California’s legislature can — and should — meet remotely

Overview

On March 16, California’s Senate adopted SR-86 (Atkins), which amends that chamber of the state legislature’s standing rules to permit Senate and committee meetings in an emergency where “one or more Senators participate in the meeting remotely by telephone, teleconference, or other electronic means.” It also permits Senators to participate remotely by electronic means to vote during a rollcall vote. While the federal constitution might bar Congress from adopting remote meeting-and-voting rules, no comparable impediments apply to California’s legislature. The state constitution broadly empowers the legislature to adopt rules for its proceedings. And nothing in California law prohibits the state legislature from conducting its business with members scattered across the state, especially during an infectious disease emergency.

Analysis

The legislature has all powers not denied it by the state constitution

Because the state constitution does not ban remote legislative meetings and voting during an emergency, the legislature may adopt such procedures. California’s legislature has all the policymaking power of a general government. It is unlike Congress, which has only those limited powers delegated to it by the federal constitution. Congress must justify its acts on specific federal constitutional provisions, but California’s legislature needs no such permission. As the lawmaking body of a plenary government, the state legislature can take any action not prohibited by the state constitution.[1]

The state constitution does not bar remote legislative meetings

Just a few state constitutional provisions arguably bear on the question of where and how the California legislature should conduct its business. None clearly bar remote meetings.

- Article III, section 2 makes Sacramento the state capital; it says nothing about the legislature meeting there.
- Article IV, section 3(a) requires that the legislature "shall convene in regular session" on the first Monday in even-year Decembers (which has already happened this year) — but it does not specify where the legislature should or must convene, nor does it require that convening be in person.
- Article IV, section 3(b) permits a governor to cause the legislature "to assemble" in emergency session, and it is silent on whether that assembly may be by electronic means.
- Article IV, section 7(a) provides that a "majority of the membership constitutes a quorum" and that a smaller number may recess and "compel the attendance" of absentees, saying nothing about physical presence being required.
- Section 7(b) requires a rollcall vote to be journaled on the request of three "members present" — again, silent on physical presence.
- Section 7(d) provides that neither house without mutual consent may recess for more than 10 days "or to any other place," but it does not identify that place.

There may be an underlying assumption in these constitutional provisions that the legislature will physically gather in Sacramento, but that is nowhere expressly required. For example, the state constitution does not define the terms "assemble," "attendance," or "present." And other constitutional provisions arguably contemplate that the legislature can meet in places other than Sacramento. Article IV, section 4(b) allows members to receive travel reimbursements for legislative meetings "at least 20 miles from his or her place of residence." That provision does not require that the meeting must occur in Sacramento. Additionally, section 7(d)

provides that by mutual consent the two chambers can adjourn to another place, suggesting that the legislature may meet wherever it needs to. That conclusion is supported by the statutory provisions we review next.

California statutory law supports, rather than bars, remote legislative meetings

One statute provides express authority for changing the legislative venue in an emergency. Government Code section 450 states that a governor may designate a temporary alternative to Sacramento as the seat of government "at any time as circumstances indicate the desirability of such a change." And Government Code section 9100 provides for legislative offices in the cities of Los Angeles, San Francisco, San Diego, and Alameda County that members can use "in the performance of their legislative duties." This is at least implicit support for the legislature's ability to work remotely.

Other statutes that touch upon the legislature's location do not bar the legislature from meeting and voting remotely. Government Code section 9020 mirrors Article IV, section 3(a) and requires the legislature to convene in regular session "at the City of Sacramento at noon on the first Monday in December of each even-numbered year." Again, the legislature has already done so, and neither the constitutional nor the statutory provision requires the legislature to *stay* in Sacramento during its whole session. And sections 9022 and 9023 (which provide procedures for initially organizing the two chambers) do not define the terms "assembling" and "present" to prohibit electronic assembly or presence.

The ongoing coronavirus crisis makes it "desirable" (as provided by Government Code section 450) for the legislature to conduct its business remotely. So do notions of fairness and equality. The governor has directed all California residents to stay at home "except as needed." Members of the legislature can stay home, and therefore should — just like the citizens they represent.

Judicial decisions affirm the controlling principles here

Case authority on the question of where the legislature can or should meet is scant.[2]
Two relevant decisions concern the legislature's efforts to secure a permanent seat for the state government shortly after California joined the Union. Those decisions support the three principles we rely on here for our conclusion that the legislature can in an emergency decide where it may safely meet: the legislature may do all things not prohibited by the state constitution; the legislature has discretion to adopt rules for its proceedings; and the legislature is not required to meet in the state capital.

All three principles appear in *People ex rel. Vermule v. Bigler*. The California Supreme Court upheld a legislative act to move the state capital from San Jose to Vallejo, and affirmed that although Sacramento is the capital of California, the legislature can use its plenary power to decide to meet elsewhere.[3]
The decision rests on the fact that (at the time) the only constitutional limit on the legislature's power to locate the government seat was that it decide by a two-thirds vote. That condition being complied with, the decision "belongs to and rests in the sound discretion of the Legislature itself, and is not subject to the control of the judicial department."[4]

Chief Justice Murray's basis for that conclusion: "I understand the rule of construction to be, that the Legislature may exercise all powers not prohibited to them by the Constitution."[5]
The Chief Justice did say that "the acts of a legislative body done at any other than the appointed place must be equally void." But the other justice in the majority[6]
disagreed on that point: "was the *Government* a *void* whilst it remained at Vallejo? The Government certainly existed whist its officers remained at Vallejo . . . I deem it a sound rule of construction, to hold no Act of the Legislature *entirely void*, unless plainly repugnant to the Constitution."[7]
And only the dissenting justice relied on the principle that allowing

legislators to transact state business elsewhere was an unconstitutional de facto removal of the state capital.[8]

Livermore v. Waite held that moving the seat of government from Sacramento could be done only amending the state constitution.[9]
But the question here does not concern changing the state capital — it is undisputed that Sacramento is the state capital. The question is whether the legislature must meet there in person. The argument that it must do so relies on several assumptions: that the state capital and the seat of government are the same thing; that the legislature meets in the seat of government; that the legislature *must* meet *only* in the seat of government. Neither of these early California Supreme Court decisions support those assumptions.

Instead, the takeaway from these limited case authorities is an appropriately hands-off judicial approach to legislative discretion — appropriately so, given the legislature's plenary power, judicial restraint, and the obvious separation of powers concerns. Accordingly, the question of whether the legislature can meet remotely in an emergency is governed by the general principle that the state legislature can do anything not prohibited by the state constitution, the legislature's plain authority under Article IV, section 7(b) to adopt rules for legislative proceedings, and its power under Article IV, section 7(d) to adjourn to another place by mutual consent of the two chambers. Neither section requires members to be physically present in the same location, nor does it specify where the quorum must meet. Because nothing 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.

Conclusion

Dispersing the state legislature and conducting its business remotely will not be problem-free. Many California constitutional and statutory provisions require public access to open legislative meetings. For example, Article IV, section 7(c) has extensive requirements for recording sessions. And California statutes require the state legislature to conduct its business

publicly.[10]
But these problems are not insurmountable. As Fivethirtyeight.com reports, Pennsylvania and Utah's legislatures have already authorized remote meetings and voting. California's legislature could likely satisfy the requirements for open meetings by livestreaming its sessions and posting them on YouTube immediately afterwards.

If the state legislature moves forward with remote meetings during the coronavirus crisis, an emergency order can mitigate some of the practical issues — but not all. Emergency orders can suspend statutes, but they cannot suspend constitutional requirements. The state constitution, however, does not bar the state legislature from meeting and voting remotely. The legislature would be within its power to pass a joint resolution authorizing remote meetings and voting during the coronavirus emergency, and doing so will permit California government to continue operating while protecting public health.

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With contributions from David Belcher, an attorney in private practice and a senior research fellow with the California Constitution Center.

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Howard Jarvis Taxpayers Assn. v. Padilla (2016) 62 Cal.4th 486, 497–98 (citations and quotations omitted): "Our Constitution vests the legislative power of this State in the California Legislature which consists of the Senate and Assembly. It is in the nature of state constitutions that they, unlike the federal Constitution, generally do not grant only limited powers. Consequently, unlike the United States Congress, which possesses only those specific powers delegated to it by the federal Constitution, it is well established that the California Legislature possesses plenary legislative authority except as specifically limited by the California Constitution. Lying at the core of that plenary authority is the power to enact laws. It has been said that pursuant to

that authority, the Legislature has the actual power to pass any act it pleases, subject only to those limits that may arise elsewhere in the state or federal Constitutions."

[2]
See, e.g., *Simpson v. Mun. Ct.* (1971) 14 Cal.App.3d 591, 596, judicially noticing "certain facts concerning the state capitol building, its surroundings, and its use: Although limited portions of the capitol house the offices of the Governor and several other constitutional officers, the major part of the building is occupied by the Senate and Assembly chambers, legislative committee hearing rooms, individual offices of the state's 120 legislators, offices of the legislature's legal, administrative and consultative staffs and facilities for the press and broadcasters."

[3]
People ex rel. Vermule v. Bigler (1855) 5 Cal. 23, 26.

[4]
Ibid.

[5]
Id. at 27. The California Supreme Court later held that this principle lay at "the heart of the decision in *Bigler*" as a fundamental doctrine based on the separation of powers "which recognizes that in the absence of some overriding constitutional, statutory or charter proscription, the judiciary has no authority to invalidate duly enacted legislation." *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 915–16.

[6]
In 1855 when *Bigler* was decided the California Supreme Court was a three-justice court. The three-member court began in 1849 (serving six-year terms); in 1864 it became a five-member court (ten-year terms); the current seven-member court (serving twelve-year terms) began with the 1879 constitution.

[7]
Bigler at 31 (Bryan, J., concurring).

[8]
Id. at 33, Heydenfeldt, J., dissenting: "I think, that by the term "Seat of Government," must be meant the place where the legislative and chief executive departments of the Government shall transact the business of State, and where the officers of these departments ought to be found by the citizen who is in search of them. . . . If, then, by a simple majority law, the officers of the various departments are required to keep their offices at a place other than the Seat of Government, the practical effect is, to all intents and purposes, a removal of the Seat of Government from the place appointed by the Constitution; and the last is violated, not with the boldness of direct attack, but in a form which, when examined, vainly attempts to conceal its unlawful purpose."

[9] *Livermore v. Waite* (1894)
102 Cal. 113, 124: "If the people shall at any time desire a removal of the seat of government from Sacramento, this result can be readily effected, either by a law passed in accordance with the existing provisions of the constitution, or by a proposal on the part of the legislature for such an amendment to the constitution as will afford them an opportunity to give immediate effect to their desire by a direct vote upon the question."

[10]
The open meeting
provisions begin with Gov. Code § 9027 ("Except as otherwise provided in this article, all meetings of a house of the Legislature or a committee thereof shall be open and public, and all persons shall be permitted to attend"); § 9028 ("Any meeting that is required to be open and public pursuant to this article, including any closed session held pursuant to subdivision (a) of Section 9029, shall be held only after full and timely notice to the public as provided by the Joint Rules of the Assembly and Senate"); § 9029 (circumstances for closed sessions).