

**Committee on Rules
U.S. House of Representatives**

**Hon. Charles W. Johnson
Parliamentarian
U.S. House of Representatives**

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**Testimony
Incapacitations and the Quorum**

Chairman Dreier; Ranking Minority Member Frost; and distinguished members of the committee: I appreciate the opportunity to participate in your review of this very important matter.

The prospect of mass incapacitations among Members of the House raises serious questions. From a parliamentary perspective, the most immediate of these relate to the quorum requirement.

What is “the House”?

The Constitution requires the presence of a majority of the House to do business. However, just as the Constitution leaves it to the House to determine what is business,¹ so also does it allow the House to determine what is the House. Thus, in attempting to discern within precisely what number the Constitution requires a majority, the seminal precedents of the House on composing a quorum begin with the question “What is ‘the House’?”

On a clean slate, this question obviously could admit more than one answer as sensible. For example, the House could decide to measure its whole number by

¹ For example, over time the House has determined that none of the following constitute business requiring a quorum: the opening prayer, the administration of the oath of office to a Member-elect, certain motions incidental to a call of the House, or an adjournment. Indeed, by adopting clause 7(a) of rule XX the House has determined that the mere conduct of debate, where the Chair has not put the pending proposition to a vote, is not “business” requiring a quorum.

the number of its seats. As it happens, the House has chosen to establish its whole number as the number of its Members, including all persons “chosen, sworn, and living” (excepting, of course, any whose Membership has been terminated by resignation or by action of the House). The precedents that record the development of this living-and-sworn standard² are most instructive. They are abstracted in the attachment.

Until 1890 the House viewed that the Constitutional requirement of a quorum made it necessary for a majority of the Members to vote on a matter. Under that practice, a large faction of Members might break a quorum simply by refusing to respond to the call of the roll, even though present.³ With the historic ruling by Speaker Reed⁴ to the effect that Members present in the Chamber but not voting may be counted in determining the presence of a quorum,⁵ that practice changed. Speaker Reed’s ruling was upheld by the United States Supreme Court in *United States v. Ballin*.⁶ The Court declared that the authority of the House to transact business is “created by the mere presence of a majority” (emphasis supplied). Since 1890, the point of order regarding lack of a quorum has been that a quorum is not present, not that a quorum has not voted.⁷

What is a quorum?

A quorum may be expressed as a fraction. The numerator is the number of Members who are present. The denominator is the number of Members who are

² Hinds’ Precedents, volume 4, sections 2889 and 2890, which record the events of March 16, 1906, and April 16, 1906, respectively.

³ Hinds’ Precedents, volume 4, section 2977.

⁴ Codified in clause 4(b) of rule XX.

⁵ Hinds’ Precedents, volume 4, section 2895.

⁶ 144 U.S. 1 (1892).

⁷ Hinds’ Precedents, volume 4, section 2917.

extant. Because the issue in *Ballin* was Speaker Reed's method of counting the number of Members present, the decision of the Supreme Court addressed the numerator of this fraction. In dictum the Court examined the question "how shall the presence of a majority be determined?" and observed that, because the Constitution does not prescribe any method for determining the presence of such majority, it is within the competency of the House "to prescribe any method which shall be reasonably certain to ascertain the fact."

Thus in 1906, consistent with the dictum in *Ballin*, Speaker Cannon employed the still-current method of counting the number of Members extant. After reviewing the perspectives of his predecessors across the 19th century and with special regard for the considered judgment of the Senate on the same question,⁸ Speaker Cannon held that once the House is organized for a Congress "a quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House."⁹

Alternate standards

Modern prospects of catastrophe raise the question whether a standard more discriminating than "living" might be necessary or appropriate under some circumstances. One of the challenges of the "incapacitation" issue is whether the House might legitimately shift between alternate approaches to calculating the denominator of the quorum fraction. Obviously any such dynamism in calculating "the House" would need to occur not merely on opportunistic bases but, rather, under appropriately certified catastrophic circumstances.

⁸ Since 1864, clause 1 of Senate rule VI has read as follows: "A quorum shall consist of a majority of the Senators duly chosen and sworn."

⁹ Hinds' Precedents, volume 4, sections 2890; Cannon's Precedents, volume 6, section 638.

During the meetings of the Cox-Frost task force on continuity of legislative operations in 2002, the Parliamentarian was asked whether he ever would advise the Chair to depart from the living-and-sworn precedent in the event of a catastrophic event that were shown to have disabled a large number of Members without necessarily establishing vacancies in their seats. Could the Speaker unilaterally change the approach to the constitutional quorum requirement that has been consistent in both Houses since 1906? The Parliamentarian acknowledged that the Constitution empowers each House to adopt and interpret its own rules and that the House is not necessarily bound to retain the approach established by Speaker Cannon's 1906 ruling (not appealed) or to maintain consistency with the similar Senate rule, but advised that any ruling by the Speaker effecting such a change in approach would be subject under rule I to an appeal to the full House and, if a record vote were had on that appeal, a quorum consisting of a majority of those living and sworn would be necessary either to sustain or to overrule the Speaker's ruling. (Even if a "runaway" Speaker were to take the further position that his ruling was not subject to appeal, that ruling of nonappealability logically would be itself subject to appeal). In the absence of a proper quorum among those living and sworn to dispose of the appeal, the House would be unable to continue its business.

The Parliamentarian believed that the Speaker should not be advised to depart from the precedents of the House in this area by a unilateral ruling, even under catastrophic circumstances tending to demand that the House be able to conduct legislative business. Rather, the House should consider — preferably in advance — what it might do in the event of such a catastrophe, addressing the contingency by a change in the standing rules adopted by the whole House in a dispassionate atmosphere with a proper quorum present. The constitutional advisability of such a rules change initially would be for the House, in its collective wisdom, to debate and determine by its vote on the proposal. The possible

vulnerability of such a rule to collateral challenge in federal court would need to be evaluated in light of existing case law such as *Ballin*,¹⁰ *Michel*,¹¹ and *Skaggs*.¹²

One must question whether the constitutional latitude noted in the dictum in *Ballin* is wide enough for the House to set a smaller number than a majority of Members living and sworn to do business. In section 5 of article I of the Constitution, the founders addressed smaller-than-majority quorums. They specified two items of business that may be transacted by a smaller number than a majority of the House. Those two items are adjourning from day to day and compelling the attendance of absentees. Whether a third item — an item like re-basing the whole number of the House in the wake of a catastrophe — validly may be added to that category without amending the Constitution is a very serious question.

The holding in *Ballin* validated Speaker Reed's noting the actual presence in the chamber of Members who chose only to lurk rather than to record their position or their presence. Speaker Reed did not find merely that the whereabouts of these Members were known. Rather, he found that they actually were in the chamber of the House observing the proceedings in person. The dictum in *Ballin* lends scant support for the proposition that methods of counting those present may extend beyond the most ordinary connotation of presence, to wit: physical attendance.¹³

¹⁰ 144 U.S. 1 (1892).

¹¹ *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994).

¹² *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997).

¹³ Another consideration is that neither the Constitution nor the *Ballin* decision contemplates any notion of "virtual presence." The founders provided for Houses of Congress that "assemble," and "meet," and forge bicameral consent to adjourn for any extended period or to meet elsewhere. They provided for Houses of Congress that keep journals, and adjourn from day to day, and easily admit votes by the yeas and nays. Even if the Houses chose to approve their journals less frequently than every day, the availability of daily votes by the yeas and nays on adjourning, alone, should rule out any notion that the founders contemplated any 18th-century analog to the "virtual presence" that today might be achieved by proxy or by teleconferencing or by discounting incapacitated Members.

For this reason, if the House were to devise a method of recalculating its number for the purpose of computing its quorum that, under specified catastrophic circumstances, departed from its settled living-and-sworn standard, then it would do well to focus on physical attendance as the measuring device. In catastrophic circumstances, the exercise could amount to discerning what has become of the House.

I am grateful for your attention and will be pleased to engage any questions you might have.

2889. After the House is once organized the quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House.

On March 16, 1906, the House voted on the question of consideration of the bill (H.R. 15744) to abolish the office of Lieutenant General of the Army of the United States, and there appeared yeas 139, nays 32, answering present 21, a total of 192.

There being a question as to the presence of a quorum, Mr. Marlin E. Olmsted, of Pennsylvania, made the point of order that 192 constituted a quorum, saying:

Mr. Speaker, the statute fixing the number of Members provides for the election of 386, and I understand that 386 were chosen. Two of those Members, one from Pennsylvania, Mr. Castor, and one from Virginia, Mr. Swanson, are not now Members of Congress. The gentleman from Pennsylvania is dead and the gentleman from Virginia, who was sworn in, has resigned. They are clearly no longer Members of this House. Two persons who were chosen to be Members have never been sworn. They have never qualified. They have not become Members of this House. That, therefore, leaves the membership of this House at 382, of which number 192 constitute a quorum. The Constitution provides that a majority of each House shall constitute a quorum. That, of course, raises the question, What is the "House?" That question has been discussed frequently here in earlier days and in the other Chamber. The question arose during the civil war, when a certain section of the country did not elect and send Representatives to the United States Congress. The statute provided for a much larger number, but only 183 Members had been chosen, of whom 92 were present. Mr. Speaker Grow announced that 92 constituted a quorum. Mr. Vallandigham, of Ohio, made the point of order that it did not, but after debate and after ruling by Mr. Speaker Grow, Mr. Vallandigham concurred. Mr. Speaker Grow did not go so far as to decide whether a Member who had been chosen, but had not been sworn, would be considered a Member of the House. In the ascertainment of a quorum it was necessary that he should decide for the purposes of the case before him, but I understand that after debate it was held in a similar case in the Senate that a person elected but not sworn is not to be considered. The present rule of the Senate, originally adopted upon the recommendation of a committee of very able Senators, including Senator Edmunds, of Vermont, distinctly specifies that "a majority of Senators duly chosen and sworn" shall make a quorum. Three hundred and eighty-four Members have been "chosen and sworn," but one having died and one having resigned, there are living but 382, and a majority, or 192, constitutes a quorum. Much more might be said, but it seems unnecessary to consume time at this late hour. I submit, Mr. Speaker, that the House now consists of 382 Members and that 192 is a constitutional quorum.

As the Speaker was about to rule, Mr. Adam M. Byrd, of Mississippi, appeared and was recorded. This increased the number to 193, which was a quorum of 384, the number in the House after the deduction of the names of Messrs. Castor, who had died, and Swanson, who had resigned.

Therefore the Speaker did not rule on the question.

2890. On April 16, 1906, Mr. Sereno E. Payne, of New York, moved that the House take a recess until tomorrow at 11:30 a.m.

On a division there were, ayes 125, noes 9.

Mr. Jack Beall, of Texas, made the point of order that no quorum was present. The Speaker pro tempore [Charles Curtis of Kansas] directed the doors to be closed and the roll to be called, under section 4 of Rule XV, and there were, yeas 165, nays 19, answering present 7.

The Speaker [Joseph G. Cannon of Illinois], who had resumed the Chair, said:

The yeas are 165 and the nays are 19; answering "present," 7, a total of 191 voting "yea," "nay" and "present" — in the opinion of the Chair a quorum. The Chair will hand to the Clerk a statement covering the reason the Chair has to assign for holding 191 to be a quorum.

"The Constitution of the United States, in the sections relating to the Congress, specifies that 'a majority of each House shall constitute a quorum to do business.' This brings to the front the question as to what constitutes the 'House,' whether it be all the Members provided for by the apportionment, or whether it be a less number determined by existing accidents or exigencies. During the civil war, when many seats in both House and Senate were vacant, this question assumed great significance and was passed upon in both Houses. On July 19, 1861, Mr. Speaker Grow, after listening to debate, decided that a quorum consisted of 'a majority of those chosen,' but expressly refrained from deciding as to whether the fact of taking or not taking the oath of office should be considered. (See sec. 250 of Parliamentary Precedents.) In 1879 Mr. Speaker Randall intimated that he held the same view; but in 1886 Mr. Speaker Carlisle treated the question as an open one. In 1890 Mr. Speaker Reed, after careful examination of the precedents of the House, held that a quorum was a majority of those 'chosen and living,' such, in his opinion, being the intent of Mr. Speaker Grow's ruling in 1861, although the language of 1861 was not in this respect definite.

"This, therefore, is the status of the question so far as the decisions of the House go. But at the present time another question arises. The apportionment gives this House 386 Members, of whom 194 are a quorum. But two Members have died, and two — Messrs. Patterson, of Tennessee, and Williamson, of Oregon — have not yet been sworn, and Mr. Swanson has resigned. If the rule be that those 'chosen and living' constitute a quorum, without regard to the qualification by taking the oath, then the quorum is 192; but if Members not qualified are not to be counted as part of the House, then the total membership is reduced to 381, and the quorum is 191.

"While the question has never been passed on in the House, it has been the subject of most careful consideration in the Senate, and the result is embodied in a permanent form in Rule III, section 2: 'A quorum shall consist of a majority of the Senators duly chosen and sworn.'

"At first, in 1862, the Senate declined to commit itself to the rule established by the decision of Mr. Speaker Grow in the House in 1861; but in 1864, after thorough debate, by a vote of yeas 26, nays 11, the Senate resolved that 'a quorum of the Senate consists of a

majority of the Members duly chosen.' The question of qualification was brought up in this discussion, but the Senate showed reluctance to bring it into the decision.

"On January 17, 1877, the Senate, in adopting rules, agreed to the rule in its present form, specifying the quorum as 'a majority of Senators duly chosen and sworn.' These words were adopted with very little debate, on the statement by the Senator in charge that they were the words of the old rule of 1864. But, in fact, the words 'and sworn' were inserted in the revision of 1868, being recommended by a committee composed of Messrs. Henry B. Anthony, of Rhode Island; Samuel C. Pomeroy, of Kansas, and George F. Edmunds, of Vermont. Their report does not explain their reasons for adding these words, and there was no debate on this point when the Senate agreed to the report. The Senate was undoubtedly aware of the change, however, since the words 'and sworn' are italicized in the report, indicating that they were an amendment. On October 11, 1893, the Senate discussed the whole rule briefly, and there was an appeal from a decision of the Chair based on the rule. This appeal was laid on the table--yeas 38, nays 5; but this question did not particularly touch the question of qualification.

Such is the status of this question so far as the law of the House and Senate is concerned. The rule of the Senate goes further than the decisions in the House, and does not seem to have been the subject of extended deliberation so far as the qualification feature is concerned. But in view of the learning of the committee who made the report of 1868, and of the reasons which seem to sustain that report, the Chair feels constrained to hold that after the House is once organized a quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House."

A quorum being present, the House stands in recess until tomorrow, at 11:30 o'clock.