



The Honorable Bill Ferguson
President of the Senate
Maryland General Assembly
State House, 100 State Circle
Annapolis, MD 21401

The Honorable Adrienne Jones
Speaker of the House
Maryland General Assembly
State House, 100 State Circle
Annapolis, MD 21401

JOSEPH SPIELBERGER
PUBLIC POLICY COUNSEL

Via email

September 15, 2020

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
MARYLAND

Dear President Ferguson and Speaker Jones,

MAIN OFFICE
& MAILING ADDRESS
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
or 240-274-5295
F/410-366-7838

The Attorney General’s opinion [“AG opinion”], released on August 14, 2020, does not stipulate that the General Assembly is prohibited from convening and voting in a remote or virtual legislative session. Rather, it addresses factors that may increase the possibility of a legal challenge and that courts would consider to determine the constitutionality of such a session, without making a clear determination about the likelihood or success of such a challenge. Of particular note, the opinion addresses:

FIELD OFFICE
6930 CARROLL AVENUE
SUITE 610
TAKOMA PARK, MD 20912
T/240-274-5295

- (1) Whether legislators convene in Annapolis or elsewhere;
- (2) Whether a quorum is present; and
- (3) How voting is conducted and recorded.

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The opinion also addresses substantive Open Meetings Act [“OMA”] concerns to ensure public access to legislative proceedings.

Our opinion is that it is Constitutional and in line with House and Senate rules and procedures for the General Assembly to convene and vote remotely or virtually, and doing so requires strict adherence to OMA requirements so that members of the public may fully exercise their First Amendment right to petition their government.

Convening Remotely

The underlying assumption may be that the General Assembly shall convene in person at the Statehouse in Annapolis, however the Maryland Constitution does not expressly require it to do so.



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The AG opinion cites the Maryland Declaration of Rights proclaiming “[t]hat Annapolis be the place of meeting of the Legislature; and the Legislature ought not to be convened, or held at any other place but from evidence necessity.”¹ It does not, however, require that the Statehouse be the meeting of the legislature, nor stipulate how many legislators must be in Annapolis to make it the “place of meeting.”

The Constitution does not define “any other place,” but Congress has historically interpreted “any other place” to mean a location outside the District of Columbia.²

This suggests that the General Assembly need not convene in the Statehouse if it is not in the public interest to do so, as long as it convenes inside the city of Annapolis. Additionally, under extraordinary circumstances, *from evidence necessity*, it may convene outside Annapolis as well.

The Constitution also provides another option whereby either chamber may “adjourn to any other place” with the consent of the other and a two-thirds vote of the members present.³ This is not contingent on necessity either.

Indeed, there is a precedent for convening outside Annapolis. Twice during the time after which Annapolis became the seat of government, the General Assembly has met elsewhere in the state. In 1757, it met in Baltimore City to escape a smallpox epidemic. In 1861, it moved its proceedings to Frederick “escape the repressive atmosphere of Annapolis which had fallen into the hands of General Benjamin Butler and his Union troops.”⁴

¹ Maryland Declaration of Rights, Art. 11.

² *Constitution, Jefferson’s Manual, and Rules of the House of Representatives of the United States One Hundred Sixteenth Congress*, accessed at <https://www.govinfo.gov/content/pkg/HMAN-116/pdf/HMAN-116.pdf#page=52> (“Under clause 12(d) of rule 1, the Speaker may convene the House of a place *within* the District of Columbia, other than the Hall of the House, if, in the opinion of the Speaker, the public interest shall warrant it.”).

³ Const. Art. III, § 25.

⁴ *Maryland Legislator’s Handbook* (2006), accessed at https://cdn.ymaws.com/www.nasw-md.org/resource/resmgr/imported/Legislator_sHandbook.pdf.



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Lastly, the Governor is also authorized, when “the Seat of Government shall become an unsafe place for the meeting of the Legislature [to] direct their sessions to be held at some other convenient place.”⁵

The drafters of the Constitution certainly intended the General Assembly to convene in Annapolis, but the language of the law and historic precedent enable it to convene where it must in order to do the people’s business while keeping its members safe during emergencies. If the General Assembly decides that it is in the public interest and its own to convene virtually, there is no Constitutional provision prohibiting it from doing so. If the drafters were to anticipate the internet and to what extent it has been interwoven into every aspect of professional life, it is quite likely they would have explicitly allowed convening virtually as well.

Quorum Requirement

The Constitution only requires “A majority of the whole number of members elected to each House shall constitute a quorum for the transaction of business.”⁶ It does not prescribe the process for determining a quorum, only authorizing “Each House shall...determine the rules of its own proceedings.”⁷ *Mason’s Manual of Legislative Procedure* lays out several guiding rules on quorum:

- Quorum is determined by the number of members present;⁸
- The presiding officer may count the members present in order to determine a quorum;⁹ and
- It has been ruled in Congress and in Parliament that the presiding officer’s count as to the number of members present is final and may not be verified.¹⁰

But what does it mean to be “present” for a quorum call? Historically, legislators record their presence on the House or Senate floor.

⁵ Const. Art. II, § 16.

⁶ Const., Art. III, § 20.

⁷ Const., Art. III, § 19.

⁸ § 503, Rule 1.

⁹ § 503, Rule 2.

¹⁰ § 503, Rule 3.



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However, establishing that the General Assembly may convene remotely implies there must be alternative means to record one's presence. If the General Assembly convenes remotely in person, it stands to reason that members would still record their presence in person in the alternate location. However, this does not entertain the notion of convening virtually, and the majority of the debate over this language pre-dates the virtual age. Therefore, it is helpful to look at recent case law addressing this question. The U.S. Supreme Court recently held that a quorum is "the number of members of a larger body that must participate for the valid transaction of business,"¹¹ as opposed to the number of members who are physically present. Earlier courts addressing similar issues in other contexts also allowed a quorum to include remote participation.¹²

Regardless, a simple House and Senate rule change would further reduce any legal challenge. *Mason's Manual* gives the legislature wide authority to change its rules, stating "The power of a house of a legislature to determine its rules of proceedings is a continuous power. It can always be exercised by the house and is absolute and beyond the challenge of any other body or tribunal if the rule does not ignore constitutional restraints or violate fundamental rights."¹³ To date, at least 28 states and territories have already changed their procedures, by bill, motion, or rule change, to allow remote or virtual participation and voting.¹⁴

None of this is to suggest that convening virtually does not pose new challenges and potential risks, as the AG opinion recognizes, including the security and integrity of the vote. Possible workarounds include requiring members to vote and confirm their vote by video chat, voting by proxy, providing security tokens to each member as a further safeguard, and allowing members a reasonable time to change their

¹¹ *New Process Steel, LP v. NLRB*, 560 U.S. 674 (2010).

¹² *Braniff Airways, Incorporated. v. CAB*, 379 F.2d 453 (D.C. Cir. 1967) (a "quorum acting on a matter need not be physically present together [and may] proceed with its members acting separately, in their various offices, rather than jointly in conference.").

¹³ § 22, Rule 3.

¹⁴ National Conference of State Legislatures, "Continuity of Legislature During Emergency," August 27, 2020, accessed at <https://www.ncsl.org/research/about-state-legislatures/continuity-of-legislature-during-emergency.aspx>.



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vote with evidence that their vote was fraudulently recorded. Additionally, there would also need to be new mechanisms to abide by Open Meetings Act requirements.

However, in considering the question of whether the General Assembly may meet remotely or virtually, we believe that it presents little legal risk to do so during this pandemic, in order to protect members and the public while allowing members to continue doing the people's work. And the General Assembly can further lessen this risk by adopting simple rule changes in both chambers, just as the majority of state legislatures have done across the country.

Open Meetings Act

It is important that the General Assembly complies with the Open Meetings Act to ensure that Marylanders can fully exercise their fundamental First Amendment right to petition their government. While we understand the public health concerns during the pandemic, we are extraordinarily concerned with transparency regarding legislative activity, especially after witnessing the end of last session, when the General Assembly continued to meet after preventing public access to observe proceedings, which was likely already a substantive violation of the Act,¹⁵ especially since not all committees livestreamed their meetings at the time.

As the AG opinion states, a committee may meet during the interim between sessions to consider proposed legislation. The OMA also does not expressly grant a right for members of the public to speak at meetings.

We disagree, however, that committees may hold public hearings and bar the public from attending in person as long as it is publicly broadcast. The opinion cites *78 Opinions of the Attorney General 240* (1993), advising that the place of meeting must be accessible to the public. The relevant language in the OMA is the public's right to

¹⁵ See *Open Meetings Act Manual* (2016), Ch. 3, part C (holding that it is a violation when a public body turns people away because the public body is meeting in a building where the public may not enter).



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“attend” meetings, not simply to observe. There is more to attending a committee hearing than simply being allowed to listen to deliberations. Being present in a hearing room allows advocates and the public to see, for example, which legislators are present throughout the hearing, and who is paying attention to testimony and engaged in the deliberative process. Being present in person shows legislators how much public interest there is in a bill, and allows them to gauge public support or opposition. Legislators, like all of us, speak and act differently when they know they are being watched. Allowing the public in-person access to committee hearings can significantly alter the way a bill is heard, and is fundamental to the right to (silently) petition government and hold it accountable. We therefore strongly believe that if committees meet in person, the public must be allowed in person access as well. This is consistent with the Attorney General’s own guidance for holding meetings during the COVID-19 pandemic, suggesting public bodies set a maximum permissible occupancy to enable people to sit socially distanced.¹⁶

Committees may also meet virtually in compliance with the OMA. The opinion cites various guidance applicable to virtual meetings, for instance that members should be identified and speak audibly, and provide reasonable advance notice of the meeting. Open government advocates have also advised, for instance, that all hearings, deliberations, and voting sessions must be livestreamed and archived, and the public must be granted the opportunity to testify orally, in writing, or both, by videoconference, phone, and electronic submission. Members should be clearly audible *and* visible to the public at all times.

With the competing crises of police violence against Black people and the health and economic impacts of COVID-19, it may not merely be permissible, but rather necessary for committee to meet during the interim to consider legislation. Nevertheless, if they choose to do so, they must ensure maximum transparency and public access to the

¹⁶ See *Open Meetings Act FAQs for Meetings Held During the COVID-19 Emergency*: https://www.marylandattorneygeneral.gov/OpenGov%20Documents/Openmeetings/OMA_FAQ_COVID19.pdf



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legislative process. The public must know as soon as possible dates and times of meetings, the process by which testimony will be accepted, and the specific bill language that will be considered. This is even more important because any bills considered during this interim will undoubtedly be complex and controversial. Anything short of this may or may not violate the OMA, but will undoubtedly lead to questions about the process by which any bills are considered and advanced. Despite the challenges, even historic public health concerns cannot justify transgression of fundamental rights.

Therefore, if it is necessary for committees to convene during this interim, they must limit the scope of that work to ensure the greatest transparency. If the emergencies that would compel interim meetings are so great to require expanding this scope of work, then the leaders of the General Assembly must immediately call for a special session to justly do the people's work.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Spielberger".

Joe Spielberger
Public Policy Counsel
ACLU of Maryland