

**THE 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
THE NEW HAMPSHIRE HOUSE OF REPRESENTATIVES**

NOW COMES the New Hampshire House of Representatives, by and through counsel, and respectfully submits this Memorandum of Law requesting this Court to return a negative answer to the question presented.

QUESTION PRESENTED

Would holding a session of the New Hampshire House of Representatives remotely, either wholly or in part, whereby a quorum could be determined electronically, violate Part II, Article 20 of the New Hampshire Constitution?

CONSTITUTIONAL PROVISION

[Art.] 20. [Quorum, What Constitutes.] A Majority of the members of the House of Representatives shall be a quorum for doing business: But when less than two thirds of the Representatives elected shall be present, the assent of two thirds of those members shall be necessary to render their acts and proceedings valid.

INTRODUCTION

The COVID-19 pandemic caused the New Hampshire House of Representatives to suspend all legislative activity following the March 12, 2020 House session. In order to comply with CDC social distancing guidelines, the full House has been unable to meet in Representative's Hall; the 400-member body has met on three occasions at the University of New Hampshire's Whittemore Center to accommodate an in-person House

session. The uncertainty regarding Part II, Article 20's presence for quorum purposes has not only prevented the House from utilizing technology to facilitate remote voting, it promises to directly affect the House's ability to conduct its future business as it plans for its constitutionally-required December 2, 2020 Organization Day and the 2021 Session. An opinion of this Court will greatly assist the House of Representatives in the performance of its constitutional duties.

ARGUMENT

1. This Court should answer the question propounded by the House of Representatives.

Part II, Article 74 of the New Hampshire Constitution provides: "Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions." This Court has noted that it is empowered to render advisory opinions only in "carefully circumscribed situations". *Opinion of the Justices (Definition of Resident and Residence)*, 171 N.H. 128, 133 (2018). Elaborating on its role in answering questions propounded by the Executive and Legislative Branch, this Court has stated:

Part II, Article 74 of the State Constitution empowers the justices of the supreme court to render advisory opinions, outside the context of concrete, fully-developed factual situations and without the benefit of adversary legal presentations, only in carefully circumscribed situations. Part II, Article 74 does not authorize this court to render advisory opinions to private individuals. Nor does it empower the court to issue advisory opinions ... regarding existing legislation. That authority extends only to proposed legislation. Further, when we issue such opinions, we act not as a court, but as individual constitutional advisors to the legislative or executive branches. Because an opinion of the justices is an advisory opinion issued to a branch of the legislature, Governor, or Executive Council, and is not an opinion of the court in a litigated case, an opinion of the justices does not constitute binding precedent. Moreover, the constitutional

duty of the justices of the supreme court to give advisory opinions does not include answering legal questions that require resolving questions of fact.

Opinion of the Justices (Domicile for Voting Purposes), 167 N.H. 539, 541-542 (2015) (citations and internal quotations omitted).

This Court has recognized certain exceptions which are directly applicable in the present matter; most notably, when an official power or duty of the other two branches of government is in question. “By the general rule of the common law, the statute, and the constitution, the justices of the supreme court are forbidden to give advice in matters that may come before the court for decision. The constitution introduces an exception to the rule in some cases, in which the official power or official duty of the senate, the house of representatives, or the governor and council is doubtful, and in which the opinions of the justices are desired by one of those bodies upon an important question of law necessary to be determined by the body requiring the opinions.” *Opinion of the Justices*, 67 N.H. 600, 601 (1892). *See also Opinion of the Justices*, 102 N.H. 183 (1959) (Court answered question regarding executive duties of Governor and Council relating to statutory authority of commissioner of motor vehicles).

On at least two occasions this Court has answered a question presented by the legislature regarding its general constitutional powers outside the context of pending legislation. “Here, however, the question propounded relates to the constitutional authority of the General Court itself, and since there is a possibility, even though it be remote, that our opinion may be of use to the present Legislature in the performance of its official duty, we deem it obligatory on our part to return an answer.” *Opinion of the Justices*, 93 N.H. 474, 475 (1944). *See also Opinion of the Justices*, 101 N.H. 536 (1957) (Court answered legislature’s general question of constitutional authority). Notably, when this Court undertook

its role as constitutional advisor in 1944, it was in the midst of the Second World War and on a matter of pressing importance to the legislature – its ability to convene itself in special session without the approval of Governor and Council. Similarly, the House of Representatives is now asking this Court, in the midst of a continuing global pandemic, to answer a question which also relates to its ability to meet and fulfill its constitutional duty. Therefore, this Court should render its opinion on a “matter of the greatest importance” under “extraordinary circumstances”. *See Opinion of the Justices*, 117 N.H. 837, 840 (1977).

Finally, the fact that the House of Representatives has adjourned from the 2020 Session should not prevent this Court from returning an answer to the question. “The advisory duty of the Justices under Article 74, Part II of the Constitution does not ordinarily require them to furnish an opinion after the General Court has adjourned. In answering your inquiries after adjournment of the regular session we rely upon precedents in which answers have been given with respect to the constitutional authority of the Legislature where the opinion has been requested for the guidance of the Legislature at a possible special session or at the next regular one.” *Opinion of the Justices*, 105 N.H. 125, 127 (1965) (citations and internal quotations omitted). This Court’s answer will undoubtedly provide guidance to the legislature when it organizes in December pursuant to Part II, Article 3 of the New Hampshire Constitution and as it plans for the 2021 Session.

2. This Court has never directly addressed the question presented but should be guided by its principles of constitutional interpretation and analogous cases.

The cases interpreting Part II, Article 20 (and Article 37’s similar provision regarding the Senate) while not conclusive on the meaning of the word “present”, are instructive on the nature of the quorum requirement. In *Pollard v. Gregg*, 77 N.H. 190 (1914), this Court held that a quorum of the

House under Part II, Article 20 consists of a majority of the members elected who are qualified to act as members:

A clear distinction is here made between “the members of the House” and “the representatives elected.” The former expression refers to those members elected who are qualified and recognized as constituting the body of the House for the transaction of business, and does not include deceased persons, or persons who have resigned, or who have been removed since their election as representatives. The framers of the Constitution could not have used language more expressive of an intention to provide that a quorum of the House should consist of a majority of the members elected, who, when the point is raised, are not disqualified to act as members. To hold otherwise would be, not to construe the language of the Constitution, but to give it a forced meaning neither necessary nor reasonable. Incidentally it may be noted that the national House of Representatives construes the Constitution of the United States relating to this question in a similar way. See 4 Hinds' Precedents, §§ 2885–2890.

Id. at 192; *see also Opinion of the Justices*, 121 N.H. 552 (1981) (House and Senate may not act in the absence of specified quorum and the legislative authority of the government may be exercised only by a quorum of the two bodies of the General Court); *Baines v. N.H. Senate President*, 152 N.H. 124 (2005) (claims regarding compliance with mandatory constitutional provisions of Part II, Articles 20 & 37 are justiciable); *Opinion of the Justices*, 102 N.H. 230 (1959) (constitutional provision providing for a fixed, stated quorum of thirteen members of the Senate is mandatory and unique); *Bezio v. Neville*, 113 N.H. 278 (1978) (procedural requirements of Part II, Article 37 are mandatory). Thus, while the specific issue of physical presence within the quorum requirement remains unanswered, the quorum requirement is both mandatory on the legislature and a foundation for its authority to act.

The question propounded is one of first instance and therefore requires this Court to engage in constitutional interpretation. This Court's longstanding jurisprudence states:

The legal principles involved in constitutional interpretation are well-established. In construing a provision of the constitution, we must look to its purpose and intent. Reviewing the history of the constitution and its amendments is often instructive, and in so doing, it is the duty of the court to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in the light of the surrounding circumstances. While the constitution as it now stands is to be considered as a whole as if enacted at one time, to ascertain the meaning of particular expressions, it may be necessary to give attention to the circumstances under which they became parts of the instrument.

Warburton v. Thomas, 136 N.H. 383, 386-387 (1992) (citations and internal quotations omitted). “We first look to the natural significance of the words used by the framers. The simplest and most obvious interpretation of a constitution, if in itself sensible, is most likely to be that meant by the people in its adoption. Additionally, we will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast.” *State Employee's Ass'n of N.H. v. State of N.H.*, 161 N.H. 730, 740-741 (2011) (citations and internal quotations omitted); *see also Opinion of the Justices*, 121 N.H. 480, 483 (1981) (“[T]he language used . . . by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted.”)

The meaning of the word “present” in 1784 would be of a different character than in 2020. A contemporaneous definition from the time of adoption finds the following:

PRESENCE, State of being present; state of being in the view of a superior; a number assembled before a great person; port, air, mien, demeanour; readiness at need, quickness at expedients; the person of a superior.

PRESENT, not absent, being face to face, being at hand; not past, not future; ready at hand, quick in emergencies; favourably attentive, propitious; unforgotten; not abstracted, not absent of mind, attentive

Thomas Sheridan, *A Complete Dictionary of the English Language* (Fourth Edition, 2 volumes; London: Printed for Charles Dilly et al., 1797) available at <https://archive.org/details/completedictiona02sheriala>.

Certainly, a contemporaneous definition would be unlikely to encompass an expansive definition of “present” or account for the myriad methods by which the House could establish a quorum electronically, but it also does not necessarily foreclose such an interpretation. Two cases may provide guidance to this Court on the manner in which the legislature determines its ability to act and thus establish its quorum.

In *Warburton v. Thomas, supra*, this Court was called upon to interpret the legislature’s veto override provision contained in Part II, Article 44. After an extensive review of the adoption of the article and its subsequent history, this Court held that the longstanding practice of the House of Representatives which required a vote of two-thirds of representatives present and voting, a quorum being present, met the constitutional requirement that a vote of two-thirds of “that house” was necessary to override a veto. *Id.* at 394. Additionally, in *Bednar v. King*, 110 N.H. 475 (1970), this Court determined that while the legislature’s method for proposing amendments to the constitution under Part II, Article 100 “by a three-fifths vote of the entire membership of each house at any session” was mandatory and must be complied with, “the procedure by

which the result is obtained in each house is to be determined by its own rules of proceedings.” *Id.* at 476.

Taken together, *Warburton* and *Bednar* suggest that this Court should not be strictly bound to an antiquated definition of the word “present”, but should also give merit to any method by which the House may establish its quorum, including by electronic means.

3. Congress, the United States Supreme Court, and other court decisions offer additional guidance on the issue.

“Although state courts are not bound to interpret their state constitutional provisions the way the United States Supreme Court construes comparable federal constitutional provisions, such precedents are quite persuasive. See *Antieau*, *supra* § 2.48, at 51; *cf. Pollard v. Gregg*, 77 N.H. 190, 192, 90 A. 176, 177 (1914) (giving weight to interpretation of provision in Federal Constitution by the United States House of Representatives when construing similar State constitutional provision).” *Warburton v. Thomas*, 136 N.H. 383, 392 (1992).

The United States Congress is currently addressing the related issues of remote voting and its quorum requirement. See Congressional Research Service, *Constitutional Considerations in Remote Voting in Congress*, (April 14, 2020) available at

<https://crsreports.congress.gov/product/pdf/LSB/LSB10447>;

see also H. Res. 965, *Authorizing remote voting by proxy in the House of Representatives and providing for official remote committee proceedings during a public health emergency due to a novel coronavirus, and for other purposes*. House Report 116-420 (May 14, 2020) available at

<https://www.congress.gov/116/crpt/hrpt420/CRPT-116hrpt420.pdf>;

McCarthy v. Pelosi, 2020 WL 4530611 (D.D.C August 6, 2020)

(dismissing challenge to proxy voting authorized by H. Res. 965 brought by members of the U.S. House of Representatives).

In determining to proceed with remote voting, the U.S. House of Representatives relied upon the United States Supreme Court's decision in *United States v. Ballin*, 144 U.S. 1 (1892). In that case, the Court was presented with the issue of the method by which Congress – and the House of Representatives in particular – could determine its quorum. The Court held, in relevant part:

The Constitution provides that "a majority of each [house] shall constitute a quorum to do business." In other words, when a majority are present the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the Constitution requires is the presence of a majority, and when that majority are present, the power of the house arises.

But how shall the presence of a majority be determined? The Constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count, as the sole test; or the count of the Speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the House may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question, and all that that rule attempts to do is to prescribe a method for ascertaining the presence of a majority, and thus establishing the fact that the House is in a condition to transact business.

United States v. Ballin, 144 U.S. 1, 5-6 (1892) (emphasis added)

Ballin should suggest to this Court that the New Hampshire House of Representatives should be able to utilize any method “reasonably certain to ascertain” its own quorum, including by electronic means. Of particular

note, *Ballin*, supra, at 8-9. cited favorably to a New Hampshire case, *Attorney-General v. Shepard*, 62 N.H. 383 (1882) in which this Court upheld a vote by an aldermanic board, holding that “An arbitrary, technical, and exclusive method of ascertaining whether a quorum is present, operating to prevent the performance of official duty and obstruct the business of government, is no part of our common law.” *Attorney-General v. Shepard*, 62 N.H. 383, 384 (1882). Again, this would suggest that the House should not be bound by physical presence alone to obtain its quorum, but should be free to establish its quorum by other means.

Few courts since *Ballin* have specifically addressed the issue of physical presence within a quorum requirement, but those which have may be instructive. *Chamber of Commerce of U.S. v. N.L.R.B.*, 879 F.Supp. 2d 18 (D.D.C. 2012) is noteworthy in its discussion of the method by which an administrative agency may statutorily establish its quorum through electronic means.

But whether the standard is “mere presence” or “participation,” the difficulty is in applying that standard to an online vote. When the very concept of a quorum seems designed for a meeting in which people are physically present in the same place, what does it mean to be present or to participate in a decision that takes place across wires? In other words, how does one draw the line between a present but abstaining voter (who may be counted toward a quorum) and an absent voter (who may not be) when the voting is done electronically? Even if “mere presence” is enough, the translation of that physicality-based concept to the JCMS process, which “automatically calls for an electronic vote when drafts are circulated,” Hayes Decl., ¶ 11, is not obvious.

As a preliminary matter, while electronic voting is relatively new, the idea that “the quorum acting on a matter need not be physically present together at any particular time” is not. *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453, 460 (D.C.Cir.1967). That the Board may “proceed with its members acting separately, in their various offices, rather than jointly in conference,” accordingly, is not controversial. *See id.* (describing the “notation voting” system).

When a full quorum participates—usually, by voting—the use of an electronic voting system that permits the Board to reach a decision without actually being together is perfectly appropriate.

Chamber of Commerce of U.S. v. N.L.R.B., 879 F.Supp. 2d 18, 27-28 (D.D.C. 2012). The court, in discussing *Ballin*, stated:

In arguing that the electronic transmission to Hayes of a notification that the rule had been put to a vote is enough, the NLRB harps on *United States v. Ballin*, a case addressing the quorum requirement for the U.S. House of Representatives. “What did the non-voting members in *Ballin* do to constitute the quorum?” the NLRB rightly asks. “They were identified as sitting in their seats when the U.S. House of Representatives called the question for a vote. And then, they did nothing. They did not have to do anything: the quorum was created by their mere presence.” Although the members of the House need not have taken any action after they showed up for the vote, the NLRB’s argument only confirms that they needed to actually be there in the first place. In other words, *Ballin* fully supports the proposition that merely holding office is not enough and confirms that an individual needs to *something*—that is, he needs to show up—in order to be counted toward a quorum.

Id. at 29 (citations omitted). *See also Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453, 460 (D.C.Cir.1967) (review of federal administrative agency statutes which permit quorum to act separately without physical presence). *But see Wheeler v. River Falls Power Co.*, 111 So. 907, 909 (Ala. 1926) “[I]ndividual members of the committee, scattered about the state, cannot be counted to constitute a quorum of a meeting of the committee which in fact they did not attend. This proposition has been often stated, is clearly restated by the Supreme Court of the United States in *United States v. Ballin*, [citation omitted] and further argument is hardly necessary. The sum of it is that, in the absence of legislative authority to a different effect, a majority of the members must attend any meeting of the committee called for legislative purposes, otherwise there is no committee

competent to act, but a majority of those present, when legally met, may bind all the rest.”

The conclusion to be drawn from the experience of Congress and *Ballin* is that this Court should find that the New Hampshire House of Representatives is free to utilize any method to determine its quorum, including electronic means, so long as a quorum can be constitutionally established.

4. Other states have permitted remote participation by legislators.

According to the National Conference of State Legislatures, “[f]rom March through August 2020, legislatures or chambers in at least 25 states, the District of Columbia, Guam and the Virgin Islands changed their procedures to allow for remote participation or voting in floor sessions or committee meetings.” *See* National Conference of State Legislatures, *Continuity of Legislature During Emergency - Remote Participation* (August 27, 2020) available at <https://www.ncsl.org/research/about-state-legislatures/continuity-of-legislature-during-emergency.aspx>. Admittedly, these states’ constitutions do not contain quorum provisions identical or wholly analogous to New Hampshire. It does indicate, however, that these states presume that their actions are necessary to conduct its business during this pandemic. California has proceeded with remote voting despite a contrary opinion from legal counsel, further highlighting the importance which legislatures have placed on their ability to meet their constitutional obligations under the present circumstances. *See* Legislative Counsel Bureau, LEGISLATURE: REMOTE VOTING - #2011147, (May 11, 2020) available at https://jones.cssrc.us/sites/default/files/200511_ltr_RemoteVoting.pdf?utm_source=Jones+-+Remote+8.3.20&utm_campaign=Jones+-+Remote+8.3.20&utm_medium=email. Nebraska has taken the opposite approach, *see* Martha Stoddard, “State Constitution makes remote voting,

virtual sessions unlikely for Nebraska Legislature,” *Omaha World-Herald*, July 9, 2020 available at https://omaha.com/news/state-and-regional/govt-and-politics/state-constitution-makes-remote-voting-virtual-sessions-unlikely-for-nebraska-legislature/article_8e061e51-c902-5bb6-95ef-dac9ddab3eb4.html. The experience of these other states, while not binding on this Court, evidences the necessity of permitting the New Hampshire House of Representatives to continue to function during the current extraordinary circumstances.

Conclusion

For the foregoing reasons, the New Hampshire House of Representatives respectfully requests that this Court return a negative answer to the question presented.

Respectfully submitted,

NEW HAMPSHIRE HOUSE OF
REPRESENTATIVES

By its attorney,

Date: October 7, 2020

/s/ James S. Cianci
James S. Cianci, Esq.
(NH Bar No. 14183)
House Legal Counsel
New Hampshire
House of Representatives
Legislative Office Building Room 405
33 North State Street
Concord, NH 03301
(603) 271-3683
james.cianci@leg.state.nh.us

CERTIFICATE OF SERVICE

I hereby certify that this memorandum was filed through the Judicial Branch's e-filing system and that at the time of filing no other parties of record had filed memoranda with the Court.

Date: October 7, 2020

/s/ James S. Cianci
James S. Cianci, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains approximately 3,996 words. I have relied on the word count of the computer program used to prepare this brief.

Date: October 7, 2020

/s/ James S. Cianci
James S. Cianci, Esq.