

Legislative Proxy Voting



By Paul Engel

May 5, 2023

- Is it constitutional for members of the House to vote by proxy?
- What is the Quorum Clause and why is it important in this case?
- Will this be a flash in the pan or an earth shattering change to the legislative process?

During the COVID-19 scamdemic, Nancy Pelosi once again ignored the Constitution and implemented by rule something called “proxy voting”. Now, Texas Attorney General Ken Paxton has filed a lawsuit in federal court challenging a bill because the final version passed in the House of Representatives by proxy vote. Does Mr. Paxton’s suit have a constitutional leg to stand on? If a court finds for Texas, what does that mean for other legislation passed on a proxy vote?

I imagine most Americans have not been a part of meetings that runs by certain rules of order, but most of us understand the basics. The need to be recognized, rules of decorum, and, oh yeah, a need for a quorum.

A bench of justices, or such a number of officers or members as is competent by law or constitution to transact business

QUO’RUM – Webster’s 1828 Dictionary

Having a number of competent members to transact business is one of the fundamental requirements for the legislative process in the United States. However, in response to the fake

public health emergency called COVID-19, on May 15, 2020, the House of Representatives, then in the control of the Democratic Party, tried to change the rules. Now, almost three years later, the Texas Attorney General Ken Paxton is trying to put a stop to it. In the case *Texas v. Merrick Garland, et. al.*, Mr. Paxton claims that the House of Representatives violated the Constitution on December 23, 2022 when they voted on the Consolidated Appropriations Act of 2023 without a quorum present.

On December 23, 2022, only 201 of the Members of the House of Representatives were present in the House's chamber. As that was less than half of the Members, a quorum was not present. The House therefore enjoyed only two powers: it could "adjourn from day to day" and "compel the attendance of absent Members." It was constitutionally unauthorized to do anything else.

The House nevertheless purported to accept the Senate's amendments to the Consolidated Appropriations Act of 2023 on that day. It did so under a House Rule that allowed absent members to vote by proxy. But the Constitution defines absent members as excluded from "a Quorum to do Business" and therefore unauthorized to vote to enact legislation—by "proxy" or otherwise. Though President Biden signed the Consolidated Appropriations Act, his signature was a nullity because the act never "passed the House of Representatives."

The Court should declare that the Consolidated Appropriations Act has not been enacted and is not law.

[Texas v. Merrick Garland, et. al.](#)

There is a lot to unpack here, so let's start with what happened in late 2022.

The Consolidated Appropriations Act, 2023, began life as H.R. 2617. It was first passed by the House of Representatives in September 2021. ... The Senate passed a different version of the

Act in November 2022. ... Because the versions passed by the House and the Senate were not identical, the differences between the two had to be resolved before the bill was considered passed by Congress.

The Senate assented to the House's amendments to the bill on December 22, 2022. The vote was 68 yea, 29 nay, and 3 who were absent from the Senate chamber not voting.

[Texas v. Merrick Garland, et. al.](#)

Hopefully we all learned the legislative process in school. Both houses of the Congress must pass a bill with the same language before it can go to the President. Since the Senate passed a version of the Consolidated Appropriations Act that was different from the one passed by the House, the House had to agree to the different language. This is where things get sticky, constitutionally speaking.

Members of the House met the next day to consider the Senate's amendments to the bill. The House did not have a quorum; only 201 of the Representatives were present.

[Texas v. Merrick Garland, et. al.](#)

I would say that someone probably failed basic math in elementary school, but that is not what happened. The leadership of the House did not miscount or otherwise make a simple mistake; they tried to get around a constitutional requirement.

Those present nevertheless proceeded to vote on accepting the Senate's amendments. The final tally, according to the Clerk of the House, was 225 yea, 201 nay, and 1 present. ... The extra 226 votes were cast by Representatives whom absent Representatives had appointed as proxies. ... The votes of those physically present were 88 yea and 113 nay.

[Texas v. Merrick Garland, et. al.](#)

Article I, Section 5, Clause 1 of the Constitution clearly states how many members of a house need to be present in order to do business.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Article I, Section 5, Clause 1

So how did the leaders of the House of Representatives attempt to get around this little quorum problem? By changing their own rules.

Determination Of Quorum.—Any Member whose vote is cast or whose presence is recorded by a designated proxy under this resolution shall be counted for the purpose of establishing a quorum under the rules of the House.

H.Res.965 – 116th Congress (2019-2020)

Again, this is where we encounter the problem. When the Constitution states that a majority of a house constitutes a quorum for doing business, does that require them to be physically present? That is the question Mr. Paxton is asking the federal courts to decide.

The Quorum Clause’s text, the structure of the Constitution, and the longstanding—and until three years ago, unbroken—practice of Congress to conduct its business in-person collectively reinforce that the Constitution forbids proxy voting.

Only with a quorum may either House “do Business.” In context, that necessitates physically present Members. The power to “compel the Attendance of absent Members,” would make little

sense if the Constitution did not require physical attendance.

[Texas v. Merrick Garland, et. al.](#)

Mr. Paxton's first argument is that if the physical presence of members was not required to do business, then why would a smaller number be empowered to compile the attendance of those absent? This argument makes sense to me. Otherwise, a minority of members could conduct business while the others were not present, something the framers of the Constitution apparently did not want. Mr. Paxton claims this is further proven by other parts of the Constitution.

Other clauses of the Constitution confirm that Members must be physically present for purposes of a quorum to vote on legislation.

Article I, § 4 requires Congress to "assemble" at least once per year, where "assemble" meant "[t]o bring together into one place" or "congregated." Johnson's Dictionary; see also U.S. Const. art. I, § 5, cl. 4 (no adjournment "to any other Place than that in which the two Houses shall be sitting"); U.S. Const. art. II, § 3 (discussing convening and adjourning Congress).

Article I, § 6 grants certain privileges to Members, but those privileges require physical presence. Specifically, Members are privileged from arrest "during their Attendance at the Session of their respective Houses, and in going to and returning from the same." U.S. Const. art. I, § 6, cl. 1. This privilege—which refers to "going" to the House and "returning" home—would be surplusage if Members could stay home to vote.

[Texas v. Merrick Garland, et. al.](#)

Other examples of constitutional construct that Mr. Paxton relies on are not as convincing.

The Yeas and Nays Clause discusses counting the votes "of

those Present.” U.S. Const. art. I, § 5, cl. 3.

[Texas v. Merrick Garland, et. al.](#)

The problem with that is the part of the clause he’s referring to is not referring to regular votes.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[U.S. Constitution, Article I, Section 5, Clause 3](#)

He also tries to link the Impeachment, Treaties, and Presidential Election Clauses’ presence requirement with the general business of the House.

Similarly, the impeachment power requires that Senate votes be by two thirds of the “Members present” in a proceeding where “the Chief Justice shall preside.” U.S. Const. art. I, § 3, cl. 6.

Neighboring language refers to “presence,” too, in a manner that would rob it of meaning if proxy voting were allowed. E.g., U.S. Const. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]”); U.S. Const. amend. XII (“the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted”).

[Texas v. Merrick Garland, et. al.](#)

While some of Mr. Paxton’s constitutional arguments work, others, not so much. It appears, however, that previous Supreme Courts have agreed with Mr. Paxton.

Supreme Court precedent supports this construction of the Quorum Clause. The Court has held that to constitute a “Quorum” necessary to “do Business,” the Constitution requires “the presence of a majority, and when that majority are present the power of the house arises.” United States v. Ballin, 144 U.S. 1, 6 (1892) (emphasis added). And “presence” means that the members must be “actually and physically present.” Christoffel v. United States, 338 U.S. 84, 89 (1949). See also United States v. Reinecke, 524 F.2d 435, 439–40 (D.C. Cir. 1975) (applying Christoffel).

[Texas v. Merrick Garland, et. al.](#)

Which brings us to an interesting point in history. What is Texas asking for?

The legislation that Texas challenges passed the House without a quorum. It therefore violates the Quorum Clause. Texas is entitled to a declaration to that effect.

Texas is entitled to both preliminary and permanent injunctions preventing the Defendants from enforcing the Act’s unconstitutional requirements. Each of the factors governing the award of injunctive relief favor Texas.

[Texas v. Merrick Garland, et. al.](#)

Texas is asking for an injunction preventing the federal government from enforcing the unconstitutional parts of the Consolidated Appropriations Act of 2023. Mr. Paxton has not only argued that parts of that act are unconstitutional, but that the House of Representatives never legally voted for the legislation. If Mr. Paxton is correct, and this United States law was not made pursuant to the Constitution, it’s not the supreme law of the land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States,

shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Article VI, Clause 2

According to Mr. Paxton, this legislation did not legally pass the House, so it was never, technically U.S. law. That's just the primer for the bombshell this case would be if the court actually finds for Texas.

Conclusion

If proxy voting in the House, as established by H. Res. 965 of the 116th Congress, is found to be unconstitutional, that means every piece of legislation voted on in the house where a majority of members were not physically present, is null and void, since it did not legally pass the House. I have no idea how many pieces of legislation that would be, or how wide ranging their impact, but I'm sure it would rattle the very halls of Congress.

Do I think the court will issue Texas their injunction? While I think Mr. Paxton has made his case, we have not heard the other side yet. Even after the case is heard, I'm not sure the court will issue the requested injunction for the simple reason of the breath of the impact it would have on the nation. Imagine how many suits would immediately be filed against each and every piece of legislation passed without a quorum? The best I can hope for would be for the court to find for Texas, but so limit their opinion as to forestall a national run on the courts.

I have to ask myself how would I find if this case were in my hands? Knowing the impact it would have, and the chaos it would cause, I would still have to find for Texas based on the evidence I've seen so far. Because if I am on a federal court, I took an oath to support the Constitution of the United States. I must uphold the law, and allow the people to suffer

the consequences of their poor choice in representation.

© 2023 Paul Engel – All Rights Reserved

E-Mail Paul Engel: paul@constitutionstudy.com