# HEARING ON THE CONTINUITY OF CONGRESS: SPECIAL ELECTIONS IN EXTRAORDINARY CIRCUMSTANCES

## HEARING

BEFORE THE

## COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, SEPTEMBER 24, 2003

Printed for the Use of the Committee on House Administration

U.S. GOVERNMENT PRINTING OFFICE

90–083 WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
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# CONTINUITY OF CONGRESS: SPECIAL ELECTIONS IN EXTRAORDINARY CIRCUMSTANCES

**WEDNESDAY, SEPTEMBER 24, 2003**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
*Washington, DC.*

The committee met, pursuant to call, at 2:05 p.m., in room 1310, Longworth House Office Building, Hon. Robert W. Ney (chairman of the committee) presiding.

Present: Representatives Ney and Larson.

Staff Present: Matt Peterson, Counsel; Paul Vinovich, Staff Director; Jeff Janas, Professional Staff Member; Charles Howell, Minority Chief Counsel; George Shevlin, Minority Staff Director; Matt Pinkus, Minority Professional Staff Member; and Catherine Tran, Minority Staff Assistant.

The CHAIRMAN. The committee will come to order.

The committee is meeting today to discuss the important and grave issue of continuing operations of Congress in the event of a catastrophic attack. This is not a comfortable issue to confront, of course, as it forces us to contemplate the possibility of our own demise in a terrorist attack or catastrophic situation.

However, we have a duty as representatives of the people of the United States to examine this issue seriously and thoroughly, to determine how best to ensure that the People's House continues to function effectively during times of a national emergency.

Since the terrible and fateful morning of September 11th, 2001, we have become painfully aware of the destructive intent of our country's terrorist enemies as well as the increasingly sophisticated and devastating methods by which they carry out their deadly work.

The possibility that terrorists could detonate a nuclear, chemical or biological weapon of mass destruction within our Nation's capital, annihilating major portions of our Federal Government, potentially killing dozens or hundreds of Members of Congress, is one that we cannot ignore, though we pray it never happens.

In the event of such an attack, the presence of a strong national leadership will be more important than ever before. The people of this country will be desperately seeking reassurance that their Government remains intact and capable while acting vigorously in the Nation's defense.

Following a catastrophic attack, it would be imperative that a functioning Congress be in place with the ability to operate with

legitimacy as soon as possible. How to ensure the continuity of the House of Representatives under such circumstances is a complex and difficult question that defies, I think, a simply solution.

When drafting the Federal Constitution, our Founding Fathers designed the House to be the branch of government closest to the people. They believed the only way this objective could be accomplished was through frequent elections. Consequently, the Constitution, Article 1, section 2, clause 4, provides that vacancies in the House may be filled only through special elections. As a result, no Member has ever served in this House who has not been first elected by the people he or she represents.

Today the committee will be considering H.R. 2844, the Continuity and Representation Act of 2003. This bill provides for expedited special elections in the event of a large number of House vacancies resulting from a catastrophic attack or other extraordinary circumstance.

The goal of this legislation is to ensure the continuing operation of the House during the times of national crisis while at the same time protecting the character of the House as an elected body.

The debate on this subject has essentially divided into two camps, those who view a quick reconstitution of the House as the most important consideration, and thus support a constitutional amendment allowing for the appointment of temporary replacements to fill vacant House seats; and, number 2, those two believe retaining the House's elected character is paramount and therefore support expedited special elections.

Without objection, because of time and the votes, I am going to submit the rest of this for the record.

[The information follows:]

Those who support an amendment argue that because of the many logistics involved in the conduct of an election, filling numerous House vacancies by means of special elections would be too cumbersome and time-consuming a process—one that could result in Congress ceasing to function at all for a substantial period of time. Thus, those who take this position believe the most effective way to address the continuity issue is for the Constitution to be amended to permit the appointment of temporary replacements to the fill vacant House seats.

Though this proposal represents an efficient method for filling House vacancies in emergency situations to ensure the continuing operations of the House, it also raises the specter of a House whose membership is dominated by unelected representatives, thereby altering the history of the House as a body consisting only of individuals elected by the people.

Resolving the tension between expeditiously filling House vacancies in the event of a catastrophic terrorist attack and maintaining the House's historical character is no easy task. For this reason, the Committee has called this hearing so that the leading thinkers on the issue of congressional continuity can shed more light and bring greater understanding on the many different aspects of this consequential issue.

The CHAIRMAN. Mr. Larson.

Mr. LARSON. Thank you very much, Mr. Chairman.

Also because of the time constraints, and I recognize that we are going to vote shortly, let me say that I join with the chairman in looking forward to this discussion. It has been a rarity in the United States Congress, for me at least, to have the kind of in-depth dialogue that I have read about, both in the newspaper accounts and also from the testimony of the distinguished panel that we have had before us, and I must say how impressed I am with that testimony. We don't do enough of reading about James Madi-

son, and we don't do enough in this body of listening to what other learned Members of our august body bring to bear on important issues of this nature.

As the chairman has indicated, clearly this is a matter that has been graphically brought before us because of the events of September the 11th. And Members have sought different solutions. And in the process, I think have engaged the body in enlightened debate. And our purpose this afternoon is to continue that enlightened debate.

I might add that Chairman Sensenbrenner and Chairman Dreier, in reading through their testimony, give salient examples of why we shouldn't abandon the very elective nature of our body. And yet equally compelling arguments have been given by Mr. Frost and Mr. Baird about the urgency to address a body and to have a body that is capable of responding to a crisis.

So we find ourselves in this committee today in, I think, the laudable position of listening to enlightened members of our own body, and then a panel of experts afterwards who will debate this issue.

I will submit the rest of my written testimony and at this time, Mr. Chairman, get the ball moving so that we can hear from our panel of experts, which is more important.

[The statement of Mr. Larson follows:]

OPENING STATEMENT
REP. JOHN B. LARSON, RANKING MINORITY MEMBER
COMMITTEE ON HOUSE ADMINISTRATION

HEARING ON "CONTINUITY OF CONGRESS: SPECIAL ELECTIONS IN EXTRAORDINARY CIRCUMSTANCES"
WEDNESDAY, SEPTEMBER 24, 2003

Mr. Chairman, I am pleased that the House Administration Committee is resuming consideration of issues relating to the continuity of Congress. Since our hearing last year, nothing has happened to diminish the significance of the questions we will address here today, and the opportunity continues for Congress to ensure that our political institutions survive a catastrophic event which might disrupt both the personnel and the physical infrastructure required to govern our nation.

I join with the chairman in hoping that this effort will be ongoing on our committee and on the other committees in both chambers which have pieces of jurisdiction over this complex subject, and that we can enhance and refine the public debate with the contribution of the diverse group of witnesses in the panels who will testify today.

The argument has been made by some that, in dire circumstances, a crisis in the operation of Congress might not occur. It might not be necessary to conduct recorded votes, which would demonstrate the absence of a quorum. Major legislation could be passed by voice vote. The Members who remain would "do the right thing." But I don't find this kind of wishful thinking credible. The job of Members is to disagree and to resolve their differences over major areas of public policy, ultimately through voting. The Constitution provides a process and a structure of powers, and the checks and balances needed to exercise them. We are a government of laws, not of men. And we need laws--including perhaps also constitutional amendments-- to resolve questions of congressional continuity.

I want to commend Chairman Sensenbrenner and Dreier for their initiative in introducing this important legislation before us today, following up on House action last year in passing H.Res. 558, referred to our committee, which urged states to expedite special elections for the House. I also want to congratulate Congressman Frost, ranking member of the Rules Committee, for his leadership of the bipartisan working group last year which secured passage of rules changes to clarify the declaration of vacancies in the House and to provide flexible new authority to alter the times and places of meetings in exigent circumstances, and also Congressman Baird, who is continuing to explore different

approaches to reconstituting the House through a constitutional amendment.

We must fully understand the inter-relationships and ramifications of all potential statutory or constitutional remedies. These proposals are not mutually exclusive and may indeed by complementary. And certainly the subject matter before us, relating to the structure and preservation of the Constitution and the Republic itself, presents the type of issue suitable for consideration through a constitutional amendment.

We may need to buttress our 18th Century founding document to adapt to threats which the abuse of 21st Century technology undreamed of in earlier eras now poses to it. Congress grappled briefly with these issues early in the nuclear era, with the Senate's passage, on three different occasions, of constitutional amendments providing for gubernatorial appointment of House Members. Congress also agreed to set-up a refuge in West Virginia at the Greenbrier Resort, on the assumption that there would be time to travel to and take shelter there once Soviet missiles were detected. It is amazing how rapidly advances in weapons of mass destruction have trumped what now appear as naive assumptions even of that comparatively recent era.

The principal subject of our hearing today is how to replenish the membership of the House as quickly as possible in the event of a catastrophe. The House in 1906 determined that the proper constitutional definition of a quorum consisted of a majority of those Members chosen, sworn and living; the same interpretation holds in the Senate. Under such conditions, the House might technically still legislate, no matter how small its membership might be. However, such a body would not necessarily be representative either geographically or politically of the larger House which existed prior to the cataclysmic event, and could not long retain the sense of legitimacy our governmental system must maintain to command the respect of the American people.

To further compound the potential problem with a quorum, the Constitution contains no mechanism for determining questions of potential disability. Disabled Members still count as part of the quorum even if they can not appear in the House chamber, which is the ultimate test of a Member's presence.

I think we can all agree that the ideal solution would

be for the states to step up to the plate and provide more expeditious procedures in replenishing their membership in the House. After all, it is a matter of tremendous self interest for them to do so. However, states may not be able to accomplish the rapid reconstitution of the House under their current legal frameworks, and it has been argued that a Federal statute providing more uniform provisions could expedite reconvening of the House after a catastrophe.

This is what the Sensenbrenner bill attempts to do. The bill can serve as a valuable starting point for this debate. I want to commend the Judiciary Committee chairman for this initiative and urge him to also consider hearings on a variety of constitutional amendments which have been broached, subject matter that falls within the domain of that panel.

However, H.R. 2844 presents potential constitutional and practical difficulties and could require a substantial unfunded mandate on the states. It would very likely prevent compliance with the Uniformed and Overseas Civilians Absentee Voting Act. And there are important questions posed by the bill's effects on existing state laws dealing with the selection of candidates, the printing, preparation and distribution of ballots, selection and staffing of polling places, counting votes and certifying election results. There would also be only seven days, in most instances, to involve the public and conduct a campaign promising a real choice among candidates.

Our colleague from Texas, Sen. John Cornyn, who has submitted a statement for the record today, held an important hearing in the Judiciary Committee on continuity issues two weeks ago and distributed results of a questionnaire he sent to state and local officials who expressed virtually unanimous reservations about H.R. 2844. I ask unanimous consent that that document also be placed in the hearing record at this time.

In its specific examination of any proposed statute expediting special elections, this committee should determine how much time is sufficient to bring a popularly-elected House back up to a size which can simultaneously produce both a quorum to legislate as well as a body still representative of the American people. If we can find a way to do that which brings the House back into action when it is needed to act, the argument for a constitutional amendment will be reduced.

Perhaps we should enact a model special election statute which addresses some of the problems I noted, but leave it up to the states themselves to determine if they prefer it to their existing laws in a time of emergency. There is no pressing need for all such vacancies in the House--even several occurring within the same state--to be filled on the same day.

Proponents of a constitutional amendment argue that any workable and constitutional statute expediting special elections, if one could be crafted to work under circumstances which saw a majority of House members killed, would probably still leave the House unable to function for a period of five or six weeks at least. They argue that a new statute would be useful primarily as a supplement to a constitutional amendment allowing some form of temporary appointments to the House.

Mr. Chairman, I am open to supporting both a legislative approach and a constitutional amendment.

In their testimony, Chairmen Sensenbrenner and Dreier cited the *Federalist Papers* and remarks at the Constitutional Convention of our nation's great Founders, James Madison and Alexander Hamilton, on the unique nature of a House of Representatives comprised exclusively of Members elected by the people. Our colleague Sen. Leahy, former chairman and ranking member of the Judiciary Committee, said that "While the possibility that the House could be weakened by terrorist attack is frightening indeed, so too is transforming the essential nature of the People's House. Amending the Constitution should be a plan of last resort." But the Founders also created a Constitution which could be adapted to new challenges and used to restructure and

preserve itself, and it gave to Congress the ability to propose changes when needed.

The House has always been elected by the people, but how relevant is our justifiable pride in that distinction if there is in fact no functioning House of Representatives due to a catastrophe and the lack of a quorum? A House somewhat different in form from the one we know could function temporarily, as long as the new structure derived from the Constitution. The Constitution provides legitimacy. All seats would be refilled in the near future through election, and the *status quo ante* quickly restored. We currently have a president who is recognized as legitimate because he ultimately derives his existence from a constitutional process, even though another candidate received more votes from the people.

I am considering introducing a constitutional amendment which would require that, in event of a catastrophe and a sufficient number of vacancies in the House which we would define, the state legislatures would meet to appoint representatives to serve temporarily as full voting Members of the House of Representatives. There is ample precedent deriving from practices of legislatures in choosing members of the original Continental Congress, as well as their role in selecting United States Senators prior to the advent of popular election of senators in 1913.

The legislatures, which sometimes meet only in alternate years in some states, would be called into special session if necessary to achieve this objective. They could choose interim representatives who reside in the congressional district and are of the same political party as a deceased Member, and who could not run for election to the House while serving there temporarily. I realize there is great controversy about introducing the concept of party into the Constitution, but I believe it is important try to retain as much continuity with the political preferences previously expressed by the people through their votes in the most recent election as possible.

I also think that, in the event of a crisis, we want the House focused on dealing with the emergency and passing urgent legislation, not gearing up for special election campaigns. I note that Mr. Lewis in his testimony raised the idea of state legislators themselves, with their experience in a parliamentary body, serving temporarily in the House, and I think that may have merit as long as they do it to serve the country, rather than to promote themselves to higher office.

To avoid potential deadlock in the process, should the legislature fail to make a choice within 3 days after convening, the governor of the state would be authorized to make the appointments subject to the same conditions I just mentioned. And while this process was underway, the states would be organizing special elections to fill the House seats in the normal manner for the remainder of the term.

I hope the witnesses will feel free to comment on this proposal, and I congratulate the chairman for his leadership on this issue.

The CHAIRMAN. Thank the gentleman from Connecticut.

If there are no further statements, we will commence with the testimony of the panel. On the first panel, we have Chairman Sensenbrenner, Wisconsin, the Chairman of the House Judiciary Committee, the chief sponsor of H.R. 2844; Chairman David Dreier, of California, the Chairman of the House Rules Committee, who is also sponsoring H.R. 2844; Congressman Martin Frost of Texas, the ranking Democratic member on the House Rules Committee; Congressman Brian Baird, who has proposed a constitutional amendment that would permit temporary appointments if a significant member of Members are unable to serve during a national emergency; and Congresswoman Candice Miller, cosponsor of H.R. 2844. And, I would note former Michigan Secretary of State.

With that, Chairman Sensenbrenner, we will start with you.

**STATEMENT OF THE HON. JAMES SENSENBRENNER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN**

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. H.R. 2844 is a responsible effort to enact a straightforward and effective procedure to replace House Members should a catastrophic attack strike the Congress. This legislation would provide for the expedited special elections for Members to fill vacancies in extraordinary circumstances, defined by the bill as occurring when the Speaker declares that there are more than 100 vacancies.

Within 14 days following such an announcement, the State political parties may nominate candidates as provided by State law, to run in the special election to be held within 21 days.

Let me say that I am not set on the 21-day deadline. I think that that deadline can be extended. But, it should not be extended unduly, because it is important that people who are elected to fill vacancies be elected very quickly, so that they can come to Washington with the mandate from their voters.

I would also state that there is no such thing as a perfect election. However, I think that an election, imperfect though it may be, is better than having appointed Members sit in the House of Representatives; and this entire issue is whether, should there be catastrophe, replacement Members of the House of Representatives should be elected by the people or appointed by some appointing authority. Elected representatives, which has always been the case, or appointed representatives, which has never been the case.

In the Federalist Papers, James Madison used the strongest of terms to state that the House must be composed only of those elected by the people. And explicitly rejected the proposition that the appointment of Members authorized by Congressional legislation is compatible with the American Republic. Therefore, the very concept offered by opponents of this legislation, a constitutional amendment that would allow for the appointment of House Members, was explicitly rejected by the Founders as antithetical to republican, with a small "R," government.

Congress has the clear constitutional authority to alter State election laws. The Founders explicitly considered Congress's power to require expedited special elections the solution to potential discontinuity of government in emergency situations.

As Alexander Hamilton wrote in the Federalist Papers, the Constitution gives Congress, quote, "a right to interpose" its special election rules on the state, quote, "whenever extraordinary circumstances might render that interposition necessary to its safety."

While a catastrophic attack on Washington would no doubt cause massive disruption here, the situation would be less severe in localities throughout the country where the special elections would be held. Several State laws already provide for very quick special elections in normal circumstances, let alone emergency circumstances.

For example, Minnesota law provides that a special election be held no more than 33 days after a vacancy. That same State, less than a year ago, further demonstrated the resiliency of the election process when the tragic death of Minnesota Senate candidate Paul Wellstone required the substitution of a new candidate just 10 days before the election.

Today absentee and overseas ballot requests transmitted by electronic means would help facilitate expedited Federal elections. Touch screen voting could reduce the need for poll workers and even eliminate entirely the need for paper ballots, and the Pentagon has already developed a system to allow troops overseas to vote over the Internet in the 2004 elections. With today's constantly advancing election technology, it will make it easier in the near future for people to exercise their right to elected representation in special elections.

Proposals for a permanent constitutional amendment would, in certain crucial moments in American history, ban voting entirely for everyone, everywhere. In other words, a constitutional amendment would accomplish what no terrorist can, mainly striking a fatal blow to what has otherwise always been the "People's House."

Remember, Representatives represent people, Senators represent States. H.R. 2844 is founded on clear existing constitutional authority, while preserving the vital time tested value of elected representation that has made this Nation the most successful experiment in self-governance the world has ever known. Thank you.

The CHAIRMAN. Thank you for your testimony.

[The statement of Mr. Sensenbrenner follows:]

Written Statement of F. James Sensenbrenner,
Chairman, House Judiciary Committee
before the House Administration Committee
regarding H.R. 2844, the "Continuity in Representation Act"

Wednesday, September 24, 2:00 p.m. 1310 LHOB

Recent commemorations of September 11 remind us that the fourth hijacked plane was headed for the U.S. Capitol before the heroic actions of the passengers of United flight 93 prevented an even more terrible disaster. Had that attack been successful, Congress's ability to function may have been severely disrupted. While the 17th Amendment allows governors immediately to appoint replacement Senators, currently there is no mechanism to quickly replace House Members. However, this and other continuity in government issues can be addressed as the Founders intended – by Congress through the legislative process.

H.R. 2844, the "Continuity in Representation Act of 2003," was introduced by myself and Chairman Drier, along with Representatives Candice Miller and Tom Cole – both former chief state election officials

– House Constitution Subcommittee Chairman Steve Chabot, and Representative Ron Paul. House Judiciary Committee Ranking Member John Conyers is also a co-sponsor of H.R. 2844. This bill, unlike other proposals, will preserve the people's constitutional right to elected representation, and for that reason it has the support of the Speaker of the House.

H.R. 2844 would provide for the expedited special election of new Members to fill seats left vacant in "extraordinary circumstances," which the bill defines as occurring when the Speaker of the House announces there are more than 100 vacancies in the representation from the States. Within 14 days after such an announcement, the political parties of states with House vacancies, as provided by State law, may nominate candidates to run in a special election to be held within 21 days.

Some are arguing for the adoption of a constitutional amendment

that would allow for the appointment of replacement House Members if large numbers of vacancies are left following a terrorist attack. Such an amendment would destroy the uninterrupted tradition that *only* Members duly elected by their local constituents should serve in the House. Even worse, such an amendment would take away the people's right to chosen representation while ignoring the current mechanism for preserving continuity in government the Founders, in their wisdom, included in the Constitution, and which is the basis for H.R. 2844.

James Madison used the strongest of terms when stating the House must be composed only of those elected by the people. Madison wrote in the *Federalist Papers* that elections are – quote – "unquestionably the only policy" by which the House can have – quote – "an intimate sympathy with the people." Madison also wrote of the – quote – "*requisite* dependence of the House of Representatives on their constituents."

The House – *uniquely among all branches and bodies of the entire federal government* – is rooted in democratic principles and those principles must be preserved, always. Madison explicitly *rejected* the proposition that the appointment of Members authorized by Congressional legislation is compatible with the American Republic. As Madison wrote in the *Federalist Papers*, – quote – "The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the [Constitutional] convention, therefore, to define and establish this right in the Constitution. *To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned.*" The very proposal offered by opponents of this legislation, therefore, was explicitly rejected by the Founding Fathers as antithetical to republican government.

Congress has the clear constitutional authority to enact H.R. 2844 under Article I, Section 4, of the Constitution, which states that "the

Congress may at any time by Law make or alter" State election laws. Consistent with the right to chosen representation, the Founders explicitly considered Congress' power to require expedited special elections the solution to potential discontinuity in government in emergency situations. As Alexander Hamilton wrote in the *Federalist Papers*, the Constitution gives the Congress – quote – "a right to interpose" its special election rules on the states – quote – "whenever extraordinary circumstances might render that interposition necessary to its safety." The Supreme Court has unanimously approved such clear Congressional authority.

A depleted House rapidly repopulated by special elections could either re-approve or disapprove policies passed by a House composed of fewer Members, or actions taken by the President alone. A further constitutional check on the President's potential abuse of power is the impeachment process, which, as any President will know, could be initiated by both a depleted or a later repopulated House of

Representatives. And of course, no law could be enacted by a depleted House alone, as the approval of a full Senate, filled with appointed Senators if necessary, and the President, would both be required.

While the Continuity of Government Commission takes an extremely pessimistic view of the resiliency of the electoral process nationwide following an attack on the Nation's capital, I have a different view. While a catastrophic attack on Washington, D.C. would no doubt cause massive disruption here, the situation is likely to be much less severe in localities throughout the country where special elections would be held. Several state laws already provide for very quick special elections in *normal* circumstances, let alone emergency circumstances. For example, Minnesota law provides that a special election must be held no more than 33 days after a vacancy. That same state, less than a year ago, further demonstrated the resiliency of the election process when the tragic death of Minnesota Senate candidate Paul Wellstone on October 25, 2002, required the substitution of a new candidate just 10

days before the election.

And while no elections are perfect, even in the best of circumstances, democracy is undeniably an essential government function in the United States of America, and I have no doubt the boundless spirit of the American people will ensure that democracy prevails in even the most pressing conditions. Just as the recovery of the Pentagon and the World Trade Center sites were accomplished far quicker than most imagined, I have the greatest confidence that the American people and state election authorities would act expeditiously to restore the People's House in time of emergency. Today, absentee and overseas ballot requests by fax, e-mail, or other electronic means not involving physical transportation could further facilitate the timely conducting of special elections. Touch-screen voting could further reduce the need for poll workers, and could even eliminate entirely the need for paper ballots, and the Pentagon has already developed a system that will allow troops overseas to vote over the Internet in the 2004 elections. Yet while today's constantly advancing election technology

will make it much easier in the near future for people to exercise their right to elected representation in special elections, the adoption of a constitutional amendment allowing Congress to deny that right of elected representation would be permanent. Expedited special elections might not yield flawless voting, but alternative proposals for a permanent constitutional amendment would in certain crucial moments in American history ban voting entirely, for everyone, everywhere.

While some imagine horrific scenarios regarding catastrophic attacks on the Nation's capital, more inspiring scenarios can be imagined that resonate more closely with the American spirit. Should such a terrible situation occur, millions of people around the country might fill schools and gymnasiums, churches and meeting halls, and freely exercise -- in the wake of a vicious attack by haters of freedom and democracy -- their right to chosen representation, a right that has survived uninterrupted throughout U.S. history. The American people would take action themselves to protect their own futures and cast a

ballot for the representative of their choice. Indeed, while some argue that adopting an amendment to the Constitution is necessary in light of a potential terrorist attack, the very adoption of such an amendment itself would accomplish what no terrorist could, namely striking a fatal blow to what has otherwise always been "The People's House." Such an amendment, giving Congress blanket authority to legislate how Members would come to serve in this body forever after, in itself provides no solution, but only potential mischief and the prospect of political gamesmanship by future Congress's for centuries to come. H.R. 2844, on the other hand, is founded on clear, existing constitutional authority, and it preserves the vital, time-tested constitutional value of elected representation that has made this country the most successful experiment in *self-governance* the world has ever known.

The CHAIRMAN. Chairman Dreier.

**STATEMENT OF THE HON. DAVID DREIER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. DREIER. Thank you very much, Mr. Chairman, Mr. Larson, Mr. Linder, Mr. Brady. I want to say at the outset that I greatly appreciate, as all of my colleagues do, your willingness to take on this issue; and I appreciate especially the remarks of Mr. Larson about the desire of many of us to spend some time focusing on what it is the framers of the Constitution actually had in mind.

I think that Chairman Sensenbrenner has very ably focused on two of the authors of the Federalist, James Madison and Alexander Hamilton, in underscoring the fact that having this, the first branch of our government, the entity which is actually mentioned before any other, that being the people's House, the House of Representatives is mentioned in Article 1 of the Constitution, ahead of the United States Senate, and that realization, that not only as you said, Mr. Chairman, that every single Member who served here has only been elected, they have only served here based on their having been elected.

There is no other Federal office where that exists. We all know that one can obviously be appointed to a vacancy in the United States Senate. We know that one, we looked at President Ford, by virtue of appointment, can become President of the United States. But, the people's House is the only place where that exists. And I know that that is something that is sacred. And to me, I believe that we should be very very careful before we look at the prospect of amending the U.S. Constitution.

In fact, members of the Commission, and I want to congratulate them for their work, like our former minority leader, Bob Michel, said it very clearly when he looked at the fact that the constitutional amendment should be the very last resort.

I will tell you, as I approach a quarter of a century of service here in the House of Representatives, I have got to say that I voted for constitutional amendments in the past; and, frankly, I have changed my votes now on constitutional amendments. I used to vote for the flag-burning amendment.

One of the reasons was that Jerry Solomon threw me up against the wall and threatened me if I don't vote in favor of the flag amendment. But, before he passed away, I told him that I was voting against the flag burning amendment, and I voted for the constitutional amendment to balance the budget. But, you know what, if we had a constitutional amendment brought forward to balance the budget, requiring a balanced budget again, I would not vote in favor of that constitutional amendment, because we have proved that we can, in fact, balance the budget without amending the U.S. Constitution.

Similarly, I think that we need to do everything that we possibly can to ensure that we maintain the nature that the Framers had for this institution. And that is why I am particularly pleased that the lead author of this important measure, Mr. Sensenbrenner, has said that we can look at moving beyond the 21 days as prescribed in our legislation. And I think that we should do that.

I just want to say that this is—what we ponder here is obviously a horrible thought. As the last person to leave the U.S. Capitol on September 11th, I was stupid enough to stay there up until 11 o'clock, upstairs there on the third floor. And I finally got out. And when you look at the Capitol and think about what could have happened, and of course what could have happened to our membership, it is just a terrible, terrible thought.

So I will tell you that I think that as we look at this challenge that is ahead of us it is a difficult one, but please, please, please go very slowly.

Let me just say that as sort of the lone Republican who represents Hollywood, a number of people have speculated over exactly, because this is all kind of—this whole prospect of losing all of these Members of Congress could create a great science fiction movie.

One proposal that has come forward for me as we look at the virus of an amendment to the U.S. Constitution and all of the unintended consequences that that might create, someone proposed a movie that was actually entitled, The Virus That Ate the Constitution.

When I looked at the characters in this, because of this very important piece of legislation, Liam Neeson was to play of course, the role of Chairman Sensenbrenner. The academics who are obviously involved in this, I sort of see Woody Allen and Don Knotts in those roles, Mr. Chairman. And you, Mr. Chairman, of course I see Robert Redford fulfilling your role. And I should say that the very modest role that I would play would be filled by the very humble Arnold Schwarzenegger.

But this is a serious matter for us as we look at this. But the ramifications could be very, very far reaching, and I wish you well in your deliberations. I will say that we can move very, very quickly in passage of this legislation as opposed to the normal 7 years that it would take, on average for ratification of an amendment to the U.S. Constitution.

The CHAIRMAN. With that we are going to terminate your time.

[The statement of Mr. Dreier follows:]

**Statement of Hon. David Dreier**

**Chairman**

**Committee on Rules**

**United States House of Representatives**

**Before**

**The Committee on House Administration**

**Of**

**The United States House of Representatives**

**On**

**September 24, 2003**
**At 2:00 p.m.**

**1310 Longworth House Office Building**

**Hon David Dreier:**

Mr. Chairman: Thank you for the opportunity to appear here today. I commend you for your interest in this issue. Our potential demise is not a subject that any of us relish considering.

Mr. Chairman, I would like to submit my written statement for the record and offer a brief summary of my remarks.

To preface my remarks I would like to quote a former colleague from Mississippi, Senator Stennis, who said:

"I believe it is one of the great heritages of the House of Representatives that no person has ever taken a seat or cast a vote in that body except by virtue of election by the people. That is a great pillar of our form of government . . .."

Mr. Chairman, the House has always been known as the "peoples' House" because the Constitution requires in Article I, section 2, that the House of Representatives "be composed of Members CHOSEN every second year BY THE PEOPLE of the several states." (Emphasis added.) Many of us here in the House take great pride in the fact that every Member of the body has always been elected. Importantly, there have been no exceptions to that rule.

As the "Peoples' House," we have never contemplated appointment and we want to preserve our distinct quality of being sent here as elected representatives of the people. Our

elections take place every other year in an effort to best represent the will of the people in each of 435 individual districts.

I want all Members to understand why we are pursuing a statutory approach rather than amending the Constitution, as some favor. We contend that the Constitution allows the Congress to preserve itself through elections, which we can regulate. Quite simply, the Congress retains the power to resolve this question – without taking the dramatic and unpredictable step of amending the Constitution. Article I, Section IV states that:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, BUT THE CONGRESS MAY AT ANYTIME BY LAW MAKE OR ALTER SUCH REGULATIONS, except as to the places of chusing Senators." (Emphasis added.)

We believe that a Federal law should be passed that would require the States to have a "mass vacancies special election" within a very limited time period. I will talk about our proposal later, but the real point is for you to understand that any Constitutional Amendment calling for appointment of House Members will meet considerable opposition by the House Membership.

I would urge you to examine our approach as the best method of preserving our institutions in times of crisis.

Beyond creating a masterful framework for our entire government, our founding fathers balanced the interests of small states and large, the citizens, and the needs of a fledgling democracy to create a republic which has become the longest continuous constitutional democracy in the world. They did so with unparalleled genius.

The Framers of the Constitution did not come upon this great document in a single flash of inspiration; rather, they spent months discussing, debating, and ultimately voting on the subject of how the government should be formed. In the end, they created a House and a Senate with differing size, constituency, term of office, procedural rules, duties, and prerogatives.

They did not casually adopt the direct election of Representatives by the people while allowing the States to select their senators, but many came to agree with Delegate James Wilson when he stated his desire for a vigorous government whose power "flow[s] immediately from the legitimate source of all authority – the people . . . . The government ought to possess not only . . . the force but [also] . . . the mind or sense of the people at large." Delegate George Mason concurred: "The people will be represented [in the House]; they ought therefore to choose the representatives."

In the end, the Constitutional Convention Delegates saw, as Alexander Hamilton noted in Federalist #59, that direct election by the people, and NOT selection (which could be held hostage to the whims or even inaction of state government leaders), is the only way to ensure a national

government—one that reflects the will of a majority of Americans.

Hamilton sums up this thought on this provision of the Constitution with his famous statement that "EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION." (Emphasis added.)

As I have discussed with the Honorable Robert Michel, our former House Republican Leader and a member of the Continuity of Government Commission, a Constitutional amendment should be an absolute last resort. I believe a Constitutional amendment would be premature until Congress determines that there are no other ways to resolve these issues through its procedures, rules, or public laws.

As I mentioned earlier, the Constitution itself contemplates this process in Article I, Section 4, where it gives to the Congress the power over the times, places, and manner of elections.

Accordingly, I have joined with several of my distinguished colleagues in support of legislation providing for expedited special elections to fill mass vacancies in the House of Representatives,

The list of cosponsors includes several Members knowledgeable on the subject of the Constitution and elections by the states. They are: The Chairman of the Judiciary Committee, Mr. Sensenbrenner of Menomonee Falls, Wisconsin; the Chairman of the Constitution

Subcommittee of the Judiciary Committee, Mr. Chabot of Cincinnati, Ohio; the former Secretary of State, Ms. Miller of Harrison Township, Michigan; the former Secretary of State, Mr. Cole of Moore, Oklahoma; and the ardent Constitutionalist, Dr. Paul of Surfside, Texas.

This legislation operates within the checks and balances underpinning our Constitution. It recognizes, as did Madison in Federalist #52, that

"It is particularly essential that the [House] should have an immediate dependence on, and intimate sympathy with, the people. . . . [E]lections are unquestionably the only policy by which this … can be effectually secured."

This bill, the Continuity in Representation Act of 2003, H.R. 2844, protects the "People's House." It requires expedited special elections for the House in the case of a catastrophe that results in more than 100 vacancies. If such "exceptional circumstances" exist, this legislation allows the Speaker of the House to call for rapid special elections in order to re-constitute the House.

Thus, under the legislation, when the Speaker announces that the total number of vacancies in the House exceeds 100, a special election must be called to fill the vacancies, and this election must occur within 21 days, unless a regularly scheduled election is to be held within 51 days. Political parties have 14 of the 21 days to nominate candidates and all determinations of the need for a special election are subject to judicial review.

The report of the Commission on the Continuity of Government states that "on average, states take four months to hold special elections, and in the aftermath of a catastrophic attack, elections would likely take much longer."

The report by the Commission postulates later that:

"Under the current constitutional arrangement, there is no effective way to begin filling House vacancies in less than three months after an attack."

This four-month figure is based on an average reached by looking at the special elections since the Ninety-Ninth Congress. This average too small a sample by which to judge a situation with mass vacancies in a time of crisis. Looking more broadly, the report contains data, showing that more that one third of the states have laws limiting the time on special elections from 28 to 127 days, averaging 84 days. (See the chart attached in Appendix A.)

We believe that elections, especially in times of crisis, can take place in a much shorter time period than four months.

The data provided by the report of the Commission shows that currently laws are in effect to start filling vacancies earlier than three months. Eight states currently have special elections limited to less than 90 days with the average being 55 days. There are also 6 states that average 90-day limits. This means that after vacancies are declared,

14 states under their current laws would begin filling their vacancies. These include New York, California, and Texas with substantial populations. Judging the impact of mass vacancies on special elections solely on the relatively few special elections sampled should not carry much weight.

As mentioned above, a number of states already have special election laws that provide for rapid elections in non-emergency circumstances --no later than 28 days in Minnesota and between 30 and 40 days in New York.

California, my home state, has provisions for special elections in the event of a catastrophe that requires them to be held within 63 days, while special elections in non-emergency situations have up to 119 days.

Any criticism about shortness of the timeframe neglects the facts precipitating our legislation: a national emergency where nearly one-quarter of the House of Representatives--or more--is killed. Under such dire circumstances, we believe that all the resources of our nation will be devoted to conducting these elections.

It is not unreasonable to think that the American people can choose their representative quickly. If September 11th showed us anything, it is that Americans pull together in times of disaster and accomplish amazing things.

I will note that the 21-day timeframe should be viewed as a starting point for discussion. If a reasonable and responsible proposal can be put forward that results in emergency elections to the House, without appointed

interim stand-in Members, but is outside of the 21-day window, I believe we should consider it.

But irregardless of the exact number of days, we believe it to be just "loopy and silly" to argue that finding polling places, printing ballots, and assembling volunteers, as some have tried to suggest, would stand in the way of the national will to re-constitute the House of Representatives in a time of crisis.

Some of those who advocate a constitutional amendment to appoint temporary, stand-in Members justify the need for appointing Members because of the vitally important business that must be done by the House of Representatives in the wake of a national crisis. In my view, the Framers intended that such important decisions should be made in the House not by someone who is selected for the people, but by someone who is elected by the people.

Mr. Chairman, in closing, I understand the desire for expediency in times of crisis. Appointing "stand-in" Members by the executive in each state or through a list of "heirs to the seat" provided by each sitting representative may seem expedient, even prudent to some. It may seem easier than planning, creating, and implementing the infrastructure necessary to ensure rapid and fair elections in the face of mass vacancies.

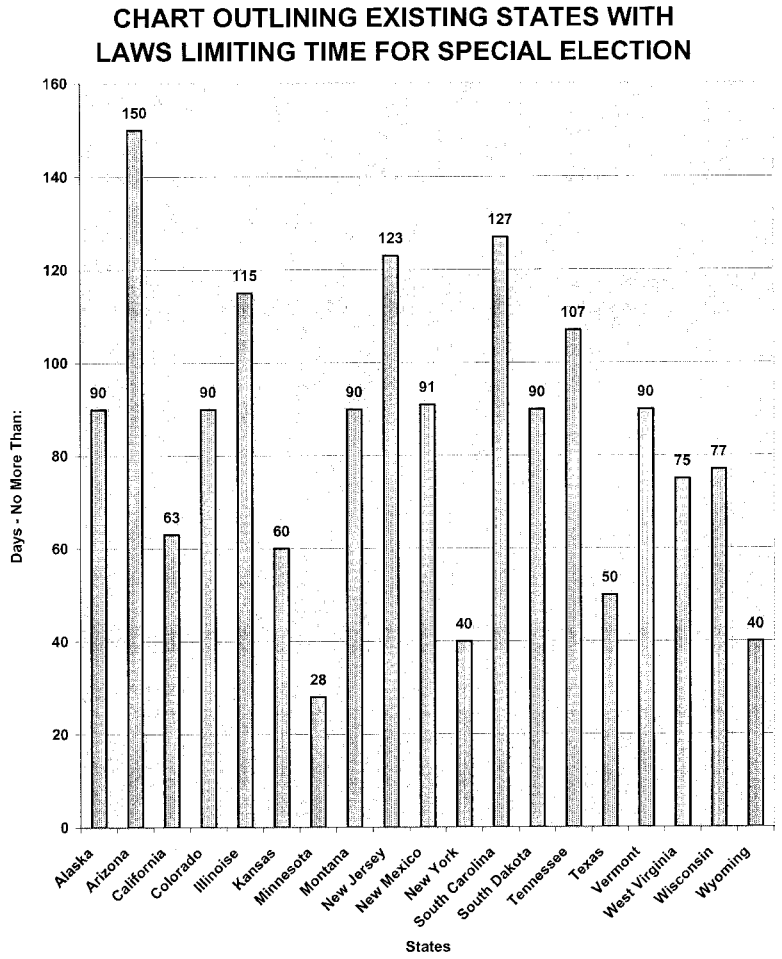
However, in the long term, I believe that after a national crisis, when large numbers of Members of the House have been killed and the existence of our republic may be at

stake, we should still choose to have faith in elections, not selections.

In a national crisis, printing ballots and conducting elections will not be insurmountable obstacles to Americans. Legitimacy, not expediency, should be our concern. And I believe that America is up to this challenge.

Mr. Chairman and members of the Committee, thank you, again, for your attention to my comments. I would be pleased to answer any questions that you might have.

## APPENDIX I




Average Number of Days: 84

# APPENDIX II

## RELEVANT CONSTITUTIONAL PROVISIONS

### Article I: Legislative Department

**Section 2: The House Of Representatives**

**Clause 1.** The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

**Section 4: Elections**

**Clause 1.** The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators.

**Section 5: Powers And Duties Of The Houses**

**Clause 1.** Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

**Clause 2.** Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

**Section 6: Rights And Disabilities Of Members**

**Clause 1.** The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

**Clause 2.** No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

**RELEVANT CONSTITUTIONAL PROVISIONS - (CONTINUED)**

**Fourteenth Amendment: Rights Guaranteed**

**Sections 3: Disqualification**
No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two thirds of each House, remove such disability.

**Seventeenth Amendment: Popular Election of Senators**

**Clauses 1-2:**

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of each State shall issue writs of election to fill such vacancies: Provided That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

**Twenty-Fifth Amendment: Presidential Vacancy and Disability**

**Sections 1-4:**

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Whenever the Vice President and a majority of either the principal officers of the executive

**RELEVANT CONSTITUTIONAL PROVISIONS - (CONTINUED)**

**Twenty-Fifth Amendment: Presidential Vacancy and Disability - continued**

departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principle officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

**Source: Congressional Research Service**

The CHAIRMAN. Mr. Frost of Texas.

**STATEMENT OF THE HON. MARTIN FROST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. FROST. Mr. Chairman, we have a series of votes. I don't know if you want me to begin my testimony or if you want to break at this point.

The CHAIRMAN. We have 10 minutes. So I will leave it up to you.

Mr. FROST. Mr. Chairman, I will briefly summarize my statement and submit the rest for the record.

The CHAIRMAN. Thank you.

Mr. FROST. Because I know that you have other witnesses.

Mr. Chairman, this is a situation like I encountered when I practiced law in that you draft a will for a client, and the client won't come in and sign the will, because he is afraid if he signs it he is going to die the next day.

Well, that is really what we face here. Congress will not come to grips with this in a meaningful way, because we are afraid of our own demise. Unfortunately, we have to entertain that possibility. I hope it never occurs. But, we do have to entertain the possibility of mass casualties.

Mr. Chairman, I am pleased to appear before you. But let me say at the outset, I am opposed to this legislation as a sole solution to the problem. I do not believe that mandating expedited special elections will work to resolve a problem of catastrophic proportions.

I am convinced that the only solution is a constitutional amendment that will provide for the temporary replacement of deceased or incapacitated Members of the House. These temporary replacement members would provide Americans with unquestionably legitimate representation in the House during the immediate aftermath of a catastrophic attack, until States have time to hold real special elections that allow voters to make informed choices about who should represent them for the remainder of the Congressional term.

My statement spells out concerns that I have about the very short time for a special election, and the great difficulty in holding those elections. I would like to add one point, Mr. Chairman, that we cannot assume that any attack would be limited solely to Washington, D.C. It is quite possible that any attack could also take place in the State capitals and in the major cities of other States simultaneously, thereby paralyzing the structures, the electoral structures of some of our states.

So I think it is illusory to assume that you can have special elections that would be done in a prompt and meaningful way in a relatively short period of time; and it is absolutely critical that the next day, or shortly thereafter, when an attack occurs that there be a functioning Congress.

I would remind the gentleman before, that the—during the deliberations of the special working committee that Chairman Cox and I co-chaired during the last Congress, it was brought out that a quorum of the House of Representatives is a majority of those sworn and living. And so that if you have five Members who survived, a quorum would be three; and I would suggest to you, to this committee and to my colleagues, that the business of the country

being conducted by three Members would not be something that would be widely respected and something that our population could have confidence in. So that it is essential that the House be reconstituted as quickly as possible.

I believe that a constitutional amendment that provides for a method for appointing successors, whether—there are several methods that have been proposed, and I will not at this point take sides as to which one I would prefer. But a method that provides for prompt appointment would ensure the efficient and prompt functioning of this government, which is absolutely critical and which was not a situation contemplated by our Founders.

Sometimes you have to realize that our Founders, no matter how great they were, did not and could not have contemplated things that are occurring in the 21st century. The mass destruction of the Congress was not something that I believe they ever contemplated. Had they done so, I believe they would have provided for a mechanism for replacement in a prompt way.

And I submit the remainder of my statement for the record.

The CHAIRMAN. Without objection. I thank the gentleman for his testimony.

[The statement of Mr. Frost follows:]

**Statement of Hon. Martin Frost**
**H.R. 2844 – Continuity in Representation Act of 2003**
**Committee on House Administration**
**September 24, 2003**

Mr. Chairman, Ranking Member Larson, I am pleased to appear before your committee today to comment on H.R. 2844, the Continuity in Representation Act of 2003. Let me say at the outset, I am opposed to this legislation. I do not believe that mandating expedited special elections will work to resolve a problem of catastrophic proportions; I am convinced that the only solution is a constitutional amendment that will provide for the temporary replacement of deceased or incapacitated Members of the House. These temporary replacement Members would provide Americans with unquestionably legitimate representation in the House during the immediate aftermath of a catastrophic attack – until states have time to hold real special elections that allow voters to make informed choices about who should represent them for the remainder of the Congressional term.

As you know, in the last Congress I served with Chris Cox of California on a Speaker's Working Group that was charged with the task of examining many of the issues relating to the continuity of the House of Representatives as well as Presidential succession in the event of a national catastrophe. Chris Cox and I, along with our colleagues David Dreier, Brian Baird, David Vitter, Jim Langevin, Steve Chabot and others spent a great deal of time contemplating the complexities of the issues associated with reconstituting the House of Representatives following a catastrophic event. We soon saw that answers are not readily at hand. As a first step, however, we recommended, and the House unanimously passed, H.Res. 559. That resolution directed each of the several states to examine their special election procedures so that in case of a national catastrophe, congressional elections could be held in a "timely" fashion. We had also recommended that the Judiciary Committee begin an examination of the constitutional amendments that have been proposed by various Members of this body as well as by students of this institution.

To my knowledge, there has not been a formal study of which states have undertaken such an examination or those that have made statutory changes that would take into account the difficulties that would be associated with conducting elections under these circumstances. I recognize that many states already have in place statutory provisions that can expedite special elections to a degree. However, I would certainly recommend that this Committee conduct a study to see which of the states have begun to make the necessary changes that would address just such a situation as well as to see what the states have in place that would allow for expedited elections should a catastrophe occur within their own borders prior to recommending to the full House H.R. 2844.

I make this recommendation because I am convinced that 21 days or even 30 days do not give parties, election officials, candidates, and voters adequate time to prepare for an election whose importance might be the most significant in the history of our country. As I said at the outset, I have concluded that the only solution is a constitutional amendment that would provide for the temporary replacement of Members following a catastrophic situation where some significant number – be it 100, 200, or 430 Members – have been killed, incapacitated, or are missing. I am not wedded to any one recommendation among the many that have been brought forth in the two years since the attacks on Washington and New York; I am, however, firm in my conviction that, for the sake of the country, for the sake of the continuity of our government – meaning all three branches – that a functioning and unquestionably representative and legitimate House of Representatives must be able to sit and meet and deal with the enormity of the issues that would face our country were such an unimaginably horrible event to take place.

I certainly respect the view of those who believe the sanctity of the constitutionally mandated direct election of Members of the House of Representatives can be tampered with only as a last resort. I do not come to my position as an advocate for a constitutional amendment without a great deal of thought and study of the issue. But what we are discussing is, indeed, a last resort. And I am convinced, that in a time when this country might find itself under attack, when the citizens might be deeply concerned about the ability of their government to respond, that it is absolutely critical that the United States House of Representatives be able to function and to assure Americans that their country has not collapsed around them.

I am not here today to argue the details of what a constitutional amendment might look like. I have heard the arguments of those who oppose the appointment of temporary Members: that "heirs-in-waiting" would be lined up to take the place of a deceased or incapacitated Member, that such temporary Members would reflect political cronyism, and would, for all intents and purposes not be representative of the states and Districts they would be sent to Washington to represent.

Without arguing too fine a point, selection of candidates by political parties – as some proponents of "shotgun" special elections have suggested we should do – might well also represent the "hand-picked" heirs of the political cronies; the only difference might be an election held seven days after the selection of the candidates would most likely leave voters in the dark about what these hand-picked candidates might espouse as remedies for the crisis at hand. Under the circumstances we are imagining, such an election may or may not give legitimacy to the men and women who garner the most votes.

I believe the American people won't want to settle for a "shotgun" election. I believe the American people will want their government in place, but if they are

given a government that has been assembled through an election process that does not give every citizen the right to make a considered choice could very well be considered illegitimate. Thus, the very problem Mr. Dreier hopes to avoid could very well undermine the very stability that each of us in the room would hope we could provide to our successors.

I have said many times since September 11, that the United States must contemplate and plan for even the most unthinkable catastrophe. I commend this committee for holding this hearing today, but I think it is long past the time that this Congress, as a whole, begin a serious discussion of what would happen if those we are fighting in this war on terror successfully disrupt our national government. My friend Mr. Dreier has insisted that the notion of a Constitutional amendment would be met with stiff resistance in this body. I can't argue that his prediction may well be the case. But, in order to make that determination, in order to gauge how individual Members feel, or how the public might react, it is time that a very public discussion of the issues at hand take place.

Without that kind of discussion, no one of us can really say we know how other Members and the public at large would react to either course of action. I cannot see how an election held 21 or 30 days following the demise of the sitting House of Representatives can be conducted, much less be considered legitimate in the long-term. I have read the very thoughtful testimony presented to the Senate Judiciary Subcommittee on the Constitution by R. Doug Lewis, the Executive Director of The Election Center. The Election Center represents the nation's voter registration and election officials and administrators and is the only organization in the country to specialize in voter registration and election administration issues. Mr. Lewis has posed an interesting question and I would like to quote from his testimony:

> What is an election? Is it a date-certain event so that voters can vote, or is it more than that? Is an election in American democracy really a "process" that includes time for the identification of candidates, the ability of candidates to mount a campaign, to raise funds, to attract supporters, to inform voters of what their choices are between individual contestants, and then going to the polls to make that choice?

Mr. Lewis makes some very important points – points that this Committee, as well as the House Committee on Judiciary should contemplate carefully. But it is incumbent on this Congress to raise this issue to one of public discussion, not to rush through a proposal that I believe will be unworkable in the reality of a national emergency.

I urge this Committee to examine this proposal with great care and to not pass summary judgment. I would urge Chairman Sensenbrenner to use the forum of his committee to examine the pros and cons of a constitutional

amendment. We are two years past that terrible day in September and we have not taken the major steps that would be necessary to ensure the continuity of our federal government. The simple fact of the matter is that the Congress will not act. It is like the case of a client going to his lawyer to have a will prepared. The lawyer prepares the will as he has been directed to do, but the client refuses to come to the lawyer's office to sign the will. Why? Because he believes if he signs it he will die.

I see the failure of Congress to deal with this issue head on as the same kind of paranoia: The irrational fear that if we pass something, then the disaster will happen. That is a foolish and foolhardy way to conduct – or not conduct – a very important piece of the people's business.

Perhaps the only way to ensure that we take action is to initiate broad-based hearings, not only here in Washington, but throughout the country, so that all Americans will understand what is at stake here. What is at stake, no matter the conclusion we reach about how to deal with catastrophe, is the very freedom we all hold dear. We are abrogating our responsibilities by not taking action, but I believe we will have punted on an issue of overwhelming importance if we merely send this bill to the House without having first had a real and meaningful discussion of its workability versus the idea of amendment the Constitution to allow for the temporary appointment of Members of the United States House of Representatives.

The CHAIRMAN. We have two votes. If you would like to return—if the Members that have testified would like to return for questions, I will leave it up to them.

[Recess.]

The CHAIRMAN. The committee will come to order, and we will continue with testimony from Congressman Baird of Washington.

**STATEMENT OF THE HON. BRIAN BAIRD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON**

Mr. BAIRD. Mr. Chairman, I want to thank you for holding this hearing. My distinguished friend and colleague, the ranking member, Mr. Larson, and Mr. Linder, thank you.

This is as serious as it gets. I am glad that we are holding hearings on this.

Two years ago, on the night of September 10th, 3,000 of our fellow citizens went to bed not knowing that they would be killed the next day. There is no guarantee that on any given day when we go to bed or any given night we are not facing the same fate the next day. What is certain is that if that were to happen right now this Congress and this country are ill-prepared to deal constitutionally with the loss of the majority of the House Members, or even substantial numbers.

It is true, I think, that the Framers could not have imagined this. It is also true that the Framers placed a high premium on the principle of direct elections. But that is not the only thing that they placed a high principle of value on. There were also fundamental concepts of proportion of representation by the States in one of the bodies of the Congress. Checks and balances and separation of powers were also critically important.

Those who argue that in some way proposals to amend the Constitution to provide for prompt replacement, followed by genuine election, is somehow eating the Constitution, would, in so doing, allow the entire Article 1 provisions, the whole set of Article 1 provisions to be nonexistent and overridden by an executive who was not elected, most likely, and who may well declare martial law.

In our fealty to this principle of direct election, which we all hold dear and important, we must not allow that to eliminate all other Article 1 functions during the time of grave national crisis. Yet that is precisely what we would do. We need to get past hyperbole. We need to get past false dichotomies and acknowledge the following principles.

Every Member of this Congress believes that, ideally, Members of the House of Representatives should be elected. But this is not about an ideal world. It is true that Madison would have held fast against anything other than direct elections, but I reckon he would have held fast against the simultaneous destruction of every Member of this body. If he were to face the situation we face today, he would also be asking, I trust, and I have read extensively about the gentleman and his position on the Constitution, he would also be asking, who checks the executive? He would be asking, who has other powers? And he would be gravely concerned about vesting all of the powers of this country in a single nonelected person whom most Americans don't know. So let's not make a false dichotomy that we don't care about special elections.

In the initial proposal I offered 2 years ago, we proposed a special election. But the bill before us today I believe is unrealistic and has several problems.

First of all, to mandate, in my original proposal we put forward a 90-day period, but you are assuming there that ideal conditions will prevail. What happens if you mandate a 3-week period or a 90-day period and circumstances, related perhaps to the disaster itself, prevent you from doing that? It is better to provide for prompt replacement of wise and reasoned people and then have genuine elections so that the American people can truly deliberate.

It is not simply getting to cast a vote that matters, it is getting to cast an informed vote in a judicious manner that matters, and we must provide for that. We must not allow the proposal before us and we are discussing today in this committee to lead the American people or the Members of this Congress to pat ourselves on the back and think that problems have been solved.

At a bare minimum, even under the most ideal conditions, and I think conditions that are not realistic, we would still be without a Congress for at least 3 weeks, probably 5, and I think more likely, judging from the State executives I have spoken with and election executives, closer to a couple of months.

Now I want to thank the committee. I want to thank the working group, the Commission on Continuity chaired by Norm Ornstein and Tom Mann, and also my good friend, Jim Langevin, who is a former Secretary of State himself.

They assure us that maybe you can hold elections, but would they be genuine? That is questionable. And, more importantly, what happens to the Congress during that time period?

Do not sacrifice Article 1 of the entire Constitution. Do not sacrifice checks and balances. Do not sacrifice separation of powers. And do not sacrifice proportion of representation in the name of specious and hasty elections. That is my fundamental message.

Let me just close with this. It is somewhat symptomatic, perhaps—and I enjoyed the humor of our chairman of the Rules Committee about who would play whom in a movie about this catastrophe. We all want to fantasize that we will be the survivors. We all want to fantasize that we will be played by the heroic lead male or lead female.

But the reality in this case is we are going to be played by pieces of charcoal, and we have got to accept that, and we have to deal with that. Somebody has to come in and pick up those pieces, and our job is to create a playing field in which they can do that, to write the script that allows wise and decent people to fill the roles. We don't know who they are, necessarily, but we must not have those roles played by nobody, and we must not leave an unelected person running this entire country under martial law.

The CHAIRMAN. Thank the gentleman for his testimony.

[The statement of Mr. Baird follows:]

**Committee on House Administration**
**Testimony of**
**The Honorable Brian Baird (D-WA)**
**2:00 p.m., Wednesday, September 24, 2003**
**Room 1310 Longworth House Office Building**

It is a privilege to testify before this distinguished committee today and I commend Chairman Ney and Ranking Member Larson for their recognition of the importance of this issue and their leadership in seeking solutions to this grave problem.

To underscore the significance of this hearing, imagine the following event. The American people are going about their daily lives when television and radio broadcasts are interrupted with the news that a nuclear weapon has been detonated in the nation's capitol and all members of the Congress, the President and Vice President, the Supreme Court, Cabinet members, and thousands of government workers and residents of Washington DC have been killed.

We must make every effort to prevent such an event from ever happening, but we must also recognize that terrorists have the desire and may have the ability to obtain nuclear or chemical weapons. Should they use such weapons, all or nearly all members of the House and Senate could be killed or incapacitated immediately and without warning. As discomfiting as this reality may be, it is reality. To believe and act otherwise is wishful thinking at best and irresponsible at worst.

Yet, as it stands now, two years after September 11th, we do not have coherent, constitutional valid plans for assuring the continuity of our government. This is unacceptable.

Since September 11, 2001, a working group within the House of Representatives, and an independent commission headed by Norman Ornstein and Thomas Mann have engaged in a careful review of the Constitution, Presidential succession acts, House rules, and other procedures relating to continuity. These reviews have revealed severe problems that could jeopardize the security and orderly government of our nation.

In my comments today, I would like to briefly summarize the key obstacles to orderly continuity in the House, respond to some of the positions taken by critics, and offer a proposal which I believe would assure continuity of House functions in the event of a crisis.

The chief concern regarding continuity of Congress pertains to the functioning of the House of Representatives. As you know, vacancies in the Senate can be filled in most states by appointment from the Governors. House vacancies, under the Constitution, must be filled by direct election.

All those who serve in the House are proud of this tradition and hold dearly to the principle that no one has ever served in the House who was not directly elected by the people. If the Congress were to be destroyed in a nuclear, biological or chemical attack, it would be an unprecedented event. New conditions demand new responses.

The problem this scenario creates is that large losses of House members would leave the House to function with just a handful of individuals (which is theoretically allowed under House rules, but of questionable constitutional validity or public acceptance). Or, if there were no survivors and all House members were killed or incapacitated, there would be no House of Representatives at all, leaving such fundamental constitutional functions as appropriating funds, declaring war, approving Vice Presidential nominees if necessary, etc. to be attended to either through extra-constitutional means or to wait until elections could take place. Again, as it stands today, no one really knows what would happen because we are not adequately prepared to deal with these circumstances. It is, however, questionable to hope or trust that in the event of such a profound crisis all the survivors would somehow magically "do the right thing". Crisis can provoke a number of reactions, but universal sagacity can not be counted among them.

Some who insist that there be no deviation from direct election to the House have argued that it is acceptable for the House to function with as few as three or conceivably even with a single member. Others have suggested that having no House at all for many weeks or months is perfectly acceptable. I believe such positions do a disservice to the intent of the Constitution, to the people we represent, and to the House of Representatives as an institution. I also believe that inaction, knowing what we now know, is an equal disservice. As an alternative, and with great reluctance, I believe it will be necessary to amend the Constitution to provide for a more orderly and expeditious means of temporarily, and I underscore temporarily, replacing House members until special elections can be held in an orderly, responsible manner.

Fundamental to my concern about continuity in the House is respect for the key constitutional principles of checks and balances and separation of powers. Ironically, those who insist that nothing other than a House comprised of directly elected members, would, by their insistence, likely leave the entire nation to be governed either by a handful of survivors, who in fact were elected by only a small fraction of the population, or by people who were not elected at all. This would likely include unelected cabinet members serving as President and Vice President, appointed Senators, or possible even military generals declaring martial law. Lacking the checks and balances of Congress, the Executive branch might claim unprecedented authority, including the power to declare war and possibly even to launch retaliatory nuclear strikes. Leaving unelected people to make such profound decisions with no checks at all is a strange consequence indeed for those who hold so dearly to the principle of direct elections.

Another argument that is made against temporary appointment is that appointees would have an unfair advantage in a subsequent special election. On the one hand the argument is made that the voters must have the right to choose their representatives, but then the voters' very abilities to make intelligent choices is called into question by the assumption that the voters would automatically choose the appointee over other candidates. This is not only intellectually inconsistent, it is also contrary to the empirical evidence from elections following Senate appointments.

Further irony is added when proposals are made for expedited elections in which the major political parties, without primary elections, would select candidates, and then elections among those candidates would be held within just a few weeks. Apparently, in the name of protecting the appearance of direct election, the opponents of temporary appointment are willing to sanction hastily arranged elections in which voters have limited choices of candidates and insufficient time to make truly informed choices. What is more, such proposals assume, without experiential evidence for support, that nationwide elections could in fact be arranged in just three weeks. That assumption is contrary to the judgments of most state elections officials who have stated that at a minimum two to three months would be needed to assure fair elections and full enfranchisement of voters. Finally, even if elections could be conducted within several weeks, which is highly questionable, it should reiterate that such proposals implicitly accept the absence of a Congress for that time period.

Given the problems that would arise in the event of large losses of House members, and in view of the problems created by waiting until elections could be held, what alternative would do justice to the functions of the House and preserve the principles of checks and balances and separation of powers that have served this nation so well?

Based on the information from the Congressional working group and the independent Continuity of Government Commission I believe the best, albeit not perfect, solution is a Constitutional amendment authorizing sitting members to identify potential designees who would temporarily assume the Elected Representative's duties until special elections could be held. Draft language for the proposed amendment follows, but let me first briefly outline its merits.

Briefly, the proposed amendment addresses the following problems:

I. Provides a mechanism for very rapid reconstitution of the Congress as a functioning legislative body in the event of large losses.

II. Addresses concerns about appointments influencing the partisan makeup of the house without inserting partisan language or requirements into the Constitution.

III. Provides for prompt restoration of representation in the event of extensive losses to a state delegation or political party, but obviates determination of a triggering threshold of losses to become effective.

IV. Places responsibility for identifying potential temporary "Designees" with the person elected by voters of a district to make decisions as their direct representative to Congress.

V. By referring to "Designees" rather than Representatives, does not violate the principle of direct election to full membership in the House of Representatives.

VI. Leaves to the States decisions about the time and place of special elections.

VII. Does not set a fixed time for special elections to allow for extenuating circumstances that might accompany a devastating attack.

VIII. Authorizes Congress to address incapacity statutorily.

**Proposed language to ensure continuity of House:**
Upon election to the House of Representatives, each elected Representative shall present to the appropriate official of their states a confidential list of individuals who the Elected Representative has thereby nominated for potential designation to service in the House in the event the Representative dies or otherwise becomes incapable of fulfilling the duties of office. All individuals so listed as potential designees must meet the Constitutional requirements for service in the House of Representatives. Elected Representatives shall have the authority to alter their list of potential designees at their discretion.

In the event of death or incapacity of an Elected Member of the House, the Executive of the Member's state shall select an individual from the Member's list of nominees to serve as Designee to the Congress until such time as the Elected Representative regains the capacity to serve or a new Elected Representative is chosen through election. Designees shall be required to take the oath of office and during the period of their service in Congress shall have all the voting privileges and other rights and responsibilities of members elected directly. Designees shall be counted for purpose of quorum counts and all legislation enacted during their service in the House shall have the full weight of law. In the event that a designee chosen by the Governor dies or becomes incapacitated before a special election can be held, the Governor shall select from the Elected Representative's list another individual to serve as designee. The Congress shall have the authority under this amendment to define incapacity of members and to establish procedures for making such determinations.

The CHAIRMAN. The gentlelady from Michigan.

**STATEMENT OF THE HON. CANDICE MILLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN**

Mrs. MILLER. Thank you, Mr. Chairman, certainly Ranking Member Larson, members of the committee as well. It is certainly a great opportunity for me to be able to address this issue today.

I am here to speak in favor of H.R. 2844, the Continuity of Representation Act of 2003. I think the need for this legislation is so very, very critically important in the wake of the absolutely horrific attacks against our Nation on 9/11.

Of course, as we all know, on that fateful day the enemies of freedom clearly targeted the pillars of our Nation. The terrorists attacked the World Trade Center, which represented our economic freedom. They attacked the Pentagon, which represents our military strength. By all accounts, Flight 93 was targeted either at the White House or the Capitol Building, both symbols of our democratic form of government and our freedom. In fact, I think it was only due to the heroic actions of those passengers on that particular plane that stopped it from reaching its intended target.

The Congress must ensure that our government remains strong and stable in the event of a catastrophic attack, and so we begin to think about what to do in regards to the United States House of Representatives if the unthinkable were to happen.

Of course, the President would be replaced quickly by the existing line of succession. The courts would be replaced quickly by a Presidential appointment. The Senate would be reconstituted quickly through a gubernatorial appointment as the 17th amendment outlines. It is only the House of Representatives that would not be able to function quickly during a time of national emergency because of the constitutional provision which requires direct election of the people.

Let me quote Article 1, Section 2, which does state: When vacancies happen in the representation on any State, the executive authority thereof shall issue writs of election to fill such vacancies. I think that is the operative phrase here: writs of election.

I am proud to be an original cosponsor of H.R. 2844 because this bill does provide an effective mechanism for the reconstitution of the House of Representatives in the event of a tragedy, and it does so by ensuring that we continue to elect Members of the House, who are in fact the only Federal elected officials who for the entirety of our national existence have been directly elected by the people.

There have been a number of suggested alternatives to the proposals that we made in this legislation. Some have called for temporary appointment of Members of Congress in such an emergency, either through gubernatorial appointment, like that in the Senate, or even by a sitting Member naming a successor to take the seat in the event of a Member's death.

Either of these ideas would require a constitutional amendment, which would be a change from both tradition and constitutional mandate, which expressly calls for the direct election of Members of the House.

Many people have also argued about the difficulty of the process of holding so many elections, special elections in such a short period of time. This is an area where I do have some experience, and I have to agree that it would be difficult. But it has also always been my observation that election officials will always rise to the occasion to complete the required work, especially in time of a national emergency.

Before coming to Congress I was honored to serve as Michigan's Secretary of State for 8 years, and one of my principal responsibilities in that role was serving as the Chief Elections Officer of my State. I do understand that the time frame that we have called for is greatly compressed; and I think this is a starting point for our debate, as both Chairman Sensenbrenner and Dreier pointed out. But let me point out several areas where the process would need to be modified I think to accommodate this very short time frame.

First of all, you would be eliminating a primary by having the political parties, who are recognized under their respective State laws, of course, nominate their candidates.

This would also negate the requirement for petitions to be gathered by the candidates as well as the verification process that most States do require, either by their secretary of State or their boards of canvassers.

In regards to election administration functions such as ballot printing, programming, testing, hiring workers and preparing polling places, most polling places are relatively stable, in fact, so much so that they are printed on voter identification cards for the most part. A congressional ballot would only contain a single office, which would dramatically increase—or, ease printing, programming and testing.

It should also be noted that since Congress has passed the HAVA Act, the Help America Vote Act, most States are embracing election reforms such as following a model that was begun in Michigan of a State-wide computerized voter registration file which is constantly updated by local election clerks and motor vehicle departments, thereby allowing an up-to-date, clean file to be printed at any time and provided to the polling sites.

Also, States are now rapidly moving towards a uniform system of voting machines. In Michigan, for instance, we will soon have all 5,300 of our precincts using optical scan voting equipment. So that would allow for a vendor to always have a camera-ready ballot, and all you would have to do is plug in the name of the candidates and to go to print.

In regards to overseas military voting, the Department of Defense has already piloted a program which allows our troops to vote by the Internet, so that the men and women protecting our Nation would not be disenfranchised.

I recognize that this is not a perfect situation, but I also believe that reconstituting the House of Representatives quickly in time of a national emergency is of critical importance, and I do believe that we should limit our debate to the amount of time necessary to hold orderly elections where the integrity of the process is upheld. Under no circumstances do I believe that we should deviate from the direct election of Members of the people's House.

Thank you, Mr. Chairman.

[The statement of Mrs. Miller follows:]

**HR 2844**

**Continuity in Representation Act of 2003**

**Chairman Ney, Ranking Member Larson, members of the Committee, thank you for giving me the opportunity to speak with you today.**

**I 'm here to speak in favor of H.R. 2844, the Continuity in Representation Act of 2003. The need for this legislation is important in the wake of the absolutely horrific attacks against our nation on 9-11. On that fateful day, the enemies of freedom clearly targeted the pillars of our nation. The terrorists attacked the World Trade Center which represented our economic freedom.**

**They attacked the Pentagon which represents our military strength. And by all accounts, flight 93 was targeted at either the White House or the Capitol Building, both symbols of our democratic form of government and of our freedom. In fact, it was due to the heroic actions of those passengers that that particular plane did not reach its intended target. The Congress must ensure that our government remains strong and stable in the event of a catastrophic attack.**

**And so we begin to think about what to do in regards to the U.S. House of Representative if the unthinkable were to happen.**

**The President would be replaced quickly by the existing line of succession.**

**The courts would be replaced quickly by Presidential appointment.**

**The Senate would be reconstituted quickly through gubernatorial appointment as the 17th amendment outlines.**

**Only the House of Representatives would not be able to function quickly, during a time of national emergency, because of the constitutional provision which requires direct election of the people.**

**Article 1, Section 2 states:**

**..... When vacancies happen in the Representation from any state, the Executive Authority thereof shall issue Writs of Election to fill such vacancies.**

**I am proud to be an original co-sponsor of H.R. 2844 because the bill provides an effective mechanism for the reconstitution of the House of Representatives in the event of a tragedy, and it does so by ensuring that we continue to elect members of the House, who are the only Federal elected officials, who for the entirety of our national existence have been directly elected by the people.**

**There have been a number of suggested alternatives to the proposal we have made in this legislation. Some have called for the temporary appointment of members of Congress in such an emergency, either through gubernatorial appointment like that in the Senate or even by a sitting member naming a successor to take the seat in the event of the member's death.**

**Either of these ideas would require a constitutional amendment, which would be a change from both tradition and Constitutional mandate which expressly calls for the direct election of members of the House of Representatives.**

**Many people have also argued about the difficulty of the process of holding so many special elections in such a short period of time. This is an area where I have some experience, and I have to agree it would be difficult, but it has been my observation that election officials will always rise to the occasion to complete the required work, especially in a time of national emergency.**

**Before coming to Congress, I was honored to serve as Michigan's Secretary of State with a principle responsibility of serving as the Chief Elections Officer.**

**I understand the time frame called for in this legislation is compressed, and is a starting point for our debate, but let me point out several areas where the process would need to be modified to accommodate our short time frame.**

**First you would eliminate a primary, by having the political parties who are recognized under their respective state laws, nominate their candidate.**

**This would negate the requirement for petitions to be gathered by the candidates as well as the verification process most states require either by their Secretary of State of the Board of Canvassers.**

**In regards to election administration functions such as ballot printing, programming, testing, hiring workers and preparing polling places, most polling places are relatively stable, in fact in most states, so much so that they are printed on voter identification cards.**

**A Congressional ballot would only contain a single office, which would dramatically ease printing, programming and testing.**

**It should also be noted that since Congress passed the Help America Vote Act, most states are embracing election reform, such as following the model in Michigan**

**of a statewide computerized voter registration file, which is constantly updated by local election clerks and motor vehicle departments, thereby allowing an up to date, clean file to be printed at any time and provided to the polling sites.**

**Also states are now rapidly moving towards to a uniform system of voting machines. Michigan, for instance, will soon have all 5300 precincts using optical scan voting equipment, which would allow for the vendor to always have a camera ready ballot, and then just fill in the names of the candidates for Congress, and go to print.**

**Absentee voting would be negatively impacted, but Clerks could set up voting stations in their city or township offices for several days in advance of the election to accommodate many of those, many Clerks do this now.**

**In regards to overseas military voting, DOD has already piloted a program which allows our troops to vote via the internet so the men and women protecting our nation would not be disenfranchised. Even though this program has not yet been used on a large scale, certainly that is the wave of the future no matter what we do with this legislation.**

**I recognize that this is not a perfect situation but I also believe that reconstituting the House of Representatives quickly in time of a national emergency is of critical importance.**

**I believe that we should limit our debate to the amount of time necessary to hold orderly elections where the integrity of the process is upheld. Under no circumstances do I believe we should deviate from the direct election of members of the people's house.**

**Clearly it is incumbent on us to find a solution to this issue which honors the wishes and the wisdom of the founding fathers that the House of Representatives remain the people's house.**

The CHAIRMAN. Well, I thank the panel for their very interesting testimony.

I had a question for Chairman Sensenbrenner.

There has been a couple of criticisms that have been out there that, one, the candidates would not be selected by the voters through a primary process; rather, would be selected by political parties. The second, the accelerated time schedule would not allow for people to become familiar with the candidates' stances.

I am not worried about that second one. I am not sure in 2 years people can figure out a candidate's stance. But I am wondering about the first criticism, about the primary process. Any thoughts on that?

Mr. SENSENBRENNER. Well, primary elections have been something that started out in the early part of the 20th century. We are the only democracy that has political parties nominate its candidates through a primary election process. It seems to me that in times of a severe national emergency which would wipe out approximately a quarter or more of the Members of the House of Representatives the quickest way to get an election organized would be for the parties to nominate replacement candidates.

I would point out that there are some States in their special election laws that do not allow for primaries but just put everybody's name on the ballot. I think that having the recognized political parties do it would be a way, as Representative Miller has said, of shortening the process, preventing having a separate campaign for a primary, as well as not having time for the circulation of petitions and the verification of those petitions.

The CHAIRMAN. Thank you.

The question I had of either Congressman Frost or Baird, the language of the proposed constitutional amendment does not limit appointments of House Members only to instances where a large number of Members are killed or incapacitated as a result of a catastrophic attack. So, you know, is it your view that routine vacancies would be filled by appointments?

Mr. FROST. I would be glad to start.

Obviously, any wording of any constitutional amendment would have to be developed by the Judiciary Committee, by Mr. Sensenbrenner's committee; and certainly there is no one formula, there is no one constitutional amendment that everyone has agreed upon in advance, as I understand.

So my guess is—it is just a guess, Mr. Chairman—that if an amendment were to be brought forward, that it would—there would be a threshold number prior to the amendment taking effect. I don't know what that threshold number would be, but it would have to be a substantial number.

Mr. BAIRD. Mr. Chairman, if I can address that, if I might. I have given a great deal of thought to this, as you know, began the night of September 11th, and participated in the working group and the commission.

We have run into a fundamental challenge, actually several. When you try to set a threshold for at what point do we institute special measures, be it special expedited elections or appointments, and there—let me give you a couple of the problems that arise.

First of all, let's suppose you say, I think it is very questionable whether or not it is truly constitutionally legitimate, in spite of what the House rules say, to have a quorum be chosen, sworn and living. Because if it is three people, it certainly does a grave injustice to what the Framers wanted. So then somewhere above that.

Well, let's suppose you set it at a hundred. If a hundred members of the Republican Conference or the Democratic Caucus are suddenly eliminated, which is quite easy to imagine if we are at a retreat somewhere, do we still have the same representative body that we had before?

If 200? We are still not to a majority threshold. If we lose the entire delegation of the State of California, does California, the seventh largest economy in the world, not have representation in the U.S. Congress?

I understand that the amendment that I have proposed as an alternative would substantially change the scenario, albeit it would still provide for special elections to be held promptly following the placement. But my premise in suggesting that we would nominate our own replacements is this.

Our citizens have elected us to make decisions about whether we take this country into war and send our sons and daughters into combat. They have elected us and empowered us to tax them or give their taxes back to them, et cetera, et cetera. As the representative of that district, we know the district or should know it rather well. We are likely to choose members of our own party, thereby obviating inserting party language which has never existed in the Constitution. And I think it is more parsimonious and elegant.

It is a change. I recognize that. But it is a change that, in the realities of the time, I think it protects us well from a more disastrous scenario.

Finally let me say, if we are to return, and I think wisely so, to the counsel of Madison and Jefferson and Franklin, et al., I wonder what they would say about adhering to the principal of special election but inserting party politics into that. Because my recollection is that they had some real concerns about parties, and allowing the parties to choose the candidates for the people might in itself vary substantially from the intent of the Framers, thereby raising questions about the legislation before us today.

The CHAIRMAN. Do you have any thoughts on what the threshold should be? Loss of 50 Members? 100?

Mr. FROST. Well, I don't have a magic number, Mr. Chairman. But I think that is something that would be subject to deliberation by the Judiciary Committee with the advice of people in our leadership on both sides, as well as advice of scholars who have studied the subject.

The CHAIRMAN. Mr. Larson.

Mr. LARSON. Thank you, Mr. Chairman.

My question first would be directed to Chairman Sensenbrenner or Representative Miller, if they choose to respond. But how was the number of 100 established? When you went through this process, why did you choose a hundred?

Mr. SENSENBRENNER. It was entirely an arbitrary number, as any number from 1 to 435 would be. One hundred is approximately a quarter of the House of Representatives; and I think that Mr.

Dreier and I and the people that we talked to felt that that was sufficient trigger to invoke that part of Article 1, Section 2, Clause 4, relative to extraordinary circumstances.

Mr. LARSON. You and Mr. Dreier both eloquently talk about the sacred relationship between—in the people's House being elected by the people. But a scenario under which the whole House might be wiped out or a scenario, as Mr. Frost and Mr. Baird have pointed out, in which a quorum is a limited number of people, how do you answer their concerns about the first amendment in general, and the concerns that they have raised with regard to the first amendment?

Mr. SENSENBRENNER. Well, the Constitution, as we all know, has an elaborate system of checks and balances to prevent any one individual or any one institution from becoming too powerful in this country. That was a reaction against the parliamentary supremacy that existed many years ago and to this day in the United Kingdom.

My answer to the question is simple; and that is that, even if the House were reduced to five Members out of 435, the checks and balances and the existing law and existing constitutional provisions would allow the President and the Senate to be able to run the country until the House was reconstituted.

The problem that I have in terms of the appointment amendment—and the amendment, you know, will result in the appointment of House Members—is that we hear complaints that an appointed President and an appointed Senate is putting too much faith in appointed officials who stepped in as a result of an emergency.

What their amendment will do is have an appointed House as well. So the entire government would end up being appointed, at lease temporarily, whereas the legislation that Mr. Dreier and Ms. Miller and I have envisioned would be to have elected Members serve in at least the House of Representatives as quickly as possible.

The other point that I would like to raise is that the United Kingdom was under attack by the Nazis during the Second World War, and the blitz in London lasted for several months. The House of Commons in the UK is the people's House, just like the House of Representatives is in the United States, and no one who has ever served in the House of Commons has been there other than by direct election of the people.

Now with the bombs raining on London, including a direct hit in the Commons chamber, fortunately not when the House was sitting, there was never any move in the United Kingdom to fill vacancies in the House of Commons by means other than a special election.

And there that country was under attack. The capital city and the building that the parliament meets in was actually being attacked, and they didn't talk about having appointed representatives in the House of Commons. They said they would have special elections, and that is what they did.

Mr. LARSON. Given your experience——

Mr. FROST. I would only respond to my friend, Mr. Sensenbrenner, that that was prior to Hiroshima and Nagasaki.

Mr. LARSON. Point well made.

Ms. Miller, given your experience as Secretary of State, is the 21-day proposal—and I note that Mr. Sensenbrenner also noted in his testimony that he was willing to look at expanding that time frame. What is a realistic time frame to constitute an election that doesn't, as was pointed out by Mr. Frost and Mr. Baird, jeopardize the validity of that vote or the constitutionality of new Members?

Mrs. MILLER. Well, I have a little trouble with the 21 days myself, having run elections. So I was pleased to hear that we have a little flexibility on that.

I do think, though, for instance, if you think about a State like Minnesota—I think you are going to be hearing from the Secretary in Minnesota in the next panel—I believe that special elections in Minnesota are now run in 33 days or something. So you wouldn't want to have a situation where you are mandating States to go further than what they currently can to run a special election. I think you have to take a look at all of that.

But when we think about the possibility of not having a functioning House for some period of time and what it means, if you think about 33 days or 35 days or what have you, I mean, we just had an August recess where we were gone for 5 weeks here in the House. I think most people would think in the case of a catastrophic attack the most important thing would be to have the ability to commit the troops. Well, with the War Powers Act, of course the President already has that authority.

Mr. LARSON. One of the most memorable events of September the 11th was the fact that the Congress, both the House and Senate, were able to convene that evening. The point that Mr. Frost and Mr. Baird continue to make is the immediacy of the crisis. I can't tell you how many number of people have said to me that the most reassuring thing of that day was to see those Members standing together.

Fortunately, as has been pointed out by everyone, we were spared because of the bravery of people. It seems that at the heart of this argument is the need to immediately address a crisis, as in contrast to making sure that we retain the purity and sanity of the people's House being elected directly by people.

Is there any compromise—and certainly the Chairman of the Judiciary Committee is an artful master in this area. Is there any compromise between these positions, Mr. Sensenbrenner?

Mr. SENSENBRENNER. I can't really see there being a compromise. Because when this debate started out there were two proposals that were on the table. One was to allow the gubernatorial appointment of representatives and the other was to allow Members to designate temporary successors.

Now, of the five representatives that you have on your panel here, Mr. Dreier is absent, four of the five of us are members of the opposite political party than our governors. And having the gubernatorial appointment in every case except Mr. Baird's would undoubtedly result in a member of the opposite party, the party that lost the election in the district, ending up being the temporary representative. That is not democracy.

The other proposal would be to allow Members to appoint temporary representatives, and it would be kind of a Member designating his temporary successor.

When I first started out in the political business as a staffer in the Wisconsin legislature during my college years, that was when there was a great fear of a massive Soviet atomic attack, and there was a blue ribbon commission that made that suggestion as an amendment to the Wisconsin Constitution. That proposal, because of public opposition to members designating their own successor in the event of an attack, ended up sinking quicker than the Titanic did, never to come back.

I think that if you are looking for legitimacy in a reconstituted House of Representatives following a disaster, having a House of Representatives be hand-picked successors of a deceased or incapacitated incumbent Congressman would end up being much more illegitimate than running through an election process.

Now, no election is perfect. We all know that. But it seems to me that an imperfect election is better than either of these methods of appointment.

Mr. FROST. If I can respond to two points that were made by different members of the panel.

First, as to the length of time for a special election—and I know that the laws differ from State to State. The law of my State requires a runoff in a special election if no one receives at least 50.1 percent, more than 50 percent of the vote, which could take—extend the period of time for filling the seat.

Prior to 1957, Texas did not require runoffs in special elections, and Ralph Yarbrough was elected to the United States Senate. A liberal Democrat was elected to the United States Senate with a plurality of the vote. So the Texas legislature changed the law to make sure that that could never happen again in a special election.

So we now require runoffs; and runoffs are of varying periods of time, 2 weeks up to a month, depending upon the State law. I don't know whether all States require runoffs in specials, but my state does.

Secondly, as to the point by Mr. Sensenbrenner, even though the Founding Fathers did not incorporate political parties, the document, into the Constitution, there is nothing that would prohibit us from specifying in a constitutional amendment, if we delegated to the Governor the right to appoint, that the Governor be required to appoint a replacement from the same political party as the deceased Member.

Mr. LARSON. Mr. Baird.

Mr. BAIRD. Let me address two points, if I may.

First of all, I think if you were to ask the voters—and ultimately this would have to go to the voters if we were to pass it through this body. You have a choice in a time of national crisis. You can either have no one from your district at all representing you in the Congress and give those authorities completely over to a member of the Cabinet who you don't know at all and who was never elected, or you can vest the person who you did vote for, who was duly elected, with the authority of nominating someone to represent your district as Article 1 provides for and as the great compromise provided for during a time of grave national crisis.

Your choice is nobody at all, checking someone who you never elected, or someone who is at least connected to you by virtue of having been nominated by the person you did elect for a temporary period; and, following that, you will have the opportunity to vote. We are all in agreement that expedited special elections make sense.

But let me underscore the merits of an appointment process. One of the challenges you face is trying to set the threshold, which we alluded to already. The other challenge is, what is the time frame? The time frame becomes albeit important because you want it to be prompt, but it is less essential once you fill the seats, if you can fill the seats with wise and decent people, and if we aren't qualified to pick wise and decent people to fill our seats then we shouldn't be here.

But if you fill the seats, then you can take the time for a truly deliberative election. Then if special circumstances—anthrax in the mail, a direct secondary hit on a State capital—if those occur, then you have still got your Congress functioning. And if it occurs that one State cannot complete its election as promptly as the other State for whatever reason, they still have representation in the body. You don't have some kind of strange misproportionate representation in the body because one State can't function as quickly as another. Once you do the appointments, you are in better shape.

Let me finally suggest this. I don't know as well as the States these gentlemen come from, but I know well the bench that we have to draw from in Washington State. We have former U.S. Senator Slade Gordon. We have Representative Al Swift. We have Sid Morrison. We have Dave Evans. We have existing governors. We have leaders in both parties who are distinguished statesmen.

I think it would be profoundly beneficial to the American people, if days, not months or not many weeks after a crisis, those people convened, and they could say, those people will do what is right for this country in this time of crisis and not just bank it all on the other body or on some Cabinet members who happened to get lucky or nobody who happened to get lucky and some general who takes charge.

Mrs. MILLER. If I could make one quick comment in regards to Mr. Larson asking if it would be possible to have a compromise. I think you asked that in your remembrance of 9/11 and all—the two Houses being on the steps of the Capitol.

We all have personal stories about 9/11. I remember very vividly that morning we were actually conducting an election in Detroit. They were having their city elections.

And I happened to be out at a precinct and watched the first plane go into the first tower and you were trying to get your mind around what you were seeing there, and went to the next precinct and saw the second plane come in. And of course I called our mayor in Detroit. We were wondering what was going on. They were closing the bridge to Canada. New York had canceled their elections for very obvious reasons, and we wondered for a moment whether or not we ought to cancel ours as well. But we thought about that for about a second-and-a-half because we very quickly recognized that continuing with our democratic process is really what sets us apart from the rest of the world and our Constitution does as well.

That is why I believe that whatever we agree to here needs to be within the confines of our Founding Fathers and our constitutional mandates and not amending the Constitution or the terrorists will be winning in a small way.

Mr. LARSON. Kudos to you, by the way, and I was unaware of that and I am glad to learn that here this afternoon.

The CHAIRMAN. On a note, you know that day, 9/11, it was truly a citizens Congress because everybody was on the street corners in small groups of three, four, or five, depending on which street you were on, and there was a huge sense of frustration, as you know, wondering where to go to and how do you reconstitute and everybody was alive. These are discussions that have merit obviously because if people had been killed that day in the Congress we would have had even more of an idea of how do you reconstitute the Congress, but everybody had that huge frustration of not being able to have a Congress at that point in time.

Mr. Ehlers.

Mr. EHLERS. I have no questions.

Mr. BAIRD. May I underscore one point of what you just said? On September 11, after the first plane hit the first tower, there were people in the second tower who were told wait, stay put and they did, and then the second plane came and killed them. It has been 2 years since that day and this body has not substantively acted. If it happens tomorrow that we are hit hard, we have left this country in a terrible mess. We have got to do something substantive so that if it happens something is out there for the legislatures to act on, and we have failed thus far in that duty.

So I really want to underscore my gratitude for you taking the leadership on this, because once it happens that lots of us are killed, the very body that is supposed to solve these problems has itself been decapitated, and that is not a situation we want to leave this country in.

Mr. LINDER. Brian, in your proposal for having a Member assign the position to another living political figure, do you anticipate a time frame before they will have a special election?

Mr. BAIRD. Very legitimate question. My hope would be, Mr. Linder, that that would be expedited, that you would have a prompt election after that, and I would provide that upon appointment that person shall serve until such time as a special election can be held. So I think you would want to have a special election to replace that person.

Mr. SENSENBRENNER. If I may answer that the Commission on Continuity of Government recommended that the appointed replacement Members be able to run in a future special election to be held 120 days after a vacancy. That would mean that the appointed Member in many States would end up serving longer than a special election under existing law could be held. In Minnesota, for example, it is 33 days between the time a vacancy takes place and the time a special election is held. And what the Commission recommends is that for almost 3 months after a Minnesota election can be held under existing State law an appointed Member would be allowed to sit. I don't think that is right.

Mr. FROST. And I would ask all of you to think back not just to what happened on the day of September 11, but what happened in

the week following September 11. We passed significant pieces of legislation during the next 7 days dealing with a variety of subjects. And I think that is extremely important that there be a functioning Congress that can address the concerns of the public so the public will have confidence in the continuation of our government. And it wasn't just standing on the steps of the Capitol that was important, it was the fact that we came together on a bipartisan basis in the days immediately following September 11 and started addressing the problems that were the aftermath of that attack. And that is really why I got involved in this entire issue, and I do want to commend Mr. Baird for taking the lead, for being the first Member of Congress to speak out on this subject and attempt to deal with this.

We have an obligation to make sure that the House of Representatives can continue to function, and you can't just say, well, the Senate and the President can take care of that. We can't pass appropriations bills with only one House. Nothing that we do on a day-by-day basis can be done by only one House in the government, even assuming the Senate was reconstituted immediately by gubernatorial appointment.

So I underscore the immediacy of this, the significance of this, and urge all parties concerned to try and figure out a real solution. Thank you.

The CHAIRMAN. Chairman Sensenbrenner, I want to ask you a question. How do you deal with incapacitation?

Mr. SENSENBRENNER. We leave it up to the States to define incapacitation. So the legislation is silent. Many Members can sign durable powers of attorney pursuant to state law should they undergo surgery or lapse into a coma after the surgery. The durable power of attorney will allow the person to appoint an attorney, in fact to resign for the Member of the House of Representatives, and this happened in my State back in the 60's, when a State Senator ended up being incapacitated and the State law was changed to allow that.

The CHAIRMAN. Anybody have any thoughts how you deal with incapacitation?

Mr. FROST. It is an enormous problem because as some of us remember when Gladys Noon Spellman suffered a stroke she was incapacitated for some period of time, and in fact the House had to ultimately declare her seat vacant, and we had a special election when our colleague Steny Hoyer was elected. But it took an action of the House at that point because apparently there was nothing in place in Maryland law or even in any other provision of Federal law that permitted the incapacity to be determined other than by a vote of the House. It is a significant problem that needs to be addressed. I don't have an immediate answer for it.

Mr. BAIRD. The proposed amendment I have offered would empower the House to provide procedures by which incapacity would be determined. Another issue I have addressed in that proposed amendment is that if a person were to regain capacity they could resume their post if they regain their capacity prior to the special election being held, which I think is reasonable. If you are trying to get the House back up quickly and someone is severely incapacitated for a brief period of time, a burn unit, et cetera, when they

are able to return to the House, if a special election wasn't held they could come back, and I think that is desirable. I certainly would approve of it.

The CHAIRMAN. One last question I have. This naming of the successor in your proposal, is that mandated to be secret or can the Member tell?

Mr. BAIRD. It is a great question. My own belief is the proposal is moot on that. My own belief is it is desirable that it be secret both for security reasons, for political reasons. You don't want people currying favor. First of all, you don't want to say, if you will sign up on my ticket as my successor if I die, I don't think you want to do that. By nominating a list of several people, you reduce the possibility of gaming it. You provide for a security element, and I think you would want initially, frankly, to establish a very rigorous tradition that this is kept strictly confidential.

The CHAIRMAN. Then it is made public?

Mr. BAIRD. It would be made public at such time—what I would propose is we nominate successors and the governors choose from that list. So presumably you obviate party manipulation because we are probably going to pick people from our own party. My original proposal to the Governors, which I think the chairman is right to criticize that proposal, it was made in the few weeks following the attack and we didn't know frankly where Pakistan was going to come out on that side of the equation. They had nuclear weapons. What I thought we needed to do is get something out there so if we were hit hard there would be some recourse. On reflection, I think the Governors already have the chance to appoint Senators. Better to let us nominate our successors temporarily and follow that by special election.

The CHAIRMAN. You get a bunch of constant press questions of who is in that envelope every year.

Mr. BAIRD. There are powerful traditions in our country and I think you could certainly say for security reasons—we don't divulge, for example, the budget of the intelligence appropriations bill. There are a lot of things we can do with tradition and I think we would respect that.

Mr. SENSENBRENNER. May I make one further point, and that is the opponents of the bill that Mr. Dreier and Mrs. Miller and I have introduced seem to think that when a disaster happens we can wave a magic wand and all of a sudden there will be new Members of the House appear. All of us who were here on 9/11 will recall that the airspace was closed down. It was impossible to get out of town or get into town during the 4 or 5 days after 9/11. Many of the Members actually had to resort to driving rather than flying. I guess about the limit of where somebody can get to Washington quickly by road if public transportation and the airways are closed down and the highways are still opened up is about where I live in the Midwest, which is 15 hours away. And if we had to reconstitute a House with appointees during this period of time, I don't think anybody from the West would be able to get here.

Mr. BAIRD. This is a rather specious argument, to be perfectly frank. You are not going to get here. This place will be gone. This inability to comprehend the power of a nuclear weapon is problematic for us here. An analogy is to London and the Blitz. The sixth

sense that we are going to come back to this very building and meet are really not adequate to the threat we face. The simple fact is if you identify the people you also want—but you don't have to do this constitutionally. Frankly, constitutionally there are issues about whether or not you can convene in another place without permission of the other body. We need to address that. We have to have people to go there and where they go is of somewhat less importance.

The CHAIRMAN. That issue ties a little bit into Congressman Langevin's issue which we approved out of this committee last session, to explore that. There was a study, about half a million dollars, to explore voting by electronic means, assuming that for example the terrorists bomb 10 cities, which is projected they possibly could have if they had their way. You had mass confusion and, you know, traffic wouldn't move and you couldn't take an airplane or train and the building is wiped out, how do you vote, if you need to vote if you are in Europe, because all the talk was just about if something happened while we were here. We might be spread out over the world or the country during a recess and that has nothing to do with this bill. But it has to do with the subject of being able to vote.

Mr. Ehlers.

Mr. EHLERS. Thank you, Mr. Chairman. I just wanted to try to clarify something. Mr. Sensenbrenner, you talked about and I guess the Commission referred to a case where more than 100 Members have been killed or incapacitated. That obviously is a serious problem but it is not crucial to the future of the Nation. They could be replaced in due course with special elections under current law. Did you consider other gradations? You mentioned you picked 100 as somewhat arbitrary between 1 and 435. What Mr. Baird seems to be talking about is the case where the entire campus is gone, most of the Members have been killed and so forth, which is quite a different situation than losing 100 or 150 Members. Were there any gradations considered in the possibilities?

Mr. SENSENBRENNER. Well, the answer is that we have to pick a number between 1 and 435. With approximately a quarter or more Members of the House of Representatives gone, we figured that that would be a sufficient urgency to have the expedited special election process that is contained in this bill. But again the bottom line is that I think you get more legitimacy in having the House of Representatives constituted by election even though it is a wartime election at a time of devastation than it is to have an appointed President and appointed Senate and appointed House of Representatives. You know, believe me, the American people proved on 9/11 that they will come together, that if there was an even greater catastrophe they will come together even quicker to work to make sure that self-government, which has been the hallmark of this country since the American Revolution, will be preserved.

Mr. EHLERS. All right. I appreciate that. It seems to me that there is a major distinction here between 100 or if, for example, we were in the process of voting in the House and a nuclear weapon would hit we would lose on average about 425 to 430 members and in fact the entire House is totally disseminated at that point, and

I can understand the argument for rapid action if that happens. I don't think there is any problem with either the expedited special election or perhaps even normal special elections in the case where it is 100 or 150. But I understand you did not consider the total catastrophe case.

Mr. SENSENBRENNER. I believe the 100 number includes the total catastrophe case.

Mr. EHLERS. You would not make any differentiation then?

Mr. SENSENBRENNER. No. The thing, Mr. Ehlers, that I think is important, is that if a significant number of Members of the House are killed then it is important to fill those seats by election as quickly as possible.

Mr. EHLERS. I am not even sure we need the expedited elections until you get a sizable number, but thank you very much for clarifying that. I appreciate that.

The CHAIRMAN. Mr. Larson.

Mr. LARSON. Thank you. I just have one follow-up question. And clearly since I have been a Member of the United States Congress, there have been at least a couple of occasions where more than 100 people haven't been present when we voted. I want to get back to this issue of time and the crisis around time. And the reason I asked before about compromise is that when you sit and listen to the two proponents, both proponents of the bill who seek the sacred nature between the people and their elected officials in making sure that Congress hangs on to that cherished manner in which we select people, and then to the opponents who are concerned overall about protecting the cherished nature of the republic by making sure that it is constituted immediately in order to carry out these functions, the reason I asked if there is a compromise is because it seems to me—let us say, for example, if a constitutional amendment were proposed and adopted it would take 2 years for that to take effect, I believe, or approximately. By the same token, there is valid and legitimate concern that an election process, however expedited, may not be, as Mr. Sensenbrenner has pointed out, the most perfect instrument as well. In many respects, don't you need both? And inasmuch as the proponents of a constitutional amendment still adhere to elections where people would be—the Congress would be reconstituted but provide the time for it to take place in an orderly fashion. And yet arguably, given the state of affairs we are operating in today, that a calamity could strike any time and a constitutional amendment would not have been ratified by the number of States.

So my question still is, is there a compromise or, minimally, we are on the House Administration Committee because of our cognizance over elections, would the Judiciary Committee entertain discussions of this issue of a constitutional amendment?

Mr. SENSENBRENNER. Mr. Larson, the Judiciary Subcommittee on the Constitution has already had a hearing on the issue of a constitutional amendment. You know, whether or not there can be a compromise, this is going to be very difficult to compromise on because you are either for an elected House and maintaining the House of Representatives as the Peoples' House or you want to have appointed successors. And once you get to the issue of appointed successors, then you start arguing over how the successors

would be appointed. And the Continuity in Government Commission, you know, basically drafted their amendment in such a broad manner that this will end up being a question of debate in the Congress. And I would guess it would be a rather intense debate between whether there should be a gubernatorial appointment or whether there should be a deceased or incapacitated Member designation.

I can say that from my own experience in Wisconsin 40 years ago, that the whole business of Members designating their temporary successors in that case in the Wisconsin legislature unleashed a firestorm of public opposition, and as a result the matter was quickly dropped and never has returned. And with gubernatorial appointments, at least the four of us who are here that represent States where the Governor is of an opposition party, I don't want my Democratic Governor appointing a Democrat as a successor. I am sure Mr. Frost doesn't want his Republican Governor appointing a Republican as a successor. And in those States where Senate appointments were restricted to the same party, I remember when Senator Neuberger of Oregon, a Democrat, died in the 60's, Republican Governor Mark Hatfield appointed a Democrat in his upper 80's as the interim successor because he was required to appoint a Democrat, and having a man that was arguably in his dotage being one of the two United States Senators certainly did not serve the best interest of that State.

Mr. LARSON. Mr. Baird.

Mr. BAIRD. You raised a very good question about the issue of how long it would take for this to take effect. My understanding and part of why I emphasize again how important it is that we act as a body, once an amendment were to pass the House and Senate, it is then available to be ratified by the States. And while traditionally it has taken a long time to actually get amendments fully approved, I think in this circumstance you could fairly rapidly convene the legislatures. First of all, I think it is in the States' best interest to have a mechanism by which they have representation in the House of Representatives, so they have a self-incentive to do that if it is a sound proposal. If we were to pass the resolution, it is then available for ratification. And if we were to be wiped out next week, all the States could convene their legislatures and ratify and we could get a three-quarters ratification promptly and it could become law and you could conceivably within a week have nominees, assuming we were bright enough to create a list.

Mr. LARSON. Conceivably if Mr. Sensenbrenner's bill was in effect and concurrent with an ongoing constitutional amendment, though, wouldn't it be more plausible that immediately his bill would take effect while the constitutional amendment was therefore being ratified? Isn't his bill in some respects a fail-safe while you are waiting to have the States go through their proper ratification process just like we would want the appropriate time for an election to take place?

Mr. BAIRD. Let me reiterate, neither myself, Mr. Frost, the Continuity Commission has opposed the notion of having elections. We are in favor of that. We want them, however, to be genuine elections. And for the reason I articulated earlier in terms of where the threshold is, what happens if intervening variables extend your

time period? The best bet is to do something promptly. I see it the reverse. We already have mechanisms to elect people in special elections. What we do not have today is a mechanism to replace people in the time of catastrophic losses of Members. The more urgent matter is to put that mechanism before the body and give the American people an opportunity.

Mr. LARSON. I agree with you, Mr. Baird. But my point is this, and while that process is evolving as it has been—the scenario has been laid out before us, in the event something has happened, isn't it wise to have Mr. Sensenbrenner's proposal, an expedited process addressing the number of concerns that you have, given that the more immediate effect needs to be addressed as well, but that may take time for us to get to——

Mr. BAIRD. Providing we don't pat ourselves on the back and say we have solved the problem. Providing we don't send a message to the American people, stay in that second tower, everything is under control.

Mr. LARSON. I am saying concurrently.

Mr. FROST. And let me if I could, I would like to address one issue raised by Mr. Sensenbrenner. If we did not provide that the Governor has to appoint a Member of the same party as the person who was killed and we might for various reasons not so provide, I would rather my district be represented by a Republican than to go without representation for 2 or 3 months in a time of crisis.

Mr. LARSON. I found Mr. Sensenbrenner's point engaging, as well as has been all the conversation, and I mean that sincerely. I think this is a real legitimate problem that Congress has got to sink its teeth into. But I could envision as well where all three aspects took place. I would lean towards the legislative body. After all, we were a Continental Congress first appointed by our legislative bodies to assemble and then appointed by legislative bodies to form the Constitutional Convention. But there is a question that has to be raised and Mr. Frost raised earlier about a simultaneous hit on legislatures or the inability for the legislature to convene or different Houses that are unable to be constituted or come to grips. Say it happened to be in, we will say, Texas or California, but then if there was a specific time limit or trigger mechanism where the Governor would then come into play or providing for opportunities for that appointment during that process, you would have gone through a thoughtful process where you are considering all of these basic alternatives and not ruling out one or the other, but adhering to a process that in fact we adhered to at the very start of the formation of this Nation.

The CHAIRMAN. Another question on incapacitation, just to clarify, Chairman Sensenbrenner or anybody else who would like to comment, but in your bill does the State declare incapacitation? Is that what you said, the State declares incapacitation.

Mr. SENSENBRENNER. Mr. Chairman, my bill is silent on the question of incapacitation and State law is the governing law on incapacitation. And most States have amended their law to allow anybody to sign a durable power of attorney. A Member of Congress signing such a durable power of attorney would appoint the attorney; in fact, make decisions which would include a potential resignation.

The CHAIRMAN. A State would declare incapacitation. Who vacates the seat though? The State doesn't vacate the seat. Congress would have to vacate.

Mr. SENSENBRENNER. With a durable power of attorney, in fact, that was appointed by the Member, the State would have the power to resign the Member's seat and, you know, that would act as a vacancy.

The CHAIRMAN. It would have a bit of a strange twist in the sense that the House vacates House seats now.

Mr. SENSENBRENNER. In the Gladys Noon Spellman case, she had a stroke 2 days before the election and fell into a coma and was reelected. She was never sworn in at the beginning of that Congress, and the House passed a resolution declaring the seat vacant I believe 45 days after she failed to appear to take the oath of office. And that resolution was placed before the House after extensive consultations with both Representative Spellman's family as well as her physician.

The CHAIRMAN. And your bill, doesn't the Speaker also announce vacant seats?

Mr. SENSENBRENNER. The Speaker can announce a vacancy based upon incapacitation to count toward the 100.

The CHAIRMAN. Thank you.

Mr. LARSON. What happens if the Speaker has been struck?

Mr. SENSENBRENNER. If the Speaker has been struck, the committee that Mr. Frost and Mr. Dreier and Mr. Cox worked on amended the House rules. And House Rule I(8)(b)(3) says in the case of vacancy in the Office of Speaker, the next Member on the list that has been provided by the Speaker shall act as Speaker pro tempore until the election of a Speaker or a Speaker pro tempore. Pending such election, the Member acting as Speaker pro tempore may exercise such authority of the Office of Speaker as may be necessary and appropriate to that end, and that would include making the determination that 100 seats would be vacant.

Mr. LARSON. That is very logical and I applaud them. Does that take into consideration a quorum that would be assembled?

Mr. SENSENBRENNER. The quorum has already been defined as a majority of the Members duly sworn, seated and living.

Mr. FROST. That is the clear precedent and that is the dilemma that we face, because under the clear precedent a quorum could be a very, very small number. And my concern, as I have expressed earlier as well as others, would be the confidence or lack of confidence that the public would have in a House being convened with a very small number of people.

The CHAIRMAN. Any further questions? I surely want to thank the panel for your time.

Mr. LARSON. Excellent.

The CHAIRMAN. Worthwhile and fascinating panel. Thank you, and we will move on to the second panel. I want to thank the panel and thank you for your patience. I want to introduce the panel. Joining us is the Honorable Mary Kiffmeyer, the Secretary of State from Minnesota and the current President of National Association of Secretaries of State. We surely do appreciate your work, Secretaries of State Association, for the great work on the Help America Vote Act, by the way, as we have talked about it with the Con-

gresswoman from Michigan and also following that I want to thank Doug Lewis, the Executive Director of Election Center, a national nonprofit organization serving elections of voter registration, also helped work on Help America Vote Act. We got Donald Wolfensberger, the Director of the Congress Project at the Woodrow Wilson International Center for Scholars, and he is no stranger to the U.S. House. And also Mr. Thomas Mann, the W. Averell Harriman Chair and Senior Fellow in Governance Studies at the Brookings Institution and a senior counselor for the Continuity of Government Commission. And Dr. Norman Ornstein, Resident Scholar at the American Enterprise Institute and also senior counselor for the Continuity of Government Commission.

Congressman Dreier wanted me to ask the last two of you which one wanted to be played by Woody Allen and which one by Don Knotts.

We appreciate your time being here on an important subject, and we will begin with testimony from the Honorable Secretary of State Mary Kiffmeyer.

**STATEMENTS OF THE HON. MARY KIFFMEYER, THE SECRETARY OF STATE FOR MINNESOTA; DOUG LEWIS, EXECUTIVE DIRECTOR, ELECTION CENTER; DONALD WOLFENSBERGER, DIRECTOR, CONGRESS PROJECT, WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS; THOMAS MANN, W. AVERELL HARRIMAN CHAIR AND SENIOR FELLOW IN GOVERNANCE STUDIES, BROOKINGS INSTITUTION; AND NORMAN ORNSTEIN, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE**

**STATEMENT OF THE HON. MARY KIFFMEYER**

Ms. KIFFMEYER. Thank you very much, Mr. Chairman, Mr. Larson, and members of the committee. Thank you for allowing me the opportunity to provide insight for this hearing about how Congress would fill vacancies in the House of Representatives if a national disaster were to take place.

On the morning of Friday, October 25, 2002, the State of Minnesota and the Nation lost U.S. Senator Paul Wellstone to a plane crash. The State was in mourning but quickly had to look forward to the future of the Senate seat, the State and the country. Election Day was less than 2 weeks away. The day of Senator Wellstone's death was full of anxiety for Minnesotans, questions abounded. Would the election proceed, would there be a replacement for Senator Wellstone on the ballot? Would absentee voters who already cast their ballots be able to change their votes? National media descended on Minnesota seemingly to wait for our election system to fail. It did not.

Minnesota Attorney General Mike Hatch and I worked through the night and weekend to implement rarely used election provisions and to inform voters. In those 10 days preceding Election Day a replacement Democratic candidate was found, a supplemental ballot was produced specifically for the U.S. Senate race, replacement absentee ballots were made available and voters were informed of the special accommodations to expect at the polling

places. The important thing was that we had provisions to deal with this situation.

On Election Day, balloting went off as usual. Because our modern ballot scanning equipment could not be reprogrammed in time to process the supplemental U.S. Senate ballot, we relied on the old-fashioned but nevertheless functional method of counting ballots by hand. The delay in the election results caused by this was just a few hours. I think Minnesotans agreed that the speed in counting was not an issue; accuracy was. One national news show had called to reserve some time in my schedule to interview me at my office the day after the election, but only if there were problems. I was there but they didn't need to show up.

One of Senator Wellstone's political supporters wrote afterwards that our efforts ensured the people a just outcome.

There is no such thing as a perfect election, even in the best of circumstances. Certainly in 2002 we faced extraordinary challenges in Minnesota. We were concerned about voters understanding the process and we were concerned about absentee voters who had a very short time to receive and submit their ballots. Still, I think the election was conducted with the highest degree of professionalism possible under the less than perfect circumstances. The thousands of election judges across our State made it possible.

The four pillars of voter rights, accuracy, access, privacy and integrity, need to be strong and in balance in order for the election system to be as good as it can be. These pillars can be maintained even in a short time frame and I think we showed that in Minnesota in 2002.

In the end, Minnesota had the highest voter turnout in the Nation in 2002 and the highest in our own State in a nonpresidential year since 1954. Most importantly, we elected a new U.S. Senator and a representative of the people was in place to tend to our State's business in Washington.

Based on last year's experience, I am confident that in Minnesota we could conduct expedited special elections within the proposed 21-day period in the direct aftermath of a catastrophic terrorist attack on Congress. Minnesota's current special election procedure is very close to this proposed timetable, calling for a special election to take place within 28 days after the Governor orders it, and the order must come within 5 days after the vacancy occurs. Moreover, the proposed 21-day period is significantly longer than the period in which we conducted the 2002 U.S. Senate election in Minnesota.

To be sure, though, our experience in Minnesota does not exactly mirror the situation that would be created by a national disaster such as you are seeking to address here. We knew that an election was approaching, for example, so that poll workers had been enlisted to work on the date when the expedited U.S. Senate election was to take place. Voters already were expecting to go to the polls and were preparing to vote. The political parties already had their "get out the vote" operations in place and were engaged in the usual late campaign strategies.

Nevertheless, from our experience in Minnesota, I would suggest there are four basic practical issues to consider if you hold an election in a short time frame: Having laws in place to deal with these issues, informing the public, informing election officials, and in-

forming candidates and political parties. We were thankful in Minnesota we had laws to deal with the situation we faced last fall. Our laws clearly delineated what was to take place so that stakeholders could have confidence in all communications that flowed from the law and our implementation of it.

From the perspective of Minnesota's 2002 U.S. Senate election, we learned that it was most important to communicate to the public the aspects of the election that would not change. It also was important to assure voters that the election process would be orderly, methodical, and that the outcome would be fair and accurate. Election information was most pressing for people who had to vote by absentee ballot. A short election time frame is not user friendly for absentee voters, and Minnesota's law made it even less so.

We learned that with adequate information and ongoing communications provided to local election officials we could count on polling place staff to step up their efforts in a time of need. I am confident that our local election officials would overcome the challenge of any national crisis.

I would suggest that any specifications you make regarding an abbreviated election time frame should be communicated clearly to the political parties. In Minnesota, the Democratic Party's process for finding a replacement candidate on short notice was found to be rather inadequate for allowing as full a campaign as might have been desired by the voters. Whatever the machinations the parties might use, a primary or other process, to name candidates in an expedited election process, they should be made fully aware of their responsibility to make their party provisions compatible with the provisions you set forth here.

I would suggest that the Federal continuity law should be similar to Minnesota's law specifying who decides when the process begins, who initiates the process and when the 21-day timetable begins. I would also suggest that you address the absentee voter issue, providing guidance ahead of time so that whatever you decide everyone involved would know what to expect and know that they must operate within the parameters you set forth.

Again I want to underscore that election officials, political parties and stakeholders would benefit greatly from a process clearly delineated in the law and voters could be sure that their rights are meticulously upheld should it be necessary to implement it.

Elections are the cornerstone of our republic, and I believe that Americans' right to vote for their representation is of the utmost importance. Especially in a time of crisis, Americans should know that they can turn to the fundamental rights guaranteed in the U.S. Constitution for strength, justice and continuity.

Thank you again for this opportunity to address you today. I commend you for having the foresight to deal with this issue.

Mary Kiffmeyer

MINNESOTA SECRETARY OF STATE

September 24, 2003

**Testimony for U.S. House Hearings**
**On Disasters and Special Elections**
**Committee on House Administration**
**By**
**Minnesota Secretary of State Mary Kiffmeyer**

Members of Congress and Distinguished Guests:

Thank you for allowing me the opportunity to provide insight for this hearing about how Congress would fill vacancies in the House if a national disaster were to take place.

On the morning of Friday, October 25, 2002, the state of Minnesota and the nation lost U.S. Senator Paul Wellstone to a plane crash. The state was in mourning but quickly had to look forward to the future of the senate seat, the state, and the country. Election Day was less than two weeks away.

The day of Senator Wellstone's death was full of anxiety for Minnesotans. Questions abounded. Would the election proceed? Would there be a replacement for Senator Wellstone on the ballot? Would absentee voters who'd already cast their ballots be able to change their votes? National media descended on Minnesota, seemingly to wait for our election system to fail. It did not.

Minnesota Attorney General Mike Hatch and I worked through the night and weekend to implement rarely used election provisions and to inform voters.

In those ten days preceding Election Day, a replacement Democratic candidate was found, a supplemental ballot was produced specifically for the U.S. Senate race, replacement absentee ballots were made available, and voters were informed of the special accommodations to expect at the polling places.

The important thing was that we had provisions to deal with this situation.

On Election Day, balloting went off as usual. Because our modern ballot scanning equipment could not be reprogrammed in time to process the supplemental U.S. Senate ballot, we relied on the old-fashioned but nevertheless functional method of counting ballots by hand. The delay in the election results caused by this was just a few hours. I think Minnesotans agreed that the speed in counting was not an issue—accuracy was. One national morning news show had called to reserve some time on my schedule to interview me at my office the day after the election, but only if there were problems. I was there, but they didn't show up.

One of Senator Wellstone's political supporters wrote afterward that our efforts "insured the people a just outcome."

There is no such thing as a perfect election, even in the best of circumstances. Certainly in 2002 we faced extraordinary challenges in Minnesota. We were concerned about voters understanding the process, and we were concerned about absentee voters who had a very short time to receive and submit their ballots. Still, I think the election was conducted with the highest degree of professionalism possible under the less-than-perfect circumstances. The thousands of election judges across our state made it possible.

The four pillars of voter rights—access, accuracy, privacy, and integrity—need to be strong and in balance in order for the election system to be as good as it can be. These pillars can be maintained even in a short timeframe, and I think we showed that in Minnesota in 2002.

In the end, Minnesota had the highest voter turnout in the nation in 2002, and the highest in our own state in a non-presidential year since 1954. Most importantly, we elected a new U.S. Senator and a representative of the people was in place to tend to our state's business in Washington.

Based on last year's experience, I am confident that in Minnesota we could conduct expedited special elections within the proposed 21-day period in the direct aftermath of a catastrophic terrorist attack on Congress. Minnesota's current special election procedure is very close to this proposed timetable, calling for a special election to take place within 28 days after the governor orders it, and the order must come within five days after a vacancy occurs. Moreover, the proposed 21-day period is significantly longer than the period in which we conducted the 2002 U.S. Senate election in Minnesota.

To be sure, our experience in Minnesota does not exactly mirror the situation that would be created by a national disaster such as you are seeking to address here. We knew that an election was approaching, for example, so that poll workers already had been enlisted to work on the date when the expedited U.S. Senate election was to take place. Voters already were expecting to go to the polls and were preparing to vote. The political parties already had their get-out-the-vote operations in place and were engaged in their usual late-campaign strategies.

Nevertheless, from our experience in Minnesota, I would suggest that there are four basic practical issues to consider if you hold an election in a short timeframe:

a) Having laws in place to deal with these issues,
b) Informing the public,
c) Informing election officials, and
d) Informing candidates and political parties.

We were thankful that in Minnesota we had laws to deal with the situation we faced last fall. Our laws clearly delineated what was to take place so that stakeholders could have confidence in all communications that flowed from the law and our implementation of it.

From the perspective of Minnesota's 2002 U.S. Senate election, we learned that it was most important to communicate to the public the aspects of the election that would not change. It also was important to assure voters that the election process would be orderly and methodical and that the outcome would be fair and accurate. Election information was most pressing for people who had to vote by absentee ballot; a short election timeframe is not user-friendly for absentee voters, and Minnesota's law made it even less so.

We learned that with adequate information and ongoing communications provided to local election officials, we could count on polling place staff to step up their efforts in a time of need.

I am confident that our local election officials would overcome the challenge of any national crisis.

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I would suggest that the federal continuity law should be similar to Minnesota's law, specifying who decides when the process begins, who initiates the process, and when the 21-day timetable begins.

I also would suggest that you address the absentee voter issue, providing guidance ahead of time, so that whatever you decide, everyone involved will know what to expect and know that they must operate within the parameters you set forth.

Again, I want to underscore that election officials, political parties, and stakeholders would benefit greatly from a process clearly delineated in the law, and voters could be sure that their rights were meticulously upheld, should it be necessary to implement it.

Elections are the cornerstone of our republic, and I believe that Americans' right to vote for their representation is of the utmost importance. Especially in a time of crisis, Americans should know that they can turn to the foundational rights guaranteed in the U.S. Constitution for strength, justice, and continuity.

Thank you, again, for this opportunity to address you today. I commend you for having the foresight to deal with this issue.

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The CHAIRMAN. Thank you for your testimony.

Dr. Ornstein.

**STATEMENT OF NORMAN ORNSTEIN**

Mr. ORNSTEIN. Thank you very much, Mr. Chairman, and thanks to you and this committee for grappling with this issue earlier than almost anybody else, as you did with your early hearing on the questions of an E Congress and also relating to some of these other issues. In the first 2 years just about after September 11, we had, really, your hearing and one in the Judiciary Committee where it was made clear early on that that was it, there was going to be one hearing and then they would close the door on consideration of any of these other issues. Two years later this is one glaring area that we have not adequately addressed. This committee has done its part, and I am glad that you are doing more.

I would like to emphasize just a few things in my time and some of them related to the testimony that you had on the first panel and your questions as well, Mr. Chairman.

The first and most significant point is this: As Mr. Sensenbrenner himself stated flatly, his legislation does nothing to deal with the problem of incapacitation. He would rely on State laws involving making seats vacant.

Let me turn to a real life scenario here. You will recall, no doubt extremely well, when the House with many Members in a near panic got out of Washington when there was a fear that the anthrax attack that had hit the other side of the Capitol might be moving over here. What we know in this post-9/11 world is that the danger of widespread incapacitation may be greater than the danger of widespread death, although they are both there. But we are talking about incapacitation in this case that might involve large numbers of Members in burn units for 2 months, 3 months, 4 months, 6 months or, in the case of an anthrax attack, sarin gas attack or maybe a quarantine because of smallpox, Members being out of pocket for weeks or months at a time. Are we going to say to those people who are victims of a terrorist attack, you lose your seats, you can't come back, somebody else has been elected in your stead? That is not an adequate answer. And the glaring problem of this bill beyond the specifics of the mechanics that I will get to and my colleagues will get to in a minute is that this does nothing to address what might be the largest problem.

We can argue about what is under the Constitution a quorum of the Congress. I and many of my colleagues are skeptical of the notion given the plain language of the Constitution that a quorum is half the Members, that the parliamentary interpretation that it is half of those who are sworn and living is adequate or not. But if you have more than half the Members in intensive care units for a couple of months, you can't have a quorum even under that interpretation. So that must be dealt with, I believe. And the only way to deal with it is through a process of interim emergency appointments.

One other point, Mr. Sensenbrenner said that the Continuity of Government Commission had said that elections should be held in 120 days and, in effect, that if you had appointments and had elections before that time, the people who were elected wouldn't get to

serve until that point. That is a misreading of the Commission report. The Commission believed and we believe that a 21-day period, even a 2-month period, and this was true of the working group as well, as they look at this in detail, one-size-fits-all for the States is simply not practical. Not all States are like Minnesota. I applaud Secretary of State Kiffmeyer for what she did in Minnesota. Of course it is not as difficult if you have an election already scheduled 10 days or 3 weeks afterwards.

And we now have, by the way, a living example. We don't have to look any further than California to see what happens when you have an election that isn't called at a regularly scheduled time 2 months after candidates have been certified for the ballot with a long and laborious process of more than a month before that time, and you can't find an election official in California who won't tell you that they face a catastrophe on their hands. It is not enough time. There are ballot companies, and we only have a small number in the country to print limited ballot stock, have been working night and day just to get the ballots available. We have seen what happened with challenges in the courts. We should expedite elections, but our provisions in the Continuity of Government Commission would have appointments exist only until under expedited special elections somebody is elected to fill the post. And our provisions for incapacitation would leave it to the individual Member who is incapacitated to return the instant that that individual was ready to return. So the appointments could not be made in a capricious or political fashion and people couldn't be shut out of their own offices.

There are ways for us to deal with both of these issues. These are not mutually exclusive proposals. What Mr. Larson suggested is absolutely true. We should be able to compromise on these. We can set a threshold for emergency interim appointments at a very high level. And frankly I want to set it at a high level. Appointments to the House should not be routine things. And as Mr. Ehlers suggested, this is something that should occur only under the most devastating of circumstances. Under these conditions we should move to expedite elections as much as we possibly can. But it is utterly unrealistic to imagine that more States would be like Minnesota or that we should mandate for every State same day voter registration as Minnesota has, something that you grappled with when you considered voter or election reform or other provisions for all the other States, that under these conditions of emergency which might very well hit the States that any of these things could take place.

Moreover, to suggest that the Speaker will make this determination when we may not have a Speaker—and I believe, by the way, that Mr. Sensenbrenner has misread the House rule which says that a Speaker pro tempore shall exist for the purposes of electing a new Speaker and be given the powers for that purpose alone. That is the plain language of the rule. This is not a Speaker pro tempore who is in a line of succession appointed who then has the full powers of the Speaker to act in this fashion.

There are gaps in this legislation that are glaring and those that you need to address. Please move forward with expedited elections. Do it in a reasonable time frame. But if it precludes doing anything

about incapacitation or having no House for months at a time, then we are failing in our responsibilities to the American people.

Thank you.

[The statement of Mr. Ornstein follows:]

Testimony of

# Dr. Norman J. Ornstein

Resident Scholar

American Enterprise Institute

and

Senior Counselor

Continuity of Government Commission

Before a hearing of the

**Committee on House Administration**

on

Continuity of Congress:

Special Elections in Extraordinary Circumstances

on Wednesday, September 24, 2003

in Room 1310 Longworth House Office Building, at 2:00 PM

Chairman Ney, Ranking Member Larson, Members of the House Administration Committee, I applaud you for holding hearings to address an issue critical to the institution of Congress, namely how Congress could reconstitute itself after a catastrophic terrorist attack.

I am a resident scholar at the American Enterprise. With Tom Mann, I am also senior counselor to the Continuity of Government Commission, a bipartisan, private commission made of people who have served in the public trust at the highest levels of government. Our commission's report has received significant attention in Congress, so I will only briefly summarize our recommendation, and I will spend the majority of my time considering the Sensenbrenner bill, which the sponsors have introduced as an alternative to our commission's recommendation. But let me stress at the outset that my colleagues and I endorse strongly the idea of having expedited special elections in the event of a national catastrophe. I do not believe that the Sensenbrenner bill is workable, but I hope that the committee can work toward a bill that will create genuine, open and competitive campaigns and elections under horrific circumstances. But I hope just as fervently that the committee, and the Congress, reject the notion that any workable and reasonable special election plan is sufficient to deal with the gap in constitutional governance that will occur in the event of a catastrophic attack on Washington and Congress.

The problem we face is that a large-scale attack could cripple the ability of Congress to function. Speaking before members of this body today, I don't think that I can overstate the importance of having a Congress in a time of crisis. The alternative is to throw all of the founding fathers' ideas about checks and balances and separation of powers out the window. Put another way, a nation without a Congress is a nation under a form of martial law or trusting the president to do the right thing without any check. No doubt, the United States under such circumstances would have the most benign form of martial law, but it would be martial law nonetheless. Everyone here today believes that Congress should be reconstituted quickly.

The problem facing a Congress after an attack is twofold. First, the Constitution provides only one method for filling vacancies in the House of Representatives: a special election. And special elections over the past thirty years have taken on average four months to conduct. With potentially hundreds of vacancies, the House would not be able to meet its majority quorum laid out in the Constitution. Or alternatively, it might try to function with much less than a majority based on a more lenient interpretation of the quorum as per House precedents. Either alternative is odious: no Congress on the one hand, or a Congress acting with most of the country unrepresented on the other. Second, neither the House nor the Senate has any effective procedure to deal with incapacitated members. In an attack that severely injured many members, there would be no effective way to fill these effectively vacant seats until the member recovered, died or the term of office ended. In this case, no quorum could be reached even under lenient House or Senate precedents.

The answer that the Continuity of Government Commission proposed unanimously was a constitutional amendment that would give Congress the power after a catastrophic attack to remedy this problem by providing for emergency interim appointments that would fill vacancies until special elections could be held. These appointments could also be made to fill in for incapacitated members until they recover. This solution would allow Congress to begin to function nearly immediately after an attack and for special elections to go forward as expeditiously as possible to elect members to serve out the remainder of the term.

The sponsors of the Sensenbrenner bill recognize the problem of mass vacancies in the House (but not large scale incapacitation), but they propose an alternative solution. They believe that they can reconstitute the House after a few weeks with a federal mandate that states conduct special elections in what amounts to seven days after candidates for office become known to the public.

Our commission carefully considered this alternative and rejected it. The commission agrees with Chairman Sensenbrenner that Congress has the power to impose a federal mandate on the states that they hold special elections within a short period of time. However, we do not believe that elections on the proposed timeframe are possible, nor would they be true democratic elections.

**Elections Cannot be Held in 7 Days, 21 Days or Even 30 Days.** The commission does not believe that elections can be held in the short timeframe that the Sensenbrenner bill proposes. The bill requires parties to choose candidates for election within fourteen days and allows another seven days for a general election to take place. Even if there were just one special election occurring in the country under non-emergency conditions, twenty-one days from start to finish for an election is not sufficient. It would be hard to even print the ballots in the seven days allotted. There would be no way to mail out and receive absentee ballots in time. Military overseas voters would be disenfranchised. Unregistered voters would not have time to register. In addition, minor parties and independents might be left off the ballot. Finally, what sort of choice would voters have if two candidates, previously unknown to them, were thrust in front of them for a few days before voting?

**21 Day Elections Would Mandate Election Procedures that Many States Oppose.** Even a bill requiring elections within sixty days, never mind the twenty-one day directive the Sensenbrenner bill calls for, would require major changes in the way that states hold elections. To achieve their end of very expedited elections, the Sensenbrenner bill's sponsors would mandate that states forgo party primaries. There would be no time to do so. Party bosses would select the candidates. There are some states that choose not to have party primaries in holding special elections, but many states would view such a procedure as fundamentally undemocratic and inconsistent with the political culture in their states. Should the federal government mandate that states give up primary elections? Independent candidates, under this procedure, would be shut out and many states would have to rewrite their laws regarding ballot access for minor party candidates.

The Sensenbrenner bill would also require that all states adopt same day registration or disenfranchise new voters or those who had moved after the last election. There would be no time to allow new voters to register in advance and for states to enter newly registered voters on to voter rolls. Some states, like Minnesota have same day registration. Many do not, and they have consciously chosen not to adopt same day registration, often for fear of election fraud or confusion on election day. Should the federal government mandate that states adopt same day registration for special elections?

There are numerous other differences among the states that would also be overridden by a federal mandate: laws about how candidates and parties qualify for the ballot; requirements to mail out voter guides; campaign finance laws; laws requiring ballots for non-English speakers; civil rights laws, etc.

**An Untested Set of Election Rules for Catastrophe Will Lead to an Election Debacle.** The Sensenbrenner bill mandates a brand new set of election rules and regulations for disasters, procedures that will never be used unless a disaster occurs. Election administrators will tell you that the introduction of new voting procedures, machines and poll locations leads to significant increases in voter error and election problems. If you ask voters, poll workers, candidates and election administrators to participate in elections that are foreign to them, many mistakes will be made. Take for example, the issue of same day registration mentioned earlier. Would a state that had never used same day registration for voting be able to implement such a system after an emergency? Would it even have the computer systems necessary to do the job? On such short notice, would most voters be able to vote at their traditional polling place? Unlikely. Would voters vote on the same type of equipment as they were accustomed or would expedited elections and consolidated polling places place many voters in unfamiliar surroundings? The alternative to this chaotic situation might be to mandate that states have very expedited elections all the time, with a mandate that they have same day registration and no primaries as well, so that when the day came to have emergency elections, states were prepared. Either course is dangerous. Either we have a tremendous federal intrusion into the state administration of elections or we leave states woefully unprepared to comply with unrealistic deadlines and using unfamiliar election practices that will lead to significant errors.

**What if 7 Day Elections Just do not Work? The Unforeseen.** I believe that the Sensenbrenner bill has unrealistic deadlines for holding special elections. But even the proponents of such an approach have to recognize that unforeseen circumstances might significantly delay elections. What then? Congress would have no other way of getting back its membership. Imagine that our transportation system is compromised by an attack making the printing of ballots or transport of voting machines impossible for a time. Or imagine that there is a major power outage that would prevent the use of voting machines or statewide voter registration lists. What if the mail system was compromised, as it was during the anthrax attacks two years ago? How would absentee ballots be mailed out or sent in? The best laid plans of election administrators might be foiled by contingencies beyond their control. If there were interim emergency appointments, Congress could function until circumstances allowed the holding of elections.

**Temporary Appointments and Special Elections Go Together.** One particularly deceptive claim has been made about the commission's proposal for emergency interim appointments. Some claim that it would "ban" voting. Quite the opposite. Emergency appointments would allow real democratic elections to go forward immediately. Within hours after an attack, special elections could be commenced. But they would go forward under a reasonable timetable that might differ from state to state. The timetable should be able to be expedited somewhat from the contemporary average of four months. But each state, while moving as rapidly as it can consistent with its circumstances after a catastrophic attack, would in the meantime be represented in Congress by emergency appointees, who would be replaced immediately as soon as the results of special elections were certified.

I applaud the committee for taking up such an important subject. This committee is particularly well suited to deal with the issue before you today as it has jurisdiction over election matters. The members of this committee know from the thorough and deliberative process they went through to pass the Help America Vote Act that elections are not simple matters and that they involve a complex interplay of voters, poll workers, administrators and local, state and federal officials. Many of those same issues that you debated in election reform are relevant to a proposal for expedited elections. I urge you to continue your efforts to ensure that Congress can quickly reconstitute itself after a terrorist attack. A solution to this problem is one we hope we never will employ, but if we are faced with a catastrophic attack on Congress, we owe it to the rest of the nation that we have plans in place for Congress to function, not to sit idle at a time of national crisis.

The Chairman. Thank you for your testimony.
Mr. Lewis.

**STATEMENT OF DOUG LEWIS**

Mr. LEWIS. Congressman Ney, I think let me first start off by saying, one of the things that we learned as you and I and the others worked on election reform when we were doing this was that too often our testimonies, our feelings, our wants and desires in terms of election reform were all trapped by our own experiences. We tended to think very narrowly as to what happens in our State or in our locale and then say that that can translate somehow nationally. One of the things that I have learned very carefully in this job is that one size doesn't fit all most of the time. And when we work with these issues, the things that we are going to look at and talk about on your behalf and with others is the question can we do it in a very short time span, and the answer is yes. I mean, let us face it, humans are going to respond to a crisis. The question you have to go beyond is should you do it in a very short time span? You know, that is the real response here. And somewhere in here, you have got to figure out and I have no ax to grind on any of this, you pick whatever you want.

What you asked me here to tell you about was whether or not we can do it safely and securely under what we know to be American democracy, and the answer is probably not. If you are going to look at the tradition of the House not wanting to obviate its own tradition that someone always has to be elected here, then you also have to look at the tradition of American elections and what American elections are about. Well, the genius of American democracy is that we have full faith in the process. And if we destroy the key elements of the House, do you then have full faith in the election that results from it? And that is where you have to come back to and what you look at.

Our process is complex. It takes time. It is complicated. It sometimes is very inefficient, but it works and it works because people fundamentally believe in the way we do things. And so hopefully any conclusions that you come to, any answers that you come up with really look at maintaining the public's ability to have faith in the process.

In other words, do we suspend democratic processes in order to promote a great democracy? That seems to be an irony that is almost inconceivable to handle and to work with. We know we learned some lessons of 9/11 because New York had an election scheduled that day. New York had to stop their election. And in order to restart the election at a later time, they first had to know what resources are available to us. What things work? There are some answers that were given here even today in the testimony that make presumptions that may not be true. None of us probably thought much about the power grid going down until it went down. If it goes down nationwide, how do we have electronic voting? How do we do that? How do we vote by the Internet or any other means in order to make this work?

So there are things here that we have got to look at in terms of not making assumptions that we are going to have conditions the

way we have always had them. We have to look at how do we do the process.

Additionally, Congress has to look at not just what it changes in its own laws, it must say clearly that it is going to rewrite the laws of States in terms of special elections to replace these folks because you are going to have to set out very clear determinations on State rules about registration that all now are obviated by the Federal need. So you have to spell that out so judges will interpret it the same way you intended so we end up with elections that we are able to conduct. Certainly most of the Nation's elections administrators when it comes to—push comes to shove is a 45-day minimum. Whether or not certain—Secretary Kiffmeyer, she can do it in 33, I think Kentucky told us 35, but everybody else wants more time than that. Can we compress some of that time? Maybe.

The question again gets back into what are you defining as an election? You have to define that before you define the rest of these procedures. Once you know that, it seems to us that every day you can give us beyond 45 helps us have a more valid election that the public will buy into, live with, understand and have some appreciation for.

Certainly in the written testimony, which I am not going to go through all the written testimony, there has to be some process for candidate qualification. However that is determined, there has to be a process there that the voters will believe in and live with. There needs to be some new considerations for voter registration. Do we do same day registration or cut off registration? How are we going to do that? Why are we going to do that? And if you set it for this principle for doing special elections, understand that if you all say that can be done for emergency wartime powers, there is going to be a whole lot of folks saying why don't we do that nationally in all of our States and national election processes. Certainly you have to have time for absentee ballots or just decide we are not going to do absentee ballots. You have to have time to get those ballots out and time to get the ballots back and time to count those ballots, and the question is do we have that?

Certainly Congress needs to think about if it is going to do all this in a way that we can commandeer within the States other employees so we are not necessarily having to rely on volunteers to come to us to be poll workers; so we can commandeer State, city and county employees to assist us in the election process and overwrite all the labor laws that prevent us from doing that. And that is another consideration.

We thought about could we do elections through the U.S. Postal Service. That presumes A, there is a Postal Service to work with. And we asked the States of Washington and Oregon to tell us could they do an election in 21 days by mail so that the entire Nation may be able to do it by mail. They said no. In fact, they told us that they would need more time than we would in terms of in person elections, that they need roughly 54 days in order to make this go in terms of ordering the ballot paper and setting up the postal operations to make this work.

Finally, I think one of the things we need to do is to look also at what you are going to do with judges. You are going to have to have a setup so that every lawyer who decides to sue because his

or her candidate didn't get their way in this particular instance—and folks, we all think that is not going to happen but how many predicted that there were going to be 150 candidates in California for Governor? You are going to have people who want to be candidates and want to adjudicate whether or not they are legally entitled to be that candidate. And so you need to think that through.

I think one final note of caution is if we are looking at a national disaster, let us not create a second disaster by forcing an election that cannot happen within the time frame. Thank you.

[The statement of Mr. Lewis follows:]

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September 24, 2003

**Testimony for U.S. House Administration**
**On Continuity of Congress**
**By**
**R. Doug Lewis, Executive Director, CERA**

Congressmen and Distinguished Guests:

Thank you for providing an opportunity for the nation's elections administrators to have input into these hearings about how Congress would fill vacancies in the Congress should a national disaster occur.

It is sobering indeed to have to contemplate a situation that would require the use of any special provisions, whether natural disasters or human caused disasters. In a climate where, for some, it is acceptable to use violence rather than votes to achieve their goals, the planning is made necessary about how to react and replenish our democracy's representatives. This planning process can even have the positive attribute of covering all manners of disasters which would otherwise might not have received careful review and planning necessitated by either natural or human disasters.

To get directly to the matter at hand, we were asked for input on whether national elections to replace Congressional Representatives could be held within 21 days and what impact such a 21-day requirement would have on the democratic process.

First let me tell you that elections administrators don't want to complicate the process in any time of national emergency. We get the message that this would be a "dire emergency" and that unusual occurrences or events would create the need for immediate response.

To respond, however, in a manner that gives you policy-makers a full range of things to consider before passing any legislation related to reacting to national disasters and/or provide for methods of Congressional successors to be put in place as quickly as possible, it is incumbent upon us to raise issues that can be too easily glossed over.

The underlying assumption for ordering a quick election would be to assure that the nation's business is attended to and that it is done with the people's elected representatives.

But that presents the first question: What is an election? Is it a date-certain event so that voters can vote, or is it more than that? Is an election in American democracy really a "process" that includes time for the identification of candidates, the ability of the candidates to mount a

campaign, to raise funds, to attract supporters, to inform the voters of what their choices are between the individual contestants, and then going to the polls to make that choice?

The point is this: if it is only an event, then we can structure an event in a short time-frame and carry off the event as flawlessly as possible. If, however, you define it in the broader "process" terms, then you have to allow the process time to work.

It has been mentioned that many who are looking at this issue do not want to break with the tradition of having House members being elected rather than being appointed -- even for a short duration. We have no quarrel with that viewpoint.

At the same time, it seems to us that the tradition of our form of democracy must weigh in equally – and our tradition allows us the time to know our candidates, the issues, the choices and the selection by voters of their choices.

> The genius of American democracy is that it creates fundamental faith in voters that it is fair, free, and has great integrity and engenders voter confidence. But sometimes it is terribly inefficient and cumbersome and time consuming and maddeningly frustrating in its complexities, and yet it works. In order to accomplish an election within 21-days means that we would have to suspend many state laws and procedures just to accomplish the task and suspend many of the voter protections that are contained in the current system.

Before we can have a "general or special election" there has to be some thinking allotted to our primary election process. Do we just abrogate the primary selection and jump to the general or special election? Do we allow political parties to get together to choose nominees and eliminate the process that most states use in allowing the primary voters of those parties to select candidates? What about the opportunities for independent candidates and minor party candidates? Or do we do like California did recently and just have a minimum number of low threshold requirements and allow all who can meet the low threshold apply for a ballot position? Are we prepared for 50 or 100 candidates or more for each of these openings?

Additionally, what does Congress set as a threshold for what constitutes a "national emergency"? Is it the loss of 25 members? 50 members? 100 members? A quorum?

Lessons that we learned in New York when 9/11 happened (because an election was also set in NY for that day) is that you need a few days just to access what kind of disaster happened to you and what resources are even available to you. Is transportation available, can the usual delivery trucks run, can traffic flow, are offices available, is electricity available, is mail service working, etc.

We don't have a preconceived notion here about what are the right policy answers, only an administrative viewpoint that you need to consider these questions before deciding the general election question. And the states, which have traditionally set the processes and qualifications for these choices, have a variety of answers and solutions here. Presumably, the Congress is going to say that a national emergency needs to take precedence and that national interests are

superior to states' interests…and that may even be the correct viewpoint, but deciding that issue alone is not without its impact on "tradition". Federal law here will definitely have to vacate all of the state laws concerning these practices in order to stay on the Federal timetable. And the states and locales will have to create new policies and procedures that will apply to this election only.

Currently, under "special election" situations, we allow for a period of time for the primary process to work but in a limited fashion. The difference in the situation here is that we are filling usually one or two Representative slots at any given time and that the election, while important, does not have the same sense of importance that a *national election* to fill numerous vacancies would presumably have in a case of national emergency.

We polled selected election officials from around the country to get a representative sample of what elections administrators would want to conduct an election with integrity, with fairness to the voters and the candidates, and which would result in serving the interests of democracy – all within a heightened environment of a national emergency.

> While the responses indicated a variety of dates ranging from the shortest time period of 35 days (after determination of who the candidates will be) to a period of four months, it appears that elections administrators feel that they can conduct an election with as few as 45 days. However, the election officials would be far more confident that the interests of democracy would be best served by having up to 60 days to get the elections organized and held. Each additional day beyond the 45-day minimum time frame creates greater confidence in the process.

Why do we need that much time especially in face of a national emergency? There has to be some process for the filing and qualification of candidates and most of our folks believe that bare *minimums* of 7 days is the shortest period and the largest number believe 10 days is necessary. There then has to be a period of ballot preparation, either printing paper ballots or programming electronic voting devices. In today's technology world those are both specialized functions and cannot be purchased or produced at every local printer or with local technology specialists in the vast majority of cases. In the most extreme instance of total cooperation with nothing going wrong anywhere, we can accomplish most of this within seven to 10 days.

Voter registration needs new considerations. What is the period to be allowed for registration cutoff in this kind of election, and when do elections offices need to have the voter registration cards to voters in a shortened time frame?

You can now begin preparation of Absentee Ballots for the disabled, permanent absentee voters (depending on state laws), and military and overseas voters. We need "transit" time for those voters to be mailed a ballot, delivery of the ballot to them, a reasonable amount of time to complete the ballot, and then to return the ballot to us. Some of these we can receive and count even after Election Day, so we can pick up some days within the election countdown of 45 to 60 days, but not all of that time.

> *Actually condensing the time here is probably the wrong way to do this; if we had more time on the front end of the process to allow us to get those ballots to the voters we could then require all of them to be in by Election Day so that the results are known shortly after Election Day.*

Somewhere in here has to be time for voters to find out who is officially on the ballot and to discover information about them. Do we just trust that the news media can do this job for us? What if the entire nation's electricity is crippled or even significant portions of it? Will the law allow some flexibility for instances of when best laid plans hadn't anticipated the kind of disasters confronting us?

Next, if using electronic or optical scan voting devices, we have to prepare that equipment and make it ready and test it before we press it into service. In a "special" election situation we can accomplish this because we generally know the limited turnout that will show for a "special" election, which is generally significantly less that we get in a general election. But in this instance, the presumption is that we have to anticipate that this is a larger general election and that means preparing significantly higher numbers of voting devices for use than in special elections.

We can normally staff a special election quickly with office staff and key volunteers and key election week workers because it is a manageable size; in this instance we are talking about being overwhelmed with an election the size of a normal general election but now with only a limited number of days to do what it takes us months to do in preparation for a general election.

> Perhaps Congress can give election officials the ability to commandeer the services of county and city employees to serve as poll workers and election workers during a national emergency and waive any labor laws contradicting such uses.

While there may be only a handful of candidates on the ballot (one race in most jurisdictions in America) but within our urban centers there will be multiple Congressional candidates races. And the preparation is the same regardless of how many offices are on the ballots. We still have to find the appropriate number of polling sites (many of which will NOT be available to us in this kind of election), staff it with poll workers, machines, ballots, and information – all of which takes months normally. The simple act of ordering ballot paper involves ordering months in advance for jurisdictions and is purchased in some by the boxcar load. Notifying voters of their polling sites all by itself can take a considerable amount of time especially if it is different for this election than normal elections (because the same facilities may not be available to us.

Election official and precinct worker training has to come somewhere in this process and it can only come after time to recruit enough people to serve (and enough reserves when the traditional 10 percent and higher do not show up). Why additional training? Because a 21-day schedule election would have to overrule so many procedures and processes that we use in a normal election, that we would have to retrain all to the "emergency elections" procedures.

One item to consider is that it may be necessary to do such an election by U. S. Mail rather than through polling sites, although most American jurisdictions don't have enough experience with

massive vote by mail programs such as Oregon and Washington have. It would, however, allow us to eliminate the time spent on polling place sites (and making sure they are accessible) and poll workers. Of course this assumes that the U.S. Postal Service is functional during such a national emergency. But in checking with the election officials in Oregon (an all mail ballot state) and Washington State (where 54% of the voters vote by mail), they tell us they would need a minimum of 54 days in order to conduct an emergency election by mail.

Now, rather than saying that all of that negates the ability to run an election under emergency circumstances, we want you to know that a Can-Do attitude means that we can and will overcome most of these limitations.

> But to offer an overly ambitious 21-day time period is very likely to court an election disaster on top of a national disaster. Can we do an election in 21 days? Yes, but it would not be what America has grown to know and understand as an election. It would suspend the rights of many, many voters in order to do so.

Our best answer and best advice is to give us a minimum of 45 days and every day you can grant that gets us closer to 60 days increases the likelihood that the election will mean more to the candidates and the voters. It will allow us to build in the kinds of quality assurance, integrity, and voter confidence processes that have been the hallmark of elections in America.

> It is our understanding that one of the House bills indicates that if such an emergency occurs 51 days in advance of a regularly scheduled election, then we wait until the regularly scheduled election. If so, then shouldn't that be the minimum number of days before any election is scheduled?

None of this anticipates what courts will do within this environment. But as policy makers, you may have to consider what kind of legal challenges will be recognized in a time of national emergency and what latitude judges will have in delaying or ordering additional candidates on ballots, or the many other examples we can give you as to how courts can obviate the best intentions of elections planners.

We have skipped any cost considerations in the hopes that a true national emergency means that costs at each level are ignored, but this may or may not be a valid assumption.

One last note of caution: When Election Day is over, there will still not be any seated members of Congress. It takes a period of days after the election to do the "vote canvass," whereby we roll in the absentee votes and those coming in from military and overseas voters. We will still have to qualify all of the provisional ballots that are cast in such an election. In most states we can accomplish that effort in 5 to 10 days, but in some even 15 days is going to be an extreme limitation due the high numbers they have to resolve.

> California, for instance, needs and uses all 28 days allowed to qualify provisional voting. That is not 28 days where Congress can wave a "magic wand" and say to California "you don't need all that time." If it takes that much time, do we just not count those votes? You need to take into consideration that whatever number

> you set for the election process leading to Election Day, that we still will have some back-end processes that are necessary and vital to a valid election. And one of the large considerations is the question: do you eliminate provisional voting in such an emergency? Or eliminate all absentee votes that cannot or do not arrive prior to Election Day? Can we just suspend the voting rights of the disabled, the absentee, the military, the overseas and the provisional voters?

There are probably easier solutions than elections but any process which looks at appointing or selecting replacements also needs to consider the public's willingness to accept the succession plan. As long as other governmental bodies are involved in the succession plan and elected governmental representatives are providing successors, then perhaps it will be accepted. But if there is a choice of appointment rather than general public election, it may be wise to consider letting state legislators elect members from their chambers to replace lost officials so that experienced legislators can serve in the interim and will not lose time learning the legislative process while trying to react to the national emergency.

Elections administrators in America are used to doing the impossible and doing so on less money and resources than they should. They will perform well in any national emergency. All we ask is that you not structure it in such a way to place the process in an overly risky, overly ambitious timetable which courts an additional disaster. Remember clearly that for the public to have faith in the government, they first have to have faith in the process that elected the government.

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The Election Center is a national non-partisan, nonprofit organization that represents (since 1985) the nation's voter registration and elections officials and administrators at the city, township, county and state levels. Our members voluntarily join from both the local and state levels, and it is the largest elections organization in America. We specialize in voter registration and elections administration issues and we are the only organization in the U.S. to specialize exclusively in these issues. The Election Center is principally a training and resource organization to assist elections professionals in making democracy work better for America's voters. In addition, to extensive training seminars, the Election Center partners with Auburn University to certify America's elections administrators in an academically oriented program of courses to improve professional competence which can lead to this nation's highest designation for the elections profession, the designation of Certified Elections Registration Administrator (CERA).

Additionally, the Election Center serves as the administrative management body for the National Association of State Election Directors (NASED) in running its Voting Systems Qualification program, where voting systems in America are tested to the Federal Voting Systems Standards to assure qualified hardware and software is used in American elections.

The Election Center has long been a resource for both the Congress and for Federal government agencies including the Senate Rules Committee, the House Administration Committee, the Federal Election Commission and its Office of Election Administration; the U. S. Justice Department; the Federal Voting Assistance Program; the General Accounting Office; and U.S. Health and Human Services, as well as scores of state government agencies and legislative bodies. The Center has also been a consultant to international governments for elections and has done training of international elections administrators.

The CHAIRMAN. Thank you very much. Next we will hear from Thomas Mann.

**STATEMENT OF THOMAS MANN**

Mr. MANN. Thank you very much, Mr. Chairman and Ranking Member Larson. As someone who has worked with the Commission on the Continuity of Government over the last year, I recognize fully the complexity of the problem but also the seriousness of it, and I have to tell you I have just been very disappointed that 2 years have passed without a substantial response of what is a glaring hole in our Constitution. I interpreted from the first panel that expedited hearings before the House Judiciary Committee are not very likely.

Mr. Chairman, I ask that my prepared statement as well as the report of the Commission on the Continuity of Government be made a part of the record of this hearing.

Mr. CHAIRMAN. Without objection.

[The information follows:]

**Statement of Thomas E. Mann**

**W. Averell Harriman Chair and Senior Fellow**
**The Brookings Institution**[1]

**and**

**Senior Counselor**
**Continuity of Government Commission**

**Before the Committee on House Administration**
**U.S. House of Representatives**

**on**

**"The Continuity of Congress: Special Elections in Extraordinary Circumstances"**

**2:00 p.m., Wednesday, September 24, 2003**

**1310 Longworth House Office Building**

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[1] The views expressed in this statement are those of Dr. Mann and should not be ascribed to the trustees, officers, or staff members of The Brookings Institution.

Mr. Chairman and members of the Committee: Thank you for inviting me to testify on the subject of the continuity of Congress in the aftermath of a catastrophic attack and specifically on H.R. 2844, legislation that requires states to hold special elections to fill vacancies in the House of Representatives during times of crisis.

I testify today as a student of Congress and the American constitutional system for more than three decades. More specifically and immediately, however, I draw on my work as a senior counselor, along with Norman Ornstein, to the Commission on the Continuity of Government. Administered by the American Enterprise Institute and the Brookings Institution, this bipartisan commission is co-chaired by former Senator Alan Simpson and Lloyd Cutler, White House Counsel to Presidents Carter and Clinton. Its members include former House Speakers Thomas Foley and Newt Gingrich, former House Minority Leader Robert Michel, and former House members Lynn Martin, Kweisi Mfume and Leon Panetta. Other commissioners have served in high positions in the executive and judicial branches of government: Phillip Bobbitt, Kenneth Duberstein, Charles Fried, Jamie Gorelick, Nicholas Katzenbach, Robert Katzmann (serving on the commission to consider the judiciary only), and Donna Shalala.

After months of research, hearings, and deliberation, our commission unanimously approved its first report, *The Congress: Preserving Our Institutions*. I believe your committee has received copies of this report but I would be pleased to have it appended to my testimony so that it is an official part of the record of this hearing. I hope you find the report useful in considering H.R. 2844. The commission's findings on problems associated with assuring the continuity of Congress in the event a large number of representatives and senators are killed or incapacitated, and the possibility of dealing with those problems through expedited special elections, are directly relevant to the legislation before you.

I have four points to make to you today. First, the problem of the continuity of government (and of the Congress in particular) in the aftermath of a catastrophic attack is real and deadly serious. Unfortunately, Congress has been tardy in dealing with it during the two years since the horrible terrorist events of September 11, 2001. Second, H.R. 2844 mandates a procedure for special elections that would sacrifice democratic substance for democratic form. Third, even if the expedited special elections worked as proposed in H.R. 2844, they would not address the most serious continuity problems associated with the death or incapacitation of a large number of members of Congress. Fourth, expedited special elections are not an alternative to emergency temporary appointments; if structured properly, they are a useful complement to such appointments.

1. **In an era of terrorism and weapons of mass destruction, the continuity of American constitutional government in the wake of a catastrophic attack cannot presently be assured. Congress has an institutional responsibility to act credibly and expeditiously to remedy this shortcoming in our political system.**

The terrorist attacks of September 11, and the likelihood that the fourth hijacked plane that crashed in Pennsylvania was bound for the Capitol, have forced us to contemplate the possibility

that many or most U.S. elected officials could be killed or severely injured without warning. Scenarios involving the detonation of a suitcase nuclear device on Pennsylvania Avenue during Inaugural Day festivities reinforce that chilling possibility. Death or incapacitation could cripple the White House, Congress, and the Supreme Court. The problem is especially acute for the Congress. The Constitution, by requiring that House vacancies be filled by special election, effectively prevents the swift replacement of members of the House killed in such attacks. In contrast, the Seventeenth Amendment provides a basis for temporary appointments to fill vacancies in the Senate until special elections are held. Moreover, neither the House nor the Senate could easily replace living members incapacitated by a biological or chemical attack until the next general election.

The inability to swiftly reconstitute the House and Senate would deprive the country of a fully functioning first branch of government at a time of grave national crisis. Unable to achieve a quorum, or relying on a questionable quorum interpretation allowing a small minority (possibly a handful) of surviving members to act for the full chamber, Congress would be unable to legitimately elect a new Speaker or confirm a new vice president (both critical links in presidential succession), declare war, appropriate funds, pass legislation needed to deal with the attack, confirm Supreme Court and Cabinet appointments, oversee an executive branch possibly run by someone largely unknown to the country, and reassure a stunned nation that their constitutional democracy is alive and well.

None of the steps taken by Congress since September 11 to cope with the disruptions to regular order following a successful terrorist attack have dealt with the critical problem of mass vacancies. While some members of Congress have faced the issue squarely, more have avoided or denied the need to engage it. This glaring gap in our constitutional system is an invitation to terrorists. It is past time for Congress to act.

**2. H.R. 2844 mandates a procedure for special elections in extraordinary circumstances that would sacrifice democratic substance for democratic form.**

Members of the House of Representatives are understandably proud of their reputation as the "People's House," based at least in part on the fact that every person who has served as a member of the House was elected to that office by the people of his or her district. This is a sound principle of republican government and ought to remain a cornerstone of representation in the House. The issue before the Congress is how best to maintain that principle while at the same time acting responsibly to provide for the continuity of Congress in the face of a terrorist attack producing mass vacancies and severe injuries. My view is that the sponsors of H.R. 2844 have made the wrong choice in balancing these interests. They have constructed a 21-day timetable for special elections that would put an enormous strain on voters, candidates, and election administrators, a strain so severe that it is likely to drain this remedy of any democratic legitimacy.

Last week the Senate received the testimony of election administrators from around the country documenting the steps entailed in running special elections and the time needed to accomplish them. This committee, which played a central role in the enactment of the Help America Vote Act, should be especially sensitive to practical issues of election administration. You know the

challenges associated with securing poll sites, recruiting and training poll workers, generating accurate voter registration lists for each precinct, designing comprehensible ballots, printing those ballots, sending out absentee ballots, providing for provisional voting, programming voting and vote-counting machinery, securing the services of a limited number of vendors, informing the public about polling locations and ballot content, managing the vote count, canvassing and certifying the results, and dealing with any legal challenges along the way. The difficulty of this set of formidable tasks is multiplied when there is no regularly scheduled election and everything must be done in scores or hundreds of districts within a three-week window immediately following a national crisis. Administrative and judicial experience with the current recall election in California underscores these challenges, and California is a single state operating with a 60 to 80 day timetable, not 21 days. In sum, the federal mandate on state and local election administrators provided for in H.R. 2844 is burdensome, expensive, unrealistic, and very likely to fail in its implementation.

Expedited special elections face an even more serious problem in the burden they place on voters and candidates. Genuine democratic elections require reasonable opportunities for potential candidates to seek their party's nomination, for candidates to develop and disseminate their campaign platforms, and for voters to receive enough information about the competing candidates to make an informed choice. The 21-day timetable, which includes a bare 7 days guaranteed for the "general" election, makes it virtually impossible to satisfy these requirements.

Members of this body should not delude themselves into thinking that any form of election is preferable to emergency temporary appointments in the wake of a national catastrophe. After all, North Korea has elections. So too did Saddam Hussein's Iraq and the Soviet Union. Only democratically legitimate elections merit our approval.

The House already has a problem with very limited competition and choice in the overwhelming majority of its districts. It would be a shame to exacerbate this pattern by creating a remedy to the continuity challenge that compounds it.

Congress should not accept a solution to the continuity problem that sacrifices democratic substance and administrative feasibility for democratic form.

**3. Even if the expedited special elections worked as proposed in H.R. 2844, they would not address the most serious continuity problems associated with the death or incapacitation of a large number of members of Congress.**

Let us assume for the moment that special elections to fill mass vacancies in the House can be conducted in the 21-day period provided for in H.R. 2844. Would this resolve the problems of the continuity of Congress following a catastrophic attack? Clearly not.

Under the scenarios outlined above, Congress would be unable to function during the critical three weeks after an attack resulting in mass vacancies. In reality, that three weeks would almost certainly extend to four weeks or more to allow for the official canvassing and certification of results in each special election. Yet this is precisely the time when critical decisions would have to be made, as they were following September 11. Allowing a president or acting president to

act alone or relying on some form of martial law during this interim period, without the constraints and supports of our constitutional checks and balances, is a far cry from American democracy as we know and revere it. Add to that the further mischief that could be caused by a rump group of surviving House members electing a new Speaker who then claims the presidency for the remainder of the term.

Then there is the very real problem of mass incapacitation. Having already experienced a serious anthrax attack, members of Congress can easily imagine a situation in which a more aggressive biological or chemical strike on Capitol Hill disables many of their colleagues. Their seats would not be vacant, meaning neither expedited special elections in the House nor the existing temporary appointment power for the Senate would be responsive to this situation. In the case of temporary incapacitation in both chambers, members should have the right to reclaim their seats as they return to health. At the same time, both House and Senate need a relatively full complement of members to act expeditiously and legitimately in the days and weeks following a catastrophic attack. No such remedy now exists for either body. Expedited special elections are irrelevant to this problem, just as they fail to adequately address mass vacancies.

**4. Expedited special elections should properly be viewed not as an alternative to temporary special appointments but as a useful complement to such appointments.**

As I indicated above, the challenge facing the House is how best to maintain the principle of democratically-elected representatives while at the same time acting responsibly to provide for the continuity of Congress in the face of a terrorist attack producing mass vacancies and severe injuries. For the reasons spelled out in this testimony, I believe H.R. 2844 does not meet this challenge. In my view, Congress needs to pass a constitutional amendment allowing emergency temporary appointments in the face of mass vacancies and incapacitation. The possible forms of that amendment and the content of implementing legislation are discussed in detail in our commission report. Here I stress **emergency temporary appointments.** What we recommend is an interim measure to allow the Congress to function until regular members can be chosen through special elections or temporarily incapacitated members reclaim their seats. Anything that can be done to improve the special election process would be desirable. But uniformly reducing the time in which such elections are held is only one consideration. Members of this committee should pay equal attention to questions of how the special elections would be administered by state and local officials and whether voters and potential candidates would have adequate time and resources to fulfill their democratic responsibilities.

Mr. MANN. I have made four brief points. Let me say that I, not surprisingly, associate myself with the comments that Norm Ornstein and Doug Lewis have made before me.

Simply four points. Number one, in an era of terrorism and weapons of mass destruction, not an era of Blitzkrieg bombing in London, the continuity of American constitutional government cannot be assured. Congress has an institutional responsibility to act and to act credibly and expeditiously to remedy this problem.

Number two, H.R. 2844, mandates a procedure for special elections in extraordinary circumstances that would, in my view, sacrifice democratic substance for democratic form. Listen, I take seriously the statements that this is the people's House and that every person who served as a Member has been elected. That is a sound principle of republican government that ought to be a cornerstone of representation in the House.

That is not the issue here. The issue is how best to maintain that principle while at the same time acting responsibly to provide for the continuity of Congress in the wake of a catastrophic attack, leaving mass vacancies and severe injuries.

My view is that H.R. 2844 has made the wrong choice in balancing these interests. They have constructed a 21-day timetable for special elections that would put an enormous strain on voters, candidates, and election administrators, in my view a strain so severe that it is likely to drain this remedy of any democratic legitimacy.

Your committee, having worked through the Help America Vote Act, is especially sensitive to the practical problems of election administration. I won't review those here. Doug has discussed some of them.

What I would say is that the Federal mandate on State and local election administrators provided for in H.R. 2844 is burdensome, expensive, unrealistic, and very likely to fail in its implementation. But, ironically, the provisions of the bill place an even more serious burden on the voters than they place on voters and candidates.

Genuine democratic elections require reasonable opportunities for potential candidates to seek their party's nomination, to develop and disseminate their platforms, and for voters to receive enough information about the competing candidates to make an informed choice. My view is that the 21-day timetable, which leaves a bare 7 days for the general election, makes it verily impossible to satisfy those requirements.

Mr. Chairman and Mr. Lawson, members of this body should not delude themselves into thinking that any form of election is preferable to temporary emergency appointments in the wake of a national catastrophe. Countries all over the world have elections. North Korea, Saddam Hussein's Iraq, the old Soviet Union. And many others have elections where they even have competing candidates. But the elections are structured in a way in which it is impossible to have any real democratic substance. We are a constitutional democracy. We have requirements about elections and their aftermath that could not be fully taken into account with this provision for expedited special elections.

Point number three, let's assume it all worked. Let's say this bill got every one, all of those vacancies replaced in 21 days. Ironically,

even if it worked they would not address the most serious continuity problems associated with death or incapacitation of a large number of Members, because, first of all, as several people have said, including Mr. Baird and Mr. Frost, the critical functions of Congress in the weeks following that catastrophe could not be fulfilled, because there would be no functioning House of Representatives.

To reconstitute the body in a month or 6 weeks doesn't address that. And, secondly, as Norm discussed, it doesn't deal at all with the problem of incapacitation. He said it well. I won't repeat it.

Let me conclude with this point. Mr. Larson said, is there a compromise? The answer is yes, there is a compromise. But to have a compromise, it has to have two parts. One, there has to be a constitutional provision that provides for emergency temporary appointments, emergency temporary appointments that can be combined with an effort to improve the special elections process. That doesn't just mean speeding it up to 21 days. I think to the contrary, your committee having so much expertise on elections and the administration of elections will find that the one size fits all may not be the best way to go here.

The process of improving that special elections process has begun with the working group. You can contribute to that. But I beg of you, do not come forward, report out a bill that is a revision of the one submitted by Chairmen Sensenbrenner and Dreier alone, without having assurance that a constitutional amendment is moving along, because what that will effectively do is take any life out of a genuine solution to a very serious problem facing the country.

Thank you.

The CHAIRMAN. Thank you.

Mr. Wolfensberger.

**STATEMENT OF DONALD WOLFENSBERGER**

Mr. WOLFENSBERGER. Thank you, Mr. Chairman, members of the committee. I ask that my prepared statement and the appended materials be included in the record in full. I will summarize my statement.

I am grateful for this opportunity today to testify on H.R. 2844, the Continuity of Representation Act of 2003. I strongly support the rationale behind this bill, which is to provide for expedited special elections to fill House vacancies in extraordinary circumstances as an alternative to a constitutional amendment that allows for the appointment of temporary Representatives.

In my considered opinion, such a constitutional amendment would be a dangerous corrosion of the very cornerstone of our governmental edifice, and that is its dependence on popularly elected representatives. If you take that away, even for a brief period, you will seriously undermine the legitimacy and moral foundation of our representative democracy.

You do not have to be a constitutional scholar or a political scientist to understand just how central the nature of this institution is to the strength, endurance and resiliency of our constitutional framework. You are the first House of the first branch of our Federal Government. The framers did not put you at that point in our founding document by accident. You are the only members of this

government who, under any and all circumstances, must be elected directly by the people.

Even a grade school student learns early on that the moral underpinning of a democracy, as enunciated in the Declaration of Independence, is that the government derives its just powers from the consent of the governed. If you remove that element of consent, you jeopardize the confidence of the people, and the justness of governmental decisions and actions.

This is the last thing that you would want to risk at a time of national crisis and confusion that would trigger an emergency replacement procedure for House Members.

That is why it is all the more imperative that you reconstitute the House in a constitutional manner as intended by the framers, through special elections, and not through a new constitutional mechanism that completely subverts that intent.

Turning to the specifics of H.R. 2844, obviously the two main questions this committee must address are what should the threshold be of vacancies to trigger expedited special elections, and what time period should be allowed for those elections to take place?

The Sensenbrenner-Dreier bill has a loss threshold of more than 100 Members. I happen to favor a much higher threshold of a majority of Members, since that is where the quorum requirements become a real problem, and I think that it should be very severe for these expedited elections to be imposed.

H.R. 2844's 21-day timetable for special elections is the greatest point of controversy. I understand that a large number of State election officials have already weighed in that this is not a realistic time frame to prepare for an election. While I am not an elections expert, I believe a 2-month period; that is, 60 days, is probably more practical and realistic.

Can this Nation survive for 2 months without a full House? I think it can. President Lincoln did not call Congress into special session until July 4th of 1861, nearly 3 months after the Civil War broke out on April the 12th. Congress still managed to set things right and enact a raft of war legislation over the ensuring months before the special session adjourned.

The proponents of a constitutional amendment claim that such an instantly reconstituted House is necessary to do such things as declare war and to appropriate emergency funds. I would reply that if the U.S. is attacked and a major part of the Congress is wiped out in the process, you are already at war and no declaration is necessary. The founders recognized the right of the President to act unilaterally in response to a direct attack on the country without a declaration of war.

As to emergency funding, that can easily be provided by statute as standby authority for the President in the event that Congress cannot convene immediately. I notice that the Commission has recommended this as well. The replenishment of the House by duly elected representatives of the people, even if it takes a couple of months, is more important than allowing laws to be written by temp Reps with no direct authority from the people.

Finally, let me say a few words about the proposed constitutional amendment recommended by the Continuity of Government Commission. The Commission seems to endorse a concise 36-word

amendment found on page 24 of its report that leaves to Congress the power to regulate by law the filling of vacancies that may occur in the House and Senate if a substantial number of Members are killed or incapacitated. Now, that is very broad authority. I seriously doubt that many States would ratify such a blank check. It is buying a pig in a poke. Even if Congress does contemporaneously enact such legislation at the time that it submits a constitutional amendment to the States, there is nothing to prevent it once the amendment is ratified from changing the law. In fact, the Commission intimates such later modifications may be necessary based on experience with the law.

The Commission favors either allowing Members to designate in advance who should succeed them, or to permit the Governors of the States to pick their successors. Under the first option, Members could designate their spouses, their firstborn, their nearest living relative, or their biggest campaign contributor to succeed them.

Under the second option, if State Governors are authorized to designate successors, there is no guarantee they will be of the same party or even from the same congressional district. So the Commission was torn between nepotism and political cronyism, neither of which undemocratic process is likely to ease the troubled minds of constituents in times of crisis.

In conclusion, Mr. Chairman, I strongly support the statutory approach of expedited special elections to deal with the possible loss of large numbers of Members. The framers gave Congress the power to regulate such elections by law to preserve our representative system of government and protect our rights. It may take a little more time, but getting it right from the start is more important than providing instantaneous continuity from temp Reps who would lack both authority from and accountability to the people.

Thank you.

[The statement of Mr. Wolfensberger follows:]

STATEMENT OF DONALD R. WOLFENSBERGER
BEFORE THE HOUSE ADMINISTRATION COMMITTEE
U.S. HOUSE OF REPRESENTATIVES
SEPTEMBER 18, 2003

Mr. Chairman and members of the Committee:

I am grateful for this opportunity to testify today on H.R. 2844, the "Continuity in Representation Act of 2003," introduced by Representatives Sensenbrenner, Dreier, and others. I strongly support the rationale behind this bill which is to provide for expedited special elections to fill House vacancies in extraordinary circumstances as an *alternative* to a constitutional amendment that allows for the appointment of temporary Representatives.

In my considered opinion, such a constitutional amendment would be a dangerous corrosion of the very cornerstone of our governmental edifice, and that is its dependence on popularly elected Representatives. If you take that away, even for a brief period, you will seriously undermine the legitimacy and moral foundation of our representative democracy.

You do not have to be a constitutional scholar or political scientist to understand just how central the nature of this institution is to the strength, endurance, and resilience of our constitutional framework. You are the First House of the First Branch of our Federal government; the Framers did not put you at that point in our founding document by accident. Even a grade school student learns early on that the moral underpinning of our democracy as enunciated in the Declaration of Independence is that government derives its just powers from the consent of the governed. If you remove that element of consent, you jeopardize the confidence of the people in the justness of governmental decisions and actions. That is the last thing you should want to risk at a time of national crisis and confusion that would trigger an emergency replacement procedure for House members. That is why it is all the more imperative that you reconstitute the House in a constitutional

manner as intended by the Founders, through special elections, and not through a new constitutional mechanism that completely subverts that intent.

Turning to the specifics of H.R. 2844, the Speaker of the House is authorized to declare that vacancies exist. If the Speaker announces that there are more than 100 vacancies, then the expedited special elections are triggered. Under these extraordinary circumstances, the executive authority in states having vacancies shall issue writs of election to fill them by special elections which shall take place not later than 21 days after the Speaker's announcement. In those states in which political parties are authorized to nominate candidates, each party may nominate one candidate for each election to fill a vacancy within 14 days after the Speaker's announcement. Finally, the Speaker's determination and announcement of the existence of extraordinary circumstances that trigger the expedited elections is not subject to appeal in the House. However, the Speaker's announcements of vacancies are subject to judicial challenge in the form of actions requesting declaratory or injunctive relief before a three-judge court convened in the U.S. District Court having jurisdiction over the congressional district of a challenged vacancy. The action must be filed not later than two days after the Speaker's announcement, the court's decision must be made not later than three days after the filing of the action, and the decision is not reviewable.

Obviously the two main question this committee must address are what the threshold of vacancies should be to trigger the expedited special elections, and what time period should be allowed for those elections to take place. The Sensenbrenner-Dreier bill has a threshold of more than 100 members or roughly 23 percent or more of the House membership. Other proposals range anywhere between 20 percent and over 50 percent of the House membership. I lean more toward the higher threshold level to trigger expedited special elections (see attachments to this testimony).

H.R. 2844's 21-day timetable for special elections is the greatest point of controversy. I understand that a large number of state election officials have already weighed in that this is not a realistic time frame to prepare for an election. While I am not an election expert, I believe a two-month period is probably more practical and reasonable. Can the nation survive for two months without a full House? I think it can. President Lincoln did not call Congress into special session until July 4, 1861--nearly three months after the war began on April 12. Granted, in the interim Lincoln took some steps that were extra-constitutional in nature, such as suspending habeas corpus. But he acknowledged as much and laid these things before the Congress for retroactive consideration. Congress not only approved all of Lincoln's emergency measures but called for more. A month later it adjourned, having passed a raft of war legislation.

The proponents of a constitutional amendment providing for almost immediate appointment of temporary representatives (or "temp-Reps") claim such an instant-House is necessary to do such things as declare war and appropriate emergency funds, and to give it all the legitimacy of a full House. I would reply that if the U.S. is attacked again with the resulting loss of most of Congress, you are already at war, and no declaration is necessary. The founders recognized the right of the president to act unilaterally in response to a direct attack on the country without a declaration of war.

As to emergency funding, that can easily be provided by statute as standby authority to the President in the event that Congress cannot convene immediately or muster a quorum; or, it can be provided retroactively as was the case in the Civil War. The replenishment of the House by duly elected representatives of the people, even if it takes a couple of months, is more important than allowing laws to be written by temp-Reps with no direct authority from the people.

Finally, let me say a few words about the proposed constitutional amendment recommended by the "Continuity of Government Commission" crated under the aegis of AEI and Brookings. On the one hand the commission seems to endorse a "concise," 36-word amendment (p. 24 of its report) that leaves to Congress the power to regulate by law the filling of vacancies that may occur in the House and Senate if a substantial number of members are killed or incapacitated. Now that is pretty broad and vague authority. I seriously doubt that many states would ratify such a blank check. It's buying a pig in a poke. Even if Congress does contemporaneously enact such legislation at the time it submits a constitutional amendment to the states, there's nothing to prevent it, once the amendment is ratified, from changing the law. In fact, the commission intimates such modifications may be necessary based on experience under the law.

The commission favors either allowing members to designate in advance who should succeed them, or to permit the governors of the states to pick their successors. Under the first option, members could designate their spouses, their first-born, their nearest living relative, or their biggest campaign contributor to succeed them. Under the second option, if state governors are authorized to designate successors, there's no guarantee they will be of the same party or even from the same congressional district. So, the commission was torn between nepotism and political cronyism, neither of which undemocratic process is likely to ease the troubled minds of constituents in time of crisis.

On the other hand, the commission cites on the next page of its report (p. 25) what a detailed constitutional amendment might look like. By my count, the amendment runs some 612 words-- 151 words more than contained in the ten amendments of the Bill of Rights combined.

But, more importantly, the amendment would set up such a convoluted system for replacing dead and incapacitated House and Senate members that it makes Rube Goldberg look like Simple

Simon. I will not go into further detail since the commission at least had the sense to opt for a concise as opposed to detailed constitutional amendment in the spirit of the Bill of Rights. As former Chief Justice John Marshall reminds us in *McCulloch* v. *Maryland* 17 U.S. 316 (1819), this is

> ...a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs....It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly and which can be best provided for as they occur.

In conclusion, Mr. Chairman, I strongly support the statutory approach of expedited special elections to deal with the possible loss of a large number of House members. The Framers gave Congress the power to regulate such elections by law to preserve our representative system of government and protect our rights. It may take a little more time, but getting it right from the start is more important than providing instantaneous continuity from temp-Reps who would lack both authority from and accountability to the people. Thank you.

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**Donald R. Wolfensberger** has served as director of the Congress Project at the Woodrow Wilson International Center for Scholars since June 1999. As a guest scholar at the Center from 1997 to 1999, he authored the book *Congress and the People: Deliberative Democracy on Trial (*Johns Hopkins University Press, April, 2000), and began organizing public seminars and writing papers on the congressional policy process which led to his current staff position. Wolfensberger is a 28 year staff veteran of the House of Representatives, culminating with his appointment as majority chief-of-staff for the House Rules Committee by its chairman, Rep. Gerald B. Solomon (R-NY) in the 104th Congress (1995-96). He previously served as minority staff director of the committee in the 102nd and 103rd Congresses (1991-94). Prior to his elevation to the full committee he served as minority staff director of the Subcommittee on Rules and Organization of the House (1979-80) under ranking Republican John B. Anderson (R-Ill.), and the Subcommittee on Legislative Process under ranking Republicans Trent Lott (1981-88) and Lynn Martin (1989-90). During his career in Congress he was recognized as a leading parliamentary expert on the rules, procedures, and precedents of the House, working closely with the Republican leadership over the years on the party's proposals for reforming the House. He is a 1964 graduate of North Central College, and successfully completed his course work towards a master's degree in political science at the University of Iowa in 1966. Prior to coming to Congress, he worked as a newspaper reporter, a radio news reporter and newscaster, and a Peace Corps volunteer in Africa.

**Summary of Proposals for Reconstituting the House After a Catastrophe**
**(Adapted from Testimony Before the House Administration Committee, May 10, 2002)**

1. **The House should enact a law requiring Governors to call for expedited special elections within 60 days after a majority of Members has been lost due to a catastrophic event.**

2. **House rules should be amended to deal with quorum problems caused by having large numbers of members incapacitated.** (A summary and a draft of legislative language for proposals #1 & #2 are attached)

3. **House Rules should be amended to create an office of House Deputy Clerk who would be stationed away from the seat of government and would work closely with the shadow cabinet, for the purpose of reconvening the House in a new location if that becomes necessary.**

4. **The current law that permits the President to convene Congress away from the Capital due to "the prevalence of contagious sickness, or the existence of other circumstances. . .[that would] be hazardous to the lives or health of the members to meet at the seat of Government" (2 U.S.C. 27) should be amended to allow the officers of the House and Senate to do so as well without presidential approval.**

5. **Appropriate rules, statutory changes, and plans should be adopted to allow for Congress to meet in two places at once, using teleconferncing, in the event the Capital is quarantined with large numbers of members both inside and outside Washington, D.C.**

6. **The leadership of both parties in both Houses should designate a number of Members to be outside the Capital when a joint session of Congress is held.**

7. **Steps should be taken to ensure full access to current computerized congressional data bases and information as well as for broadcast coverage of proceedings should Congress need to reconvene elsewhere.**

8. **Every House and Senate Committee and support office should devise contingency plans for carrying on its functions elsewhere, even if existing personnel are killed in an catastrophic event.**

**SUMMARY OF PROVISIONS OF STATUTORY ALTERNATIVE FOR FILLING HOUSE VACANCIES UNDER EXTRAORDINARY CIRCUMSTANCES (Amending 2 U.S.C., ch. 1, sec. 8)**

- Existing language in the law which leaves it to the states and territories to prescribe the time for holding special elections to fill vacancies in the House under ordinary circumstances is left unchanged.

- Under the extraordinary circumstances in which vacancies in House exceed half the authorized membership, the executive authority of each affected state affected shall issue a writ of election to fill the vacancy not later than 60 days after the vacancy is declared, unless a regular election occurs during that period or within 30 days thereafter.

- A vacancy by death or resignation can be declared either by the governor of the state or by the House (by adoption of a resolution), and, if both the House and governor declare a vacancy, the 60 day time frame for the election to take place begins with the date on which the earlier such declaration is made.

- The House may, by a two-thirds vote, declare a vacancy by incapacity based on the request of the incapacitated member or on its own determination, based on competent medical authority that the member is unlikely to be able to carry out the trust and duties of office for the remainder of that term.

- If the House finds that a member is temporarily incapacitated and likely at some future point during that term to be able to resume the trust and duties of office, the House shall adopt a resolution declaring temporary incapacity and authorizing a leave of absence (with compensation and benefits). During the period of absence the Representative shall not be counted as a Member of the House for purposes of a quorum.

- A person declared temporarily incapacitated who resumes the duties of office shall be counted for the purposes of determining a quorum.

- Any Representative named in a resolution declaring a vacancy or temporary incapacity shall not be counted for purposes of determining a quorum during consideration of that resolution.

- The provisions affecting the internal proceedings of the House, are enacted as part of its rule making authority; are considered rules of the House as they apply to the procedures to be followed during extraordinary circumstances; supersede other House rules only to the extent they are inconsistent with them; and are subject to the constitutional right of the House to change its rules at any time.

(Summary and text prepared and drafted by Donald R. Wolfensberger, Feb., 2002)

## A STATUTORY APPROACH TO FILLING HOUSE VACANCIES UNDER EXTRAORDINARY CIRCUMSTANCES

Title 2 U.S. Code ("The Congress"), Chapter 1 ("Election of Senators and Representatives"), section 8 ("Vacancies") is amended to read as follows (with new language printed in italic):

1 Sec. 8. Vacancies.

2 *(a)* The time for holding elections in any State, District, or Territory for a Representative or
3 Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed
4 by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws
5 of the several States and Territories respectively.

6 *(b)(1) Notwithstanding subsection (a), under extraordinary circumstances (as defined in*
7 *paragraph 2(A)), the executive authority of any state in which a vacancy exits shall issue a writ of*
8 *election to fill any such vacancy, with the election to take place not later than 60 days after the*
9 *vacancy is declared unless a regularly scheduled election for the office is to be held during such*
10 *60 day period or within 30 days thereafter.*

*(2) For the purposes of this subsection only –*

12 *(A) "extraordinary circumstances" shall be those in which vacancies in the*
13 *representation of the states in the House of Representatives exceed half of the authorized*
14 *membership of the House;*

15 *(B) a vacancy caused by death or resignation may be declared by the executive*
16 *authority of a state or by resolution of the House, but the 60 day period in which an election shall*
17 *take place shall begin with the earliest such declaration made; and*

18 *(C) a vacancy caused by incapacity may only be declared with the concurrence of*
19 *two thirds of the House either upon a written request signed by the incapacitated Representative*
20 *or upon a determination by the House, based on competent medical opinion, that the Representative*
21 *is unlikely to regain the ability to carry out the trust and duties of office during that term.*

22 *(3)(A) If a Representative is found to be temporarily incapacitated and likely at some future*
23 *point during that term to regain the ability to carry out the trust and duties of office, the House may*
24 *declare by resolution that the Representative is temporarily incapacitated and is granted a leave of*
25 *absence with full compensation and benefits.*

26 *(B) A Representative granted a leave of absence by reason of temporary incapacity*

*under extraordinary circumstances shall not be counted for purposes of determining a quorum during such absence.*

*(C) If a Representative who has been declared temporarily incapacitated resumes the trust and duties of office, the leave of absence shall be vacated and the Representative shall be counted for the purposes of determining a quorum.*

*(D) Any declaration by the House of a Representative's temporary incapacity shall not extend beyond the current term of the Representative.*

*(4) A Representative named in any resolution considered pursuant to paragraphs (2) or (3) shall not be counted for purposes of determining a quorum during consideration of that resolution.*

*(5) The provisions of paragraphs (2), (3), and (4), insofar as they affect the internal proceedings of the House, are enacted–*

*(A) as an exercise of the rule-making power of the House and as such are deemed a part of the rules of the House, but applicable only to the procedures to be followed by the House under extraordinary circumstances;*

*(B) supersede other rules only to the extent they are inconsistent therewith; and,*

*(C) with full recognition of the constitutional right of the House to change its rules at any time, in the same manner, and to the same extent as in the case of any other rule of the House.*

## Change of Place of Meeting of Congress

2 U.S.C. 27 is amended to read as follows:

"**Sec. 27. Change of place of meeting.**

2 (a) Whenever the Speaker of the House and the Majority Leader of the Senate, acting jointly
3 after consultation with the Minority Leader of the House and the Minority Leader of the Senate,
4 determine that the public interest shall warrant it, they shall notify the Members of the House and
5 the Senate respectively, to reassemble at such place and time as they may designate.

6 (b) If either the Speaker of the House or the Secretary of the Senate are unable, due to death
7 of incapacity, to make such a determination and so notify Members of their respective bodies, the
8 Clerk of the House and the Secretary of the Senate are authorized to notify Members of the House
9 or of the Senate, respectively, to reassemble at such place and time as they may designate.

10 (c) If either the Clerk of the House or the Secretary of the Senate are unable, due to death
11 of incapacity, to make such a determination and so notify Members of that body, their successors,
12 as pre-designated by the Speaker of the House and the Majority Leader of the Senate and confirmed
13 by that body, are authorized to notify their respective Members to reassemble at such place and time
14 as they may designate.

15 (d) If none of the officers listed in subsections (a) through (c) are able to make such
16 determination and notification of Members, the President is authorized by proclamation, to make
17 the determination and to convene the Congress at such place and time as he may judge proper.".

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**Note:** 2 U.S.C. 27 presently reads as follows: "Whenever Congress is about to convene, and from the prevalence of contagious sickness or the existence of other circumstances, it would, in the opinion of the President, be hazardous to the lives of the health of the members to meet at the seat of Government, the President is authorized, by proclamation, to convene Congress at such other place as he may judge proper." The language in subsection (a) closely tracks that now used in concurrent resolutions of adjournment of the Congress for more than three days (e.g., see H. Con. Res. 360, 107th Congress, March 20, 2002: "Sec. 2. The Speaker of the House and the Majority Leader of the Senate, acting jointly after consultation with the Minority Leader of the House and the Minority Leader of the Senate, shall notify the Members of the House and the Senate respectively, to reassemble at such place and time as they may designate whenever, in their opinion, the public interest shall warrant it."

(Drafted by Don Wolfensberger: 6/24/02)

**FURTHER RESPONSE OF DONALD WOLFENSBERGER
TO A QUESTION POSED AT HOUSE ADMINISTRATION COMMITTEE
HEARING ON
"THE CONTINUITY OF CONGRESS: SPECIAL ELECTIONS
IN EXTRAORDINARY CIRCUMSTANCES"
SEPTEMBER 24, 2003**

This is in further response to Congressman Larson's question of me as to whether there were any circumstances in which I could support a constitutional amendment to deal with the continuity of Congress problem when large numbers of members are killed or incapacitated.

I indicated that the most nettlesome problem raised by the issue is how to deal with mass incapacity. I can imagine a situation in which 100 members are known dead, and another 300 are either incapacitated or missing (and only the remaining 35 members are alive and able to serve). Under those circumstances, even an expedited election to fill the vacancies created by death would not bring the body to a level at which it would have a working quorum to conduct business. Even if the vacancies due to death were filled, there would only be 135 members of the House, well short of the 218 members necessary to constitute a quorum. The same problem could exist in the Senate, even with the immediate appointment of persons to fill vacancies caused by death under the terms of the Seventeenth Amendment.

Either or both houses of Congress could be effectively prevented from doing any business absent a quorum, unless the incapacitated members resigned to allow for special elections to fill their seats. This is the kind of "catch-22" problem which would seem to warrant a constitutional amendment to allow for temporary appointments to serve in the place of only those members incapacitated or missing and unaccounted for. For example, the 35 (or, after special elections, 135) members could not even act to expel missing or incapacitated members absent a quorum.

I perhaps did not make clear that I would limit such temporary appointment authority to that latter category of incapacitated and missing members, and would not extend it to the seats of those members killed until their replacements were made by special elections. But that was certainly my intent.

It would still be my firm position that the vacant seats of members who had died should only be filled through expedited special elections, preferably no later than 60 days after the seats had been declared vacant.

Attached is a rough draft of a possible constitutional amendment that is narrowly drawn to address the situation I have described. It would cover the subsequent changed status of incapacitated or missing members if they either resume their responsibilities in Congress or die (or are declared "presumed dead"). In the latter instance of death (or presumed death), the temporary appointments would be replaced by members elected to fill the vacancy. Congress could prescribe standards and criteria for enforcing the amendment by legislation, regulation, or rule. For instance, Congress might require by law that governors choose the temporary appointments from lists of persons pre-designated by the incapacitated or missing members.

**Possible Constitutional Amendment to Provide Temporary Appointments For Representatives and Senators Incapacitated or Missing Following a Catastrophic Occurrence**

Sec. 1. When either house of Congress is unable to do business due to the lack of a quorum resulting from the death, incapacitation, or unaccounted absence of members following a catastrophic occurrence, the executive authority of a state shall make temporary appointments to serve in the place of any member from that state who has been incapacitated or declared missing until such member resumes the duties and responsibilities of office or is replaced by someone elected at a subsequent election.

Sec. 2. The Congress shall have the power to enforce this article by appropriate rules, regulations, or legislation.

The CHAIRMAN. Thank you. You have been a fascinating panel. And in my mind, this is going to be three-fold. And everybody has had a lot of good points. Something where you have to have your election as quick as you can, but you have to make sure that the election is not going to cause arguments for the next 2 years.

And, you know, with the Help America Vote Act, and there are many people in this room, and I see some staff from the Senate, Kenny and Paul and everybody that was involved, Steny Hoyer's people, everybody.

And we sat down with Senator Dodd, and I mean literally thought of every single scenario, to the point where you know, you think of a scenario and think of one more. We did that on the Help America Vote Act, including if the electricity goes out, we have got batteries on those computers. So we thought that one out, too.

We thought about the disenfranchisement issue and provisional—how you lock it in, and where you put the signs up. As you know, we just tried to think of every scenario that could go wrong. They are elections and they are critical.

This whole scenario is the same, and more in the sense that you have got to involve the election process. Is 45 days too long? Is 21 too short? And on top of it, I still want to go back to Congressman Langevin's E-Congress, because people have criticized that. I was told that what we should have, in case of a catastrophic incident, we should have three to four temporary U.S. House sites, three, maybe four.

Now, the problem you have got is if there is massive bombing here and there is spot bombing across the United States, you literally can't get anywhere. You have to have the availability to have 435 helicopters or 200 helicopters to be going and getting people. You would have to have a massive constant standby deployment of aircraft.

And that is why I think under only the rarest of circumstances the E-Congress is a great idea, because we don't have these incidents while we are here. You can be in Europe. Members travel a lot during their recess back in their districts. And if something goes wrong out here, how do you actually vote to reconstitute the Congress if you can't be here, or if you have had a gas attack, smallpox, and we have to get out of Washington. How do we go back—and some people have died. And how do you revote a new Speaker? And so I think that is another component that has got to be looked at, in my opinion, very, very carefully.

One problem is, and 9/11 gave you a little feeling of this, but there is a point in time, if a lot of people had been killed here, if that plane had reached the Capitol and a lot of people were killed, I think you would have, and we didn't have a system in place, I think you honestly would start to have the arguments, whether justified or not, that we had gotten as close as we could to a few people running this country. I mean, a President and a Vice President and a few Members of the House and a few Members of the Senate.

And I think that will cause fear, and almost a paranoia of leaning towards, look, we got close to a dictator of sorts, because the perception is out there. And if there were massive bombings and martial law had to be declared or something, then it goes another

step. And I think people would feel there is no balance out here. At least if you have Members reconstituted in some amount of time, the Members are going to complain that somebody has gone too far with this or somebody has made a bad decision or a cabinet member or the President or another Member made a bad decision.

So I think that is something we won't know unless it happens. But I think that is also something that has got to be looked at. The other question I wanted to ask anybody who would like to answer it, is back to the incapacitation. There is a lot of merit to what we are discussing today, and to the bills, obviously, that are out there.

But incapacitation is one-issue that has got to be thought very, very carefully out on who makes a determination of who is incapacitated and how is that carried out. Also, in my mind, the House still has the ability to vacate. It calls for declination. So, therefore, there is a mechanism where you could expel a Member, for criminal purposes. So there has been a situation I think where the House has been the one to vacate the seat.

I get a little bit uncomfortable with a State deciding to vacate a Federal seat, just as we shouldn't turn around and say to the Secretary of State or Governor, we are going to vacate those seats as Washington, D.C.

But incapacitation, anybody have any other thoughts on it?

Mr. ORNSTEIN. As I suggested, Mr. Chairman, this is the most glaring problem with the simple election process. What I had suggested, and what we have, at least in some of the detail in our Commission report as one option here, and this is part of the problem of not only what triggers any of these mechanisms, but who makes that decision.

One of the problems with this bill, as we have discussed, is if you have the Speaker as the figure there, or any figure in Washington, you might lose that person, you would have no ability to trigger it. Incapacitation, by the way, also affects the other side of the Capitol. The Senate has an appointment provision for vacancies.

I am very uncomfortable with the focus on vacating seats when we might have temporary incapacitation, and I certainly do not want to take Members who are thrown into intensive care units or burn units as a consequence of some terrorist attack and say to them, thank you very much, you lose your seat, someone else is going to replace you, and you can't come back.

So we are going to have a fog of war here if there is an attack. You are going to have people missing.

What I suggested is that the Governors, under conditions of an attack, canvass their State delegations and make a determination as to whether half or more of the members of the State delegation are dead or missing or incapacitated. If so, they sign proclamations to that effect. And when you reach a threshold number, maybe it is a thrid of the States, maybe it is half of the States having signed such proclamations, and you can have them sent to the comptroller general and other designees, including some who are outside of Washington, then you trigger this mechanism.

If it turns out that someone is missing for a few days, and you have made an appointment, then that person pops up, then all you have to do is simply have a provision in place, as we have suggested, that that individual simply sign a statement saying I am

ready to serve again and they are back and they supplant the temporary appointment.

Let me make just one other note here, Mr. Chairman, about the election process that Doug Lewis has made well at other points too.

Even if you can do this in 3 weeks or 45 days or 60 days, you are going to need another period of a week or 10 days to certify, to deal with provisional ballots. So under the best of circumstances here, we are talking months. And to some degree, the solution suggested by my esteemed colleague, Mr. Wolfensberger, is we have to destroy this institution to save it. I am not comfortable with the notion that President Lincoln suspended habeas corpus and the country survived. I don't want that happening again. I want to do everything that we can to avoid that. And if it is 28 days or 30 days under these circumstances or 60 or 70 or 80 days, that is too long when the American people are going to want a Congress to provide a check and balance.

The CHAIRMAN. One other point also, the big question, and again this would be a furor. But if the military is out fighting, as they are now as we speak in Iraq and Afghanistan and Bosnia and other parts of the world, and there is a catastrophic event here, would the military get their votes in to vote for Members of Congress who vote whether they go to war or not? So can you do that in X amount of days with the military voting?

That was, as you know, the Help America Vote Act, that was a big part of what we looked at, because it was a furor, when people felt their vote wasn't counted and they were over fighting for the country. Obviously it made them upset.

Mr. WOLFENSBERGER. I would like to respond on a couple of points. First of all, the House was not destroyed as a result of Lincoln suspending habeas corpus. He also spent money that had not yet been appropriated. As soon as the Congress convened in that special session, almost 3 months after the fact, the House not only retroactively ratified what Lincoln had done, they gave him additional authorities.

Now, does this mean that the Congress rolled over, was destroyed or whatever? You might recall from your history that the Congress also set in motion either a select or a joint committee on the conduct of the war that drove Lincoln up the wall. So it was not a supine institution by any means.

The House of Representatives was not destroyed. It came back and it came back strong. And also the union survived. It is still doing pretty well last I heard.

The second thing I want to mention is on the expulsion of the incapacitated. That is that you should not look at the expulsion as only being for punishment of Members, even though they are tied closely together in that part of the Constitution.

My search of the precedents indicates that the two-thirds vote is also used to expel a Member who is incapable of performing the duties and responsibilities of office. In other words, it would be very appropriate, if Congress makes a determination that that person is unable to carry out their duties for the remainder of that term, for a Congress to take that vote. But it should be by a two-thirds vote.

I was very upset by the fact that Gladys Spellman was thrown out of office by a majority vote. Why? Because she wasn't sworn.

She was a Member of Congress under the precedents of the House. That should have been a two-thirds vote, in my opinion.

The CHAIRMAN. The issue of the way to decide to vacate a seat. As I understand it, years ago when we didn't have travel as we do today in the United States, States would get notified because of the official act of notifying a State about a vacancy. It had to do, if I recall right, because you couldn't get to D.C. that fast. So there was this official notification. But I am not sure that just because of notifications of vacancies that we should embark on allowing the State to declare the vacancy. Nobody wants to use the word "expulsion" when it comes to incapacitation. But you are right, because expulsion is not just for criminals.

Mr. WOLFENSBERGER. The House precedents made clear that either the executive of the State or the House of Representatives can declare the vacancy. I would not extend that to incapacity, as Mr. Ornstein's constitutional amendment would, to allow the Governor to declare somebody incapacitated.

I think that has to be handled much differently, even by a constitutional amendment. But you are right that it can be declared by the Governor of the State, or it can be done by the House. In the case of a Nick Begich and Hale Boggs whose plane went down in Alaska and they never found it, the Governor of the State of Louisiana refused to accept the statement of an official in Alaska that said that they are presumed dead. So in that case the House of Representatives had to vote to declare the vacancy because the governor had refused to do so.

Ms. KIFFMEYER. Thank you very much, Mr. Chairman. I think the issue that I find, there are a number of points that have been so validly brought up by the members of this panel and the Congressional members before us. And the thoughtfulness ahead of time to deal with reasonable scenarios, adjusted to them, knowing that no matter what time you choose, no matter what number there will be circumstances placed upon you that no one can foresee, and you will be faced with the challenge to rise to the occasion and to do the best that you can.

You will be commended for the foresight, but everybody will understand that you could not have known the exact circumstances. It needs to be said that there should be reasonable accommodations for every one of these points at which you will draw the line. And there will be dissatisfaction to some measure. It will be miserable circumstances that would trigger this law.

Certainly no doubt that was the case in Minnesota. And the first response is to deny that it happened. It is the human condition to say, I wish it hadn't happened. I don't want it to happen. I don't like that this is happening. Yet the process and the continuity was of primary importance at that time. We were grateful for the law, insufficient in many ways as it was at the time. It was nevertheless a guiding light that was very important and very valuable to the continuity, to the issues that were upon us.

I think that is always an important consideration. I know that every one of these matters are very valid, but that at some point along the way the decision will have to be made and a process put in place which is much greater than any one failure at some point along the line that we may question. Thank you.

The CHAIRMAN. You raise—I think the point you are raising is the way we have looked at a lot of things. After 9/11, we had an amazing amount of decisions to make on what we were going to do with the physical structure of this Capitol. And you can look at some of the things we did and criticize them. Some of the things we do are good.

Now, does that mean that we are totally safe right now? Absolutely not. If somebody wants to shoot something into the building, things can happen. But you make your best effort to make sure that—you do the best effort that you know that you can do, and we have carried through on that. Every week we reassess, Congressman Larson and our staffs, reassess all types of security things. Things we can tell you about and some things we can't. We continue to do that for the physical structure of the Capitol. This report came out about 9 months ago, and we need to continue for the human structure of this Capitol; that is, the men and women that serve here. We need to continue to debate this. I don't know what is right or completely wrong, but I think we need to continue on with it. We do it on the physical structure and security. We need to do it on how Members are replaced, I believe.

Mr. LEWIS. And I think one of the assumptions that you have to make, and I want to make two points here. One is the first assumption. Don't always assume that the attack is going to be from outside. It could very well be from inside, and if there is a suspension of all of the democratic institutions that works obviously to the advantage of the person or persons who are doing the attack from the inside.

Secondly, I think you have got to look at, if you provide for replacements of Congressional folks, it takes a while to learn to be a legislator. Administrative people go nuts initially trying to figure out how the legislative process works. And it seems to me that you need to think through, how do you get experienced legislators up here? How do you get people who don't have to learn their way around how a bill gets passed and how the Congress itself gets things done?

Somewhere in here you need to think about how does that succession plan bring people up who can hit the ground running.

The CHAIRMAN. Where there is a will there is a way. But you just raised another thought in my mind. We go through freshman orientation. We bring everyone in. We pick them up, and bring them in here, make them sit for 9 days and terrify them with the fact that they could go to jail, or owe $50,000 bucks out of their checking account if they make a mistake or if the staff makes a mistake.

And you bring people out here. And we have talked about the Members getting killed. What about the staff? And if you had a loss of the institutional staff, I mean Lord forbid this would happen, if you did, you have got these new Members and you would have to kind of look at kind of suspending some of the ethics rules probably in the House, because they are going to be doing all kinds of things not even knowing it.

I mean there is all of that aspect that I think has to be talked about internally too, because you raised a point.

Mr. LARSON. Thank you, Mr. Chairman. And again, thank all of the esteemed panelists, both for your patience and endurance here

today. I, in keeping with the spirit of Hollywood that Mr. Dreier evoked earlier, I tend to think of Mr. Ornstein and Mr. Mann more like Rex Harrison or Russell Crowe, for their thoughtful and professional deliberation on these matters, and appreciate both the Continuity of Government Commission's report and on preserving this great institution of ours.

I have a number of questions. First I wanted to ask, and again I want to second the kudos of the chairman to Secretary Kiffmeyer for the extraordinary manner in which you handled elections after the unfortunate passing of Senator Wellstone.

But in Minnesota and several other States, and this was noted in the testimony of Mr. Ornstein, a voter can register up through Election Day and also receive a ballot, which has apparently in Minnesota worked well.

Our colleague, Representative Sabo, is preparing to introduce the Same Day Voter Registration Act of 2003. Based on the Minnesota experience, would you favor introducing that practice nationwide if we had to have emergency special elections? And what do you think of the Sabo proposal in general?

Ms. KIFFMEYER. Well, Mr. Chairman, and Mr. Larson, I think under extraordinary circumstances there are a number of things that you would probably put in place in order to do an expedited election that you would not do routinely. So that may be a circumstance that you would have to take a look at.

Certainly now with the Help America Vote Act, there are provisional votes that are a type of recognition that if you are not on the preregistered list, that you are able to cast a provisional ballot. So already through the Help America Vote Act we actually have law in place to deal with such a situation that could be used in an expedited election.

Mr. LARSON. Thank you. Again, I want to thank especially Mr. Lewis as well for raising several scenarios in your deliberations. And Mr. Wolfensberger, I guess, is there any circumstance or any calamity in which you would consider a constitutional amendment that would reconstitute the House of Representatives? And the reason I say that, because I am struck by the fact that at some point, if we go back to the beginning, the Continental Congress, that at some point legislators have to be appointed to constitute the formation of government.

And I understand people, and I think even on the Commission, and again I think it is an outstanding report, went to great lengths to grapple with this issue of not wanting to just willy-nilly go forward with a constitutional amendment. But given the enormity and the potential for a catastrophic event, the President giving his State of the Union message, dirty bomb explodes, taking or incapacitating the vast majority of Members of Congress, the President, judicial branches, where the issue was raised as well.

That is an extraordinary event that again, doesn't—it takes place today in real terms, not in the Second World War or the Civil War as examples were given before, good examples, and no quibble with those examples. But it seems to me that we must grapple with this situation. We can't be in denial that this could absolutely transpire. And what would be wrong with going forward on two tracks as we look forward to addressing this issue and having—because there is

no guarantee that a constitutional amendment would be ratified by the States, but having in true democratic fashion not only this Congress, but the Nation grapple with this issue?

Mr. WOLFENSBERGER. I think that is an excellent question. I think the thing that was brought up in today's testimony that is the most nettlesome, and the best argument for a constitutional amendment, is that a large number of Members would be incapacitated and you might be in deadlock for a prolonged period of time before some kind of determination is made that you have to expel them because they are not gong to recover.

So it seems to me if you had a situation, for instance, where 100 Members were killed but you had 300 Members incapacitated, and you could not get yourself a quorum, even if those 100 Members were replaced by special elections, how do you get a quorum? And it seems to me that maybe that is the one instance in which you would have to have temporary replacements by a constitutional amendment.

So I can understand that situation, putting you in a deadlock where you really can't act. You would not have 218 sitting Members, even after a special election, unless the Members that were sitting decided to expel all of those that were incapacitated. They might recover within a few weeks time or a few months, time.

So I would concede that that would be one very dire situation where Congress could be deadlocked for months with a vast majority of Members just incapacitated.

Mr. MANN. Mr. Larson, I am encouraged by my friend Don Wolfensberger's statement here that he could imagine a circumstance; namely, mass incapacitation, in which emergency temporary replacements would be needed, and of sufficient importance that the principle of elected House Members could be amended in that slight way.

What I want to suggest to you is that this principle has taken on a life that goes well beyond any basis in reality. It has something to do with the institutional competitiveness between the House and the Senate. This is a very awkward thing for me to discuss. But you know, we talk about the other body and in the House we grouse about the other body and its institutional frailties and liabilities, and the other body occasionally makes similar comments about this body.

Some competitiveness is a good thing.

The CHAIRMAN. I hate to interrupt you. But when you are in retirement in your job, you make comments about the other body. You have nothing to do. They do that.

Mr. MANN. I am afraid in this context it has moved to the point of hubris. What I want to say is the special character of this institution, the House of Representatives, does not reside in the fact that there is no provision for temporary emergency appointments. It has to do with its size, with the length of term, with the smaller constituencies than the other body, with the particular constitutional powers that it was given.

Would anyone claim that the Senate of the United States lacks legitimacy because of the provision within the 17th amendment allowing for temporary special appointments? Listen, the 17th amendment was passed, it is part of the Constitution. We have di-

rect election to both bodies, both Houses of the Congress have direct election.

The Senate is different from the House for reasons other than elections, the direct election. In fact, I would argue that the electoral process of the Senate and the House have become more similar over time. Fund-raising has become more similar. And, therefore, it is more hubris than anything else to place so much attention on this notion that every Member of the House has been first elected.

If my friends and colleagues who make this argument would show equal interest in trying to lend more substance to the elections to the House, by dealing with the problems of uncompetitiveness, the fact that 90 percent aren't competitive, the problems of redistricting, the problems that contribute to this lack of competition, then I would feel a little more sympathy.

The second point is elections are not the only feature of the United States Constitution. Brian Baird sort of said this, others have said it as well. We have more than just a small "d" democracy, we have a small "r" republic, and we have a constitutional system which includes separation of powers. We mange to balance interests, and it seems to me in that spirit it is very dangerous to elevate this small provision having to do with temporary emergency appointments above everything else that provides the real basis of our durability as a constitutional democracy.

Thank you.

Mr. LARSON. I just wanted to comment on that, because you raise a very good point. It was going to be one of my follow-up questions, is that I feel that the House is at a constitutional disadvantage because of the powers granted in the Constitution for the Senate to be able to reconstitute almost immediately.

While under the best circumstance, it would be, well, let's say even if we took 21 days in the process, that is highly unlikely, and more likely probably about 60 days as people have indicated, and even then for some States that may not be a reality. But the idea that the Senate can be reconstituted immediately, and given the emergency nature of which we would be operating under, I think would be governing and leaping almost in Haigian fashion, saying we are in charge here at this point, given the nature of what has happened and what has transpired. And whether it be hubris or human nature or the state of the emergency, for us not to have looked at the Constitution and recognized that by its very nature there is an imbalance that has been created here in terms of dealing with this emergency, then I think that would be wrongheaded on the part of the Congress.

Mr. Ornstein.

Mr. ORNSTEIN. Thanks, Mr. Larson. Just a couple of points. One, I want to throw out a couple of figures for you, following up on what Tom said.

If you look at Senate appointments with individuals who then run for election in their own right, their success rate is 50 percent. If you look at House elections, reelection rates are about 98 to 99 percent. One of the worst case scenarios here for me is that we have elections in 21 days. You have party bosses slap together candidates, probably it is going to be the rich and the famous. They

come in under the aegis of an election mandate and then they may be there for decades thereafter. We will have set the House for a very long period of time under the worst, most stressful, most distorted set of conditions. It is another reason to make sure that we have adequate time here for very full elections.

In our Continuity of Government Commission we had some very spirited debates about those who might come in under emergency interim appointments and could then run for election, and we came to the conclusion that we should leave that. We don't want to bar people under those conditions from running.

But we were very much cognizant of the fact that coming in as an appointment, what history suggests is that is not a blank check that you are going to be there forever, that people under those conditions, voters under those conditions look, the next time around, when you will have a substantial period of time for an election, to make those judgments.

One other point, as we look at our worst case scenarios and we think about a House that might consist of just a handful of Members, remember that under the presidential succession process three Members of the House could constitute a quorum, choose a Speaker who might then become the President, the acting President for a period of time, and the worst case scenario that we have come up with is something happening at an inaugural.

What the Congress has to do, and what you also have to think about, is the succession process for all three branches. We need to take another look at presidential succession. Now, it has been done very responsibly in the past by the Congress. I think it is outmoded at this point. But the reason that we drew our constitutional amendment the way we did was very much to parallel the way that the Constitution itself deals with presidential succession. It delegates to Congress that authority by law, not a supermajority, after a President.

Congress hasn't manipulated that process for partisan or other crass political purposes. They have dealt with it very seriously. I have little doubt that if you passed an amendment that gave the Congress the authority to set rules in place for emergency interim appointments that it would be dealt with in a responsible and not a political fashion.

What pains me the most is that all of these issues, how you set the threshold, what that threshold ought to be, whether as Mr. Ehlers suggested 100 members is really necessary, or whether it ought to be 300 or 400 for a quorum, whether we are dealing with the kind of worst case scenario that Don Wolfensberger just talked about where he indicated a willingness at least to consider an amendment where you have got widespread incapacitation but not to a point where you would expel Members, but you would be gridlocked for months without a quorum, any of those circumstances, we ought to have been debating this over the last 2 years to try and come to some balanced judgment. It is only now that we are going to do it.

We have had lengthy periods without a Vice President. We had Presidents comatose for months, with Woodrow Wilson. We didn't act until it was forced upon us. We ought to be able to do better now.

Mr. LARSON. Along those same lines, Chairman Dreier in his discussion alluded to the fact that there—he was talking about a virus, and in this case a virus that eats the Constitution. Of course he was referring to the fact that all of these potentially bad things could happen when you propose amending the Constitution. And yet as we look back at our history, that is not the case. They have been very thoughtful.

I am not concerned, especially given the events since September the 11th, and the response of the American people, who seem to have a more renewed and deliberative interest about the instrument of government, that this wouldn't be a wonderful exercise for this country to reacquaint itself with its civic responsibility.

And I further believe that, you know, some valid points have been made in terms of time, and the very nature of the House of Representatives and the concept that they are elected directly by the people. What a great opportunity to bring this forward to classrooms and back to our town halls and our communities where people once again take a renewed interest in what did, in fact, our forefathers intend.

And what is this process of amending the Constitution? And can this circumstance simply be dealt with legislatively? Should there be a list of people? Should we go back to the State legislators or the Governor for an appointment process? What kind of constraints should we have? Why shouldn't the American people participate in this thing, and have the media, instead of flooded with the—well, kinds of programming that often emanate in the evening? Why not focus on this kind of amendment process concurrent with an instant remedy that Mr. Sensenbrenner has proposed as well?

In the event, God forbid, anything were to happen between the process of ratification or not, or in the event that an amendment was not ratified then, I guess half a loaf is better than no loaf at all. But I am very deeply concerned by the questions that you have raised, and I thank Mr. Lewis again.

I believe that if Secretary Kiffmeyer could do it in 31 days, and given the crisis and even given Mr. Sensenbrenner's concept that America will pull together, you know that America would pull together in that kind of a fashion. But should they under those circumstances, and are there unanticipated calamities, as the Secretary pointed out, that we haven't even yet considered? And why not have a bird in the hand in terms of an emergency provision that would allow us to have the kind of transition that would preserve the very sacred idea that is embodied in the Dreier and Sensenbrenner and Miller proposal?

Mr. WOLFENSBERGER. Mr. Chairman, Mr. Larson, that is an excellent statement. I think, you know, you have obviously thought this over a great deal. I just wanted to get back to one thing though. I have to take issue with my good friend Tom Mann using the word "hubris" as applying to those who think the House is unique and it should retain its elected character no matter what.

I don't think that is hubris at all, because to me hubris means an attitude of infallibility, invulnerability, being above the law, being above the people. The attitude of the people that you have heard today on the earlier panel that support or oppose the con-

stitutional amendment is that they are of the people, not above the people. That is not hubris. They want to keep it that way.

The House is different from the Senate. I don't care how much they are getting more alike in the way they campaign or some of the rhetoric they use on the floor at both bodies. The Senate is full of a lot of former House Members that carry some habits with them. But the fact remains that they are two different institutions. And when you consider the fact that the history of this constitutional amendment we are talking about today, it has passed the Senate three times but never the House. Why?

Because the Senate has the attitude that you have for My Fair Lady, why can't a woman be more like a man? The Senate says, why can't the House be more like the Senate? Well, it is not. And that is the reason that you have had the resistance in the House and the reason the Senate has been so happy to let the House be like the Senate and allow the Governor to appoint.

But I would remind you that we got the 17th amendment because we had legislatures appointing Senators in the old days and things got so scandalous by that process that they had to go with direct elections. That is how we got the 17th amendment. My State of Illinois was the worst, from what I have read.

So you have to think these things over as to why we have these differences, where we are both coming from. Yes, we are unique. It is not hubris that the House thinks it is of the people and maybe it should stay that way even in the short term in a catastrophic situation.

So I will leave it at that.

Mr. MANN. I am sorry, but the Senate is of the people too. They have direct elections and had even well before in most States the 17th amendment was passed. That ratified a practice that was well underway. The differences between the bodies are important but they do not rest on whether the legitimacy of the body flows from the people. Both bodies are elected by the people and are representative of different terms, different constituencies, different sizes, different constitutional provisions.

What we are talking about is temporary appointments. That is a very, very small part of the picture. And for anyone to place the special character of the House on that provision I think is to do great distortion to the constitutional system as it exists today.

Mr. LARSON. What would you think about a provision that would, and I think Mr. Ornstein alluded to this, that the Commission considered this. But Governor O'Neill from Connecticut, a very wise man, had to deal with constitutional appointments when he was Governor and had appointive capacity. And one of his rule of thumbs was that you could never succeed yourself in that position. You could serve out the term. And there was nothing constitutionally that would have prevented a person from succeeding himself. But that was the understanding and the proviso, because, he would argue, that you were not elected by the people and you shouldn't be using this office to initiate your campaign to succeed yourself.

How would you respond to that wisdom of Governor O'Neill?

Mr. MANN.. I think there is something to be said for that. It is true in our Commission we had a lively debate on that. One of the

problems was that it seemed like a restriction on free speech, free expression to deny someone the ability to run for office. But if it was deemed to be consistent with the Bill of Rights, since we are talking about emergency temporary appointments in the face of a national catastrophe, I think it would be highly desirable for these to be seen as interim temporary appointments drawing on people, as others have said, hopefully with legislative experience and some standing who could fill this need on a short-term basis.

Mr. ORNSTEIN. You know, our position, and I think I can associate Brian Baird with this as well, is for most of these things we are almost agnostic. Whether it is State legislators with a time limit so you wouldn't end up with the gridlock and then Governors taking over to make these decisions, whether it is a list of people, any limits that you place on those making the appointments and preventing them from running again, those are fine. I would be perfectly happy to enthusiastically endorse any or all of those.

The most significant thing is that we grapple with these issues and that we begin to move on them. The one thing I believe we all agree with is this should not be for the House of Representatives a routine matter. We don't want appointments. We don't want the House to be exactly like the Senate.

We want this to be only in the event of the most dire catastrophe, and if you want to set the threshold at 218, or if you want to set it with some combination of Members dead or incapacitated, if you wanted to set it at 300 even, something that is high enough that you are only going to trigger it under the worst of circumstances where the alternative is no House at all for a substantial period of time, please go ahead and do so. Just do it.

Just one other very brief note, because Mr. Ney had mentioned military voters and we didn't get back to that, and Representative Miller mentions it in her testimony as well. We did have a very small number who voted using the Internet the last time. We have a pilot project going forward in this election that will encompass a lot more people.

But using the analogy of the worm that Mr. Dreier suggested, given the worms we have had in the Internet, knowing the fire walls under the best of circumstances don't work, knowing we have had all kinds of conferences and experts look at Internet voting more generally, this is a disaster in the making more generally.

It is not going to work particularly. It would be easy to have that thwarted under the circumstances. To have an expedited election in a 3-week period fundamentally means that you are going to deny lots of absentee voters the right to vote, and you are going to deny the military the right to vote.

And under these circumstances where you may be picking Representatives for a long period of time, that is a consequence that we ought to think through very seriously if we want to move to 3 weeks, 6 weeks, 8 weeks or 12 weeks.

Mr. LARSON. Madame Secretary, I saw you wanted to speak.

Ms. KIFFMEYER. Yes, Mr. Chairman. I thought Dr. Ornstein, I thought you did a wonderful job laying it out just simply. Take this larger matter at hand on a principal base away and move forward, because the greater danger is not having anything at all, some-

thing happening of catastrophic importance and then we have nothing at all to go on, which would be very, very harmful.

And I am reminded of a platform rules committee that I was dealing with, made up of 10 attorneys.

After several meetings of taking notes for them we had several pages of rules to govern our convention. The morning of the convention we were to finish doing those rules. However, we ran out before the convention started. The convention started without those rules, and it was not a pleasant situation.

So it illustrates the point that even in any situation you may not have perfection but do not let that keep in the way of doing the best, and do not let the analysis paralysis take hold and thereby miss the greater good by simply taking action.

The CHAIRMAN. I will make a comment on Dr. Ornstein's comment.

You know, what we might have to do is say, look, we can't do these in 10 days, we can't do them in 21 days, or, if you do, here is where you disenfranchise. Then you lay out on the table and you admit it, doing the best you can do. But those are decisions that do have to be thought out.

Everybody here has raised a lot of good points. I have one question about the constitutional amendment. Any best guesses of what time frame the States would ratify it? I mean, we are talking about right now if an emergency at—the Capitol is under some catastrophic attack, could this be how many years down the road?

Mr. LEWIS. I am going to be one—I would say to you, I am Pollyanna in all of this because I believe in the process and I think it will all work, so I am probably someone who is going to give you the dreamer's attitude. But I honestly think if you come up with a constitutional amendment that is halfway reasonable you are going to see the States act fairly quickly this time on it because they understand the nature of what we are facing that we have never faced before.

The CHAIRMAN. I wanted to make one comment also. We joke about the Senate and the Senate about the House, but in all reality it is the United States' Senate. If something happened over there, their difference—we are elected. But their difference, as we know, they can be reconstituted within days. In the event something does happen, at least you do—in the knowledge in your mind, you do have a fully constituted Senate. That doesn't mean you shouldn't have a House, but at least you do have a body. It is not like both bodies have to be elected and all of a sudden you don't have a Senate or a House. So that is at least a stability point with the Senate's appointment process.

Mr. ORNSTEIN. With one exception, and it is a real-world exception that we saw with the anthrax. If that anthrax attack had been in fact a serious terrorist effort to disable the Senate and had gotten into the ventilation system through the offices, we might very well have had 50 or 60 senators in intensive care units with inhalation anthrax for months—no quorum, no Senate. So I believe the Senate also has a responsibility now. There are too many real-world circumstances where you would have neither a House nor a Senate because of widespread incapacitation. The Senate has a

hole in its process that has to be dealt with just as much as the House.

The CHAIRMAN. On those terms I was thinking of death. But, again, it comes back to the incapacitation. I think it is a real touchy subject to who deems that that Senator is incapacitated and who deems it in the hospital. Does the doctor or the governor? That is a road that needs a good amount of discussion.

Mr. LEWIS. What I would hope as a result of what you all have done today and what Senator Cornyn did a couple of weeks ago in the Senate is that I would hope that the concept that you folks need to move forward settles in. Obviously, somebody in here has to take lead, because when—all too often what happens in what I have observed and what happens on Capitol Hill is that people go into brain lock when they offer a bill. They just absolutely cannot see any other way to do things other than what they have proposed. Hopefully, your committee can guide through this process to help all the Members see that there is a greater good here and a greater objective here. But with all due respect, I think Senator Kiffmeyer—Secretary Kiffmeyer absolutely right. The urgency is now.

Mr. WOLFENSBERGER. Just one point on the length of time it would take to ratify the constitutional amendment. I think it depends on the nature of the constitutional amendment. If you come up with one that the Commission has recommended that says, well, the Congress will fill in the blanks later with the statutory language, I think it would take the States some time to come around to that. They may not support it because they see that Congress can do most anything then by law. So a lot of it depends on the nature of the constitutional amendment. If it is one that is fairly clear, such as mirroring what the Senate now does, that may well go pretty fast. I just don't know.

But getting back to the O'Neil principle that Congressman Larson raised on whether a Member that is appointed should be able to succeed himself, I am strongly ambivalent on that. On the one hand, I agree with the others that under the Constitution anybody that is eligible should be able to run for office. On the other hand, you have these people who have just been appointed and you say the urgency is for them to be there and do the emergency legislating that needs to be done, but at the same time you are making it possible for them to be running for office. And you know darn well with an expedited election they are going to be back home running for office more than they are going to be here learning the ropes and doing the legislating.

Mr. LARSON. That is why Governor O'Neil was a wise governor.

The CHAIRMAN. I want to thank a tremendous panel, and I want to thank all the witnesses who have worked so hard to prepare for this. I want to thank Congressman Larson and his staff and our staff for all of their time and effort into this.

I ask unanimous consent that a written statement prepared by Senator John Cornyn of Texas on the subject of H.R. 2844 be entered into the record.

Without objection, his statement will be entered.

[The statement of Senator Cornyn follows:]

United States House of Representatives
Committee on House Administration

**H.R. 2844 – Continuity of Congress: Special Elections in Extraordinary Circumstances**

Wednesday, September 24, 2003, 2 p.m., Longworth House Office Building Room 1310

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WRITTEN STATEMENT OF SENATOR JOHN CORNYN

I want to congratulate Chairman Robert W. Ney, ranking member John B. Larson, and all of the members of the Committee on House Administration for holding this important hearing on the issue of continuity of Congress. And I thank you for the opportunity to submit these written remarks.

On Tuesday, September 9, I chaired the first in a series of hearings in the Senate on continuity issues. That hearing of the Senate Judiciary Committee examined serious weaknesses in our ability to ensure continuity of the Congress – the subject of your hearing this afternoon as well. Last week, on Tuesday, September 16, Senator Lott and I co-chaired a joint hearing of the Senate Judiciary Committee and the Senate Rules Committee to explore problems with the current Presidential succession law. Future hearings on the continuity of government are also planned.

**I convened these hearings because I am deeply concerned that, two years after the terrorist attacks of September 11, 2001, Congress still has not taken the steps necessary to ensure that the vital institutions of our government – including Congress itself – will continue to operate on behalf of the American people should another attack occur. Two years is too long, and so I congratulate this committee for holding today's important hearing.**

Two days after September 11, Congress approved legislation expediting benefits for public safety officers killed or injured in the line of duty that day. Three days after September 11, Congress appropriated $40 billion in emergency funds for recovery from and response to the attacks, as well as legislation authorizing the use of military force. A week later, Congress approved additional legislation to stabilize and secure our economy and our airports, and to provide compensation for the victims of the September 11 attacks. And in subsequent weeks, Congress enacted several other bills and appropriations measures to bolster national security and upgrade our capabilities to combat terrorism.

**Had the events of September 11 unfolded differently, however, none of this legislation might have been enacted in timely fashion.** United Airlines Flight 93 was likely headed for the Capitol. But for a late departure and the ensuing heroism of the passengers onboard, Congress might have been destroyed.

**Under our Constitution, Congress cannot act without a majority of its members present.** Article I, section 5 of the Constitution expressly provides that "a Majority of each [House] shall constitute a Quorum to do Business." Our Constitution is explicit on this point, because our Founders believed it fundamental to our representative form of government.

As Alexander Hamilton explained in *The Federalist No. 59*, the Constitution empowers states to shut down Congress by refusing to send representatives. And in fact, during the first Congress, neither the House nor the Senate were able to operate for an entire month, because a majority of Representatives and Senators failed to appear for duty. Both chambers waited until "a quorum, consisting of a majority of the whole number, [was] present." *See also United States v. Ballin*, 144 U.S. 1, 7-8 (1892) (stating general principle of parliamentary law: "[A] majority of those present may act, provided those present constitute a majority of the whole number. . . . [A] major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act.") (citing Dillon, Municipal Corporations § 283 (4th. ed.) and *Brown v. District of Columbia*, 127 U.S. 579, 586 (1888)).

This vulnerability was deliberate. As one delegate to the 1787 Constitutional Convention in Philadelphia urged his colleagues, "[i]n this extended Country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two Houses to make laws." 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 251-52 (1966) (statement of Col. Mason).

**Congressional power exercised by just a handful of members is thus not only constitutionally dubious. It raises serious questions of democratic legitimacy as well. The Founders properly rejected the notion that a small body of members from one region of the nation might enact national legislation or confirm federal officials to govern the entire country.**

This commitment to federalism and national representation has a cost, however. Under the Constitution's requirement of a majority for quorum, terrorists could shut Congress down, by killing or incapacitating a sufficient number of Representatives or Senators.

(Of course, both Houses of Congress sometimes approve legislation without actually having a quorum present. Under the doctrine of presumptive quorum, the presence of a quorum is presumed unless a member suggests the absence of a quorum. Accordingly, actions can be taken by unanimous consent or voice vote despite the actual absence of a quorum. If anyone suggests the absence of a quorum, however, the Constitution requires the presence of a majority of the entire body before action may be taken. In short, the doctrine of presumptive quorum is no cure for terrorist attack with respect to ensuring the continuity of Congress.)

**Our ability to ensure continuity of Congress under the current Constitution is woefully limited.** States have power to allow their governors to appoint Senators in cases of vacancies, and 48 states have elected to do so. But the Constitution provides no immediate mechanism for filling vacancies in the House, nor for redressing incapacities in either chamber.

Vacancies in the House can be filled only by special election. As expert witnesses testified during the September 9 hearing, special elections take months to conduct, for reasons of mechanical feasibility, democratic integrity, and the rights of military and other absentee voters.

**What's more, incapacities cannot be addressed at all – and, although people often forget, this problem affects the Senate no less than the House.** If 50 Senators were in the hospital and unable either to perform their duties or resign, they could not be replaced. The Senate could be unable to operate for up to two full election cycles – a four-year period.

The Continuity of Government Commission, a bipartisan panel of former congressional leaders and government officials across the political spectrum, has unanimously endorsed a constitutional amendment to provide for emergency interim appointments, in cases of catastrophic attack, until special elections can be held. Under this approach, special elections would be held – but interim emergency appointees would be able to serve immediately, during the time it necessarily takes to conduct special elections.

**Just as the 25th Amendment ensures continuity of the presidency, the proposed amendment would ensure continued congressional operations.** Indeed, some members of Congress have already introduced their own constitutional amendment proposals, joined by a bipartisan coalition of more than 80 co-sponsors.

Alternatively, several distinguished Republican House members have introduced H.R. 2844, a statutory proposal to require expedited special elections in cases of emergency. Parties would have two weeks to nominate candidates, and the election would occur seven days later.

**I am open to any proposal that gets the job done – that is, any proposal that ensures that Congress will be able to convene immediately in the wake of a major terrorist attack on the nation, in order to appropriate emergency funds and authorize government actions and authorities in response.** And I certainly respect the sincere desires of House members to preserve, to the maximum extent possible, the tradition that every member of the House is elected.

**I am concerned, however, that special elections alone – without constitutional provision for interim emergency appointees – will either take too long to conduct and thus fail to ensure adequate continuity of Congressional operations, or will sacrifice too many other important principles and traditions, such as meaningful democratic elections and voting rights, in the process.** It is one thing to plan for an election that has been scheduled months or even years in advance, or to make small adjustments in the days and weeks preceding the regularly scheduled election. It is quite another thing, however, to conduct an entire election from a standing start, and in a dramatically shortened time frame.

**A Congress that cannot operate denies all Americans meaningful democracy. A Congress based on expedited special elections that disenfranchise military and other absentee voters denies too many Americans the right to vote. Better to ensure full democracy through timely, meaningful special elections, and to ensure continued Congressional operations through other mechanisms.**

**At the hearing I chaired last week, experts testified that special elections take months to conduct.** It takes time to qualify the candidates, hire poll workers, prepare voter rolls and voting

machines, and reserve polling locations, as well as to verify election results and qualify the winners to take office.

**I am also deeply concerned with testimony that such expedited elections would effectively disenfranchise military and other absentee voters.** Americans who put their lives at stake to protect democracy against threats abroad have every right to participate in democracy at home. According to our witnesses, which include an expert in military voting rights, it would be impossible to send and receive absentee ballots to our troops overseas under such limited time constraints.

**Giving voters and candidates just seven days to debate issues and examine qualifications also presents serious concerns of democratic integrity.**

**Remarkably, every letter we have received from state and local elections officials has expressed concerns about any 21-day expedited special elections regime.** They have expressed concerns based on mechanical feasibility, democratic integrity, and preservation of the voting rights of military personnel and other absentee voters. Thus far, we have received letters from Geoff Connor, the Secretary of State of my home state of Texas, as well as letters from the states of Alaska, Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Minnesota, Missouri, Pennsylvania, North Carolina, South Carolina, South Dakota, Vermont, Washington, and Wisconsin.

One of those letters came from **Mary Kiffmeyer, the Secretary of State of Minnesota** and, I am informed, a witness at today's hearing. Her letter of September 8, 2003, is enormously instructive, and I am grateful to her for submitting it. It is worth quoting portions of that letter here:

> [A] short time period such as 21 days means that a number of military and overseas voters will have a limited time period to apply for an absentee ballot, receive it, and then have it delivered to the polling place after it is voted. . . . Issues associated with polling place and poll worker availability may arise. The period for the voting public to become aware of the election and be informed about the candidates is reduced. Certainly in such disastrous circumstances, our country would be facing very unique circumstances and it might justify a unique way o[f] resolving the importance of continuity of government. Another way of resolving this issue is through an appointment. . . . This is an option used for a US Senate vacancy, which your committee might consider.

**Finally, even putting aside all of the problems of mechanical feasibility, democratic integrity, and voting rights, special expedited elections still would not be available to redress the problem of incapacities, as opposed to vacancies in office. And once again, I hasten to point out that the problem of mass incapacities plagues the Senate just as it does the House.**

Again, congratulations on holding today's hearing, and thank you for the opportunity to submit written remarks for the record. I hope that today's hearing of the Committee on House

Administration – like the Senate Judiciary Committee hearing I chaired last week – is just the first step in a longer process in both Houses of Congress of ensuring that our more than 200-year experiment in self-government will never perish from this earth.

In an age of terrorism and a time of war, few things could be more important than ensuring that the United States government – the nation's most vital instrument of national security – is failsafe and foolproof, against even the most devious and destructive of terrorist plots. Nobody likes to plan for their demise, but failure to do so is foolish and dangerous. We must begin the process of sending the message to terrorists that there is nothing they can do to stop the American government from securing freedom here and around the globe. Two years is too long, and the time to plan for the unthinkable is now.

The CHAIRMAN. I ask unanimous consent that members and witnesses have 7 legislative days to submit material in the record and for their statements and materials to be entered into the appropriate place in the record.

Without objection, the material will be so entered.

I ask unanimous consent that the staff be authorized to make technical and conforming changes on all matters considered by the committee at today's hearing.

Without objection, so ordered.

That completes our business for today. Thank you.

Mr. LARSON. Mr. Chairman, I just wanted to thank you for bringing this forward in a timely fashion as you always do.

[Whereupon, at 5:25 p.m., the committee was adjourned.]

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