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.

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[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]

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[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]

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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 present[20] 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 are 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.