

## Why Isn't California's Legislature Meeting Remotely?

By David Carrillo and Stephen M. Duvernay | July 16, 2020 at 03:53 PM

Everyone in California is working remotely these days—except the state legislature. Back in March, the California legislature almost decided to adopt a remote meeting procedure, when the state Senate voted to meet remotely. But the state Assembly leadership demurred, and so (other than returning briefly last month to pass the state budget bill) the legislature has been inert for months. That may have been the right call initially, but as the pandemic grinds on everything in California has been forced to evolve into an online process. About 24 other state legislatures are already doing (or working on doing) some remote work. Even Guam and the Virgin Islands figured out how to change their procedures to allow for remote participation or voting, as have many local governments in California. If everything happening remotely is our new long-term reality, why is the California legislative process on hold?

Is there some constitutional objection? Not that we could find. Start with the principle that the California legislature is plenary, limited only by the state and federal constitutions. The California Supreme Court has held that “it is well established” that the California legislature “possesses plenary legislative authority except as specifically limited” by the state constitution. We scoured the California constitution for some bar to remote legislative work, or a requirement that legislators meet in person at every peril. Nothing in the state constitution directly speaks to those questions, so the general principle controls: absent some constitutional prohibition, the state legislature can do the smart thing here and meet remotely.

The state constitutional provisions that indirectly bear on this issue likewise support the conclusion that the legislature could adopt a joint resolution authorizing remote meetings and voting during the coronavirus emergency. Rather than limiting the legislature's discretion to meet remotely in a state of emergency, the California constitution permits such creative solutions. Article IV, Section 7(b) authorizes the legislature to adopt rules for legislative proceedings, and under Article IV, Section 7(d) it may adjourn to another place by mutual consent of the two chambers. Neither section requires members to be physically present in the same location, nor do they specify where the quorum must meet. Because nothing expressly bars the legislature from doing so, the legislature may adopt a rule that in an emergency its members may assemble electronically, attend meetings remotely, and be virtually present to establish a quorum.

In fact, the longer the legislature hides the more it risks creating a major constitutional problem. All signs point to this pandemic being the new normal for the foreseeable future. Every day the state limps along with only two branches of government increases the separation-of-powers concerns about delegating legislative power. There's only so much the state can do without a functioning legislature and remain a representative republic. If you're looking for constitutional boojums to worry about, that's a big one.

Did some musty bureaucrat scribble a secret memorandum frowning on remote meetings? Maybe, and if there is such a document then let it be made public so the people can understand why their representatives feel hobbled. The one legitimate practical concern we can see is the need for public access to and comment on the legislative process. Yet countless other state and local agencies in

California and the nation quickly adopted creative solutions to keep the machinery of government working in the sunlight. Surely holding legislative sessions on Zoom, posting the recorded video on YouTube, and making agenda items publicly available for download goes a long way to satisfy the core concern about keeping the legislative process accessible. If the legislature feels those solutions are shaky, it can always pass a law affirming them. And it can find additional ways to increase public access and ensure representative accountability. Right now public service needs to be about finding solutions, not looking for problems.

Is the legislature afraid of being sued? It shouldn't be—the legislature gets sued all the time, for good reasons and bad. They have lawyers to defend them. This is a pick-your-plaintiff situation: do nothing and be sued for inaction, or meet remotely and be sued for that. Doing the people's work remotely is a better position to defend than neglect of duty. And the legislature has the fail-safe that when it does meet in person again, it can re-pass any laws that are invalidated on purely procedural issues like insufficient public access.

Finally, we question whether the courts would review a challenge to remote legislative work. The state legislature has broad inherent authority and express constitutional power over its own organization, process and rules. Even if such a dispute is reviewable, the courts are likely to prefer a remote legislature over no legislature. And if there is harm to the public from remote lawmaking, given the risk of infection the remedy cannot be to order in-person meetings—not when the courts themselves are working as remotely as possible, and when even the brief return to adopt the budget in-person resulted in multiple COVID-19 infections among legislators and staff. The availability of remote legislative solutions means that the apparent dilemma of meeting in person (risking infection) and not meeting at all (disenfranchising constituents) is a false choice. It's time for the legislature to adapt to the new pandemic reality, and get back to work for California.

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