

# Legal Ramifications of Flouting Mask Rules by Members of Congress

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During the invasion of Congress on January 6, 2021, members of Congress were forced to take shelter for a few hours with a large group of their colleagues. Several Democratic members of Congress—Reps. Bonnie Watson Coleman (N.J.), Pramila Jayapal (Wash.), and Brad Schneider (Ill.)—have revealed that they have tested positive for COVID-19 after sheltering with colleagues who refused to wear masks. There have been rules in place since July 2020 that require masks in House office buildings and on the floor of the House, but those rules have not been consistently enforced. A number of House Republicans did not wear masks during the emergency sheltering and refused to accept masks offered by Rep. Lisa Blunt Rochester (Del.). House leadership has committed to enforce the rules more stringently going forward and impose fines starting at \$500 on members who do not wear masks on the House floor. Democratic Representatives Debbie Dingell (Mich.) and Anthony Brown (Md.) have introduced legislation that would go farther, imposing fines of \$1,000 per day on House members who do not wear masks on the Capitol grounds.

## **But do representatives who have contracted COVID-19 have any legal remedy for holding the House or other individual House members liable for their having contracted the virus?**

First, it is important to note that no one can say with certainty when, where, or how they contracted the virus. Representative Schneider has acknowledged directly that he does not know that he contracted the virus during the insurrection, but that his exposure during the shelter in place was the greatest exposure he has experienced during the pandemic. He surmises that the fact that three people (thus far) have tested positive points to the forced sequestering with unmasked colleagues as the probable source of infection. There has been no reporting on whether the Republican members who refused to wear masks have tested positive for the virus, making the proof of the source of the infection more challenging.

Second, even assuming the newly infected Representatives could establish they contracted the virus from unmasked colleagues on January 6, their legal remedies are extremely limited. While employees in the private sector could complain to the Occupational Safety and Health Administration (OSHA) about unsafe working conditions, the Occupational Safety and Health Act (29 U.S.C. § 654) does not apply directly to the U.S. Congress. Under the Congressional Accountability Act (CAA), 2 U.S.C. § 1341, the legislative branch is required to comply with OSHA standards mandating that the workplace be free from recognized hazards likely to cause death or serious injury. Under the CAA, a member of Congress or a staff person can request that the General Counsel of the Office of Congressional Workplace Rights (OCWR) conduct an inspection of unsafe working conditions. If the inspection determines there are

unsafe working conditions, the OCWR General Counsel can issue a citation or notice of violation. If the violation has not been corrected after that notice, the General Counsel may file a complaint to be submitted to a hearing. Currently, even without a formal complaint to the OCWR, Congress has taken steps to more rigorously enforce its rule requiring masks in congressional workplaces.

Third, assuming a member of Congress who contracted COVID-19 could prove he or she was infected by a specific colleague who was not wearing a mask, legal recourse against that colleague would likely be barred by the terms of the Speech or Debate Clause of the U.S. Constitution, contained in Article I, Section 6. This clause states that members of both Houses of Congress “shall not be questioned in any other Place” about any speech or debate and shall be “privileged from Arrest” during attendance at a session of Congress. The limitation on questioning a member of Congress about speech or debate is intended to protect them from efforts by members of the Executive branch or members of the public to interfere with their exercise of their legislative duties. The refusal to wear a mask might not be seen as an aspect of legislative debate, but at least one Republican who refused to take the mask offered by Representative Rochester was heard to say she did not want to make this “political,” and those who refuse to wear masks may assert that they do so for political reasons.

If the Speech or Debate Clause did not bar a suit by one Representative against another, the legal claim would likely be one for tort damages related to an intentional assault, which requires proof that an individual deliberately acted to cause another to fear imminent harm. There have been numerous tort cases filed against cruise ships, nursing homes, and entertainment venues by people exposed to COVID-19. Suits against individuals are rare, but might follow the theories advanced by individuals exposed to the Human Immunodeficiency Virus (HIV). HIV cases ordinarily involved battery claims because of the means of transmission through close bodily contact, but because COVID-19 is transmitted through airborne particles, liability would not necessarily be predicated on physical contact but merely the apprehension of contracting the airborne virus.

Establishing liability for COVID-19 infection is difficult in any workplace. As in many other areas of employment and tort law, imposing liability on members of Congress is even more challenging. In the absence of targeted legislation, members of Congress may have little recourse against colleagues who expose them to a greater risk of infection by their refusal to comply with basic health and safety practices during the pandemic.