

**Testimony before the Permanent Subcommittee on Investigations
Committee on Homeland Security and Government Affairs
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**Joshua C. Huder
Senior Fellow, Government Affairs Institute at Georgetown University**

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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 minibuss 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).