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## Proxy voting opens potential legal loophole for Trump

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This is what a virtual pandemic impeachment looks like.

With President Trump's fate at stake, dozens of House members cast their votes Wednesday by proxy, under special pandemic rules allowing them to offer their input through the use of a designated voter. In doing so, they may have given Mr. Trump a legal angle to challenge the move.

The House has been using virtual voting for months, including on coronavirus relief measures. But impeachment brings new constitutional questions, said Mark Strand, president of the Congressional Institute, a nonprofit focused on making Congress run better.

He said nobody has had standing to challenge the proxy process, but that could change.

"Is that person going to be Donald Trump? He could say, 'Well, you shouldn't be able to impeach me without having people vote in person.' I don't know," Mr. Strand said.

Other congressional scholars and legal experts, though, said they believe the House is on safe ground.

"I don't see why the manner of meeting or voting would be a problem. It is a piece of congressional business, to be conducted, as with all such business, in the manner each house thinks best," said James A. Gardner, a law professor at the State University of New York at Buffalo.

To be sure, most lawmakers did show up in person during the 232-197 vote that made Mr. Trump the first president ever to be impeached twice.

Fifty-seven lawmakers had active proxies during the vote, though it appears only about 52 used them. About three-quarters were Democrats and the rest Republicans.

Subtracting the proxy votes, there would have been a majority for impeachment but it would have been closer than the final tally.

Virtual impeachment began this week when the House Rules Committee met mostly by video to orchestrate debate on a resolution calling on Vice President Mike Pence to trigger the 25th Amendment to sideline Mr. Trump.

The committee then held a virtual session to write rules of debate for the impeachment.

Ahead of Wednesday's vote, Mr. Strand said using proxies for so momentous an occasion struck a wrong note.

"Whatever they do today is going to become a precedent for future presidents. So they should think long and hard, and they should take this very seriously, and they should do it by the Constitution, which requires in-person voting," he said.

Democrats established the proxy voting process in May as it became clear that Congress needed to return to the Capitol even as the coronavirus was spreading.

Lawmakers who use the proxy process are required to file a notice turning over their voting power to a colleague who will be on the floor. That colleague casts the absent lawmaker's vote by announcing it aloud during the vote.

Donald Wolfensberger, a congressional scholar at the Woodrow Wilson International Center for Scholars, has been tracking proxy votes. He said of 14 roll call votes taken this year before Wednesday, only three included proxies, all as part of the debate over the 25th Amendment strategy.

More than five dozen members voted by proxy in each.

Mr. Wolfensberger said proxy voting has escalated since late last year, with some votes in mid-December garnering more than 80 votes from afar.

He said he doubts Mr. Trump's chances of success if the president asks the court to intervene.

"I suppose Trump might challenge, but he'd probably get the same court response that House Republicans did when they challenged the rule last spring," said Mr. Wolfensberger, a former top staffer on the Rules Committee.

A federal court in Washington ruled last year that the courts can't try to police what was essentially an internal House matter. That decision rejected a challenge brought by House Republicans. Republicans filed an appeal.

As they filed the lawsuit, Republicans were reluctant to use proxy voting themselves. That has changed in recent weeks, though.

Kevin Kosar, a scholar at the American Enterprise Institute and co-editor of the book "Congress Overwhelmed," said Republicans in their lawsuit warned of the possibility of corruption through proxy voting.

So far, that hasn't happened, Mr. Kosar said.

He also said it's not the sort of thing that is likely to anger voters.

“You won't find droves of Americans caring a whit about it. Americans generally want Congress to quit squabbling and to just vote on issues and then move on to the next one,” he said.

Among the more than a dozen Republicans voting by proxy were several who previously criticized the practice.

Ilya Shapiro, director of the Levy Center for Constitutional Studies at the Cato Institute, said he didn't see any reason that voting on impeachment by proxy would be different from other floor business.

“The precedent was set when House rules were changed to allow proxy voting back in May,” he said.

However, Josh Blackman, a professor at the South Texas College of Law, said things could get dicey if the Senate tries to create the same proxy system for voting on conviction during a trial.

“Each senator must swear an oath and vote as a juror. That vote cannot be delegated,” he said.

Coronavirus concerns were driven home this week as three House members announced they had tested positive for COVID-19 after being in close-quarters lockdown during the attack on the Capitol. They blamed their infections on Republicans who refused to wear masks during the lockdown.

“Today, I am now in strict isolation, worried that I have risked my wife's health and angry at the selfishness and arrogance of the anti-maskers who put their own contempt and disregard for

decency ahead of the health and safety of their colleagues and our staff,” said Rep. Bradley Schneider, Illinois Democrat.

Also testing positive after the lockdown were Reps. Pramila Jayapal of Washington state and Bonnie Watson Coleman of New Jersey, a 75-year-old cancer survivor.

They all voted by proxy Wednesday.

Democrats this week powered through a rule ordering fines on any lawmaker who breaks the House’s mask mandate.