



What's in a House quorum? GOP wants the courts to rule on that

Chris Marquette

June 4, 2020

Republicans have gone to court to overturn recent coronavirus-related rule changes adopted by the Democratic-controlled House. But just 15 years ago, when the Republicans were in control, they also changed rules in response to a potential crisis.

In 2005, the GOP-led House voted, 220-195, to adopt a rule paving a pathway to establishing a provisional quorum if catastrophic circumstances left the House without the majority of members needed. A quorum has long been defined as a majority of the whole number of the House, according a Congressional Research Service report. The provision has never been triggered nor challenged, as has been done with the latest rule change.

When the House adopted that rule 15 years ago as a response to the 9/11 terrorist attacks, the Republican majority did not question the constitutionality of using a “provisional quorum” in the face of crisis. Now, House Republicans are suing Speaker Nancy Pelosi and asking a federal court to stop proxy voting — a rule approved by a majority of the chamber — that establishes a quorum counting members who vote by proxy.

Norman Ornstein, a resident scholar at American Enterprise Institute who helped create the Continuity of Government Commission in the wake of 9/11, is among those pointing to the dissonant position.

Republicans, he said, showed no opposition to adopting a rule that could end up allowing two members to constitute a quorum if for instance, more than 218 members of the House were incapacitated or killed in a terrorist attack.

“The way that the House Republicans in the majority dealt with this was to pass into the rules, with all of their members supporting it, a provision that basically would allow a provisional quorum that could be as few as two to make the House work,” Ornstein said.

“They were perfectly fine with that back then,” he added.

Loading the player...

A constitutional question

Article I, Section 5, of the Constitution says that each House “may determine the rules of its proceedings.” In that vein, the House voted 217-189 on May 15 to allow proxy voting for a 45-day period due to the coronavirus pandemic, a practice eligible for renewal until the adjournment

of the 116th Congress. The measure had no Republican support. To be fair, no Democrat supported the 2005 rule change.

House Minority Leader Kevin McCarthy, lead plaintiff in the lawsuit, doesn't dispute the chamber's authority to craft its own rules, but said that when the rule established is open for debate on its constitutionality, the courts should take action.

"Congress can write their own rules; they just can't write unconstitutional rules," the California Republican said at a May 28 press conference. "If you take [Democrats] at their word, they can write a rule that says Republicans only get half a vote. That women cannot vote. That would be Congress writing their own rules."

There is a big difference, Ornstein said, between the examples McCarthy cited and allowing members to vote by proxy.

"If Congress writes a rule that says they can shoot Republicans, clearly that's going to be of a different order than something like this," he said.

What the Democrats did "is not diluting Republican votes, this is not taking away the rights that duly elected members of Congress have," Ornstein said. "And if [McCarthy] believes so much that Congress can write its own rules, they just can't write their own Constitution, then they wouldn't have passed that ridiculous rule that they did in the aftermath of 9/11 that said they could have a quorum of two."

The lawsuit, filed May 26 in U.S. District Court for the District of Columbia, asserts that the unprecedented proxy voting rule change runs afoul of the Constitution because it allows a member to vote as proxy for up to 10 other members and counts them toward a quorum to conduct floor business.

Article I, Section 5, of the Constitution says "a Majority of each [chamber] shall constitute a Quorum to do Business." House GOP signatories cite this part to argue it is a requirement for members of Congress to physically assemble to form a quorum. But the complaint acknowledges that the Constitution "does not ... dictate the method by which the presence of a quorum shall be proven."

"Over the course of 231 years, Congress has assembled at the seat of government while war raged in the surrounding environs and deadly contagion spread throughout the country," the complaint says. "Yet neither House of Congress has ever authorized voting from the floor by mail, telegraph, or proxy, nor even considered, it appears, such a procedure. The unbroken American tradition of in-person assembly and voting in Congress confirms the unambiguous text of the Constitution: proxy voting by Members of the House of Representatives is unconstitutional."

Before the 104th Congress, 18 of 22 standing committees allowed proxy voting. In 1995, a ban was put on the practice due to concerns, particularly by minority parties; all Senate standing committees permit proxy voting, according to a CRS report.

"The Constitution says each house sets its own voting rules, which is why there are proxies in committees, but where there might be a constitutional problem is with getting a quorum on the floor. Article I, Section 5, says there must be a majority to do business," said Ilya Shapiro, a constitutional law scholar at the Cato Institute.

The ‘proper place’

Asked whether the GOP is kicking congressional authority to the courts, a spokeswoman for House Minority Whip Steve Scalise defended the lawsuit and its reasoning.

“They’re not asking another branch of government to dictate House rules; they’re asking the judicial branch to review a rule they believe is unconstitutional and issue an opinion,” spokeswoman Lauren Fine said. “The courts are the only appropriate avenue for seeking resolution on constitutional issues — it’s precisely what they’re set up to address.”

Another member of House GOP leadership, Conference Chairwoman Liz Cheney of Wyoming, echoed the sentiment through a spokesman.

“The purpose of the lawsuit is for the judicial branch to review the constitutionality of what Democrats have proposed,” Jeremy Adler said. “When there are questions of constitutionality, the courts are not only the proper place, but they’re [the] only place to litigate those arguments and reach a decision. It’s why they exist.”

Daniel Weiner, a lawyer at the Brennan Center for Justice, doesn’t expect the lawsuit to go far.

“It would really be unprecedented for a court to interfere with an eminently reasonable set of procedures instituted to deal with a historic pandemic, and that’s why I’m so skeptical of this lawsuit,” he said.

“The Constitution plainly envisions the Congress getting wide, wide leeway to decide on its own operating procedures. Their argument defies original intent and it defies common sense today,” he added.

Texas Rep. Chip Roy, who joined the lawsuit, said in a floor speech last week that the Democratic staff report of the Rules Committee “acknowledged the constitutional questions that arise from proxy voting.”

The report he cited notes that proxy voting “could raise some of the same constitutional questions as remote voting — namely, whether a Member must be physically present in the chamber to vote.”

The Democratic report continues: “However, many scholars argue that the House has the right to determine its own rules, and that the courts would be unlikely to question the process the House used to pass a bill, if the House determined that it was within the bounds of the House rules. And unlike remote voting, proxy voting has a basis in parliamentary tradition and is not accompanied by the same security and technology concerns.”

Illinois Rep. Rodney Davis, the ranking member of the House Administration Committee who helped compile a Republican plan to bring Congress back amid the pandemic, called proxy voting an “unconstitutional scheme” that “takes away the voice of the American people.”

Oklahoma Rep. Tom Cole, ranking Republican on the Rules Committee, said he is “deeply concerned that proxy voting is not constitutionally sound and thus could endanger the legality of legislation passed by such means.”

If the courts were to strike down proxy voting, it would open Congress up for many more lawsuits, Ornstein said.

“Once you say that you have the ability to overturn what a majority of Congress has done on the basis of rules — not even legislative action — you are opening this up to a flood of suits from members against other actions taken in Congress,” he said.