

STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2020-0414

**Request for an Opinion of the Justices (Quorum under Part II, Article 20)**

**MEMORANDUM OF LAW OF REPRESENTATIVE ROBERT ‘RENNY’ CUSHING  
AND MINDI MESSMER**

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Now come Representative Renny Cushing and former Representative Mindi Messmer, by and through counsel, who respectfully submit this memorandum of law regarding the request of the New Hampshire House of Representatives for an advisory opinion relating to the ability of the House to meet remotely during the current pandemic.

**INTRODUCTION**

In the middle of March of this year, faced with the unprecedented crisis of the Covid-19 pandemic, the New Hampshire House of Representatives suspended its normal sessions in the State Capitol in order to protect the lives of the representatives, a majority of whom are particularly vulnerable due to age. This unsought hiatus came at a critical period in the legislative year when bills are exchanged between the bodies, and before the Committees of Conference

seek to resolve difference between the bodies, and before the dates for final passage, transfer to the Governor, and a final veto override session. While ultimately a small number of bills were able to be fully enacted in three special sessions that took place in the Whittemore Center at UNH, which was then available because classes had been suspended, much of the critical legislative work of the session was simply left undone. Hundreds of millions of federal CARES ACT funds were received and expended by the Governor without the legislative oversight provided for in the State Constitution.

The resulting diminution of democracy was reluctantly accepted by the legislative leaders who no doubt hoped that the crisis would be resolved before the next legislature was to convene in December of 2020. Sadly, it now appears impossible for the foreseeable future for the legislature to meet in the State Capitol. In order to preserve democracy in New Hampshire without threatening the lives of the legislators it thus is critical that the people's legislature be able to meet and deliberate in a manner that addresses the exigencies of life in a pandemic. Accordingly, the House of Representatives has sought an advisory opinion on whether the holding of a session of the House "remotely, either wholly or in part, whereby a quorum could be determined electronically, violate Part II, Article 20 of the New Hampshire Constitution. "

**I. THE IMPERATIVE OF LEGISLATIVE CONTINUITY THAT RUNS  
THROUGHOUT THE NH CONSTITUTION MUST INFORM ANY  
ANALYSIS OF PART II, ARTICLE 20.**

While the framers of the New Hampshire Constitution sought to provide a structure for independent branches of government with diffuse powers to prevent the undue accumulation of authority, it is clear that their vision included a heightened regard for the primacy of the legislature as the most representative body possible of the people. They created a massive House

of Representatives, which with 400 members is the largest in the nation with each member charged with representing an average of 3291 residents, the lowest by far in the nation. The original framers and their successors strove to create an agile legislative body equipped with the tools needed to face a variety of threats so that the most representative body in the state was the body with the most robust assurance of continuity.

Thus Part II, Article 5a, enacted in 1942 in the face of a war with totalitarian powers granted extraordinary powers to the General Court:

**[Art.] 5-a. [Continuity of Government in Case of Enemy Attack.]** Notwithstanding any general or special provision of this constitution, the general court, **in order to insure continuity of state and local government operations in periods of emergency** resulting from disasters caused by enemy attack, shall have the power and the immediate duty to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and **to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations** including but not limited to the financing thereof. **In the exercise of the powers hereby conferred the general court shall in all respects conform to the requirements of this constitution except to the extent that in the judgment of the general court so to do would be impracticable or would admit of undue delay.** (Emphasis added).

This provision authorizes the legislature to take any and all steps necessary to ensure the continuity of government including the replacement of any official whether 'elected or appointed'. This power is both plenary, as it is not limited by any other provision of the Constitution, and exclusive, as no such powers relating to continuity in times of crisis were ever bestowed upon either the Judicial or Executive branch.

Indeed, in separate related provisions, Part II, Articles 49 and 49-a, the Constitution provide that where either a vacancy in the office of governor arises or the governor is unable to function due to incapacity, it is legislative officers (Senate President and Speaker of the House) who exercise the power of the governor to direct the executive branch. There is again no such similar grant of emergency power to either the judicial or executive branches to wield the legislative powers in times of emergency. No member of the executive branch is even included in the chain of succession in the absence of a functioning governor.

While these articles were enacted in response to the threat of invasion by a foreign totalitarian power, the framers also took care provide for legislative continuity in the face of epidemic

threats to the health and lives of the legislators, no doubt because they lived in times without antibiotics or vaccines where the threat of pandemic was ever-present.

To begin with the Constitution provides that each body shall determine the rules by which they operate. Thus Part II, Article 22 provides in relevant part that, “The House of Representatives shall choose their own Speaker, appoint their own officers, and **settle the rules of proceedings in their own House...**” (emphasis added). Similarly, Part II, Article 37 states that “The senate shall appoint their president and other officers, and **determine their own rules of proceedings.**”

It is clear that the framers understood this grant to extend to deciding the conditions under which the legislature would meet in times of health crises. If, and only if, the two legislative bodies could agree upon where and when to meet, the governor was authorized to resolve the differences pursuant to Part II Article 43 and explicitly states that where such disagreement exists, “(and) in cases whereby dangers may arise to the health or lives of members from their attendance at the general court at any place, the governor may direct **the session to be holden at some other the most convenient place within the state.**”

This provision clearly assumes that in the absence of disagreement between the bodies, the power to decide where and when to meet resides in the legislature pursuant to the grant of authority to each body to “settle the rules of proceedings”; Article 43 would make no sense otherwise. In the instant pandemic, “the most convenient place within the state” and the only place truly capable of protecting the lives of the members is a remote electronic setting.

It is only in the context of the pervasive constitutional imperative to ensure legislative continuity that the words and import of the Article 20 requirement that a *quorum* be *present* can be understood.

In a commencement address in 2010, former Supreme Court Justice David Souter eloquently explained how the meaning of phrases originating centuries ago must be interpreted so as to remain true to the values expressed by the Constitution as a whole, while maintaining as well an awareness that our reality has changed in the centuries since the words were first used:

“The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another. Not even its most uncompromising and unconditional language can resolve every potential tension of one provision with another, tension the Constitution’s Framers left to be resolved another day; and another day after that, for our cases can give no answers that fit all conflicts, and no resolutions immune to rethinking when the significance of old facts may have changed in the changing world. These are reasons enough to show how egregiously it misses the point to think of judges in constitutional cases as just sitting there reading constitutional phrases fairly and looking at reported facts objectively to produce their judgments. Judges have to choose between the good things that the Constitution approves, and when they do, they have to choose, not on the basis of measurement, but of meaning.

The fair reading model misses that, but it has even more to answer for. Remember that the tensions that are the stuff of judging in so many hard constitutional cases are, after all, the creatures of our aspirations: to value liberty, as well as order, and fairness and equality, as well as liberty. And the very opportunity for conflict between one high value and another reflects our confidence that a way may be found to resolve it when a conflict arises. That is why the simplistic view of the Constitution devalues our aspirations, and attacks that our confidence, and diminishes us. It is a view of judging that means to discourage our tenacity (our sometimes reluctant tenacity) to keep the constitutional promises the nation has made.

Where I suspect we differ most fundamentally is in my belief that in an indeterminate world I cannot control, it is still possible to live fully in the trust that a way will be found leading through the uncertain future. And to me, the future of the Constitution as the Framers wrote it can be staked only upon that same trust. **If we cannot share every intellectual assumption that formed the minds of those who framed the charter, we can still address the constitutional uncertainties the way they must have envisioned, by relying on reason, by respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people.”**

[\(https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/\)](https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/)

With all of this in mind, the meaning of the word ‘present’ in Article 20 presents no barrier to remote electronic meetings while there exists an electronic method to determine the quorum. To begin with, even before the crisis when the members meeting in Representatives Hall, their presence was determined electronically through the electronic voting system which tallies the number of responses to the quorum call and displays the result on an electronic screen visible to all. Their voices were transmitted through electronic microphones both within the chamber and to the world at large through streaming over the internet. Their votes were cast via an electronic system and displayed on an electronic screen in the chamber. In this sense nothing would change if the members were to signal their ‘presence’ from different locations. The purpose of the requirement of a presence of a sufficient number of members in any body is to ensure that decisions are informed and made by a sufficient portion of the membership to avoid minority rule making. Roberts Rules of Order Newly Revised states that ‘The requirement for a quorum is protection against totally unrepresentative action in the name of the body by an unduly small number of persons’. (Roberts goes on to describe how a quorum can be determined in electronic meetings by having the members state that they are ‘present’ at the meeting time).

The Article 20 requirement of a quorum was not connected in any way to the mere corporeal presence of members in a room, which advances no values in and of itself. Rather the requirement of sufficient presence of members serves to ensure that a majority hear debate, can speak and vote. A member meeting electronically can fully take part in observing, debating, and voting—all of the key legislative functions advanced by quorum requirements.

According to the National Conference of State Legislatures, between March and September of this year 25 states plus Guam, the Virgin Islands and the District of Columbia have all authorized remote electronic sessions. Most if not all of these states have quorum provisions in their constitutions, yet almost all of these states made the authorization through either legislative rule changes or simple resolutions. (In at least one case, the presiding officer just announced the change). The NCSL reports no constitutional challenges to electronic meetings in any of these states. (<https://www.ncsl.org/research/about-state-legislatures/continuity-of-legislature-during-emergency.aspx>) .

Because of the central imperative of legislative continuity expressed throughout the New Hampshire Constitution, as well as the fact that all of the values protected by the Quorum requirement of Article 20 are equally protected by simple procedures available to the legislation, this Court should advise that there is no constitutional barrier to the NH House of Representatives joining the majority of states in utilizing electronic barriers to enable democracy to function in the pandemic. As noted by Abraham Lincoln in the dark days of the civil war, and repeated on several occasions in decisions of the United States Supreme Court, the Constitution is not a mutual suicide pact and the provisions of Article 20 must be permitted to preserve a democracy, not deny it.

Respectfully submitted,  
Robert 'Renny' Cushing and Mindi Messmer

By Their Attorney,

Dated: October 8, 2020

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On September 17, 2020, the House of Representatives after a period of months in which it was only able to assemble times because of