²⁵

Many state legislatures have adopted a blended system in response to this crisis, incorporating remote participation with in-person deliberation and proxy voting. State legislatures in Oklahoma²⁶ and Pennsylvania,²⁷ for example, limit the number of legislators and staff in the chamber at one time, enable members to live-stream proceedings, and allow absent members to cast votes by proxy. The processes vary by state. However, this combination affords in-person members to manage floor proceedings and debate while absent lawmakers can vote on motions, amendments, and participate in the debate.

This approach offers a couple advantages, in my opinion. First, this blended-remote process can be implemented immediately through changes to the chambers' standing rules,²⁸ without waiting to procure specific hardware or software. While Congress may want to consider such technology as a contingency option should a future crisis preclude Congress from convening,²⁹ doing so now would only delay congressional action on urgent responses to the pandemic.

Second, in my view proxy voting also serves as a deterrent against long-term reliance on remote participation. Institutional change is sticky. In this case, the convenience of remote voting presents a tempting practice that may only serve to enhance the power of a few actors in the legislature and executive branch. Proxy voting in committee has a long history, and stigma, in Congress. Decades ago committees chairs abused proxy voting to report measures from committee, which spurred reform to curtail it in 1970.³⁰ The stigma of proxy voting functions as a check on the use and potential proliferation of remote voting.

In conclusion, Congress is vital. It's role in our political system cannot be substituted or replicated. For that reason, Congress must find ways to convene under these extraordinary circumstances. However, it should also be wary of the potential damage remote legislating could inflict on representative politics. Congress should only resort to these procedures only under emergency circumstances. Otherwise, the legislature risks losing the space making it a vibrant representative body.

Thank you for the opportunity to testify before you today. I look forward to you questions.

²⁵ Geoffrey Skelley and Nathaniel Rakich, "The Pennsylvania Legislature Is Testing Out Remote Voting. Here's How It Works," *FiveThirtyEight*, April 2, 2020, <https://fivethirtyeight.com/features/congress-has-resisted-remote-voting-but-some-state-legislatures-are-making-it-work/>.

²⁶ Tres Savage, "Sausage in a pandemic: What the Oklahoma Legislature plans Monday," *Nondoc*, April 5, 2020, <https://nondoc.com/2020/04/05/what-the-oklahoma-legislature-plans-april-6/>.

²⁷ Skelley and Rakich, "The Pennsylvania Legislature Is Testing Out Remote Voting," April

²⁸ "Majority Staff Report Examining Voting Options During the COVID-19 Pandemic," Committee on Rules, United States House of Representatives, March 23, 2020, https://rules.house.gov/sites/democrats.rules.house.gov/files/StaffReport_VotingOptions.pdf.

²⁹ Norm Ornstein, "Congress Desperately Needs a Contingency Plan," *The Atlantic*, March 13, 2020

<https://www.theatlantic.com/ideas/archive/2020/03/congress-needs-contingency-plan-right-now/607933/>.

³⁰ Section 106(a) of the Legislative Reorganization Act of 1970 (P.L. 91-510. 84 Stat. 1140).

PSI Staff Memorandum

To: The Permanent Subcommittee on Investigations
From: Subcommittee Staff
Date: April 30, 2020
Re: Roundtable on Continuity of Senate Operations and Remote Voting in Times of Crisis

On April 30, 2020, at 9 a.m., the Permanent Subcommittee on Investigations will hold an online roundtable via WebEx entitled “Continuity of Senate Operations and Remote Voting in Times of Crisis.” The recorded roundtable will be posted to the Subcommittee’s website. The Subcommittee will hear from the following experts:

Martin B. Gold, Partner, Capitol Counsel, LLC

Joshua C. Huder, Senior Fellow, Government Affairs Institute, Georgetown University

Lorelei Kelly, Fellow, Beeck Center for Social Impact and Innovation, Georgetown University

Jurisdiction: The Senate Committee on Homeland Security and Governmental Affairs, whose jurisdiction governs the Subcommittee’s jurisdiction, has jurisdiction over congressional organization, including continuity and technological issues such as those discussed here. This memorandum does not endorse any specific technology, however, which is under the purview of the Senate Sergeant at Arms. The Senate Committee on Rules has jurisdiction over the rules changes discussed in this memorandum.

Introduction

The COVID-19 virus has shut down major sectors of our society, including many functions of Congress. By rule and custom, the two chambers of Congress have always met in person to conduct business, including committee hearings, floor deliberation, and voting. Neither chamber has contingency plans that allow those functions to proceed remotely, but this crisis highlights the need to consider means for Congress to do its job at times when it may not be safe for members and staff to gather in person.

Some experts have expressed concerns about Congress operating remotely, particularly citing the importance of physically meeting together to facilitate the deliberative process and ensure broad participation in negotiations.¹ Those

¹ *E.g.*, Timothy LaPira & James Wallner, *In Congress, Assembled: A Virtual Congress Creates More Problems than It Solves*, LEGBRANCH.ORG (Mar. 26, 2020), <https://www.legbranch.org/in-congress-assembled-a-virtual-congress-creates-more-problems-than-it-solves/>.

concerns are valid: face-to-face communications and in-person meetings are the most effective way for Congress to conduct its business on a regular basis. Remote participation should never take the place of in-person participation except in the most limited circumstances—crises, affecting the entire country, that would otherwise hobble Congress’s ability to act without this authority. The current nationwide pandemic requires Congress to consider how best to continue its operations, communicate, and pass necessary legislation safely. Subcommittee Chairman Rob Portman and Senator Richard Durbin, for example, have introduced a proposal to allow the Senate to conduct business remotely during times of nationwide emergency, as detailed in Section II below.

This memorandum provides: (1) a brief overview of congressional continuity efforts to date; (2) a description of Senate proposals to allow senators to participate and vote remotely; (3) a legal analysis of remote congressional proceedings; (4) a discussion of other jurisdictions that have implemented remote legislative procedures; and (5) a discussion of the technological security specifications the Senate should consider if it adopts a remote participation and voting system.

I. Continuity of Congress Efforts to Date

The foundational documents of the United States provide little guidance regarding the continuity of Congress should members be incapacitated or unable to meet in the Capitol. The Constitution provides that when vacancies happen in the U.S. House, the state’s executive authority shall issue a writ of election.² Similarly, the Seventeenth Amendment states that state executive authorities shall issue a writ of election to fill vacancies in the Senate, except state legislatures may empower the executive to make a temporary appointment until the election³—a significant exception that would allow the Senate to be re-populated much more quickly than the House. Finally, the Constitution mandates that during a session of Congress, neither house may adjourn without the consent of the other house for more than three days, “nor to any other Place than that in which the two Houses shall be sitting.”⁴

In the nation’s more recent history, however, events have transpired that have caused the federal government and scholars to assess Congress’s preparedness for emergencies and to consider contingency plans. During the Cold War, Congress secretly constructed a bunker at the Greenbrier Hotel in West Virginia. Built 720 feet into a hillside, the compound was resilient, with two-foot thick, steel-reinforced walls.⁵ Had a nuclear attack threatened the Capitol, Congress could have relocated

² U.S. CONST. art. I, § 2, cl. 4.

³ U.S. CONST. amend. XVII, cl. 2.

⁴ U.S. CONST. art. I, § 5, cl. 4.

⁵ Ted Gup, *The Ultimate Congressional Hideaway*, WASH. POST (May 31, 1992), <https://www.washingtonpost.com/wp-srv/local/daily/july/25/brier1.htm>; *The Bunker*, GREENBRIER

to the bunker, which included 152 rooms, complete with House and Senate chambers.⁶ The bunker, officially known as Project Greek Island, was decommissioned after the *Washington Post* exposed it in a 1992 article.⁷

Similarly, the September 11, 2001 terrorist attacks led to renewed consideration of how to ensure the continuity of Congress. The main body of work from that time consists of three reports on the continuity of the federal government as a whole, produced by the Continuity of Government Commission, a joint project of the American Enterprise Institute and the Brookings Institution.⁸ Additionally, Congress held several hearings to consider continuity of government issues and review the Commission's recommendations.⁹ A bipartisan working group chaired by Representatives Christopher Cox and Martin Frost also offered initial recommendations.¹⁰

Although several hearings in the late 1990s and early 2000s addressed remote voting,¹¹ most of the discussion regarding continuity of Congress in the Commission's reports and in the congressional hearings focused on the incapacitation of individual members or the inability to meet in the U.S. Capitol.¹² The Commission observed that Congress "is the institution least able to reconstitute itself after a catastrophic attack," as compared to the executive and judicial

(Aug. 6, 2016).

<https://www.greenbrier.com/GreenbrierResort/media/Accommodations/Documents/The-Bunker-Overview-FINAL-080616.pdf>.

⁶ Ted Gup, *The Ultimate Congressional Hideaway*, WASH. POST (May 31, 1992).

<https://www.washingtonpost.com/wp-srv/local/daily/july/25/brier1.htm>.

⁷ John Strausbaugh, *A West Virginia Cold War Bunker Now a Tourist Spot*, N.Y. TIMES, (Nov. 12, 2006), <https://www.nytimes.com/2006/11/12/travel/12heads.html>.

⁸ CONTINUITY OF GOV'T COMM'N, *Preserving our Institutions: The Continuity of Congress* (May 2003); CONTINUITY OF GOV'T COMM'N, *Preserving our Institutions: Presidential Succession* (July 2, 2009); CONTINUITY OF GOV'T COMM'N, *Preserving our Institutions: The Supreme Court* (Oct. 19, 2011), <https://www.aei.org/profile/continuity-of-government-commission/>.

⁹ *Hearing on E-Congress—Using Technology to Conduct Congressional Operations in Emergency Situations Before the H. Comm. on Administration*, 107th Cong. (2002); *Ensuring the Continuity of the United States Government: The Congress Before the S. Comm. on the Judiciary*, 108th Cong. (2003); *Continuity of Congress: An Examination of the Existing Quorum Requirement and the Mass Incapacitation of Members Before the H. Comm. on Rules*, 108th Cong. (2004).

¹⁰ See H.R. REP. NO. 108-141 at 13–14 (2003), <https://www.congress.gov/108/crpt/hrpt141/CRPT-108hrpt141.pdf>.

¹¹ *Legislating in the 21st Century Congress Before the H. Subcomm. on Rules & Organization of the House of the H. Comm. on Rules*, 104th Cong. (1996); *Hearing on E-Congress—Using Technology to Conduct Congressional Operations in Emergency Situations Before the H. Comm. on Administration*, 107th Cong. (2002). Although these hearings lay a helpful foundation, the technological advancements since that time make for a much different discussion today.

¹² See, e.g., *Ensuring the Continuity of the United States Government: The Congress Before the S. Comm. on the Judiciary*, 108th Cong. (2003); *Continuity of Congress: An Examination of the Existing Quorum Requirement and the Mass Incapacitation of Members Before the H. Comm. on Rules*, 108th Cong. (2004).

branches.¹³ The Commission raised numerous points still worth considering today about how to ensure that Congress can function if an attack kills or incapacitates a substantial portion of the membership, particularly regarding the appointment of House members.

Although the Commission focused its attention on those issues that seemed most pressing in the wake of the 9/11 attacks, it did raise hypothetical situations similar to the circumstances the nation currently is facing: “Imagine a biological attack that prevented Congress from convening for fear of spreading infectious agents.”¹⁴ “More troubling” than long-term incapacitation of members, the report observed, “is the possibility of an infectious disease such as smallpox. If even a few members of Congress contracted the disease, the members might choose not to convene for fear of spreading the disease.”¹⁵ The Commission, however, never discussed how Congress should address those circumstances to ensure its continuing functionality.

In 2002, Representative James Langevin introduced the first bill explicitly mentioning the concept of remote voting by Congress. His bill, the Ensuring Congressional Security and Continuity Act, would have directed the National Institute of Standards and Technology to “investigate the feasibility and costs of implementing a secure computer system for remote voting and communication for the Congress.”¹⁶ A contemporaneous press release from his office stated:

Langevin envisions that in the event a quorum of Congress could not be present in a single location to conduct Congressional business, members could instead utilize an Internet- and satellite-based communications system. A member could log on with secure, biometrics technology from anywhere in the world to acknowledge that he or she is not incapacitated and provide his or her physical location. This system would also provide members with critical information on pending government business and response to the attack or disaster.

Langevin believes a viable emergency plan must also establish alternate meeting locations, a means of deliberating and a way for the general public to follow congressional businesses [*sic*], and ensure that Congress follows the democratic process.¹⁷

¹³ CONTINUITY OF GOV'T COMM'N, *Preserving our Institutions: The Continuity of Congress*, cover letter from Co-Chairman Lloyd Cutler & Co-Chairman Alan Simpson (May 2003), https://www.aei.org/wp-content/uploads/2011/10/20030605_FirstReport.pdf.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 11.

¹⁶ Ensuring Congressional Security and Continuity Act, H.R. 3481 107th Cong. (2001).

¹⁷ Press Release, Rep. Jim Langevin, Langevin Testifies in Favor of His Bill to Ensure Continuity of Congressional Business in Event of Terrorism or Natural Disaster (May 1, 2002),

He emphasized in testimony that the plan should only be used in an emergency and that “[t]he traditional personal face-to-face interactions that we all enjoy would not be jeopardized.”¹⁸

In this current session of Congress, members have introduced resolutions in both the House and Senate to allow remote voting. In the House, Representative Swalwell introduced H. Res. 890, the Members Operating to be Innovative and Link Everyone (MOBILE) Resolution. It would amend the House Rules to permit absent members to participate in committee hearings via videoconference and establish a remote voting system so absent members may vote when physically absent. The rule change would apply at all times and under all circumstances, not just during times of emergency—it effectively would enable Congress to operate remotely any time members determine it is too inconvenient to return to Washington.

The House Rules Committee released a report last month reviewing options for remote voting, but ultimately declared that “[i]t 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 development. This change cannot be implemented overnight, and likely cannot be accomplished in time to address the current crisis.”¹⁹

More recently, however, House Rules Committee Chairman James McGovern recommended a rules change to temporarily allow a limited form of remote voting. Under his proposal, “any Member unable to travel to Washington due to the pandemic could provide specific instructions for each vote to a fellow Member who has been authorized to cast those votes on their behalf,” without any ability to give a general proxy. Chairman McGovern reasoned that the system would not be susceptible to hacking or foreign interference.²⁰

On April 22, 2020, however, Speaker Nancy Pelosi announced she would not move forward with a vote in the near future to change House rules to allow for proxy voting; instead, she announced a bipartisan task force, including

<https://langevin.house.gov/press-release/langevin-testifies-favor-his-bill-ensure-continuity-congressional-business-event>.

¹⁸ *Hearing on E-Congress—Using Technology to Conduct Congressional Operations in Emergency Situations Before the H. Comm. on Administration*, 107th Cong. 11 (2002) (statement of Rep. James Langevin).

¹⁹ MAJORITY STAFF OF H. COMM. ON RULES, 116TH CONG., MAJORITY STAFF REPORT EXAMINING VOTING OPTIONS DURING THE COVID-19 PANDEMIC 1 (Mar. 23, 2020),

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

²⁰ Press Release, H. Comm. on Rules, Chairman McGovern Statement on Presentation to the Democratic Caucus Recommending Implementation of Temporary Remote Voting During this Pandemic (Apr. 16, 2020), <https://rules.house.gov/press-releases/chairman-mcgovern-statement-presentation-democratic-caucus-recommending>.

House Majority Leader Steny Hoyer and Minority Leader Kevin McCarthy, to “review remote voting by proxy and reopening the House.”²¹ Majority Leader Hoyer also mentioned that House committees will begin to work in a “virtual context,” although he did not provide details.²²

In the Senate, Senators Portman and Durbin have introduced a resolution to allow remote participation and voting only in times of nationwide crisis—a crucial feature. Senator Rand Paul also has offered a remote voting proposal. Both of these proposals are described in more detail in the following section.

To be sure, during a previous pandemic, Congress chose to meet in person with only limited protections. During the 1918 Spanish Flu, Congress closed public seating,²³ The House passed bills with a small number of members present—possible only if no House member asked for a count of members in the chamber.²⁴ But as commentators have observed, “[w]hile the flu outbreak did not close the House entirely, it slowed its activities to a crawl.”²⁵ Ultimately, three House members died of the flu.²⁶ In 1918, Congress did not have technology available that would allow it to consider remote participation and voting. In 2020, that technology exists and should be considered as a means to protect members while allowing them to fulfill their constitutional duties to represent their constituents and legislate.

II. Senate Proposals

a. Portman-Durbin Proposal

Senators Portman and Durbin introduced S. Res. 548, a resolution amending the Standing Rules of the Senate to enable the participation of absent Senators during a national crisis, on March 19, 2020.²⁷ At the time of this memorandum, the resolution has 15 cosponsors and has been referred to the Senate Committee on Rules.²⁸

The Portman-Durbin proposal would allow senators to participate and vote remotely during a time of exceptional, nationwide crisis under limited conditions.

²¹ Heather Caygle, John Bresnahan & Sarah Ferris, *Pelosi Scraps Proxy Voting Plan After GOP Outcry*, POLITICO (Apr. 22, 2020), <https://www.politico.com/news/2020/04/22/pelosi-house-proxy-voting-200861>.

²² *Id.*

²³ Jesse Rifkin, *What did Congress do During the 1918 Flue Pandemic?*, GOVTRACK.US (Apr. 2, 2020), <https://govtrackinsider.com/what-did-congress-do-during-the-1918-flu-pandemic-c0bd96ad2287>.

²⁴ *Id.*

²⁵ *Whereas: Stories from the People's House* (Dec. 18, 2018), <https://history.house.gov/Blog/2018/December/12-14-Flu/>.

²⁶ *Id.*

²⁷ S. Res. 548, 116th Cong. (2020).

²⁸ *Id.*

Specifically, it would authorize the Senate Majority Leader and Minority Leader (or their designees), by mutual consent, to permit physically absent senators to vote remotely only when two criteria are met: the country must face “an extraordinary crisis of national extent” *and* the crisis must be sufficiently catastrophic that “it would be infeasible for Senators to cast their votes in person.”²⁹ By giving discretion to the two leaders to permit remote voting under those two circumstances, the resolution ensures that the Senate can allow remote participation without first having to take an in-person vote, which might prove impossible during a catastrophe.

In order to further tether remote participation and voting to crisis conditions, as well as prevent the normalization of its use, the resolution would only permit remote activities for a brief period of time. Once the Senate leadership determines that the two conditions for remote participation and voting have been met, senators could only participate and vote remotely for 30 days. Should a continuation of the crisis require it, the Senate could vote to extend remote participation and voting for an additional 30 days, but only with the concurrence of three-fifths of the Senate.

The resolution would permit senators participating remotely to count towards a quorum. The Constitution requires a quorum to conduct business, and stipulates that a majority of senators constitute a quorum. The resolution makes clear, however, that senators must actually be participating in order to count toward a quorum. Senators not in the chamber nor “logged on” to the remote voting system would not be counted towards a quorum. Finally, the resolution would delegate responsibility to the Sergeant at Arms, the Secretary of the Senate, and the Director of the Doorkeepers for approving any system that the Senate uses to enable remote voting and deliberation.

b. Paul Proposal

On April 21, 2020, Senator Paul offered a remote voting proposal as an amendment on the floor to H.R. 266, the Paycheck Protection Program and Health Care Enhancement Act.³⁰ although Senate did not consider the amendment. The Paul proposal would allow any senator to make a privileged motion to authorize a period of up to 30 days to allow senators to cast votes outside of the Senate Chamber using technology approved by the Secretary of the Senate, Sergeant at Arms, and Doorkeeper of the Senate. The proposal would limit consideration of the motion to two hours of debate and only allow amendments to change the length of time of

²⁹ *Id.*

³⁰ Senator Paul has not yet introduced his resolution, but it is available at <https://www.paul.senate.gov/sites/default/files/page-attachments/RemoteVotingAmendment.pdf>.

remote voting. The motion to authorize remote voting would require a three-fourths majority vote. Senators who cast remote votes would be counted toward a quorum.

The proposal does not address remote participation in debate or other proceedings by senators and is not limited to emergencies.

III. Legal Analysis of Remote Congressional Proceedings

The Framers did not contemplate Congress meeting or voting remotely, nor could they have conceived of the technology available today that would enable remote proceedings. The Framers, however, gave Congress wide latitude to govern itself. The Constitution provides that “[e]ach House may determine the Rules of its Proceedings.”³¹ The Supreme Court has recognized that discretion is limited only by other “constitutional restraints” and “fundamental rights.”³² The constitutional restraints applicable to remote voting proposals raise two main questions. First, what must a senator do to be counted present toward a quorum?³³ Second, where may Congress sit?³⁴

This section of the memorandum first reviews Congress’s broad discretion to make its own rules regarding the quorum requirement and the location of its sessions, and then turns to the deference courts give to the validity of enrolled bills signed by the leaders of Congress and the President. Given the Constitution’s broad grant of authority to Congress to set its own rules of proceedings and the efficacy of today’s technology to allow for robust debate and secure transmission of votes, it appears likely that courts would uphold a Senate rule allowing remote participation and voting during times of nationwide emergencies.

a. The Supreme Court has recognized that Congress has wide latitude to write its own rules.

Over the past 128 years, the Supreme Court has affirmed Congress’s discretion to govern its own internal proceedings. Although “[i]t has long been settled . . . that rules of Congress and its committees are judicially cognizable,”³⁵ the courts have reviewed Congress’s internal rules under a deferential standard.

The Court’s 1892 analysis of a House rule in *United States v. Ballin* has served as the guidepost for all future analysis of congressional rules. In *Ballin*, the Court

³¹ U.S. CONST. art. I, § 5, cl. 2.

³² *United States v. Ballin*, 144 U.S. 1 (1892).

³³ U.S. CONST. art. I, § 5, cl. 1 (“[A] Majority of each [House] shall constitute a quorum to do business.”).

³⁴ U.S. CONST. art. I, § 5, cl. 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.”).

³⁵ *Yellin v. United States*, 374 U.S. 109, 114 (1963).

considered whether the House had authority to vote on bills pursuant to a House rule that allowed the House to count present, but non-voting, members toward the number necessary for a quorum. The Court established three conditions the chambers of Congress must meet for their rules to pass constitutional muster, writing:

The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between modes or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house³⁶

Thus: (1) a rule must reasonably relate to the method of proceeding; (2) it may not “ignore constitutional restraints”; and (3) it may not “violate fundamental rights.”³⁷ The Court clarified that neither the wisdom of a rule nor the length of time a previous rule had been in force mattered in the Court’s analysis.³⁸ The House’s rulemaking power, the Court concluded, is “within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.”³⁹ So long as a House or Senate rule satisfies *Ballin*’s three prongs, courts treat challenges to a chamber’s rule as nonjusticiable political questions.⁴⁰

Over time, the Supreme Court has applied the *Ballin* analysis to a handful of congressional rules. For example, in *United States v. Smith*, the Court clarified it would only review whether the Senate had complied with its own rules for confirming a presidential nominee and not the “wisdom or folly” of the rule itself.⁴¹ More recently, in *NLRB v. Noel Canning*, the Court deferred to the Senate’s broad

³⁶ *Ballin*, 144 U.S. at 5.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See, e.g., *Consumers Union of the United States, Inc. v. Periodical Correspondents’ Ass’n*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976) (holding that a challenge to House rules governing press gallery admission presents a nonjusticiable political question in part because of the Constitution’s “textually demonstrable commitment of such rules to the legislative branch of government.” *id.* at 1351). Under the political question doctrine, the Supreme Court declines to review “political questions.” The Court has explained that political questions can be identified by: a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 396 U.S. 186, 216 (1962).

⁴¹ *United States v. Smith*, 286 U.S. 6, 33 (1932) (quoting *Ballin*, 144 U.S. at 5).

discretion to make its own rules regarding what constitutes a session of Congress so long as the rules reasonably related to the mode or method of proceeding and did not “ignore constitutional restraints or violate fundamental rights.”⁴²

i. Congress may determine for itself what it means to be present for a quorum.

Although the Constitution explicitly provides that “a Majority of each [House of Congress] shall constitute a Quorum to do Business,”⁴³ the Supreme Court has deferred to Congress regarding what it means for a member to count toward a quorum. In *Ballin*, the Court recognized that the Constitution “has prescribed no method for making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact.”⁴⁴ Further, the Court noted that there was “no constitutional inhibition” of this method of determining the presence of a quorum, and “no violation of fundamental rights”—so the House rule passed muster under the three conditions, discussed above, the Court had determined would apply to congressional rules.⁴⁵ The Court also concluded that the Senate and House Journals accurately reflect each chamber’s proceedings, and “if reference may be had to such journal, it must be assumed to speak the truth.”⁴⁶

Additionally, both houses of Congress have exercised their authority to change their rules governing the denominator of the quorum equation—the number of total seats to be counted in determining a quorum (as opposed to the numerator—the number of members who must be present to constitute a majority). From the First Congress until the Civil War, both houses of Congress defined the denominator of a quorum as the total number of seats that existed—not the number of seats to which senators had been elected.⁴⁷ The Civil War, however, challenged the founding era practice of defining the quorum denominator as the total number of Senate seats. Secession reduced the numerator of senators, but because the Senate did not want to admit the independence of the seceding states, the denominator was still fixed at the pre-

⁴² *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 551–52 (2014) (quoting *Ballin*, 144 U.S. at 5). See also *Yellin v. United States*, 374 U.S. 109, 116–17 (1963) (deferring to House rules governing executive sessions of congressional committee); *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1982) (deferring to House rules governing allocation of congressional committee seats), *cert. denied*, 464 U.S. 823 (1983).

⁴³ U.S. CONST. art. I, § 5, cl. 1.

⁴⁴ *Ballin*, 144 U.S. at 6.

⁴⁵ *Id.*

⁴⁶ *Id.* at 4.

⁴⁷ CONG. GLOBE, 37th Cong., 2d Sess. 3021–22 (1862); see also Howard M. Wasserman, *Continuity of Congress: A Play in Three Stages*, 53 CATH. U. L. REV. 112–13 (2004).

Civil War number. This meant that almost 70 percent of the remaining senators had to be present to constitute a quorum.⁴⁸

To address this problem, the Senate engaged in a long and detailed debate, extending over a number of years, about the meaning of the quorum clause and what change might be permissible under the Constitution. Senator John Sherman from Ohio led the efforts to change the quorum denominator to only elected members, arguing that “[t]he condition of the Senate is such that I am satisfied any casualty would prevent us doing business under the present practice.”⁴⁹ Although Sherman’s resolution failed by one vote, it was adopted two years later.⁵⁰ Senate Rule VI still exists today. It defines a quorum as a majority of members duly chosen and sworn.⁵¹

The House also changed the number of representatives to count toward the denominator of the quorum requirement from the number of total seats to the number of elected representatives.⁵² Then in 1890, the House interpreted the number of elected members to refer only to living elected members.⁵³ In 1906, under the leadership of Speaker Joe Cannon, the House adopted the rule that governs today, which counts the denominator as members chosen, sworn, and living, and excludes those who have resigned or been expelled.⁵⁴

Both the Supreme Court’s acknowledgment of Congress’s authority to alter its rules regarding quorum requirements and Congress’s history of doing so suggest that Congress has sufficient authority to determine quorum requirements for itself, including that remote participation of members—so long as they are, in fact, participating—can count toward a quorum sufficient to do business.

⁴⁸ CONG. GLOBE, 37th Cong., 1st Sess. 1 (1861); John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution’s Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1047, 1059 (2006). Including the Confederacy, there were 34 states in the 37th Congress. But only 24 states actually elected senators since 10 states seceded. Those 24 states collectively sent 48 senators plus the two senators from non-seceding Virginia (soon to be West Virginia) and Andrew Johnson from Tennessee who sided with the Union, for a total of 51 senators. This meant that a quorum was 35 out of 51 senators, or slightly less than 70 percent of the body. *Id.*

⁴⁹ CONG. GLOBE, 37th Cong., 2d Sess. 3021 (1862).

⁵⁰ CONG. GLOBE, 37th Cong., 2d Sess. 3194 (1862); CONG. GLOBE, 38th Cong., 2d Sess. 2087 (1864).

⁵¹ STANDING RULES OF THE SENATE, Rule VI, S. Doc. No. 113-18, at 4 (2013), <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> (Rule VI states that “a quorum shall consist of a majority of the Senators duly chosen and sworn”).

⁵² CONTINUITY OF GOV’T COMM’N, *Preserving our Institutions: The Continuity of Congress* 8–9 (May 2003), https://www.aei.org/wp-content/uploads/2011/10/20030605_FirstReport.pdf.

⁵³ 21 CONG. REC. 10234–35 (1890); John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution’s Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1047 (2006).

⁵⁴ 40 CONG. REC. 5354 (1906); RULES OF THE HOUSE OF REPRESENTATIVES, RULE XX, 116th Cong., <https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/116-House-Rules-Clerk.pdf>.

ii. Online presence may count toward presence for a quorum.

The Constitution does not explicitly prohibit remote participation by members of Congress in congressional sessions. The constitutional language discussing sessions of Congress includes words that imply physical presence—“The Congress shall assemble,”⁵⁵ “may be authorized to compel the Attendance of absent Members,”⁵⁶ “[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting”⁵⁷. But, as discussed above, without an express constitutional prohibition, courts have been unwilling to interfere in Congress’s decisions regarding how it conducts its own sessions.⁵⁸

And although courts have not yet had occasion to review whether a member’s remote presence may count toward the Constitution’s quorum requirement, they have reviewed that question in other governmental contexts. In those cases, when a governmental body’s rules do not explicitly prohibit a member’s remote presence as contributing toward a quorum, courts have found that remote presence counts, so long as members do something to establish their presence for the quorum. For example, in *Herrin Transportation Co. v. United States*, the Supreme Court issued a *per curiam* opinion affirming a district court decision holding that a broad grant of authority to the Interstate Commerce Commission to control its own proceedings meant that “it may select a [remote voting] procedure as an aid in dealing with its tremendous workload. The statute does not specifically provide that administrative action be taken concurrently by the deciding members in a formal meeting and we decline to impose such requirement.”⁵⁹

Likewise, the D.C. Circuit held that a law governing proceedings of the Civil Aeronautics Board that authorized the Board to “conduct its proceedings in such a manner as will be conducive to the proper dispatch of business and to the ends of justice”⁶⁰ “permits the Board to proceed with its members acting separately, in their various offices, rather than jointly in conference.”⁶¹ The court continued, “[t]his is a reasonable way for the Board to proceed in dealing with its not inconsiderable workload. A similar system is in use on this court for processing motions and the deluge of petitions for rehearing en banc.”⁶²

⁵⁵ U.S. CONST. art. I, § 4, cl. 2.

⁵⁶ U.S. CONST. art. I, § 5, cl. 1.

⁵⁷ U.S. CONST. art. I, § 5, cl. 4.

⁵⁸ See *Ballin*, 144 U.S. at 5; *Noel Canning*, 573 U.S. at 551.

⁵⁹ *T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F. Supp. 777, 785 (S.D. Tex. 1960), *affirmed by Herrin Transportation Co. v. United States*, 366 U.S. 419 (1961).

⁶⁰ *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) (quoting 49 U.S.C. § 1481 (1964)).

⁶¹ *Id.*

⁶² *Id.*

The U.S. District Court for the District of Columbia specifically confronted the question of what constitutes participation sufficient for a quorum when proceedings take place online.⁶³ When the National Labor Relations Board—which requires three members’ participation for a quorum—passed a rule through online voting with only two members participating, the court held the rule invalid because the third member did not participate at all. The court explained that the absent member “cannot be counted toward the quorum merely because he held office, and his participation in earlier decisions relating to the drafting of the rule does not suffice. He need not necessarily have voted, but he had to at least show up.”⁶⁴ The court continued, “But whether the standard is ‘mere presence’ or ‘participation,’ the difficulty is in applying that standard to an online vote. When the very concept of a quorum seems designed for a meeting in which people are physically present in the same place, what does it mean to be present or to participate in a decision that takes place across wires?”⁶⁵ The court reasoned that the quorum could have been established by the board member voting, “express[ing] his intent to abstain or even acknowledg[ing] receipt of the notification.”⁶⁶ But at minimum, the member “needs to [do] *something*—that is, he needs to show up—in order to be counted toward a quorum.”⁶⁷

Consistent with these opinions, during this current pandemic, the Supreme Court has determined for itself for the first time that remote presence counts toward a quorum. This, even though the law governing terms of court implies that the justices should be physically present at the Court to hear cases. The law states that “[t]he Supreme Court shall hold at the seat of government a term of court commencing on the first Monday in October of each year”⁶⁸ Additionally, the Court’s internal rules also imply, but do not require, that physical presence is necessary. Rule 4 of the Supreme Court, addressing “Sessions and Quorum,” contemplates “[o]pen sessions of the Court” where “the Court sits to hear arguments,” and “[s]ix members of the Court constitute a quorum.” “In the absence of a quorum on any day appointed for holding a session of the Court, the justices attending—or if no Justice is present, the Clerk or a Deputy Clerk—may announce that the Court will not meet until there is a quorum.”⁶⁹

⁶³ *Chamber of Commerce v. N.L.R.B.*, 879 F. Supp. 2d 18 (D.D.C. 2012).

⁶⁴ *Id.* at 21.

⁶⁵ *Id.* at 27–28.

⁶⁶ *Id.* at 29.

⁶⁷ *Id.*

⁶⁸ 28 U.S.C. § 2.

⁶⁹ RULES OF THE SUPREME COURT OF THE UNITED STATES, RULE 4; *see* 28 U.S.C. § 1 (“The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”).

The Court announced on April 13, 2020, however, that “[t]he Court will hear oral arguments by teleconference on May 4, 5, 6, 11, 12, and 14 . . . In keeping with public health guidance in response to COVID-19, the justices and counsel will all participate remotely.”⁷⁰ Despite rules requirements mentioning the concepts of sitting for court, justice attendance at court, and the presence of justices, the Supreme Court has determined that the remote presence of the justices will suffice to constitute a quorum. The Court’s conduct is consistent with its own and lower court opinions affirming that remote participation in governmental proceedings may count toward quorum requirements.

iii. Congress may determine where it meets.

Just as Congress has discretion to determine what form of member participation counts toward a quorum, it has authority to determine where it meets. The Constitution does not prescribe where Congress may or may not meet. It is important, however, to review the circumstances that may arise under remote participation in Senate proceedings, including the type of business conducted, and whether only some or all of the senators are participating remotely.

Type of business. Based on the absence of constitutional instruction regarding Senate proceedings other than votes, the Senate will be on its surest footing conducting any remote business short of a floor voting process. The Constitution does not provide any instruction regarding how committees hold hearings or votes, nor about how the Senate conducts floor debate. It does, however, require a majority of senators’ participation to establish a quorum to vote on legislation, as discussed above. Although the discussion above describes why it is likely courts would decline to review a Senate rule that allows the Senate to establish a quorum through remote participation, any limitations created by the constitutional quorum requirement do not apply to other Senate activity. The Senate would, however, have to amend its rule requiring the physical presence of senators to constitute a quorum at committee proceedings.⁷¹

Portion of senators participating remotely. Whether some versus all senators are participating remotely also may affect the constitutional analysis of remote participation and voting. The Constitution’s sole restriction on where Congress meets is that each chamber must consent to the place in which the other chamber is meeting, providing, “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”⁷²

⁷⁰ Press Release, U.S. Supreme Court, Press Release Regarding May Teleconference Oral Arguments (Apr. 13, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20.

⁷¹ See STANDING RULES OF THE SENATE, Rule XXVI, S. Doc. No. 113-18, at 34 (2013),

<https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf>.

⁷² U.S. CONST. art. 1, § 5, cl. 4.

Two years after the Constitution was adopted, Congress enacted the Residence Act, which established that ten square miles on the Potomac River would serve as the permanent seat of government, and Philadelphia would serve as the temporary seat for ten years, until 1800.⁷³ As planned, Congress met in the U.S. Capitol Building for the first time on November 17, 1800. Congressional precedents suggest that the two chambers do not need the other's consent for meeting in a place outside their chambers if the location is in the District of Columbia,⁷⁴ given that Congress has appointed the entire territory of Washington, DC as the seat of government⁷⁵.

Although it has never been tested, if the Senate floor remains open and some senators are present in the Capitol, while others participate remotely—perhaps through a video relayed to the Senate floor—the Senate potentially could deem itself meeting in Washington, DC, without need for the House's consent. If, on the other hand, an emergency requires all senators to participate remotely over the internet, the Senate probably would need the House's consent to meet in cyberspace under the Constitution's clause requiring the House to consent if the Senate adjourns “to any other place than that in which the two Houses shall be sitting.”⁷⁶

As discussed further in Section VI, both Kentucky and Vermont have state constitutional clauses mirroring the U.S. Constitution's clause regarding the necessity of obtaining the other chamber's consent to meet in a different place.⁷⁷ In adopting remote voting and participation processes, the Vermont House and Senate and the Kentucky House have all required personnel to operate on the chamber floor during session to avoid that constitutional question.⁷⁸

Although the framers would not have contemplated the idea of senators meeting over the internet, there is precedent for events the framers assumed would occur at a physical location now occurring at a remote location. The Elections clause gives states the power to regulate the “[t]imes, places, and manner of holding elections.”⁷⁹ Although the framers would have contemplated physical polling places within the states, this has not prevented states from adopting measures allowing remote participation, like absentee voting. In 1864, 150,000 Union soldiers were allowed to

⁷³ Residence Act of 1790, ch. 28, 1 Stat. 130.

⁷⁴ See *Deschler's Precedents* Ch. 1, § 4 (discussing Congress's appointment of the District of Columbia as the seat of government).

⁷⁵ 4 U.S.C. § 71 (“All that part of the territory of the United States included within the present limits of the District of Columbia shall be the permanent seat of government of the United States.”).

⁷⁶ U.S. CONST. art I, § 5.

⁷⁷ KY. CONST. §41; VT. CONST. ch. II, § 6.

⁷⁸ Staff interview with Vermont General Assembly Staff (Apr. 27, 2020); staff interview with Kentucky General Assembly Staff (Apr. 28, 2020).

⁷⁹ U.S. CONST. art I, § 4.

vote absentee away from a physical polling place.⁸⁰ Like remote Senate participation and voting, electoral absentee voting is tailored to accomplish the constitutional goal of citizen participation in selecting their representatives, and there is no explicit prohibition against it.

Ultimately, the Supreme Court has recognized Congress's broad discretion in all matters of how to conduct its sessions. The Court has acknowledged that the Constitution "gives the Senate wide latitude to determine whether and when to have a session, as well as how to conduct the session. This suggests that the Senate's determination about what constitutes a session should merit great respect."⁸¹

iv. Application of *Ballin* Analysis to Portman-Durbin Proposal

Given the courts' significant deference toward congressional rules generally, and quorum rules specifically, it is likely that courts would defer to the Senate's or House's determination to use an online process during a nationwide emergency. Reviewing the Portman-Durbin proposal under the three-part *Ballin* test demonstrates the likelihood that courts would uphold laws passed with some, or even all, senators participating remotely.

Reasonable relation to the method of proceeding: First, the Portman-Durbin proposal reasonably relates to the method of proceeding. It requires the Secretary of the Senate, Sergeant at Arms, and Director of the Doorkeepers to approve the remote process as reliable and secure. It contemplates that senators would be able not only to vote, but also to participate in the proceedings leading up to the vote, just as they do during in-person sessions.

Constitutional restraints: Second, the Portman-Durbin proposal does not ignore constitutional restraints. Although the framers did not contemplate remote participation in Senate proceedings, they did not prohibit remote participation. Courts have acknowledged in other contexts that if rules do not explicitly prohibit an entity from calculating a quorum in a reasonable way that allows them to "show up,"⁸² they will not inquire further into the entity's discretion to govern its own proceedings.⁸³ And even though the Supreme Court's own governing statute and rules imply physical participation to meet its quorum requirements, the Court has determined for itself that remote participation is sufficient and does not violate

⁸⁰ Alex Seitz-Wald, *How Do You Know Voting by Mail Works? The U.S. Military's Done it Since the Civil War*, NBC NEWS (Apr. 19, 2020), <https://www.nbcnews.com/politics/2020-election/how-do-you-know-voting-mail-works-u-s-military-n1186926>.

⁸¹ *Noel Canning*, 573 U.S. at 551.

⁸² *Chamber of Commerce*, 879 F. Supp. 2d at 29.

⁸³ *Id.*

those rules.⁸⁴ It seems likely that remote participation by members during a nationwide emergency would pass judicial muster. Furthermore, if some senators are able to participate on the Senate floor, while other senators participate remotely, the Senate could be understood as “sitting” in Washington, DC, and would not need the consent of the House to allow some of its members to participate remotely. Despite constitutional language implying that Congress should meet in person, courts likely would defer to a congressional determination that remote participation during a nationwide emergency does not ignore constitutional restraints.

Fundamental rights: Third, the Portman-Durbin proposal does not violate fundamental rights. The rights that conceivably could be at issue here would be those of members to participate in congressional proceedings and of the minority to exercise its influence granted by other Senate rules over the Senate’s proceedings. The proposal ensures that members may participate in proceedings as they do when they participate in person. It leaves intact all other Senate rules governing debate and voting, which protect minority rights. To protect senators’ ability to participate and minority power, the technology should provide means for the members to engage in robust debate and communications with other members, and ensure that all members have equal opportunity and technological capability to participate in the proceedings and vote securely. Lastly, the proposal does not preclude senators from coming to the Senate to participate in person. This memorandum addresses those technological issues further in Section V.

b. Enrolled Bill Rule

In addition to the deference courts give to Congress to set its own rules for proceedings, courts generally assume that enrolled bills are accurate and do not review them for procedural deficiencies. An enrolled bill is one signed by the Speaker of the House and the President Pro Tempore of the Senate, and sent to the President of the United States.⁸⁵ The Supreme Court has long held that an enrolled bill “should be deemed complete and unimpeachable.”⁸⁶ The D.C. Circuit has explained, “The only ‘evidence upon which a court may act when the issue is made as to whether a bill . . . asserted to have become law, was or was not passed by Congress’ is an enrolled act attested to by declaration of ‘the two houses, through

⁸⁴ Press Release, U.S. Supreme Court, *Press Release Regarding May Teleconference Oral Arguments* (Apr. 13, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20.

⁸⁵ 1 U.S.C. § 106.

⁸⁶ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892).

their presiding officers.”⁸⁷ The court continued, “[a]n enrolled bill ‘is conclusive evidence that it was passed by Congress.’”⁸⁸

In this case, should Congress use remote voting to pass a bill, and congressional leadership and the President sign that bill, courts likely would look to the enrolled bill rule in any challenge to that law and determine that the enrolled bill is determinative of Congress’s will in the case.

IV. State and International Experiences with Remote Voting

Although the U.S. Congress has not moved to remote sessions, several states and foreign countries already have been experimenting with such proceedings. According to the National Conference of State Legislatures, legislatures or chambers in at least 14 states and the District of Columbia have changed their rules to allow for remote participation or voting in light of the pandemic.⁸⁹ This section provides an overview of Vermont, Kentucky, and New Jersey’s experiences with remote proceedings, as well as those of the United Kingdom and several European Union nations.

a. Vermont

Both the Vermont Senate and House have adopted resolutions allowing them to conduct business remotely, although their procedures differ. On April 8, 2020, the Vermont Senate, with a bare minimum of 16 senators present to constitute a quorum, unanimously passed a resolution to allow the Senate to conduct a session of the Senate electronically “at which one or more Senators may participate, debate deliberate and vote in a meeting of the Senate from a remote location.”⁹⁰ Vermont General Assembly staff explained to Subcommittee staff that the Senate preferred to operate via a video conference call.⁹¹ Its rules require that members be present and visible on camera to count as participating.⁹² To date, the Senate has conducted three electronic sessions with the Lieutenant Governor—acting constitutionally as the Senate President—present and presiding in the chamber. Members may attend in person if they so choose.⁹³ The Senate did take several roll

⁸⁷ *Public Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 486 F.3d 1342, 1350 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1076 (2007) (quoting *Marshall Field & Co.*, 143 U.S. at 670).

⁸⁸ *Id.* (quoting *Marshall Field & Co.*, 143 U.S. at 672–73).

⁸⁹ *Continuity of Legislature During Emergency*, Nat’l Conf. of State Legislatures (Apr. 28, 2020).

⁹⁰ S. Res. 11, 2020 Leg., Reg. Sess. (Vt. 2020).

⁹¹ Staff interview with Vermont General Assembly Staff (Apr. 27, 2020).

⁹² S. Res. 11, 2020 Leg., Reg. Sess. (Vt. 2020).

⁹³ Email from Vermont Legislature staff to Subcommittee staff (Apr. 28, 2020) (on file with the Subcommittee).

call votes, but found the process cumbersome and now has suspended roll call votes.⁹⁴

Similarly, on April 23, 2020, the Vermont House unanimously adopted a temporary rule to allow remote participation while the State of Vermont is subject to a House Declaration of a State of Emergency based on the COVID-19 pandemic.⁹⁵ It also adopted a temporary rule to allow the House's committees to vote remotely, subject to the normal quorum rules and other committee rules.⁹⁶ Unlike the Senate, the Vermont House chose to use an electronic voting system conducted over technology that the state uses for emergency communications to the public. Legislative staff stated that that technology allowed the House members to vote securely and quickly.⁹⁷ The technology the House uses sends an alert to members' mobile phones, as well as to their email addresses, to which the members must respond to vote.⁹⁸ Although the House has not used it yet, the technology also would allow members to take a photograph of themselves and their vote to confirm that it is actually the member voting.⁹⁹ The legislative staff noted that during the first session using the remote technology, 90 percent of House members were able to submit their votes within 63 seconds.¹⁰⁰ They said that the videoconferencing platform has enabled chamber-level debates, with the screen view shifting between the presiding officer and members, as well as allowed for large group meetings of members to allow them to reach consensus before floor debate.¹⁰¹ Similar to the Vermont Senate procedures, the House Clerk and Parliamentarian were present in the House chamber to conduct business.¹⁰²

b. Kentucky

The House of the Kentucky General Assembly has adopted remote procedures, while the Senate continues its operations in person.¹⁰³ The Kentucky House passed a resolution amending its rules to allow for "alternative voting" at any time the Speaker or other presiding officer authorizes it. The resolution specifies that the quorum shall include members physically present as well as those verified by the

⁹⁴ See S. JOURNAL, 2020 Leg., Reg. Sess. 439–42 (Vt. 2020); staff interview with Vermont General Assembly Staff (Apr. 27, 2020).

⁹⁵ H.R. 18, 2020 Leg., Reg. Sess. (Vt. 2020).

⁹⁶ *Id.*

⁹⁷ Staff interview with Vermont General Assembly Staff (Apr. 27, 2020).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Email from Vermont General Assembly staff to Subcommittee staff (Apr. 28, 2020) (on file with the Subcommittee).

¹⁰³ David A. Lieb, *Virus Pits Health vs. Public Duty for Some State Lawmakers*, ASSOC. PRESS (Apr. 24, 2020), <https://apnews.com/c4ac2e3a7668f32395749914dd944569>; staff interview with Kentucky General Assembly Staff (Apr. 28, 2020).

Speaker to be present through “appropriate means, including but not limited to a video call in which the member’s face can be seen.”¹⁰⁴ The rule allows the member or a designee of the member’s caucus who is physically present to cast votes on behalf of the member.¹⁰⁵

Staff for the Kentucky General Assembly told Subcommittee staff that before passing this resolution, the Kentucky House’s policy was to require all members to be present on the Capitol grounds, although not necessarily in the House chamber.¹⁰⁶ In that situation, each day, members received a packet with the convening roll call through which they could certify that they were present on campus.¹⁰⁷ Members would convey their votes to members of leadership who would act as their proxy on the floor.¹⁰⁸ Some legislators would text or email pictures of their votes to their proxies or the chief clerk to verify their vote.¹⁰⁹ In some cases, they also would send their leadership, who were present on the floor, any discussion or questions regarding their vote, which the leadership members would read aloud.¹¹⁰ The Kentucky General Assembly staff noted that the proceedings would pause after a roll call vote to ensure members would have a chance to review and confirm their votes through a live feed from the House floor.¹¹¹

c. New Jersey

On March 20, 2020, the New Jersey State Legislature passed a bill allowing the Legislature to conduct meetings, vote, and receive public comments electronically during a state of emergency.¹¹² Legislative staff explained that floor proceedings are conducted through a conference call without video on the House floor.¹¹³ Several staff members from the two parties and from the Office of Legislative Services are present on the floor to conduct the proceedings.¹¹⁴ The Senate has used the House floor to conduct its remote proceedings because the House floor already has the technology installed.¹¹⁵ Each member dials in, and staff on the floor can confirm which members are present. The members vote by voice, and for the House proceedings, an administrative clerk records the votes through the House’s

¹⁰⁴ H.R. 133, 2020 Leg., Reg. Sess. (Ky. 2020).

¹⁰⁵ *Id.*

¹⁰⁶ Staff interview with Kentucky General Assembly Staff (Apr. 28, 2020).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Pub. L. No. 2020, 2020 N.J. Sess. Law Serv. Ch. 11 (Assembly 3850) (West).

¹¹³ Staff interview with New Jersey State Legislature Staff (Apr. 28, 2020).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

electronic voting system.¹¹⁶ Members have an opportunity to review and correct their votes once voting concludes.¹¹⁷

d. International Experiences

International legislatures have adopted a variety of approaches to address the challenges of voting and conducting oversight during the pandemic. Several European parliaments have adopted remote voting, and other bodies have begun to explore this practice, but no countries in the Group of 7 other than the United Kingdom have implemented remote voting procedures as of mid-April 2020.

In an April 4, 2020 letter to the House of Commons of the United Kingdom, Speaker Sir Lindsay Hoyle explained that Members of Parliament would be able to ask questions and make statements via video link at the start of each sitting day.¹¹⁸ The House of Commons would broadcast these proceedings live, and it would consider broadcasting other proceedings like debates on motions and consideration of legislation. Hoyle also explained that he had asked House employees “to undertake preparatory work as a matter of urgency on a system of remote voting in divisions of the House.”¹¹⁹ He further noted that a House committee would publish a report on the proposed virtual operating model, and it would be “for the House to decide, in accordance with existing processes, the way forward once it returns [on] April 21.”¹²⁰ On April 16, 2020, the House of Commons Commission announced it would allow members to question ministers and the Prime Minister via Zoom starting on April 22.¹²¹ The Commission deferred to the full House to decide on a system of remote voting.¹²²

In addition to remote operating procedures, the clerk of the House of Commons also suggested on March 16, 2020, that the House might relax rules around the quorum

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Letter from Sir Lindsay Hoyle, Speaker of the House of Commons, to the House of Commons (Apr. 14, 2020), <https://www.parliament.uk/documents/Speaker%20to%20all%20MPs%20-%20update%20re.%20virtual%20proceedings%2014%20April%202020.pdf>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Coronavirus: MPs and Peers to Quiz Ministers Via Video Conferencing*, BBC (Apr. 16, 2020), <https://www.bbc.com/news/uk-politics-52299514>; see also Luke McGee, *British Politicians are Concerned a “Virtual Parliament” Cannot Hold Boris Johnson’s Government to Account Over Coronavirus*, CNN (Apr. 16, 2020), <https://www.cnn.com/2020/04/16/uk/uk-parliament-virtual-parliament-social-distancing-intl-gbr/index.html> (“While it will still be possible for votes (known in the UK as ‘divisions’) to take place in the House of—the means by which legislation receives Parliamentary approval—these will still be restricted to members sat in the chamber itself.”).

¹²² *Id.*

required for formal votes—for example, proxy votes from party whips, on behalf of members of their parties, could count toward meeting the quorum requirement.¹²³

On April 21, 2020, the House of Commons voted unanimously to approve a “virtual Parliament,” in which only 50 of the 650 members would be allowed in the chamber at one time, with another 120 members allowed to participate remotely via teleconference.¹²⁴ Participation would be apportioned between the political parties based on the number of seats they won in the previous election.¹²⁵ Remote voting also would occur, although the government planned to introduce only legislation that would pass by overwhelming consent to avoid the need for paper balloting.¹²⁶

The Inter-Parliamentary Union has also catalogued several instances of European legislatures that have already instituted remote voting. The Croatian parliament, for example, has implemented special measures to allow committees to hold meetings remotely and vote via email or text message.¹²⁷ The parliament of the Czech Republic has also instituted remote voting via WebEx, which the parliament hosts internally.¹²⁸ The Luxembourg Chamber of Deputies also uses WebEx to allow for remote committee meetings and voting through roll call.¹²⁹ In Poland, a resolution from the Presidium of the Senate has allowed parliamentarians to vote remotely; deputies of the Sejm, the lower house of parliament, will verify their identities through text message.¹³⁰ In Romania, the standing orders of the Senate have also been changed to provide for remote meetings, with remote plenary sittings broadcast live and roll call voting by phone.¹³¹ When the Spanish parliament held a plenary session in late March, it also used videoconferencing and remote voting for parliamentarians who were unable to attend.¹³²

¹²³ Memorandum from the Clerk of the House of Commons to Procedure Committee (Mar. 16, 2020), <https://committees.parliament.uk/committee/126/procedure-committee/publications/3/correspondence/>.

¹²⁴ William Booth, *U.K. Parliament Votes to Continue Democracy by Zoom*, WASH. POST (Apr. 21, 2020), https://www.washingtonpost.com/world/europe/virtual-parliament-uk/2020/04/21/373ccf08-83d1-11ea-81a3-9690c9881111_story.html.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Inter-Parliamentary Union, *Country Compilation of Parliamentary Responses to the Pandemic* (accessed Apr. 15, 2020), <https://www.ipu.org/country-compilation-parliamentary-responses-pandemic>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* See also David M. Herszenhorn, *Democracy in Critical Care as Coronavirus Disrupts Governments*, POLITICO (Mar. 24, 2020), <https://www.politico.eu/article/democracy-in-critical-care-as-coronavirus-disrupts-governments/> (stating that during a late March session of the Congress of Deputies, “deputies will be able to vote remotely on two decrees related to labor and agricultural policy as well as on urgent measures to respond to the pandemic and the economic fallout”).

Other than the United Kingdom, peer countries of the United States in the Group of Seven have not instituted remote voting as of mid-April 2020. In France, for example, the Senate has held videoconference committee meetings via Tixeo, and the National Assembly has held remote committee meetings as well, but they have not authorized remote voting.¹³³ The Council of the European Union, however, instituted a temporary plan in late March to meet via videoconference and then “take formal decisions using a streamlined ‘written procedure’—a longstanding mechanism by which national capitals vote remotely on policy proposals.”¹³⁴ The European Parliament also temporarily allowed electronic voting by email for its plenary session that took place on March 26, 2020: “Members would receive electronically, via email to their official email address, a ballot form, which would be returned, completed, from their email” to a Parliament mailbox.¹³⁵

V. Technological Security Recommendations Regarding Remote Senate Voting and Participation

Should the Senate adopt a remote participation and voting system, that system will become a prime target for adversaries of the United States wishing to disrupt the system to undermine confidence in the country’s institutions, or to alter the outcome of significant votes.¹³⁶ Therefore, any system the Senate adopts must provide a level of security that would ensure confidence in the validity of senators’ identities and votes similar to that which exists on the Senate floor.¹³⁷

Under current remote voting and participation proposals, decisions about specific technology solutions would rest with the Senate Sergeant at Arms, the Secretary of the Senate, and the Director of the Doorkeepers. Based on conversations with technological experts, however, this memorandum describes three principles the Senate should consider in developing and implementing any remote voting system to ensure its security: encryption, authentication, and verification. In describing

¹³³ Inter-Parliamentary Union, Country Compilation of Parliamentary Responses to the Pandemic (accessed Apr. 15, 2020), <https://www.ipu.org/country-compilation-parliamentary-responses-pandemic>.

¹³⁴ David M. Herszenhorn, *Democracy in Critical Care as Coronavirus Disrupts Governments*, POLITICO (Mar. 24, 2020), <https://www.politico.eu/article/democracy-in-critical-care-as-coronavirus-disrupts-governments/>.

¹³⁵ Natasha Lomas, *EU Parliament Moves to Email Voting During COVID-19 Pandemic*, TECH CRUNCH (Mar. 23, 2020), <https://techcrunch.com/2020/03/23/eu-parliament-moves-to-email-voting-during-covid-19/>; see also Maia De La Baume, *Corona-Era European Parliament: Empty Chamber and E-Voting*, POLITICO (Mar. 27, 2020), <https://www.politico.eu/article/corona-era-european-parliament-empty-chamber-and-e-voting/>.

¹³⁶ See Erika Lovley, *Cyberattacks Explode in Congress*, POLITICO (Mar. 5, 2010), <https://www.politico.com/story/2010/03/cyberattacks-explode-in-congress-033987>.

¹³⁷ See Rebecca Kern, *Remote Voting by Congress Technically Feasible if Leaders Agree*, BLOOMBERG GOV’T (Mar. 31, 2020), <https://about.bgov.com/news/remote-voting-by-congress-technically-feasible-if-leaders-agree/>.

these principles, this memorandum demonstrates the extent to which off-the-shelf solutions could be used to stand up a remote voting system in the near term.

a. Encrypted Tools for Remote Participation and Voting

If the Senate adopts a remote participation and voting system, it should consider ensuring the votes are encrypted during transmission. This section discusses three types of encrypted tools that could protect votes.

i. End-to-End Encrypted Application Remote Voting Tool

One potential solution is to deploy end-to-end encryption (E2EE) technology, which is already deployed in numerous applications widely used by the general public.¹³⁸ In fact, the Senate already recommends the E2EE application Signal for use by senators and staff.¹³⁹ According to Ben Adida, Executive Director of the non-profit Voting Works, the Senate could create a remote voting system using open source industry standard cryptology found in other widely used encrypted applications or use an existing tool like Signal with safety numbers.¹⁴⁰ This could be done by providing each senator with a modern, secure phone, to be used only for remote voting, which contains the application. Through this encrypted application and device, senators could securely transmit their votes to the clerk in the chamber via voice, video, or written text.¹⁴¹

Matt Blaze, the McDevitt Chair of Computer Science and Law at Georgetown University, also believes E2EE technology could be used to protect a remote voting process. He says, “Because the scale is small and secret ballots are not required, remote voting for congressional bodies is a much simpler problem than voting in civil elections. It is possible that an acceptably secure system could be deployed relatively simply using existing tools, including standard protocols and libraries for end-to-end encryption and digital authentication.”¹⁴²

¹³⁸ Popular encrypted messaging applications include WhatsApp with 1.5 billion users worldwide and Facebook Messenger with 1.3 billion global users. See Michael Grothaus, *If You Value Your Privacy, Switch to Signal as Your Messaging App Now*, FAST COMPANY (Apr. 19, 2019), <https://www.fastcompany.com/90335034/if-you-value-your-privacy-switch-to-signal-as-your-messaging-app-now>. Other popular applications include Signal and Telegram. See Miriam Cihodariu, *The Best Encrypted Messaging Apps You Should Use Today*, HEIMDAL SECURITY (Jul. 20, 2019), <https://heimdalsecurity.com/blog/the-best-encrypted-messaging-apps/>.

¹³⁹ Joe Uchill, *Senate Approves Encrypted App Signal for Staff Use*, HILL (May 17, 2019), <https://thehill.com/policy/cybersecurity/333802-sen-staff-can-use-signal-for-encrypted-chat>.

¹⁴⁰ Staff interview with Ben Adida (Apr. 17, 2020). For more on safety numbers, see *What is a Safety Number and Why do I see that it Changed?*, SIGNAL, <https://support.signal.org/hc/en-us/articles/360007060632-What-is-a-safety-number-and-why-do-I-see-that-it-changed->.

¹⁴¹ *Id.*

¹⁴² Staff interview with Professor Matt Blaze (Apr. 17, 2020).

ii. Blockchain Remote Voting Tool

In addition to E2EE applications, the Senate may consider blockchain. With its encrypted distributed ledger, blockchain can both transmit a vote securely and also verify the correct vote. Some have argued that these attributes make blockchain useful for electronic voting broadly.¹⁴³ Blockchain can provide a secure and transparent environment for transactions and a tamper-free electronic record of all the votes.¹⁴⁴ It also reduces the risks of incorrect vote tallies.¹⁴⁵ Moreover, some firms have already begun to deploy blockchain-like technology to help countries, like Estonia, run elections entirely online.¹⁴⁶

Although some have raised concerns about the use of online systems for voting, those concerns are more specific to secret ballot elections than they are to public Senate votes.¹⁴⁷ One concern specific to the Senate is the risk that majority control of the blockchain could fall into the wrong hands. Due to the small size of the Senate, any remote blockchain voting system would need to be properly set up to eliminate any threat of a 51 percent attack to ensure that no bad actor could gain majority control of a voting chain.¹⁴⁸ A 51 percent attack occurs when an actor controls more than half of a network's computing power and uses that power to exert control over the blockchain.¹⁴⁹ Other security concerns for remote blockchain voting in the Senate include possible vulnerabilities from cryptographic flaws and software bugs.¹⁵⁰

¹⁴³ Perianne Boring, *The Future of Voting is Blockchain*, CHAMBER OF DIGITAL COMMERCE, <https://digitalchamber.org/the-future-of-voting-is-blockchain/>.

¹⁴⁴ Federico Panisi, Ross P. Buckley & Douglas W. Warner, *Blockchain and Public Companies: A Revolution in Share Ownership*, 2 STAN. J. BLOCKCHAIN L. & POL'Y 189, 213 (2019).

¹⁴⁵ *Id.* at 215.

¹⁴⁶ *Estonian Elections 2014-2019*, SMARTMATIC (Dec. 2019), https://www.smartmatic.com/fileadmin/user_upload/CS_Estonia_2014_2019_Dec.pdf.

¹⁴⁷ See Susan Greenhalgh, Susannah Goodman, Paul Rosenzweig & Jeremy Epstein, *Email and Internet Voting: The Overlooked Threat to Election Security*, NAT'L ELECTION DEF. COAL., COMMON CAUSE EDUC. FUND, R STREET INST., ACM US TECH. POL'Y COMM. 5 (Oct. 2018), <https://www.commoncause.org/wp-content/uploads/2018/10/ElectionSecurityReport.pdf> ("The report foregrounds a serious, yet widely overlooked cybersecurity threat to state and county election infrastructure that receive ballots sent as attachments in the form of emails or digital faxes.").

¹⁴⁸ Mike Orcutt, *Once Hailed as Unhackable, Blockchains are Now Getting Hacked*, MIT TECH. REV. (Feb. 19 2019), <https://www.technologyreview.com/2019/02/19/239592/once-hailed-as-unhackable-blockchains-are-now-getting-hacked/>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

iii. Joint Worldwide Intelligence Communication System Remote Voting Tool

Another option would be for the Senate to create a hardened, air-gapped system with encrypted communications akin to the Joint Worldwide Intelligence Communications System (JWICS). JWICS is the global intranet used by the military and intelligence community to transmit information classified at the Top Secret / Sensitive Compartmented Information level.¹⁵¹ JWICS is already used for video teleconferencing (VTC).¹⁵² At a recent event discussing remote voting options for Congress, General David Petraeus described how he used secure VTC capabilities every day to speak with President Obama during his time as commander of United States Central Command.¹⁵³

Secure VTC could allow senators to be seen and heard while casting their votes, while also potentially permitting senators to engage in a wider array of deliberative activity. Those averse to screens in the Senate chamber might wish to recreate a more technology friendly chamber somewhere else in the capitol, similar to how the Greenbrier bunker contained an alternative Senate chamber for use in case of a catastrophe.¹⁵⁴ The potential amount of time and effort associated with implementation of such a system may not be appropriate during the current pandemic, but the Senate may want to consider designing a permanent JWICS-style system to enable remote participation during future catastrophes.

b. Proper Authentication of Senators

Just as the Senate only allows senators to cast votes on the Senate floor, and only for themselves, if the Senate adopts a remote voting system, it must consider means to ensure that the system guarantees that only senators can cast votes. Furthermore, the system should have a protocol in place to ensure that senators are casting votes freely and with full presence of mind. The system could do so by authenticating the identity of each senator as part of the login process to create a remote notarization audit trail.

¹⁵¹ Nathan Strout, *Why the Intel Community Wants to Improve its Top-Secret Intranet*, FIFTH DOMAIN (Aug. 21, 2019), <https://www.fifthdomain.com/battlefield-tech/it-networks/2019/08/21/why-the-intelligence-community-wants-to-improve-its-top-secret-intranet/>.

¹⁵² Justin Lee & Arthur Nakagawa, *Video Enabling the Combatant Commander's Headquarters*, DEFEND TECHNICAL INFO. CTR. (Jun. 2004), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a465993.pdf>.

¹⁵³ *Mock Remote Hearing April 16 featuring former Members of Congress, General David Petraeus*, POPVOX (Apr. 17, 2020), <https://www.youtube.com/watch?feature=youtu.be&v=lqTwgEjqqgg>.

¹⁵⁴ See Ted Gup, *The Ultimate Congressional Hideaway*, WASH. POST (May 31, 1992), <https://www.washingtonpost.com/wp-srv/local/daily/july/25/brier1.htm>.

i. Identity Authentication

The reliable and secure identity authentication practices already employed in the private sector and other federal government entities are also available to the Senate. Multi-factor authentication has become central to security in recent years. Many are familiar with two-factor authentication, which may, in addition to a password, require a user to verify the legitimacy of a login attempt by answering a phone call or retrieving an emailed. Multi-factor authentication adds layers to that process. For example, in addition to a voice confirmation, a user may also need to scan his or her fingerprint and answer a security question. Layering multiple factors creates the redundancy and complexity necessary to form a secure system.

For these reasons, the Senate should consider employing multi-factor authentication for any remote participation and voting system. Only after senators are properly authenticated would they be permitted to access the secure network to cast their vote. While there are a variety of factors that can be used, three particular factors lend themselves well to off-the-shelf solutions.¹⁵⁵

Factor 1: Passwords. To access the system, senators would have to provide information only they know. Most likely, this would be a password.

Factor 2: Tokens. To supplement their password, senators would have to provide something that only they have. This could be a one-time generated password or token, such as those provided by an RSA SecurID, or an item akin to the Personal Identity Verification Card used by the federal government.¹⁵⁶

Factor 3: Biometrics. Biometric factors provide a high level of security because they enable access to be tailored to specific people. Although fingerprint and facial scans are commonly used, even in consumer electronics, they can be defeated by presentation attacks. A presentation attack fools the biometric authentication system by mimicking, or spoofing, the feature being analyzed. For example, the fingerprint locks on some smart phones have been fooled using a mold of the user's fingerprint.¹⁵⁷ Currently, commercial iris scanners appear to be the biometric system best able to detect

¹⁵⁵ Renan Dias, *The 5 Factors of Authentication*, MEDIUM (Dec. 8, 2017),

<https://medium.com/@renansdias/the-5-factors-of-authentication-bcb79d354c13>.

¹⁵⁶ See *Identity and Access Management*, RSA, <https://www.rsa.com/en-us/products/rsa-securid-suite>. See also *Introduction—PIV Guides*, GEN. SERVICES ADMIN., <https://piv.idmanagement.gov/>.

¹⁵⁷ See Tarang Chugh & Anil K. Jain, *Fingerprint Spoof Generalization*, presented at the Int'l Conf. on Biometrics, Greece 2 (Jun. 2019), <https://arxiv.org/pdf/1912.02710.pdf> (describing different instances of fingerprint presentation attacks).

presentation attacks due to a combination of commercial technology and intrinsic properties of the eye.¹⁵⁸

ii. Prevent Voting under Duress

Although voting from within the Senate chamber does not completely minimize the risk that senators might be forced to vote under duress, voting from a location beyond the chamber might expose senators to greater risk.¹⁵⁹ Any remote voting system must include a mechanism to minimize this risk.

One way to guard against voting under duress is to employ VTC capabilities that give the viewer a sense of who is with the senator. Some have already proposed this solution.¹⁶⁰ Another option would be to provide senators with a code word that they could use to make clear to those in the chamber that they were voting under duress.

c. Verification of the Vote

All the experts the Subcommittee consulted agreed that it was vital that senators' vote be verified. Adida noted that even though E2EE solutions could work for the Senate, all technology has the potential to be hacked. Therefore, a remote voting system must include an audit mechanism to verify or notarize the senator's vote.¹⁶¹ One option could be to have another trusted individual verify the senator's vote.¹⁶² Another option, suggested by Chris Boehnen, former Director for Science and Technology for the Office of the Director of National Intelligence, could be to institute a layover period between when senators finish casting their votes and when those votes become finalized.¹⁶³ Since Senate votes are public once cast, Professor Matt Blaze suggests that senators should be able to observe how their electronic votes are recorded and correct any discrepancies before votes are finalized.¹⁶⁴

When voting on the floor, senators are allowed to cast their votes during a period of time determined by the presiding officer.¹⁶⁵ Only while the vote is open can senators change their votes. Once the presiding officer declares the voting window

¹⁵⁸ Staff interview with Chris Boehnen (Apr. 16, 2020).

¹⁵⁹ Daniel Schuman, *Summary and Analysis: House Rules Committee Democrats Report on Remote Voting* 5, DEMAND PROGRESS (Mar. 24, 2020), https://s3.amazonaws.com/demandprogress/reports/Summary_and_Analysis_House_Rules_Committee_Democrats_Report_on_Remote_Voting.pdf (“[Senators in the chamber] are just as subject to blackmail, coercion, and threats.”).

¹⁶⁰ *Id.* at 1.

¹⁶¹ Staff interview with Ben Adida (Apr. 17, 2020).

¹⁶² *Id.*; staff interview with Professor Matt Blaze (Apr. 17, 2020).

¹⁶³ Staff interview with Chris Boehnen (Apr. 16, 2020).

¹⁶⁴ Staff interview with Professor Matt Blaze (Apr. 17, 2020).

¹⁶⁵ STANDING RULES OF THE SENATE, Rule XII, S. Doc. No. 113–18, at 8 (2013), <https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf>.

closed, senators are no longer able to change their votes. To enable senators voting remotely to see and change their votes during this window, the clerks could create and share a list of each senator's vote as part of the voting process. This list would be updated in real time as senators cast their votes. Senators would be able to see their own votes, check if their vote was recorded correctly, and correct it if not.

Another option is for senators to form voting partnerships. During the vote, senators would check in with their partner, reminding them to review the reported vote to ensure it matches with either the yea or nay transmitted. This partnership could also be part of the identity authentication protocol—after passing each of the aforementioned identity authentication tests, senators might be required to speak with their partner and share a predetermined code word to verify each other's identities. In the event of a catastrophe that incapacitated senators, each senator could have a list of partners one through ninety-nine. If the first partner was incapacitated, the senator would move down the list to the second name and so forth.

VI. Conclusion

Given the current pandemic situation, it is important for the Senate to find a way to conduct its business without threatening the lives of its members. Remote participation and voting could provide a means for senators to represent their constituents, pass legislation necessary to address the crisis, and keep the country moving forward until it is safe for them to convene in person. Any remote participation and voting solution must be carefully secured to prevent malign attacks and ensure the integrity of the deliberative process. And any changes to the Senate rules must ensure that the Senate will return to normal, in-person procedures as soon as possible to avoid losing the intangible, but very real, benefits of face-to-face interactions between members and staff. Whatever changes the Senate pursues, the primary goal should always be to return the nation and Congress to their normal functioning as soon as safely possible.

Personal Statement
Seth Barrett Tillman, Lecturer¹

[1] I am a citizen of the United States, and a resident of the Republic of Ireland.

[2] In 1984, I graduated from the College of the University of Chicago with a BA (honors), and, in 2000, I graduated from Harvard Law School with a JD (cum laude). I have practiced law in the United States, and I have been a federal law clerk in the Third Circuit and in three district courts, for two district judges and for one magistrate judge. I have taught as an adjunct in a U.S. law school, and since 2011, I have been part of the full-time faculty in the Maynooth University Department of Law, Ireland. (My university affiliation is listed for identification purposes only.) My title is Lecturer or Assistant Professor.

[3] I have over 30 publications. My publications have been cited over 700 times, including over 350 domestic and foreign journal citations, and over 350 non-journal citations, including citations by courts of record, in legal briefs and other filings submitted to courts of record and administrative bodies, domestic and foreign, and by members of Congress in hearings, by members of the Irish parliament in debate, in Congressional Research Service publications, and in casebooks, books, treatises, etc. I have submitted over a dozen amicus briefs in federal litigation since June 2017. I frequently write on: congressional/parliamentary procedure and Founding-era legal issues and materials.

[4] I have been asked, on very short notice, by congressional staff, to opine on the constitutionality of Senate Resolution 548 (116th Congress, second session). The resolution is a proposal to amend the Senate's rules by allowing remote voting in certain circumstances. For reasons that I explain below, it is my opinion that:

[a] the substantive proposal is consistent with the constitution's aspirational norms; and,

[b] legislation and other congressional instruments enacted or passed by the Congress and the Senate at times when the Senate is relying on the proposed amended rule would be upheld by the courts.

The Substantive Proposal is Consistent with the Constitution's Aspirational Norms

[5] Article I creates two houses—these were parliamentary houses—chambers that one-and-all understood in 1788 and since would follow the common law customs of *lex parliamentaria*. Parliamentary chambers have two primary aspirational goals. First, the majority must have an opportunity to govern. Second, the minority should have a fair opportunity to probe the majority's purposes and plans through debate (including public debate in the press). As Senator Henry Cabot Lodge explained:

The primary duty of a legislative body is to act. Debate, even when most valuable, is subsidiary. We ought to have always both debate and action, but, if

¹ Lecturer, Maynooth University Department of Law, Ireland. Roinn Dli Ollscoil Mhá Nuad.

Seth Barrett Tillman
Senate Resolution 548
116th Congress (2019-2020)

we must choose between them, action must have the preference, for endless debate without action would soon bring any government into contempt.²

These twin goals are *aspirational*. They are not always achieved, and even when achieved, the results are not equal on all occasions. The proposed amended Senate rule does not impinge on these norms. Quite the contrary: the rule change enhances the ability of individual senators and the chamber as a whole to continue in their dual roles: governance (including legislation and oversight) and debate.

Of course, I am assuming that the Senate will choose a technology which will allow members to duplicate (within reason) what a member might hear (and see) if he were within the traditional physical Senate chamber—that is, each member participating in proceedings could hear (and see) the presiding officer (when speaking), the member who has the floor, and any member making an objection. Second, I am assuming that the Senate will choose a technology that is reasonably secure—that is, the presiding officer could, in fact, determine that the remote member (and not an imposter) is, in fact, participating.

The Courts Are Likely to Uphold What Congress Enacts While the Senate Votes Under the Authority of the Proposed Amended Rule

[6] Members of Congress take an oath to uphold the Constitution. For that reason and others, should the Senate pass the proposed rule change, the amended rule comes with a presumption of constitutionality. Second, authority for the proposed rule change falls squarely within the Constitution's Rules of Proceeding Clause.³ Third, in an emergency, or even post-emergency when evaluating actions taken during an emergency, the federal courts are likely to defer to the decisions taken by the Senate based on the facts and circumstances which were known at the time. Moreover, the proposed rule change does not exhibit any partisan bias, nor does it favor any particular interests in an *ex ante* fashion. In other words, the proposed rule change does not look like ordinary politics; rather, it looks like statesmanship. Finally, legislation will be insulated against procedural challenges by the enrolled bill rule.⁴

Admittedly, there is a Supreme Court case which suggests that the courts might inject themselves into decisions involving congressional procedure. In *United States v. Munoz-Flores*,⁵ the Court adjudicated a purported violation of the Constitution's Origination Clause.⁶ The Court held that such challenges are justiciable. In reaching that conclusion, the Court explained that an Origination Clause challenge involved both houses, and so it was akin to a traditional separation of powers claim. Here, a

² Henry Cabot Lodge, Sr., *Parliamentary Obstruction in the United States*, in HISTORICAL AND POLITICAL ESSAYS 169, 179 (Cambridge, Houghton, Mifflin and Company 1892).

³ U.S. CONST. art. 1, § 5, cl. 2.

⁴ *Field v. Clark*, 143 U.S. 649 (1892); see also *R v Countess of Arundel* (1615) 80 ER 258 (Ch.).

⁵ 495 U.S. 385 (1990); see also *Public Citizen v. Clerk*, United States District Court for the District of Columbia, 451 F. Supp. 2d 109 (D.D.C. 2006) (applying *Field v. Clark*'s enrolled bill rule notwithstanding *Munoz-Flores*).

⁶ U.S. CONST. art. 1, § 7, cl. 1.

Seth Barrett Tillman
Senate Resolution 548
116th Congress (2019-2020)

claim based on a purportedly defective quorum, in conformity with the proposed Senate rule change, would be a pure intra-cameral challenge. Because the proposed Senate rule change does not involve the House in any way, *Munoz-Flores* is not controlling. Finally, for the reasons discussed above, I think it highly unlikely that the current Supreme Court would extend *Munoz-Flores*' rationale in holding that it applies to the issue now under your consideration.

What is Wrong with the Proposed Rule Change?

[7] We, as a country and as a people, now face new and dire circumstances. The most significant problem with the proposed rule change is: it does not go far enough in dealing with these circumstances. Remote voting is a step in the right direction, but it is not enough.

First, many senators are old, and some are infirm. Should they contract COVID-19 or a similar disease, many will be unable to meaningfully participate in senate proceedings. What is worse, if such senators were severely incapacitated, they would not be in a position to submit a resignation. Under current rules, living senators who are incapacitated remain senators, and only a formal resignation would allow their seat to be declared vacant and then filled by their state's governor or by a new election. The Senate's rules should provide that a senator may intentionally absent himself, but *only if* the senator gives timely, written, and signed notice (which could be transmitted electronically) that the member intends to absent himself. Otherwise, the presiding officer, after a suitable length of time, should have the power to declare a senate seat vacant,⁷ thereby allowing the seat to be filled.

Second, Congress should enact a statute delegating to each house a limited power to legislate absent bicameralism in circumstances where the other house is unable to form a quorum. Notwithstanding the Supreme Court's ruling in *INS v. Chadha*,⁸ the Constitution expressly provides Congress with a limited power to delegate its lawmaking power to a single house.⁹ This power was exercised by the First Congress in a statute signed by President George Washington.¹⁰ This was all done at a time when the Framers were still alive, and when some of their number were members of Congress. There is no record in debate on that statute, in the contemporaneous press, or in contemporaneous private records that anyone suggested that Congress acted unconstitutionally in enacting this statute. If your goal is to secure the legislature's role during this and future emergencies, then this is your source of legitimate constitutional authority to take bold action. And, today, bold action is what is required.

⁷ *Model Continuity of Congress Statute*, 4 PIERCE L. REV. 191 (2006), 4 U.N.H. L. REV. 191 (2006).

⁸ 462 U.S. 919 (1983).

⁹ U.S. CONST. art. 1, § 7, cl. 3; *see also A Textualist Defense of Article I, Section 7, Clause 3*, 83 TEX. L. REV. 1265 (2005).

¹⁰ *See An Act to establish the Treasury Department*, 1 Stat. 65, 66, ch. 12, § 2 (Sept. 2, 1789).

Seth Barrett Tillman
Senate Resolution 548
116th Congress (2019-2020)

Let me know if you need any further particulars.

And wishing you well in these trying circumstances,

/s/

Seth Barrett Tillman

28 April 2020

